IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1282/7/7/18; 1289/7/7/18

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

20 April 2021

Before:
The Honourable Mr Justice Roth
(President)
Dr William Bishop
Professor Stephen Wilks
(Sitting as a Tribunal in England and Wales)

BETWEEN:

UK Trucks Claim Limited
v
Fiat Chrysler Automobiles N.V. and Others
and
Road Haulage Association Limited
v
Man SE and Others

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Tuesday, 20 April 2021

(10.00 am)

Submission by MR FLYNN (Continued)

THE PRESIDENT: Yes, Mr Flynn. Good morning.

MR FLYNN: Good morning to the members of the Tribunal. Good morning, all. Just checking that I can be heard.

THE PRESIDENT: Yes. Very clearly.

MR FLYNN: Good. Thank you. I'm going, then, to address the objections raised to our application by the respondents, even though they don't press them to the point of trying to strike us out, but before I did that, I thought it might just be helpful to complete the discussion of our class definition, because Mr Thompson, in his skeleton, and I think yesterday, identifies a couple of other points which he says lead to incoherence in our class. You will see that at paragraph 72 and following of his skeleton. It relates to the exclusion for people whose primary business is selling or leasing new or used trucks, and the definition of, "Primary", as we saw yesterday, being deriving more than half the turnover from that activity.

We say this is to misunderstand the scope of our class definition and the reason for the exclusion. We are seeking to exclude, as well as the members of the cartel and other manufacturers, we are seeking to

exclude affiliated, unaffiliated dealers and truck rental companies, whether they rent on a short or a long-term basis, or provide other financing options for the purchase of trucks, and Mr Burnett explains that in his first witness statement at paragraph 34. Again, I don't think I need to go to these, but the rationale, essentially, is that we did not want to exclude from the class hauliers, operators of road haulage operations, whether they are members of the association or not, whose primary activity is haulage, but have, possibly, a sideline or a -- in selling or renting trucks, but whether or not they have such a sideline, they can only claim for the trucks used in road haulage operations. That is the scope of our class, and the reality is that where some operators might have such a sideline, it's probably conducted in a separate business, a separate legal entity, that wouldn't be a claimant anyway, and so doesn't -- in many ways doesn't operate very differently from a complete exclusion for leasing or selling or renting trucks. So we say there is no conflict, it is a clear line, and, actually, to turn it round, it's no clearer in UKTC's definition, because they include, as you saw yesterday, they include short-term leases within their class definition, but they exclude lessors offering rentals on -- for more than a year from the

definition, but, of course, obviously, a lot of rental companies do both, so where it's not clear to us where the line falls in the UKTC class either, and so if the rental company which offers short-term leases also has some longer term leasing business and retains the interest in those trucks which is often the case, then, potentially, it falls within their class and we think there is some lack of clarity in their borderline as well, and not least as to what the overcharge position is said to be in those borderline cases.

Perhaps I could also point you to a suggestion -- it's made at paragraph 91 of his skeleton -- that we have, in their words, "Already directly preferred", the interests of lessees over lessors, and used truck purchasers over new truck purchasers because of the wording, the way they are reading a paragraph of our claim form, and perhaps we should just turn that paragraph up. So, in our claim form which is tab 1 of Bundle C, so C/1, at --

THE PRESIDENT: Could you just pause a moment?

MR FLYNN: Yes of course. {C/1/1}.

THE PRESIDENT: Yes. Yes Mr Flynn. In Bundle C/1?

MR FLYNN: Bundle {C/1/44}. Mr Thompson is focusing on paragraph 77 to say we have already, in the case of leased trucks, we've already preferred interests of

lessees, but that -- he is really taking it out of context. If you turn the page back to the previous page {C/1/43} to paragraph 72, you will see that the point that's being made in these paragraphs is about the overcharge for -- flowing from sales of trucks made by people other than the -- as it now says -- "Settling cartelists". You will remember the discussion we had on that, so this is really about umbrella sales. Paragraph 76 says that the PCMs will have purchased or leased new pre-owned relevant trucks from the proposed defendants and their groups, other cartelists and their groups, agents or companies that form part of the undertakings to which the settling cartelist is to belong, and other manufacturers of relevant trucks and their groups, and intermediaries who are appointed by them to sell, and so it goes on.

So, 77 {C/1/44} is simply saying that in those circumstances where what you have is a cartelised sale passing down the line, or one from umbrella manufacturers, then there will be passing-on of the inflated prices caused by the infringement to the class members.

THE PRESIDENT: Yes. I think it's -- I'm getting an echo. I don't know if -- is that better? Yes.

We also seem to, on my audio, be getting like

a constant doorbell. Yes, and people are nodding. I don't know what the source is of that.

MR FLYNN: I must say I can't hear that.

THE PRESIDENT: Right. I think other people, Mr Pickford and Mr Jowell can from their nods. If anyone has any idea what that is, perhaps that can be attended to, but on your paragraph 77 it doesn't read in the narrow way you have just explained, because, in particular, reading it, it would suggest that if a class member, proposed class member buys a new truck and then, after several years' use, sells it as a used truck to another class member, it is averred that the inflated price is fully passed on. You see what I mean.

MR FLYNN: Yes. I do.

THE PRESIDENT: If it is supposed to say -- and that point is picked up by several of the respondents, in other words, there is full pass-on on the resale, if you mean purchased or leased a relevant truck from -- other than from a -- if you are dealing with umbrella trucks here only, in other words, relevant truck not manufactured by one of the cartelists, I think you need to make that clear. Is that what you do mean?

MR FLYNN: Yes. I think it is, Sir, and I take the point, and I was going to complete this point by saying that if we had not made ourselves clear, I hope what I have said

today does make it clear, and we will propose an amendment in due course.

THE PRESIDENT: Well, I think we ought to adduce -- yes. There is a lot of interference. Is that better? -- purchased or leased relevant trucks, if the position -- I think the respondents need to know what the position is. You are saying not manufactured, or manufactured by someone other than the cartelists? Is that it?

MR FLYNN: It is all in the context of the flow from paragraph 72, and what it's not meant to say is that the --

THE PRESIDENT: Settling cartelists, yes.

MR FLYNN: -- the overcharge is fully passed on down the purchasing and leasing chain, so I think if I may, Sir, I think what we should do, and we can do that in the course of the day, is do a proposed mark-up which we can put to you. I hope the explanation is sufficient for people to make their submissions now.

THE PRESIDENT: Yes. If you can do that, that would be helpful.

MR FLYNN: So, there is another point Mr Thompson takes which is on these --

MR THOMPSON: I'm sorry, can I just --

THE PRESIDENT: Yes, Mr Thompson?

MR THOMPSON: I must confess, I'm sure that the respondents

may make the same point but I must confess, I don't really understand the points being made because, for example, paragraph 75 is in general terms about used trucks and I must say I had understood that paragraph 77 corresponded to general terms that -- I mean, if 77 is only linked to 72 {C1/1/43}, I must say at the moment I'm finding it very difficult to understand what the pleading is, but it may be that there is some (Inaudible) Mr Flynn suggests.

THE PRESIDENT: Well, I think, Mr Flynn, that just underlines the importance of those, when you are producing an amendment by the end of today.

MR FLYNN: Yes. Understood, Sir. We will do that. I was going to say that there is another point that Mr Thompson takes in that section of his skeleton which relates to these cost-plus or, I think, more properly called, "Open book", contracts, and, again, we hope we've made this point clear. It's not a major issue, or, indeed, a major feature of the market, but, as we understand it, would have taken place at certain points and with certain types of persons for whom services were being provided, and the essential point, and it is in footnote 28 of our claim form which you will find if you still have that open before you, you will find at -- getting there myself --

THE PRESIDENT: I think it's footnote 24, isn't it?
MR FLYNN: I think I have got the wrong reference and I think you are right.
THE PRESIDENT: Footnote 24, page 27.
MR FLYNN: That's the one, footnote 24. Apologies.

So the essential point of that, and it is a distribution issue, if the operator provides trucks on an open book basis to someone who is not part of the action, the relevant trucks can't be claimed for in the action, but if, say, a supermarket is part of the action and paid for trucks on this basis, they could claim the relevant part of the overcharge, and that's what that means, and I think that is clear, I think, from our Rule 81 notice, and we can, again, if there is any fiddling around that needs to be done with that, then it can be done.

THE PRESIDENT: Well, can we just look at -- if we want to deal with cost-plus now, open book now, because that is a point that we wanted to raise with you, we are, ourselves, somewhat confused about how that is handled. You say there is something in the draft order, is there, that deals with it, or you are talking about your notice, but the notice is just ancillary. What I'm not clear about is if the -- the proposed class member is making a claim, what's being said is, if they provide

haulage service on a cost-plus basis, they will have fully mitigated their claim, and, therefore, they have no damages. It is as simple as that. You can't get round that by saying, well, there is some undertaking somewhere that they will pass on what they recover to someone else who's not part of the claim. It is a fairly simple point.

MR FLYNN: The person providing it on that basis has no claim, we say. Has passed, you know, has passed on their costs. That's the essence of the open book --

THE PRESIDENT: Yes. Well, if they have got no claim, isn't the position, then, that, as regards trucks that were used for haulage on an open book basis, or to the extent that they were used for -- on an open book basis, that should be excluded from the claim at the outset, and as it is an opt-in claim, this is much, much easier.

MR FLYNN: Well, we say that the person who has received it, so the supermarket, say, who has received the service on that basis is, nevertheless, bearing the overcharge, even if it has passed directly through the road haulage operator, so that --

THE PRESIDENT: Well, I see that, but they are not claimants. They are not in the class.

MR FLYNN: Well, some of them will be because they are own account operators. Some of them will be.

So if you have a supermarket --

THE PRESIDENT: Well, let's split it down then. Some won't and some will.

MR FLYNN: Some won't and some will.

THE PRESIDENT: Yes.

MR FLYNN: Yes.

THE PRESIDENT: Those who are not are not in the claim.

MR FLYNN: That's right.

THE PRESIDENT: And the fact that -- I mean, there might be pass-on by people in the claim, in the class, to all sorts of other people.

MR FLYNN: Yes.

THE PRESIDENT: They are not going to get the money because they are not claimants. The pass-on will reduce the amount of damages recovered.

MR FLYNN: That's right. That's right, Sir, so this only caters for the -- I hesitate to say, "Unusual", I have no idea what the statistics are -- but it only caters for the situation where the recipient is, itself, a class member.

THE PRESIDENT: Yes. I see. So it's reduced to that.

MR FLYNN: But that will arise because people need to -- they may have their own fleets, but they may need to buy in additional services from time to time or regularly for certain types of operation. So it will arise.

THE PRESIDENT: But then they are doing it not as people who purchased or rented trucks at all, they are doing it as recipients of haulage services, are they not?

MR FLYNN: I think that is true, and it is loss caused by the infringement to a member of the class.

THE PRESIDENT: Yes, but it --

MR FLYNN: When they are a member of the class.

THE PRESIDENT: Well, we need to, then, look at the -- how the claim form is formulated to actually make that very clear. It is certainly, I have to say, speaking for myself, I can't speak for my colleagues, it wasn't clear to me that that's the way the claim is actually formulated, that you are seeking to recover not just the overcharge on purchase and an overcharge on purchase, whether -- or lease, but also the pass-through overcharge for recipients of haulage services on a cost-plus basis, which is, I think, what you are saying.

MR FLYNN: I think it is what I'm saying, Sir, but it only arises when that person is also a member of the class, obviously.

THE PRESIDENT: Yes.

MR SINGLA: Sir, I'm sorry to interrupt, but could Mr Flynn just take into account what is said at paragraph 195 of the RHA's reply? There seems to be a lack of clarity as

regards what would happen where the relevant customers were not participating in the proposed collective proceedings. What Mr Flynn has just said doesn't seem to sit at all well with what's at 195.

THE PRESIDENT: Thank you. I was just looking for that paragraph because there it is suggested that the customers -- it will cover customers who are not in the class, and that, as it were, recovered for their benefit.

MR FLYNN: I think what it says is that they are customers to the extent that they fall within the proposed class definition and are otherwise part of the proposed proceedings, would be entitled to claim for such trucks, but where they are not, they won't.

THE PRESIDENT: I think it's probably -- it is paragraph 19 -- it is the last sentence of paragraph 194, I think, that it concerns distribution that would be awarded to operators used for open book, but any damages would be payable to the downstream customer. I think that's the point. It's not so much 195, I think it's 194. So the damages are awarded to the operator, although they have suffered no loss, but then, on distribution, they are payable to the customer, and I don't think that is what you have just been saying, but I think I now understand your general point.

MR FLYNN: Well, yes, and I think the point on the methodology is possibly taking us slightly off the point because that is how, as it were, Dr Davis would arrive at the figure, but who could actually -- who would have the claim for it, I think, is a separate issue.

THE PRESIDENT: What I think you are saying is that the -- perhaps the -- where the claim might be made by the operator, but where it is clear that they were supplying it under an open book contract, or to the extent they did, if that supply was to another class member, then that class member would make the claim.

MR FLYNN: That's right, Sir, and I know you say the notice is incidental, and I take the point, but if you look at it, and it is -- or I can just quote it to you -- but it is in the same -- it is {C/11/4}, if I have got the right reference, and it is the wording at the top of that page:

"This means that, if you are an own-account operator who, as well as purchasing or leasing relevant trucks, also received haulage services from independent road haulage companies during the applicable period, the RHA's position will be that such independent road haulage operators did not pass such higher truck prices or costs on to you. The only exception being open-book contracts where you, as an own-account operator directly

paid for the cost of the relevant trucks used in the contracts".

THE PRESIDENT: Yes. I see that you are -- it is actually devolved to you.

Well, I understand what you are seeking to do now, but it is obviously right that the pleadings in the case should control what happens, not the notice governing the pleadings, and it may be a fairly -- as now explained -- a fairly small point in practice in the class, we've no idea, but I can see it may not be significant.

MR FLYNN: Yes, Sir. Again, I have no statistics, but we think the point, possibly due to our own lack of clarity, the point has attracted rather more attention than it deserves in the grand scheme of things, but I hope that does something to allay concerns.

If I can then move on to the respondents' objections, we say that, obviously, the essence of --

THE PRESIDENT: Just one second before you do that.

MR FLYNN: Yes, of course. Of course. (Pause)

THE PRESIDENT: Yes. So again, just to be quite clear on this, if one looks at your skeleton argument at {A/2/13} which is paragraph 23(c), the second sentence:

"The RHA has made plain from the outset that it is not seeking to recover on behalf of such operators 'but

instead that it will seek to recover on behalf of such operators' customers, to whom many overcharge was passed on'".

But as I understand its such operator's customers if they are part of the class, if they are, in any event, part of the class. That's the position, isn't it?

MR FLYNN: That's exactly right, Sir, and, sorry, it may have seemed obvious to us because they are the only people on whose behalf we are proposing to bring any claims, but yes, that is the position.

THE PRESIDENT: Yes.

MR FLYNN: So there is not, as it were, sort of waiting in the wings a whole lot of people who are not road haulage operators, as defined, who are -- whose claims we are seeking also to bring in.

THE PRESIDENT: Yes. If it was on behalf of -- if they were supplying it that way to someone else, then it will simply mitigate the claim, and there will be no damages for that particular supply.

MR FLYNN: Precisely so. Precisely.

THE PRESIDENT: Thank you.

MR FLYNN: Good. Apologies if we have added to the time that needed to be taken on that.

So the essence, we say, of the Merricks ruling is that when you have a proper class representative, the

application should be allowed if it shows a reasonable prospect of proving at trial a more than nominal loss to the class, and a plausible methodology for establishing that loss on a common basis. That's where we are, and what mustn't be allowed to distract the Tribunal is difficulties that might be encountered in proving that loss at trial, or quantifying it. Those are issues for the trial, and Lord Briggs puts it in many ways, but essentially the claimants, and because of them the representative, is entitled to that trial, and the courts have to do the best they can with the material that's available to you, so I think one has to be alert to arguments that in one way or another are designed to sort of counter that broad thrust. When things -- criticisms are made of us that, in many ways, just go to difficulties that we may or may not face when proving or, you know, establishing the methodology leads to a loss, that - so while what is ranged against us are a series of attacks which are said to go to the viability of our whole application or to the fundamental methodological choices that Dr Davis would propose to take, or our inability to manage supposedly intractable conflicts, what these are really, in my submission, are attempts to bite chunks out of the class that we are seeking to represent, and efforts to persuade you that

such claims as are attacked in these arguments should either not be brought at all or should be brought in other fora at greatly increased cost and difficulty for the affected claimants.

THE PRESIDENT: Although I think it is fair to say, Mr Flynn, that unlike the UKTC claim, there isn't really such, as I read it, fundamental attack on Dr Davis' methodology. I think the respondents recognise, although they say things about the heterogeneity and they do say it can't be applied, but the basic methodology is using an economic regression analysis, that there is no plausibility difficulty about that when looking at whether a collusion caused an overcharge. That's understood.

The conflict point is a point that's important for us because that goes to the class representative. It's not a point, really, about the methodology, particularly. It might have implications for the methodology, and there are some other points to do with proportionality and complexity and so on which, again, are important, irrespective of the methodology.

MR FLYNN: Yes, Sir. I take that point, and I'm glad to hear what you say about your understanding of the criticisms of Dr Davis. I do think they have been muted since -- I shouldn't use that word in a Teams context --

they have been somewhat watered down following Merricks, and the full frontal attack of, "You will never get the data to do this", has clearly gone, and I think at least one of the OEMs says in no uncertain terms that they have no fundamental objection to the approach that Dr Davis proposes to take. The question is can it cater for such things as heterogeneity in the market, and so forth.

If I tell you what I'm proposing to cover, and I must say I'm not entirely clear how much time I should be taking on this, but I will endeavour not to trespass on the time -- Tribunal's patience, and I don't necessarily need to take a long time on it -- I was going to say, nevertheless, something about what is said about the -- Dr Davis' methodology, just so that we all know what it is. Obviously you will have a fuller discussion next week.

I wanted to say something about the emissions technology aspect of the infringement and what we propose to do about that, and to address the new and used trucks point where the conflict arguments are at their most acute, to discuss foreign trucks and EEA trucks, the claim period and the run-off point.

What we say, or how we say issues to do with pass-on, interest and tax should be handled, and then

I think that will probably be enough for now, as it were. There may be points of detail to come back to, and obviously, even this will have to be taken at a somewhat fast pace and without delving too much into detail, except where questions are put to me.

In relation to Dr Davis' approach, there is a legal submission to start with which picks up on something that you, Sir, pointed out yesterday. There is no requirement on us to produce a methodology that leads to individual loss calculations of the sort that a single claimant might have to provide in High Court proceedings.

As you have said, Sir, section 47C applies to all collective proceedings, so it's not just to opt-out proceedings, it applies to opt-in as well, and the phrase, "Aggregate award", is not in the statutory language. An aggregate award is an illustration of the type of award the Tribunal can make without taking into account the individual value of claims, but it may not be the only one.

So just because we are not in an opt-out situation, we are proposing an opt-in, and just because we are not seeking a single aggregate award of £42 billion, or whatever it might be, does not mean that the Tribunal has to be thrown back on a series of individual damage

assessments. It is a spectrum, not a binary choice, and everything that Lord Briggs had to say about the broad axe, well-worn, as you said yesterday, Sir, but still sharp, we would say, and the court's duty to do what it can with the available material, so in that context, just when one looks at Dr Davis' methodology, the sort of criticism that says it's not individual enough, it doesn't condescend to -- it doesn't get down sufficiently to the individual level, we say is just not a good ground of criticism.

On the other hand, we do think that there is possibly a lack of appreciation in some quarters about just how far Dr Davis' methodology does go in estimating the loss suffered by an individual class member or at the level of an individual class member, and has firmly at its heart the attempt to vindicate the compensatory principle.

The methodology, his regression analysis, is intended to allow for the quantification of damages arising from the infringement at the individual class member level, and, indeed, at the level of the individual truck. Again, you know, you will be talking to him next week, but when we see criticisms such as that of Iveco saying that it's not sufficient for Dr Davis to say that he has a realistic prospect of

establishing an overcharge on a class or sub-class basis, it must be capable of reliably estimating overcharge on an individual class member basis, we say, well, that's precisely what it does aim to do.

It does aim to estimate the individual damages for each class member, and on a truck basis, through the transaction price regression, using individual data on prices, characteristics, demand, supply factors, characteristics of the class members and others combined with the estimated parameter values in the model, and those parameter values are used -- are derived using data from more than one individual class member, so the whole -- the individual predictions are based on these parameter values as averages for subsets of the class members, and they will relate to narrow subsets of the class members, so this isn't a broad averaging of class or sub-class levels, and Dr Davis says that he will have advantages of using this data set across the members because he can use the whole sample to learn about individual experiences, including, to pick up one point of which much is made, the individuals' size, the size of the operator, to negotiate prices. So he will be able to learn about the relationships between size of operator and ability to secure discounts.

So it's not as general, I think, as is being

presented.

THE PRESIDENT: Just to be clear, are you saying that it's envisaged, as you understand it, and of course we can ask him, but you have been working and those instructing you with him, that he would get significant data from each class member who has opted in.

MR FLYNN: I wouldn't say, "Each member", but many members. I mean, sufficiently numerous and sufficiently representative to be used for these purposes, but I don't think we are asking every class member to turn over all their documents. That would be, I think, disproportionate, but it would be sufficient to satisfy him that he has the whole picture, and again, I don't know, you know, what proportion of claimants that might be, but it will be a substantial exercise.

So -- and this goes, also, to the heterogeneity point, I mean, Dr Davis is quite clear and you will have seen that from his latest report, that there is no reason why this approach, this common methodology, should not be able to determine the impact on relevant outcomes of a heterogeneous supply, and he thinks that he will be able to do that, and as we know from the case law, it is, of course, important for you to attach sufficient weight to the view, which you can test, obviously, but the view of the experts that he would

expect his work to produce that outcome. That's critical.

I mean, it is probably unhelpful for me to anticipate the way he would put it, or simply paraphrase for you what he puts in his report, but another issue is that it is suggested that his methodology won't cater for the situation where a class member hasn't actually suffered any harm, because it will be over-averaged, as it were, so it is even said that Dr Davis has recognised that that is an unavoidable problem. That's not his position, and he does believe that he can control the risk of no harm within the subset, so that the risk of damages being produced by -- a damage estimate being produced by the model in the case of someone who has suffered no harm is a low to infinitesimal risk in his view. He deals with that in some detail in his latest report, and he says, and I think this ties in with the legal submission that I made at the beginning, that some form of averaging is inherent in this exercise, and if it's not permitted to -- you know, on that basis, it's going to make the regime very difficult.

THE PRESIDENT: I think he said that, of course, before the Supreme Court in Sainsbury's, which has made clear that the broad axe applies at both stages. So I think that's clarified, and I think that's what he is -- and he has

made -- he served a short supplemental report that concerned us. Okay. It's probably enough on Dr Davis, unless you want to say more, and you want to deal with the emissions technology.

MR FLYNN: Yes. That's precisely where I had got to. Of course, he has something to say about that too, but I think it might help, since it's not really featured in any of the discussions we've had in this case so far, just to set out the basis of our claim in this respect, so unless the Tribunal doesn't want to do that, I propose that we just have a quick look at the decision itself, just to remind ourselves of where this aspect of the claim comes from.

THE PRESIDENT: Well, they were found to have colluded on discussions on the time of introduction of the emissions at various stages of emissions technology and the euro standards.

MR FLYNN: That is precisely right, Sir, and so, just references is then --

THE PRESIDENT: So if you just give me some recital references, we needn't turn it up.

MR FLYNN: Recital 2, that's describing the infringement, describing meetings at Recital 51, 52, 54, and the point is that these issues are discussed in the same meetings and at the same time as the pricing issues.

THE PRESIDENT: Yes.

MR FLYNN: So, we seek to recover the loss caused by that conduct, caused to our proposed class members, and the way we say that translates into loss is the delay of the launch of those improved, as one assumes they are improved, emissions models, gave rise to increased costs on behalf of the class members. Fuel costs certainly, repair and maintenance, R and M, and possibly differences in purchase and resale value when compared with the counterfactual, and once again, of course, no strike out has been brought. No suggestion this is meritless, what's being said is, well, this isn't the right place to bring these claims, and I will just refer to one or two of the points that are made, I think it's my friend Mr Jowell who makes the running on this.

Firstly, it is said somewhere or other that this is a sort of bolt-on to the claim, and we don't see it that way at all. It is an integral part of the infringement, and it's connected. It's absolutely connected through the same people discussing it and the loss being felt by the same class members, obviously not all of them, but some of them will have suffered through both aspects of the infringement.

Fuel is obviously the major issue. It is a major input into the costs of a haulage operator, as

Mr Burnett explains, probably a third or more, and we say it's perfectly appropriate and efficient from the litigation perspective to have these claims addressed in these proceedings --

THE PRESIDENT: I think, Mr Flynn, if I can interrupt you, we understand that, and, clearly, the decision, the operative part of the decision makes clear that there was that collusion. You say that too, increased fuel costs. I think the only issue is that if there is a method of calculating that, given that it doesn't affect the whole class, and how Dr Davis is going to deal with that so as to isolate that part of the damages claim, and attribute it. I mean, that's the, as I see it, the only issue there, not that it is inappropriate to claim for it when it is part of the decision, provided the claim can be formulated effectively.

MR FLYNN: Yes. Well, I will focus on those points, but it is -- I mean, one reason that is advanced for saying that it is not appropriate for this to be done in these proceedings is that it only affects a small number of class members. Well, we don't know that. No one knows how many people, how many trucks, were affected, and nobody could know without disclosure which would make dual actions actually quite difficult in this case, and, obviously, it is a somewhat separate topic, does require

a separate methodology for assessment, but that's just inherent in my submission, and we know that sort of difficulty and complexity, as I have already said, you know, the court won't be put off by that. That's inherent in this business of bringing this sort of claim. We have the funding for it, and in our submission we -- this is the right place to bring it.

I don't know if you want me to go through some of the objections that are taken on the factual basis. I mean, these are issues which, essentially, we can't resolve now, I would say, but we have positive evidence from different respondents and objectors which actually do support aspects of our case such as whether the introduction of the Euro 4 and 5 standards had positive impacts on fuel efficiency. We know that's not precisely what they were aimed at, but the fact of the matter is they had that impact and Daimler, at least, accept that.

THE PRESIDENT: Yes. Well, you are entitled to allege that. No one says that it can be struck out as fanciful. As I say, the question is, and it may be more a question for Dr Davis to explain quite how he is going to factor that in and you say he is going to do an individual calculation, but using averages, but given that, obviously, it will only affect a certain number of, as

you accept, class members or where it affects a class member it may not affect all their purchases.

MR FLYNN: Well, let me just turn, then, to Dr Davis' approach, and, again, you know, he is the expert not me, but you will have seen that he has dealt with this in some detail in his first, second and fourth reports, and --

THE PRESIDENT: Well, if you are just basically relying on what he says, why don't we take that up with him.

MR FLYNN: You will have it, and you can --

THE PRESIDENT: Yes.

MR FLYNN: -- you know what he says he will do.

THE PRESIDENT: Yes.

MR FLYNN: He considers that this is a viable approach, so he recognises that the benefits will vary according to the individual circumstances of class members, but he is confident that he can drill down to find out about that, and that more may be, of course, available in the following disclosure, so perhaps one point that is worth making on the expert methodology is that he considers also that there is an economy, if I can put it that way, of having these matters dealt with in the same proceedings, because he would be relying on some of the same data for the two separate exercises, if I can put it that way, of dealing with the overcharge issue and

the emissions issue, so they shouldn't be done in silos, and his data on transaction prices and secondhand prices would be used in both, for example.

So, yes, you can put it to him, and, as I say, he is the expert not me, so you don't need to hear it from me or test my understanding of these matters, but the bottom line is he considers that he has got a credible, plausible methodology and every reason to believe that he can detect the data to bear on it, and that's really the bottom line.

THE PRESIDENT: Yes.

MR FLYNN: Well, if that's sufficient to assist the Tribunal for now on emissions, I was going to move on to new and used trucks. I don't know when you wanted to take a break, Sir, but I can go into it now or --

THE PRESIDENT: Well, I think, yes, not until 11.30, so if you start on new and used, because that's a big topic.

MR FLYNN: That's a big topic, indeed. Indeed. That's, of course, where, as I said earlier, the allegation that we have a conflict in our class is at its most acute, but we start from the position -- our position is that there isn't a conflict. Obviously, the -- if you take an individual transaction the seller of the truck has hopes, maybe, for how much damages he will get for the -- having originally purchased it, the purchaser of

that truck as a secondhand truck may have hopes for how much he might get for, you know, how much might have been passed on down to him. We accept that, but whether that's a conflict of the sort that should lead to certification being denied to the class, I think, is an entirely different and much bigger issue, and in the particular case of this market, the issue is more confused, so perhaps it's not the right way of putting it, but a relevant factor is that if you take individual claimants, very many of them, and I will come back to that, many of them will be in both camps, so, you know, they will be facing two ways, if you like, on individual transactions. We say that -- is it five thousand for me or is it three thousand for him -- sort of question, is not a hard-edged category conflict that should lead to anyone saying that it is impossible to certify this class, and we have addressed some legal topics, you know, some legal authorities on that in our reply of which, of course, in the first place is the Canadian authorities.

THE PRESIDENT: But aren't they all cases where the claim is for aggregate damages?

MR FLYNN: They are.

THE PRESIDENT: Well doesn't that avoid the problem? Because then you recover the total amount of the

overcharge that was caused by the defendants, and then issues of pass-on, as between class members, don't concern the defendants. You deal with it then subsequently at the distribution stage.

MR FLYNN: But the question at the certification stage is whether there is an intractable conflict such that it is inappropriate for the same person to represent the typically direct and indirect purchasers.

THE PRESIDENT: Well, there wouldn't be, because you are certifying the class action, and the class action is a claim in aggregate for what overcharge the cartel caused in inflating the selling price, and on that issue, which is the only issue in the class action which they are being argued out at that point, there is no conflict because everyone wants to get the maximum overcharge. The difficulty is when you are going not for aggregate damages but for individual damages -- I mean, take a simple example. You say many may be in both camps. Some won't be, and as I understand it, you have no idea what proportion are in both camps and what proportion aren't, and some might be very much, even if they buy used and new, their purchasers might be heavily weighted towards used, so they might have bought a few new over this very long cartel period, but predominantly they bought used, and suppose at some point the

defendants, or some of them, make an offer for a certain amount for used trucks to the purchasers of used trucks. Well, if that seems a good offer for the used claimants who are predominantly used trucks, it might be far less attractive to accept it for those who bought new trucks, because it will reduce the amount they are left claiming for, and how as a single representative, can you fulfil your duty toward -- we are getting an echo again.

MR FLYNN: I can hear you perfectly well Sir but I don't know if you can hear me.

THE PRESIDENT: Are others getting an echo? Yes. A lot of nods. Perhaps, Mr Flynn, it shouldn't be a problem. Can you mute yourself for a moment while I'm speaking? Is that better? Yes. Thank you. I don't know why we are getting it on this hearing, we don't normally have this problem, but there we are.

I mean, that is an example of the sort of conflict, and that is what -- I drew your attention yesterday to the passage in the guide addressing precisely this point, because that's where the conflict arises, nothing to do with your expert, he will do a good job I have no doubt, and he will work out what, in his opinion, is the proper distribution, but you are going to be faced with expert evidence, as you know, from all the respondents, and they might come up with something quite different,

and at various points there will be strategic decisions to take, and, as I say, there may be settlement offers, and you, as the class representative, have a duty to the whole class. We, as the certifying court are in the unusual position that we have to, as it were, protect the interests of class members. Normally a court in adversarial litigation can say, well, we are not concerned with that, it is a matter for their respective lawyers, but here we are -- the lawyers are, as it were, one removed from the actual people with the claim. They are instructed by the class representatives. The court has, I think, in FX's case, the Tribunal went so far as to say it is a quasi-fiduciary role, so we have to think about this, and the rules make that clear, that we must think about it, so that's where the issue of conflict comes in, and I'm not sure how far the Australian cases, because they are all about aggregate damages, really help.

You need to -- now you need to unmute yourself, Mr Flynn.

MR FLYNN: If I can now be heard I think I had been muted by the system, so the Canadian cases are, of course, about those -- generally about aggregate awards, although that's not what they are focusing on in these cases, as I would hope to show you, but in my submission those

concerns that you have raised are, to an extent, less acute in the case of an opt-in class where we do have, you know, claimants are present. It's not as if we have devised some theory of harm which is being brought for -- whilst, of course, in the interests of consumers or small businesses, essentially a speculative exercise brought by class action lawyers and funders, this is a very different category of case where the persons who opt in are on full notice of the basis on which the claim will be brought, and entrust those claims to the representative to defend their interests and fully and fairly. As you have said. I mean, of course, our expert will do a good job, maybe the others will take a different view on exactly where to draw the line here and there, but it seems to me that it's not the sharp defeat for one group is victory for the other sort of case that the case law has in mind when talking about a conflict of this kind.

In relation to the overlaps, of course we only know in respect of those who have already signed up to the proceedings, and we only know what we know about them, but roughly two-thirds of the people who have signed up are purchasers of used trucks, and 60 per cent of those bought both new and used, so across the class at the moment you have got 25 per cent, a quarter, who only

purchased used, a third, roughly, only purchased new, and the largest group, 40 per cent, is those who purchased both. Now, I take your point, and I haven't got the numbers, that we don't know the weightings within that category, but, nevertheless, it is a very, very substantial number. This is not a sharp distinction between direct or indirect purchasers. Most people in the class, if you -- well, most people, the largest group, anyway, 40 per cent of them, if you were to say they needed separate representation, 40 per cent of them would be in both separately-represented camps which, frankly, does not make a great deal of sense in the logic.

Now, if any friends want to come along and make an offer in respect of used trucks, one can see that at that point a sharper conflict might well arise, because that would no doubt -- that would be on a basis, a proposed financial settlement that might be attractive to the -- those who bought used, whether they also bought new as well, they might be potentially attracted by it, and there might be some issues of whether that was appropriate for the -- those who were only sellers of, you know, trucks that they had used from new, as it were, but that could be addressed, in my submission, at the time, and just to go back to where I started, I

mean, this does not seem to us to be the sharp conflict, or one that can be solved by separate representation, or by -- well, sorry, it can be solved by -- anything can be solved by separate representation, I mean by the aggregate damages award, because if, in calculating the aggregate damages award, our expert or anyone else who is doing it, were to adopt the same methodology, the same issues would arise. The same issues would arise. There will be many other aspects of the methodology where people can take different views, depending on how they were situated, as to what the appropriate or what the, "Nice to have", would be in their particular case, but also in a complex market of this kind, once again, people may be in both camps, so they may have bought from affiliated dealers, they may have bought from non-affiliated dealers. There are all sorts of issues where it's not a clean distinction, and we say, if you look at the Canadian cases and what they are talking about as success or failure, this is not a success or failure issue. This is a sort of, "Push me pull you", on the money, and bearing in mind the statutory regime and the ability of the Tribunal here to make awards which are not, you know, absolutely necessarily the same as would be made in individual proceedings, we don't actually see much difference between an aggregate award

of the sort one more or less inevitably gets in opt-out cases and the class-wide approach that we are suggesting. So we don't think there is a conflict, and we don't think that conflict would be solved if there is one, we don't think it would be solved by saying, "Why don't you just do an aggregate award". You would always have the problem down the line, and we say that's not a -- the direct sort of direct concern to the respondents of the sort that should allow them to press this point to the point of persuading you that we should not be certified for the class.

Given that the methodology that Dr Davis is suggesting is one that would estimate separately for the new and used categories, we think that that is an appropriate approach, and that the time for re-assessing this issue should be when that -- when the exercise has been run, as it were, when we know who the opt-in class are, when we know what these weightings are, as between the three categories, if you like, new and used, and both, purchasers of both, and then, if anyone then has a serious point to make to say that something has gone fundamentally wrong and a group has been disadvantaged in a way that is unacceptable or they can't fairly be represented by a single person, then that can be addressed at the time.

So if the solution involves not the, we would say, sophisticated approach that Dr Davis is proposing, that says, actually, this has got to be taken at a higher level so that you address a -- you find a way of assessing the damage across the class which doesn't take account in this way of the new and used, so you take a sort of total class-wide approach, what does that say for the regime? I mean, in my submission the approach that we are suggesting is a perfectly sensible and fair one in the interests of the class as a whole, and not one which leads to a particular group being, you know, silenced, squashed, or not given a fair crack of the whip.

THE PRESIDENT: When you say it's not the time to address it, and it can be addressed when the problem arises, can you just explain how one addresses it when the problem arises? I mean, suppose you get -- Dr Davis will do an estimate of pass-through through used trucks, in other words, what overcharge used truck -- purchasers of used trucks face, and that, however he works it out, will, therefore, or may, I should say, may, therefore, affect the mitigation of purchasers of new trucks because if most of them, after a certain period of use, seek to sell the truck used, as I understand is quite common, obviously an increase in the price of used trucks will

reduce the damages of those who bought new trucks. So he does his calculation in an objective way. You get reports from the respondents which come up with different figures, although they may suffer no overcharge at all, but they may go on in the alternative to say, well, if there is an overcharge then the pass-on on used trucks was rather different from the one that Dr Davis has estimated. At that point the claimant, which is, for this purpose, the RHA taking the decisions in discussion with Dr Davis, will have to consider, do they accept part of the points made in criticism? Do they stick rigidly to his initial view? There will be those sort of decisions that have to be taken in the course of the proceedings. The concern we have is not with Dr Davis at all, it's with the sort of instructions that a claimant has to give, and strategic decisions that have to be taken.

You say one can address it at that stage. How is it going to be addressed? Because we don't want to certify a class which is going to give rise to intractable problems down the line.

MR FLYNN: Well, in my submission you can't know at this stage that that's the case, and that's what the Canadian authorities say. They say, "No, it's only ..." you know, it is a pretty dramatic thing to say, "We can't

certify this class", even though members of it may have different interests, and, as I said, I don't think that's just in the context of an aggregate award.

So if --

THE PRESIDENT: Which is the -- if I can interrupt you, I'm sorry to do that, but which is the Canadian case that you particularly rely on? It's probably in your skeleton. We can look at it.

MR FLYNN: Well, probably the one -- I mean, obviously the regime is different, and these are effectively dicta, but the one that we rely on particularly I think is the Infineon case which is at joint authorities 7, Volume 7.

THE PRESIDENT: Yes. At tab 97.

MR FLYNN: Tab 97.

THE PRESIDENT: JA/97. Yes.

MR FLYNN: That's it. If one looks -- I mean I don't know if you want me to go through what the case is about. As I say, they are all in a slightly different context.

THE PRESIDENT: Yes.

MR FLYNN: So it is dicta faced with an objection to a class that included direct and indirect purchasers the court says, well, this is -- say if one takes paragraph 149 on page {JA/97/53}:

"Inherent conflict of interest between ..."

THE PRESIDENT: Yes?

MR FLYNN: At 148 at the top of the page, assuming everyone is reading the English but there are parallel translations:

"The Appellants argue that there is an inherent conflict of interests between Ms Cloutier as an indirect purchaser, and the direct purchasers ... [They] have opposing interests in that each of these subgroups will argue that its members absorbed the full amount of the overcharge ... this argument has no valid basis".

The relevant provision says:

"The member to whom the court intends to ascribe the status of representative [must be] in a position to represent the members adequately."

Translates:

"In determining whether these criteria have been met... the court should interpret them liberally. No proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly. Even if a conflict of interests can be established, the court should be reluctant to take the extreme action of denying authorisation".

That -- the circumstances they seem to have in mind, I think, do flow from the inherent nature of the sort of opt-out class action regime which is where people will

bring cases before the court on the basis of theories of harm and with funding, and there may be a problem if there is not full disclosure, and at 151, over the page on page 54 -- sorry -- bundle reference {JA/97/54}:

"It would accordingly be contrary to the spirit ...[the relevant provision] ... to deny authorization ... on the basis of a potential conflict of interests between members of the group. The record does not suggest that Option consommateurs..."

Who are the class rep, and Ms Cloutier, who is the designated representative of one of the groups:

"...are undertaking and conducting the proceedings dishonestly or that they have failed to disclose material facts...", and so forth:

"The class members clearly share a common interest in establishing the aggregate loss and in maximizing the amount of this loss", which, I would say, our class members do too:

"As the British Columbia Supreme Court astutely pointed out in ... Sun-Rype ..."

Another case that you will have been taken to on many occasions:

"...'[t]he only parties at this time that have an interest in [making] the direct and indirect purchasers in a conflict of interest are the defendants'".

That, I think, is a strong point here, because we are the only show in town, as it were, representing the interests of purchasers of used trucks which is a substantial sector, substantial number of operators, and, you know, they will have nowhere to go if the Respondents persuade you that this is an intractable conflict of interest, and a large chunk of, we would say, valid claims will not be pursued and prosecuted in front of you.

So that's a strong example, Sun-Rype that they quote. Sorry?

MR JOWELL: Forgive me, but before the Tribunal leaves the judgment could I invite them also to read paragraph 154 {JA/97/55} which makes it plain that it is, indeed, considering the position in relation to aggregate loss.

MR FLYNN: I don't deny that, but as I have said I don't think the judgment necessarily turns on that. It turns on whether there is an inherent conflict and at a later stage in these proceedings our reports which Mr Jowell and others are, of course, free to criticise, and will be a feature of the trial, will establish the loss for the class making various findings, as it were, evaluating a number of pieces of evidence which will cut the claimant class in a number of ways of which new and used is by no means the only one, or, indeed,

necessarily the most prominent. So there are decisions to be made in the methodology, but in our submission this is not a clean distinction as between direct and indirect purchasers, where, indeed, you may have satellite litigation further down the line as to whether the -- you know, whether the line has been drawn in the right place and whether there is, indeed, any overcharge, pass-on, and so forth, and you will get satellite litigation about settlements and satellite -- and appeals about judgments in these -- in that sort of case.

As I said, if, in fact, there were to be an offer to one category but not the others, one can see that at that point you might have to consider whether the same party could represent both categories, let's say there was an offer only in relation to used or only in relation to new trucks, at that point it might have to be -- that might have to be addressed, but that's not, in my submission, a matter for immediate concern.

THE PRESIDENT: And in terms of addressing it later, I put it rather starkly in terms of an offer only for new or for used, I mean, the more likely position, of course, is that it is an offer for both, and it is a question of how the offer is cut between the two groups, and whether it should be -- the response should be to try and

increase one or the other, or which way, how it should be balanced, what negotiating strategy should be used. I should think that's, in reality, the more realistic position. There is reference, I think, in your reply to using a different team of advisers at some point. Is that not right?

MR FLYNN: Yes. That is correct. That is correct, Sir. We did say that if that were -- if that remained a concern, there are various approaches that could be taken.

I mean, firstly, if it is really thought that there is a serious conflict here, firstly, the first level, I think, would be to -- as it were, at the informational level, to make sure that the Tribunal is satisfied that that potential conflict has been drawn sufficiently sharply to the attention of the class, and, of course, the representative, and, indeed, solicitors acting for them have their own responsibilities in relation to conflicts which are palliated in circumstances where informed consent is given and so we say that it is clear to those who sign up that claims will be made for both, and so parties are well aware that if they are -- tend to buy trucks from new and then sell them on, then they may be in company with operators who buy those trucks in the class. They are well aware of that, and if it is thought that that needs to be in any way sharpened up,

that can be done by amending our website, emailing the class members and, of course, by any notices to be issued in due course.

We did say that we would consider, if it was a point of concern for the Tribunal and it is 162 of our reply for your notes, and that's the point you were thinking of, and 58(b), I think it is, of our skeleton, that we would consider appointing a separate team of lawyers and separate economist if that were thought to be the -- an appropriate way of dealing with the apprehended concern, and that would certainly mean that even under the aegis of the class, as it were, the issues would be debated even before they were brought, you know, before you and we could -- there could be an appropriate solution which, again, would be before the Tribunal and available to the respondents to question.

I think what you were putting to me last night, Sir, goes further than that in that it would involve a new representative, a separate representative, not the RHA but some other body or individual, that's obviously, from our perspective at least an extreme solution, and you wouldn't expect me to have a kind of ready answer to, "Yes, this is what we can do", and who we would suggest. We do say that -- we maintain that this issue is better addressed later on, and that, I think, is the

answer to criticisms, particularly from MAN that we put out that suggestion without developing it in any detail, but --

THE PRESIDENT: Is it going to -- can I just ask you -- is it -- first of all, is there sufficient scope within your budget to cover what's proposed in paragraph 162, first question; second question is, when you say the Tribunal could be involved, it's not quite clear to me how we would be involved. It's unlike an opt-out case, you are free, the RHA is free to settle this case at any time. We don't approve of settlement of opt-in. We don't see it, we don't know what -- and it's not quite clear to me what role we would have. You might be able to come, perhaps, to ask for directions, I suppose.

MR FLYNN: Well, this wouldn't simply -- the proposal wasn't simply addressing the issue of settlement, Sir, but actually how the claims would be prosecuted, so that's when I said it would be before the Tribunal. If it is purely a settlement issue, then yes, it is an inherent feature of the regime that the Tribunal, I think, is not involved in that settlement, so that's a fact. You asked me about funding, though, and let me just say that we say that the funding arrangements are sufficient to embrace this proposal. Other law firms beyond the two who are on the record for this hearing have been

involved, as you know, and they have been paid, and you accepted in the funding judgment that there was unlikely to be difficulty in raising additional funds for contingencies that might arise in this litigation, and I think as we are all aware, and events have shown, it would have been a rash person who would have predicted half the things that have happened in the course of this case, and that, frankly, is not, you know -- the idea of a separate firm or separate team and an additional economist is not in the scale of things a massive drain on resources, so I don't think that would be -- that need be of any concern.

THE PRESIDENT: Yes. Thank you. So you are basically saying don't -- it is a potential conflict, it may not arise. There is a lot of overlap anyway, a very substantial overlap within the class, and it can be -- if it does arise -- addressed, there are various steps short of a separate class representative by which it could be addressed at various stages and one potential is outlined there if an issue arose to get separate advice on that basis.

MR FLYNN: Exactly Sir, in circumstances where we say that the conflict is far less sharp than envisaged in some of the other contexts, notably because so many of the members of the class would be in both camps anyway,

so ...

THE PRESIDENT: Yes.

MR FLYNN: Sir, I don't know if we have thrashed that about enough for now or whether there are other questions you would like me to address, but if not, perhaps that would be a convenient moment for --

THE PRESIDENT: Yes. If you have covered what you want to say about the conflicts on which, of course, the respondents have said quite a bit, and if you have dealt with that topic then I think that would be a sensible moment, unless there is something else you want to say, but you can reflect over -- if you have an additional point, if we take 10 minutes, let's come back at 11.50.

MR SINGLA: Sir, may I just check in on timing please? By our calculations Mr Flynn is due to finish at quarter to one, and we were wondering whether the Tribunal might be prepared to rise for the lunch adjournment at 12.45 so that we have a clean start after lunch.

THE PRESIDENT: Well, we started 15 minutes earlier than expected, I think, so I think we can let Mr Flynn go until 1 o'clock, and then you can have a clean start after lunch.

MR FLYNN: Let me see how we go, Sir. Certainly, if I can finish before or just before 1 o'clock then I will endeavour to do so, but I don't know what Mr Singla's

calculations are, but I wasn't planning to take all morning --

MR SINGLA: Sir, obviously I don't mean to cut Mr Flynn too short, but on the timetable that we agreed we were due to commence, I think, at soon after lunch today so Mr Flynn has in fact been granted an indulgence with the early start today. We've taken that into account, and still given him the end point of 12.45, and as I say I'm not meaning to be difficult but we are -- there is a few of us queuing up to make a number of points, and I'm just conscious if we lose 15 minutes with Mr Flynn then that will have repercussions later on in the hearing.

THE PRESIDENT: Yes. The timetable we were sent, Mr Singla, I think, which -- no, that we directed, I think -- was that on Day 2, which is today, the morning is for RHA and the afternoon is the respondents. That's the Tribunal's email of 15 April.

MR SINGLA: Well Sir I haven't seen that email so I'm not going to get --

THE PRESIDENT: Well, yes, it was sent to all the solicitors from what appears, at least it states that it was sent to everyone.

MR SINGLA: Well Sir I don't want to take up 15 minutes debating the timetable. We are happy to start at 2 o'clock.

THE PRESIDENT: Yes. Very well. So we will come back -- we've now cut short part of our break but we will come back at ten to.

(11.44 am)

(A short break)

(11.54 am)

THE PRESIDENT: Yes, Mr Flynn?

MR FLYNN: Am I now audible to the Tribunal? Thank you. Thank you, Sir.

I don't think there is anything I need to come back to at this stage on the conflicts point we were just discussing. I can address further issues in reply as needed next week.

So perhaps I could just say a few words on the foreign trucks, the EEA trucks, aspect of our claim which has generated a certain amount of heat on earlier occasions.

The reason why we propose to extend the class to cover UK hauliers, UK road haulage operators who also have foreign operations in relevant jurisdictions was to provide them in the interests of helping the UK haulage industry, to provide them with a proportionate means of access to justice, as it is sometimes rather high-flown -- put in a rather high-flown way, but a proportionate means of access to recovery in respect

of trucks affected by the cartel, but operated by them in overseas jurisdictions. It's not, as it were, an open invitation to large fleets based in other countries which have no connection with the United Kingdom and with this jurisdiction. That was the thinking behind extending the class to that, and there are, as the Tribunal knows from the individual actions, there are some operators who fall into that -- who fall into that category, and who are not in the individual actions, and who may yet choose to opt in to our action if approved, or otherwise consider their position.

Now, against that we have accepted, in our documents in what I would suggest is a pragmatic way, that to date the EEA component, if I can put it that way, of our signed-up group is modest, and if it stays that way there could well be something to be said, could well be argued that it would be disproportionate to continue with those claims in these proceedings. We maintain the position, though, that the time for taking that decision is at the end of the opt-in period when we will know how many such trucks are put forward by proposed class members, and by then it may be the position that there is a substantial, worthwhile number of trucks in play in one jurisdiction, more than one jurisdiction, and we can have the more focused discussion about the best way of

addressing that issue, and how it could be appropriate to assess the loss caused by those trucks. We say that's a perfectly sensible and fair way of approaching the matter, and the Tribunal has, it has been repeatedly emphasised not least by the Supreme Court, extensive case management and other supervisory powers in relation to these collective proceedings, and is well able, we submit, to deal with the situation as it arises, and at that point we will know whether the rather theoretical objections that the OEMs are putting forward have any real force, so, I mean, that's our position.

Sir, I'm afraid I can't hear you.

THE PRESIDENT: Can you hear me now? How is that supposed to work? We've got to certify that this class is suitable. These are not people with no potential claim, clearly. This was a pan -- EEA-wide cartel, so if they bought trucks in the Czech Republic they may have a claim. If it turns out only purchasers of 75 trucks we've said are suitable to be included, how can we then turn round in a few months' time and say, "Sorry, we don't think it is proportionate to have you here, we now exclude you". Don't we have to take a view now as to what, on something as fundamental as this, what the class is?

MR FLYNN: Well I think, Sir, there may be a distinction

between what the class is and how to manage the proceedings. The class, we say, is clear. What we don't know, and we don't know this in relation to any aspects of the class is what the final numbers will be at the end of the opt-in period.

THE PRESIDENT: No, but hang on. I mean, we know the class for the UK is large, and we can take a view on that, and the exact number doesn't matter. It's going to be a very significant, substantial class. You are talking now about -- and this goes to the class definition, because it can be defined to cover only trucks bought in the UK, or leased in the UK, or, as you wish to define it, more broadly, but that will then exclude part of the claims of people we've just said their claims are suitable on that basis to be included, and it seems to me that's problematic.

MR FLYNN: Sir, in my submission it is an inherent feature of the opt-in regime, because you don't know -- you don't know who's going to be in front of the Tribunal at the end of the opt-in period.

THE PRESIDENT: But we have to take a view, don't we? Mr Thompson argued we should certify opt-out because these are small businesses and they are unlikely to opt-in, and that's a good reason for opt-out. You have said in answer to that, no, the Tribunal has material

before it on which it can be satisfied that many small businesses do opt-in, indeed thousands of them, so it's quite reasonable for us at this stage, on what you put before us, to treat this as opt-in, and we understand that, but now, on this point, you are saying, well, we just don't know, we know that there are some, there are people that that is a valid claim, but whether it ought to be included or not we just don't know at this point, so certify it for opt-in and then exclude those claims in a few months' time, or exclude some of them.

PROFESSOR WILKS: Could I chip in and say that from your skeleton it seems that these people with foreign trucks would largely be larger mixed fleets, so one would have expected that they would have opted in more assertively and earlier, so the idea that many more would come in is less plausible.

MR FLYNN: Well, I take your point, Sir, and I can't give evidence on that matter. Yes, I think this plainly is the sort of people we are talking about are the bigger operators, we've had enormous success, if I can put it that way, in attracting the smaller operators to sign up, but also some large operators. It's just, as it happens, and as the numbers fall out today, those have not included operators who are not committed to other actions before you, or before the Tribunal, or

elsewhere, with, you know, substantial fleets in other jurisdictions, but they still could. Naturally, if you say this claim is to be restricted to UK trucks only, then they won't and they will have to decide what they do about their small or large fleet in Czechoslovakia -- or, I'm sorry, the Czech Republic. Showing my age -- or Ireland or wherever it might be, but those people do exist, they do exist, some of them, indeed, are members of the association and it is possible if the class is approved as we say it should be, that they will opt in before the end of the opt-in period, but I --

THE PRESIDENT: Well, I mean, we accept they exist, that's not the issue, but if they -- as you accept there are bigger operators, so by -- as must be right, if they are in several jurisdictions, these are not the micro businesses that you have been -- or even small businesses that you have been emphasising, so they would also be well able, one suspects, to bring an independent action, either here or, indeed, abroad, including UK trucks in their foreign action, as some have done, apparently.

MR FLYNN: Yes, yes indeed. Yes indeed. I think what one can say is, in relation to these -- this particular category of operator, what they are doing is considering their options, and, obviously, you know, our claim has

been pending for some time. They don't know whether it's going to fly or not, and they are -- they are weighing up their options, which might well include bringing -- if it is of substance to them -- might well include bringing actions in other jurisdictions. All I can say --

THE PRESIDENT: So they are not people where this is, as it has been put both by Mr Thompson and you, for the small businesses, it's collective action or nothing, realistically, because the other point about this, of course, is that it hugely complicates the proceedings for all the UK trucks which you say should go ahead anyway, clearly, because we've got issues of foreign law to deal with, potentially a number of foreign laws, you have accepted, I think, that the purchase would be governed under Rome II and I think we straddled the change of regime on foreign law by the law of the place where the trucks were purchased, so we may have several foreign laws. That, simply on the legal side which may affect issues like pass-on, potentially, even limitation, conceivably, and certainly complicates the -- that aspect, and I think that Dr Davis, although he says, of course, he can account for it, that does not, certainly -- exclude, I think he says, that pass-on is likely to vary between different states because the

markets are national, and, therefore, even issues of overcharge might vary between different states, so the great mass of UK purchasers of UK trucks whom you wish to represent, their action is going to be very complicated by this small additional category of larger operators wanting to claim for trucks they acquired abroad.

MR FLYNN: Well, Sir, I accept all that, and I can't put the point more highly than I have. I would be, of course, delighted if, amongst our sign-up operators, we had someone who had got 300 trucks in Belgium or something that I could say, well, at least it would be proportionate to deal with that, so we recognise the complexity, obviously complexity and even uncertainty isn't a matter that should necessarily put the Tribunal off, but we recognise those issues, and, as I have said, we take a pragmatic approach, and I can't really put it more strongly than I have done already.

Can I -- unless, I mean, you know, the objections are well summarised by you, Sir, and, you know, made at greater length by my friends, and that, I think, is where we are. If someone comes off the fence in the course of the day I might let you know, but probably can't do much more with it than that at this point.

In relation to the length of the claim period and

the run-off, we proposed a lengthy period within which claims would be assessed, eligibility of purchases or transactions to be considered within the claim, but that is not to be equated with the run-off period itself, which is a matter to be established empirically, as we have repeatedly said. I'm not sure we've got the point over to all the respondents, but that is our position.

We do say it's not appropriate to take, as I think UKTC has for simplicity's sake, a short or almost no run-off period just as an arbitrary matter of class definition, the RHA's aim in bringing these proceedings is to provide recovery for the harms caused by the infringement, and we don't know at what point that stopped happening, notably as it will have embraced effects in the used market, cascading down, and in relation to the increased costs we say caused by the agreed collusive delay in introducing the new euro technologies, so I don't think anyone is suggesting that the Tribunal is in a position to determine the run-off period, and certainly nobody has produced any evidence that would substantiate any length or -- well, any kind of length of run-off period, and we say that is an appropriate method for us to -- an appropriate way for us to define our class, to seek our claimants, and then run the analysis to see what the effects of the

infringement are which, again, Dr Davis has explained how he would do that, and what he expects the analysis to show, including where the infringement ceases to have any relevant impact in the market, and that's -- so we don't think there is anything to complain about there, we think that's -- our class definition remains a sensible one, as is our means of tackling the claims that will be put forward under it.

THE PRESIDENT: Well, Mr Flynn, we are very troubled by that for a number of reasons. First of all, we would have thought it is for you as claimant to reach a view. You have got an expert, you know a lot about the market, not only that, there is -- the point has been made there have been a lot of individual actions started where they have got their own experts who have also reached a view, and to state what it is, actually, you are seeking to claim for. You don't know what the overcharge is, we understand that, but something as fundamental as over what period you are making your claim, but more particularly, given that this is a class action where we have this screening role, what, as we understand it, you will be inviting people to sign up on the basis that you are pursuing a claim on their behalf for trucks purchased over this period, and then at some point your expert will look at the figures and then say, "No,

actually, they haven't got a claim, although they are now your client class", and you will be telling them, "We are going to kick you out", to put it brutally, and we find that a very problematic approach.

Is there any basis on which you are saying this period is a realistic run-off period?

MR FLYNN: Well, we are not saying -- as I said, we are not saying it is the run-off period, we -- and, with respect, I think at this stage of the proceedings it's not possible for us to do anything other than a -- you know, even a finger in the air exercise when we simply don't know what the details of the infringement is, how it worked, how it translates into the market. We could speculate about these things. I don't think that would be -- you say we have an expert, I don't think that's for our economic expert at this stage because what he is in the business of is devising an appropriate methodology when he gets some data to crunch, and as for trade experts and so forth, they would, likewise, be in the dark about the scope of the infringement. The people who know about this are on the other side and understandably and they are fully entitled to, then they are not saying anything about it, but I don't think it's fair to expect that we just arbitrarily take a period. As I say, UKTC has taken one that's so short that it's

almost non-existent and will exclude claims that we would say on any instinctive, finger in the air approach would, nevertheless, be feeling the effects of the infringement, the period we originally specified was on the basis of expectations about the course of these proceedings that have been falsified for reasons that we all know, and we are not saying to anyone who signs up, "We will get you money", we are saying there was an infringement and we will investigate and prosecute claims. I don't think anyone is being asked to sign up on the basis of a false prospectus. We are gathering the class and we will, if permitted to proceed, then we will be able to establish their loss on an individual basis from the two aspects of the infringement, but to take an arbitrary view now on where that should cut off is, in our submission, unreasonable in the shape of this new regime.

PROFESSOR WILKS: Mr Flynn, could I come in to reinforce that point? In your amended reply, paragraph 173 I think it is, you actually say:

"The RHA has -- it is wrong to say that the RHA has asserted that there was, as a matter of fact, a run-off period of eight years and four months. The RHA has never said this".

And yet that is precisely what you are going to put

into your opt-in invitation. I mean, it is almost -- it is vague, somewhere on the margin between vague and spurious to invite people to opt in on that basis, and although you say they may not have any guarantee of gain from this process, clearly that's the implication, so, you know, can we come back on this and think about it a little bit more carefully?

MR FLYNN: Well, I hear what you say, Sir. I understand the observation. Firstly we didn't intend the period to be that long. Secondly, we don't know. We don't know. No one knows how long the infringement continued to produce effects. Thirdly, we don't say that is the run-off period which is a technical term that everyone in this virtual room understands but our claimants don't. We say that there was an established cartel and we will investigate claims, and in point of fact, although we continue to add people to the claim on a daily -- probably hourly basis, the great majority of those who have registered made their purchases during the period of the infringement, so in point of fact, while, you know, I hear what you say and we take it seriously, that we are almost misleading applicants, in point of fact, 90 per cent of them or so, and I think this is in Mr Burnett's evidence, were purchasers during the period of the infringement, so as it happens, and you may say

that's just happenstance, we haven't attracted a whole lot of people who are simply going to find out at the end of the day there isn't anything for them because we can't show it.

PROFESSOR WILKS: I'm not sure I entirely follow that. You are saying you might as well include them in case there aren't many of them and I wondered, anyway, whether this isn't an argument about used trucks. I can see that used truck purchasers may, later on into the run-off period, be more likely to be claimants, but that isn't what you are saying.

MR FLYNN: Well Sir, it depends on where you say I'm saying it. I did say a moment ago that the shape of the actual run-off period was likely to be complicated in this case by reason of the impacts of the cartel on the used truck market as well as the impacts of the cartel in relation to emissions technology, and causing additional costs to operators, so it depends where you are looking, I think, to say where is it that the RHA is leading people on here, and I just make the point that in point of fact most -- the overwhelming majority of the registered -- or signed-up people are those who purchased during the infringement period, so I take the point about the imprecision, the open-ended-ness of the invitation. We have, nowhere, equated that with the formal run-off

period for the cartel. We have always been clear, certainly to the Tribunal and the respondents, that this is a matter for investigation and to be established empirically.

DR BISHOP: Mr Flynn, the process by which a cartel is uncovered, it usually has something rather dramatic about it -- a dawn raid or a notification that someone has confessed -- and normally the cartel, the behaviour which constitutes the illegality is desisted from. They stop sending round price lists in this particular case. The idea that there are continuing effects is, of course, a natural one, but I'm not aware here that there is anything that would point to that being very long. For example, it hasn't delayed the exit of anyone from the industry, or, as far as I know, it hasn't led to the quick entry of someone who was otherwise -- some change in exit or entry. There may be contracts for purchase which, you know, for supply over a few months or a year or two, but it's hard to see that there would be very many effects on price going on for a long time.

Now, I accept it is an empirical question, and Dr Davis in the case of your application and Dr Lilico -- Dr Davis, I should say, in the case of your application and Dr Lilico in the case of the other application, would need to investigate it, but eight years seems

a very long time. Normally, cartels collapse very quickly and people are extremely keen not to be seen to be engaging in any of the illegality which they now learn is going to cost their company millions, or even hundreds of millions.

MR FLYNN: Well, absolutely Sir, and your experience, of course, is greatly more than mine in this area. What we are talking about is not continuing collusion by the cartelists, one assumes, and we have no basis to imagine anything other than they stopped, and I think it is probably recorded in the decision, certainly there is an established period for the infringement, and we are not suggesting that they carried on doing it. The point is, how long do those effects take before the impact of the cartel dissipates, and we give examples in our pleadings, including the -- in addition to the matters I have already mentioned to Professor Wilks, the Commissioning period for trucks, and you will see that all of this is in paragraphs 172 and following of our amended reply, which Professor Wilks has taken me to, and in point B of paragraph 173 the -- we note that the collective proceedings form refers to the lengthy Commissioning process for manufacturers as a factor suggesting a substantial run-off period and in our submission borne out by evidence from the respondents

and objectors, so, as I say, while we take seriously the suggestion that we are drawing people on, we have explained, I think, as carefully as we can, why we think that there may not just be a short run-off period but it may, in certain areas, aspects of the market, not in respect of every claimant, obviously, but in respect of some of the claims that we seek to bring, there may be a continuing effect of the cartel that can be measured in years not months, and that's what we have sought to explain.

Ultimately, I mean, the Tribunal has our application, and the Tribunal does not have to certify the period for the length of time that we suggest, if the Tribunal wants to suggest that a shorter period is appropriate, then that, I think, can be done in the publicity in relation to the opt-in period, but we say that all this will actually come out in the wash. People have assigned their -- not assigned, but entrusted their claims to us, as we saw yesterday in the litigation management agreement and they will be developed and assessed properly by Dr Davis' methodology which, obviously, Sir, you are interested in.

DR BISHOP: Yes. Just one other point that -- because yours is an opt-in application, am I right in thinking that if a firm has entered into -- during the cartel period,

entered into a long-term contract for supply of trucks over some years, so this was a real issue, the price had been fixed earlier, and they thought, rightly or wrongly, that they could do nothing about the price, so maybe the effects went on for five years or something like that, because it is an opt-in case, you could, I suppose, make an inventory of those clients who were affected by such long-term contracts, and they would be a specific item of damages, but would not open it up to a claim for effects -- well, the nebulous effects for people who were not affected by long-term contracts who were not prejudiced by their own long-term contracts. Am I right in thinking that?

MR FLYNN: Well, yes. I think the existence of such contracts would plainly be a factor in the analysis of individual claims that would not be, as it were, averaged across the whole claimant body, given the sort of granularity of the investigation that Dr Davis proposes, and we do in categorising our signed-up claimants, you know, if there are such people, their claims should be advanced, but the existence of such people does not mean that we are using them as some kind of proxy for effects right across the market which, as you say, would be nebulous.

DR BISHOP: I suppose my point could be put this way, that

if there are such people then justice can be done to those people without the necessity of expanding the class through a long run-off period.

MR FLYNN: Well, sorry -- am I coming through? Yes.

I think that it would be a heavy act of engineering, I think, to define the class such that it caught those people and didn't, as it were, exclude others. What I would say is that we will -- to the extent that people sign up -- we will know what the pattern and features of their truck purchasing is, and the fact that they signed long-term contracts is something that would come up in that examination, but there is no reason to think that it would be generalised across the entire claimant body, so I think justice can be done to them but I think it would not be possible to design out -- design the class so that it covered people, for example, who had long-term contracts but only if, say, they were above three years or something of that sort. I think it will come up, and their claims will be discovered and pursued, but I don't think it is a matter of class definition from the off, as it were.

THE PRESIDENT: Well, one could define the class to say it is people who entered into their agreements to purchase or lease trucks up to this date, irrespective of whether the trucks were actually delivered subsequently. It's

not a difficult definition or exercise.

MR FLYNN: Well, I take that point. I mean, obviously we have defined the class to be purchasers and you could argue, I suppose, in the case of a long-term contract that they purchased at the beginning of the contract, I mean, depending on the terms of the contract, maybe not if it was a kind of call-off arrangement under which you had the option to purchase. You know, there are many, many possible features, and I'm obviously not an expert on truck purchasing, but I take your point, Sir, that, you know, one could limit the class by reference to date of purchase or date of transaction with OEM. I'm just reminded that in the -- as I said, there are various features which suggest to us that the run-off period may be longer than has been suggested by the OEMs, in other words, it stops simply because they didn't -- they stopped exchanging price lists at a particular point, assuming they did. Again, in the part of the reply which we were if not looking at, had open in front of us, we note that MAN accepts that the emissions aspect of the infringement may justify a run-off period that lasts until 2014, so that's three years since the end of the infringement, and we would say that's the very minimum, and, as I said, we didn't intend our claim period to be this long from the end of the infringement.

That's -- and we've already put an end stop on it, but that's just -- that's the happenstance of litigation in this field.

THE PRESIDENT: Can I ask, have you looked at the individual actions of which there have been a number of hearings now, to see what sort of run-off period is being argued for in those cases? They are all well-resourced claimants with their own experts who have done quite a lot of work by now.

MR FLYNN: Well, I can't pretend that I have done that myself, Sir, no. We are obviously aware of them and, you know, we've all been citing to you the rulings on disclosure in those cases, but we are not, of course, privy to the details of those cases, so it would be only a matter of the public record and, yes, they may -- who knows. I don't know, so if you are going to tell me there is a clear consensus as to what the run-off period is, or that it is not controversial or anything of that sort, then, of course, I'm all ears, but, you know, we haven't looked at those for the purpose of further amending our claim at this point. Obviously, there is going to be a lot of case management and tidying up to do, depending on -- even assuming that we are granted a collective proceedings order, you know, the timing of it, the scope of it, there is going to be an enormous

amount of things to do, if this isn't a question of, you know, here is our application, is it yes or no. That's not, I think, how the Tribunal would propose to approach this, but no, I'm not -- sitting here I'm not informed as to the position that has been taken in the individual actions which we have no, of course, role, and the respondents no doubt are, and if there are points they wish to make on that, we will no doubt hear from them, but if there is something specific you had in mind, Sir, as I say, I, of course, will listen with gratitude, but no, I have nothing to --

THE PRESIDENT: It's not that I'm here to inform you about it, it's just that it's not just you, of course. You have quite a team, and, indeed, you have emphasised quite a team at the RHA working on this, and I was just wondering if -- and I'm not suggesting there is a unanimous view, there certainly isn't, but whether the trouble was taken to ask for the pleadings or the non-confidential aspects of the pleadings in those cases just to see on this question, what view is -- or what views are being taken as to the likely extent of any enduring effect, but I think you have answered that question.

MR FLYNN: Well no, we obviously have their pleadings but I cannot say that they have investigated the position.

I'm told that nothing is pleaded in the Daimler actions. I just don't know, and I repeat, though, that we are not saying that the claim period that is on our form is the run-off period that will be established. We are saying the run-off is likely to be a substantial one, so we don't accept that it's -- everything fell away once MAN had been in to see the Commission, but we are not suggesting that it is eight years either.

THE PRESIDENT: I understand how you are putting the point. It might, I suppose, make Dr Davis' task, who is doing a, "During and after", comparison slightly easier if there is a longer post distorted period, if you don't like the word, "Run-off", but where competitive conditions are not restored, because he would have more, as it were, clean years to look at to compare with the distorted years.

MR FLYNN: Yes, absolutely, and I'm sure he would be delighted with that, and it is a complicating factor if, in fact, there is a very long unclean period if one is running a before and after regression approach, but he does also say that he expects a comparator to emerge which may not necessarily be the before and after, it may be -- may arise through comparisons between different sectors or segments of the industry, so before and after is not the only possibility for him to find

a relevant comparator which he is confident will turn up, and I don't think he is being too Micawberish about that, but again, you can ask him, but what I do say is that one can't do this on an arbitrary basis. We don't know. We don't know if it is one year, five years, or even eight years. I don't think it is eight years but who knows. We don't actually know. It is not a matter the Tribunal can establish now. Whatever the position is in relation to the individual actions there is no ruling on it, even if there is a consensus among the claimants which there probably isn't, but even if there were as to how this should be approached, I mean, that's -- let's say there is, they might be right, and that's what Dr Davis' analysis would show. I think one just can't sort of draw a line, an arbitrary line in the sand and say that's when it stops.

THE PRESIDENT: I think we understand.

MR FLYNN: Conscious of time, Sir, the one -- I suppose the one issue that it's probably worth spending a moment on now is the approach to pass-on, which was something that you raised yesterday with Mr Thompson. We say we have been sensitive to the issue and known that it is something that will have to be catered for in these proceedings appropriately, but we don't think it is fair to criticise us as the respondents have done heavily for

not seeking to certify pass-on as a common issue at this stage. We are fully expecting it to be certified in due course, and we have made proposals for how the pass-on issue could be addressed on a common basis, both in -- as a legal matter and with potential economic methodologies from Dr Davis, so we have identified the makings of a common issue at any rate and the appropriate methodology, but we do say that it is appropriate and proportionate not to, as it were, to fill in the blanks until we've seen pleaded defences, not because we think there is any realistic prospect that not one of the defendants will plead pass-on, but because we actually need to know what they will say. The law on the issue has been developing in other contexts, and they have strategic choices to make, and it is right and appropriate, we say, that we should know what we are facing before going into the detail of how it should be addressed but if I may I don't think it is right to raise a spectre of another set piece hearing along the lines of this one at which the only issue would be should that be certified. In my submission it is much more likely to be a mixed hearing in which, yes, there might be an application or a need to vary the collective proceedings order as the Tribunal is well able to do in the course of these proceedings, and will

be expected to do, but as much of it will be to do with case management about, you know, what evidence is to be produced, how, and by whom, and you may also be faced by an application on the case management or other basis from at least one of the OEMs suggesting that pass-on shouldn't be addressed at all until the issue of overcharge has been resolved, and whether -- they would say whether pass-on is even capable of being addressed as a common issue or is inherently an individual exercise should be addressed at that point, and it may be that the attractions of that are not -- you know, that's a proposal that's not without attraction, but it's not right to say that we have sat on our hands and pretended that the issue isn't there, or haven't given any thought to how it should be addressed. We have specified that in some detail, and I will not weary the Tribunal by going through that now, but you have seen it, and essentially it's a phased approach at which we first establish the legal nexus point, possibly, via sampling methodology and then we go on to assess the actual level of pass-on if that threshold is passed, and then you are into what Dr Davis has to say about it, so in our submission we have appropriately made proposals for how this should be dealt with, but also appropriately we say as to when it should be dealt with,

and that's not at this hearing now, but in due course when we have the defences.

THE PRESIDENT: The pass-on breaks down into various aspects and one can see there are some of the more extreme potential assertions that you don't know how they are phrased and the law is not so clear, that you can't deal with now. There are two much more basic aspects of pass-on, one is the new truck being disposed of and sold as a used truck which arises in your action because you are bringing claims for purchasers of used trucks, so there is that aspect of pass-on as applied to all the new trucks that are being bought which seems a fairly clear one.

The other one is that you are including people who act for hire and reward as opposed to own account, and there is the, again, fairly clear form of pass-on saying, well, if that's your business and you are buying a truck so you will then be renting it out, your rental charges are affected by the purchase price of the truck. That doesn't involve any elaborate law on discussing what pass-on means. The difficulty about not including it is that you end up on what is the main aspect of the claim, the overcharge on the truck where the position where you may get a judgment saying the overcharge is so much for each of these people, but they actually can't,

then, recover any money because they are then left saying, well now you have bought your trucks from DAF, now you can go and argue pass-on with this mighty opponent which, for the small and medium businesses in the class is a very unattractive prospect. So what we are wondering is how you are assisting them in dealing with the -- what seemed to be the fundamental pass-on arguments, even if there might be some more abstruse ones that one or other of the respondents might wish to raise.

MR FLYNN: Well, in relation to the new and used cascade we discussed earlier, obviously that will be part of Dr Davis' exercise, that's exactly the point we were on earlier, so, as it were, pass-on within the class is the whole point, I suppose, of the discussion we were having earlier.

THE PRESIDENT: So wouldn't that become a common issue then -- is there any reason why it shouldn't be a common issue, that particular form of pass-on, across the -- at least the class of purchasers of new trucks.

MR FLYNN: No. I think no, actually. That's something we would inevitably be investigating anyway. It is an issue that will arise at least in respect of any truck that's been sold or purchased by a member of the class, so I guess one could characterise that as a common issue

which arises right from the beginning, so yes, I take the point.

THE PRESIDENT: The Court of Appeal in Merricks made clear that, "Common issue", doesn't mean the same answer.

MR FLYNN: Yes.

THE PRESIDENT: It is a fairly broad concept. That's where the Tribunal was found to have got it wrong.

MR FLYNN: Yes. Yes.

THE PRESIDENT: So that's that one. The other one is, as I say, your other category, it may overlap, the hire and reward operator.

MR FLYNN: Well, overlap in the sense that I suppose the hire and reward operator is also likely to have trucks for sale in the course of their business, so yes, but I'm not clear that -- we accept, of course, that in, let's say when, when pass-on is pleaded as a defence, that's the legal burden, the evidential burden falls on us. We accept that, and no doubt you could say some work could be done on it. We are, I think, suggesting that while pass-on will undoubtedly feature in this -- in these proceedings, there is no need to seek to identify all the issues that might arise and might be capable of a common resolution at the point of certification. These proceedings are sort of live animals that change character in the course of the

proceedings, and the Tribunal is able to -- it is not a once and for all exercise, so the Tribunal is able to reassess issues such as commonality and, indeed, suitability in the course of the proceedings, so we say it is a mixed -- what shall I say -- it is a mixed categorisation and case management issue. We are saying that the better way to deal with this and address this is not in the abstract making assumptions, but, actually, seeing what the case that we are facing is, and we fully expect that to include the wrongly called, "Pass-on defence", we expect the defences to refer to pass-on which we will have to do some work on, and we have explained why, at this stage, we think that will be capable of resolution as a common matter, or aspects of it maybe, but we can't have the definitive debate about that today, and in our submission it is better to cross the bridge when we actually come to it on this point. We will know much more in a few months should it be relevant. If the respondents, the defendants, as they would be at that point can persuade you that there is no prospect of overcharge being resolved as a common issue, well that's the fate of these collective proceedings, and we have explained how it is possible, then, that, you know, issues might need to be taken on an individual GLO sort of basis, but that's not something which we can

resolve a priori in my submission.

THE PRESIDENT: Mr Flynn, you have got five minutes on -- if you wanted to say something about tax and interest.

MR FLYNN: Well, perhaps I don't need to, unless the Tribunal has particular concerns. We -- it is similar to the pass-on issue. We say it is not necessarily that these issues would have to be approached on an individual basis, which is what is being said against us, we have Dr Davis who deals with that in some detail, and we have the funding for these exercises, as Mr Meyerhofff explained in his evidence in the funding appeals which was accepted by the Tribunal, so without going into the detail, and I know that, you know, compound interest is a feature of interest in the Merricks litigation, you know, we have addressed this in what we think is appropriate detail now, and unless there are particular questions the Tribunal wants to raise at the moment, then maybe I can come back to it in reply when we've heard the full panoply of arguments against our proposed approach.

THE PRESIDENT: Yes. Thank you.

MR FLYNN: In which case I can close at that point, Sir.

THE PRESIDENT: Yes. Well, if we have any further questions we will ask them at 2 o'clock, but otherwise we understand that concludes your opening submissions and

it will be for Mr Singla to commence at 2. Just to be clear, the extra 15 minutes was the earlier start this morning which was because you were delayed in beginning yesterday, so those 15 minutes were for you, and you have kept to your time.

So 2 o'clock.

(1.00 pm)

(Luncheon adjournment)

(2.00 pm)

Submission by MR SINGLA

THE PRESIDENT: Yes, Mr Singla.

MR SINGLA: Sir, I'm grateful. As the Tribunal will be aware, Iveco's position is that neither application should be certified, and we rely upon a number of reasons in support of that position, as set out in our response, but in my oral submissions, as we did in our skeleton argument, I'm going to focus on the commonality condition, and, in particular, why we say that the issues of whether the infringement caused the proposed class members to incur an overcharge, and, if so, to what extent, assuming, of course, there was an overcharge, which we don't accept, why that's not a common issue, and those are UKTC's proposed common issues 1 and 2 at paragraph 55 of their amended claim form.

Now we of course say that it is wrong for the Tribunal to focus only on the overcharge question, because overcharge is only one of a number of matters that feed into the overall question of quantification of loss, and we say it is wrong in principle to ignore, as UKTC do, issues such as pass-on, mitigation and tax and so on, but I will leave those points aside because they are primarily relevant to our suitability condition arguments.

Sir, in relation to commonality, I'm going to divide my oral submissions into four parts. First, I'm going to address you in relation to the applicable legal principles, and although at this stage of the hearing I'm primarily focusing on the UKTC application, to avoid having to deal with the principles and the case law twice, I will pick up some points made by the RHA along the way.

Second, I'm going to make some brief submissions about the nature of the infringement and the settlement decision, and I will be brief in relation to that because we say that, contrary to UKTC's submissions, it is utterly obvious that the Commission didn't make any findings about the effects of the infringement.

Third, I will make some submissions about the features of the trucks market, and I will do that by

reference to the factual evidence which Iveco has served and also the empirical analysis of Dr Durkin which we say corroborates that factual evidence, and as you know, Sir, we say that the market is characterised by a high degree of heterogeneity.

Then fourthly I will make submissions about UKTC's proposed expert methodology, and again, as the Tribunal will know from our response and our skeleton, we say that the methodology is fundamentally flawed on a number of levels. We say it's not reliable, not grounded in the facts, and, therefore, the UKTC's application fails the commonality condition, and, Sir, just pausing here, I would say at the outset that we submit it's not good enough for Mr Thompson to simply deflect questions put to him by the Tribunal by saying, well, of course, the Tribunal can ask Dr Lilico questions next week, the point being, Sir, that the UKTC's expert, Dr Lilico, has already served four expert reports, and in addition to that, a number of the problems that we face with the UKTC application are not actually problems with the expert methodology at all, but they are problems in relation to the litigation plan which Mr Harris will address you on in more detail.

Sir, before I delve into the legal principles, can I make two short preliminary points? The first is that

a premise underlying the submissions made on behalf of UKTC and the RHA, but particularly UKTC, is that these cases necessarily must be certified because of what happened in Merricks, and we say that that is an entirely false premise, and we say that both UKTC and the RHA have misunderstood the Court of Appeal and the Supreme Court judgments in Merricks, and I will take you to them in due course.

Particularly we say that UKTC have failed to appreciate that in Merricks the Tribunal found that the methodology which was proposed was a sound one, and that finding, by the Tribunal, was not challenged on appeal, and in contrast here we say, as the Tribunal knows, UKTC's methodology for calculating aggregate damages is hopeless, and we say properly analysed, in fact, nothing in the Merricks judgments should be read as a carte blanche for certification of all CPO applications in the future. On the contrary, Lord Briggs expressly acknowledged that the Tribunal plays an important screening and gatekeeping role, and UKTC's submissions at some stages are so extreme that they amount to saying that post-Merricks, there is some sort of presumption of commonality and I will show you that in due course, but we say that's obviously wrong.

Sir, the second preliminary point, and a related

one, is that UKTC make an in terrorem submission that if the Tribunal were to refuse certification of its application, that would seriously undermine the effectiveness of the CPO regime. They make that in their skeleton but also the amended reply at paragraph 175, and, Sir, again, we say that that is completely misguided. Although they refer at paragraph 4 of their skeleton rather grandly, if I may say so, to their case as being the, "Ideal case", for an opt-out order for collective proceedings for an aggregate award of damages, they say that will establish the regime on a sound footing, we say, Sir, that that represents wishful thinking on their part, because what we have here, given the nature of the infringement which was in almost all respects concerned with information sharing and gross list prices, is very different to a hard core agreement to fix transaction prices, we have a trucks market which is characterised by a high degree of heterogeneity, made complicated by the fact that these are indirect purchasers, although Mr Thompson repeatedly refers to the proposed class members as, "direct purchasers". We say there are fundamental problems with the UKTC's methodology, and, as Mr Harris will develop, fundamental problems with the litigation plan.

So, putting all of that together, Sir, we say this

case is manifestly unfit for certification, either on an opt-out or an opt-in basis.

Now, with those introductory points, if I can turn to my first topic, the applicable legal principles, and I will have to take this a little faster than I would have liked due to time constraints, but there is actually quite a lot between us and UKTC as to the applicable principles.

The first point, Sir, is the interpretation of the commonality condition, and I'm using that term as shorthand for raising the same, similar or related issues of fact or law.

Now, as you will have seen from our amended response and our skeleton, we submit that what that wording requires is for the Tribunal to consider whether, (a), a question that is the same, similar or related necessarily arises for determination in each of the individual claims, and, (b), whether that common question admits of an answer that is also the same, similar or related for each proposed class member.

Now, it doesn't seem to be controversial that a common question is required. As to the need for a common answer, we submit that that plainly flows from the underlying policy of the CPO regime, because the whole rationale for the regime is to provide efficient

and cost-effective remedies to those harmed by anti-competitive behaviour, and in order to provide the efficiencies and the cost-effective remedies, we say it cannot be sufficient that a common question arises for determination, because if there are two different individual claims in relation to which the answers would be entirely distinct and unrelated, then it would plainly be neither more efficient nor more cost effective for the claims to be brought on a collective basis. There has to be something which justifies combining them.

Now, Sir, we say that, ultimately, the question of interpretation is one of English law and by reference to an English statute, but -- and we do say that one should be careful about over-borrowing from the Canadian jurisprudence, as it were, and Lord Briggs made a similar point at paragraph 42, but we do submit, Sir, that it is striking that our interpretation of the commonality condition, as I have just set out, is consistent with a long line of authority in the Canadian common law provisions, and just to save time, if I could just point you to paragraph 5 of our skeleton argument where we've referred to two cases, the important case of Dutton, paragraph 39, which really is the starting point in the line of cases, and the quote that we've included

there is:

"The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact finding or legal analysis".

Sir, if you are looking for Dutton itself, it is in Joint Authorities Volume 6, tab 81. It's paragraph 39 which is the key.

THE PRESIDENT: Yes.

MR SINGLA: Sir, the second case that we've quoted in our skeleton is Kett {JA/110/1} which we say is the most recent case in the line of authorities, and we have included paragraphs 127 and 140.

THE PRESIDENT: Joint Authorities? What's the reference?

MR SINGLA: Kett is at Joint Authorities Volume 9, tab 110.

THE PRESIDENT: Thank you.

MR SINGLA: And the quotations we've included are {JA/110/1} there must be something, "Unifying the pursuit of the answer", as between the various individual claims, and paragraph 140:

"The ability to generalise or extrapolate from one claim to another is crucial to existence of a common issue".

We submit that the commonality condition in the English legislation should be interpreted in the same way, because, as I say, there must be something which

justifies combining the claims, a unifying thread.

Now, what do the applicants say about this? Sir, as between Iveco and the RHA, in fact there is nothing between us, because although there is lots of hyperbole about our interpretation being devoid of logic and robbing the statute of meaning and so on, in fact, when one looks at what they are saying generally, they adopt the same interpretation, so, for example, at paragraph 36 of the amended reply, and paragraph 26 of the skeleton, they quote the Dutton wording themselves. They say:

"The question for the Tribunal is; is the resolution necessary to the resolution of the claims of each class member and will answering it in common avoid duplication in legal and fact finding analysis?"

So we say that's exactly the same point that we are making. That's taken straight from paragraph 39 of Dutton, but UKTC, on the other hand, advance a much more radical and permissive interpretation of the commonality condition. They don't accept that there needs to be a common question and a common answer, and at paragraphs 159-160 of their amended reply they argue that a common question alone is sufficient.

Now, we say they don't have any underlying principle or rationale to support that interpretation, and no

doubt if such a permissive and broad interpretation were correct, the RHA would have been advancing it as well.

Now, all they do have, Sir, and all they quote in their documents in support of this interpretation is the Supreme Court of Canada's decision in Vivendi.

Now, we accept that in Vivendi the Supreme Court said that all that was required was a common question, but we do say, and this is in paragraph 12 of our skeleton, that their reliance upon Vivendi is misplaced, and the reason it is misplaced is because that was a case construing the Quebec Code of Civil Procedure. The Quebec Code of Civil Procedure, the wording of which specifically referred to identical, similar or related questions of law or fact, and we say in light of that wording, which specifically referred to, "Questions" -- I'm sorry Sir, I should give you the reference. It's Joint Authorities 8, tab 101. I will not go to it myself because of time constraints.

THE PRESIDENT: No. No need.

MR SINGLA: Now, Sir, when one reads {JA/101/1} the Vivendi decision, one sees that the Supreme Court was at pains to emphasise that the decision was a question of construction of the Civil Code in Quebec, and although there is common law authority, common law provinces authority cited in the judgment, the Supreme Court makes

very clear indeed that the interpretation in Quebec is more expansive and more permissive than the well-established test in the common law provinces.

Now, we also submit that there is a danger in relying on the Quebec regime because, in fact, it is quite different to the UK legislation. There is no equivalent to the suitability condition, so whereas the Canadian common law provinces contain a commonality requirement and also a preferrable procedure requirement, I'm sure you are well-familiar with that, in fact, when one looks at the position in Quebec, and this can be seen in Vivendi, for example, at paragraph 67, there is no preferrable procedure requirement, so it is a much, much more expansive regime, something which the Supreme Court recognises and confirms in Vivendi.

Sir, we say that if analogies are to be drawn with Canadian jurisprudence it should be by reference to the common law provinces, rather than Quebec, and, indeed, if one looked at the Court of Appeal's judgment in Merricks at paragraph 40 where they refer to Canadian jurisprudence, they refer, there, to the common law being the Ontario procedure, and Lord Briggs at paragraphs 37-42 again focuses on the common law provinces, and there is no mention of Quebec.

So, Sir, insofar as UKTC rely on Vivendi in support

of their construction, we say that takes them nowhere, but I would address a point that they make at paragraph 17 of their skeleton and footnote 5, where they say that their interpretation of the commonality condition, based on Vivendi, has consistently been adopted by the Canadian Supreme Court. Those are the words Mr Thompson uses in his skeleton.

Now, with respect, that's simply not right, and as with quite a lot of their submissions, one has to be very careful and actually follow through the cases and the materials cited in the footnotes.

In fact, on a proper consideration of those authorities, if I could just explain the position without going through the cases individually, Sir, the position is this; the Dutton case, paragraph 39, is the starting point in these cases. That's the wording about avoiding duplication in factfinding or legal analysis. That was a common law province case, Supreme Court decision, on an appeal from Alberta.

One then has the Hollick case which I'm sure you are familiar with because it's cited many times. That was also a Supreme Court case from Ontario, so another common law case, and paragraphs 15 and 18 of Hollick adopt the Dutton case, and it was decided only a few months after Dutton.

The next case is Rumley which UKTC cite in their footnote 5 as being somehow supportive of their position, but in Rumley, if one actually takes time to read the case, what is being applied is the Dutton formulation, and that's paragraph 29 of Rumley, and if it helps to give you the references, Dutton is {JA/81/1}, Hollick is {JA/83/1} and Rumley is {JA/82/1} I believe.

Sir, each of those decisions -- they were decisions of Chief Justice McLachlin. They were all the same judge and they were all decided within a few weeks of each other, so we say it is hardly surprising that the same test from Dutton was applied, but if one moves forward in the chronology to 2013 and the Pro-Sys case which of course the Tribunal is familiar with, that also applied Dutton. That's at paragraph 108, and that's {JA/98/1}.

So that's the position when we get to Vivendi in 2014, and as I say, Vivendi makes clear that it is a Quebec-specific decision, and although there is reference to Dutton and Rumley, in the end the Supreme Court says, well, Quebec is a different animal altogether.

Then we get Pioneer v Godfrey which again is cited by UKTC as somehow supporting their position. Pioneer v

Godfrey is {JA/108/1}. That also approves the Dutton case, and there is reference, again, to paragraph 108 of Pro-Sys, so it is the avoiding duplication of fact and legal analysis test.

There is, it is true, some reference in Godfrey to Vivendi, but on proper analysis of the judgment it is on a different point, and, Sir, so we say on this first issue of the interpretation, the first word, really, is the Dutton case, which has been consistently applied in the common law provinces, and the later word is Kett, and again, Kett at paragraph 122 cites paragraph 39 of Dutton, so Vivendi, we say, is an exceptional case and shouldn't be followed.

Sir, my second topic on the legal principles is the role of expert evidence --

THE PRESIDENT: Well, before you move on, Canadian cases are all very interesting and can be of help, and that's clear, but, of course, this is our domestic regime and UK legislation, and it has been considered by the appellate courts here, and the Court of Appeal addressed the issue of commonality, and the view taken by this Tribunal, including me, was precisely the point that you have just made, which is why we said in Merricks, pass-on is not a common -- that is a common question, but it's not a common answer, because someone who has

1 several children who drives a motor car is going to be
2 spending money on fuel to a large extent, on children's
3 toys and so on, whereas a student of 17 with no car is
4 going to have a totally different expenditure pattern
5 and therefore totally different pass-through, which is
6 required for the Merricks claim, and therefore it's not
7 a common issue, and the Court of Appeal said in no
8 uncertain terms that was wrong, and the Supreme Court
9 said, although it wasn't appealed, but they expressly
10 approved the Court of Appeal's ruling on common issue.
11 MR SINGLA: Yes.
12 THE PRESIDENT: So isn't that -- whatever the Canadian
13 courts may have said, is not the UK approach that it is
14 not a case that you need a common answer?
15 MR SINGLA: Sir, I am coming on to deal with the Court of
16 Appeal's judgment in Merricks.
17 THE PRESIDENT: I see. I thought you were moving on to
18 another --
19 MR SINGLA: Well, I'm still within the legal principles.
20 I'm hoping to address you on four separate topics within
21 the legal principles. The Merricks decisions will be my
22 third and fourth because I do want to take you to the
23 Court of Appeal and the Supreme Court. We say, in
24 short, that the Court of Appeal's reasoning, properly
25 analysed, is consistent with our interpretation.

THE PRESIDENT: Well, that's what -- it is important you deal with that because that's the starting point for our interpretation and Canada is the sort of add-on.

MR SINGLA: Yes. Well, we say -- well, I'm just dealing with UKTC's point, the test should be the same as Vivendi, and we say, well, Vivendi is just out on a limb in terms of Canada, but of course we agree that it is a question of UK interpretation and I will deal with Merricks shortly.

THE PRESIDENT: Yes.

MR SINGLA: I'm just, at the moment, putting forward our positive case as to what should happen at the certification stage, so we say the starting point is that's how the statute should be interpreted.

The second point is the role of expert evidence, and we say that the test that should be applied is the same as the Tribunal's judgment in Merricks at paragraph 59 of first instance, and we say nothing in the Court of Appeal or the Supreme Court suggested that the Tribunal was wrong to apply that test and to consider whether the methodology put forward by Mr Merricks was sound. On the contrary, if one looks at paragraphs 39 and 41 and 49-51 of the Court of Appeal, and 39-40 of Lord Briggs and 135, 136 and 153 of Lord Sales and Leggatt, there is, actually, universal agreement there, the Tribunal

did the right thing by assessing the methodology by reference to the test that it applied.

THE PRESIDENT: Yes.

MR SINGLA: And -- but before I move on, in relation to methodology, I just want to make two points. One is you will see that we've quoted the Chadha case in our skeleton argument, it is Joint Authorities tab 86 {JA/86/1}, and we say that is a particularly interesting authority because it is an example of a case where an applicant put forward a methodology which had assumed the very thing that the methodology needed to prove and that was an indirect purchaser case. Homeowners said that as a result of some price fixing of iron oxide which had been used in their bricks, they had overpaid for their houses, and the plaintiffs put forward some expert evidence which assumed that the higher costs of those bricks would have been passed on to the home buyers, and that case held, I think it was the Court of Appeal of Ontario, but it is interesting because we say the expert in that case made exactly the same fundamental error that Dr Lilico has made in this case, which is assuming the answer, and so we draw that to your attention on that point, and in relation to emissions --

THE PRESIDENT: Any particular -- it is paragraphed --

MR SINGLA: Yes. It is paragraphs 28, 30, 31 and 52.
THE PRESIDENT: Thank you.
MR SINGLA: And one can see that what's being applied is the Hollick basis, in fact, test, and what the court says is, "This doesn't pass muster", because they are assuming the very answer of the question, we say that's exactly the error that Dr Lilico has made, which is fatal to UKTC's application.

Sir, secondly on methodology, if I could just pick up a question that you put to Mr Thompson yesterday in respect of emissions, the position, as you know, Sir, is that no methodology has been put forward whatsoever, and Mr Thompson said he didn't want to duck the question but he did duck it by saying, well, of course, you can ask Dr Lilico on Monday, but Dr Lilico has already said, in section 8 of his first report, and section 1.16 of his second report, that he is not putting forward a methodology, so we say on any view that part of the case falls away.

Sir, in relation to the relevance of methodology, I'm still on my second topic, because, again, there is something between the parties on this, the RHA, for their part, accept that the Tribunal should consider the methodology, and the only difference between us is whether, in fact, this is a subsequent question, or

whether this goes to the identification of the common issue, and we say that it's the -- it's part of satisfying yourself of the commonality condition is satisfied, whether or not a plausible methodology is being put forward, and we say, in fact, if one looks at Pro-Sys which is Joint Authorities Volume 8, tab 98 {JA/98/1}, if you look at paragraphs 113-114 and 118, what is happening there is that the methodology is being scrutinised in order to see whether the commonality condition is satisfied. It's not a subsequent question as the RHA say, but that is a narrow dispute.

UKTC seem to take a rather more radical approach and they suggest at paragraph 58 of their amended reply that, in fact, the only principle, the only governing principle post Merricks is broad axe.

Now, it's all very unclear from the written submissions and the oral submissions didn't help, but if what is being said is that methodology should not be scrutinised because it's all a matter of broad axe, we say that they have quite seriously misunderstood the Supreme Court's decision, because --

THE PRESIDENT: Well, as I understand it, sorry to interrupt you, but I haven't been persuaded otherwise, the CAT, as you know, in Merricks, took Rothstein, J's formulation, and while it was found we imposed too onerous

a threshold for the basis in fact condition, that there should be a credible and plausible method, was not disapproved, and that was the approach we took, and, indeed, as I think you said was implicitly approved by --

MR SINGLA: Well, we say it is actually expressly approved, and so we are somewhat surprised to see the reference to the only governing principle being broad axe.

THE PRESIDENT: So I don't think you need for my part to address that.

MR SINGLA: Well, I'm grateful. You will recall yesterday Mr Thompson did try and make a submission that they didn't have to but --

THE PRESIDENT: I think Mr Thompson wants to clarify. Yes, Mr Thompson?

MR THOMPSON: We are going quite quickly and the transcript didn't pick up the reference to what we are alleged to have said in the reply. I would just be grateful to --

MR SINGLA: Paragraph 58. It is Volume B1/2, page 10.

Sir, let's move on, because they also say in the same breath, well, if you are going to look at methodology, it is a very low test. They say it is not an onerous test, and as to that we make a number of points. The first is in Pro-Sys itself, paragraph 102, 3 and 4, what the court there says is this may not be

a merits assessment but we are concerned with a meaningful screening exercise here, and there needs to be more than just a superficial level of analysis and there needs to be "more than symbolic scrutiny".

At paragraph 104 the court says:

"There is limited utility in attempting to define 'some basis in fact' in the abstract. Each case must be decided on its own facts".

So we say it's not that helpful just to characterise it as a, "low bar". They cite a case called "Ewert", in support of this proposition which is at Joint Authorities Volume 8, tab 107 {JA/107/1}, and again I don't have time to take you through that, but if one reads the case carefully, what actually is happening in that case is the court is contrasting some basis in fact with no basis in fact, and interestingly --

THE PRESIDENT: Well, Mr Singla, as I understand it, the "some basis in fact" is the evidential threshold which in Merricks was the question -- two quite distinct questions. One is what is the methodology being proposed, and the second is, is there the -- any likelihood that the data will be available to apply that methodology. So, for example, you can say regression analysis, very well accepted, much used, the methodology, but on a particular case not the slightest

chance of getting the data you need to apply it effectively. I'm talking hypothetically, not about this case. Those are two quite distinct points. If you are addressing the methodology which is the issue that -- and in backtracking for a moment in Merricks, we found that the methodology condition, or threshold, was satisfied, but the data we felt didn't meet the "some basis in fact" test. It was the second point that was challenged and overturned on appeal, but as I understand it, you are now on the first point about methodology, which is distinct from the basis in fact.

MR SINGLA: Sir, with respect, if one looks at the Canadian cases, and I have read a number of them, the basis in fact test is not used, with respect, in exactly that way. There is no bright line being drawn between the plausibility of the methodology in the Pro-Sys paragraph 118 and the Merricks paragraph 59 sense, and data issues on the other.

So, for example, in the Ewert case, the court says -- and as an example of no basis in fact, the court cites and relies heavily on the Chadha case which is, as I said earlier, a case where the methodology was deeply flawed because it assumed the very thing that it had to prove.

So I do submit that one's not dealing with two

separate issues. One is dealing with a single issue which is: is there a plausible, credible methodology grounded in the facts, and so on, and as part of that question one can have regard in some circumstances to data, but we don't accept, with respect, that there are two separate questions, methodology and data on the other hand.

Of course, in some cases they are run together because often problems with methodology will involve data availability issues, but we don't accept the basis, in fact, is just a data question.

Sir, my final point on this is simply just to note that we don't accept the test is a low bar, and the Kett case, which Mr Harris is going to take you through in detail, is an example where certification was refused on the basis that the case was too large and too fragmented.

Sir, if I may move to my third topic on the law which is the distinction between the certification test and the strike-out summary judgment test, and the reason I need to address you on this is because both UKTC and the RHA suggest in numerous places that it is sufficient for their case to be certified that they meet the summary judgment and strike-out standard, and Mr Flynn, I think, alluded to that earlier in his oral

submissions, but it is very clearly in both of their written submissions, in their amended replies and in their skeleton arguments, and Mr Flynn in particular says the overarching test is simply whether they can show a triable issue.

Now, I do want to take you through the Supreme Court's judgment on this because we say that they have misunderstood what Lord Briggs in particular was saying in Merricks, because we submit he was not saying that all that needs to happen is the strike-out summary judgment test needs to be overcome, in fact, one has to understand what the issue was in Merricks, and what Lord Briggs was really addressing, because we submit that the question that he was considering, or the particular issue that he was dealing with, was the submission about whether the data issues, or the forensic difficulties, I think Lord Briggs refers to them as, his central point was that the forensic issues would be the same in an individual action as would be in a collective action, and he said, well, if that's the situation, if you have an individual action which is not being struck out, but there may be some data and some quantification problems, then if those very same issues arise in a collective action, why draw a distinction? That's no basis for refusing to certify, because the very same problems

arise in both.

We submit that is the proper context in which Lord Briggs is referring to meeting the strike-out and summary judgment standard.

We say crucially, and, indeed, obviously, we say that Lord Briggs was not saying that the only hurdle which a CPO applicant needs to overcome is the strike-out summary judgment test, and in my submission, when one stops to think about it, that obviously wouldn't make sense because we know that in the legislation there is an additional hurdle for CPO applicants. It's not good enough for them to survive the strike-out summary judgment test, but they also need to persuade you that they meet the standard for certification.

THE PRESIDENT: Well, Mr Singla, I don't think either applicant said it's only a question of strike-out summary judgment. They emphasised that in this case no respondent is seeking to say there is no arguable case, but they are not saying that's the end of it, because if it was the end of it, we wouldn't be here because nobody has applied to strike out. They have made that point in part of their argument -- just listen for a moment please -- I did not understand either Mr Thompson or Mr Flynn to say because nobody is applying to strike out

you don't have to worry about any of the statutory conditions. That's not their submission.

MR SINGLA: Well it is in writing Sir, and I can give you the references. It is UKTC's amended reply paragraph 34 where they say:

"The Supreme Court has made clear that no higher merits test should be applied at the certification stage" --

THE PRESIDENT: Yes. No higher merits test. In other words you can't say, "You are not going to be able to prove that the cartel caused any overcharge", and that's going to be a difficult argument on the merits, and, indeed, to be fair, no respondent is saying we should throw this out because an argument that the cartel caused an overcharge is unsustainable. That's the merits point, but that's not the certification point.

MR SINGLA: Sir, well, we agree with that analysis. With respect, if one looks at what UKTC say in writing and the RHA where they consistently refer to the overarching test as being whether or not there is a triable issue, and I have a number of references, so paragraphs 24, 26 and 27 of the RHA's amended reply --

THE PRESIDENT: Well, you can take it from me that's -- I understand that's the approach, it's clearly not. That's on the issue of the merits argument that there is

no higher merits argument than strike-out.

MR SINGLA: No, well, I'm very grateful. You are quite right, that the submission wasn't pitched that high in oral submissions, but, with respect, it is in writing, but I will not take up time.

So that, actually, saves me the task of showing you why that was wrong on a matter of analysis of Lord Briggs.

THE PRESIDENT: Yes.

MR SINGLA: So then can I turn to my fourth topic which is now to turn to the Court of Appeal's judgment in Merricks to deal with the commonality question?

THE PRESIDENT: Yes.

MR SINGLA: And that can be found at tab 60 of the joint authorities bundle, I believe.

THE PRESIDENT: Yes. Well, we better turn that up, which is Joint Authorities -- folder 4 at tab 60. {JA/60/1}. Yes.

MR SINGLA: Sir, could I dive straight in to, really, the crucial paragraphs on this, which are 46 and 47, and I think 49 and 50 as well, so that's at page {JA/60/22}. I have already made the point that in case one wants to see the reference in the judgment, the paragraph 77 of the first instance Tribunal's judgment, one can see that quoted on -- it is in paragraph 32 of the Court of

Appeal on page 16, and that's the paragraph 77 where the Tribunal found that the methodology was sound at first instance.

We say that's very important context, so when one comes to interpreting the rather compressed reasoning in paragraphs 46 and 47, the background is that there is a finding that the methodology was sound, and that finding wasn't challenged on appeal, and, Sir, do you have 46 in front of you? Because we say, if one looks at the last part of paragraph 46:

" ... the issue of whether the MIF overcharge was passed-on to consumers generally and in what amounts is an issue common to all such individual claims as a necessary step in establishing ..."

THE PRESIDENT: Yes.

MR SINGLA: So we say, just pausing there, we say that that demonstrates or is consistent with the common question, as it were, so in every single case that issue arose.

THE PRESIDENT: Yes.

MR SINGLA: And then more pertinently, perhaps, as to the common answer, we say that the next paragraph is the answer here. So paragraph 47:

"An analysis of the pass-on to individual consumers at a detailed individual level which is unnecessary when what is claimed is an aggregate award. Pass-on to

consumers generally satisfies the test of commonality of issue necessary for certification".

So we submit that this is consistent with our interpretation, and that what was going on in Merricks was a claim for an aggregate award of damages in circumstances where the Tribunal had found that the methodology was sound, but there were issues with data, but the Court of Appeal is saying, well no, there is a sound methodology, it is wrong to look at the data question, and it is the sound methodology for the aggregate award of damages that provides the common answer to the class.

THE PRESIDENT: But the common answer, as you have just said, you make the point as I understood your submission, when you addressed this point, it's not just the same, similar or related question, but the same, similar or related answer for each individual case, and if you look at the question as posed by the Court of Appeal which is the common question, whether the MIF overcharge was passed on to consumers and in what amounts is an issue common to all such individual claims, well, the answer to that question, what amounts, was not a common answer to all individual claims.

MR SINGLA: But with respect -- I'm sorry. I didn't mean to interrupt.

THE PRESIDENT: No, you didn't.

MR SINGLA: Oh. Good. Sir, with respect, the key, we say, is that the aggregate award of damages is providing a class-wide answer, and so --

THE PRESIDENT: But that's not a common answer to all -- for each -- the same, similar or related answer for each individual claim. It is a class-wide answer, which is exactly the view this Tribunal took, that because it can be approached on an aggregate top-down level, you don't need the same answer to each individual claim, and, therefore, although it's not a common answer in that sense, it's sufficient.

MR SINGLA: Sir, with respect, our reading of the Tribunal's approach at first instance was to say, let's look at what the issues are in each of these individual claims, and you, I think, held that it was not a common issue, but you then proceeded to consider whether the problem, as it were, could be overcome through the use of a methodology, and the structure of the Tribunal's judgment follows that, so one has consideration of common issues, and then separately and later in the judgment, consideration of the methodology, and within the methodology section you first start by saying, well, it's sound in theory, subject to the data point.

So, in the first instance judgment there is

separation of the consideration of those two matters. One, what are the common issues across the claims, but secondly, can the problem that there is no common issue, as the Tribunal saw it, can that problem be solved because of the methodology, and what we submit is that the Court of Appeal is running those two points together, so not breaking them down in the two stages that the Tribunal did at first instance, but in this rather compressed reasoning in 47 the Tribunal -- the Court of Appeal is saying, what is being claimed is an aggregate award, and therefore you don't need to analyse pass-on to individual consumers at a detailed individual level, because the commonality condition is satisfied by virtue of the fact, or as a result of the sound methodology for arriving at an aggregate award, because the question in each case is; has the claimant suffered a loss, but the answer is going to be provided by the aggregate award on a class-wide basis.

So we submit this is consistent with our interpretation of the legislation.

THE PRESIDENT: In that case it is not a very big difference.

MR SINGLA: Between?

THE PRESIDENT: Between the approach, as you interpret it, of the Court of Appeal, and the approach of the Tribunal

at first instance.

MR SINGLA: Well, we agree with that, Sir. We are not saying there is a huge amount between this approach and the Tribunal's approach at first instance.

THE PRESIDENT: As Lord Briggs found, that it was because we went so wrong on common issue as regards this point that it led us into a wrong analysis of certification. So he thought the difference was quite fundamental.

MR SINGLA: Well, Lord Briggs, with respect, did not consider the commonality question in any detail whatsoever, so what one is left, really, with, is these paragraphs in the Court of Appeal, and one has to -- it is slightly cryptic, but when one steps back and tries to analyse what is being said in 46 and 47, the end of 46, we say, means that there is a common question, because it arises in every individual claim.

THE PRESIDENT: That's clear.

MR SINGLA: The conclusion in 47 is that the commonality test is satisfied, and they are clearly not stopped at the common question, so they haven't said at the end of 46, the same question arises in every case, therefore the commonality test in the legislation is satisfied.

So there is something, with respect, in the first sentence, long sentence in paragraph 47. That is the key to unlocking this, and so one gets -- one goes from

the common issue at the end of 46 to satisfaction of the commonality question at the end of 47, and we submit that the reason there is an answer, common answer is because you have got a claim for an aggregate award, against the background where the Tribunal has found that the methodology is sound, and one can see that in 49 and 50 if one scrolls down or moves down, one can see that the CAT said:

"It was sufficient to persuade the CAT that the calculation of global loss based on a weighted average pass-on was methodogically sound and not purely theoretical", et cetera.

The question, Sir, you have put to me that there is not a huge difference between what we are saying and the Tribunal. That's right. The key, we say, to why the Tribunal was overturned in Merricks was the data question, and the critical question that Lord Briggs, as I said earlier, the crucial point so far as Lord Briggs was concerned, was that the data issues, what he described as the forensic problems, would be the same in an individual and a collective action, and he said, well, if that's the case, why are you refusing to certify?

Whereas here, we are saying -- we are not saying there are problems which would arise in the individual

action, we are focusing our objections to the commonality, to the combining of these claims, so this is very different to what happened in Merricks, because it can't be said that the points we are running are ones that would apply equally to an individual action. We are saying there is a problem here so far as certification is concerned, and there is probably a limit to how far I can take this, because we are just looking at two or three paragraphs, but we do submit that on proper analysis the key to this is the aggregate award with a sound methodology, and if one interprets the case in that way, and as I say the Supreme Court doesn't really help or take things further on commonality --

THE PRESIDENT: Yes. It wasn't appealed, so ...

MR SINGLA: No, it wasn't appealed. It wasn't even considered. We say, as I said earlier, the Supreme Court was focused on a data point and a forensic broad axe point, but the problems here for the claimants are not, we say, quantification broad axe -- they are not problems which can be solved by liberal use of the broad axe, because we are actually saying there are problems in terms of the certification hurdles. These problems are not the same as the problems that would arise if these claims were brought individually.

THE PRESIDENT: Well, isn't it, then, if I have understood your submission, and I just want to make sure I have understood it correctly, isn't it, in a sense, the same point as the expert methodology point? You say there hasn't been produced an expert methodology that can answer this question satisfactorily on a common basis, therefore, it's not -- there is not a common answer, therefore it's not a common issue. So it goes back to the fact that you say the methodology of UKTC is not satisfactory. If it was satisfactory, and could produce an answer on an aggregate basis, then, as I understand your interpretation of this, I agree, rather compressed two paragraphs in the Court of Appeal's judgment, then it would be a common issue. Is that fair?

MR SINGLA: Yes. We do accept that if UKTC, with a claim for aggregate damages, had a sound methodology which was reliable, plausible and grounded in the facts, that would satisfy the commonality condition.

Now, the problem for UKTC is that the methodology is fundamentally flawed.

THE PRESIDENT: Yes.

MR SINGLA: So pointing to Merricks and the Court of Appeal doesn't help them one iota because there is nowhere Mr Merricks' sound methodology.

Now, we also say that this is a particular point

where aggregate damages are concerned, so one has to be slightly careful about rolling out, as it were, the reasoning in 46 and 47 to RHA's claim where it is actually a claim for individual loss, a rather different animal to aggregate damages, but we submit that the proper analysis is the legislation refers to common issue, or same, similar, related issue. We say that what that involves or requires is a common question and a common answer, and that the various stages that one has to go through, the analysis, first of all, is; does the same question of similar or related question arise in every case, answer, yes.

Is there a common answer. Now that involves, first of all, we submit, looking at the factual background. One can't just jump straight to a claim for aggregate damages and say, well, that solves everything, because along the way one has to actually consider the factual background, and this is part of assessing the methodology, so the reason that we make so much, or put so much emphasis on the heterogeneity of the trucks market is because when one comes to assessing whether or not that methodology is sound and grounded in the facts, one has to have reference to the particular market that one is dealing with, and the nature of the infringement.

So, whilst UKTC could say in theory, we would

accept, that a sound methodology which was grounded in the facts and took account of all the heterogeneity, et cetera, if they did all of that we would accept applying paragraphs 46 and 47 they satisfied the commonality question.

THE PRESIDENT: So it is really a question of the methodology, because you could not have a more heterogeneous group than the spending patterns of every adult in the United Kingdom. It is about as heterogeneous as you can get.

MR SINGLA: Well, conversely we would say this methodology from UKTC is about as bad as one can get, so --

THE PRESIDENT: Well, I say it comes back to the -- it's not really about what's a common issue, it's about whether the methodology is plausible, sound, or whatever the test is.

MR SINGLA: Yes. I would accept that in substance, but there is a difference between us in terms of the starting point and they accuse us, UKTC, in their written document, of starting at the wrong point and trying to smuggle back in questions of individual assessment and so on.

We say they start at the wrong end of the telescope because they start with paragraphs 46 and 47, and they say, well, everything is now presumed to be common,

because if it was all common in Merricks it must be common in every case going forward, and we say that really does miss the point that in Merricks, whilst it was very heterogeneous, there was a sound methodology, and so it's not right simply to say because you claim aggregate damages, everything dissolved away. That's just not right.

One starts with the legislation which requires a common question, common answer, and in relation to the common answer they have the hurdle of showing a sound methodology, and so there is no question of smuggling things back in. The starting point is that these are all individual claims, and it is only if they can satisfy the Tribunal that they have got a sound methodology of bringing together all of these claims, and of dealing with all of the heterogeneous features, that's the only way, we submit, they can get out of the problem that these are ultimately very, very individualised claims.

So there is an issue between us as to which end of the telescope one starts from.

Sir, if I can then leave the law and just deal quickly with the -- my second topic, which was the nature of the infringement and the decision, now, in short, we say that the conduct which gave rise to the

Commission's finding of an infringement was almost exclusively concerned with the exchange of information about gross list prices and the decision makes no findings whatsoever in relation to the alleged effects, and we say that's significant for two reasons. First of all, as our expert, Dr Durkin, explains, but this doesn't seem to be controversial, as a matter of theory, economic theory, information exchange infringements are inherently very different to hard core horizontal price fixing agreements, and, in particular, the effect that they have on prices can be very different indeed. That's Dr Durkin at paragraphs 56-57 of his first report, Volume 2, F, tab 10 {F/10/20}.

Secondly, we say this is very significant because not only did the Commission decision not find any effects on gross list prices, but a fortiori it didn't find any effect on net or transaction prices, ie the prices actually paid by the proposed class members, and so we submit --

THE PRESIDENT: Well, not completely, there was some finding on net prices, but it was mostly gross prices, but there was, of course, that paragraph of agreeing net prices.

MR SINGLA: No, I'm sorry Sir if I misspoke. I meant to say in respect of effects. We say there are no effects found as regards gross list prices but a fortiori no

effect found on net or transaction prices, and so we submit there can't be any question of the Tribunal proceeding on the basis of some presumption of effects on transaction prices, and if I could just show you the decision very quickly, two recitals in the decision which we say are actually conclusive on this point, the decision is in Bundle K, and if I could ask you to turn up page 20 of Bundle K, please?

THE PRESIDENT: Just one moment. {K/1/20} which recital?

MR SINGLA: We say if one starts at 80 the Commission is saying:

"When one is dealing with an object infringement there is no need to examine the actual effects", and that's just a statement of law, but what we say is conclusive is Recital 82, and particularly the last sentence:

"Consequently the present case is not necessary to show actual anti-competitive effects", so not only as a matter of law when one is dealing with an object infringement are there no effects necessarily, but the Commission is actually saying that they haven't looked at effects, and so we do submit that references to the fining guidelines or the fact that there was found to be an effect on trade which is a point relied upon, we do say that those miss the mark because it is quite clear

that the Commission didn't find any effects, and the damages directive also cited by Mr Thompson doesn't help, and we would commend to you the BritNed judgment where a similar submission was made and rejected by Marcus Smith, J, paragraphs 19-23 which is Joint Authorities Volume 4, tab 55, he rejected a submission that there should be a presumption of harm, but if I could just explain why Mr Thompson is flogging this dead horse, as it were, it's because Dr Lilico has belatedly accepted in his fourth report that his methodology can't assess whether or not there was an overcharge. It can only assess the extent of an overcharge.

So for UKTC, this idea of there being some presumption of an overcharge arising out of a decision has become rather fundamental to their case, because what they can't otherwise establish is the first question, whether there was an effect. They have only got a model to help the Tribunal assess the extent of that effect.

If I could -- I'm conscious of time -- if I could move to my third topic which is the features of the trucks market, because before one gets to methodology, one has to see just how heterogeneous the market is, and I think the most efficient way of picking up the points we made in our factual evidence would be to look at our

response which is {D/1/1} I think. If I could ask you to turn to paragraph 54, so I think that should be page 23 of the bundle {D/1/23}.

PROFESSOR WILKS: Sorry Mr Singla, which bundle?

MR SINGLA: Sorry, I think it should be Bundle D, tab 1.

THE PRESIDENT: Yes. That is right. That is your response.

MR SINGLA: Yes. I'm grateful.

THE PRESIDENT: D/1.

MR SINGLA: If I could ask you to turn up page 23 of the bundle, please. What we've done here, Iveco has served witness statements from Mr Flach and Mr van Leuven and Mr McCarthy but it is particularly Mr Flach and Mr van Leuven whose evidence we have summarised or collated, as it were, in these paragraphs, 55 through to 92, and if I could just very quickly ask you to look at these paragraphs, so one starts with the heading, "Differences between products". Do you have that at 55?

THE PRESIDENT: Yes.

MR SINGLA: I'm grateful. So three truck ranges, medium trucks, heavy trucks under two brands, considerable choice for customers as to the configuration, and then you have got all of the particular options within the Eurocargo range, and then the off-road use at paragraph 57, and then at 58, and you will see the reference to Mr Flach's statement:

"As a result there were thousands of unique configurations for Eurocargo Trucks" and "Which configuration the customer preferred would depend on ..."

And then the paragraph goes on to say {D/1/24}:

"Iveco manufactured a very large number of available configurations. In 2011 in the EEA Iveco sold more than 5,000 variants".

Again one can see the reference in the footnote, and then you have got the Stralis and Trakker heavy trucks where similar points are made about the various configurations, and if one skips ahead to paragraph 63 {D/1/25}: "Iveco sold more than 6,000 variants of its Stralis and Trakker trucks."

That's just within one year. That's 2011 only, and Mr Flach says the same is true of other OEMs, so far as he knows, and at 65, and this is Mr Flach saying that the truck manufacturers compete on things like brand value, quality, reliability, fuel efficiency and after sales customer support, local preferences for particular brands, and then there is a reference to bundling, if one moves forward to paragraph 69 {D/1/26}, so trucks are often sold or bundled together with other products, and again the footnotes will hopefully help in terms of navigating the evidence, and then the heading above 72,

"Differences between transactions", so of course, as the Tribunal knows, trucks were sold through two different sales channels, and then if I could skip to 76 {D/1/27} this is now referring to Mr van Leuven's evidence which is more about pricing rather than truck manufacturing, "Gross list prices":

"Iveco's trucks are available in thousands of different configurations. There is a different gross list price for each theoretical configuration".

Then at 77, this is the contrast between gross prices and net prices:

"Iveco's dealers purchased trucks from Iveco at significant discounts".

One sees the various types of discount in the subparagraphs but including, importantly, individually negotiated discounts at 77.2 and 3 {D/1/28} and further discounts in 4.

So that's the dealer prices, but then, of course, there is another level. There is the transaction prices which is paragraph 78, and we say:

"Necessary to distinguish between the two".

So some direct sales where there were direct negotiations between Iveco and the end customer, but the vast majority, the evidence shows, were through dealer sales, and there were obviously negotiations between the

dealer and the end customer as well, and Mr van Leuven's evidence, as we've summarised in 79 is that the gross list price generally would not have been a point of reference for end customers in price negotiation.

And then 80:

"As a result of these various negotiations and discounts, transaction prices ... for the same Truck - i.e., the same configuration - could vary considerably".

Then we go on, the headings you will see above 81, differences between modes of acquisition, and then 84, used trucks where there is a particular issue that we deal with at 88 {D/1/30} where there is actually negotiation when the used trucks are sold back, so that adds to the degree of variation.

So those are the key points I just wanted to draw to your attention, but obviously I would ask you to look closely at the factual evidence, because all of that is relevant, highly relevant, we say, to the assessment of the plausibility and so on of the expert evidence, because unless the expert evidence can deal with all of these variations, then we say it fails the test.

Now, in addition to the factual evidence, we've also served some expert evidence from Dr Durkin, and he has carried out some empirical analysis which -- the purpose of which is to corroborate the factual evidence, so it's

not, as the RHA have said, intended to challenge or undermine the regression methodology, that's not the purpose for which that evidence has been served. The purpose of the evidence, as Dr Durkin explains in his first report, is to illustrate and corroborate the heterogeneous nature of the trucks market, and if I could just point you to the exhibits, I'm afraid they are contained within a confidential bundle, but when one looks at the documents, only certain facts and figures are actually themselves confidential, so I hope this won't be problematic, but if I could --

THE PRESIDENT: Can you pause a moment? I don't know who is on the Opus document retrieval facility, because if you refer to a document, even though you don't read it out, it is brought up very helpfully and very quickly, with admirable speed, by Opus. Have you, and those instructing you, checked that if you are now referring to a confidential document which I take it is an Iveco confidential document so it is your client's confidence, that will not go to anyone outside a confidentiality ring?

MR SINGLA: Sir, I'm being told that we have looked into this and confidentiality will be preserved, and the Opus team don't have access to the confidential bundles on the screen, so hopefully --

THE PRESIDENT: So it won't come up on screen then?
MR SINGLA: Well I hope not, I'm being told that it won't happen.
THE PRESIDENT: Oh. I see. It's usually the other way around, but very well.
MR SINGLA: I will obviously tread very carefully. What is not confidential is -- I can tell you what these exhibits show, and you will see when you turn up Bundle G, if I could ask you to look at it in hard copy, you will see which bits are highlighted, so, in fact, only specific parts of these exhibits are confidential.
THE PRESIDENT: Yes. So this is Bundle G, presumably tab IC4, is it?
MR SINGLA: Exactly, and I would like to start at page 3, if I may, and I should say, I will not take you there, but Dr Durkin in his first report does explain, he gives a narrative explanation for each of these exhibits, but I will not have time to show you those references, but it's paragraphs 28, 29, 34-40 and 59-60 where he explains what he is doing in these exhibits, but if I could just briefly show you them, and if you have page 3 you will be able to see some yellow highlighting which is the confidential aspect of this particular exhibit.
THE PRESIDENT: Yes.
MR SINGLA: I'm grateful. So I think there is no problem in

telling you what this exhibit does. It shows the very large number of different configurations for one particular type of Iveco truck. One can see that in the configurations for that particular truck, and then from 97 through to 2010 one can see the very large number of different configurations, and then if one goes to Exhibit 1B which is the next page, it is exactly the same exercise in respect of a different type of truck, so, again, enormous quantities of configurations through the relevant period, corroborating what Mr Flach says.

Exhibit 2 is perhaps less pertinent for this purpose, but it shows the division between dealer and direct, so I touched on earlier that the vast majority of these sales were through dealers, and that's why Mr Thompson is wrong to describe the claimants as, "Direct purchasers". One can see the overall percentages at the bottom of that row.

Exhibit 3, I think, all of which is confidential, but I think the purpose of it is simply to demonstrate the number of different dealers that Iveco dealt with in the relevant period.

If one moves forward to Exhibit 4 --

THE PRESIDENT: So these configurators, the configurators, that's the matter which was also exchanged, the commercially sensitive information, that was exchanged

by the unlawful collusion? Is that right? When the Commission found that the manufacturers exchanged information on computer-based truck configurators which were commercially sensitive. Is that the configurations that you are referring to here?

MR SINGLA: No, no, Sir, I'm sorry if I have taken this too quickly. What Mr Flach -- two entirely different things. The configurator is, I think, what you have in mind.

THE PRESIDENT: Yes.

MR SINGLA: Whereas this is configurations, so variations, as it were, of particular truck models. So it's got nothing whatsoever to do with that particular recital that I think you have in mind in the decision. This is simply saying that within the Iveco business, and one gets this from Mr Flach's evidence, within a particular model of a truck there are lots of different types, so that is what is meant by, "Configurations", but the --

THE PRESIDENT: But what is meant -- sorry. You go on.

MR SINGLA: -- configurators are something completely different. We are just talking about different types of trucks here.

THE PRESIDENT: Well, what are configurators?

MR SINGLA: They are a form of computer software.

THE PRESIDENT: Showing what?

MR SINGLA: I'm just having a look at the -- I think the configurators, I think it is explained in the decision that the configurators --

THE PRESIDENT: Yes. It says, "This facilitated the calculation of the gross price for each possible truck configuration", because, as I understand it, the configurators are the things that go into making up the configuration. Is that not right?

MR SINGLA: The configurator is -- if I can -- this will not be wholly accurate but it is a form of computer software to calculate the price, but the configurator will give you a price for each configuration of a truck, so what I'm dealing with at the moment is simply to say that there are thousands of configurations of truck. I'm not, at the moment, dealing with how their price was calculated or anything about the computer software, I'm simply saying that if one went out on the road and looked out for Iveco-branded trucks, one would actually be seeing thousands and thousands of different types of truck.

THE PRESIDENT: Yes, and the configurators tell you how to price them, each individual one, as a gross price.

MR SINGLA: Broadly speaking.

THE PRESIDENT: Yes.

MR SINGLA: Broadly speaking, yes.

DR BISHOP: Is this what used to be called a, "Calculation model"? The information for --

MR SINGLA: I'm told that's not right. I can take instructions if the Tribunal is interested in exactly what the definition of a, "configurator", is, but, with respect, it's slightly off the point I'm making, which is simply to say that one mustn't look at truck models and say, well, there are five truck models. Actually, when you take into account the different specifications of each of these trucks, one is dealing with a large number of variants or varieties or types or sorts, but for this purpose it's not relevant how the prices of each of those varieties was calculated, which may have been through a computer programme.

THE PRESIDENT: Yes. But what is relevant is that the method of calculation for every possible different variation was the subject of the information exchange.

MR SINGLA: Well, Sir, I will have to --

THE PRESIDENT: That's the point I'm making. Of course there are many different kinds of truck and that's the whole point of having to use a computer model, a computer software to get your price, because there are so many different variants.

MR SINGLA: Yes. Well, the point we are simply making is that are thousands of --

THE PRESIDENT: Yes.

MR SINGLA: -- it is a common sense proposition that there are lots of different types of trucks but we are dealing with some evidence from UKTC and the RHA saying that we have grossly overstated the position, some very high-level statements to that effect, and all I'm seeking to do at the moment is to say, actually, what Dr Durkin has helpfully done is he has illustrated that a model -- it is far too simplistic to talk about a single truck model, and if one goes back to Exhibit 1A back at page 3, one can see in the footnotes there -- well, one can see that the number of models is one of the columns, but then you have something called, "VP codes", and so it is the VP codes that pick up the different trucks with different specifications, and what one can see is that, actually, the number of models is relatively small, and at footnote 2 he says that the model simply identifies the suspension type, weight and engine horsepower, but then the VP code identifies the product, model, engine mechanics, technical specifications and extras, and this will probably make more sense if one reads Mr Flach's evidence alongside it, but the short point is this supports what we are saying about heterogeneity and there are literally thousands of these trucks.

THE PRESIDENT: There are many, many possible different elements, obviously there are a multiple of that in terms of different potential combinations. However, it doesn't particularly help me as to how many of each of these hypothetical variants were actually sold. We just don't know.

MR SINGLA: I'm sorry Sir, these are numbers of trucks sold.

THE PRESIDENT: Yes I know but it doesn't -- yes, I understand that, that's the first column.

MR SINGLA: Yes. So what we are saying is, if one takes the class of proposed members, they will have bought between them a whole host of different products. That's really the submission, and the factual evidence and the empirical analysis supports that, so that one is not dealing with a commoditised product where every member has gone and bought the same football shirt, for example, they have each bought quite different things, and that's the purpose of those exhibits.

THE PRESIDENT: Yes. The only point I was making is the first column after the year, the sales volume, is not the aggregate of the other columns --

MR SINGLA: Yes.

THE PRESIDENT: -- to put it very simply. That's clear.

MR SINGLA: Yes.

Sir, the further exhibits from Dr Durkin, they are

there to show that changes in the average gross list price in a particular year led to quite significant variation in individual gross list prices. That's Exhibit 4, so when there is a -- I'm sorry, that's exhibit -- sorry, that's Exhibit 8, actually, I had skipped ahead to Exhibit 8, so Exhibit 8 shows that where there is a change in the average gross list price --

THE PRESIDENT: Just a moment. So this is on page 12?

MR SINGLA: Yes. Exactly. We say that that demonstrates that where gross list prices, the average gross list price changes, the gross list price for individual configurations, there is significant variation in what the change is to the gross list price for individual configurations, so this is part of our general point that there is no systematic relationship between gross list price and transaction prices. In fact, when one looks through Exhibits 8, 9 and 10 and 11 of Dr Durkin's first report, those exhibits, what they show is that when gross list prices change there are actually very, very different changes to the individual gross list prices for particular configurations, and then one sees that trickle down into the effect on dealer prices, and then one also sees that with the direct sales that Iveco made to customers as well, so in other words, a change

at the highest level to a gross list price will look very, very different by the time it's made its way through the dealers and through to end customers, and that is as a result, as Dr Durkin explains, of the individual negotiations that are happening at both of those levels.

So we say that the empirical analysis is -- corroborates what we are saying about heterogeneity, and that is then the starting point when one comes to analyse the adequacy or otherwise of Dr Lilico's methodology. The question is, well, against that background in a claim for aggregate damages, has Dr Lilico adequately put forward a methodology for dealing with all of these points.

So if I can turn, now, to my fourth topic, which is specific submissions on his methodology, now we say here we've identified -- there are lots of points that could be made, but we've focused in our written material on four particular points and I may just deal with three now, just to tell you what they are.

The first is, and we say this is the fatal flaw, as it were, that he assumes the very thing which he is required to prove. His methodology will always return a positive overcharge, and so we say, actually, that that -- that the application should fail because the

methodology is so fundamentally flawed in that respect, but we also have other points, and the second point is that he doesn't take into account any of the heterogeneous features of the market, and, thirdly, he makes an unsound assumption that any effect of the infringement on transaction prices was the same as any effect on gross list prices, and that's why those latter exhibits that I have just referred you to are so relevant because they show that that is a false point.

Now, before I just develop each of those points briefly, the starting point is, we say, that Dr Durkin explains why a simulation model is ill-suited to the heterogeneous nature of this market, and although there are references in Dr Lilico's second report in particular to the fact that he might use econometric models as a cross-check, he really seems to have pinned his colours to the simulation model mast, and we say that is the model that one needs to have regard to when assessing whether the test is met, and we say the simulation model is flawed because of the assumptions which bear no reality.

So on this first topic of assuming an overcharge, it's become clear, it's now common ground that that is, in fact, what he has done. He first sought to justify the approach in his second report at section 1.5 where

he says:

"This is a price-fixing cartel, and so I consider this to be the natural default assumption".

He actually goes as far as to say that he should assume that there was an effect on transaction prices. That's in section 1.5 of his second report, and the only basis for that, we could see, anyway, was in the decision. He refers to some wording in the decision around agreements or concerted practices, and the fact that this was a by object infringement, and he says, well, on that basis I'm justified as treating this as a price-fixing cartel, and we say, and I have already dealt with this, that that is not what the Commission did at all.

It would be questionable to assume that even a price fixing cartel was fully effective, as Dr Lilico does, but a fortiori, where one is dealing with an information exchange, we say that no impact on gross list prices can be assumed, and certainly not any impact on transaction prices, and so the Chadha case is relevant here because that is an illustration of where the Canadian courts at least have said that this is simply not good enough. One can't move forward with a methodology that assumes the very thing that it needs to prove, and, of course, we are going to be saying, if this case were to be

certified, we would be saying there was no effect, that would be our primary position, and so we say it is wholly wrong for the case to move forward on some presumption that goes against our primary case.

The only answer we now have -- first we had the justification that, well, the decision has already found that this is a price-fixing infringement, now we have Dr Lilico's fourth report where he has changed tack, because he now says; well, of course, the purpose of my model is only to work out the extent of the overcharge. It's not the role of the economics -- the expert evidence to establish whether there was an effect, and this is paragraphs 2.8, 2.9, paragraph 3.2, 3.3 and 3.7 in Dr Lilico's fourth report, and we submit that this is, actually, the fourth report actually makes the position worse rather than better, because what we have now are vague references to the Tribunal being able to -- or being required to analyse whether there was an effect by reference to documentary evidence. It's wholly vague as to how UKTC and Dr Lilico say the Tribunal will come to that conclusion, and what's particularly interesting is if one looks at what the Tribunal has said in the individual actions, for example at paragraph 41 of the disclosure ruling, unsurprisingly the Tribunal has said there that the economic models

will play a crucial role in establishing whether there was an effect.

So we submit that, really, the fourth report does not help things at all. Dr Lilico had set out what he calls, "A rough overall task plan", and he also lists information which he says his assessment of overcharge would draw upon, but we say none of that cures the fundamental problem that his model will never be able to assist the Tribunal in establishing whether there was an overcharge, and, we say, that these references which have come out for the first time to an overall plan, a task plan, and documentary evidence, we say none of that is sufficiently explained in order to give the Tribunal comfort that one can work around the fundamental problem with his models, and, in addition, I think the Tribunal has this point already, but in addition to the problems with Dr Lilico's evidence, one of the other problems that UKTC have is that their litigation plan and their budget doesn't deal with the points that he says at paragraph 2.19 he is going to draw upon, so when he talks about getting data from government agencies and third parties and so on, as Mr Harris will explain in due course, none of that is actually catered for.

So the combination of a methodology that's

fundamentally flawed, plus a complete failure in the litigation plan to deal with what Dr Lilico says is his only answer, we say for those reasons this must be -- certification must be refused, and as to heterogeneity, so even if the Tribunal is against me on the first point and somehow is prepared to work with a model that assumes the very thing it is required to prove, we say that Dr Lilico has not catered for -- or his methodology doesn't cater for all of the heterogeneous factors in this market, and we've identified in our written materials I think six different matters which he hasn't catered for, either at all or sufficiently. The first is product differentiation. The Tribunal knows he has put forward two models, one which is wholly undifferentiated which we say is hopeless on the facts, and the second, which is differentiated, but we say is equally hopeless, when one looks at the very limited extent of differentiation that he is allowing for. It just bears no resemblance to the factual evidence that's before the Tribunal as to the level of differentiation that was going on in this market.

That's the first point that he doesn't deal with.

The second point is bundling, and he acknowledges in his first report that bundling may be a relevant factual matter, but he puts forward no methodology for

accounting for -- or controlling for bundling.

The third point is sales channels. He recognises belatedly in his third report that he may need to investigate the impact -- the different impacts of sales channels on transaction prices, but again, no methodology put forward whatsoever as to how he is going to do that.

The fourth is the mode of acquisition, and here he started in his first report by assuming that the effect on purchases and leases would be the same, and he again belatedly recognises that that's hopeless, but again, he doesn't -- beyond recognising that it's something that he will have to look at, there is a vague reference to standard statistical techniques at Lilico 3, paragraph 1.49 but nothing beyond that.

The fifth point is resale and buy backs. He has failed to take account of any effect of the infringement on the resale and buy back values, and in his second report he says, well, I have explained this in mathematical terms, look at section 3.3 of my first report, so one goes to section 3.3, and one sees there an algebraic equation which just says if there is an effect on the trucks when they are resold, that should be deducted from the claim value, but that's very different to putting forward a methodology for how he is

actually going to work out whether there was an effect on the residual value, so we say that's equally hopeless, and then the sixth point is bargaining power, and this is quite an interesting point with respect, because in Dr Lilico's third report we say here that the mask really slips so far as heterogeneity is concerned, because he says that the Tribunal, in the CPO cases, will not be able to use as a safeguard any overcharge percentages that might come out in the individual actions, and this is at paragraph 1.27, I think, of his third report, and he says:

"Different claimants have different bargaining power and therefore the overcharge levels will be different".

Indeed he goes as far as to say it would not be safe, to use his word, to use the percentage overcharge determined in the individual actions to read across to the CPOs.

Well, we agree with that, because all of these claimants are in completely different positions, but what is his answer? Well, he has none.

So we say for those six reasons Dr Lilico's methodology completely fails to engage with the heterogeneity, and therefore is unsound and fails the test, and the third defect that we've alighted upon is his reliance on gross list prices, and again one sees

the pattern through his evidence, so he starts by assuming that the effect on gross list prices and transaction prices was exactly the same, that's where he starts out in his first report. We point out that that's hopeless on the facts, so he comes back and says, well, there must be some relationship -- it must be reasonably predictable -- and we say, well, that's not right. Look at the factual evidence. Mr Flach -- Mr van Leuven says it's not a systematic relationship between the gross list price and transaction prices. Dr Durkin has shown that through his empirical analysis, so again, what's his answer? He says, well, don't worry about it, I will get lots of transaction data from you on disclosure, but we've said in relation to that that we don't have any transaction price data, and the other OEMs, or at least some of them, are in the same position.

It's no good, we submit, certifying this case on the basis that something may come out in disclosure, or these are just data issues, as it were, when the evidence before the Tribunal at this hearing is that that data will not be there, and so --

THE PRESIDENT: You don't have -- can I just clarify, you don't have transaction price data because Iveco only sold to independent dealers. Is that right?

MR SINGLA: In the UK that's almost exclusively right. There is a tiny, tiny exception. This is explained in Mr McCarthy's evidence, but it is true to the tune of something like 99 per cent. It is a very, very high percentage, so we've explained this in the factual evidence, and they are not going to get transaction data from us, and so, therefore, the question for Dr Lilico is how are you going to assess the relationship --

PROFESSOR WILKS: Mr Singla, just for a second, you have shown us a lot of transaction data in the confidential material, how was that analysis constructed if you didn't have it?

MR SINGLA: I'm sorry, Professor Wilks -- the data that Dr Durkin -- I have had to take this very quickly but the answer is this; what Dr Durkin is looking at is two different things. One is dealer prices, and to the extent he talks about transaction prices --

PROFESSOR WILKS: He does in Exhibit 11.

MR SINGLA: Yes, and that is because Iveco has a very, very small portion of sales to direct customers.

PROFESSOR WILKS: So that's only 10 per cent.

MR SINGLA: Exactly, and --

THE PRESIDENT: Well, is it reliable or not, what Dr Durkin has put forward in that exhibit? Can we draw any conclusions from it or not?

MR SINGLA: Well, what Dr Durkin explains, and I apologise because I didn't show you the actual paragraph in his report, what he says is, because Iveco doesn't have transaction data for the most part because the vast majority of sales are through dealers, he could only demonstrate that point by reference to the Iveco direct sales, so most of his exhibits you will see are looking at the empirical analysis between average gross list prices and dealer prices, and then he says, "I would like to do the same for end customers but Iveco doesn't hold the data, so I will do my best to assist by looking at the very small direct sales channel".

THE PRESIDENT: Well, isn't that what the Supreme Court has told us we have to do in these cases? We have to do our best, even if the data is very limited --

MR SINGLA: Well, there are a number of answers to that. The first is --

THE PRESIDENT: -- which is what Durkin has done.

MR SINGLA: No, well, the first answer to that is the data issue here is rather different to the data issues in Merricks, because here we are saying -- the --

THE PRESIDENT: Well, it's not looking at the facts of Merricks, it is a general principle that the Supreme Court has set out, even if data is limited you do your best in these cases with what you can get.

MR SINGLA: No. Well, with respect, we would say it is highly relevant to the suitability condition which Mr Harris will obviously address you on in more detail, but the position on this point is Dr Lilico is saying, "I'm going to look at the difference between gross list prices and transaction prices and I will get disclosure". So the first point is, "You are not going to get disclosure of that. How are you going to deal with it?" then the answer is, "Well, we will get some disclosure from the PCMs".

THE PRESIDENT: Well, you will get disclosure of the 1 per cent, presumably.

MR SINGLA: Yes. Whatever the --

THE PRESIDENT: You will get the same sort of information that Dr Durkin got.

MR SINGLA: Yes, but when we are talking about an opt-out with this very, very large case, that data will not be representative of the majority of these sales which were through dealers, so we say that if they are going to look at transaction data, that's going to have to come from the claimants, but then that runs into the problem that the litigation plan and the arrangements for disclosure are seriously flawed, and so this is --

THE PRESIDENT: No. You don't get disclosure in an opt-out generally from claimants, but why can't one say, well,

the transaction prices that Iveco, if it is a competitive market, in some sense, the transaction prices that Iveco is charging can't be out of line with the transaction prices that independent dealers are charging, otherwise nobody would have bought from Iveco.

MR SINGLA: Sir, this is actually a very important point. It is a very helpful question, because the important point is that the dealer sales are very different. One of our key points is that one has to look at the different sales channels, and in fact, as I said a few minutes ago, Dr Lilico now accepts this, because where you have sales through dealers, you have got two levels of negotiations. You have got negotiations between the dealer and Iveco in this case, and then the dealer and the end customer.

THE PRESIDENT: We understand that.

MR SINGLA: Well, so that, with respect, we say the effect of all of that is that the end customer who buys through a dealer is in an entirely different position to the customer that buys directly from Iveco, and the dynamics --

THE PRESIDENT: But if the price is so different, why doesn't he buy from a -- if you say it is a much higher price, significantly higher, it doesn't have to be much higher, but there is some significance then why don't

they buy from Iveco?

MR SINGLA: Sir, this is all explained in our factual evidence. Iveco only tends to deal directly with the very largest of its customers, so this is all covered in our factual evidence. The direct sales channel is a very limited aspect of the business, and it tends to be the largest customers.

THE PRESIDENT: So there the transaction price relationship will be very different because they get -- so really, we can't draw any conclusion from Dr Durkin's table because it's based on very large customers not the typical customers. That's what you are saying, isn't that right?

MR SINGLA: No, that's only right in relation to -- well, it's not right -- but it only applies to one of Dr Durkin's tables.

THE PRESIDENT: Yes. I mean that one, the transaction price.

MR SINGLA: Yes. But the rest of Dr Durkin's tables are looking at the -- what would happen in the dealer channel, because he is saying look what happens to an average gross list price change, to the average -- to individual changes to gross list prices, so that's at the first level. This is still at the Iveco level. One change in an average gross list price leads to

variations in individual configurations gross list prices. You then have a level of negotiations between Iveco and dealers which, again, leads to a whole host of different outcomes at the dealer level because of the bargaining power and so on being different, and then you have got downstream dealer to end customer, and again, you have got negotiations, meaning that the end customers are often paying different amounts for the same configuration, so we say that the PCMs are actually in very different positions, and it's no good Dr Lilico saying, well, I will investigate all of this by reference to your disclosure, because there will be a very limited amount and none in relation to the end customer data through dealers, and we say that their proposals from the PCM's side to give disclosure are seriously inadequate, so we say that third point is another fundamental problem with the methodology, and if I could just draw the strands together, because I'm conscious of the time, we do say the methodology is fundamentally flawed, and we say that despite having served four reports now, Dr Lilico has not given the Tribunal comfort that he has got a sound or reliable way of assessing whether there was an overcharge and the extent of it, so we say that it fails the test that was applied by the Tribunal in Merricks, but, in addition to

that -- so that, in itself, means that the commonality condition is not satisfied -- but we would also submit that this has knock-on consequences for the rest of UKTC's case, because everything that I have been addressing you on is in relation to aggregate overcharge. Dr Lilico doesn't even begin to analyse the aggregate loss position, and one can't just ignore these things, so, in fact, it's not aggregate damages at all, it is a fundamentally flawed methodology calculating aggregate overcharge which only goes part of the way, and, further, and finally, we say that the distribution mechanism has real problems attached to it as well, and although Lord Briggs has told us it's only in exceptional circumstances one should look at the distribution mechanism at the certification stage, we do submit, and we say this in our response, that this is a sufficiently exceptional case, because where one has a methodology that cannot deal with so many of the fundamental points, that will have real problems for the distribution mechanism down the line which we say should not be ignored by the Tribunal at this stage.

Sir, unless I can assist further, I'm sure Mr Harris is chomping at the bit.

THE PRESIDENT: Well, Mr Harris, on my screen, looks very relaxed. We shall take a break because we are sitting

1 until 5 today, until 3.50 pm.
2 (3.39 pm)
3 (A short break)
4 (3.50 pm)
5 Submissions by MR HARRIS
6 THE PRESIDENT: Yes, Mr Harris?
7 MR HARRIS: Good afternoon Mr President, members of the
8 Tribunal. I'm going to address you orally, as you know,
9 principally about UKTC. There will be a much shorter
10 slot tomorrow where I make some miscellaneous oral
11 submissions about the RHA. As to UKTC, I will not be
12 finished today, it will probably take another half an
13 hour in the morning, but I will obviously make maximal
14 progress this afternoon and the first topic is what I
15 submit is the wrong choice of collective proceedings
16 architecture by UKTC. It's clear in my submission that
17 UKTC has set out with the objective of pursuing
18 a top-down, aggregate methodology, and now at least
19 principally it does so for an opt-out class, so they are
20 the three things -- top-down, aggregate and, thirdly,
21 opt-out. Now, one can understand the attraction of that
22 type of architecture, it tends to create larger pots of
23 damage, most of which never gets distributed, and that
24 leaves a big chunk of unclaimed damages that can
25 fiduciary commercial funders and lawyers, but notably,

the top-down methodology, so the first of those three points, means that the data that is needed doesn't come from the PCMs, the proposed class members. That's what it means by definition. You don't build-up a top-down methodology member by member from the bottom. On the contrary, you get it globally from the top. That's what it means, and that's what UKTC wishes to do.

In Merricks, for example, that was a top-down methodology, and all of the VOC, that's Volume of Commerce, all of the VOC data, and some of the OD, the Overcharge Data, that is intended to come from MasterCard, but most importantly it doesn't come from the PCMs, the consumers. It doesn't come from there at all. No need to have anything to do with them, and the top-down methodology, if it works, then it is peculiarly apt for an opt-out approach, for the very reason that I have just given. You don't need to get data from the PCMs, and in an opt-out methodology, of course, you don't know who they are. You don't have any contact with them, you don't take instructions from them, you don't know who they are, but that's fine, because in a top-down opt-out, you don't need it, and it's also particularly appropriate, top-down, for -- I beg your pardon -- aggregate and opt-out can be particularly appropriate for aggregate damages, and again, for

largely the same reasons.

For an aggregate damages award, you do not need, again, by definition, to quantify the individual amount of the loss. That is what section 47C(2) says, of the Act, and that was the subject matter of the Merricks litigation, and it was quite clear what it meant. It was a fundamental change in the common law by Parliament as regards individual assessment of loss, so again, if you are not going to individually assess the loss, because you are taking advantage of aggregate damages by express reference to 47C(2), again, you don't need to have any regard to the PCMs. You don't need to know who they are, where they live, what they do. Don't take any instructions from them.

So that is a type of architecture that I accept is open under the legislation, so just to reiterate, number one, top-down, number two, aggregate, and number three, opt-out, but it is to be noted that that is at one end of the collective regime procedural spectrum, and it is at the opposite end compared to an individual action, and of course, I like to compare with individual actions because after the Supreme Court we've all been told that's what we should be doing.

So, my first submission, then, is that the UKTC approach is at the opposite end of the procedural

spectrum from an individual action and in those three critical respects, and that architecture must proceed on the basis that you aren't having any regard to the PCMs or their individual circumstances, but I invite you, with respect, to now take a step back. There is no objective reason to think that all fact patterns that exist in the world of infringements are suitable to be approached from this extreme end of the procedural spectrum. I will develop that point in a minute. Some fact patterns don't fit that approach but just before coming back to that I respectfully remind the Tribunal, as we did in our skeleton argument, that a collective action under this regime, section 47B and for that matter 47C, it doesn't have to be for aggregate damages. It doesn't have to be top-down, and it doesn't have to be opt-out. Every single one of those is a distinct choice that has been made by this PCR, UKTC, and on any given set of facts, in my submission, any one of those choices, or, indeed, all three of them, may be wrong or unsuitable. It is beyond doubt that they are all subject to scrutiny at the certification stage. Are they suitable, is any one of them suitable or are all three of them not suitable, and what's more, as I said a moment ago, they are to be scrutinised through the lens set out in Merricks Supreme Court, namely, are they

suitable by comparison, at least in part, the analysis is in comparison with individual actions, so is that choice of ignoring the PCMs appropriate when compared with the possibility of proceeding in an individual action.

I will be, just by way of foretaste, because as Mr Singla submitted earlier, I will be developing this later on, a key aspect of an individual action is of course the ability to obtain data and evidence and materials from that individual, and then for the defendants and for that matter the Tribunal, to test those materials as part of the defences to the action. In other words, of course in an individual action a defendant has the right and the ability to obtain and test the data and the evidence from the individuals, but that ability and that right on the part of defendants essentially doesn't exist in a top-down aggregate opt-out methodology, so putting my first point another way, the individual is essentially non-existent in a top-down aggregate opt-out methodology up until the point at which there is or isn't any damages, and then they have to be distributed, so in a nutshell, the starting point is that UKTC has made three distinct choices of architecture, and they take it to one end of the procedural spectrum, and the question for you,

members of the Tribunal, in my respectful submission today is; is that choice by UKTC of that extreme end of the spectrum suitable on the fact pattern of this given case. That's the first and foundational question.

Now, of course, Daimler accepts that that choice of that end of the spectrum can be a fair and proper choice. For example, there was no problem with it in Merricks. In that case the methodology was sound, even though it was top-down, aggregate and opt-out, and there was no need for the individual to be involved prior to distribution, but critically, in that case there were or are, since it is an ongoing matter, no difficult downstream issues giving rise to defences, so, for instance, there is no downstream pass-on by the end consumer who goes into a merchant and buys some shopping. There is no tax problem. There is no difficult or bespoke mitigation story per individual consumer. None of those problems or issues or facts arose on the fact pattern of Merricks, but more critically yet still for today's purposes, and, in particular, in the light of what Mr Singla just submitted to you by reference to Dr Durkin's evidence, in Merricks there is simply no bespoke or individualised story per consumer about the pricing of the underlying products. It just doesn't arise on that fact pattern.

There was absolutely no need at all to have regard to the PCMs in Merricks for the purposes of assessing volume of commerce or overcharge across the class. It simply didn't arise. The sound methodology was sound, irrespective of not having to have regard to the PCMs on either of those points or any downstream point, so the fact pattern of that case didn't require the involvement of the PCM.

Now, I will come back in a minute to a little bit more on Merricks, but I just take an aside, because Mr Thompson submitted on Monday, and I quote, this is from page 84, lines 16-19 of the transcript, that:

"Pursuing a top-down aggregate approach was the approach that was envisaged by this Tribunal itself in its disclosure document".

I think he meant that --

THE PRESIDENT: That's the disclosure ruling, I think it must be.

MR HARRIS: I think he meant, "Disclosure ruling", but the transcript says, "Document", but I don't recognise that description. That disclosure ruling, nominally entitled, "Ryder", but applying to a number of the individual actions, wasn't even about the choice of methodology, let alone the suitability of the choice of methodology, but in any event an individual regression, no matter how

complicated, as is to be adopted in, amongst others, Ryder and, in fact, all of the other individual actions, they are regressions on the facts of individual cases, and what's more, they are not top-down, and they are not aggregate, and in any event, Ryder is just one corporate group, and BT is just one corporate group, and Royal Mail and Dawson Group, et cetera, et cetera, so the submission made by Mr Thompson on Monday that somehow this Tribunal had already endorsed for these trucks infringement actions, top-down aggregate approaches in my respectful submission was wrong and incoherent, but these --

THE PRESIDENT: I think the other point he was making is that, and that's what I understood the Ryder ruling was being relied on, was simply that the Tribunal said it won't be possible to calculate all appropriate loss on the basis of each truck sale.

MR HARRIS: I accept that, Sir, precisely, but that is not the same thing as being a top-down or aggregate approach, let alone having been endorsed as suitable for these infringements in these cases.

THE PRESIDENT: I think that's where it was taken from. That was the --

MR HARRIS: Yes, and in my submission UKTC has taken the view that because it has decided, as a litigant, to

pursue the end of the spectrum, top-down, aggregate opt-out, therefore the facts of the case and the litigation steps adopted must somehow be made to fit those choices that that litigant has decided itself to make. That is what emerges in my respectful submission from their written submissions, including their skeleton argument, but the problem is that on the current fact pattern those choices that it has decided to pursue mean either that facts have to be ignored or they have to be approximated, or they have to be aggregated, or they have to be approached at a very, very high level of abstraction, or, as Mr Singla just submitted, in the case of the simulation methodology, they have to be just simply replaced. You ignore the facts and you replace them with assumptions. The facts don't even enter into it on a simulation, as regards the critical assumption, but why are those things being done? They are being done so as to mask or avoid the individual features that occur on the facts, including the ones to which Mr Singla referred.

In short, individualisation is anathema to a choice of top-down, aggregate opt-out methodology, and it's no accident that for that reason UKTC decries Daimler's protestations of individuality and heterogeneity. It does so because they don't fit with the choices of

architecture that the UKTC as a litigant that's decided to adopt.

So my very first and foundational submission is that the Tribunal begins its analysis by having regard to the actual underlying fact pattern, and asks itself in my respectful submission, right at the beginning, is this fact pattern suitable for a collective approach that is top-down, aggregate and opt-out, not, "I have chosen that as my architecture, therefore everything has to fit into it", and in my submission if the fact pattern, on the facts, is not suitable, then the choices that have been made by that litigant can't proceed. It shouldn't -- it doesn't even get out of the starting blocks. Now, UKTC is the only entity in this litigation that doesn't recognise this point. It doesn't recognise this point that its choice, its litigation choice at the extreme end of the architecture spectrum is simply wrong on the facts of these cases. Everybody else can see it. Everybody else agrees with it, including, notably, the RHA.

Quite properly the RHA recognises the significant differences between the fact patterns of individual claimants and the losses to which they have allegedly given rise, and with this recognition the RHA and its expert, Dr Davis, have deliberately, and in my

submission correctly eschewed a top-down and an aggregate approach, and, indeed, also, an opt-out approach. They don't -- they deliberately do not do any one of those three things, and that's because they have correctly, in my submission, identified at the foundational first level question, is the fact pattern of this litigation suitable for those choices, and the answer is, on each one, no.

Now, the RHA tries to deal with the very important individualised features that do occur on the current fact pattern, and it does so on a bottom-up, opt-in class, not on an aggregate basis, so it tries, it tries, to add up individual amounts of loss by reference to individual claimants on an individualised basis, and we heard Mr Flynn try to address some of that.

Now, as it happens the RHA has made a host of other profound, and in the OEM's submissions, fatal errors, and is riddled with the intractable conflicts of interest that Mr Flynn, with respect to him, was unable to deal, and we will hear more about them from Mr Jowell tomorrow, but it doesn't suffer from this major architectural or conceptual mistake right at the outset.

Now, moving on, UKTC's apparent answer to this fundamentally wrong architectural choice appears to be twofold. First of all it says, well, look at Merricks.

That, "Radically dissolved", quote-unquote, that was a phrase Mr Thompson used three times, that approach radically dissolves the problems that this type of claimant faces, but, with respect, UKTC has fundamentally misunderstood Merricks. I adopt the submissions in that regard made by Mr Singla and I will develop one or two more in just a moment, but, secondly, and this one is much shorter so I will deal with it first, UKTC secondly says, well, but, oh well, don't worry because now, at the eleventh hour, in our third and fourth reports on a wholly unsubstantiated and unparticularised basis, without any budget or any accompanying litigation plan, somehow I will apparently sample some data using some as yet non-existent "Claimant database", quote-unquote, some members of my putative proposed class, even though I don't know who they are.

As to that latter, that takes only a sentence to dismiss, it is obviously the case that undefined sampling from unknown people, thereby obtaining who knows what data about what issues doesn't convert the architecture from being top-down, aggregate, opt-out. So even if it didn't suffer from the flaws that nobody can really tell what's going on, it still leaves behind this fundamentally unsuitable architecture. So that's

all I have to say at the moment about that. I will return to litigation plan later on.

But as to Merricks, Merricks is simply not any support for the proposition that if you decide as a litigant to choose top-down, aggregate opt-out, then the facts must somehow be made to fit that litigation choice. In Merricks, the fact pattern did suit a top-down aggregate methodology, leading to compensation across the class as a whole. Mr President, Sir, you will well remember and those of the rest of us who have read and studied the decisions now know that the -- across the class VOC was suitable because all of that data came from MasterCard. That's it. That's why top-down was suitable. Globally, you had all of it from one source, and you were definitely going to get it. It couldn't be further removed from the facts of this case, but Merricks didn't begin life by saying, "Aha! We wish to do top-down, and aggregate and opt-out, and therefore we will just mask or ignore problems that arise with VOC", for instance. It just didn't have the problems with VOC, and it certainly didn't mask or ignore such features at the expense of just and proper compensation to the class as a whole. You, Sir, and the members of that Tribunal, found that as a matter of methodology that was sound across the class as a whole. It was just

that you, Sir, found, with your then colleagues, that it didn't have the relevant data, and we know the rest of that saga, but the key point, therefore, is that whilst there are some fact patterns that are suitable for this end of the collective architecture, there are some that aren't. Merricks was, this one isn't.

It's just worth remembering that Merricks did not involve divergent price negotiation stories, did not involve divergent and bespoke product bundles for the purposes -- any relevant purpose, did not involve any implications of price negotiation or price bundling for the pricing of the underlying allegedly overcharged product, simply doesn't feature in that case, did not involve offsetting the price of one part of the bundle against another part, did not involve counterveiling buyer power, and so there was simply no individualised problems at all, or issues, regarding VOC or overcharge, and as I submitted a moment ago, that's at that stage, but downstream there were no issues at all. They simply don't arise, but the fact pattern of these cases is different in every single respect. Each of those issues that I have just identified does arise on the fact pattern of these cases, and what's more, that's not just my submission, but the proof is in the pudding. We know that each one of those arises on a trucks infringement

case because each one of those matters is being tackled head on in the individual actions proceeding in this very Tribunal. As you pointed out on Monday, Sir, including by reference to very detailed and involved disclosure, and critically disclosure not just from the OEMs, but also from the individual claimants themselves, so my first and overarching submission, then, is UKTC has simply started in the wrong place. It has failed to have regard to the fact pattern, or -- and I adopt this very much the same submission that Mr Singla made by reference to Hollick v City of Toronto, basis of fact.

Basis of fact means the underlying fact pattern. It doesn't mean, with respect, evidence of the availability of data to apply a methodology. That phrase, and I have just quoted it directly, is to be found in paragraph 118 of Pro-Sys. It is a different point. They both are relevant, but it is a different point.

My submission is that the basis of fact has to be realistic, plausible, credible, or the other way of putting, "Basis of fact", is the phrase that we see originating in Hollick and then pervading all the cases that Mr Singla helpfully took us to, grounded in the facts. That's what, "Basis of fact", means. Is it grounded in the facts, or, in my submission, grounded in the fact pattern, and the answer is UKTC simply isn't.

It started by thinking, well, it would be much easier if we could do top-down, aggregate opt-out, so let's cram everything into that, but it just doesn't work. It's not suitable.

Now, no particular problem arises from the realisation that some fact patterns don't fit that extreme end of the architecture. Just because a fact pattern doesn't fit that extreme end of the architecture, that doesn't mean, ipso facto, that it cannot be pursued at all. There is no great jurisprudential crisis if your fact pattern doesn't fit that extreme architecture. Importantly, if done properly individualised features obviously can work in individualised claims, and you can pursue them that way but of course I don't end there. They can also work in groups of individualised claims, for example using test cases, or by grouping together certain claimants, and having them pursue certain issues together.

They could also work in group litigation orders. Incidentally, I don't recognise the description that Mr Thompson gave to the McCulla claim issued by the RHA underlying claimants as being a GLO. It's not a GLO. I don't know where he has got that from. It is just a group of individualised claimants, some 16,000 of them, having issued one claim form and said that they

wish to proceed in that manner if they don't get a CPO.

THE PRESIDENT: Can I just interrupt you a moment? Do we have the McCulla claim form somewhere in this matter?

MR HARRIS: You do and I will be taking you to it. If you want the reference now, it's D1, tab 10, but there is no need to turn it up now because I wish to show you some parts of it in due course.

THE PRESIDENT: I can have a look at it overnight. Yes.

MR HARRIS: Thank you, but even more important for today, so I have just said there are other ways of doing these claims on a given fact pattern, and I mentioned individualised, or groups of individualised or GLOs, but even more important for today they also can, if done correctly --

THE PRESIDENT: Yes, just pause a moment. Mr Thompson wants to --

MR THOMPSON: I'm sorry to interrupt the flow of Mr Harris' eloquence, but the point about a GLO is actually a point against Mr Flynn. I was simply referring to his skeleton argument where he describes it as a GLO in paragraph 49(c) at page {A/2/23}. If it is not a GLO then Mr Flynn needs to correct it, but it's not my point. I don't know anything about it.

THE PRESIDENT: Yes. Thank you.

MR HARRIS: Thank you very much. But even more important

for today's purposes, such fact patterns can also, if done correctly, work in other forms of collective action under section 47B itself. Indeed, if done correctly, and of course we all submit that RHA hasn't done it correctly, but if it had been done correctly, then that type of individualised, heterogeneous fact pattern, conceptually, and as a matter of architecture, could be catered for in a bottom-up, non-aggregate, opt-in basis, for exactly the opposite reasons that I have said it can't be catered for in a top-down, aggregate opt-out basis.

Now, if you think about it, that point is intuitively obvious. A bottom-up approach that adds up individual damages figures by reference to identified individual opt-in claimants, is the closest type of collective action that one can get to an individual action, so it's much more likely to be closer to the suitability mark in terms of architecture for an action that -- for a fact pattern that has critical individual features that an architect at the opposite end of the spectrum.

THE PRESIDENT: It would have to have common issues to make it sensible to do it, proportionality and -- in terms of efficiency, on a collective basis.

MR HARRIS: I quite agree, and Mr Singla has submitted that

that doesn't work in UKTC and tomorrow he will be submitting the same thing as regards the RHA, and we respectfully adopt them, but I'm not going to trespass on his territory, but I'm going to move on now to my second topic, but just before I do, I would like to make one more point about a big difference compared to Merricks.

In that case it was common ground from the Tribunal through the Court of Appeal to the Supreme Court that there was absolutely no alternative to a collective action whatsoever. No end consumer had ever brought a claim, and the limitation period was just about to expire when Mr Merricks issued his collective claim form. In sharp contrast in this case there is not only a theoretical alternative, but actual alternatives are already up and running and being vigorously pursued left, right and centre, including the McCulla claim which I will come back to later or tomorrow.

In other words, the UK trucks litigation landscape is fundamentally different by comparison with what faced Mr Merricks. Mr Merricks was all-or-nothing. This case is not at all all-or-nothing.

THE PRESIDENT: Well, apart from the McCulla claim which you will show us, the claims that are actually running are all claims by companies, or indeed groups of companies

of considerable substance.

MR HARRIS: Not at all Sir. With great respect I will be showing you later in these submissions that that's not correct on the facts. There are some claimants with one truck, some with three, some with four, some with five. There is a whole list of them and I will show you the detail in due course. Indeed, if you would like to see one of those claim forms overnight it has been added at M/24 of the bundle but I probably won't reach it today, but if you would like to see it overnight, it is called A to Z Claimants, it is an Edwin Coe claim, and there is another claim called Adnams which we will also show you tomorrow {M/24/1}. But before I do, what I would like to do is go to the Kett v Mitsubishi case. Mr Singla and I both referred to it in our skeleton. You may recall this case. It was one that I made submissions about on behalf of LSER in the Gutmann CPO and I said that it wouldn't surprise me if it recurs in the trucks cases and here it is recurring.

Now, before I ask you to turn it up, just for the record, I also rely, for the same reasons that I rely on Kett v Mitsubishi on the two other Canadian cases referred to in our skeleton argument, Dennis v Ontario Lottery and Gaming Corporation, that's at {JA/112/1} and Mouhteros which was about a college in Canada, and

that's at {JA/113/1} but I'm not going to go to them at all in the time. We've referred to them in our skeleton, and the reason I referred to them are the same as the reasons that I referred to Kett v Mitsubishi which is closer on the facts.

I will ask you to turn up Kett v Mitsubishi in just a minute, but I'm going to introduce it. When you do turn it up you will find it at {JA/110/1} which is Bundle 9 of 14, but you don't need to turn it upright now.

The reason I refer to Kett v Mitsubishi in more length than the others is because although I obviously don't say that the fact pattern in Kett is the same as these trucks cases, nevertheless there is some striking similarities. The headlines are that was a massive claim, also in the auto supply sector with a very large degree of heterogeneity in the transaction patterns, including, and this is critical, including as to price, and including as to counterfactuals, and what the PCR in that case was trying to do, was to mask the heterogeneity on the actual underlying fact pattern by posing high-level, supposedly common questions that ignored the actual or bespoke transaction features, and why did he do that? It's because he wanted to proceed with an aggregate, top-down econometric approach on

a class-wide basis, so it is extremely similar to the situation that we find ourselves in, and I just note in passing that even in that case, even in that case, the PCR didn't try to run a simulation methodology that wasn't based upon data at all, but just upon assumptions. Anyway, that's a different issue that Mr Singla has largely dealt with, but the court in Kett, that's to say the British Columbia Court of Appeal, wasn't having it. The judge pointed out the many different types of heterogeneity on the autosupply transaction features of that case --

THE PRESIDENT: I think it is the Supreme Court which is the Court of First Instance, isn't it?

MR HARRIS: I don't believe so but I'm willing to stand corrected. I'm pretty sure it was the Court of Appeal, but we can see it in a minute.

The court wasn't having it because it pointed out in the course of a long judgment which I plainly won't go through from beginning to end in these oral submissions, that there was heterogeneity as to price negotiations, and there was insufficient commonality on the facts of that auto supply case with its many, many, many thousands of different types of transactions for the case to proceed by way of a collective aggregate action, and amongst the many problems to which that attempt to

mask or aggregate or highly abstract questions, thereby ignoring the facts, amongst the many problems to which that gave rise which we will see in just a minute were, (a), a lack of due process for the defendants, (b), a complete disinterest on the part of many of the PCMs in what was happening for most if not all of the other PCMs on those points. They just weren't interested. They were like, well, those facts don't apply to me, so although you are spending lots of time and money litigating them, I couldn't care less. They don't relate to me, and, (c), an absolutely massive number of issues that any collective trial would have had to deal with resulting in an enormously long trial length if it had been certified.

In short, that large auto supply case, the fact pattern was just not suitable, it was too big and it had too many strands, and, notably, before I turn up a handful of the passages, notably, it was denied certification without there being any reference at all to any other way in which any of the actions could be pursued by any of the claimants. No reference to that at all. No suggestion that they could have done it in any other way, or -- let alone that they were actually doing it in some other way, and then finally, and I will take you to this very briefly, it also makes some very

telling and germane points about the litigation plan right at the end, so without further ado, if I could ask you to turn up Kett v Mitsubishi, and my principal submission is {JA/110/1} is that I would invite you to read the whole of the fact section and the whole of the commonality section from paragraph 121 to the end. I'm obviously not going to do that. The facts of the first handful of pages, and then paragraph 121 onwards is commonality, but I'm just going to take you, if I may, in the time available, to paragraph 1 {JA/110/4}:

"Can a class action be too big to certify", and then if you to turn to -- you don't need to but if you were to turn to the very final paragraph you would find that the answer to that is yes, it can be too big to certify and that, I submit, is exactly our case, and then at paragraph 8 you see that there was a plethora of different products, well, Mr Singla has already addressed you on that, there are way more products in this set of trucks actions than there were even in Kett v Mitsubishi. At paragraph 13 --

THE PRESIDENT: Just pause a moment. (Pause)

Yes. Paragraph 8 sets it out, doesn't it. Yes?

MR HARRIS: Yes, and as I say again, I don't pretend that the fact pattern is identical, but all I'm saying is that when you read the facts you will see that the

plethora or heterogeneity is sufficiently similar for this to be a very good analogy, and in particular when we reach those bits that talk about the bearing upon pricing and counterfactuals, but just so that you have got it to hand, paragraph 13 makes the point that the automotive supply chain is global and complex, well, thank you very much, I adopt that in terms, and then at part (c), paragraph 25, two more pages further over {JA/110/8}, I particularly invite you to highlight the second sentence that says:

"Rather, sales are negotiated with each customer", well of course those are the facts of trucks as well, and then although you don't need to read it now you will see that at paragraph 30 {JA/110/9} there are various different types of misconduct alleged, and you have already made this point, Sir, that some of the misconduct alleged in this case may not have affected some of the purchasers, for example emissions technology, or may have affected them in different ways, so again, the facts are not identical but the analogy is a sound one, and then I'm going to skip over the facts and just identify, in the section on commonality, a handful of the key paragraphs, but I can't do it justice, because I obviously don't have time to read all of the relevant paragraphs, but --

THE PRESIDENT: Well, Mr Harris, given the time of day, it is not a massively long judgment. It's not very short, but it's not huge, we can read it overnight.

MR HARRIS: May I, if I don't -- I'm just conscious that there are other people backed up behind me and it may be that I could give you the paragraph numbers now and you do that overnight, if you don't mind, and I will simply read out two paragraphs now.

THE PRESIDENT: Yes. I think that's sensible, and that saves you time and --

MR HARRIS: Very good. So 124, 125, 127, 132, 134, 147 and 48, 151 through to 155, 159 and 172-174, and then 182-185, and then there is a bit on litigation plan, but they are one amongst the handful that I'm just going to take you to right now.

MR THOMPSON: Could I just, to save time, could I just ask the Tribunal to pay particular attention to paragraphs 130 and 131?

THE PRESIDENT: 130 and 131. Yes. Thank you. Well, as I said we will read the whole judgment.

MR HARRIS: I'm very grateful. So that will -- I'm very grateful because now I will just take you to, probably, four or five paragraphs. Number 155 {JA/110/43}, one in the list, you will see that just as in this case the defendant's expert in Kett put in material that was

grounded in the facts of the particular autosupply chain and identified for the benefit of the British Columbia court, the Supreme Court, yes, Sir, of British Columbia, that the methodology advanced by the claimant's expert couldn't cater for the individuality that was required to be evaluated in the context of the particular products involved. That's the first sentence of the indent at 155, and a similar point is made at 154, and he goes on over the top of the page {JA/110/44}:

"In most of the circumstances, individualized engineering analysis ... is required".

Now, obviously, I'm not saying engineering but as you know, we, the OEMs, we say pricing. That's where it is individualised, and then at 159 {JA/110/45} this court makes the submission I made at the very outset of my oral submissions today about Pro-Sys:

"The credible and plausible methodology must be capable of approving common impact that is common to all the members of the class. That's 115. The methodology cannot be purely theoretical or hypothetical and must be grounded in the particular facts of the particular case in question".

That, Sir, is what I say is meant by, "Basis in fact", and if you go to 118 of Pro-Sys, 118 at the end is where it uses the phrase, "Evidence of the

availability of data", so it is an adjunct.

THE PRESIDENT: Yes.

MR HARRIS: Thank you, but then the problem here in Kett was exactly the problem that Dr Lilico faces, in my very respectful submission. It says here -- I'm reading from the middle of 159:

"The facts are such that any analysis would have to be at best..."

At best that is:

"... conducted on a shipment-by-shipment basis".

When you have read the facts overnight you will see that there were literally thousands or tens of thousands of shipments, let alone products, and the judge says, no, it would have to be at best shipment-by-shipment, and Dr Allen, that's the claimant's expert:

" ... never truly wrestles with the implication of this reality, i.e. that the analysis for one shipment cannot be extrapolated to members of the class whose vehicles contain parts from other shipments", and that was Mr Singla's point which I gratefully adopt. The pricing analysis and the mode of transaction that, if you like, the transaction method, they are different and bespoke and heterogeneous, and that's why it's not common, and it was the same in Kett, and the judge said, well, it's just too much. You can't do it. You are

trying to mask too much of this fact.

So that's -- and then, as you will see, this is then picked up in passages that I have identified at 172-75 that I will not read out, but what I will read out before finishing on the points that it makes about litigation plan is at 183, paragraph 183 which is internal page number of the report, page 51 {JA/110/51}.

What the judge said, having been through, as you can see in some considerable depth, he says:

"In my view this case really seeks to tie together many potential class actions, the CPA ..."

That's the Collective Proceedings Act, or Class Proceedings Act:

" ... is not designed to stitch together a case with so many dangling threads".

Well, exactly:

"It is designed for cases with a strong factual and legal bond".

I pause because that was my foundational submission. Is the fact pattern one that has a sufficiently strong factual and legal bond without too many dangling threads for you to be suitably choosing that end of the architectural spectrum, and what this judge has done is he has gone through the facts and he said, well, I know that's what you are trying to do but you have got it

wrong because it's too big, there are too many dangling threads and they don't have a sufficiently strong legal and factual bond, and that's what we all say about UKTC, and then at 72, the indented paragraph from the Ontario court in Caputo v Imperial Tobacco, I just invite you overnight to read it all but the passage I read out now is, third sentence down, it is 72 indented -- do you have the sentence, Sir, beginning, "The legal principles underlying"?

THE PRESIDENT: Yes.

MR HARRIS: "The legal principles underlying the claims asserted require inquiry into the circumstances of each individual class member in order even to ascertain liability, let alone damages. This would be necessary on a procedural basis ..."

And this is the bit that I really emphasise because it's going to be my next topic:

" ... to ensure that the defendants are treated fairly, but would also be necessary from the perspective of the members of the class who each would receive fair compensation".

But it is about due process to defendants as well. Not only can it be completely unsuitable as a matter of architecture, but by choosing the wrong architecture you can ride roughshod over the rights of the defendant, and

that's where I will come to in a minute but just before getting there I'm going to switch, because it is such helpful remarks, right at the end of Kett, and you didn't see this, Sir, in the Gutmann case, but if you turn right to the final page of Kett, you will see that there is a heading above paragraph 205 called, "Litigation plan", and I would invite you, I think I gave you --

THE PRESIDENT: That's page 59. {JA/110/59}.

MR HARRIS: That's right. Report page 59. I perhaps didn't put this on the list or -- if I didn't, please do read these three paragraphs overnight but I will just take you to the killer parts. The claimant in this case, Mr Kett, produced a litigation plan, and then it is commented on, and the most relevant point is at 207:

"However, the challenges raised by the evidence here ..."

And I just pause. Again, the question begins, what is the evidence and what is the fact pattern, and then what do we do? That's the analysis:

"The challenges raised by the evidence here demand more than a standard form plan. The plaintiff's plan needs to address directly the many threads of liability and damages. While such a plan would be suitable for a case with a clear common core, it is too simplistic

for a case lacking the same".

Over the page at indented 78, second sentence3 {JA/110/60}:

"Thus the plan should contain at a minimum information as to the manner in which individual issues will be dealt with, details as to the knowledge, skill and experience of the class counsel", et cetera.

So you can see that the litigation plan is to be tailored to the complexities. That was the word in the case that Mr Thompson cited to you, albeit it was mostly about the standard of review on appeal, complexities, and this case is essentially making the same point.

Look at the evidence, look at the fact pattern, is it complex, does it have many threads, does it involve lots of other issues, if so, you simply must deal with it in your litigation plan, and if you don't, you fail, and as you know that's our submission as regards UKTC.

So that's all I have on Kett in oral submissions, though I will be happy to answer any questions about that or queries tomorrow morning, and it takes me on to my third topic.

Again, you heard something about this from the defendants in Gutmann, you, Sir, though I'm conscious that your fellow members of the Tribunal today didn't. It is about due process again, that's why I highlighted

that remark in Kett just now, but also about what the US case law calls, "Winnowing out", and it is highly relevant to this claim, because we heard just today from Mr Flynn in terms that he recognises that there will be some of his proposed claimants who have, and I quote, "No claim at all". Those are his words. It was in the context of the cost-plus pricing, and he is obviously right. People who do use cost-plus pricing, obviously have no claim at all, and that's why he was in a bit of difficulty, and a bit of fancy footwork surrounding footnote 24 and what have you, and a large swathe of yet to be seen amendments to his claim, but be that as it may, winnowing out is highly important where there are what the case law calls, "Uninjured claimants", or claimants with no claim. It is the same thing, and the two cases to which I'm going to draw your attention, again, very briefly, the same two that you saw in the Gutmann case, they are In Re Nexium in the first District Court of Appeals and In Re Asacol three years later in the same Court of Appeals, but first the point in outline, and then I will identify the paragraphs and read only one or two of them.

If the facts do not fit, then an aggregate, top-down approach does very real danger, that by approximating them or aggregating them or approaching them at a high

level of abstraction will prevent the defendants from defending themselves. That's the due process point that we've just seen in Kett.

Now, on the fact pattern of these cases there are many obvious candidates for such a potential denial of rights to the defendants. They include volume of commerce and downstream pass-on. I have already mentioned both of those two, but they also include tax, other mitigation and compound interest if that's to be pursued. As it happens on UKTC's methodology they also include overcharge, and you have heard Mr Singla on that, for example, the simulation methodology is fundamentally inapt, and it is fundamentally inapt to assume that which you are going to prove, so I'm not going to repeat those, you have heard those already, but in other words there are lots of candidates, potential defences, or indeed actual defences because Mr Flynn accepts that some of his claimants won't have a claim, that can be ridden roughshod if there is too high a level of abstraction, too much approximation and too much aggregation, such as when you adopt a top-down, aggregate methodology for an opt-out class, and if you would like the reference to Mr Flynn's remarks it is Day 2, page 9 of the transcript, but -- now I will be coming back to VOC as an example later on because as you know,

Daimler does pick on VOC and with very good reason, but the basic point for now is where the methodology that's been chosen by the litigant, freely chosen, didn't have to be, cannot cope with the actual facts of say VOC or say pass-on, then to ignore or mask them means that we cannot defend ourselves by reference to those points.

Now, there is nothing in the English legislation, nothing at all, that allows, let alone mandates, that where a litigant that's decided to make a choice, that ignores, deliberately ignores, the PCM's individualised positions, that, nevertheless, it can get away with it because somehow the English legislation says, oh well, don't worry about the rights of the defendants then to defend themselves on VOC or downstream pass-on or tax or mitigation, don't worry about all of them, they are all thrown out of the window because you have decided that you want to do it without reference to these individual facts. That's not what the legislation says. Even section 47C(2) doesn't say that, and that's the only bit of the legislation to which the claimants could conceivably point. 47C(2) says, as we know says in terms it's without assessing, without making an assessment of the individual quantum of loss, and that, of course, was the point in Merricks, and that's why the majority deals with 47C(2). It's about not having to

work out individual quantum of loss where there is a global suitable aggregate methodology, but it doesn't mean that where the underlying fact pattern was such that it was not suitable to have a global VOC starting point, that, oh well, don't worry, you can just ignore that because you have decided, you have chosen to go for a section 47C(2), that's not what it says, and it doesn't say that somehow where overcharge -- now moving on from VOC to overcharge -- it doesn't say -- and pass-on -- it doesn't say that where overcharge has been passed on, oh well, don't worry, because you have chosen to ignore an individualised assessment of overcharge by way of pass-on, we will just ignore it, even though it amounts to a defence. It couldn't possibly mean that. It couldn't even begin to mean that because, of course, if it has been passed on, as you yourself said, Mr President, earlier today, if it has been passed on it's not a loss at all to the people who are in your class. It's simply not part of the claims or the quantum. It doesn't become part of the aggregate pot of damages at all if you are pursuing an aggregate approach. It has been passed on out of the pot, so not only does the legislation not say it, and not only could it not say that except in the most clear of terms because riding roughshod over defendant's due process

rights would, of course, have ruffled a lot of feathers, but it also doesn't work because on the pass-on point it would mean that the pot of damages isn't compensatory across the class as a whole. It would mean that that which isn't part of the pot for that defined class is somehow in it, even though it shouldn't be, and that's obviously not compensatory across the class as a whole, so it's hopeless on all manner of levels, but the critical point, then, is that it could mean, on the facts of these cases by reference to, say, VOC, or, say, downstream pass-on, or, say, other mitigation or tax or what have you, there could be, and indeed there will be, some claims for which there is simply no loss at all. There are, if you like, uninjured claimants, and as Lord Briggs made clear, I will not turn it up, Mr Thompson, I believe, took you to it yesterday at paragraphs 45 and 46, in terms, Lord Briggs for the majority says that the collective regime is about bringing actual claims for which there is at least nominal loss. That's what he says in terms, and the same point is made by Rothstein, J in Pro-Sys that we cite in our skeleton, that collective actions are not a means of bringing claims that no individual could. They are about combining claims that an individual could bring, at least in theory, but -- and even an individual can't bring

a claim for which that individual has no loss. It's simply not a tortious claim at all under UK law. That point is reflected in the structure of the Act, because, as you know, Sir, in section 47A, what it refers to is that you can group together individual actions that can otherwise be brought by individuals, "In civil proceedings". That's just the same point put another way. I'm not entitled to bring an action for an individual who hasn't suffered any loss, not a tort claim, it's simply not a claim, so with these points in mind, my submission is that the Tribunal should approach certification, and, in particular, because of what Lord Briggs says as a matter of UK law in 45 and 46 of the Supreme Court judgment, you should approach it in the same way as it is approached in the US, which bears in mind the cardinal place of the rights of due process in these aggregate, opt-out claims, and that way, which you heard me submit in Gutmann, is that the methodology adopted simply must have some way of winnowing out the uninjured claimants or the non-claims at least at the trial stage, and that is before the aggregate damages pot is reached, and obviously before there is any distribution, and the critical point that we are about to see in In Re Nexium and In Re Asacol is that although you don't have to do the winnowing out of these

non-claims, these uninjured claimants today, as part of the CPO analysis, what you do have to do today is you and your colleagues, Mr President, Sir, you must, in my respectful submission, be satisfied that the methodology that is proposed today is capable later of winnowing out the uninjured from the injured, the real claims from the non-claims, and if, today, you are not satisfied that it is even capable of doing that, you must deny certification. That's my submission, and that is expressly what is said in In Re Nexium and In Re Asacol and in my respectful submission it is directly supported by what Lord Briggs says about how you have to have individual claims with at least nominal loss and that you are not seeking to combine together something that's not actually a claim at all, and so without further ado, I will just take you, very briefly, to In Re Nexium and In Re Asacol and I'm not going to read very much out at all, you will be pleased to hear, but In Re Nexium is JA 10 of 14 at tab 135 {JA/135/1}. All I'm going to do is take you to the headnote and then identify a couple of paragraphs for the Tribunal to peruse -- I would say, "At your leisure" but I'm conscious that you don't really get much leisure time.

In any event the headnote, it is report page 11, it is little headnote 8 {JA/135/11}:

"Class action is improper unless theory of liability is limited to injury caused by ..."

THE PRESIDENT: Just a moment. Page 11?

MR HARRIS: It is report page 11, so ...

THE PRESIDENT: I think you need -- is there a bundle page?

MR HARRIS: Yes. I'm working off a slightly different copy. It is {JA/135/3}, and I read out 8, and the critical bit being, "Defendants cannot be held liable for damages beyond injury they caused". You may recall Sir, and you certainly recall when you re-read it, that this was one of those pay for delay drugs cases, and some people wouldn't have switched anyway, if you like, brand-loyal customers, and there is, therefore, a big chunk of people potentially who suffered no loss from the fact that the generic was delayed because they wouldn't have bought it anyway, but then the next one I just read out is headnote 10 --

THE PRESIDENT: Sorry, I'm --

MR HARRIS: Headnote 8 --

THE PRESIDENT: Class action is improper. I see.

MR HARRIS: Yes. So it is headnote 8.

THE PRESIDENT: Not 11.

MR HARRIS: No, and now headnote 10, just below it:

"Where individual claims process is conducted at liability and damages stage of litigation, payout of

amount for which defendants were held liable must be limited to injured parties ..."

And this is the bit:

" ... and at class certification stage court must be satisfied that prior to judgment it will be possible to establish mechanism for distinguishing injured from uninjured class members. Court may proceed with certification so long as this mechanism will be administratively feasible and protective of a defendant's Seventh Amendment and due process rights".

THE PRESIDENT: Don't know if that applies to our -- I can understand the point at 8.

MR HARRIS: My submission is that this approach in the US should apply here, I recognise that this is a US case and that this is a nascent and developing jurisdiction in the UK, but what I'm saying is that the underlying legal and jurisprudential reasons for them taking this approach in the US are the same as in this country when you are talking about aggregate top-down opt-out class actions, and they are that --

THE PRESIDENT: This is dealing with pay out.

MR HARRIS: Pay outcomes after the trial and what they are saying is that prior to judgment, that's judgment at the trial, you have to have been able to distinguish who is injured from who is uninjured, and you have to be able

to do that at the certification stage.

THE PRESIDENT: Yes, but that's -- in other words, pay out is distribution, isn't it?

MR HARRIS: Yes, but this is talking about -- my submission, I mean, I obviously haven't got time to go through this in depth now, but my submission is that when you read it you will see that what it is saying is that at certification you must have a methodology that will allow you later to distinguish who is injured and who isn't, precisely because otherwise the defendants will be being made to pay for damage that they haven't caused or loss that hasn't been suffered by those claimants, and that is an infringement of the defendant's due process rights.

THE PRESIDENT: We will have a look. In that case I'm not sure what 10 is saying that's different from 8, but maybe it is the same point.

MR HARRIS: And if I could just identify for you in particular paragraph -- I will not go to them now but for overnight or at your so-called, "Leisure", paragraph 10 of the -- this is 10 of the paragraphs in the report itself, and 11 and 12, and then you will find that if you then were to read the first two pages of the dissenting judgment of Circuit Judge Kayatta which is in the report pages 32 and 33, that would then make the

next case, In Re Asacol on the detail of this case, a lot easier to follow. I just give you that, if you like, as a heads up. You will find it -- and the reason for that is, if you just were to identify -- you perhaps don't even need to turn it up now and I have only got five minutes left for today, but In Re Asacol is in the next bundle of authorities, so it is in 11 of 14 at tab 139 {JA/139/1} and you will see that Judge Kayatta then gave the leading judgment three years later in the same division of the same Court of Appeals in the In Re Asacol case and revisits some of the particular problems that were identified in In Re Nexium as to how one would go about proving whether somebody has got a claim or not.

Now I don't need to go into that for today, but take it from me that if you were to read a little bit of Kayatta in the dissent it will make In Re Asacol a lot more understandable, but the critical point is that three years later in this same division Court of Appeals, and I'm reading now from in the report, internal page -- sorry, let me just find it. It's at heading 3, so in the bundles for today's hearing it is page {JA/139/10}. You will see that two paragraphs down, do you see the paragraph beginning, "In considering the proprietary of class act certification"?

THE PRESIDENT: Yes?

MR HARRIS: You will see we deal again with the issue that strikes at the heart of the competing considerations, the proper treatment of uninjured class members at the class certification stage, and then what they go on, if you were to read the remainder of the next three pages, or -- well, better still, five pages, you will see that they say exactly the same thing as In Re Nexium that in a top-down aggregate opt-out claim which was this type, in order to preserve the defendant's due process rights you need to be able to winnow out people who have no claim, who were uninjured, and you need to be able to see that you can do that today, otherwise you shouldn't certify. That's the point, and the problem, and the reason I raise those cases, is the problem that UKTC has got is exactly the same as the problem that Mr Gutmann had in the trains tickets case, is that he has no methodology at all, ever, for winnowing out those people who don't have a claim.

So let me give you, in the three minutes remaining to me, some examples. The VOC. Dr Lilico overtly takes data but makes no attempt for his VOC to isolate the price of the bare truck. No attempt at all. There is no claim, however, in this case for VOC relating, for example, to repair and maintenance contracts that may

have formed part of the invoice for the truck, or to truck bodies, again, that may have formed part of the invoice for the truck, or to finance charges that, again, on the undisputed factual evidence that has been put in by the OEMs that may have formed part of the invoice, but there is absolutely no way of isolating, on Dr Lilico's approach, what the VOC is that relates to these other extraneous features of the transaction, but there is simply no claim for that VOC at all, and yet Dr Lilico ignores the problem. He either ignores it, or, with great respect to him, doesn't understand it because it has not been dealt with at all in any one of his reports and all that we get in the final amended reply is, and I quote, "These VOC problems are 'insubstantial'", and then Mr Thompson said, and I quote, "They are hopeless", but far from it. Have you to ask yourself, what is the fact pattern of these cases?

The fact pattern of these cases is that there is varying and bespoke VOC per transaction. It is a real life complexity. It is a complexity with which the plan, as we just saw at the back of Kett, the plan simply must deal. It can't be swept under the carpet. They can't be just parked. The evidence, and I will end with these two references, the evidence is that the body

can cost more than the truck itself. The reference for that is First Belk, paragraph 87, and that's at E/IC2/29, and the evidence is -- it is not disputed, this evidence, the evidence is also that material profit can be made from, for example, the repair and maintenance contracts, indeed, because of that profit the sale of the truck may actually be made at a loss, and that's First Belk, paragraph 66, and you will find that that's in Bundle E, tab IC2, page 22, and paragraph 66 itself is not confidential, but unless you wish to address -- ask me anything about that paragraph tomorrow, you will find that if you read 44, 45 -- 64, 65 or 67 -- some of that is confidential so just, please, bear that in mind if you look that up overnight, and so my point is, and I close here today, and I will finish off my submissions tomorrow, is that there are various aspects of this claim, and VOC is by no means the only one, the other absolutely blinding candidate is downstream pass-on for which Mr Flynn has already accepted there are some claimants with no claim at all, they give rise to inclusion in the claim of matters that simply cannot be in the claim. It is incoherent, there is no claim, or they are uninjured as regards those parts, and UKTC can never identify them, and can never strip them out, and you can already tell that today, and

for that reason alone it's not suitable for certification.

THE PRESIDENT: Well, I'm not sure Mr Flynn did accept those -- if you could mute -- can you mute, Mr Harris? Is that better? No. Is that better? Yes. I'm not sure, on that concluding point, Mr Flynn did accept, once he explained how he is dealing with the open book contracts, that necessarily anyone with no claim at all, because it is the open book, unless it said that there are members of his class who only ever used their truck to rent -- that they bought to rent out on a cost-plus basis, and I think his evidence was that's very unusual that that's done, so they will have a claim in his opt-in class.

MR HARRIS: Sir, I understand that point and I'm going to finish now, but the answer to that is it doesn't matter. What you can't have is the inclusion in a claim of a part of a claim, VOC, for which there is no infringement. There is no valid claim. You have to be able to winnow that out. That's a non-claim, so even if there was somebody who had some cost-plus contracts and somebody who had some other non-cost-plus contracts, you would have to winnow out the bit that is cost-plus, because Mr Flynn accepted, and it must be right, that they are non-claims, and of course there may be some --

THE PRESIDENT: Well, I think the point is that the volume of commerce, because it's only where they have been passed on to someone else who is in the class, that it's within the claim, and if it is passed on to someone who is not in the class, then there is not a claim for that element, and he said there are virtually -- in effect, virtually no one in the class who only dealt with open book contracts, so that it could be said they have no claim at all.

MR HARRIS: I accept that, Sir, but UKTC can't make that point.

THE PRESIDENT: No, no. This is about -- you were dealing with Mr Flynn, and --

MR HARRIS: Yes. I accept that. My point about relying on Mr Flynn is this is the same sector of the same type of claimants that he wishes to represent, and that Mr Thompson wishes to represent, and my point is that it is accepted by the RHA that there are some claimants out there who have cost-plus contracts, and therefore no claim, and Mr Thompson, however, for UKTC, he has absolutely no idea who they are, and then he can't identify what their VOC is, and he can't exclude it. That's the point, and I will end there, Sir. I have got a note saying that Mr Pickford wishes to just address you for a moment about timing for tomorrow.

THE PRESIDENT: Yes. There are various hands that have gone up. If I take Mr Flynn first, because I have just been referring to what he said.

MR FLYNN: Sir, you saved me the trouble of saying what I might otherwise have said on that point. That's precisely our position. I simply report that just after 4 o'clock we lodged with the registry a proposed amendment of paragraph 77 which is a slightly different point, and won't be the swathe of amendments that Mr Harris is apparently looking forward to, but I hope deals with the discussion we had on that point, and that's all I need to say at this moment. I'm afraid I can't hear you, Sir.

THE PRESIDENT: And I assume you are supplying that to all the respondents. Yes. Thank you. Then it was Mr Pickford. You wanted to say something?

MR PICKFORD: Yes, Sir. Thank you. Simply on the question of timing, some concerns have been raised just about whether we are going to get through everyone's submissions on time by the end of tomorrow, when we are going to start. One possible way through is that we could potentially, if we don't finish tomorrow afternoon, wrap up anything on Monday morning, given that we have quite a lot of time on Monday, but it seems that we are becoming a little bit behind schedule at the

moment, and potentially people at the lower end of the batting order are going to get exceedingly squeezed under the current timetable.

THE PRESIDENT: I haven't got timings broken down as between the various respondents. I have got a list of issues that each is going to address, but I don't know how you have proposed to divide up the time between you.

MR PICKFORD: Broadly speaking, Sir, we've adopted an equal division of time except for poor Mr Hoskins who gets a little less time, but this submission is partly on his behalf. I'm somewhat concerned that where we are currently going is that by the time we get to Mr Hoskins at the end there may be no time.

THE PRESIDENT: He isn't actually a respondent to any application, is he?

MR HOSKINS: I'm an objector to both. I was hoping to be allowed to say something.

THE PRESIDENT: Yes. You can say something but as an objector, you would normally only say anything if you thought that the points you wanted to object on had not been taken by any of the respondents, one would expect, as you are similarly an OEM, any good points, as we've got a battery of respondents, will be taken by them, but if you think they have left something out, then you can add a short supplementary observation, but one wouldn't

expect you, with all -- in this case where you are not a respondent -- to have an equal time with respondents.

MR HOSKINS: Sir, I have never asked for that. As Mr Pickford said that wasn't the basis we had arranged it. I think he is worried, even with me not repeating anything they say, and even with me having less time than any of them, they are going to take up the time and leave me with nothing. I think that's the translation, but of course I'm not going to repeat what they have said. You know me too well by now, Sir, it's not my style.

THE PRESIDENT: Well, I appreciate that, but, well, let's see how we get on. I doubt very much that we will need all of Monday. This is not, as you all appreciate, it's not an opportunity for you to cross-examine the experts. It's more for the Tribunal to raise some questions that we might have, either a concern or a need for clarification with the two experts, albeit that you can ask some supplemental questions, so I doubt we will need all of Monday, and I would have thought we will see where we are at the end of tomorrow, and if necessary we can allow Mr Hoskins some time on Monday, and Mr Jowell as well if that's necessary for his submissions, because I think you, Mr Jowell, are the last in the batting order of respondents, as I understand it.

So we will leave it there and we will resume at 10.15 tomorrow, and we will endeavour to do the homework that Mr Harris has set us. Thank you.

MR THOMPSON: Sir, I suspect I speak for Mr Flynn as well, but both he and I have been extremely constrained by time. The respondents were asked to allocate time last week. They also asked for extra time which they received, and in my submission they are extremely experienced advocates, and well-capable of making their submissions within the time, so I would be strongly objecting to them spilling over into Monday unless there is obviously a direction from the Tribunal, but at the moment I cannot see any justification for it at all, especially as they have allocated the timings between themselves, just to put that on the record.

THE PRESIDENT: Well, let's see where we get to. The main issues, it seems, have been allocated between Mr Pickford, Mr Singla, Mr Jowell and Mr Harris, so the additional issues I'm not sure what they are, but we will see where we get to, but let's deal with this in -- as it arises, but I understand your concern, Mr Thompson, because you may feel that there is quite a lot being raised you want to respond to, and that you should have time to do that.

MR THOMPSON: Yes.

THE PRESIDENT: 10.15 tomorrow.

(5.10 pm)

(The hearing adjourned to 10.15 am on 21 April 2021)

I N D E X