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)

27 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

_____

Tuesday, 27 April 2021

(10.00 am)

HOUSEKEEPING

THE PRESIDENT: Good morning. So this is now for the respondents to make brief submissions on the expert evidence, and I don't know what arrangements you have made, who is speaking first.

MR HARRIS: Mr President, we've arranged an order for the submissions, but there is a housekeeping matter that arises very briefly.

Mr Thompson and his team on behalf of UKTC have submitted a witness statement for Mr Perrin after hours on Friday evening.

THE PRESIDENT: Yes. We've seen that. We've seen your objection. I think what we will do is we will take the hour for comments on the expert evidence which Mr Perrin's witness statement is nothing to do with, and we will then deal with the question of that witness statement.

MR HARRIS: Thank you very much.

Submission by MR SINGLA

MR SINGLA: Sir, members of the Tribunal, it has been agreed that I will kick off on behalf of the respondents and we have agreed to split the hour evenly, as it were, with the exception of Mr Hoskins who only wants, I think,

three minutes at the end, so that leaves us with approximately 14 minutes each I think, and we will avoid duplication by making brief submissions on the evidence in relation to the same issues that we dealt with last week.

THE PRESIDENT: Yes.

MR SINGLA: Now, for my part, I don't intend to say much about Dr Lilico's oral evidence, beyond making the general point that Iveco's position is that his evidence did not come close to engaging with, let alone rectifying, the numerous problems with his proposed methodology that we have identified.

As you know, we say his approach of estimating overcharge is not plausible or grounded in the facts. What is clear from his evidence yesterday is that he is still assuming that the infringement led to an overcharge. Although he described that at page 35 of the transcript as, "Economic reasoning", in truth we submit that what he is doing is he is making an a priori assumption that there was an overcharge and we submit that that is the fatal flaw in the methodology.

We also note that he made clear yesterday that he is standing by his undifferentiated and differentiated product models that he put forward in 2018, even though they have been shown to be completely divorced from

reality, and, contrary to what he said yesterday at page 39, those models will not give the Tribunal a reasonable answer or a reasonable reflection of the data, as he suggested. Of course, he is not estimating aggregate damages at all. He focuses only on overcharge, and so he doesn't take account of the other matters that we know from Sainsbury's are equally part of the overall quantification of loss, and finally, Sir, it won't have been lost on the Tribunal that Dr Davis referred to the simulation model as his last port of call, and that chimes with what Dr Durkin says in his evidence about a simulation model also being ill-suited to this case, and that's Dr Durkin's first report at paragraph 161.

Now, in the time that I have this morning, I would like to address the RHA application, and, in particular, make two points arising out of the oral evidence of Dr Davis. The first concerns the issue of Dr Davis trying to estimate individual losses suffered by the RHA's proposed class members by calculating the average per truck overcharge figure for each of the six sub-classes, and on that topic there was an important exchange between Dr Davis and the Tribunal at pages 122 to 128, and the second issue is that of resale pass-on, and, as you know from what I said last week, our

position is that it cannot and should not be certified as a common issue. The RHA is not seeking to have it certified as a common issue, and we say that this is reinforced by the evidence which Dr Davis gave yesterday.

Now turning to my first point, as the Tribunal knows, what Dr Davis is doing is arriving at six overcharge figures for his proposed sub-classes, and in terms of the legal position, the RHA accept that because they are not claiming aggregate damages, the appropriate legal test is whether Dr Davis' methodology is able to estimate reliably the individual losses so, the commonality question that arises in relation to the RHA's application is different to the issue that arises on the UKTC's application and the issue which was considered by the Court of Appeal in Merricks where aggregate damages were being claimed.

Now, as I submitted last week, we say that Dr Davis' methodology will not lead to reliable estimates of individual loss because he doesn't adequately deal with the heterogeneity of the trucks market, or sufficiently capture the highly individualised nature of the inquiry, and as Dr Durkin explains at paragraph 55 of his first report, in some cases the average effects of an infringement might reliably reflect the effects on

individual transactions. Dr Durkin says, for example, where there is a price fixing agreement in respect of transaction prices of commoditised products, but we say in the present case, given the nature of the infringement and the heterogeneity of the market, and Dr Davis himself accepts that individualised negotiations were a feature of the market, what we say is that average effects are unreliable predictors of individual effects and that's supported by, and indeed the purpose of Dr Durkin's empirical analysis.

Now, we submit therefore that it is far too simplistic for Dr Davis to put all of the proposed class members, let's say 15,000-odd, put those into six sub-classes and apply averages. We submit that that will not lead to reliable estimates of individual losses, and it will lead to a breach of the compensatory principle, because there might be some proposed class members who receive compensation on the basis of the average figure, even though they, themselves, if the facts were properly analysed and properly investigated, the facts would show that they didn't suffer any loss at all, and Dr Davis in his fourth report accepts this. He quite candidly says it's possible that some PCMs were not harmed by the infringement, and he agrees that individual PCMs may have suffered zero losses.

Now, that's the position in terms of his fourth report.

Now, we say that this is not good enough, with respect, and either on commonality or on suitability grounds the methodology should be rejected, either because the methodology will not lead to reliable estimates of each PCM's loss, so that's commonality, or because if the PCMs were to bring their claims individually, there would be a much more detailed investigation of the factual position, and there was an important exchange in relation to this between Dr Davis and the Tribunal, because Dr Davis responded, I think in response to a question from Professor Wilks, that in response to our point that these average estimates will not be close to the individual loss position, he said at page 125 of the transcript that it may well be possible to use more subgroups, and he says, "I don't know how many subgroups we are going to need ultimately".

Now, we submit that, with respect, that's not a satisfactory answer, because what Dr Davis has put forward at this stage is an approach whereby he proposes six sub-classes, and that is the basis, we say, on which the Tribunal must assess his evidence, and the question of whether the commonality and suitability conditions are satisfied.

In my submission the fundamental problem for Dr Davis is that in order for the RHA application to be certified, he recognises that he needs to keep the number of sub-classes small, and, indeed, he describes it as, "Desirable", at paragraph 127 of his second report, whereas, in fact, in order to estimate loss of each individual PCM accurately, and to take proper account of the highly individualised nature of the inquiry, he would need to have a very large number of sub-classes, but then, of course, the case plainly wouldn't be certified, and we say it's not good enough to rely on the broad axe, because the point here is that there is an alternative way in which the cases could be brought, and there would be a more precise assessment of individual loss and less approximation if the cases were brought on an individual basis, and this case is, therefore, not like Merricks where the same forensic difficulties as regards quantification would have existed whether the claims were brought on an individual or collective basis, as the Supreme Court held.

Here we submit the exercise of quantification, where one is talking about individual losses incurred, allegedly incurred by thousands of proposed class members, we say that the approach is too simplistic, and the broad axe is not an answer.

The real problem with Dr Davis' approach, with respect, is that he can't put forward a very large number of subgroups. He says in response to Professor Wilks' question that he may well, in due course, be able to narrow his approach, and this is page 123 of the transcript, but the problem is that all of Dr Davis' evidence yesterday in this respect was premised on the idea that he would receive considerable amounts of disclosure.

Now, we know that the OEMs don't, themselves, hold transaction data, certainly in the case of Iveco, very little transaction data indeed, and although Dr Davis described the claimants' disclosure as being a third source, in fact the claimants' disclosure will be the key to identifying the characteristics of the claimants and so on, so --

THE PRESIDENT: They would -- sorry to interrupt you -- the OEMs, even if they don't sell directly then they supply to dealers, presumably.

MR SINGLA: They do, but what Dr Davis said yesterday, in order to arrive at more narrow estimates, he says, well, that will be a question of disclosure. He may be able to come up with some more subgroups in due course, but the disclosure he referred to was disclosure from defendants and dealers, and we say, with respect, if

what one is trying to do is to arrive at more accurate estimates of individual loss, that will be on the basis, largely and primarily, of the claimants' disclosure and evidence, and we submit that there is a total disconnect between --

THE PRESIDENT: I don't quite follow, sorry to interrupt you, but those defendants, some sold partly directly, Iveco much less, but if they sold to dealers and one gets some disclosure, a limited amount from some dealers, to see what the relationship is in broad terms between supply to dealers and dealers' margin, why doesn't that give you a guide to transaction prices? Of course it's not precise in each individual case, clearly. No common action is going to give you the same precision as an individual action.

MR SINGLA: No. I apologise. The transaction data is one question.

THE PRESIDENT: Yes, but won't that help on the transaction data?

MR SINGLA: Yes. That will help on the transaction data but what one is talking about is a factual investigation in respect of the individual class members. So, for example, to take the example that's been referred to a number of times, bargaining power, what one is looking at there, when Dr Davis says, well, I may be able to

turn my six sub-classes-classes into more narrow subgroups, if what he is trying to do is arrive at a better and more precise individualised figures, leave aside transaction data, that will require disclosure and factual evidence from the claimants. One wants to see what the individual position of the claimants was, and that's what would normally happen in an individual action, so that is the key disclosure, we submit, will not come from the defendants or dealers, it will come from the claimants. It's not a third source, it is the primary source for that type of disclosure, and we say there is a complete disconnect between Dr Davis, when he tries to improve his averages, what he needs to do is he says, well, I need disclosure, and he says it may well be necessary to get considerable disclosure from the claimants, and as I submitted last week, the problem is the RHA is not putting forward a plan which involves disclosure from the claimants. It's all premised on a voluntary basis, and we say that's not good enough, and, therefore, the averaging approach is too broad brush, and the problem for Dr Davis is that he either has to say, "There will be lots of subgroups in due course", or he has to say, "There will be lots of disclosure from the claimants", and so we submit that as currently presented the application doesn't pass muster

in terms of the suitability or commonality condition.

Now, if I could very briefly turn to the resale pass-on issue, as I said last Wednesday we submit that it would be entirely wrong to certify that as a common issue. That is because the RHA has never sought to have pass-on certified as a common issue, and, therefore, the OEMs have not been required to deal with it on that basis, and we submit Mr Flynn would need to make an application for permission to amend which we would oppose at this stage, and, indeed, it's not clear from what Mr Flynn said on Day 3 whether, in fact, the RHA is moving position or not, but we submit on the substance the RHA has never put forward a concrete methodology for pass-on, and the reason for that was made clear by Dr Davis because it's not straightforward. It doesn't flow automatically from the used truck regression.

There is the important role of intermediaries, and Dr Davis, at page 131 yesterday, candidly accepted that there is no immediate read-across.

If I give you the references, pages 128, 129, 130, 131, 132 and 133, including in response to a question from the President, Dr Davis very fairly accepted that he hasn't gone into detail on pass-on, these are just preliminary views, emerging thoughts, that he has put forward in very broad terms. So in light of that oral

evidence, we submit that the Tribunal cannot properly certify resale pass-on as a common issue, and that, with respect, is a significant point because it has wider implications for the RHA's application, because if the Tribunal is otherwise minded to certify a common issue as regards overcharge, in our submission the fact that nothing else is going to be certified, pass-on, mitigation, tax, interest and so on, because none of those issues will be certified, we submit the suitability condition is not satisfied, because all of those points, those other points are equally relevant to quantification of loss, and we submit it won't take the PCMs very far to have a common issue trial on overcharge if they are then left, each, to fight individually on all of the other issues.

Now, Sir, conscious of time, unless I can assist further, those were my brief submissions on the evidence.

THE PRESIDENT: Thank you.

Submissions by MR PICKFORD

MR PICKFORD: Sir, I think, members of the Tribunal, it's up to me to go next.

So first the UKTC.

The point on which I focused my submissions last week was on the UKTC's failure to address pass-on and I

explained it was essential to grapple with that issue in any opt-out claim seeking an aggregate award of damages, and that the UKTC's failure to do so was fatal to its application.

Now, nothing we heard from Dr Lilico undermines that submission. Dr Lilico appeared to claim, first, that some types of what lawyers might term, "Pass-through", to downstream customers aren't real pass-through because they concern demand and not supply side issues. I found that evidence somewhat unclear, but ultimately it doesn't matter, because notwithstanding that point Dr Lilico accepted that pass-through at least as lawyers understand it was relevant to mitigation, whether or not it met his own personal definition.

We then heard speculation from Dr Lilico that used trucks aren't very good at long journeys, perhaps they are a bit like small children. He didn't provide any evidence for that contention at all, and Dr Lilico, if he is going to develop points on that basis, needs to do so, and they clearly raise highly fact-intensive questions, and he has nowhere explained how he is going to address those sorts of points.

We also heard, for the first time, a suggestion about developing an econometric analysis between movements in the prices of new trucks and secondhand

trucks.

Now, that might seem slightly surprising, given that Dr Lilico has generally deprecated econometrics as the primary basis for analysis, but critically, the most important point here is there is no specificity. There is nothing concrete for the Tribunal to have regard to at all.

Perhaps most interestingly we also discovered yesterday, for the very first time, how Dr Lilico thinks he might address pass-on in the context of the in-house provision of haulage, and he gave the interesting example of a quarry, and he speculated you could potentially work out that a quarry which might have bought trucks at an overcharge couldn't pass on that overcharge in their prices to a particular customer, and he suggested that would be, perhaps, because the customer in question might be near another quarry, and so competition from the nearer quarry would prevent the first quarry from increasing its prices.

Now this raises a geographic competitive analysis which is a variant of, perhaps, the type of isochrone analysis we see, for example, in the context of when the CMA is looking at competition in grocery retail. Now, even in that context, that sort of undertaking is a very, very substantial one, but in this case the

degree of complexity that's implied by the sorts of things that Dr Lilico was discussing is immense. To make the suggestion good you would need to analyse the location and demand characteristics of each customer of a quarry, their sensitivity to haulage charges, you would need to look at competition between quarries, you would need to do that for each quarry, for every customer, and that's just for quarries, and then you would need to do it, of course, for every single market where trucks are used, and in my submission that is the quintessential example of a highly complex, individualised inquiry, and nowhere does Dr Lilico explain how he would address those sorts of issues, even in an opt-in action, let alone an opt-out action.

Finally, Dr Lilico speculated that for purchasers of some trucks the pass-on effect might be outweighed by volume effects, and so he said that would entitle him to ignore pass-on altogether, but of course volume effects depend on a complex interaction between supply considerations and demand considerations in the market into which the downstream products are being sold, so this analysis doesn't bypass the need for a vast informational inquiry, it actually exacerbates it. It adds to the things that you need to consider, because you also need to consider whether those volume effects

do outweigh the pass-on, so, again, nothing from Dr Lilico about how that would work. With respect to him it is the flimsiest of ill thought through speculation.

THE PRESIDENT: I don't think the claim form alleges a volume effect, does it?

MR PICKFORD: No, I don't think it does. It's Dr Lilico's response to say, well, I can dispense with pass-on because, look, there will be volume, and it doesn't help. If you think it through just one or two steps, it is of no assistance at all. It doesn't make the analysis any simpler.

So I turn, then, to the RHA, and I address three points -- heterogeneity, size of the claimants in the class, and pass-on.

So, first, heterogeneity. The problem remains that the only answer that Dr Davis and the RHA provide in relation to the difficulties that are raised by the complexity arising from heterogeneity is, essentially, I'll use econometrics, and so that isn't sufficient. I'm just going to give a few examples.

First Dr Davis we say still has not satisfactorily explained how one can, through econometrics, really take account of inherently idiosyncratic features of a negotiation such as the interaction between bargaining

skill of an OEM and a dealer and a final customer. Now, what he says is; oh well, I can look for trends in the data, but in our submission that is not developed, it's highly speculative and it's ultimately not realistic in relation to the sorts of considerations that I was just adverting to.

Secondly, he hasn't explained at all how he is going to deal through econometrics with the complications caused by framework agreements, and, for example, the fact that trucks bought during the period of infringement may have had their price negotiated outside the period of infringement.

Third, he hasn't explained satisfactorily how one can predict from the features of a truck using econometrics missing variables such as the complements that were sold with the truck, whether that's a body or a repair and maintenance contract, and this isn't a question of having enough data for a regression. I think that's where we say, with respect, Dr Davis goes wrong.

This is a question of having sufficient primary evidence on matters that are as fundamental as the value of commerce in order to evidence and prove a claim, and the missing data problem is really a very significant one. If we could go very briefly to his second report,

that's in Bundle F, tab 7, page 156. {F/7/156}. I'm looking at paragraph 381. I would be grateful if the Tribunal could let me know when that has been found.

THE PRESIDENT: Yes. We've got it. Thank you.

MR PICKFORD: I'm going to crack on, on the basis that --

THE PRESIDENT: Yes.

MR PICKFORD: So paragraph 381, first sentence:

"Based on the responses of the 42 PCMs of the sample group, comparable chassis cab-only cash prices were provided for 49 per cent of the new relevant trucks procured on cash price contracts", so that means for more than half, he didn't get that data, and one looks at footnote 481, and we see that the situation is worse still, because the rates, the response rates, only refer to those where there was invoice data available, so if there isn't an invoice date available those appear to be excluded. That's footnote 481. So there is obviously a low response rate, even in relation to that issue.

One then sees about halfway through the paragraph:

"Overall, for 51 per cent of relevant trucks procured on a cash price, I can observe that the cash price does not include payments for the body".

So what that means is that for about half of trucks the body was part of the transaction, and then perhaps most worryingly of all, in the final sentence:

"I collected direct information on the value of modifications or additions made to the factory specifications", so here we are with some of those key issues that I have been referring to:

"And 23 per cent of new relevant trucks procured on cash price contracts provided this information".

So 77 per cent of his sample didn't, and this is a survey that was done with the first report, so one can imagine it involved the more organised proposed class members who had signed up early, and if one traces through the footnotes, I don't have time to do that now, one can see that the average number of trucks per claimant, for these claims, it was into three figures, so we are talking about more organised, bigger claimants, and even for them, he simply doesn't have the kind of data that he needs, and we say it's simply not realistic that those problems are going to be mended by econometric extrapolation.

What it manifestly needs is an individualised enquiry, and these questions don't just go to distribution, as the RHA would have you believe, they are questions that go to whether class members should be receiving any compensation at all.

Now, you had a discussion with Mr Singla about Dr Davis suggesting, well, he can get the information

from claimants -- sorry -- from defendants, but we say that is just wrong, and just a few further short points. Mr Ashworth makes clear in his statement, and the reference is {D/19/16}, that DAF does not actually know the transaction prices of all of those sales that were through independent dealers and Mr Flynn has never suggested to you that part of the RHA's plan is a vast third party disclosure application against dealers. He doesn't -- no one knows whether dealers would even hold that information, and it's not about getting a sample, as was possibly the inference to be drawn from the discussion with Mr Singla, because we are talking here about the VOC for individual claims, and the need to disentangle in every case the price of a truck from the price of complements.

So in conclusion on that, econometrics is not a cure all, and the RHA have placed far too much weight on it and given far too little thought to how properly to address the individualised idiosyncratic issues that arise in its claim for damages.

Second point concerning the nature of the class, the RHA's case on suitability depends on saying that a CPO is preferable because its class members cannot be expected to bring its claims individually, and it would be more proportionate to do so as a class. Now, we

don't accept that. Obviously you have heard what I have said before about smaller claimants, but nothing that Dr Davis said yesterday avoids the problem that it is plainly not the case that the class is made up exclusively of small claimants, and so the RHA's justification for a CPO, we say, breaks down for the class of a whole. Indeed, Dr Davis himself noted that for larger claimants there may be issues such as off-invoice bulk discounts, and that wouldn't be apparent in the type of data that Dr Davis envisages using for the class as a whole. That is just the sort of thing that demands an individualised enquiry and means that the RHA is wrong to lump all claimants, big and small, into its proposed class.

And then finally pass-on. Again, you had a short discussion with Mr Singla about this. Points I make are that even aside from the issue of used trucks, the extent of pass-on is an important issue in the RHA's own positive case, because they say for hauliers who passed on 100 per cent of their costs to those to whom they supplied services, the RHA will claim on behalf of the person who received the services, and Dr Davis did not contend that he can work out for which supplies there was ultimately 100 per cent pass-through with his econometrics, and rightly so. That needs an examination

of individual supply contracts and individual conditions of supply and demand.

Moreover generally, we say Dr Davis' proposals on pass-on remain hypothetical and noncommittal, and that, of course, stands in contrast to his overcharge analysis where he has sought to investigate issues in some more detail.

The problem for the RHA is that the burden of evidence and disclosure on pass-on is plainly on the claimants themselves, and so this failure to grapple with an essential element of the path to damages remains deeply unsatisfactory and is a further basis for the denial of the application.

I hope I have stuck to time. Unless I can be of any further assistance, those are my submissions on behalf of DAF.

THE PRESIDENT: Thank you.

Submissions by MR JOWELL

MR JOWELL: Mr President, members of the Tribunal I wish to address you on three matters, all of them related to the RHA -- new and used trucks, the run-off period and the emissions technology delay.

Now, in relation to new and used trucks, the evidence of Dr Davis was very clear. He said that on his model for those in the class that purchased on

a cash basis, and were new truck buyers, the used truck overcharge would fall to be subtracted -- subtracted -- in the damages calculation that he proposed to make.

So, as Dr Davis accepted, the higher the used truck overcharge is, the less the new truck cash buyers will receive in damages, and he accepted that in response to the questions that I put to him on Day 4, pages 156-159.

On the other hand, it is a truism to say that it assists those in the class that purchased only or predominantly used trucks if the used truck overcharge exists, and is higher. That is because in those circumstances they will receive more in damages.

So Dr Davis' evidence bears out our contention that there is a clear and direct conflict of interest between two parts of the class. The conflict of interest arises in relation to the issue of the existence and the extent of any overcharge on used trucks. That issue pits those in the class that bought only or predominantly used trucks against those that bought only or predominantly new trucks.

It may be that the position is less clear-cut for non-cash purchasers that may have never sold -- resold their truck. It may be that there are complexities for the calculation by reason of the overcharge on used trucks finding its effect via dealers, or being

mitigated by that, but none of that gainsays the fundamental conflict between at least very substantial parts of the class in relation to this issue.

This is not a conflict that can be overlooked or glossed. It is glaring, direct and immediate, and the only way it can lawfully be cured is to excise one of either used truck purchasers or new truck purchasers from the class.

If the other claim is then to be brought it must be brought via a separate representative that is entirely distinct, and if I may just use this opportunity to pick up on Mr Hoskins QC's point about Rule 78(4) and the use of sub-classes, first of all I should say we agree with Mr Hoskins' general submission that it would be far too early to order any other sub-classes. However, as far as Rule 78(4) is concerned, it relates in terms to persons whose claims raise common issues not shared by the whole class.

Now, it is correct that the guide goes a little further and speaks of a potential conflict of interest and mentions in the context of cartel damages categories of purchasers with conflicting interests that require separate representation.

Now, for our part, we think that the guide has more in mind a future possible conflict between different

categories of purchasers so that, for example, the kind of situation one saw in the Infineon case that we looked at, but we are doubtful that it envisages a direct, immediate and actual conflict of the sort that we are faced with here, but, nonetheless, we do not wish to promote form over substance.

It matters not whether the representative for used truck purchasers is appointed pursuant to Rule 78(4) or pursuant to Rule 78(1). What matters in our submission is that there should be genuinely separate representation with all that goes with it -- separate funding, separate lawyers, separate experts, separate plans and so on. That's what we have to say about new and used trucks.

I come, next, to the run-off period.

Now, true to his reports, Dr Davis did not endorse a run-off period of over eight years. The furthest he got in his evidence, I seem to recall, was saying that it could not be ruled out, but neither could he say that it was a reasonable view. You will see that on Day 4, pages 105-106.

Dr Davis mentioned three specific points that might support a longer run-off period, and on this aspect his evidence was illuminating.

First of all, regarding the possibility of long-term

contracts agreed in advance, Dr Davis rightly did not demur from the President's point that this could be dealt with by a specific carve-out for trucks where the contract had been agreed and hence the contract price fixed during the infringement period. One finds that on Day 4, page 102.

The second point mentioned by Dr Davis related to the pass-on of emissions technology costs by the introduction of Euro 6 standards in 2014 and that possibility, but he seemed to acknowledge that this did not take one beyond the end of 2014 which is when those standards were introduced. He didn't say that in absolute terms, but I think it is the fair implication of what he said on a number of occasions. I would refer you to Day 4, pages 102-3, page 146, lines 20-26 and page 148, lines 23-24.

So that gets you no further than the end of 2014 on any view.

Finally, on the possibility that Dr Davis mentioned of a longer run-off period specifically on used truck prices and purchases, we make four observations. First of all, for the reasons that I have already explained, the purchase of used trucks should be excluded from the class altogether, or at least requires entirely separate representation.

Secondly, in any event, this point would, at most, justify a longer run-off period explicitly and solely for used trucks, and not for new trucks.

Thirdly, even on used trucks there was no suggestion that this could go beyond three to six years, so at most to the end of 2016. You will see that, on pages 105 and 151.

Finally, as Mr Harris QC elicited, any longer run-off period for used trucks specifically would also require a corresponding adjustment to the start date for used trucks to reflect a longer run-in period, and you will find that on pages 173-174.

Can I finally turn to the delay to the introduction of emissions standards?

The first point we would observe is that this is not a part of the infringement where it can credibly be said that there should be any starting point or prima facie assumption that the infringement caused loss to the class, or even to part of the class. On the contrary, as Dr Lilico pointed out, the starting point, the natural starting point, is that higher emissions standards would increase the cost of the truck. If there were a benefit from fuel efficiency, the OEMs would have had an incentive to introduce those anyway because it would have been beneficial for their

customers, and so a competitive advantage.

You will see he said that on page 82 of his evidence. That's important because it means that the RHA must convince the Tribunal that there is a realistic prospect of establishing any loss on a class-wide basis, and as the Pro-Sys test approved in Merricks reminds us, the methodology provided, or proposed, cannot be purely theoretical or hypothetical. There must be some evidence of the availability of data to which the methodology is to be applied.

You have seen all of the factors enumerated by Mr Cussans in his evidence that I referred Dr Davis to that may affect fuel efficiency. Those factors don't just include mileage by any means. They also include driving style, topography, journey type, load, repair and maintenance, and so on.

Now, that was Mr Cussans' evidence, and the RHA is the RHA. If it had disagreed with Mr Cussans' factors, no doubt it could and would have said so. It didn't.

So we are entitled to assume, you are entitled to assume, that all, or at least many of those factors have to be modelled on a common basis if Dr Davis' approach is to be viable.

Now, Dr Davis in response speculates that he may be able to obtain some proxies for these factors. He

speculates about obtaining telematics for driving style, service records for maintenance and so on, but as he acknowledged at the end of his answers to my queries yesterday, he has not sought to see whether he can obtain this data in practice. That was Day 4, page 42, lines 14-18.

The RHA has not provided him with any, and one can add to that, that another vital element in his methodology, a vital component, is the interest rate, but the RHA has accepted that it is not proposing to calculate interest on a common basis.

So all in all, this is a good example of a theoretical or hypothetical methodology, but one where there is no reasonable evidence of the availability of data to which the methodology can successfully be applied. It should, therefore, be rejected on a principled application of the Pro-Sys test.

Those are my submissions, unless the Tribunal has any further questions for me.

THE PRESIDENT: Thank you.

Submissions by MR HARRIS

MR HARRIS: Mr President, members of the Tribunal, on behalf of Daimler I gratefully adopt the submissions that we've heard this morning on behalf of Iveco, DAF and MAN.

I have only one further point to add as regards the

RHA claim, and then I will take you, if I may, to some passages in the UKTC evidence of Dr Lilico yesterday that rather illustrate the difficulties with its claim.

The point on the RHA is as follows; it is now abundantly clear that Dr Davis' methodology is incapable of addressing what I addressed in opening as the, "In Re Asacol", problem. You will recall that I took you to In Re Asacol, and prior to that In Re Nexium, and you will recall that my submission was that in this country we should adopt the same approach for certification as is done in the US and for the same reasons. That was that you have to be able to see at the certification stage that the methodology that is proposed is capable, albeit down the line, but is capable of excluding the so-called, "Uninjured claimants", that is to say claimants to whom there is no loss, and reasons, you will recall, for that submission were that otherwise, it is a blatant infringement of due process rights, and, in addition, in this country, and how I -- and why I tied it very specifically to the UK regime is that it stands foresquare with what Lord Briggs said in the Supreme Court in Merricks that you have to have a claim that is grouped together that has, "At least a nominal loss".

The other way I put it was that you can't have non-claims under section 47A and 47B, because non-claims

can't be brought in civil proceedings. The end result of all that was you have to be able to exclude claims where there is no injury, or the claimant is uninjured, or has no loss, but Dr Davis cannot do that, because, as Mr Pickford rightly pointed out, he essentially -- and Mr Singla for that matter -- rightly pointed out, was that he, essentially, is not doing what he says on his tin. He is not, in fact, doing an individual loss. What he is, in fact, doing is taking six sub-classes and then averaging and approximating within the sub-class, and that, of course, masks the fact that some people within any one or all six of those sub-classes may be the so-called, "Uninjured claimants".

For instance, the one about which we've heard a fair amount during this hearing are the ones that the RHA accepts. There are some people out there who have had total pass-on, cost-plus contracts. In those circumstances, they don't have a loss, by definition.

Another one would be about which we've heard less but it is dealt with at length in the written materials, countervailing buyer power. There will be some people for some contracts on some occasions who have been able to counter away any potential overcharge by dint of their countervailing buyer power, and that's all the more so when you will recall that I took you in opening

to the uncontradicted evidence of Mr Belk at paragraph 66 and 67 where he explains that in the context of these sales, many, if not most of which are bundled the OEMs often do not make any profit at all on the actual truck which is the subject of the infringement decision because they make their profit on the other elements of the bundle -- for example the repair and maintenance contracts, and the -- et cetera, the buy backs and what have you, the financing arrangements.

So in all of those cases there are, very credibly, "On the basis of these facts", there are going to be some uninjured claimants, but Dr Davis --

THE PRESIDENT: Can I interrupt you just to clarify, on the cost-plus contract, am I right in understanding what you say? You say it must be at least nominal loss, not no loss. If the truck is used partly for cost-plus contracts but not exclusively, non-cost-plus, that would give some nominal loss. It would be only if it is used exclusively on cost-plus. Is that right?

MR HARRIS: Yes. That is right. I accept that. Yes.

And the problem is that if I'm right, therefore, that in the UK, on the basis that I put forward the same test, the In Re Asacol approach should be taken for the same reasons, then Dr Davis simply fails at the certification stage because he cannot identify and

exclude these people, so that's my point on the RHA.

As regards the UKTC, what I'm going to do now, slightly differently to my learned friends, is just identify for you some passages in the transcript of Dr Lilico's evidence that bear out the criticisms that were made by either me or my learned friends in opening.

I don't propose, given the time, that you actually turn them up, but I will give the references as I go through, and they will, of course, be recorded on the transcript.

On page 19 Dr Lilico admitted that the causal mechanism -- this is line 19 -- the causal mechanism for the creation of the cartel is built into the construction of the different models. Over the page at 20, line 8, he said the attribution is built into the model. Well, that's precisely our point. The model assumes the very answer that it is supposed to, in fact, identify.

Then on page 42 at lines 17-18, Dr Lilico accepted that there were, and I quote, "Challenges in unpacking that exact point". That was the point about countervailing buyer power. He was recognising that there is an inherent heterogeneity and individuality, and he simply says, well, that will be challenging.

Well, we say, with respect, that he hasn't addressed

it -- he can't in the context of his opt-out, and that is one of the reasons why the methodology is unsound and shouldn't be certified.

On page 48 at lines 14 through to 17 Dr Lilico said, for the first time on the question of transactional price data, well -- and I quote:

"Maybe you would be able to get some witness evidence that said, you know, it might well be that somebody knew that the dealer mark-up was typically X or Y".

A couple of pages later you asked him a question about that, Mr President, page 50, lines 4-5, and then he speculated that the -- and I quote:

"I'm imagining that maybe, there is some relevant industry expert".

Well, with respect, none of this is put forward by the UKTC. There is no such witness statement, and there is no industry expert. There is no methodology attached to either of them, and yet Dr Lilico was accepting, in my respectful submission, that that would be required. So that's another flaw in the methodology.

Moving on, what we have is on page 62, line 11, Dr Lilico was asked by you, Mr President, about the ways in practice of ascertaining how to take out, amongst other things, VOC for people who are excluded from the

class or who opt-out, and Dr Lilico simply speculated at lines 10-11 that:

"Either somebody opts out and they tell you".

Well, my submission, of course, was they don't tell you anything. They are not obliged to tell you anything. They just say, "I'm opting out". So that's a non-starter. Certainly there is no evidence for methodology to the contrary, and then Dr Lilico speculated, same line, " ... or if there is another action there will be a determination of how many are covered", but of course there are two answers to that. Number one, there may not be another action. Just because you opt-out doesn't mean you have to pursue some other action, and, in any event, some of these actions have yet to be started, and some of the ones that have just started are years away from trial and they bear no relationship to the timetable of this proposed collective, so that's not a safe basis of being able to take anything out at all, and there is no methodology to deal with it.

Over the page at 64, line 16, we heard for the first time, this was on the issue of, if you like, defunct companies, that there would be a so-called churn rate. Dr Lilico speculated orally -- we had not heard anything about this in any of his four reports, despite the fact

that this was raised fairly and squarely by Daimler back in the pleadings stage -- and although I will not read out every passage, on page 65, while discussing this new oral proposal of churn rate, he says things like:

"I would have thought ... might ... might ... if it turned out ... presumably ... you might ... probably".

It is entirely speculative on the hoof, and we say has no proper foundation. It's not credible or plausible. As you know, Daimler makes the strike out summary judgment application, which falls into that category as well.

Over the page on 71 at line 14, Dr Lilico said, and I quote:

"Instead, as my understanding of the process is that the dealer has a function much more like a broker so that the dealer, in fact, does own the truck for a few moments or a few hours ..."

And he goes on. Well, with respect, that's just wrong on the facts. He didn't cite any evidence for that proposition. It's entirely inconsistent with Mr Belk's evidence, and, moreover, my reading of the evidence from each and every other OEM, so his understanding is just wrong, and it gives rise to another problem that his proposal is not grounded in the facts, and has, "No basis in fact".

Then, on page 88 Dr Lilico was talking about the market practice of open book contracts, and he freely accepted at lines 5 through 7, and I quote:

"You would need to get disclosure from claimants as to whether they had these particular sorts of contracts in this particular sector".

But of course he has no methodology for doing that and, indeed, on their opt-out proposal they have no identified clients, and, indeed, as it happens, on their opt-in proposal they don't have any identified clients, so that's, again, a non-starter and then --

THE PRESIDENT: I didn't follow the last point, on their opt-in proposal. I mean, they wouldn't have identified clients until -- they could have done what the RHA did, but, I mean, they would get identified clients on an opt-in.

MR HARRIS: They would, but what I'm saying is that at this stage, when you are assessing the opt-in as the back-up alternative, they haven't even done what the RHA has done which is come to you and say, "Well, at least I did a sample from 42". They haven't got any, so that was the point.

THE PRESIDENT: Yes. Yes.

MR HARRIS: And then wrapping it up, just a couple more points, I think it may have been Mr Singla, perhaps

Mr Pickford, I think it was Mr Pickford, identified what I contend -- this is page 89 between lines 9 and 21, that Dr Lilico speculatively, orally, was prepared to say that in the case of pass-on, when you asked him about that, you would need to do some sort of econometrics. That's a quote, lines 9-10, and then he goes on to say:

"It may be ... it is probably: It is probably ... it is probably ... and it is probably", that's through to lines 21, and there are two problems with that. As Mr Pickford submitted, that's nowhere near specified enough, leaving aside that they don't seek to have it certified, but it is also standing in extremely sharp contrast with what Dr Lilico explained was his preferred, and indeed in his evidence, by far the best method for the principal economic analysis in this case, namely simulation for the purposes of overcharge, and we just point out that no explanation is being given, let alone a credible or plausible one, for why, suddenly, insofar as he addresses pass-on at all, it is obvious that it should be econometrics, albeit on a five-time probable basis, but as regards simulation -- as regards overcharge, econometrics was definitively rejected by Dr Lilico as being the suitable one. I accept he did say in back-up, around the edges, "I might do something

if I ever got some data", and then my final point relates to the problems with opt-in rather than -- I beg your pardon -- opt-out as opposed to opt-in in the UKTC case, and this is pages 90 and 91, and unsurprisingly Dr Lilico freely accepted on page 90, lines 17-19 and then again over the page that things are -- and I'm quoting:

"Some of the things are going to be easier if you have got some people to get data out of".

He was referring there to opt-in, and we say that that's -- although the opt-out proposal for UKTC is already completely hopeless for the reasons I addressed in opening, there is Dr Lilico essentially accepting some of the same points.

So unless I can be of further assistance, those are the brief submissions on behalf of Daimler.

THE PRESIDENT: Thank you. Yes Mr Hoskins?

Submissions by MR HOSKINS

MR HOSKINS: I think it's just me to bring up the tail end. Some brief words on the sub-classes.

Dr Davis' response to the Tribunal's questions on sub-classes simply confirmed that the RHA's six proposed sub-classes are based solely on Dr Davis' current methodological proposals.

However, as a matter of law, the Tribunal does not

need to identify particular sub-classes in order to permit an economist to pursue a particular methodology, and the inverse is also true. The identification of particular sub-classes as a matter of law should not constrain an expert's choice and scope of methodology.

So in our submission, the reasons given by the RHA for their six sub-classes should be rejected. There is obviously a separate issue for new and used trucks in relation to dealing with the conflict that's been identified, but sub-classes should not be identified simply because it's wrongly considered that that's necessary to allow a particular methodology to be pursued.

Two final points. If the Tribunal does order any sub-class, for whatever reason, it should make it clear that that decision on sub-classes does not tie the hands of the other economists in this stage as to the methodology which they believe is appropriate, and, furthermore, we submit the Tribunal should make it clear that any decision on sub-classes at this stage is not definitive because all the economists are agreed this is a matter that should be kept under review and, if necessary, should be visited later in the proceedings.

That's all I wish to say in relation to sub-classes.

THE PRESIDENT: Thank you very much. Thank you all for

keeping to time.

What we plan to do is just to deal with the question of Mr Perrin's short 7th witness statement and then we will take a 10-minute break before hearing reply submissions.

Can I say about the witness statement which we have looked at, most of it, it seems to us, really didn't add anything to the submissions we've heard, or the point that was made previously, namely that the funders have committed large sums of money and they are not, as a matter of commercial common sense and incentives, likely to leave the party they funded high and dry if the budget gets exceeded and more money is needed. All material that we've already got, such as the amount that has been spent to date which is in the updated budget that we've -- has been already in the papers before us, it seemed to us there are only two real new points at the heart of this. One is at paragraph 5 where he says that additional contingent funding has been committed, doesn't state the amount, and the second is, in paragraph 16, where he gives some detailed, limited detail of the economic viability threshold which everyone was aware of but it had been redacted as confidential.

As regards paragraph 5, we don't think that's

satisfactory. The amounts of funding was disclosed, and if it said that it's now been revised to some unstated figure, that should be disclosed, and it should be disclosed to the respondents just as the original figure was disclosed, so we won't place any reliance on that beyond the general point that's been made all along that the funders, even though there is a figure stated and committed, will be responsive to requests for more money because they don't want to, as it were, don't want the ship to sink in which they have invested so much.

As regards paragraph 16 we think that's helpful. This was something that had been treated as confidential. It gives a limited disclosure of the confidentiality which we think is in everyone's interests, so that's the view we take of the witness statement.

So we can hear any submissions from Mr Thompson that he thinks we should take paragraph 5 fully into account, and then from Mr Harris, I think, his solicitors wrote, or those instructing him, I should say, wrote a letter, and subject to that, if that's not pursued, we can hear any submissions about the rest of it.

So, Mr Thompson, that's, obviously, our views before hearing from you. Do you want to make any specific submissions about paragraph 5 of this statement?

MR THOMPSON: Sir, if I may, just by way of context, and I think as appears from the terms of the statement itself, the points that it addresses arose either from questions raised by the Tribunal or from remarks made by Mr Flynn and Mr Harris as to the alleged uncertainties in the UKTC funding arrangements and in the case of Mr Harris he effectively gave evidence from the bar that everybody knows why people enter into opt-out agreements, and in my submission that's a very inappropriate form of evidence and Mr Perrin properly gave evidence on an informed basis on that significant issue.

So far as paragraph 5 goes, I took the Tribunal to, I think, paragraph 13 of Mr Perrin's sixth statement, and it is true that effectively what it does is update and expand the position stated there in the light of experience since that statement was made some time ago, and to that extent, in my submission, it's something that the Tribunal can and should take into account.

In relation to economic viability, I think the Tribunal has already accepted that that is a useful --

THE PRESIDENT: Yes. Well, it's only paragraph 5. I mean, I understand why the statement is put in on other points. Paragraph 5, it does seem to me, speaking for myself, although we have discussed this between the

three of us, I mean, if it was going to update the material in that way, a lot else has been updated, that could have been done before we started and it could have been done in a way that doesn't have to be redacted.

MR THOMPSON: I think the point that is being made by Mr Perrin and I think the Tribunal will recall the nature of the submissions made by Mr Bacon at the funding hearing, that effectively nothing is ever enough, and so if we increased the budget by 25 per cent, Mr Harris would say that was outrageous and it should be increased by 100 per cent, and if we increased it by 100 per cent he would say 200 per cent, so clearly the funder does not want to be driven down that road, and so he has put it in the terms he has there, but I'm understanding that the Tribunal does not want to go down that path and have any information that's not available to anybody else, and I fully understand and respect that view, so I don't want to push it any further, and I don't think it is appropriate to do so either.

THE PRESIDENT: Right. Well, it's not about what submissions other people might make, it is either there has been an agreed, and it's not very clear, even from that paragraph, there has been an agreed revision to the 24 million to some other undisclosed figure. Well, that (a) could have been said earlier and (b) is

unsatisfactory put in such a vague way, and that's why it seems to us that's not something that's either particularly arisen from submissions made or satisfactory in that form, so that's why I would disregard it, as I have said, subject to listening to Mr Harris, so you needn't -- and what he wants to say.

MR THOMPSON: I don't want to say anything more. (Inaudible).

THE PRESIDENT: Just regarding the rest of it. Yes. Mr Harris, we won't have regard to paragraph 5. Do you want to object to the rest?

MR HARRIS: No, Sir, we gratefully accept the determination on paragraph 5. Very, very quickly, on paragraph 16, the economic viability threshold, I simply make one brief submission and that's all we need to do. I don't object to it being included. The 25,642 trucks in our respectful submission is a meaningless figure, because, of course, it all depends on what degree of overcharge is attached to any one truck, so whilst it is a figure that has been put in from our perspective, it is a figure plucked from thin air, and no reliances can be placed upon it in that sense, but I don't object to the introduction of the figure and for that -- and I accept the remainder of the statement. It was really paragraph 5, and that's been dealt with to our satisfaction, so

I can be quiet now.

THE PRESIDENT: Yes. Very well. So we will admit it, excluding paragraph 5. We will take a 10-minute break, we will be back at -- well, we will come back at 11.15, so slightly less than ten minutes.

(11.08 am)

(A short break)

(11.20 am)

THE PRESIDENT: Yes, Mr Thompson?

Submissions by MR THOMPSON

MR THOMPSON: Thank you, Sir. The two basic submissions that I'm going to make I don't think will surprise the Tribunal. The first is that there is no legal basis to refuse the UKTC application which fully satisfies each of the statutory criteria, but the RHA application, is, in our submission, undermined by a series of significant defects, the output being that the UKTC application should be granted whether or not the RHA application is also granted.

So on the first point there is no legal basis to refuse the UKTC application. Just to recap, UKTC and its advisers planned their application in May 2018 carefully to comply fully with the statutory requirements of the new damages regime. The class definition in particular avoids any and all conflicts

within its proposed class, while maximising the benefits to the members of its direct purchaser class.

Despite the best efforts of the manufacturers, UKTC's application complies fully with all of the requirements for certification, as set out in the amended claim form, the amended reply and the extensive witness statements of Mr Kaye, Mr Perrin, Mr Surguy and Mr Leonard and the four expert reports that the Tribunal now has from Dr Lilico as well as his oral evidence.

So, on the four main points, UKTC has clearly identified a claimant class that corresponds closely to the admitted infringement, plus a short and unchallenged run-off period.

Secondly, it's just and reasonable for UKTC to act as the class representative for claims relating to new, UK-registered trucks. It is a single purpose, Special Purpose Vehicle with no conflicts, funding, and extensive industry and professional expertise, and its chair and chief executive Mr Kaye and Mr Leonard, have explained the commitment of UKTC and its board to pursuing this issue to achieve a fair recompense for all its class members.

The UKTC claims raise a series of common issues of fact and law and resolution of those issues is much more suitable for collective than individual proceedings.

In summary, individual assessment of the common issues for the members of the UKTC class, the great majority of whom are small and medium-sized enterprises or individual, would, in reality, be very difficult or impossible. It would be highly complex and expensive if it was attempted by the High Court on an individuated basis, and any follow-on claims in the Tribunal would now clearly be time-barred and would be time-barred since 2018.

So I'm going to address six topics. First of all, the class definition and the class representative, I will take those together, then the expert evidence, then commonality and suitability which I will again take together, and opt-in and opt-out, then differences between the UKTC and the RHA, and, finally, the difficulties that we see in the RHA application insofar as the relative merits are considered to be relevant by the Tribunal as it is partly provided for in the rules.

I should, however, mention, since it has been held in terrorem, not only by Mr Harris but, on occasion, by Mr Flynn, the question of strike-out which made a fleeting and rather timid appearance just now at page 36, lines 2-6, and our basic position is not properly pleaded, it hasn't been properly pursued, and it is, in substance, completely hopeless.

Mr Harris' skeleton raises it in two completely different formats. In paragraph 1(a), {A/4/2} he raised it in very wide terms that duplicates the certification issues of commonality and suitability, complaining that we are seeking a top-down aggregate award and saying that that is somehow improper, although that's precisely what the legislation provides for, and that's precisely what his client, Mr Merricks, sought and is currently in the process of obtaining in his case, and then at paragraph 50, by complete contrast, at {A/4/9} he chooses a very narrow complaint about emissions technology and the relationship to fuel costs and the Tribunal will have heard Dr Lilico's position on that, but as a matter of theory he is somewhat sceptical about it, although as a matter of fact it is a possible further element in the claim, but we are left in the dark, really, what the purpose of this strike-out was, whether it was very wide or, indeed, what it adds to any of the issues that the Tribunal is required to determine, so I'm not going to say anything more about it.

Turning to the issue of class definition and class representative, we would say that there has been no real challenge to the UKTC class definition. Mr Jowell in particular has obviously thought about this issue in

some detail and made no complaint against the UKTC class definition at all, and nobody complained about the run-off period.

We say that the definition is clear and straightforward. It has no built-in conflicts or unclear boundaries, and the only challenge appeared to be a rather half-hearted suggestion from Mr Pickford on behalf of DAF that there might be some room for some form of double recovery in higher cases such as Ryder which he said at page 50 of Day 2, lines 2-12.

We would say that that's not the case. Either a claim falls within the scope of the UKTC class or it doesn't. One claim for new UK-registered trucks acquired during the cartel run-off period and by, "Acquired", as we've defined, it means either purchased or leased from the manufacturer or a dealer or finance house on a long-term basis.

If a claim does fall within the UKTC class, for example as purchaser or long-term lessee, then any individual claimant can decide to opt-out from or, alternatively, if it turns out in that way, opt into the UKTC proceedings, but if the claim doesn't fall within the UKTC class, for example the short-term hirer, a dealer or a finance house, then there is no conflict or double recovery.

There are only two subsidiary points that I should perhaps touch on -- cost-plus issue which was raised by MAN in its pleadings and it hasn't been pursued by MAN or any other manufacturer, and we would submit that it is a bad point on the evidence as against UKTC for the reasons given by Mr Leonard in his witness statement which hasn't been challenged or questioned.

Secondly, we agree with Mr Hoskins on behalf of Volvo and Mr Biro, his expert, that there is no need for sub-classes at this stage at least. Indeed, Dr Lilico and Mr Biro agree that it may be sensible to create a limited number of sub-classes at a later stage, for example large other small fleet buyers or hirers and hauliers perhaps would be obvious contrast, but none of that has been explored and it would be premature at this stage.

Just by way of clarification, if it is not clear, that the UKTC sub-classes, as used by Dr Lilico in his first report, were essentially adopted for presentational or statistical, rather than legal or economic purposes, although, as Dr Lilico points out, it is far from impossible that different categories of operator, for example long haul, short haul, might ultimately emerge as different and relevant, corresponding to different categories of operator. That

certainly doesn't need to be decided now.

Turning to the question of class representative, we would again say that there was no substantial challenge. No challenge to the arrangements that UKTC has made to manage the litigation, for example, the composition of its board or possible internal conflicts. The only challenge to the UKTC as a class representative appears to be the planning and future funding of claims management or sampling, and we would submit that they are essentially a rehash of points that were raised by Mr Bacon almost two years ago, in May 2019, and rejected in the funding judgment.

I may have got the date wrong. I think it may have been later in 2019, perhaps June or July.

UKTC relies on the general approach of the Tribunal in the funding judgment. We say it would be extremely unjust for UKTC to have the trouble of dealing with this issue in a three-day preliminary hearing in 2019, and on a subsequent appeal, then to revisit the issue after a two-year delay which UKTC has no responsibility at all.

Mr Harris advanced an aggressive criticism at the UKTC litigation plan, but his most concrete complaints seem to be that UKTC has not yet appointed an administrator or set up a claimant database.

We would invite the Tribunal to find these criticisms to be insubstantial and unrealistic, and premature at this stage.

We've made it clear that we've considered the issues carefully, but don't wish to waste costs pending the outcome of this application which has already been extremely time-consuming and expensive for reasons that the Tribunal will be well aware of. That's explored in Mr Surguy's second and third statement.

As a matter of law, we rely on the Canadian case law that we took you to and which Mr Flynn refers to in his pleadings, as to the correct approach to litigation plans at the certification stage, and also, as I say, to the general comments made by the Tribunal in the funding judgment.

On the facts, we submit it is appropriate to bear in mind that no disclosure has yet been made, including disclosure relevant to the settlement decision itself, and it is apparent that the manufacturers have a vast quantity of information and disclosure, some of which has already been revealed in the individual claims.

Secondly, the nature of the order that may be made is still unresolved, and, thirdly, in reality, the collective claims will take account of disclosure and rulings in the individual claims as the Tribunal pointed

out in the funding judgment.

As we've already referred to on more than one occasion in this hearing, there is a helpful checklist set out in Mr Lilico's fourth statement, building on other remarks in earlier statements, and that's F4, 8-9, but Dr Lilico explained to the Tribunal that he didn't necessarily think that all those elements would have to be addressed in full, and they would obviously have to be reviewed as the disclosure process proceeded, and a similar incremental approach is described in Mr Surguy's second and third witness statement, and we would invite the Tribunal to find that to be an entirely appropriate approach in a complicated case of this kind at a relatively early stage.

If the case is ultimately an opt-in case, then, as I think the President suggested this morning, some sampling of claimants might be appropriate from the claimant class, but, equally, as discussed with Dr Lilico yesterday, and reflecting the size of the class and the nature of the industry, it may be more appropriate either to use public industry data or to deduct more focus sampling on particular subsets of claimants where specific issues are identified.

We would say, and I will come to it again, it is a benefit of the opt-out approach, and of the aggregate

award, that issues are viewed at industry level which are much more likely to be representative and also where published data is much more likely to be available in relation to a mixed bag of claimants who may ultimately come forward.

I will not say any more about the statement from Mr Perrin, but we obviously rely on it as background to the step that is being submitted.

As the Tribunal is aware, the status of expert evidence is the next topic which I will take before addressing the legal questions of commonality and suitability, which has been a vexed issue. As the Tribunal knows, it is referred to in rather general terms in paragraph 6.13 of the guide, but, in practice, in a case of any size, it's clearly a critical question in relation to commonality and suitability.

We would submit that the expert methodology of Dr Lilico provides additional support and strong support for its application. It is obviously a matter for the Tribunal to assess his evidence, both written and oral, but we would submit that Dr Lilico is a highly experienced expert who has clearly considered the issues that arise in this highly unusual case very carefully and in great detail.

In his evidence to the Tribunal, he explained his

view as set out in his four reports that simulation modelling is a recognised methodology, and I don't think that's disputed and couldn't be disputed given the academic writings of Mr Noble and Dr Davis themselves, that he considers to be the best way to estimate quantification of loss on the particular facts of this case. We submit that that reasoned opinion explained both in writing and in oral evidence is entitled to respect.

This case differs from the standard case of a cartel that's relatively limited in time and space, so that comparators can be used either from adjacent time periods or adjacent geographic markets. One might take an example of a cartel geographically limited to Wales or Scotland, or lasting only a few months or a few years.

Dr Lilico has set out a detailed explanation of his reservations about the potential limitations of a regression analysis on the specific and exceptional facts of this case, and he has explained his approach carefully and fully in response to the Tribunal's questions. We would invite the Tribunal to find that he was open in his answers and made it clear that he didn't exclude the use of other methodologies to compliment his preferred approach.

More specifically, he gave a careful explanation of his concern that the outcome of a regression analysis might not give any clear result, or might result in wide error bars, and he gave the example of the difficulties caused between the cartel period and the post-cartel period, matters that might be very difficult to control for.

He also discussed with Dr Bishop a number of ways in which simulation modelling could be used, and I will summarise it in three ways. First of all, as a direct comparator based on the conditions of competition prevailing outside the cartel period, secondly, as a way of modelling a but for situation within the cartel period with the position outside the cartel period acting as a constraint on the in-cartel period resulting in a check on the validity of the model, and, thirdly, as a way of confirming the model by testing its ability to predict outcomes in other periods of the infringement, or, indeed, outside that period, and from that perspective the length of the infringement is obviously an advantage rather than a disadvantage because there are a lot of contrary issues that can be tested, or contrary temporary issues that can be tested.

We would say that in each case an advantage, however unusual, of simulation modelling, is that it's not

a purely statistical correlation between prices where the question is can the statistical correlation be sufficiently confidently correlated to found a finding of causation out of the cartel, and on this sort of case Dr Lilico's concerned that that may or may not give clear results, particularly for the early period of the cartel, given the lack of data in that period, but it is also a way, simulation modelling is also a way of modelling the impact of this infringement on this market, and it also allows maximum use of the available data as to the nature of the infringement and of the market, including the extensive information and binding authoritative information from the settlement decision itself.

We would say it's not appropriate for the Tribunal to refuse to certify on the basis that it has expressed a general preference or a different or a common approach in other cases, and particularly not where those other cases were all non-collective cases with different methodological requirements.

Then finally, and it is really the converse point that I think was made by Mr Harris, or possibly Mr Pickford, we would say that it was a very revealing element in the discussion with Dr Davis that he was ultimately constrained to accept that simulation

modelling would be an alternative if it wasn't possible to identify a clear comparator. Although he suggested that this would be a last resort, he was notably unable to explain clearly what post-cartel period he would use for any regression analysis, or how he would identify the difference between a potential claimant and a potential comparator, or, under questioning from the President, to identify any other credible comparator that could be used instead of the during/after methodology which itself appeared to be uncertain.

In their submissions, both written and oral, the manufacturers have relied extensively on a case called Chadha on the basis that there is a dictum in that, that the expert in that case assumed that he was required to prove. I don't know if the Tribunal has had a chance to look at that case. I can give the Tribunal the reference and we can go to it if necessary but I'm obviously concerned about the time. The case is at Joint Authorities 86, and if I could give the Tribunal the references, it is paragraphs 1-3 and 46-48 and 52, pages 3 and 5-6.

There are a number of rather obvious points of distinction with Chadha. First of all, this is not an indirect purchaser case, and that's a point that was made in the important case of Pioneer v Godfrey at

paragraphs 106, 116 and 230 of Joint Authorities 108, page 76-82 and 142, that Chadha was an indirect purchaser case. Just on the facts, it concerned a single component in the manufacture of some types of bricks used for house building, and an allegation from a house purchaser that the cartel for the ingredients in bricks had caused the price of its house to increase.

So the claimant was seeking certification on a class-wide basis with no expert evidence explaining how the increase in the price of the single component in bricks could impact the housing market, either generally or in relation to houses using the relevant type of bricks.

By contrast, Dr Lilico is expressing his expert economic opinion, but the natural assumption is that collusion on future gross list prices for new trucks throughout the EEA is likely to have affected prices to customers of new UK-registered trucks, i.e. direct purchases within the cartel. He considers that to be a standard economic expectation which he himself shares, i.e. that a future list price cartel will affect not only list prices but also transaction prices for the relevant products. The manufacturer's experts may disagree with that, but that's a matter for trial, not for now.

What is important is that Dr Lilico is not assuming without explanation that a cartel in relation to a component using the manufacturer of some EEA trucks could have affected the costs of some or indeed all such trucks, for example a special sort of rubber or steel used in the manufacture of some trucks. He is basing his opinion here on the nature of this cartel as found on this market and in relation to direct purchasers of the cartelised products. So in my submission Chadha is of no assistance to the Tribunal whatsoever and the distinction is more revealing than the authority itself.

The other point that has been pursued is Dr Lilico's position in relation to pass on, or UKTC's position more generally, and there are two preliminary points which I think Mr Pickford, with respect, didn't really address. The first is that the position of the RHA is strikingly different from UKTC.

In relation to UKTC, the pass-on issue that the manufacturers wish to raise is effectively a mitigation defence against direct purchasers. In relation to the RHA, they have a mixed bag of pass-on issues, some positive, some negative, some that they advance, and some that they defend, and that's the issue we raised in relation to paragraph 77 of the amended claim form in the opening submissions.

The other point is that Mr Pickford doesn't seem to distinguish between pass-on, so a cost being passed down the chain to a customer, and umbrella effects that may lead to prices of a competing product to go up which might be other new trucks not within the cartel group, or possibly used trucks, and that's not a question of pass-on, although it may well arise as an issue in relation to the marginal competitors, and possibly in relation to Scania in relation to this case.

We say that UKTC in fact has a perfectly clear position on pass-on, and the Tribunal, or certainly the President, will recall the facts of Merricks, and certainly Mr Harris and Mr Hoskins will also recall it, where there was, in fact, an upstream pass-on from acquiring banks to merchants where MasterCard accepted that there was a straightforward pass-on there. That's at paragraph 14 of the Merricks judgment at JA68, page 7, and we would say there was a similar, equally simple issue of upstream pass-on where a manufacturer sells its trucks to a dealer or finance house, and leases that truck either temporarily or as the basis of a long-term leasing arrangement with a haulier or hiring firm. In such cases there is no basis for the intermediary to do anything otherwise than to pass on the cost of the truck and thus any overcharge to the purchaser or lessee of

the truck, i.e. the UKTC class member.

Mr Harris made some reference to a witness statement of Mr Belk, and he didn't give any specific reference and when we looked at it, it didn't seem to cast any light. It is a straightforward point. Perhaps a more straightforward point is that so far as I'm aware, no claim has been made against MasterCard requiring banks, or if it is manufacturers, from third party dealers or finance houses who sold trucks to members of the UKTC class.

On the other hand, there are also a number of possible other types of downstream pass-on that may or may not be raised by the manufacturers, both in respect of the acquirers of used trucks and the recipients of services provided by truck owners or lessees. Our consistent position, both in our pleadings and the evidence of Dr Lilico, is that it's for the manufacturers to plead and prove their case on this issue, including any methodology that they intend to rely on for this purpose, and as a matter of authority we would rely on paragraph 44 of the Ryder disclosure ruling which is at JA64, page 17, and the Tribunal, the President, may recall that an indication was made that {JA/64/17} that the manufacturers should suggest what their methodology is for pass-on, and we would say by

analogy, the methodology for pass-on is a matter for the manufacturers to specify as part of their defence, not for UKTC to guess whether they may put forward a good or bad methodology. Clearly our preference would be for a bad methodology on that question but we don't yet know what they are proposing to do. Until the manufacturers have actually and specifically pleaded pass-on, it is logically incoherent to expect UKTC to explain precisely how it will deal with the specific pleading which may or may not be made, or the methodology that may or may not be advanced.

At this stage, Dr Lilico has explained that he is well aware of the possibility that he may have to deal with pass-on if and when it is pleaded, and he gave some indicative indications, both orally and in his first and second reports at F/1/48 and F/2/21 to 23, and we would submit that it is fully sufficient at this stage for UKTC to say, as Dr Lilico confirmed in his oral evidence, that UKTC has been considering possible ways in which the issue might be addressed along with the interrelated issue of volume effects.

Just for the Tribunal's reference, the question of volume effects was, in fact, anticipated in the amended claim form at paragraph 56.1 at B/1/27. It was referred to in the amended reply at footnote 39 at B/2/30, noting

that the defendants haven't pleaded their case on the issue one way or the other. Dr Lilico mentions it in his first report at page 48, and in his report where he gives a graph, page 23, looking at the trade-off between possible pass-on and volume effects, depending on the nature of demand on the market, and, finally, I would note that in Sainsbury's, I think it is a point that I took the Tribunal to in opening, the paragraph 218 which is at JA/66/62, where the Supreme Court considers the issue of volume effects and gives the general -- makes the general observation that it considers that such an issue would rely on economic opinion evidence and would involve imprecise estimates, so it appears to confirm that the -- a very broad axe, if I can put it that way, is likely to be appropriate in relation to volume effects, which, of course, is entirely consistent with our aggregated approach to damages more generally. So we say that there is nothing in Mr Pickford's complaints about pass-on.

If I now turn to commonality and suitability, first of all I think Mr Singla took the lead on commonality and Mr Harris on suitability, particularly on Day 2 in the afternoon.

We would say that the commonality requirement is fully and obviously satisfied. First of all, there was

some erroneous submissions on the law from Mr Singla who, for some reason, took all the law back to front, and referred to a number of Canadian cases until the Tribunal pointed out that this was a UK court and so the judgment of the Court of Appeal was more relevant.

Taking it the right way around, it may be worth just looking briefly at the Court of Appeal judgment in Merricks which is at {JA/60/22}.

THE PRESIDENT: Yes?

MR THOMPSON: It is, first of all, the passage at B-C from paragraph 46:

"As indicated above, there is no requirement under section 47C(2) to approach the assessment of an aggregate award through the medium of a calculation of individual loss and the appellant's experts have not attempted to do so".

At 47:

"To require each individual claimant to establish loss in relation to his or her own spending and therefore to base eligibility under Rule 79 on a comparison of each individual claim would, as I have said, run counter to the provisions of section 47C(2) and require 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".

In my submission that's entirely contrary to Mr Singla's suggestion that where both the question and the answer must be common where, like UKTC, we are seeking an aggregate award. It's possible, and I don't know whether Mr Flynn wishes to advance this, that paragraph 47 leaves open the position where, like the RHA, you are not seeking an aggregate award. You could read it as saying because of the possibility of an aggregate award, you don't have to have a common answer, or you could say where there is an aggregate award being sought, you don't need a common answer.

For my purposes, that doesn't really matter. We say that you don't need a common answer in relation to this question.

THE PRESIDENT: Could I just pause for a moment? I have just been handed a message about the technology. Just a moment. (Pause)

Sorry to interrupt you, I have just been informed that there is a technical problem, apparently. It doesn't affect people who are now logged in and participating on Teams or watching the livestream but if you disconnect from either you may not be able at the moment to reconnect. It's being looked into. It

obviously doesn't affect any of the counsel who will remain logged in, though if we do take a break or -- I will hope it can be resolved over lunch, but I just advise those who are observing, either on the live stream or on the Teams platform, if you log off as things stand you may not be able to rejoin, so you may want to leave your connection running, even if you have to leave for a few moments.

Sorry to interrupt you Mr Thompson.

MR THOMPSON: Not at all Sir, I was just concerned that nobody could hear me, but --

THE PRESIDENT: No, no. I think everyone who is in is fine. Apparently people can't join now and if you leave you may not be able to come back.

MR PICKFORD: I do understand that some people have actually got booted out. Mr Williams QC I think has been booted out of the system but obviously I'm still here and I'm listening.

THE PRESIDENT: Yes. Well, I'm reluctant to -- sometimes these things are resolved more quickly, sometimes they prove more troublesome. I haven't the slightest idea, obviously, what the cause is, let alone the remedy, so I think if we've got our transcript running, I suggest we carry on. If I get a message that a lot of people are missing out, we might have to pause.

MR PICKFORD: Understood.

THE PRESIDENT: Yes, Mr Thompson, you were saying that Merricks, paragraphs 46-47 are contrary to Mr Singla's submission that the answers also have to be common as well as the questions, and you left open the possibility that this might apply to opt-in as well as opt-out.

MR THOMPSON: I think the point I was making was that this is authority that at least where you are seeking an aggregate award, then the implication of that choice and the terms of 47C(2) means you don't have to have common answers. You just have to have the sufficiently common question.

THE PRESIDENT: Yes.

MR THOMPSON: And in relation to the Canadian case law, we looked at a number of cases, but in my submission it doesn't assist the manufacturers either, and that the position is sufficiently summarised in the judgment of Pioneer v Godfrey which I referred to a moment ago, and, in particular, at paragraphs 103-106, and that's at tab 108 of the Joint Authorities. {JA/108/1}. You will see it is the judgment of the Supreme Court of Canada. It may be that the Tribunal has looked at it before, but the relevant passage starts at page 74 under the appropriate heading, "What is the standard required to certify loss as a common issue", and then at 103 it sets

out the relevant legislation, then in Microsoft, which I think is also Pro-Sys, and it refers to principles derived from Dutton, which I think Mr Singla referred to, and then it goes on, 105, approving the earlier, or agreeing with the earlier approach in Vivendi says:

"The common success requirement in Dutton should be applied flexibly. Common success denotes not that success for one class member must mean success for all, but rather that success for one class member must not mean failure for another. The question is considered then, common, if it concerned to advance the resolution of every class member's claim, even if the answer to the question, while positive, will vary among those members".

Then there is a long quote from Microsoft, and then I have also made the point just a moment ago in relation to Chadha that the references to Chadha make it clear that it was significant in that case that they were indirect purchaser cases, but I will not make that point again, and perhaps for the Tribunal's note it's worth referring to another case, Shah, where the same issue is discussed in the Ontario Court of Appeal, I think, at paragraph 101 of Joint Authorities 106 at page 41, so in my submission there is no tension between the UK authorities line and the Canadian line and that there is

no need for common answers to common questions, it is merely that you can't have inconsistent answers which may be relevant to Mr Jowell's various criticisms of the RHA class definition which, to some extent, UKTC agrees with and adopts.

I net that there was also a concession which ties together the expert evidence and this commonality principle where Mr Singla appeared to accept that if Dr Lilico's methodology is acceptable, then the commonality principle was satisfied, and that was at Day 2, pages 115-116. I think he was trying to gloss these reasonably clear statements of principle with some sort of link to the merits of the expert evidence. I do not see much in that in the law, but by way of concession then we obviously -- and you have my submissions on Dr Lilico's evidence.

Mr Singla also suggested at one point that UKTC's position was that it didn't really matter about anything because the only relevant principle was the broad axe principle. He said that at pages 100-101. Not quite sure where he got that from. It's true that broad axe appears in our pleadings, but it also appears in the judgment of the Supreme Court, and we are content to apply the law as it is stated in Merricks, including the Pro-Sys Microsoft test in respect of expert methodology.

As a matter of substance, we say that the UKTC application raises a host of issues, most centrally the relationship between list prices and transaction prices, and the role of emissions technology in the cartel infringement. The legal issues are addressed in the recitals judgment, and we would accept that in due course that it is likely that there will be common litigation arguments and in particular (Inaudible) arguments and we would anticipate that there may well be common issues of volume effects, as I have just explained.

There are two particular issues I should just touch on, first of all interest and secondly tax. I think in opening, our primary position was that this is all premature and essentially matters for distribution of final quantification, but I do note two points. One is the issue of quantification damages, Dr Lilico proposed a simple approach of compound interest that he addressed in his first report, but it is obvious that there are different approaches that are possible, both common and with a degree of individuation, and those can be considered later in the proceedings.

So as far as tax goes, there is quite extensive tax law on tax treatment in complicated cases, and we've included the relevant section from McGregor at section

18. It is at JA/150.1/1, and in our submission the most relevant passage is paragraph 18.20 at page 11, and this paragraph suggests that at least in complicated cases the courts have adopted, or traditionally adopted, a pragmatic approach, so the case we referred to, Deeny v Gooda Walker is a case about Lloyd's names where I think there were 3,000 Lloyd's names, and there Potter, J as he then was adopted a fairly broad brush approach intending to ignore any differences in taxation between the profits that would have been earned but for the infringement, and the treatment of the damages received by the claimant. Or that's how it would transpose to the present facts.

Our basic submission is that the collective proceedings are likely to be an extreme case where this broad brush approach is appropriate. For example, in particular, that tax should effectively be treated as a common issue and ignored, because it is far too complicated and disproportionate to address it, but our basic point is there is no need to resolve this issue now.

So then turning to suitability, we would say that the UKTC claims are obviously more suitable for collective than individual proceedings applying the test in Merricks, and Mr Harris made some general

observations about the differences between top down and aggregate cases and individual cases, and to the extent that he was intending to reflect the Tribunal rules and a ruling of the Supreme Court in Merricks, perhaps unsurprisingly we don't take issue with the general point that it's relevant for the Tribunal to consider whether the claims do indeed raise common issue and are suitable for resolution on a collective basis, and, in particular, on a top down or aggregate basis.

We would say that applying those legal tests to the UKTC application, we would say that both its claims and any defences that may ultimately be run are more suitable for aggregate award or top down analysis and a collective approach than for individual assessment on the basis of a compensatory principle. We say that, realistically, it is the only way to address claims of this scale and scope for the reasons given by the Supreme Court in Merricks.

Just mentioning it, I think it is implicit in Mr Harris' submission, that he was contrasting the position in Merricks with the position here, and we would submit, respectfully, and without taking sides in Merricks, that Merricks cannot be regarded as a paradigm case for a collective claim, either in terms of commonality or suitability.

As noted by the Tribunal at various points during the hearing, and in its original judgment and also, clearly expressed in the concerns of the minority judgment of Lord Sales and Lord Leggatt, the Merricks claims are extremely disparate, but the majority of the Supreme Court and the Court of Appeal didn't regard that as fatal to the practicability of the collective claims.

I note that the majority of the Supreme Court did not disagree with the Tribunal's expert assessment at paragraph 68-78 of its initial judgment, JA 54, pages 25-27, as to the difficulties that would, in due course, face the Merricks experts in pursuing their methodology, and those problems have not gone away.

The Supreme Court simply considered that the legal threshold for certification on an issue of this kind was, in reality, an extremely low one.

Mr Harris referred to a case called Kett, and I think invited the Tribunal to read a number of passages from it. I don't know whether it's going to assist the Tribunal to go to the Kett case or whether the Tribunal is sufficiently familiar with the facts. It is at JA/110, and the facts are summarised on page 4, paragraphs 1-7.

THE PRESIDENT: Mr Thompson, we have read it. We didn't think it is of great assistance.

MR THOMPSON: No. If I could take that very briefly, we would say it was an extreme case on the facts, both in terms of diversity and lack of commonality, and we note that the court specifically contrasted the facts of that case to those of a price fixing cartel in three different places, four different places -- paragraph 130, 158, 165, 184 -- both in terms of commonality and in terms of the litigation plan which, in that case, it addressed at paragraphs 205-208 in terms of page references that's 36, 44, 47, 51 and 59-60, and our basic submission is that Kett is, in reality, much more of a problem for the RHA and Dr Davis in that the degree of granularity that appears to arise in Dr Davis' methodology could be argued to undermine the suitability of the RHA claim without collective proceedings at all, as Mr Singla pointed out in his submissions on Day 3 and has appeared at least partly to be raised by Professor Wilks during Dr Davis' oral evidence on Day 4 at pages 124 and by Mr Jowell at pages 159-163 in that the level of granularity implicit in Dr Davis' methodology appeared likely to generate really very small groups of differently-placed truck purchasers and hirers in quite idiosyncratic situations which does raise the question of whether the approach in Kett is actually quite comparable to some at least of the ways in which the RHA

puts its case.

THE PRESIDENT: Well, we have to say we didn't think Kett was of great use for either application, but it seemed to be a very, very different kind of case.

MR THOMPSON: In relation to volume of commerce which is a concept that Mr Harris is much attached to and has raised on a number of occasions in his written and oral submissions, again, we would say that the position is, in fact, exactly the opposite to that stated by Mr Harris contrasting the position in Merricks with that in this case.

As we understand it in Merricks, the volume of commerce was not all derived from MasterCard transactions, but also included cash and visa purchases made at retailers accepting MasterCard and so, as I understand it, you would need the total sales data from all merchants accepting MasterCard to establish the value of the commerce as the starting point for the assessment of their claims, and you would also need data from third parties to deduct the various pass-on issues that were raised by the expert methodology. In my submission there is an adverse contrast to the present case where, apart from umbrella sales, and possibly sales by Scania, the manufacturers before the Tribunal must have the data for most if not all new UK Trucks

that they sold or leased between 1997 and 2011 falling within the scope of UKTC's class.

Even if some sales records turn out to be incomplete for the earlier periods, for example, there are a variety of other public sources that have been used to fill in any gaps in identifying which trucks were sold when and for how much.

Dr Lilico has always made it clear that he would adjust the volume of commerce to take account of the best available evidence, the transactions and the size of the UKTC class, whether opt-in or opt-out, including from direct sales or, if available, from manufacturers' evidence and monitoring of discount levels, or possibly by additional data sought from dealers, or possibly by claimant sampling.

If the manufacturers wish to argue that some of those other services were cheaper because the trucks are more expensive, for example the dealers gave away more of their retail margin or manufacturers gave more favourable finance deals as a side effect of the cartel, whether because they are complements to new trucks or for any other reason, then that, again, is a matter for them to plead and prove in their defences.

Likewise, if the manufacturers wished positively to argue that one or more of them cheated on the cartel by

offering other services more cheaply to avoid the effects of the cartel, that's, again, a matter for them to plead and prove, and we can't anticipate that now.

THE PRESIDENT: I didn't quite follow that when you say, "Cheated", on the cartel. There is a limited element of price fixing in the decision, the agreement on charges for Euro emissions, but for the most part it was an agreement to exchange gross list prices, so unless the prices that were exchanged were not actually the gross price, they were fabricated prices or false prices, there is no cheating, given what you actually -- what discounts you give and what prices you charge, is there?

MR THOMPSON: I'm obviously not privy to the thinking of the manufacturers, but I think it is a reasonably well known phenomenon that people cheat on cartels and then there is a question as to whether that gets them off the hook when they are --

THE PRESIDENT: Yes.

MR THOMPSON: -- all I was doing, and it is obviously a back water for present purposes, is that one possibility would be that the list and transaction prices will all be in accordance with the cartel and nobody would be complaining about that, but one of the cartelists was giving favourable buy backs or --

THE PRESIDENT: Yes.

MR THOMPSON: -- as a way of cheating on the cartel and stealing a march on their competitors.

THE PRESIDENT: All I'm saying is that I don't think for the most part the cartel -- this is the big problem with the overcharge in part, not the only problem but one of the problems, is that the prices exchanged were generally not transaction prices.

MR THOMPSON: I understand that, and that would obviously be -- perhaps, I would anticipate -- one of the most significant common issues that will need to be decided as to what the relationship was between the list prices that were colluded on and the collusion in relation to emissions technology, and what impact that can be anticipated to have had in relation to transaction prices, so I certainly accept that that will no doubt be a fiercely-fought, if not the most fiercely-fought topic at trial, both in the individual cases and in the collective cases.

THE PRESIDENT: Yes.

MR THOMPSON: So, overall, in my submission and obviously drawing together both the points I made in opening and in my written case, we would say that this was an eminently suitable case for a collective action, and, indeed, more suitable in some respects than the Merricks case, as it were a paradigm case for a collective claim.

I turn now to opt-out/opt-in. The first point I make is legally it arises as an issue for the Tribunal once it is decided to grant UKTC's CPO application. It is then required to decide the basis on which it certifies the proceedings. One sees that from section 47B(7) and Rule 80 which set out the approach that the Tribunal was required to make in its order. It's not a statutory criterion for certification or refusal of certification on the grounds of commonality or suitability which one sees in section 47B(5) and the specific rules are at Rule 79(2).

By contrast, suitability for an aggregate award is a relevant factor for overall suitability, Rule 79(2)(f). Having made that legal point we submit that an opt-out and an aggregate award are the better options as in Merricks and for the reasons we have given.

First of all we say it reflects the approach of the Tribunal in the individual cases themselves, and, in particular, its disclosure ruling, that, in reality, and contrary to the rather broad submission from Mr Harris, these are, indeed, issues that need to be considered on an aggregated and top-down basis, as envisaged by the Court of Appeal and the Supreme Court in Merricks, and I'm sure the Tribunal is very familiar with these passages. It's paragraphs 57 and 58 and 76 of Merricks

at pages 22, 23 and 28, and paragraph 41 of the disclosure ruling, JA/64, pages 16-17.

Then looking at individual factors in favour of opt-out, first of all, as I submitted in opening, opt-out is preferable for individual claimants in two important respects. First of all, it is financially preferable, and that it involves the sharing of risk with the Funders and Weightmans whose recovery ranks behind that of individual claimants, and is subject to endorsement by the Tribunal pursuant to section 47C(6).

This is an advantage both against the UKTC opt-in claim, but, in particular, against the RHA opt-in claim which is notably less advantageous to individual claimants than UKTC's opt-out claim, and that's in two respects which were slightly blurred in the initial discussion. First of all, the RHA opt-in claim makes provision for multiple recovery of the funder's investment before there is any recovery by the claimants, and, as I understand it, a minimum fee in practice is likely to be £81 million, being three times the projected investment of £27 million, and one finds that at C/41 page 4 and C/45 pages 1-3 for the latest arrangements in relation to the minimum recovery, and then it is also secondary in priority to the funder's percentage which is taken in advance of claimants'

recovery, and in this respect that's the case under the the UKTC and the RHA opt-in arrangements. In relation to the RHA it's at C/41, pages 29-32, paragraph 3.2 and I think I gave you the UKTC references in opening.

So it is financially preferable, and it also avoids any arguments on limitation which I have raised throughout as a concern, and I note the various individual cases that have been brought in dribs and drabs since the UKTC application in May 2018, many of them apparently driven by limitation concerns. The RHA itself says that it brought its portmanteau proceedings in the High Court in March last year because of limitation concerns at paragraph 49(c) of its skeleton at A/2 page 23, and the dates of the most recent individual claims appear to be driven by the date of the commission press release in relation to this investigation of 20 November 2014, and there has been a flurry of claims issued at the end of last year, just before the six-year deadline expired in relation to that press release, whether correctly or not. I'm certainly not making any concession on behalf of anybody in relation to that press release, but I certainly note that it appears to have triggered further claims, and, indeed, Mr Harris has put in evidence about this at tabs 24 and 25 of bundle M, I don't know if we have much

reference or explanation as to why it was so late, but it does make the point, and the press release is at K/0.1 page 1 which sets out the background.

So it's preferable for individual claimants in that they are financially better off and they avoid tedious disputes over limitation, but it is also, in our submission, preferable for the Tribunal and for the efficient conduct of the litigation, and thus ultimately for the defendants as well as the claimants for the reasons set out in Merricks in relation to opt-out claims and aggregate awards.

We say for a class of this size and diversity and scaling, opt-in is, in fact, likely to lead, first of all, to wasted initial costs as the claimant class is constituted, and, secondly, to additional costs and complexity during the proceedings as the Tribunal has to assess the nature of the opt-in class rather than the character of the UK Trucks market as a whole, which is a large class for which a significant volume of industry-wide data is already available. We say that the use of industry-wide statistics is much fairer and easier for all concerned than the creation of bespoke materials created to reflect the characteristics of an opt-in class which may or may not be representative of the overall class and there is obviously evidence in the

settlement decision itself and the Scania decision, that's for example, at section 1.3 and section 3 of the settlement decision at K2, 8-9, and in the Scania decision, sections 3 and 4 at K3, 10-16, and we've also provided evidence in terms of survey evidence from 2012 at B27/2 which gives detailed evidence as to the composition of the trucks market. It's obviously much easier to do that at the industry-wide level because that's what everybody looks at. Nobody says, "I wonder if somebody is going to bring an opt-in case in five years' time", and so data simply won't be available in relation to subsets who may ultimately opt-in.

So opt-out allows the Tribunal to review the character of the infringement as a whole against the character of the UK Trucks market as a whole in accordance with the guidance of the Supreme Court in Merricks, and then turning back to Mr Hoskins' and Mr Biro's contribution, any material differentials that are identified by the parties or by the Tribunal during the litigation process can be dealt with by the Tribunal or by the parties by the agreed creation of sub-classes, as Mr Biro and Dr Lilico agree, or by any directions that may be needed at the award stage, for example the different categories of claim or to take account of specific issues that might have emerged in relation to

interest or tax, or, indeed, specific provision of a deceased person or dissolved companies.

There is one issue in relation to dissolved companies in particular that we've thought about a bit more since my opening submissions, which is a discrete issue of bona vacantia in relation to dissolved companies, and we've considered that as class representative on behalf of all members of our proposed class.

Then our position is that claims are assets of insolvent as well as solvent companies, and the estates of deceased as well as living persons, and we are concerned, as class representative, to represent the interests of all members of our class.

In the particular case of the company that's dissolved and can't be returned to the register, or indeed can be within the six-year period, our general understanding is that the assets of the company become bona vacantia and therefore accrue to the Crown as represented by the bona vacantia section of the Treasury Solicitor. We submit, at least provisionally, that a possible procedure would be for the Tribunal to notify the Treasury Solicitor of the issue so that it could make representations at the first CMC, and even if the Treasury Solicitors aren't interested, which seems

unlikely, given the possible sums involved and the issue of principle that it involved, then we can make suitable submissions at the first CMC.

We certainly submit that it would be premature to rule out any particular category of claims at this stage, although it might be appropriate in due course to make specific provisions in the calculation of any aggregate award once it is clearer what the factual position is and, in particular, the position that the Treasury Solicitors are taking, and the scale of any issue that remains, and Dr Lilico gave some general view as to the likely methodology that might emerge if and when the factual position is clearer. And, indeed, the legal position.

Then finally in relation to opt-out and opt-in, and there has been a good deal of evidence going both ways on this between parties and, indeed, between the RHA and the UKTC, we remain -- our position remains that individual claims aren't, in reality, a viable alternative to UKTC's opt-out CPO, and that an opt-in would, itself, be likely to leave significant gaps which are contrary to the purpose of this regime.

As we've explained in our reply, in particular at paragraphs 215-219 at B2, 74-75, the non-collective actions that have taken place so far based on the

settlement decision are overwhelmingly comprised of claims for more than ten trucks, or ten trucks or more, and so far as we can see, the late addition of Daimler's further analysis of -- or micro analysis of the A to Z claims bought at the end of last year doesn't materially alter that position.

So the position that emerges, that despite Daimler's and the RHA's best efforts to discredit the UKTC opt-out application, there remains a very substantial number of trucks falling within the scope of UKTC's class which would be unaccounted for in any of the individual claims so that if UKTC's opt-out CPO isn't granted, many small business claims will go uncompensated, contrary to one of the central purposes of the statutory regime with which we started.

I think the battle of the evidence only goes so far, but it is a document I haven't referred the Tribunal to so far, but in fact my solicitors, I think Mr Surguy has explained in his witness statements, have actually gone to considerable efforts to contact the solicitors in the various individual claims and to try and work out how many claims they actually relate to that fall within the UKTC class, and I don't think I need to go to it at this late stage, but the table is at B28.1 which sets out the best information that we have coming into the hearing

including the Constantine Cannon cases that were started in November last year, so that's the position on the facts.

So that's what I wanted to say about the opt-out/opt-in issue. That, then, takes us to the, perhaps slightly unseemly issue of the relative merits of our claim as against the RHA claim, but it is obviously an important issue for the Tribunal to grapple with.

The first point is it appears to be common ground with MAN who have taken the lead on this issue, or a degree of common ground that could, in principle, have two collective claims that are different classes arising out of the same cartel. For example, in general terms, direct purchasers and indirect purchasers could each have a separate claim and a separate class representative of new and used trucks. Indeed I think this morning Mr Jowell seemed to be edging towards the possibility of having effectively two collective claims, one for the new trucks and one for the used trucks. That, of course, could be achieved by limiting the scope of the RHA claim which does include used trucks.

The main issue for the Tribunal is which is the most suitable class representative for the new trucks claims, i.e. the UKTC class. Whether or not two representatives

could, in theory, be represented, the differently-defined classes, for example the purchasers of used trucks or fire engines or something of that kind, but on the issue of relative suitability, we submit that the answer is a clear one. We say that the contrast between the incoherence of the RHA class definition and the coherence of the UKTC definition is a strong plus factor for the UKTC application, plus factor being one of the words used by -- expressions used by Lord Briggs in Merricks.

We submit the UKTC is clearly the most suitable class representative for claims falling within its class definition, i.e. for new UK-registered trucks.

As explained in my opening submissions, the RHA does not cover all such claims, and, secondly, it has a series of clear conflicts in advancing such claims.

It may assist the Tribunal if I explain what it is we are and are not seeking, and if I did it by way of example, you could take a company which has a fleet of 20-40 trucks over a year depending on seasonal demand. So of that 40 trucks you might say that it purchases 10 outright out of its own funds, so those would clearly be within the UKTC class. It leases five from the manufacturer for six years using manufacturer finance arrangements. Again, that would be within UKTC class.

It leases five more for six years using third party finance. Again, that would be within the UKTC class. But it also hires in 10 or 20 trucks on a seasonal or weekly basis, for example, to meet summer or winter peaks, and we would say, no, those are not within the UKTC class, even if they were new when they were taken out, they were purchased by somebody else, and most of them will be used trucks, so they fall outside the UKTC class.

We say by contrast, RHA's claim involves a series of difficult conflicts and uncertainties which would go beyond the points that Mr Jowell has raised in his submissions. To take a not unrealistic example, a large multinational haulage firm could have bought both new and used trucks throughout the period from 1997 to 2019. It could have both UK-registered and non-UK-registered trucks. It could have both its own haulage fleet and it could hire in other trucks from large and small fleets on long and short-term bases, and it could also subcontract haulage to smaller businesses as and when demand is high, including on a cost-plus basis, and we would submit that it is apparent from Mr Burnett's first statement, particularly paragraphs 32-34 at C/4, 12-14, that this is an eminently realistic scenario, and that the problem for the RHA, as understandably given its

status, it has tried to meet all of the demands of all of its members, and, in particular, the demands of its largest members and claimants.

This creates obvious conflicts. First of all for other persons who have acquired new trucks from the manufacturers during the cartel period, but also for individual claimants themselves where their interests are internally incoherent, particularly in relation to new and used trucks, so, for example, an individual company may have bought ten new trucks in 2005 and sold ten old ones to another claimant, and then sold another ten in 2010, so it will have, obviously, inconsistent claims in relation to all of those trucks, depending on who it sold them to and whether those people had sold them on to somebody else or hired them on to somebody else.

The second problem is that RHA's approach systematically discriminates against hiring firms in favour of haulage firms, despite the fact that hiring firms may have substantial claims for new trucks, and this is an issue that has been before the Tribunal since 2019 in the case of the charter hire company that wrote to the Tribunal and whose letter is at B29/2. That emerges from the class definition and the exclusion for companies whose primary business is in hiring rather

than haulage.

So a firm that's only or primarily engaged in haulage can apparently claim not only for new and used trucks, but also for trucks hired on a long and short-term basis, and for services brought in on a cost-plus basis where it doesn't even own the truck at all, in each case based on alleged pass on of costs from other claimants and/or hiring companies that own or operate those trucks. By contrast, on RHA's approach hiring firms, even if they also provide haulage services, are apparently excluded from RHA's claims altogether in at least some years, and maybe altogether, and even if they can bring any claims at all, they face a range of inconsistent pass-on cases from an indefinite number of other members of the RHA class who hire out those same trucks from time to time. So on the UKTC's approach, hiring firms can claim for all their new trucks, as and when they buy or lease them, and haulage firms can also claim for all their new trucks. (Inaudible) for all of the various hiring arrangements from other members of the UKTC class. The effect is that I have to say this was a very deliberate decision, the UKTC has avoided all of the conflicts that beset the RHA class definition.

We say the RHA approach not only creates conflicts

within the class, and discriminates against certain categories of new truck buyers, it also creates very considerable uncertainties as to the scope of the class that don't arise on UKTC's class definition. Again, one might do that by way of example.

Given the RHA class definition and its long run-off period, what is the position of a business that started buying trucks only in 2013 or 2014? Is it a member of the RHA class or is it, in reality, some sort of comparator of what might uncharitably called, "Cannon fodder", for Dr Davis' various regression analyses, or is the position going to remain uncertain as to the state of this company until Dr Davis reaches a view one way or the other about where he intends to have a cut off.

To give another example, what if the firm is engaged in both hiring and haulage and it bought 100 new trucks during the cartel period, but the majority of its turnover in one or more of the years was in hiring, for example, in 2012 or 2005, or, indeed, in 2019, or 2021. Would such a company be excluded altogether from the RHA class because of earning too much money from hiring, would it include it sometimes for some years, and if so, which ones? We say that there is just a hopeless unclarity, not only unfairness but also unclarity in the

RHA's class definition. So we would say overall that our case not only passes the relevant legal tests, but it specifically passes the test of being the most suitable way of bringing a claim for new trucks. Indeed, it is a highly suitable way, and we would say, with respect, that the RHA's approach to new trucks is effectively unsuitable, not only for the reasons given by Mr Jowell, but also the reasons I have just given.

We submit that the RHA not only in relation to class definition, but also in other respects, with respect, the application contains a number of serious defects, and one can come at it in a variety of ways, but one way is the heterogeneity point that the manufacturers are so enthusiastic about, and we say that contrary to the submissions of the manufacturers, the problems with the RHA application do not originate from the heterogeneity of the UK trucks market, but rather from the heterogeneity of the RHA class definition, and also from the strategic choices made by the RHA presumably at an early stage, in their approach to three issues, first of all quantification of loss, secondly pass-on, and, thirdly, the sign-up process.

We say that the RHA's major problems are four-fold. First of all, the incoherent class action that I have just mentioned, secondly the decision not to seek an

aggregate award, thirdly their inconsistent approach to pass-on, and, fourthly, their unsatisfactory approach to the sign-up process.

I have obviously already made a number of submissions in relation to class definition, but our overall submission on the defect is that it is driven by the needs of the RHA membership and its recruitment drive, not by economic or commercial logic, or the provisions of a statutory scheme, and I have referred the Tribunal to the approach reflected in Mr Burnett's first statement at paragraphs 32-34 at C4/12-14.

Just to pull together the threads of the points I have been making at greater length just now, first of all the RHA has wrongly excluded hiring firms altogether, despite the fact they obviously purchased significant numbers of new trucks during the cartel period, but the RHA has also wrongly included a number of categories of claims that are mutually inconsistent.

New and used trucks, trucks acquired not only during the cartel period but during the RHA's arbitrary and excessive run-off period to May 2019 leading to an ambiguity in their class, and problems with their expert methodology, and I should say that the run-off period that they have chosen is truly arbitrary. There have been some references in Mr Flynn's submissions to our

case being arbitrary, but their actual cut-off derives from the date on which these applications were stayed, pending the Merricks appeals which one finds in paragraph 37 of the RHA ACF, amended claim form at C/1/15, and I don't think anyone could say that that was anything other than an arbitrary date.

By contrast, as I said in opening, our approach to run-off is carefully considered and reasonable, and doesn't appear to have been questioned by anyone, and that's at paragraph 140 of our amended claim form at B64.

The third category that causes problems is short-term hire arrangements of all kinds which are inconsistent with the claims of the owners or long-term lessors of those trucks, and creates an enormous multiplicity of actual and potential claims and class members and all sorts of inconsistencies. That's reflected in paragraph 7.5 of the RHA draft order at C10, page 3.

The next category, which is the unexpected arrival of services received from other hauliers allegedly on a cost-plus basis, which inevitably undermines the claims of the suppliers of those services who actually owned or leased the relevant trucks, and that's the passage we looked at from footnote 24 of the amended

claim form at C1/27.

Then finally, and I think this is a section which the Tribunal has already indicated is not particularly (Inaudible) is foreign truck purchases which, as we understand it, only appear to relate to a small proportion of the RHA claims, and apparently their largest membership case, and may explain why they have been included, but it would lead to a wholly disproportionate (Inaudible) costs for the class as a whole and that's reflected in paragraph 5 of the draft RHA order at C10, page 2.

I have already said that to some degree we accept and endorse some of the criticisms from Mr Jowell, but I was also listening closely to Mr Hoskins' submissions in relation to sub-classes, and our submission would be that these fundamental problems with the RHA application cannot be solved by creating sub-classes or tinkering around the edges of the RHA claims.

As Mr Hoskins explained, the statutory provisions for the creation of sub-classes are discretionary for the Tribunal, but they relate to sub-classes of class members, not to sub-classes of claims. One sees that in the definition of, "sub-classes", at Rule 2 of J11/4 and in Rule 78(4) of J11/20.

The problem for the RHA is that the various

different categories of claims that the RHA wishes to bring are overlapping and mutually inconsistent. For example, they include claimants who bought new, used or both categories of trucks in different proportions and at different times. As such, the use of sub-classes cannot be used to address the incoherence and internal conflicts that beset the RHA application.

Now, the second problem for the RHA is that it based its collective claim deliberately and despite indications from the Tribunal, it has maintained that position, on an individualised assessment of loss. In our submission that loses the main purpose for collective regime as described in Merricks.

Now, as Mr Singla in particular pointed out on Day 3 at pages 69-71, and, indeed, to some degree this morning, most of the advantages of a collective approach identified by the Supreme Court in Merricks are lost in a case of this size and scope if the class representative is seeking to justify individual awards of damages in accordance with compensatory principles.

Our submission would be that it emerged from the very candid oral evidence of Dr Davis that the exercise he proposes will be enormously complicated and expensive and the manufacturer has already made it very clear that it is likely to be challenged by them, either as

inconclusive or as fundamentally unfair, and inconsistent with the compensatory principle, and then Mr Harris has made the point that it may also mean that it will have people who are not in fact entitled to any money, receiving money which would be contrary to the compensatory principle itself, and thus the effect of the collective regime has effectively been nullified by this choice.

Again, I will not make the point again, but I have already referred to the Kett case. We would say that it was much more germane to the issues that are likely to arise in relation to an individualised assessment of loss for hundreds of thousands of claims than for a collective claim that's made for an aggregate award in accordance with the principles set out by the Supreme Court in Merricks.

The third point, I think it's something I have touched on already, it appears obvious that the RHA has not adopted a clear or consistent approach to pass-on. So far as we understand it, despite the amending of the pleadings and then the deleted paragraph, the RHA has a positive, but in our submission, incoherent case on pass-on for used and sub-hired trucks, and I think for cost-plus services, which is undeveloped and unexplained, that leads to obvious in-class conflicts.

The second stage, the RHA is seeking to avoid downstream pass-on being certified as a common issue at all, notwithstanding the fact that for another purpose it is, itself, advancing a positive pass-on case, and we would say that the debate over whether or not paragraph 77 meant something different from what it appeared to mean, whether it should be amended or deleted, confirmed that the RHA hasn't got a clear account of what its position on pass-on is between members of its class, or, indeed, at all.

Then the final point, no doubt Mr Flynn regards it as one of the strengths of his application, but in my submission it is also a troubling feature of the application, that the RHA sign-up process has a number of troubling features, some of which relate to the incoherence of the class.

The first point is that because of the run-off period it appears that approximately a third of RHA's claims, something in the order of 150,000 claims, relate to a period after 2011 which raises the question of whether or not claimants are actually being signed up for the RHA class without either any claims or without -- or with the preponderance of their claims in fact more likely to be candidates for Dr Davis' regression analysis, or at least possible candidates,

than they are to actually receive any money, so one could envisage someone being rung up and saying, "The good news is you have got to give Dr Davis a lot of information about your truck prices, but the bad news is you are not going to get any money", and in my submission that's an unsatisfactory feature of the run-off and the approach that the RHA has taken to recruiting people.

That might be an innocent issue if, once it emerged, claimants could get out of the RHA proceedings, because as I understand it, the RHA positively asserts that claimants who have signed up to the RHA proceedings are locked in, even if some or all of their claims are not ultimately pursued in these proceedings, and possibly at all, and even if RHA's collective application isn't granted. That appears to be the effect of clause 2.6 of the members' agreement, and Mr Flynn's suggestion that it would be a bit of a power play if RHA's application weren't granted. That was at Day 1, pages 132-134.

The RHA seems to be suggesting that it would try to compel members of its proposed claimant class to participate in individual High Court proceedings involving higher levels of risk and costs, and that don't appear to fall within the scope of the funding agreement that's been provided to the Tribunal, and

despite the clear emphasis in all of RHA's marketing materials that the RHA was seeking a CPO under the CAT's new collective regime. Some of these points we've made in our skeleton argument, but we also note that during the hearing the Tribunal has observed on more than one occasion, for example at Day 2, page 33, that in collective proceedings the Tribunal itself has a quasi-fiduciary role towards class members and potential class members, and we would submit that a class representative in its relationship with its members must have serious, if not stronger fiduciary duties, given the extent to which they are managing claims on behalf of members of the class.

We would say that it is hard to see how the RHA could be said to be acting consistently with any such duties, or, indeed, its contractual obligations under the LMA if it refused to release persons who signed up if the CPO application were refused, particularly if the UKTC was offering those persons the advantages of a section 47B process on the basis of which the RHA had signed them up in the first place, whereas the RHA was no longer offering those advantages.

Putting the matter more broadly, it appears that the RHA is threatening to act against the best interests of its members, and that draws together the various points

I have made that the UKTC proceedings have a number of significant advantages that would be of benefit to individual claimants. This draws together a number of the points I have already made.

First of all, the UKTC has a clearly-defined class, and an agreed run-off period, apparently accepted as such by Mr Jowell and by Dr Davis himself. Apart from being arbitrary, the UKTC run-off period and its class more generally, has been carefully considered and it is fully justified.

Secondly, all new truck acquisitions are within the UKTC class, whether purchased outright or on long leases, and whatever their intended use. The class has been carefully designed to avoid conflicts within the class.

Thirdly, the only positive pass-on UKTC is arguing for between dealers or body builders or finance houses, and as I have said one can compare that to the issue of the banks in Merricks. Dr Lilico's methodology is a general application to the entire cartel period, whereas Dr Davis' during and after methodology will face particularly difficult issues of attribution to the early part of the cartel period, particularly if the RHA run-off period is actually used.

We say the UKTC distribution methodology is entirely

straightforward and intuitive, based on relevant outlay on a year-by-year basis during the cartel period, and finally, and this is a point we've come to on a number of occasions, the UKTC opt-out arrangements are strongly protective of individual interests with substantial risks being borne by the UKTC solicitors and funders.

Those were the submissions I wanted to make, both positive and to some degree negative. I see the time. I don't know whether I might -- since I'm ahead of time, be allowed to take instructions from the various interested parties and make brief submissions after lunch. I think we are well within the timetable, and so I would submit that I will not be more than ten or fifteen minutes after lunch if that's acceptable to the Tribunal, and then we could rise now and either start at five to two or at 2 o'clock as the Tribunal sees fit.

THE PRESIDENT: Mr Thompson, that sounds very sensible. It's now almost 1 o'clock, one minute to one. I think we shall resume at 2 o'clock, and you can have a little time then, having conferred with your team.

MR THOMPSON: I'm very grateful, Sir.

THE PRESIDENT: 2 o'clock, and can I, just before we rise, metaphorically, just find out about the technical situation? Just a moment. (Pause)

MR PICKFORD: So, speaking on behalf of Mr Williams, who

obviously was my particular concern, he has managed to get back in, and as I understand it there was a Microsoft-wide problem with Teams, and it seems that at least at our end that's been addressed. I obviously can't speak for others.

THE PRESIDENT: Yes. Well, the safest course is that you just turn off your camera and microphone, but don't log out so you keep the connection. It's good to hear that it seems to have been resolved, but whether that applies to everyone I just don't know, but if you do that and don't actually log out, then everyone should be safe. 2 o'clock.

(1.00 pm)

(Luncheon adjournment)

(2.00 pm)

THE PRESIDENT: I'm told the problem to which I referred earlier should not affect the livestream at all which is independent of the Microsoft Teams link which I think Mr Pickford informed us it was a Microsoft problem which we believe has been rectified, but, obviously, I can't give any guarantee about that.

Clearly, everyone at least who is appearing seems to be still on the platform. Mr Thompson, you are allowed a little longer, if you want it.

MR THOMPSON: Good afternoon Sir. I suspect it will be

welcomed all round. I have only one very short point to add. The Tribunal will recall that I was making some comments on the litigation management agreement, or I think that's what it's called, at C/25 of the bundles, {C/25/1}. I will just give the Tribunal the references. Clause 2.6 and clause 3.1(a) is, I think, what I called, "The lock-in arrangement", and also an obligation on the part of the RHA to carry out its agency in such manner as it thinks best to promote the interests of the claimants and then clauses 9.2 and 11.2 give a Right of Termination on three-month notice but also set out the cost consequences, that's at {C/25/15} and 16, and I'm simply trying to draw the Tribunal's attention to the fact that there isn't a strictly analogous arrangement on the part of UKTC because we don't have any such -- sort of pre-CPO sign-up agreement or process. The equivalent, insofar as it is equivalent is in the updated company rules which are at 3.18.1 and in particular, the provisions of clauses 4 and 5.

THE PRESIDENT: 3.18.1 of what?

MR THOMPSON: I'm sorry, B18 Sir.

THE PRESIDENT: Oh, B18?

MR THOMPSON: Yes, which are the updated company rules which are exhibited to Mr Surguy's witness statement, and they're the draft class member rules, and they apply in

the event that an order is made and they set out the position of class members and the obligations of class members in that situation and that's at {B/18/7} through to {B/18/10}, so that was purely by way of information in case the Tribunal wishes to compare and contrast, and so that was the only other point otherwise --

THE PRESIDENT: Just one moment. B/18, one of the class member rules, which obviously only applies for opt-in because opt-out you won't have that relationship, and then you say at B/18 -- I mean, I'm just trying to understand what these are.

MR THOMPSON: Yes. I didn't want to detain the Tribunal, it was more for the Tribunal's note, but if you look at clause 4 you will see there alternative provisions in relation to opt-out and opt-in.

THE PRESIDENT: Yes, but -- I see. For an event -- but for opt-out it will only apply for those who opt-in who are -- is that right? I'm looking at the very beginning. The heading on page {B/18/2}:

"These apply in the event that authorised proceedings are opt-in proceedings", and someone has opted in, or:

"In the event the authorised proceedings are opt-out collective proceedings has claimed their entitlement to a share of the recoveries or who has opted in in

accordance with the terms of the CPO".

So it has limited application for opt-out, more for those who are domiciled outside the UK at the time of the order, but opt-in because they come within the class definition.

MR THOMPSON: Yes, although it also sets out a process for opting out at 4.3, but I think that's probably, in practice, governed by the terms of any order that the Tribunal might make.

THE PRESIDENT: Yes. But it is a rather different -- yes.

MR THOMPSON: Yes. I think the short point is there is no equivalent procedure in place now, as it were. It is entirely conditional and governed by the terms of any order, and I think that was the only point I wished to make apart from commending the points that we've made already, which I think I possibly don't need to do, so unless I can assist the Tribunal further, those were our submissions.

THE PRESIDENT: Thank you very much.

So, Mr Flynn?

Submissions by MR FLYNN

MR FLYNN: Thank you, Sir. Good afternoon to the Tribunal.

I'm going to focus on objections to -- taken to our application, and I'm going to take them in two groups. Firstly, the sort of overarching or knock-out points

that are taken by the respondents that would, as it were, scupper our entire case, so going for the suitability of the class representative, commonality, expert methodology and so forth, and then in the second part I will address the points that take pot shots at particular aspects of our claim.

I wasn't proposing to say anything about the UKTC application or to repeat anything I said on the law on competing CPO applications. I would just say, I don't know if it was a slip by Mr Thompson, but he mentioned a strike-out application. Just for the record, we haven't made or threatened any strike-out in relation to UKTC, even if we could, so I'm not quite sure where that came from.

THE PRESIDENT: I think it was a strike-out by -- suggested by Daimler, not by the RHA, I think.

MR FLYNN: Yes. Well, certainly there is that, but Mr Thompson referred to both Mr Harris and to me in that connection, so if -- just to avoid any misunderstanding.

MR THOMPSON: Just to clarify, I was not suggesting that Mr Flynn had made any application, but I think two or three occasions he made the point that he hadn't confronted any summary application from anybody else. That was the only point I was making. I wasn't suggesting that he had himself made any application of

that kind.

THE PRESIDENT: Thank you. Yes. Mr Flynn, you needn't worry about that.

MR FLYNN: Sir, it sounds as if I don't.

The other thing I was not going to say anything about, because you didn't invite submissions on it from my learned friends, and vacantia I probably don't even have a right to reply, is foreign trucks, EEA trucks, where you know our position and it may be, it may not be, that we know yours, Sir, so I'm not proposing to say anything more about those unless asked.

So, in the first part of what I want to say, the overarching points, as it were, I'm going to basically deal with commonality and suitability together because they have been approached in a somewhat mixed way coming at it by different angles by various of my learned friends, and then say a few things about the issue, increasingly confused issue, possibly, of pass-on.

THE PRESIDENT: And just to be clear -- we are getting quite an echo, but -- so I will say little, but -- thank you -- on the issue of conflict which has been raised quite a lot, that comes under overarching or particular points that you are going to respond to?

MR FLYNN: I'm going to respond to it in the second half because the conflict -- the most focused aspect of it is

the new and used point which I would take as not a threat to the whole class, but a way of attempting to persuade you that the scope of our claim should be cut down, and that's certainly the way Mr -- my learned friend Mr Jowell put it this morning, so I was proposing to spend some time on it, but later on, if that's acceptable to the Tribunal.

THE PRESIDENT: No, that's fine. Take your own course as you anticipate addressing it. That's what we would like.

MR FLYNN: Without doubt, Sir. Yes. I couldn't get away with not addressing that one, I think.

So picking up submissions variously made by Mr Singla for Iveco and Mr Pickford for DAF and Mr Harris for Daimler, as he correctly pronounces it for us, we say, of course, the attack on our claim, I think it's fair to say is less acute than on the UKTC's claim, but we, nevertheless, need to deal with it.

I'm going to make a couple of legal points and then delve into the main issues, I think, that come up under commonality and suitability, being Dr Davis' methodology and whether it's more appropriate for our claims to be brought in individual actions or less appropriate that they be brought in collectives, depending on whichever end of the telescope you approach that particular point.

I may not need to spend a lot of time on the law, but certainly Mr Singla, last week, if, perhaps, less so today, spent a considerable amount of time on his point that there has to be a common question and also a common answer, as he called it, and answer, not only the question but the answer must be same, similar or related for each proposed class member. I mean, I probably don't need to give you references, but that was a strong theme of his submissions.

We responded to that, of course, in our amended reply. I will just give you a reference for your note. I don't think we need to turn it up, but it is paragraphs 29-43 of the reply at C/3/14, and our position, I think, clearly stated, is that following the Court of Appeal's judgment in Merricks, which remains the leading authority on this aspect of the law, that there are two requirements to be satisfied. First, the common question, there must be an issue which arises in the claim of every class member, or, indeed, sub-class member, if there are sub-classes. Second, there has to be a methodology capable of resolving that issue on a common basis which has a real prospect of success. That's the Merricks language, and the Pro-Sys version of that is a methodology which has some basis in fact or grounded in the facts one sees elsewhere.

Now, it may be common ground, and Mr Singla seemed to be saying at times that, actually, our position was the same as his. We think it is possible that his ultimately collapses to being the same as ours, but we don't agree on the common answer point, because we think that's, at best, a misleading way of putting the issue. It's likely to lead you up a blind alley.

The methodology has to be capable of resolving the issue on a common basis. That's the key issue, and as you pointed out in discussion, Sir, with Mr Singla, the answer to the common question may be quite different as between class members, and that's what we see from Merricks.

So the whole class in Merricks you have to resolve the pass-on issue, but the degree of it will exhibit enormous variety, wide divergences, as Lord Briggs said. That's paragraph 33 of his judgment.

However, whether or not there is common ground between myself and my learned friend, Mr Singla, he does seem to be saying that the commonality requirement will not be satisfied if you get different answers in individual claims, and you will recall that they, extensively in their pleadings, say that the overcharge issue is only going to be common in cases that involve commoditised products without material differentiating

factors between suppliers and customers. You can see that in -- I have got references, Sir -- 33, paragraph 33 of their amended reply, {D/1/14} and paragraph 95 of that, {D/1/32}, and you will recall repeated references to the perhaps unhappy case of the replica football kit, and this is where, I think, the heterogeneity argument comes in, referred to, again, extensively today as well as in submissions before.

So we don't think that the issue of overcharge in this case is not capable of being a common issue because of the heterogeneity of the market, meaning that the answer may differ between members of the class. That's inconsistent with the judgments in Merricks, so the issue for you is whether there is a credible methodology for resolving the overcharge on a common basis.

Before looking at that in a little more detail, perhaps I can just say a couple of other things on the law, just to preface the remarks.

It is not correct to characterise our position as being, if we are not facing a strike-out, then we are home and dry, and certification is, as it were, in the bag. We spent considerable time responding to and explaining our position in relation to that statutory criteria that the Tribunal will have to be satisfied by, including matters such as funding, the litigation plan

and so forth, but all these criteria, we say, reach their limit in these certification proceedings if what is, in fact, being done is an attempt to bring in a higher merits test than one that exceeds the strike-out standard, because certification is not about that, and the Supreme Court has been absolutely clear about it.

So as regards the methodology, obviously the methodology isn't itself a legal claim that's, as it were, strikable as such, but the question is, does it enable the class representative to present the Tribunal with a reasonable prospect of showing that the represented class has suffered a significant loss, more than a nominal loss, and heterogeneity has got to be looked at in that context. It can't go beyond supporting an argument that our methodology doesn't meet that test, and so -- and likewise, when we are told, well, the RHA can't get -- they can't get this piece of evidence, or we won't have -- we, prospective defendants, won't have that sort of data, that's only relevant if the respondents can convince you that without that -- without those pieces of data there is no way that the RHA in this particular case would have a reasonable prospect of proving the necessary level of loss to the class, and that's what -- that's how Lord

Briggs dealt with the data availability point which, to an extent, rode again to some extent in the submissions of my friends having earlier been abandoned following the Merricks judgment. We had a bit more about data availability this morning.

So just looking at our methodology, and what Dr Davis proposes in his detailed reports and in his fulsome answers to the Tribunal yesterday, it is important to bear in mind that those against us, the respondents and objectors, do not make and disavow any root and branch attack on what Dr Davis proposes to do. There is no suggestion, it is said, that his methodology is not credible or plausible per se, and that's quite an important concession. They recognise that the methodology is, in itself, plausible, and has a plausible basis of establishing loss to the clients.

So it is a contradiction to recognise that and yet say that we are not putting forward common issues for resolution. The way they do that, the prism through which they attempt to make that argument, is, of course, heterogeneity, and possibly the difficulty of observing unobservable factors, and perhaps another point that's made about the methodology is that it won't produce a result that is sufficiently individuated to be compensatory. As I said in opening, the criticism is

not individual enough, and in my submission that's not a valid criticism to make of our approach.

The final sort of threshold point on this, this is not the time for the battle of the experts. Mr Singla recognised that, and then went on to make extensive comparisons between what Dr Davis has to say about heterogeneity and what Dr Durkin has to say about that, and in our submission that's inappropriate and it definitely is not the time to do it.

Focusing in on what Dr Davis actually proposes to do, we heard again from Mr Singla this morning and from Mr Harris, to the effect that what Dr Davis intends to do is examine average overcharges at class or sub-class level, put them into six buckets and apply averages, I think is the crude summary of what has been said.

Dr Davis was unequivocal yesterday. He said, so, in no uncertain terms that that's not actually what he is going to do, and his reports, in my submission, made it clear, make that perfectly clear, but at transcript from yesterday, page 122 line 25, what he said is:

"Some of the contentions which are being put forward are that what will come out of the regression analysis is necessarily only an average overcharge across the entire sub-class. That is not right".

That's what he said.

The methodology that he proposes aims, as we've said before and perhaps I don't need to belabour this, but aims to estimate individual damages at the level of each member of the class, and at the level of the individual truck that each class member purchased or leased, and that's done through the transaction price regression that no doubt will be the focal point of the analysis as per discussion with Dr Bishop yesterday, the transaction price regression uses individual data on prices, on truck characteristics, demand and supply, characteristics of the class members, and other matters, all estimated within the regression model, and the parameter values that are used within the regression model used data from more than one class member, but that is an advantage. It means that the individual predictions for the class members, relying on these parameter values estimated as averages for the subsets, and in some cases narrow subsets, is a positive feature and enables the estimation to be more accurate.

Let me just say that when Dr Davis was speaking at that point of -- I think he phrases it in terms of, "Subgroups", I don't think that's to be confused with, "sub-classes", a point to which I will, of course, return later, but sub-classes, as used in the legislation, is a different issue. He is talking about

how he cuts the data, and at page 123 of yesterday's transcript, line 4, he said he would allow for an interaction between characteristics of the claimant and the dummy variable so that the overcharge can be estimated separately for at least, in principle, if we have enough data for different subgroups of claimants within a sub-class, and that's what I would expect to be able to do, so that in the end the damages estimate for an individual truck in an individual sub-class will depend on that individual's data.

Now, insofar as I understand that, and I say he is the expert and it's not me, it's not a matter of simply averaging the overcharge at the level of the class or the sub-class level, and he considers that it is an advantage of the model of using a data set that reaches across the proposed class members in each sub-class. He uses the whole sample to learn about and better reflect individual experiences. For example, negotiation of prices and, you know, learning across a relevant sample will enable him to be more accurate in assessing the extent to which differences in sizes, for example, between class members will have an impact on the prices that they secure in their individual transactions.

Now, you heard Dr Davis and you are better able to debate these things with him than I am, but perhaps I

could just give you some references to his reports on these particular points for you to follow up on, if this is an issue of concern to -- when dealing with the arguments that are being made against his proposed methodology, so in his first report I would point you particularly to paragraphs 32, 98 and 153. That's {F/5/15}, is the first one, and then page 52 and page 78 within those bundles. In his second report at paragraphs 146-151, that's in {F/7/67}, and in his fourth report, paragraphs 117-125 and to 133, and that's {F/9/56} and following.

So that said, when one considers heterogeneity -- I have just about managed to say it now, in a couple of hours I may have more difficulty but I hope not to be troubling the Tribunal in a couple of hours -- there is a factual dispute about this. There is a factual dispute about the real degree of heterogeneity in this market. You have seen Mr Burnett's evidence, but his second witness statement at paragraphs 5-9, which is {C/7/2} and his fourth statement at paragraph 6-20 which is at {C/9/2} are evidence on this point, and, in my submission, this is not a factual issue that the Tribunal can, and I suspect does not want to, resolve at the hearing. That's going to be a major issue for trial, but as far as the economic methodology is

concerned, it is also crucial that Dr Davis has expressed the view to you that he can, adequately, control for the heterogeneity that is present, and the case law tells you that you should, with respect, place considerable weight on his view. Other experts may disagree profoundly, but the time for that battle is not now.

Dr Davis thinks he can recognise these unobservable factors which he can account for by the use of appropriate proxies, and his view, clearly, and you discussed that with him yesterday, is that the respondents overstate the extent of heterogeneity, and, also, misstate how it would be addressed in the methodology, so the number of different possible body lengths or axle weights or other variants in trucks in the table to which he was taken, shouldn't be confused with the number of variables that have to be in the model to explain that, so the sort of multiplication of all these possible variants produces, no doubt, an impressive number, but that's not reflected in the complexity of the model which would need to take account of it.

The next point about averaging, having put it in context and explained the degree of averaging or otherwise that is inherent in what Dr Davis intends to

do, let me start by making, or repeating a legal submission that I made in opening. It is an important point that section 47C of the Act permits the Tribunal, as it knows well, in collective proceedings, to make an award of damages without undertaking an assessment of the amount of damages recoverable in the respect of the claim of each represented person. That's very clear language, and I think it means what it says, and it does not refer to aggregate damages or an aggregate award, and it plainly, as you said, Sir, and we've discussed this, so maybe we don't need to go on about it, but it is equally possible to make an aggregate award in opt-in proceedings as well as opt-out, and section 47 it is C that applies generally, whether or not an aggregate award is sought. An, "Aggregate", award meaning, for these purposes, as we've always made clear, a single amount of damages for the whole class, a single number as sought in Merricks.

So my submission remains that in the statutory scheme there isn't a binary choice between aggregate awards on the one hand, and we know all about that from Merricks, and wholly individualised awards of damages on the other, where you have to treat each claim as if it were, in effect, a High Court claim and adhere absolutely strictly to the compensatory principle.

That's not the nature of this new regime, and in my submission there is, or can be, a sliding scale which allows a degree of averaging or approximation, even if no single aggregate award is sought, and, in my submission, that is one of the aims of the collective proceedings regime. It is proportionate to approach cases on this basis. It allows proceedings to be litigated in a fair way, and in a sensible way, subject always to the Tribunal's powers and its version of the overriding objective, as Lord Briggs pointed out, and proportionality is an important issue in this sort of proceedings, with many claims being brought under one -- I shouldn't say, "Umbrella", but one aegis.

Averaging is, of course, or econometric approaches are, envisagable in individual actions, and the Tribunal is -- we've heard much reference to the Tribunal's approach in the individual track actions, and I understand that a similar approach was going to be taken in the settled power cables litigation when there were well over 100 transactions which were -- or projects -- which were to be examined, but to -- as I understand it, the trial judge, Rose, J, as she was then was in favour, or perfectly prepared to countenance an average overcharge approach, and the BritNed case that I think Mr Singla referred to was, of course, quite different

because, as you pointed out, Sir, there was just one contract, and so averaging is -- this isn't just a broad axe sort of point, it's a point founded on the terms of the statute but it is entirely consonant with the broad axe principle, and everything that Lord Briggs in the Merricks judgment drew from that to arrive ultimately at the statement that, really, it is the court's duty, however hard it may be at times, to quantify genuine claims doing the best that it can with the evidence that is before it, recognising that there may be gaps and imperfections.

I say all that to counter the suggestion that's come in a number of forms from my learned friends that because we are not seeking an aggregate award, what we are actually doing is bringing a whole lot of individual claims that have to be assessed on an individual basis, and we can't prove it.

In my submission that seriously underestimates the possibilities that are presented by the collective actions regime, but as I have said, Dr Davis' methodology goes far beyond the mere prediction of an average overcharge across his proposed six sub-classes, and I'm not going to repeat that.

One particular point that Mr Harris raised this morning was, I think, what he calls his, "Re Asacol",

point based on the US case law about the risks of a methodology which provides compensation for uninjured claimants. Just quickly on that, the cases themselves recognise that if it is at a de minimis level, damages for uninjured claimants de minimis, it's almost a tautology to say the law won't mind about that.

Dr Davis says that he is able to control for that risk because he will be examining the claims of the proposed class members in these smaller subgroups and subsets across his classes and sub-classes he will be controlling for the risk of over-compensation. Perhaps I can refer you to his fourth report, paragraphs 126-133, which is at {F/9/60}, and he can control, he says, for the bundling issue, the fact that other benefits are often wrapped up with the truck purchase, and to the extent that the concern is based on this, in my submission, somewhat over-played concern in relation to open book contracts or cost-plus contracts, I think as I have already said, if there is a single operator operating only on an open book basis, the RHA doesn't know that person, if you know what I mean.

So it's inconceivable that there is anyone operating on a full open book basis and not doing anything else, so that's driving the concern about over-compensated or compensation for uninjured claimants. I think one can

leave that out of account, and the methodology, we say, caters for it.

The other aspect of suitability is, shouldn't these claims be better off brought as individual actions. Isn't that more suitable, is there any need to bring them under the collective proceedings regime. Now, particular reliance is placed in that connection on the McCulla proceedings. You know, Sir, members of the Tribunal, you know why they were brought, as Mr Burnett has explained in his fourth witness statement. You will find it at footnote 8 of that statement {C/10/5}, and we refer to it also in our amended reply, paragraphs 199-202 {C/3/111}. These are purely protective proceedings launched because, essentially because of the respondent's unwillingness to give anything other than very narrow undertakings in relation to limitation when these, when this CPO application was stayed, and they were brought pursuant to the commitments that the RHA has brought to the proposed class members who have signed up to its enterprise, and we looked at the litigation management agreement last week and Mr Thompson's shown it to you just a few minutes ago.

The RHA has been given the authority by signed-up proposed class members to bring alternative legal proceedings if its CPO is not granted. You have seen

the detail of the clause in the litigation management agreement and perhaps I don't need to go back up to it, but it does include a reference to, as I think I put it in opening, finding them a home if the RHA can't provide one, which may answer some of the points that Mr Thompson was making.

These proceedings were, at one point, possibly only one point last week characterised as a GLO, and I think there is a reference in our amended reply to the undesirability, shall I call it, of the distinctly less preferable option of seeking a GLO. That may be where these proceedings would -- the McCulla action would go if they had to proceed, but at the moment all they are are a claim form listing some claimants and an agreed stay with the defendants pending resolution of the CPO application.

So the mere fact that these proceedings have been brought tells you absolutely nothing about the feasibility of pursuing those actions in High Court proceedings, still less, of course, their preferability. Undoubtedly, and the Tribunal itself knows about this, the High Court has wide case management powers and can be creative and, who knows, if those proceedings had to be followed perhaps they could be done well. That doesn't make them preferable to the collective regime

and proceedings before this Tribunal which in my submission is plainly, and I think anyone making the opposite suggestion would have some difficulty, is plainly the preferable place to bring proceedings, notably, but I will come on to large actions, but notably because, even on the basis of the currently signed-up members of the -- proposed members of the class, they are predominantly small, very small, micro and some medium-sized companies. Yes, there are some bigger ones too, but predominantly, overwhelmingly, they are not, and these are precisely the sort of businesses that the 2015 reforms were supposed to help.

So yes, as Mr Pickford points out, there are some large claims in there, but if that were relevant to the existence of a collective proceedings, or the scope of a collective proceeding, one might have thought it could potentially have featured in a full opt-out case such as Merricks where there will be some extraordinarily wealthy people in the class who will have spent eye-watering sums of money at hotels and goodness knows what other sorts of facilities but no one, of course, would suggest they shouldn't be in the class, but you don't look, in my submission, at the individual level in these, you look at it overall, are individual proceedings preferable to the proposed collective

action, so the fact that some large operators and possibly, I only say this teasingly, but some larger operators with extensive operations outside the jurisdiction may choose to opt-in, that's their prerogative. It doesn't make our application an unsuitable one, and, anyway, and in my submission Mr Pickford was unable to assist the Tribunal on this matter, how do you cut it? Where is your cut? What's a large claim? By number of trucks? What number and what isn't an arbitrary number for that, or by value of the claim? Well, people don't really put anything other than indicative values on these claims, and the defendants will say they are all worthless, because there was no impact, despite their efforts over so many years, there was no impact of the cartel on transaction prices, so if there is no overcharge at all it certainly makes sense for that to be determined on a collective basis.

THE PRESIDENT: Can I just ask you about McCulla, as you are moving off there, the funding agreement that we saw, does that -- is that covering also the costs of pursuing the McCulla claim as such at the moment? Do you know? Beyond having issued the claim form? I mean actually taking it forward.

MR FLYNN: Well, Sir, obviously yes -- the short answer is

yes, we haven't had to seek separate or different funding to issue the claim form. If this -- if the collective proceedings do not go forward and the McCulla proceedings do, then my understanding is, but I'm obviously not -- I can't give evidence on this, but my understanding is, you know, the funder will be behind it because, you know, that's the way to follow up on your discussions earlier, that's a way of not losing their outlay, and not sinking the ship, so I believe so. I believe so and I do not see why not.

So yes, subject to that, I was going to move off from McCulla and large claims, just to say something about factual evidence which I think is the other major advantage pressed on you by my friends of documentary or witness evidence in individual actions, as opposed to these collective proceedings, and a particular aspect of that was a suggestion that disclosure from the PCMs, as I think we are all calling them, will be entirely voluntary. Mr Singla said it will be a unilateral choice of the RHA as to how much factual evidence they choose to deploy, page 84 of the Day 3 transcript.

Respectfully, we don't follow that. We just -- we don't follow that.

The litigation management agreement, as you know, says that those who sign up and if the proceedings

continue, the represented parties will be contractually obliged to co-operate with the requests that the RHA may make for documents or for information, and Mr Thompson was attributing a Machiavellian purpose for that, that we were trying to attract people in the fold to get their information knowing that they hadn't a claim. I leave that to one side, but the fact that that's the mechanism for producing the documents doesn't make it simply a unilateral matter for the RHA, what documents will be sought, what the scope of disclosure will be. Disclosure in these proceedings will be handled by the Tribunal. Tribunal party will seek disclosure from the other, there will be arguments about it, and agreements, possibly, and arguments, certainly, and they will be discussed at case management conferences.

The litigation management agreement is the way -- the route for the RHA to obtain the necessary information. It tells the Tribunal that that route is there, but that doesn't mean that we have carte blanche as to what we do or do not produce.

Dr Davis said yesterday that I think he ranked, as it were, the claimant data third behind defendant data and dealer data. The point he was making, which in my submission he made perfectly clearly, was that where available and relevant, it's likely that data from the

defendants, or from dealers, will be both wider in scope and better organised in the sense of being prepared on a consistent basis and probably with up-to-date IT infrastructure. Claimants, by definition, will be more disparate. They are individuals. That's sort of the point we are on, and they may not. Not every haulage company, it has to be said, has the most modern computer system or the best record keeping. Some of them do, and of course some of them may not, but overall what Dr Davis is quite clear on is that it is a positive advantage of opt-in as opposed to opt-out, that data will be available from claimants at an early stage in the proceedings, and in my submission the play that has been made of the sample data that he obtained at an early stage, the response rate and so forth, is no more than that. It is a play. He took a sample, he asked for aspects of it to be done on a random basis for illustrative purposes. I don't think one can draw any final conclusions from that sample.

It is worth saying, and he touched on this as well, that there are public data sources going to all sorts of relevant issues that can be drawn on, and the RHA has the budget to investigate and interrogate those sources, as you know, although Mr Jowell's eyebrows were somewhat raised, Dr Davis referred to topography, to data on the

weather, all these things are publicly available if they are needed, and no doubt there are many other sources of such material. So in my submission the faint resuscitation of data availability this morning can be safely discounted.

THE PRESIDENT: I think those points went only to the particular sort of claim on fuel, extra fuel costs, operating costs, from Euro emissions where those points arose. It wasn't on the more, if you like, the heart of your claim about overcharge and any pass-through.

MR FLYNN: Yes, no. I fully recognise that, and it wasn't Mr Jowell who was talking about the sample response rate. That was others, so if I have misstated his position I didn't mean to. He absolutely raised those in the case of, "Are you really going to be able to get what you need to show fuel usage", I think it was, and mileage in relation to the operating costs and the emissions context.

The next point I wanted to cover -- Sir, I see the time. The next point on the, as it were, overarching points was the pass-on issue, because the sort of headline criticism, as far as suitability is concerned, I think, is the RHA has not sought certification of pass-on as a common issue at this stage. It's dealt with it in an unacceptably imprecise way, or a high

level of generality, and it hasn't mapped out a route to resolving this issue in the litigation plan. That was sort of where we started on pass-on.

In the course of the hearing, pass-on, pass-through, mitigation, have come to be applied to a number of different phenomena, and sometimes are confused or swept up together when they don't have to be. In particular, the issue of what I think has been called in this hearing, "Resale pass-on", so the pass-on of any overcharge when a truck is sold, and what I might call more traditional pass-on in relation to the passing-on of cost increases by members of the class to their customers, a somewhat different issue, and it has also come up in relation to the cost-plus or open book contracts, but perhaps that's had enough relative air time for the moment.

So just breaking it down, then, into dealing, first, with the resale pass-on, pass-on in respect of selling a new or used truck, Dr Davis has presented a clear methodology, the bones of a methodology of more than that, for assessing pass-on in respect of the resale. He has consistently recognised that he will need to account for the extent to which purchasers of new trucks who sell their trucks in due course on to either intermediaries or other haulage operators, he has to

account for any element of the overcharge embodied in the sale transaction, so the minus signs in his equations that were pointed out yesterday will not, I think, come as a surprise to anyone.

He will be estimating the overcharge embodied in the purchase of a used truck, which would be the passed-on overcharge in a direct sale from a new truck purchaser to a used truck purchaser within the class. He went into some more detail yesterday and in his reports as to the nature of the adjustments that will or will not be necessary, in particular for the non-cash price contract model where the truck and acquirer is, in reality, a truck user for the period of the lease, and never acquires a proprietary interest in it, and has no place in the resale, and he has proposed how to assess the value of buy back operations, paragraph 74 of his fourth report, and mitigation in that context, buy back guarantees, for example, these transactions take a number of forms, but you can see that from paragraph 78 of his fourth report, and where it's sold to an intermediary, so there is a -- this isn't haulier to haulier sales, but haulier to intermediary and intermediary to used truck purchaser, he recognises that he needs to have a methodology for calculating how much of the overcharge is passed on to the intermediaries,

and he deals with that in his second report at paragraph 279, and he -- for completeness, he has referred to trade-ins and part exchanges, and you will see that at paragraph 83 of his fourth report, and for a new truck, you know, particularly one that's not been flogged to death, part exchanges are probably the commonest form of resale, an operator with a substantial fleet doesn't spend a lot of time on the truck equivalent of Exchange & Mart or, "We Buy Any Truck", they probably just go back to the dealer and trade it in for a newer model.

Now, all of that is resale pass-on, and it was suggested that I was, I think, a number of times I've been thrown lifelines, or otherwise generously helped out from the bench, and I was opportunistically grabbing at a chance to have pass-on certified as a common issue when we've resolutely maintained throughout these proceedings that we don't think it's the appropriate moment. That, I think, may or may not have been, but it only makes sense as a confusion of the two particular categories of pass-on that I have referred to, the real resale pass-on and the traditional pass-on, which is the one we have dealt with throughout in our pleadings.

Now I was responding to a suggestion from you, Sir, but it would be possible to certify the specific issue of resale pass-on now, and we do think, for all the

reasons I have just explained, we have probably done the work, as it were, to have it certified as a common issue, if that's an option which is attractive to the Tribunal. It's not, of course, listed as a proposed common issue in the claim form, as this issue, as we had seen it at that -- up to then, or, indeed, up to the hearing, was treating resale pass-on as an integral aspect of the calculation of overcharge on used truck sales, but you could formulate a common issue along the lines of the extent to which the overcharge was passed on in resale transactions by proposed class members, and I'm entirely in the Tribunal's hands. We can see the sense of it. If we need to make an application that can be done, or amend the claim form, and I don't think that's either an embarrassing matter or a kind of failure or abandoning of principle on the RHA's part, however much Mr Singla may wish to make of it. This is the sort of thing that happens in complex litigation all the time.

MR PICKFORD: Sir, I hesitate to interrupt but I do have a very considerable concern about this submission. We seem to be having an application floated in reply which, in my submission, is quite wrong, and quite improper. Obviously, if the RHA wanted to make an application of this sort -- well, frankly, it should have been in their

original claim form, but at the very least it should have been at the beginning of the proceedings so we could have dealt with it then. I'm not quite sure what we are supposed to do with this now.

THE PRESIDENT: Well I think, Mr Pickford, this arose from our looking at the way Dr Davis is calculating the overcharge, that he is taking account of resale -- the overcharge loss of the individual class members, and his formulae. He is actually, and that was brought out from the questions that were asked of him, deducting a resale pass-on, and so he is doing that, and as he is doing the overcharge on a common basis, it seems to be part of the way he is doing that, if the overcharge is a common issue, then that aspect of actual truck pass-on as a used truck is coming in there in the way -- in his method, and it seemed to us that it followed from that, that it is actually being approached as, in that way, as a common issue, not pass-on more widely and the various other ways that pass-on might be alleged.

MR PICKFORD: Well, Sir, with respect to Mr Flynn, that obviously overlooks entirely, as just one point, the fact that there are intermediaries involved in that chain of resale, because what the overcharge might be for a person to whom -- who buys the used truck is not necessarily the same as what was -- as the amount

further upstream, given that there is an intermediary in between, and we haven't had anything about that from Mr Flynn, I don't think we had anything about that from Dr Davis, and this is, you know, a potentially quite complex issue which we say it's not appropriate for Mr Flynn to be able to, on an ad hoc basis, develop an application in respect of at this stage.

THE PRESIDENT: Well, I think Dr Davis fully recognised that that price may be the price that's achieved from, or the resale, maybe, to an intermediary.

MR PICKFORD: But in which case this issue would not have been part and parcel of what they were seeking in relation to the overcharge issue. There is something else in there, and that wasn't ever flagged to us prior to Mr Flynn effectively making this submission on the hoof now. That's our concern. If it was put on an entirely different basis from the beginning, when the claim form, they said, well, as it is, we are seeking this overcharge and we say that we can also deal additionally with the intermediaries issue, and, vacantia, we would actually like pass-on to be certified in this respect as a common issue, well then we could have considered that, we could have had evidence on it, we could have addressed it properly, but what we can't do is address any of that now at this stage in reply.

THE PRESIDENT: Well, we will look at the way it has been put. I thought that the way that the overcharge is actually being put by the RHA is that it involves a reduction, or deduction of an element of pass-on, and that's how they are proposing to calculate the overcharge, and that that is the method Dr Davis put forward, but we can check through his reports as to whether, actually, that is what he is proposing to do. If he is, then whether one says it's part of the overcharge common issue or it's separate, they would be a measure of semantics. (Cross talk).

MR SINGLA: Sir, I'm sorry to interrupt, and it's obviously unfair to interrupt Mr Flynn's submissions in this respect, but can I just ask that this is dealt with in an orderly basis, whether it's now or at the end of Mr Flynn's submissions? As I said this morning, if their case position is that Mr Flynn procedurally would need to make an application for permission to amend, and that is the proper course.

Now, obviously I agree with what Mr Pickford says, but, with respect, this needs to be dealt with on a proper procedural footing, and in my submission it's not right that Dr Davis has dealt with resale pass-on, and in the references I gave to you this morning, to his oral evidence, he accepted that there is no immediate

read-across, and so I do ask the Tribunal to deal with this in an orderly fashion so that one can first hear the application for permission, because that is what is required when one is dealing with a significant amendment to a claim form. Mr Flynn may like to say that these sorts of things happen all the time, but, with respect, that's absolutely wrong, if one is applying amendment principles.

So could I just ask at this stage that the Tribunal directs either to deal with this now by way of an application or to deal with it at the end of the day, because, with respect, it is unsatisfactory for us to be sort of bobbing up and down during the course of reply submissions, and I do have a number of things to say about this.

THE PRESIDENT: I suggest, and I see Mr Harris wants to speak as well, that we let Mr Flynn continue his submissions, and then at the end, if you want to come back on this, he can explain it, exactly what the position is.

It may be a question of exactly what we mean by, "Pass-on", in this respect, because it's a somewhat slippery word that is used in various different ways.

MR HARRIS: Sir, can I just --

MR SINGLA: Can I just put the issue in its proper context

so that there is no misunderstanding, at least on Mr Flynn's part, because how this originally arose is that the RHA, as he accepts, has stubbornly refused to seek pass-on in any shape or form, pass-on or mitigation, let's be clear about the terminology. They have never sought to have any of these quantification issues certified as a common issue.

Now, we then, in the course of Mr Flynn's submissions last week for the first time -- Sir, you put to him that because Dr Davis had done the used truck price regression, that is still dealing, Sir, with the purchase of used trucks, that's not dealing with the deduction of the value of the -- the residual value of a new truck when sold, so that's the context in which this issue arose and then Mr Flynn said, yes, I can see the sense of that, but, with respect, what that misses is the point about the intermediaries. These are not precisely two heads of the same coin, and so it is not right to say that Dr Davis has dealt with this in any of his reports as a pass-on or mitigation issue. He did not say yesterday that he had done that. Indeed, he said quite candidly that his emerging views on the hoof were to the effect that there may be something to this point, but he hadn't properly considered it by contrast, he said, to the work that he had done on the overcharge

issue and I can take you through the transcript of yesterday.

THE PRESIDENT: No, I remember that.

MR SINGLA: But that's the context in which this arose and it is very important to understand that it's not been dealt with by Dr Davis on the footing that it is a pass-on issue.

MR FLYNN: I don't know if Mr Harris also wants to make a point on it.

MR HARRIS: Very briefly for the record, Daimler also objects to this floated last minute proposal, and the only point I would add, because I adopt wholeheartedly what's been said by Mr Pickford and Mr Singla is that it's even worse for the RHA, because when it was floated in oral submissions a week ago, whilst Mr Flynn said something like, yes, I can possibly see something in that, he then didn't accept it. He didn't say, oh, actually, the suggestion has been made to me in oral submissions in opening that I should adopt an aggregate damages approach for any aspect of pass-on, he said that he is not proposing to adopt an aggregate damages approach.

THE PRESIDENT: No, I don't think -- Mr Harris, I don't think we are talking about aggregate damages, we are talking about pass-on.

MR HARRIS: Sorry, I meant -- sorry, I meant this -- getting an echo now. This point, when it was floated with him, he didn't adopt it.

THE PRESIDENT: Mr Flynn.

MR FLYNN: Well, I've more or less finished what I propose to say on that, and I'm not going to repeat it. I gave a number of references to what Dr Davis said about it, and I said, as I said last week, I can see the sense of what the Tribunal's saying to me. I'm not making an application, but if the Tribunal thinks that these proceedings should go ahead and that it would be important and sensible in those -- in the proceedings for there to be a defined common issue on this point, I do see the sense of it, and that can be accommodated, and I don't say more than that, so that may be characterised as me, once again, rebuffing the lifeline, but that's it. I'm responding to a suggestion from the bench which we hadn't thought of which I can see -- I can see the sense of -- and the Tribunal has the power to say that's an appropriate way to examine the issue.

THE PRESIDENT: I think we understand your position.

MR FLYNN: Yes. Well I hope so.

THE PRESIDENT: And we understand that the defendants also strongly object to that course, and I think -- no, Mr Singla, I think Mr Flynn should continue. In order to

continue you will have to unmute yourself.

MR FLYNN: You are quite right about that, Sir, however much others may prefer the other way.

You are quite right, and if, at the end of the day, my friends wish to say, no, that's not appropriate, it's not right or ripe for identifying as a common issue, well that will be the Tribunal's judgment, and I don't really think I can add to it. Outside this issue of truck resales, we do maintain our position, our consistent position, our obdurate position, as they may say that pass-on does not need to be, and is not appropriately certified before we have the defences.

We've set out a plan as to how we would deal with pass-on once the defences have been served. We have explained how and why we think the pass-on can be dealt with on a common basis, and Dr Davis has outlined a possible methodology for doing so at Davis 2, 409-478, which is in {F/7/167}. We've said at paragraph 147 of our amended reply, which is {C/3/73} that, if necessary, you can potentially approach pass-on on an aggregate-style basis as it will be done in Merricks.

We have access to claimant data which will be relevant either to pass-on on a common basis, or, ultimately, as an individual basis, which is how the OEMs think that it should be dealt with, as I

understand, and I think they recognise, ultimately, that pass-on, and not all issues particularly, if, on their case, there are going to be individual issues anyway, don't have to be certified at this stage, and the Tribunal has already examined the issue and expressed itself satisfied as to whether the RHA would have the necessary funding if pass-on had to be dealt with on an individual basis, and I refer in that context to paragraph 65 of the funding judgment, which I believe is not in the bundle, but it's [2019] CAT 26 at paragraph 65.

So we don't think the Tribunal needs to certify pass-on now as a common issue, and that should be dealt with after defences and it can, if necessary, be dealt with on an individual basis if we don't succeed on the common issues basis.

I was then going to move to the -- taking chunks out of our case section of what I have to say, Sir, and I wonder if that might be a convenient moment. I'm afraid you are muted, Sir, or I can't hear you.

THE PRESIDENT: I take it from the progress you are making that you are within time to finish by, I think we said we can sit until 5.

MR FLYNN: Yes I am, and I would hope that you don't have to sit as late as 5, Sir, depending on whether I say

anything else that excites my friends as much as I just have. Thank you.

THE PRESIDENT: Very well. So we will be back at 3.40.

(3.30 pm)

(A short break)

(3.40 pm)

THE PRESIDENT: Yes, Mr Flynn?

MR FLYNN: Thank you, Sir. In the remaining time I wanted to cover four topics -- class period and run-off, emissions technology delay, sub-classes and the alleged new and used conflict issue.

Starting with class period, which links to run-off on which we've heard notably from my learned friend Mr Jowell, and which we well understand is a matter of concern to the Tribunal, I want to reiterate to start with the point that the RHA has never intended to imply that the part of the class period which runs beyond the end of the cartel is, or will be, found to be the run-off period, or, indeed, the run-off period for any part of the harm caused by this complex infringement. We have always said that the existence of any run-off, any sort of run-off and the length of it is an empirical matter that we don't know at this stage of the game, rather what the RHA as a representative body was seeking to ensure is that whatever the disclosure and the

evidence might eventually produce, claimants, PCMs, who may have suffered harm resulting from this infringement, including during any run-off, were not artificially excluded from the collective proceedings, even before they started.

Now, in an individual action, in my experience it would be rare to specify a run-off period in the Particulars of Claim, but you normally -- one says that there is likely to have been, and that will depend on disclosure and evidence including expert evidence, and claimants in such cases do not risk having parts of their run-off claim cut off because they didn't plead a period at the beginning. The risk in the collective proceedings context is that if you draw the class period too narrowly you may end up excluding valid claims, even though the evidence that later turns out may show that the run-off period extended beyond the class period, and we've said that the UKTC claim in its desire to be clean and neat and uncontroversial runs precisely that risk.

Nevertheless, we took to heart, Sir, your enquiry as to whether we had looked into the individual actions which, of course, we follow from the distance we have to follow on, but we've refreshed knowledge of them, and, indeed, as I understand it on the materials that we can see, because they are not -- not all the pleadings are

available to us, particularly if they had been amended as many have repeatedly, do not appear to have suggested particular run-off periods in their initial pleadings, but have, as I suggest is the usual way, left that to be determined after disclosure and expert evidence, but obviously in some of the disclosure requests in what I think are sometimes called, "The frontrunning cases", we do see that OEMs have been ordered to make overcharge disclosure, in some cases to the end of 2017 on the basis of what has been said about run-off periods in those actions, and in the hope of discovering a clean period within the range of the disclosure period, and I just repeat that, of course, you can't manufacture a clean period, you can't say, "There is an infringement", let's say it stopped on a particular day, we will have a run-off period of two years and then let's assume there is a clean period after that. You don't know that, it is an empirical issue. The run-off period may be one or three years or there may be no run-off but you don't know that so you can't determine what is the clean period in advance. You can hope, but the submissions that I think Mr Harris produced on -- in the Ryder case that has been included in the bundle, and the reference is {F/14/33}, we see that Ryder's economist considers it likely that the effects of the

cartel persisted well after 2011, and that factors affecting truck prices during the period from 2011 to 2014 included the introduction of the Euro 6 standard. So as far as we can see there is a suggestion, and I can't really say, sitting here, how far it's got, but there seems to be suggestions in the individual actions, at least some of them, of a multi-year run-off period which we cannot tell, and I just don't know whether that takes into account the position of used trucks where, for reasons that were discussed, I think, with Dr Davis yesterday, might account for an additionally lengthy run-off period, and which are not being claimed for in all of the individual actions, and particularly not, I think, in the front runner cases which are the ones where disclosure is more advanced.

Dr Davis yesterday obviously gave evidence to you that he considers that there are factors pointing potentially to a multi-year run-off period. He referred to the Euro 6 point, long-term contracts, I think they have been called a number of things, framework contracts and call-off contracts, and used trucks. All of those factors, he said, suggested the possibility of a multi-year run-off, and he also said that he could not, a priori, exclude the possibility that the price effects of the cartel, the basic price effects of the cartel,

would have continued beyond the end of the infringement, because it made tacit co-ordination more easily. He gave the example of the detailed price book in the Westinghouse case, I think, but here we have, right up to the last minute, the exchange of detailed, full price lists, and, indeed, the sort of computer models known as configurators which are referred to in the decision.

THE PRESIDENT: Well, Mr Flynn, can I just interrupt you for a second?

MR FLYNN: Yes.

THE PRESIDENT: We are not questioning the point that there might be a run-off period, and that it's reasonable to go beyond the end of the cartel, the date in 2011 when it came to an end and, indeed, it's not unusual that people claim for some run-off period, quite aside from the particular factors here that you have just mentioned, although I think the framework contracts can be dealt with separately and there is a special case. It is quite different, first of all, I don't think any of the individual contracts that you referred to where they don't specify run-off period, but they are, of course, people who bought trucks during the cartel period, so they have got a primary claim, and then they continue it. The concern here is, in a sense, twofold. One is that it becomes an invitation to people to join

the class who never bought a truck in the cartel period, but did buy some trucks in 2014, and that that gives rise to problems, and potential disappointments.

Secondly, one has inevitably to take a view without, of course, actual empirical knowledge, of what is a reasonable run-off period, otherwise there is no basis for not saying that you continue until today, or until judgment, but you have got to take a view, also, not only for good sense, but because of the disclosure obligations that are then imposed on the defendants. That's what has to be done in all the individual actions, because otherwise disclosure becomes wholly disproportionate and you have to take a view, even though you don't know because you haven't got, of course, perfect insight, what is the clean period, but one has to make an assumption, otherwise there is no basis for Dr Davis to do his comparative regression, so one has to take a sensible view, guided by experience from other cases, understanding of this market, and good sense, and I think the point that was being made is, well, the cut-off you have taken is actually not one that Dr Davis has actually advised, saying, well, I think that's probably the best guess we can make. He wasn't involved in that, he made that very clear. It's theoretically possible, it's logically possible, but it

might appear unlikely in which case it seems in terms of sensible management of the proceedings, and proportionality, to say the run-off should be shorter but no one is saying, certainly the Tribunal is not thinking that there must be no run-off period, so that's, I think, the way we are approaching it.

MR FLYNN: Yes, Sir. I fully understand, and that's the point I was coming to. We've heard the arguments -- the points you expressed very clearly, and we want to be realistic about this, and I'm not saying, and I say again, we are not saying that's the run-off period. We accept what is said, and being pragmatic about it, it's plain that the Tribunal is, shall we say, unlikely to wish to certify the proceedings that -- with the claim period for the one that we have contended. My point on that is, of course, it's -- that doesn't mean no to certification, because it's open to the Tribunal to say what period would be appropriate, and if -- just before my friends get too excited, if I make a suggestion based on what we've heard, then I would say that, to the end of 2014, or probably more fairly to allow a bit of safety margin, as it were, to the end of 2015, 2015 would be a perfectly reasonable -- I don't say compromise because this is for the Tribunal's decision -- but if you feel it is appropriate to lop

something off the claim period which I fully understand for all the reasons you have given, then a date in the 2014, 2015 range in my submission, is reasonable, because that would cater for the possible multi-year run-off for all the categories that I have identified, and I fully accept, also, that in terms of class definition, a special case could be made or provision could be made for contracts entered into which, nevertheless, go beyond that period, so it's a question of -- if there are long-term contracts of which the price is agreed in the -- what the French called the, "période suspecte", then they would be catered for, and all of those matters, the short point, can be put into a judgment of the Tribunal and reflected in an order in due course. The Tribunal is not bound to say yes or no to the draft order that we put -- you know, the Tribunal is not locked in, it's not an anything or nothing, sign here or reject, proposal.

THE PRESIDENT: Well, we fully accept that and that's the approach we propose to take. It's always the case in collective proceedings that we can refine the class if we think it's too broad in various ways, if we decide that it is appropriate to certify and if the run-off should be 2012 or 2015 we can say that. It's not -- you are quite right, it doesn't mean, vacantia, there is no

certification, and I don't think that was a submission from any of the defendants, and if it was, it certainly did not receive a warm reception in the Tribunal, but I didn't even understand that submission to be advanced.

MR FLYNN: I'm not sure that it was, Sir, and I hear what you say, and thank you. So I -- in that case I can probably move on to emissions, again -- here we go again.

MR THOMPSON: I do have some concern about this, given that the RHA has made a very pointed issue about the size of their sign-up class, but if their sign-up class includes four or possibly five years of claimants who, for all I know, may have signed up on the basis of their claim since 2014, then even if they did have claims before that, it makes it very uncertain what exactly is being said about the size of the RHA claimant class or where it's headed. I mean, I -- it's been quite a big part of the case, and at the moment I'm very uncertain as to what Mr Flynn is actually saying, or, indeed, about what's going to happen to the people who have signed up on that basis, because --

THE PRESIDENT: Mr Thompson, can I interrupt you? Two quite separate points. One which is a fair point that you make, that the RHA has urged upon us, as a point in their favour, the large number of people who have signed

up, and you point out, quite fairly, well, if the class period is actually shorter some of them may not be in the class as finally defined, so one must be careful putting weight on the number without some allowance for that, and I understand that.

The fact that they have signed up people on a different basis, or a longer basis cannot tie the hands of this Tribunal as to what we certify. It is a matter for the RHA to deal with if it has any problems with any individuals later, but that's not our concern. We are clearly not bound by what they may have said to individuals when seeking to get them to enter into that agreement or indicate their willingness to participate.

MR THOMPSON: Of course. It is simply in the last section of my submissions this morning, which I am concerned as to what exactly is being proposed and where that leaves the comparisons that have been drawn. Other than that ...

MR FLYNN: Sir, perhaps I can address this simply and shortly by saying I haven't got the figures to hand at the moment, but I recall that when this issue was raised with me in forthright terms by Professor Wilks, that I gave him what figures were then in front of me as to the proportion of our signed-up claimants who had bought within the infringement period, and it was in the 90 per

cent range, so yes, there may be some people who are at risk of being lopped off, as I put it, if they were only active in the claim period which falls outside any -- well, which falls outside our proposed -- falls outside any claim period that the Tribunal may declare appropriate, and that, as you say, Sir, is a matter for us to manage. An opt-in claimant isn't required, actually, to turn up with any signed-up people, which is probably just as well, because UKTC haven't. It is not a requirement, and we have pitched the exercise, we would say, fairly at our claimant body, and we also think it's -- insofar as objection is taken to us misleading them on behalf of the respondents, of course they say the whole exercise is futile, because there isn't any overcharge, so we've been getting their hopes up for nothing anyway, so, you know, I think it's just a question of selecting a claim period which is in the Tribunal's appreciation, does justice to the issues.

THE PRESIDENT: Yes. I don't think we need to spend more time on this point. I think we should move on to -- you have still got three issues to deal with.

MR FLYNN: Yes I have, and it's obviously -- I will try to deal with them shortly because obviously if my friends have got important things to say they should be heard.

In relation to emissions, let me take this fairly

shortly. You will remember Mr Jowell's submissions and you will remember Dr Davis' account yesterday. Three points, really. Insofar as what's said is we are making a lot of unfounded factual assumptions, and really saying that the -- we are assuming that the new emissions technology either led to greater fuel efficiency whereas in fact any improvements came from other developments in the OEM's business, as you said in response to Mr Jowell, Sir, those are merits points. They may be right, they may be wrong. You don't know, of course, but they are merits points, but I did just want for your note to give you the evidence from the OEMs that we rely upon in part to make these assumptions.

So you have evidence on behalf of Daimler from Mr Belk. He says that the development of Euro 4 and 5 had a positive impact on fuel efficiency, as compared with Euro 3, so you look at {E/IC2/37}. Mr Cussans for MAN himself says that while the Euro standards --

THE PRESIDENT: Mr Flynn, Mr Flynn, just give us the references. You needn't -- and then move on.

MR FLYNN: So Mr Cussans, Bundle D, Volume 5, tab 15, page 9, and Mr Burnett reporting things that he knows, second witness statement, paragraph 27, Bundle C1, it's tab 7, page 9, and he refers to studies, notably the Nordic

Road Association and comments by the OEMs at the time when the emissions standards were rolled out.

THE PRESIDENT: Yes.

MR FLYNN: And you look at paragraph, particularly, 28 of his statement.

So those are the factual assumptions and why we make them, or partly why we make them.

Secondly, this is inherently individualised, and that was what a lot of points put to Dr Davis yesterday was about.

Again, Mr Jowell put it fairly to Dr Davis that he hadn't got a plausible methodology for it, but Dr Davis disagreed, and he says there is data, it is perfectly realistic to do what he is proposing, he is the expert and, in my submission, you should defer to that or attach weight to that conclusion of his.

The other point just to make briefly is what's going on in the individual actions where Mr Jowell said, well, there was an emissions claim brought by VSW but it had been dropped. That was followed by a letter from Mr Jowell's solicitor -- and that seems to be right, indeed -- that was followed by a letter from those instructing Mr Jowell, and it doesn't, I think, seem to have made it to the bundle, I hope it is --

THE PRESIDENT: Well, we've got it.

MR FLYNN: You have got it.

THE PRESIDENT: Yes. We've seen that there are two cases where it is alleged.

MR FLYNN: Yes. Exactly. You have seen that so I will not go over that, but I will just make the point that -- and it came up in the -- what I said a minute ago about the disclosure exercise -- it may be that the VSW claim that was dropped was more to do with in some way the price of the truck rather than the operating costs of the truck, and that the claim may have been slightly different. That seemed to come up in the disclosure ruling. I don't know that for a fact, but there was a reference to the price of the truck, so it may be a slightly different point, but it is coming up in some of those amended claim forms that Mr Harris has also introduced to the bundle.

So let me leave emissions there, unless I can help the Tribunal further in that respect. I wanted to say a few words on sub-classes which was Mr Hoskins' theme and he gave a very detailed account of the place of sub-classes in the legislation and the rules, and I assume that he will have been reassured by what you had to say about it, Sir, and you say -- you agreed that the Tribunal has got a lot of flexibility in adjusting, refining, adding to sub-classes during the course of the

proceedings, and his converse point that the ordering of sub-classes doesn't tie the hands of any experts, economists or otherwise, notably those on behalf of the defendants, as to the methodology that they want to employ or what they have to say about those whose reports they are commenting on.

I would say also that Dr Davis, like all the economists involved, has made a point of stressing that there should be flexibility in the definition of the sub-classes because the economic -- you know, as matters progress, the economic analysis becomes more refined, and some things may turn out to be blind alleys, and some things may turn out to require greater investigation, so I think all the economists are agreed there needs to be flexibility to allow them to do their work, but I would say Dr Davis gave forcible reasons why the sub-classes and the categorisation that he proposes embody crucial distinctions for the exercise that he considers that he needs to carry out.

So against all that, one wonders whether the mistake that we have made according to Mr Hoskins is really a matter of great dispute between us and the respondents or objectors in the case of Mr Hoskins, because there is flexibility, it doesn't stop them doing whatever they want to do, and as we noted in our amended reply at

paragraph 62, the Tribunal seems to have taken a -- if I can put it somewhat colloquially -- it can't really hurt the approach in the Pride case as long as there is no conflict between the sub-classes, there is no real problem in certifying. Obviously conflict is my next point.

So, ultimately, we say -- we ask you to certify the sub-classes that we have suggested, yes indeed, based on the approach that Dr Davis proposes to take, and in my submission powerfully evidenced, but ultimately, if you are persuaded by Mr Hoskins that you shouldn't do it, then it may not, in a sense, matter very much in that Dr Davis will be free to carry on his exercise, so a somewhat equivocal landing on sub-classes.

Then my last topic, I think, subject to questions from the Tribunal, is the new and used conflict issue which will take a little more time.

As regards this matter, and pulling together what we have already submitted, we say the objection is unfounded. It's wrong in principle in the scheme that the UK legislation lays down, and it's -- which is different, of course, from the Canadian regime in many ways, and it is premised on a simplistic and -- hypothesis or paradigm when one looks at the facts, so our principal position is that there is no relevant

conflict, and the fall back position is that if the Tribunal is not persuaded that, there are, and we've laid them out in our reply and skeleton, there are approaches that could be taken. I think Mr Jowell is now setting his cap at separate representation for the used purchasers, but on the question of principle, is there a conflict, in my submission the -- my friends' submissions would have greater force, and I don't say they would be a killer argument, but if they had suggested in any way that this supposed diametrically opposed conflict between new and used purchasers in our class could lead to an adverse effect on the defendants in the form of higher damages or double counting or something of that sort, then one might say that this is, as it were, a fight that they have a dog in, but they haven't done that, and they haven't gone, really, beyond a sort of theoretical statement that, of course, methodologies are subjective, you can always tweak them, you can be influenced one way or another to favour one or other group within your represented class, or -- to reach particular outcomes, but we haven't had any illustrations about that, so one wonders why the respondents care about this. I'm sure they act from the best of motives, and their clients have turned over a new leaf, but why do they care?

They have no basis for preferring one or the other or suggesting that we do, and if, in fact, now that Mr Jowell has made the suggestion, their risks of the conflict eventuating, of people trying to, as it were, increase on both sides of the divide, are heightened if the groups are separately represented, and come at it from only one angle, each seeking to manipulate the results as my friends suggest is possible without really explaining how or how likely that might be.

They say if we were seeking an aggregate award, as in the Canadian cases, where both direct and indirect classes containing both direct and indirect purchasers have been certified, that would be fine, because, well, the conflict would be deferred until distribution. One might ask why is it such a wonderful thing to certify the class which embodies the conflict, and just kicking that -- the resolution of the conflict down the road, well they say, of course, they are not troubled by those conflicts, they only look at the -- they only face the class-wide award and are not involved in distribution, but that -- the aggregate award scenario could only cure the problem if you had an opt-out claim where you have a reliable estimate as, say, you apparently do in Merricks, of the aggregate volume of commerce.

It's different in the opt-in, because the class

doesn't embody everyone by definition, so even if you could get to a reliable aggregate volume of commerce for the new and likewise for the used, that you felt properly reflected the class in the aggregate damages award they are hypothesising, you still have to assess the overcharge for the respective groups independently, which means the problem hasn't actually gone away. It's still there. So what that comes down to saying is that you can't ever bring an opt-in claim on behalf of claimants at different levels of the supply chain, and the consequence of that, in my submission, is that you force representative bodies, class representatives, into adopting models which are more overblown, not to say gargantuan, less sophisticated in methodology and claiming for loss, and, in my submission, that's unhelpful and not a good thing for the regime.

So we say within our class the apprehended conflict is actually of no concern to them. If you take the paradigm, I will come on to the paradigm, but if you take the paradigm of the purchaser of a new truck who, in a few years down the line, sells it to another class member after, say, three or five years, whether the overcharge that's passed down to the purchaser is 100 per cent or 50 per cent or nothing, makes no difference to the damages that the defendant would be paying in

respect of that truck.

What they want to establish, of course, is that there is no overcharge at all, or that any class member passes on its overcharge in full, but whereas the conflict that they say, that concerns them as between the members of the class, so aggregate damages don't solve it, in my submission, and, in a sense, what's the difference from what we are doing? We are seeking to recover damages on the class-wide basis by the -- Dr Davis' bottom-up methodology and the apprehended conflicts between the class members which may not be confined to new and used, but that's the main example that we've been discussing, will be resolved according to his methodology.

If you split the class, so if you had a class that was only purchasers of new trucks and which would then, according to them, and no doubt that's the effect of incentives, would have the aim of maximising recovery for purchasers of new trucks, and a case was advanced which did not suggest there was any mitigation when the truck was resold within the claim period, it would, of course, immediately face objections, either or both from the defendants, or anyone who was bringing a claim on behalf of used truck purchasers, so the exercise has to be done anyway.

Secondly on this, and this is sort of questioning the paradigm, and the premise being that you have a head-on conflict between a purchaser of a new truck and a purchaser of a used truck, there are three sets of facts that I think need to be borne in mind here. One is that the members of our class have been invited to join it, and have signed up, fully in the knowledge that we intend to claim in respect of new trucks and used trucks, and, in my submission, they have given informed consent to that approach within the class. That's absolutely vital but not mentioned in the respondent's submission.

The task of the class representative is to manage the interests of the class as a whole, and take decisions, and give instructions that are in the best interests of the class as a whole overall, and that's the task of the class representative. It's also the task of a trade association such as the road haulage association. That's what it does all the time. It's what it is good at and has experience in, and it is advised by solicitors who also know their onions and their professional responsibilities. I see Dr Bishop has a question.

DR BISHOP: Mr Flynn, you seem to verge on suggesting that Dr Davis is a kind of natural arbiter between the two

classes, the rental group and the direct purchase group. Would you go so far as to say that your different members would accept whatever came out of Dr Davis' equations, and existence as to how much was passed on, and, vacantia, how much the claim of one might be augmented or diminished, and that you would not seek to influence him? Would you go so far as to say that?

MR FLYNN: Sir, talking of new and used, you mentioned rental companies rather than -- I'm talking about the purchaser of a used truck who sells the truck and it is bought by another member of the class, this being --

DR BISHOP: Sorry, that's a terminological problem. I meant the interests of the two members of the group who have joined, who have opted in, one of whom bought his truck new from Daimler or someone, who then later sold it and it happened to be bought by another member of the class who is -- who -- so has bought a used or secondhand, or whatever you want to call it, pre-owned truck, or whatever it is, so now there is a potential -- there is said to be a potential conflict there, and my question concerned whether you, the people directing it, would accept whatever happened to come out of Dr Davis' estimations of what those were.

MR FLYNN: Well, obviously I haven't got a crystal ball, but as I'm explaining the members of the class have signed

up on an informed basis. They know that an independent expert economist has been appointed by their proposed class representative, and broadly yes, I would expect, and would be surprised but, you know, I'm not Mystic Meg, but I would be surprised if there were a sort of rebellion down the line. I think -- and this is partly because of a point I'm going to come on to, this paradigm of the purchaser of a new truck selling that truck to a member of the class in due course, is -- I will not say a rare event, but it's just one of many possibilities in the resale world, some of which we've already touched on.

But yes, the methodology that Dr Davis suggests is one which is intended to fairly represent in reality the extent of any overcharge found to exist in the first purchase price that's carried over into the resale transaction. That's what he is intending to do.

Now, if I can move on, because I think all of this is relevant to the existence of a conflict.

You may get situations, and you may get many situations in which someone has purchased a truck and later sells it in a private transaction to another member of the class on a -- you picked up on the terminology, Sir -- a pre-owned truck. I mean, used, secondhand has a specific meaning, I think, pre-owned

and used probably don't, but the purchaser of a new truck may find itself, let's assume it is a corporate body or him or herself in a number of possible positions, some of which you discussed with Dr Davis yesterday, and we've also touched on, in the issue of the pass-on discussion, a short while ago.

There are buy back arrangements, buy back options. There are dealers in used trucks, there are part exchanges, so there are all sorts of things that happen which, if you were to sort of atomise it, all of which may make an individual member say, well, the really nice thing to find would be that, you know -- there is no -- I don't lose any of the overcharge by part exchanging it with a dealer. Well, you know, that may be right or wrong, but to coin a phrase, there is a heterogeneity in the resale world which hasn't been very much emphasised by my learned friends in setting up this, in my submission, rather artificial conflict, and the third set of facts that are relevant to assessing the reality of the conflict is the overlaps between the groups, or the make-up of the class, and broadly you can say some purchase only used trucks, some purchase only new trucks, and some are mixed, buy both, or have done in the relevant claim period, and I have given you some figures on that already. You have those in our

documents, but we've had a -- we've had another look, so 40 per cent of the people already signed up, that's not an indication of how the class will land, but at the moment 40 per cent of those signed up purchased both new and used.

Now, Mr Jowell moved away from the -- as it were -- the centre of the bell curve to the edges earlier today, saying the conflict is really between the purchasers of all or predominantly new trucks or the purchasers of, you know, people who only buy or predominantly only buy used trucks, but, nevertheless, you know, the predominant category who use both are in the middle, and that may go up or down later, but when you look across the distribution you could obviously imagine all sorts of different incentives at the individual level as to what they might hope the methodology might turn up.

So if two-thirds of the signed-up class have purchased used trucks, so -- and of that two-thirds, I think we've given you these figures already, about 60 per cent purchased both new and used, and 40 per cent of that two-thirds purchased only used, so you get roughly a quarter of the total of purchasing used. The majority of those, as you would expect, are micro businesses -- five or fewer trucks. That's 85 per cent of the people who only buy used are the micro businesses, and all the

rest are probably in the SME categories, and as far as we can understand the data, there are only six of the signed-up operators who only buy used trucks who have a fleet of over 100, and they are all SMEs in terms of their revenues or assets.

Likewise, of the people who buy new and used, virtually all of them are SMEs, 60 per cent of the people who buy new and used are businesses with no more than five trucks, and they are fairly evenly split between those who purchase new and used, so, you know, there is no particular preponderance there.

If you were being systematic about this, as I said, you would really say there are three groups with conflicts -- new, used and the mixed category -- and if you were really looking for conflicts even that would probably be too crude. I would also say that given this diversity in the possible situations or make-up of new and used purchasers, the idea of a settlement offer that sort of splits the class and makes it impossible for them to agree seems somewhat implausible. I don't doubt my learned friend's ingenuity, but that would be a difficult one for them to bring off, and in the event that such an offer were made, well it would be the job of the RHA as the class representative to determine, you know, whether it is in the interests of the class as

a whole to accept the offer.

So ultimately, we say even if there is a conflict that one can properly describe here, it's not one which is really of concern to the respondents, and what they are really trying to do is knock out the claim for used trucks, as Mr Jowell candidly explained, and what one is reminded of is the Canadian cases, and as I said they are all dicta, not obiter dicta, but they are just dicta, they are ways of looking at the problem, but in -- I think it derives from the Sun-Rype case where the court says, well, it is actually only the respondents who have an interest in promoting the suggestion that there is an inherent conflict in the class. They are the ones who benefit from this suggestion.

So Mr Jowell says, well, the only way to deal with this is to carve-out used trucks, so quite a chunk of our claim, obviously, and have them entirely separately represented, new representative, new funder, new lawyers, and that certainly couldn't be the RHA because, as I understand it, I mean, the funder certainly hasn't signed up for that, so they would be left floundering around, and even if you could achieve it, at obvious expense and considerable complexity, I think one has to bear in mind that there would have to be constant

co-ordination between the two groups, he suggests, which is the minimum I think it could be, because of the overlap, so you would have Mr A and B company in both groups, in both groups, and having to have their interests carefully represented.

We say it is a transparent device to get rid of a large chunk of our claim and at the expense of the smaller signed-up members and PCMs, the ones who are, of course, most in need of a collective redress scheme, and who will have enormous difficulties if they are excluded, because, as currently -- as matters stand currently, no one else is seeking to represent them, and if Mr Thompson is right, they would be out in the cold because limitation would have expired, and just to say that in the individual actions that we were looking at last week, some of the pleadings that Mr Harris has put in the bundle show that quite a few of those claims are claiming for both new and used, for example the local authority, the District Council claims, new and used are being claimed there, and, in the end, it would be surprising, in my submission, if an individual claimant could do it, that it couldn't be done in the collective proceedings as well.

So we say that there isn't a conflict. If you are not with us on that we have proposed means of dealing

with it within the RHA itself through sub-committees and separate legal teams should that really be necessary, and obviously in my submission the option of saying they are out in the cold and have got to find their own class representative would be unfair and harsh, and I probably can't say much more about it. That's what I had to say on that topic, and unless I can help the Tribunal further, at this point, on the basis of the submissions we've made, and subject to what has been said in our oral and writing, oral address and writing, we maintain our application for certification of our opt-in proposal.

THE PRESIDENT: Yes. Thank you. Can I -- if you could mute -- yes. I don't know why it produces that echo.

Can I just ask you one question on the application, and it is reflected in the claim form as well, because it is to do with class definition, that we are not quite clear about. We can look at it in your claim form in Bundle C/1. The definition is at paragraph 33 on {C/1/12}. At paragraph 34.2.

All persons whose primary business is to sell or to lease new or pre-owned medium or heavy trucks, and, "Primary business", is defined on the next page at {C/1/13} at 35.2A:

"The person in question who derives more than half

its turnover from selling or leasing medium or heavy trucks".

It is not quite clear how one is to work that out. Are you thinking of it on an annual basis in each year, or would it be across the period, the more than half the turnover?

MR FLYNN: Sir, I have a vague memory which may not be right, that we discussed aspects of this earlier in the hearing, and that I pointed out, or perhaps this is only in my dreams, but I pointed out that a class member who is principally a haulier who has a sideline in selling or leasing trucks would probably do that through a separate entity anyway, so wouldn't actually be a claimant, and this originally -- the idea was to -- not to exclude as claimants, members of the class, so hauliers or others who had this sideline, as long as it was not the main part of their business.

THE PRESIDENT: I think we understand the underlying point and you want to exclude dealers and finance companies who may have purchased only to hire out and hire purchase and so on, and so in most cases there is unlikely to be any problem but it was just something -- and it may be that we don't need to deal with this now, but if we do decide, and we obviously haven't reached a view but if we were to decide to authorise and certify

the RHA proceedings, probably one would need a more precise definition of quite over what period that's to be assessed, because if there is anyone on the boundary, they need to -- one has to be clear whether they are in or out.

MR FLYNN: Yes. I take the point entirely, and I don't think there is, as it were, a further definition behind, "Primary business", anywhere, so the question probably has to be answered as a matter of first principle, or clarified, and I think my first reaction would be that it would have to be across the period of the claim which was one of your suggestions, because we wouldn't want someone with that primary business to be a claimant, should they otherwise fall within the definition.

THE PRESIDENT: Well, perhaps we could leave it with you and you can, if you wanted to write in just clarifying what you think is the preferred period of assessment, whether it's a period of the claim or year-by-year or whatever.

MR FLYNN: Thank you, Sir.

THE PRESIDENT: Yes. There are various hands up. I will take any point other than the point that was raised before the break about the question of common issues, because I want to say something about that, but if there is some other point apart from common issues, I think, Mr Singla, you were first, then Mr Jowell, then

Mr Pickford.

MR SINGLA: Sir, I'm grateful. I just wanted to give the members of the Tribunal a reference. An issue of law seems to have emerged during the hearing as between myself and Mr Flynn as to whether section 47C(2) is confined to aggregate damages or not, and he said at pages 122-123 today that section 47C applies generally whether or not an aggregate award is sought, and, Sir, I made some very brief submissions about this last week at Day 3, page 69. I said that that's wrong, and if one looks at the statutory regime as a whole, it's plainly wrong, and the reference I wanted to give the Tribunal is to Rule 73(2) which defines, "Aggregate damages", and tracks precisely the language of 47C, and then the term, "Aggregate damages", is used throughout the Rules at 73, 79, 92, 93, 96, and the Rules make clear that where one is seeking aggregate damages in the defined sense, then one has to plead a case, and so on, and vacantia I just wanted to give the Tribunal that reference, if it assists.

THE PRESIDENT: Yes. Thank you.

MR HARRIS: Sir, can I give a reference on that same point to assist? On the same point, and for the same reason, it's paragraph 6.78 of the guide under the heading, "Award of damages and costs", also defines it in the

same way, and that's at JA/12/31.

THE PRESIDENT: Yes. Well, I would hope the guide follows the definition in the rules. If we define it differently that would be somewhat embarrassing. Yes. Mr Jowell.

MR JOWELL: Yes. Sir, I'm conscious that I don't have a right of reply to the right of reply, but there were two novel points that Mr Flynn raised, I think for the first time in his reply on new and used trucks which, if I could say something very briefly about them, the first is the suggestion that people that have registered with the RHA have signed up in knowledge of the new and used issue, and have given their informed consent. We have looked at the document that they have signed. It is at {C/25/1} and there is nothing in that document that we have seen that waives their right to claim a conflict of interest. That is the first point that we would make.

There is a reference in clause 2.5 to the possibility that the RHA may, if it is not certified, including for reasons of a conflict of interest, it should then try and find those class members alternative representation or pursue the claim by other means, but there is no waiver of conflict of interest.

THE PRESIDENT: Yes.

MR JOWELL: The second point he raised was that we, as

defendants, have no legitimate right to raise this point. We say --

THE PRESIDENT: Well, he didn't say you have no right to raise the point. He didn't say that. He said it doesn't affect -- the conflict is not one that is going to concern you in the same way that it wouldn't concern you at the point of distribution.

MR JOWELL: Well, as to that, we say it is a fundamental principle of any class action regime that there cannot be a conflict of interest within the class in relation to a common issue, and as defendants we are fully entitled to raise that, even if we do so in the pursuit of our own interests --

THE PRESIDENT: Yes, well, he didn't say you are not entitled -- he didn't make that submission that you are not entitled to raise it.

MR JOWELL: No, indeed, but we say that it is fundamental --

THE PRESIDENT: Yes, and you have said that in your submissions before. I don't think that's reply.

MR JOWELL: Very well Sir. Those are the only points.

THE PRESIDENT: Yes, Mr Pickford?

MR PICKFORD: Thank you Sir. I have just two very short points. Firstly, Mr Flynn's improvisational skills led him to make a further new point this afternoon on the run-off period, and he has backed off his eight to nine

year period now and says it is 2014 or 2015, take your pick. He didn't advance any evidence for these new dates that are now being advanced in reply. They are as unsatisfactory as his earlier dates in principle. It simply seems to be the case that Mr Flynn recognises that his earlier dates were particularly objectionable, and he was chancing his arm and now he is seeking to moderate them somewhat, but the basic problem remains with all of these dates, is that the RHA never asked Dr Davis to give proper consideration to what the run-off period would be in advance.

Second point is that we have had some discussion about how the class might be defined, were the Tribunal to want to certify the RHA, and obviously I'm sure this is -- goes without saying, but it is, nonetheless, very important to my clients, that if there is to be some sort of modification or proposed modification of the terms of the class as compared to that which was sought by the RHA originally, it is important that we are heard on it, so that we can provide our views appropriately.

THE PRESIDENT: Well, I'm not quite sure about that, Mr Pickford. If we accept, for example, an argument that European trucks, as they have been described, should be excluded because we've been persuaded by the arguments of the respondents, we are not going to give

you another chance to be heard on it. If anyone would be heard it would be the applicants. If we were to increase the size of the class over what has been sought, certainly you would have a right to be heard, but if we say it seems too broad in some sense, whether it's this one or the UKTC, and we think it is more appropriately reduced, I'm not sure that having heard everything you said in complaint about it, that that means we have another hearing and another set of arguments.

MR PICKFORD: Well Sir, I think it depends somewhat on the terms. Obviously, if there is something where you accept a submission that's been made to you by one of the respondents and the effect is a blue pencil that we just draw a line through part of the class, I would accept we don't need a further hearing for that. If there is going to be an alteration, for instance, in relation to the definition of primary business, and there is going to be a new definition of, "Primary business", and we have a concern about the new definition, it would only be proper and fair to allow us to make submissions on that. It very much depends -- I take the point, it depends on the context.

THE PRESIDENT: Yes.

MR PICKFORD: But there may be some alterations where it

would be appropriate to ensure that we have a right of reply.

THE PRESIDENT: Well, if we accept an argument from a respondent, the fact that one respondent made the argument doesn't necessarily mean everybody else agreed with him, and we would never end on that basis, so the main thing is that you should be treated fairly, and if there is no risk of unfairness, I don't think we get another hearing and another lot of submissions, and in many class actions, certainly that's the experience in jurisdictions which have had a lot of these, the class as proposed in the application is not the one, quite, that the court finally certifies, and there is some involvement by the court in possibly curtailing. Sometimes it can go the other way in which case, of course, the respondents would have to be heard sometimes. The court may think that people are being artificially excluded and might think it ought to be broadened. That's more an issue with opt-out, obviously, than opt-in.

Yes, Mr Flynn.

MR FLYNN: Well, Sir, I don't want to reply to replies that aren't really legitimate, but I would say that the points that Mr Singla raised I did make in opening, and now I think you have both our submissions pretty

clearly, but the fact that aggregate damages are defined in the wording of section 47C may not be surprising, but that doesn't say that it's a comprehensive -- it is -- in Venn diagram terms it may not embody all the types of awards that the Tribunal can make, and obviously, as you say, the guide follows the rules.

In relation to Mr Jowell they weren't new points, I did mention informed consent, Day 2, page 45.

THE PRESIDENT: Yes. You needn't address us on that.

MR FLYNN: The point I would like just to quickly make on that is that you have to look at all the documents that proposed class members sign up to before you can make any reply submissions on informed consent, and, lastly, Mr Pickford's point that I was just improvising without evidence, the evidence that I pointed to was evidence that you heard from Dr Davis, and that's what underpins the length of the class definition that I would say was an appropriate one underpinned by the evidence. Thank you for your indulgence.

THE PRESIDENT: Yes, and I think Mr Harris.

MR HARRIS: Sir, yes, very short, there was a new point from Mr Thompson that in relation to defunct companies there might be a proposal that we heard this morning of involving the Treasury Solicitor. It didn't seem to find any favour, but in the same way as has been raised

as regards other new points, were that to be a suggestion that the Tribunal were minded to pursue, we would like to be heard on that because we don't think that's been thought through.

THE PRESIDENT: Yes. Thank you. That's about, as I understood it, that was with regard to companies that have been dissolved where the assets get passed as bona vacantia.

MR HARRIS: Yes. That's right. Thank you.

THE PRESIDENT: Then on the issue that aroused a lot of heat before the short break about the question of common issues, we do not, in the order, certify common issues. There is no requirement to do so, and we don't do so, nor does the draft order seek such certification. We have to be satisfied that there are common issues. If there are none, there can be no collective action, so that's the first question. There must be some common issues, and it is equally established that not all the issues have to be common. We, vacantia, need to indicate what issues and such issues that seem clear are common issues, but it doesn't go beyond that.

Of course, if the common issues are so limited and so few it may be, then, the Tribunal would think the case is not suitable for collective proceedings because it doesn't achieve much, but provided there are

sufficient common issues, then the matter is eligible to proceed as collective proceedings, so we do not have to set out at this stage every issue that might turn out to be a common issue.

We don't anticipate, vacantia, specifying that pass-on, however defined, if it is the RHA case, is a common issue, but we might express a view of what may turn out, depending on as the proceedings develop, matters that might be able to be dealt with appropriately collectively, or might need to be dealt with individually, depending on the evidence, including the expert evidence.

So I don't think it's a binary question now on the pass-through, even in a limited sense, as to whether it may prove in the end to be a common issue or not. We certainly won't approach it that this is a determinative question, and I hope that that satisfies the concerns that have been raised, and it is quite fair for you all to point out that the RHA did not put its case forward, suggesting that that is necessarily a common issue.

So if anyone wants to say something in response to that, now is your chance. Mr Thompson. Yes.

MR THOMPSON: Yes, Sir. It was -- it is a minor point but a formal point that if we get to the stage of an order under Rule 80, then one role that the Tribunal does

perform is to approve the notice provided for in 81, and that does provide for common issues, so to that limited degree, I think the Tribunal does need to approve the common issues to be notified to claimants. That's the only qualification to the indication that you have just given, Sir. That was the only point I wanted to raise. The approval process is at 80(1), and the references to the common issues are at 81(2)(c) and (d), but subject to that I'm grateful for the indication from the Tribunal.

THE PRESIDENT: Yes. Thank you. Mr Pickford?

MR PICKFORD: Thank you Sir. We are also very grateful. The only point I would make, and I'm sure it is an obvious one to the Tribunal, but in considering the extent of the comments that the Tribunal might make, it is obviously the case that we haven't advanced evidence on this issue, but we might well wish to do so, had it been raised as part of the claim. It's not just the intermediaries' question, there is also questions about how one might establish the ownership path for a given truck. There may well be other issues too, and we would just urge the Tribunal to bear in mind that there are a number of unexplored points here when considering what comments it might or might not wish to make on what might be certified in the future.

THE PRESIDENT: I'm sure we will take that well into account. Thank you. Mr Hoskins?

MR HOSKINS: Just a very short point on the Tribunal's powers in the order, and apologies you may already be aware of it already, Rule 74(6) provides -- sorry, I will let you look it up -- a collective proceedings order may be limited to only some parts or issues in the claim to which it relates, so obviously you have the choice, if the Tribunal so wishes, having heard five days of argument, it can define which issues are common and which are not, and for our part we suggest that it would be useful, given the Tribunal has heard five days of issues, to actually use that power and to specify which issues it has decided are common.

Now obviously that's something that may be revisited, we've seen the other powers where a CPO may be amended, but we have been here for five days and we would submit you can and should make that clear in the order.

THE PRESIDENT: Well, we will see what we think it is appropriate to do. I think, as we've just reached beyond 5 o'clock, as Mr Hoskins has just reminded us, if anybody needed reminding, we have been here for five days, albeit with interruption of two days' break which was no doubt welcome. When the collective proceedings

regime was about, together with the Registrar of the Tribunal, we went to North America to talk to Canadian and US Federal Judges about their experience with what they call, "Class actions", to see what advice they could give us. The one thing they were all agreed about is they are extremely challenging and difficult. There is no doubt that this is a challenging and difficult pair of cases. We clearly will take some time to consider all you have said. Thank you for your very well thought out, developed and efficiently coordinated submissions. You have given us a lot to reflect upon.

You will be informed in the usual way when we do produce our judgment. With that, we shall metaphorically rise and the proceedings have come to an end.

(5.05 pm)

(Hearing concluded)

I N D E X