IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1603/7/7/23
1628/7/7/23
1629/7/7/23
1630/7/7/23
1631/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 23rd – Friday 27th September 2024

Before:
The Honourable Mr Justice Roth
Professor Alasdair Smith
Ian Forrester KC
(Sitting as a Tribunal in England and Wales)

BETWEEN:
Professor Carolyn Roberts

Proposed Class Representative

v

(1) **Severn Trent Water Limited & Severn Trent PLC**
(2) **United Utilities Water Limited & United Utilities Group PLC**
(3) **Yorkshire Water Services Limited & Kelda Holdings Limited**
(4) **Northumbrian Water Limited & Northumbrian Water Group Limited**
(5) **Anglian Water Services Limited & Anglian Water Group Limited**
(6) **Thames Water Utilities Limited & Kemble Water Holdings Limited**

Proposed Defendants

-and-

The Water Services Regulation Authority ("Ofwat")

Intervener

A P P E A R AN C E S

Aidan Robertson KC, Benjamin Williams KC, Julian Gregory & Lucinda Cunningham (On behalf of Professor Carolyn Roberts)
Mark Hoskins KC, Matthew Kennedy, Anneliese Blackwood & Daisy Mackersie (On behalf of the Proposed Defendants)
Jessica Boyd KC and Daniel Cashman (On behalf of the Intervener)

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Wednesday, 25th September 2024

(10.30 am)

Submissions by MR GREGORY (cont.)

MR JUSTICE ROTH: I would just like to say we have had a further note, as we invited, from Ofwat for which we are very grateful and it certainly assisted our understanding of how the pricing works and, if I try to summarise it, that, in fact, Ofwat sets the allowances. The water companies report their pollution incidents and then the actual price they charge is set by the company according -- within the bandwidth of the allowance according to what they have reported. It is not that Ofwat tells them "You have to charge this". They set the price within the allowance that you have given them.

MS BOYD: That's correct, Sir. The process sets a maximum cap on what they can recover from customers.

MR JUSTICE ROTH: Yes.

MS BOYD: The only intricacy in relation to what you have said, as we tried to set out in our note, is that there is a process of in-period ODI determination by Ofwat, which is on the basis of the reported figures, but that process does not undo or go behind the formula that has been set at PR19 as to how the revenue cap will be calculated, and it doesn't, save to the extent explained in the note, go behind the figures as recorded in the EA database by the water -- in accordance with the companies' reporting requirement to the EA.

MR JUSTICE ROTH: That's why you get, now I understand it more clearly, the breach of paragraph 9.1 of Condition B.

MS BOYD: That's our position.

MR JUSTICE ROTH: Thank you very much.

Mr Hoskins, yes.

MR HOSKINS: On the note I have been asked to point out that Yorkshire Water's

performance commitments are in slightly different form for PR14. I don't think it matters at all for present purposes. I could give you the references if you wanted to read the difference, but I am not encouraging you to ask to for that unless you are particularly interested.

MR JUSTICE ROTH: Yes. There is quite a bit about Yorkshire Water in the experts' reports, but we are not being asked to take a different view.

MR HOSKINS: There is one other observation. This is simply an observation. It is not asking you to make a decision on it, but paragraph 8 of the note I found particularly helpful in the sense that you will see in the pleadings there's a reference to the fact, for example, that the reporting to Ofwat directly affected the price controls, etc, and that the reporting to the EA indirectly affected the price control.

Paragraph 8 is a very clear explanation, which shows that the performance commitments, the application of them, was driven in the first instance by information provided directly to Ofwat and the role of the information provided to the Environment Agency was very subsidiary. So you'll see that at paragraph 8(a):

"…Ofwat seeks assurance from the Environment Agency that it is satisfied that the classification of the reported incidents (under categories 1 - 4) is correct."

Then you have a footnote which explains the purpose of -- again you will have seen reference to the calibration report and the MD109 report, but it does, I think, clearly show that for practical purposes if section 18(8) precludes any claim based on the provision of information to Ofwat, and I simply put it this way for present purposes, it is difficult to see how there could be a free standing claim based solely on the provision of information to the Environment Agency, but that's not a matter for today. I simply make the observation because the way in which this note clarified the role of the EA information seemed to me to be helpful in that regard.

MR JUSTICE ROTH: Thank you, Mr Hoskins.

Yes, Mr Gregory.

MR GREGORY: May I just comment briefly on that? My understanding of what happens is this. The sewerage companies have duties to report discharges in the first instance to the Environment Agency. That is the major source of incident reporting the Environment Agency gets. The public will also sometimes report incidents and there may be occasions when the public reports in a situation when the sewerage company has not.

The Environment Agency then potentially carries out an investigation, or at the very least, it has to decide which of the four categories it is going to place the discharge into. Once it has decided that, that is recorded on the Environment Agency's database.

That information is then shared with the relevant sewerage company, so the sewerage company will know the incidents that the Environment Agency is aware of and the category that the Environment Agency has placed them into. So that information, which comes back to the sewerage company from the Environment Agency, is the basis for the information which the sewerage company then subsequently provides to Ofwat as part of the charge control process.

My understanding of what Ofwat is saying here is that, as well as getting that information from the sewerage company, they then also get it from the Environment Agency, or at least they check with the Environment Agency that the information that has been provided to them by the sewerage company is correct and accurately reflects how, among other things, the Environment Agency has categorised the discharges.

So Mr Hoskins suggests that the information provided to the Environment Agency is in some way secondary, but on another view, it is primary because it is the Environment Agency which records the information in its database, which is then passed to the sewerage companies, which is then passed to Ofwat.

There was one other point in your comments that I wanted to pick up. You noted that the revenue allowances were set by Ofwat and then the sewerage companies set their prices so as to comply with the revenue allowance.

If you could turn to Holt 1, which is in bundle 4, tab 1 --

MR JUSTICE ROTH: Yes.

MR GREGORY: -- and turn to page 55, and there is Table 4.3 at the top of the page, so the sewerage companies obviously have an incentive to charge their prices up to the revenue allowance limit. You can see at the bottom row in that table --

PROFESSOR SMITH: Mr Gregory, page? My fault. Sorry. I misheard you.

MR GREGORY: Bottom row in the table at the top shows the amount they overshot or undershot the revenue allowance in the different years. As you can see, in almost all years it was a relatively small deviation, less than 1%. The only exception is the year 2021, which was the year of the COVID lockdowns. My understanding is the reason why they sort of missed the revenue allowance limit at that stage was there was quite a significant shift from use of water and sewerage services in business premises to use at the home, and that meant that they overshot it or undershot it by a larger amount than they would normally.

I also understand that if they do over or undershoot, then it is possible for that to be taken into account by Ofwat subsequently.

MR JUSTICE ROTH: That's the result of the fact they reported an overperformance against the baseline which enabled them to price close to the allowance, but this is a direct result of the degree of overperformance that was reported.

MR GREGORY: The only reason I point it out is the method for estimating aggregate damages is based on estimating the difference between the revenue allowance in the actual world and the revenue allowance in the counterfactual, and the revenue allowance strictly speaking is the amount -- the maximum amount the sewerage

companies will be allowed to charge their customers, and the only point I am making is they do, in fact, charge up to that limit.

MR JUSTICE ROTH: Is that right? It is based on the difference between the revenue allowance? I thought it is the difference between the price that would have been charged, not allowance.

MR GREGORY: Yes.

MR JUSTICE ROTH: How close they would get to it or not. You are assuming the allowance is the same.

MR GREGORY: Yes. Of course, they set their prices, but the sum total of the prices produces less than the revenue allowance.

MR JUSTICE ROTH: Yes. I mean, I think Mr Holt explains it fairly clearly.

MR GREGORY: Just in terms of the order in which we are proposing to do things, Ofwat has kindly said they are happy to stay around for the submissions in relation to the counterfactual issue. They have no interest in the class definition issue. So what Mr Hoskins and I have agreed is that we will deal with the counterfactual issue first subject to your approval, including the response and any reply, and then we will move on to the class definitions ultimately.

MR JUSTICE ROTH: Yes. Presumably Ofwat has no interest in the funding.

MR GREGORY: Yes. I am just going to start with a couple of additional observations that were posed in the questions by Mr Forrester and Professor Smith at the end of yesterday afternoon. Mr Forrester asked whether the financial circumstances of the companies had any relevance to these claims. I said "No, it is basically a matter for Ofwat".

In addition, however, and it is actually noted in paragraph 3 of Ofwat's note, the performance commitments were subject to a collar. So a collar is a maximum level of underperformance that limits the financial penalties that can be imposed on the

companies. So if the target is 10 incidents and the collar is 15 incidents, it doesn't matter if actually they have 20 or 30 or 40 pollution incidents. The maximum level of underperformance is the collar of 15, five more than the target, which is the difference between the targets and the collar, and that's then used to calculate the financial penalty.

Ofwat --

MR FORRESTER: Supposing that one year the calculation established that they were at the collar, but if the collar hadn't been there they would have gone lower, the result would have been worse, does that analysis -- is the collar for the next year recalibrated?

MR GREGORY: My understanding is no. The collars are applied on an annual basis for each individual performance commitments.

The only caveat to that is in PR14, because it was the first charge control period in which these sorts of performance commitments had been introduced, as well as having collars on the individual performance commitments, there was also an aggregate collar that applied to the maximum amount of penalties that a company could incur across all of the performance commitments it was subject to, and that aggregate collar did not exist in PR19.

MR FORRESTER: So, to be clear, I was asking if from one year to the next there might be a recalibration, a re-determination. "You did very badly last year. You didn't suffer financially as much as you might have feared to suffer. This year we are going to recalibrate the collar".

MR GREGORY: My understanding is the collar -- the Ofwat solicitor shakes or nods her head -- The collars, as well as the targets for each year, are set at the beginning of the charge control period and once set they are not changed throughout the period.

MR FORRESTER: Thank you.

MR GREGORY: The point in relation to your question I was going to note is that Ofwat sets the collar figures, as well as the targets, in the light of its statutory duties, including the need for the sewerage companies to be adequately financed. So you are not going to get a situation where a company performs very badly, there is a collar and it is suddenly subject to some huge unforeseen penalty. Where the collars are there, the penalties are foreseen, or the potential size of the penalties are being foreseen.

Turning to Professor Smith's question, I took you through Ofwat's proposed approach to PR24, and then you noted that it was a “hypothetical jump” to say that Ofwat would just have done in PR19 what it is proposing to do in PR24 if the scale of the pollution incidents had become clear in PR14. I said this is an issue on which the parties will be able to lead evidence and make submissions and the Tribunal will just have to form a view as to the appropriate counterfactual targets.

Well, that is correct. It is obviously true, though, that because the counterfactual is hypothetical, it is impossible for us to know with any certainty or precision what would have happened in that counterfactual world. That is a point which is well-recognised in the authorities, which make it clear that courts just have to do the best they can with the evidence that is available, and in relation to that I will just show you a short passage from the Supreme Court's judgment in Merricks. That is in bundle 6, volume 1, tab 4. I would if be grateful if you could turn to page 325. At paragraph 45 --

MR JUSTICE ROTH: Did you say ...

MR GREGORY: It is authorities bundle, so bundle 6, volume 1, tab 4.

MR JUSTICE ROTH: Volume 1. Yes.

MR GREGORY: Tab 4, page 325. At paragraph 45:

"An appreciation of the legal requirements of the certification process, and in particular their level of severity, needs to be derived from setting the express statutory provisions of the Acts and the rules in their context as a special part of UK civil procedure, with

due regard paid to their purpose. Collective proceedings are a special form of civil procedure for the vindication of private rights, designed to provide access to justice for that purpose where the ordinary forms of individual claim have proved inadequate for the purpose."

Down at paragraph 46:

"The issues which gave rise to the forensic difficulties which led to the CAT's refusal of certification in the present case all relate to the quantification of damages ..."

Just pausing briefly there, the determination of the counterfactual is part of the quantification of damages. The nature and level of the PR19 targets will feed through directly into the estimation of aggregate damages.

On the next page, 326, at paragraph 47:

"Where in ordinary civil proceedings a claimant establishes an entitlement to trial in that sense, the court does not then deprive the claimant of a trial merely because of forensic difficulties in quantifying damages, once there is a sufficient basis to demonstrate a triable issue whether some more than nominal loss has been suffered. Once that hurdle has been passed, the claimant is entitled to have the court quantify their loss, [as a matter of justice]. There are cases where the court has to do the best it can upon the basis of exiguous evidence."

Then paragraph 48:

"A resort to informed guesswork rather than (or in aid of) scientific calculation is of particular importance when (as here) the court has to proceed by reference to a hypothetical or counterfactual state of affairs."

Then if you could turn over to page 327 and paragraph 51 at the bottom of the page:

"In relation to damages, this fundamental requirement of justice the court must do its best on the evidence available is often labelled the 'broad axe'."

Then the quotation:

"'The 'broad axe' metaphor appears to originate in Scotland in the 19th century."

We are getting some old authorities in here:

"'The more creative painting metaphor of a 'broad brush' is sometimes used. In either event the sense is clear. The court will not allow an unreasonable insistence on precision to defeat the justice of compensating a claimant for infringement of his rights".

There is European guidance to the same effect. In a Commission Staff Working Document entitled Practical Guide on Quantifying Harm in Actions for Damages based on breach of Articles 101 and 102 ... the Commission said ..."

I would be grateful if you could just read paragraphs 16 and 17 which are quoted there.

(Pause).

The point being made here is that if a claimant establishes an infringement and they have suffered some loss, then they have a right to have that loss quantified by the court even if that is a difficult task, and cannot be done with any precision. If a broad brush or a broad axe estimation is the best that can be done, then that is what must be done. That is the context in which the blueprint at trial considerations raised by the defendants' counterfactual point falls to be assessed.

The issue is whether the counterfactual issues raised by the defendants are likely to render the claims untriable, even taking into account the obligation on the court to quantify damages using the available evidence, even if the evidence is imperfect and even if it is impossible to know exactly what would have happened. That is why the Tribunal had described the Microsoft test as being a low order test for blueprint to trial. That is the quote at paragraph 52 of our skeleton.

So when I say that the parties will be able to lead evidence and make submissions on what the counterfactual PR19 performance commitments would have been, the fact that the Tribunal will necessarily be engaged in a speculative and uncertain exercise

because the counterfactual is hypothetical, does not mean that there is not an acceptable blueprint to trial. That is just the nature of the beast. If the PCR establishes her case on liability, the class members will be entitled to have their losses quantified.

I am now going to highlight a couple of aspects of Mr Holt's proposed methodology. First, I am going to show you that Mr Holt's method will produce estimates of the number of the pollution incidents that would have been reported in the counterfactual that could have been used for two purposes: first, to identify the counterfactual PR19 pollution targets -- what the counterfactual PR19 pollution targets would have been if, as the defendants contend, Ofwat would have used the same method for setting the target as it did in the actual world. And, second, that he produces estimates that can be plugged into those PR19 pollution targets, once determined.

On the first point I will just start by showing you what the defendants say about how Ofwat, in fact, set the PR19 targets. I would be grateful if you could turn back to Mr Williams' report, which is at bundle 4, tab 3, page 454.

At paragraph 3.31:

"Under its benchmarking analyses, Ofwat set the PCLs for Pollution Incidents at the upper quartile (UQ) of industry performance…

(b) At PR19, Ofwat set the PCL for pollution incidents for all WaSCs based on a forecast industry UQ. This was calculated from the WaSCs' forecasts of Pollution Incidents as submitted within their PR19 Business Plans."

Down at paragraph 3.33, just above the subparagraphs:

"…it follows from the above that:

(a) There is a direct and mechanistic link between the number of Pollution Incidents reported by WaSCs and the targets (PCLs) Ofwat set WaSCs at its PR14 and PR19 Final Determinations."

I would be grateful if you would just read footnote 49 to yourselves. (Pause.)

To remind you, there was a standard pollution incident target for all sewerage companies in PR19 and it is set out in the claim form. Again, I will just show it to you again, because it is going to be relevant to some other submissions I am about to make. That's at bundle 1, tab 1 and I would ask you to turn to page 61.

You can see at paragraph 136(2) sets out the PR19 performance commitments:

""Pollution incidents" based on the total number of Pollution Incidents (Category 1, 2 and 3) per 10,000 kilometre of wastewater network."

The length of each defendant's sewerage network is known, or at least easily identifiable, so the question is whether Mr Holt's proposed methodology is capable of producing an estimate for each of the defendants for the total number of category 1 to 3 pollution incidents that would have been reported in the counterfactual, absent the abuse.

If such estimates can be produced, on Mr Williams' approach they would have informed the defendants' pollution incident forecasts that Ofwat would have used to set the PR19 target.

I would be grateful if you could go to Mr Holt's report, which is bundle 4, tab 1 at page 72.

MR JUSTICE ROTH: Sorry. What page?

MR GREGORY: Holt, 72. I would be grateful if you would read to yourselves paragraph 7.1.5. (Pause.)

On to the next page, page 73. At paragraph 7.1.9:

"Sections 7.2 to 7.4 below set out a preliminary methodology for identifying unpermitted Early Spills ..."

MR JUSTICE ROTH: Can I stop you, Mr Gregory? Subject to correction, I did not understand the defendants to be arguing that there isn't a credible methodology put forward by the Proposed Class Representative for estimating, or seeking to arrive at,

the actual number of pollution incidents.

MR GREGORY: Save for one point which I am going to come to, subject to Mr Hoskins correcting me, what they say is we have identified a methodology of identifying discharges which are in breach of permits. Mr Hoskins has said for some of these assets there is basically a mens rea requirement. So it is only discharges in breach of permit which they knew about which should have been reported.

I am going to come on to that point, but I don't think there is any challenge to the methodology, for example, for establishing discharges that were in breach of permits.

MR HOSKINS: May I say, we don't accept the methodology at all, but we are not taking a certification point.

MR JUSTICE ROTH: But you are not saying it is implausible such that it shouldn't pass the Microsoft test? So this bit that you are taking us to, it is not being criticised for present purposes.

MR GREGORY: Yes. It is not at this stage.

Paragraph 7.1.9:

"Sections 7.2 to 7.4 below sets out a preliminary methodology for identifying unpermitted Early Spills and/or Dry Spills from the Defendant's DCAs."

Just to remind you “DCAs” are what has been defined as “discharge condition assets”. So that's assets the permits of which contain a discharge condition that says that the asset is not allowed, basically, to release dry spills or early spills. Sir, as you said, because this is not challenged, I am not going to take you through the substance of what he says there. It is sufficient to note for these purposes that the method will produce an estimate of the number of dry and early spills in breach of permits from assets which have that condition. That will include all spills without identifying which of the four categories they would have been placed into by the Environment Agency.

I have noted previously that Mr Holt has a method for estimating which category

unreported spills would have been placed in, had they been reported. That is in covered in section 7.7 of his report, which starts at page 94, 94 at the bottom of the page.

Paragraph 7.7.1:

"This sub-section sets out my proposed methodology for classifying Dry Spills and Early Spills… into different categories of pollution incident relevant for the purpose of PR14 and PR9 ODIs."

On the next page you can see of the references in bolder text to the self-reporting guidance and the CICS guidance. That's the classification scheme guidance.

On page 96 in paragraph 7.7.10 he there sets out his method for categorising -- putting spills into the different categories. You have seen that before. It was set out in our skeleton I think at paragraph 18. So he is proposing to look at spills which were reported to the EA and identify the characteristics that led them to be put into different categories, and based on that he will develop rules to allocate the spills into different categories.

Then if I could just ask you to read paragraph 7.7.15, which starts at the bottom of page 97. (Pause.)

So Mr Holt's method would produce estimates of unreported discharges that would have been placed into all four of the categories. He actually has to do that because some of the defendants have slightly different performance commitments. Some of them refer only, for example, to category 1 and category 2 spills. That will be able to be used for two things in the counterfactual analysis. First, they can be used to recalculate the Upper Quartile targets, if the Tribunal decides that Ofwat would in the counterfactual have used the same method for setting PR19 targets as it did in the actual world. Second, they can be used to calculate how the defendants would have performed against the counterfactual PR19 targets, once determined.

Of course, we cannot know for sure what metrics those PR19 targets would have used and we never will, because it is a hypothetical counterfactual, but at least in the absence, at this early stage of the proceedings, of factual evidence on the points, the two most likely candidates are, (1) the same metrics that Ofwat, in fact, used in PR19, category 1 to 3 spills per 10,000 kilometres of sewer, and, (2) the metrics Ofwat is proposing to use in PR24, which includes that metric, but also category 1 and 2 spills, the so-called 'serious pollution incidents', in respect of which the target is zero. In either case, Mr Holt's methodology will produce estimates that can be used to assess performance against such targets.

You now have a section which is entirely optional for the Tribunal. If you turn forward to page 127 in Mr Holt's report, at the bottom of the page there is paragraph 8.6.10 and in the first instance could I just ask you to read that paragraph to yourselves? (Pause.)

That paragraph is quite dense. It summarises -- it is in the context of a section which is producing a preliminary estimate of damages -- how you get from the estimated number of pollution incidents which should have been reported in the counterfactual to the impact on the revenue allowance, and my question for the Tribunal is whether you want me to unpack that paragraph and take you through it or whether you feel satisfied that you understand what's going on.

MR JUSTICE ROTH: Give us a moment, Mr Gregory. (Pause.)

MR GREGORY: You might also want to read footnote 303. The question is really in how much detail you want to understand how the performance against the performance commitments feeds through into the revenue allowance. It may be you think those are points of detail and you are happy they feed through in one way or another.

MR JUSTICE ROTH: Yes. I don't understand the cross-reference to table 8.7, which

doesn't seem to cover 2020.

MR GREGORY: Maybe it is an incorrect reference to the table. Possibly it should be a reference to table 8.9, row B., which specifies the penalty deadband.

MR JUSTICE ROTH: "The estimate reached its cap of 265 ..."

MR GREGORY: It should say "collar". All that has happened earlier in the chapter is that Mr Holt has estimated that this particular defendant would have hit its collar to the pollution incident performance commitment.

MR JUSTICE ROTH: So it should be "collar", not "cap"?

MR GREGORY: Yes.

MR JUSTICE ROTH: That does make quite a difference.

MR GREGORY: Then what he does is --

MR JUSTICE ROTH: No, I think it is 2020 -- no, I think it is at table 8.8, isn't it? That is what -- because that shows it exceeded the collar.

MR GREGORY: If they hit their collar, then they would have been subject to a penalty of £2.57 million. What actually happened based on what they reported was they received a reward of £2.34 million.

MR JUSTICE ROTH: Because they reported 184.

MR GREGORY: Yes, you take the number they reported. You then have to convert it into a rate per 10,000 kilometres of sewer. Then you multiply that by the ODI incentive rates and that produces the figure of £2.34 million and it is the difference between the reward of £2.34 million that they received and the penalty of £2.57 million which Mr Holt says should have been imposed on them that produces the figure of £4.91 million, and used as a sort of delta in the revenue allowance for that particular year.

If that's enough ...

MR JUSTICE ROTH: Let's just see ... Again, I mean, I think we can understand the

method. I don't quite follow where the figures might tie up, because at table 8.11 it has there 190 pollution incidents reported in 2021.

MR GREGORY: Yes.

MR JUSTICE ROTH: In table 8.8 it seems to be 184, not 190, but ... So I don't quite see how they work together, but I don't think we need that for this purpose. I mean, we understand what Mr Holt is doing I think. Yes.

MR GREGORY: I am grateful. In that case I will turn to the final point made by the defendants in relation to the counterfactual.

MR JUSTICE ROTH: But there was a mens rea point you said.

MR GREGORY: Yes. That's --

MR JUSTICE ROTH: In which you are saying that Mr Holt is taking account of all category 3, is it, incidents and the defendants say only category 3 incidents that they should have known about?

MR GREGORY: Yes.

MR JUSTICE ROTH: That should have been reported.

MR GREGORY: That's the point.

If you could turn up our skeleton at paragraph 75, that summarises the issue and our position on it. I would be grateful if you could just read paragraph 75. (Pause.)

MR HOSKINS: If I might hopefully clarify this to save some time, we did raise this point in the Response. We didn't then double down on it in our skeleton. I was just double checking my instructions. We are not going to pursue it as a methodology point, but there is potentially quite a big mens rea issue that may come back at a later date. There has been correspondence on that. I don't want to take up Mr Gregory's time or the Tribunal's time.

MR JUSTICE ROTH: That's very helpful. It seems quite complex because one gets into the different kinds of asset and, as I understand it, some of which have an absolute

obligation or some of which have monitoring equipment and some of which didn't. Yes. Right. So we are not concerned with that.

MR GREGORY: Nothing else beyond that. We have decided to push the class definition point until later. So unless the Tribunal has any more questions for me on certification, that was all I was going to say at this stage.

MR JUSTICE ROTH: Then Mr Hoskins.

Submissions by Mr HOSKINS

MR JUSTICE ROTH: We will make a start, shall we, and then take our break?

MR HOSKINS: I hope I can save some time at the outset by making it clear we are not going to pursue any methodology points in PR14 at this certification stage, although we would reserve our rights to fully argue those if certification is given, but for the purposes of today, for the purposes of certification we are not making up the PR14 methodology point.

MR JUSTICE ROTH: Yes.

MR HOSKINS: Just a very -- you have been taken to and though the law. I am going to show you a couple of authorities to stress a couple of points.

First of all the MOL v Mark McLaren case, which is at authorities 6, volume 1, tab 10, page 532. As you are aware, we had the Supreme Court in Merricks and then the Court of Appeal has subsequently made statements about how certification should be carried out in light of Merricks. That includes this statement in the Court of Appeal in McLaren at paragraph 14:

"There is a requirement upon an applicant for certification to place before the CAT a methodology setting out how the claim will be advanced at trial. This forms part of the material which is evaluated by the CAT to decide whether the statutory conditions for certification are met. The test to be applied to determine its adequacy is the

'Microsoft' test", which, as we know, comes from the Canadian authority.

So there is a requirement upon an applicant to place before the CAT a methodology setting out how the claim will be advanced at trial.

Then the Gutmann case. So this is tab 8 of this bundle.

MR JUSTICE ROTH: Just a second. Perhaps it is also worth looking at, while we have this open, paragraph 18 at page 535:

"The CAT made the significant (and in our view correct) observation that proportionality and practicability govern the construction of a methodology."

At paragraph 75, the quotation:

'In those circumstances, the use of an alternative methodology which will be capable of being applied in practice should not be prevented simply because a better one might be available in economic theory. Any such alternative methodology will need to be assessed on its own merits, having regard to the availability of data to enable it to be applied. Further, any chosen methodology may need to be adapted as data becomes available, or perhaps proves not to be available in exactly the way that was previously anticipated. The possibility of this occurring does not preclude certification ...'."

Now that may be worth bearing in mind.

MR HOSKINS: Absolutely, Sir. Obviously I am not going to take you through all the case law. I am just going to emphasise the points, and obviously there are bits in the skeleton argument that the PCR relied upon and we rely on other aspects, but I am not attempting a synthesis. I am just tying in certain points. You are absolutely right. There is a lot more than the two points I am going to show you.

MR JUSTICE ROTH: That does qualify the methodology point you make based on paragraph 14 of McLaren.

MR HOSKINS: It does, but the submission I am going to come to and the question for us is going to be has even a basic methodology been put forward for some of the

fundamental issues in this case? That's how I am going to put the case. That's how we have to put the case, because, as you pointed out, there are the refinements. What I am emphasising at the outset is there has to be a methodology placed before the Tribunal for dealing with the fundamental issues, no higher than that and no simpler than that.

Then in the same vein in the Gutmann case in the Court of Appeal, this is in tab 8 of this bundle, page 484, at paragraph 56:

"Issues not answers: At the certification stage the methodology must identify the issues, not the answers. The CAT is concerned to identify the issues and gauge whether the methodology proposed for determining those issues is workable at trial when the issues are tested and might lead to different answers, some in favour of defendants. Because of this the CAT will wish to assess whether, if the defendants do win on some issues at trial, the methodology is capable of being adjusted so as to reflect only partial victory by the class."

So you have seen the submissions about -- there is a legal submission about the counterfactual. Now the PCR might win on that, but we might win on that. You have seen our written submissions. It wasn't developed orally, so I am not going to go back to that legal debate, but quite clearly, we say there is a prospect we will win the legal debate at trial. So the PCR has to be in a position, if we are right, to deal with that aspect. So the CAT -- we leave that on one side, because it has not been pursued today by the PCR, so I am not going to tilt at that windmill.

So assume that legal issue has been resolved in our favour and we are into identifying the counterfactual. The CAT has to identify the issues, engage whether the methodology proposed for determining those issues is workable at trial.

If we look at Mr Holt's methodology at a very high level, so that's bundle 4, tab 1, and if we can turn to page 106, at the bottom of page 106 you see "Summary of framework

and the data required for the proposed methodology". Can I ask you to read, please, paragraph 7.12.1? (Pause.)

We need to focus on steps 2 and 3, because it was clear from the summary and indeed from reading the rest of the report is, having established the number of Pollution Incidents that Mr Holt contends should have been reported in the counterfactual, what Mr Holt then does is he plugs those numbers into the actual performance commitment and ODIs that applied in PR19 without making any other adjustments. That's common ground. I will give you the reference. We don't need to turn it up. That's the PCR's skeleton, paragraph 62. That's bundle 1, tab 1, page 662.

With respect to the PCR, the core issue for today is not whether once a counterfactual has been identified, could that be plugged into the model? The issue today is how would the Tribunal identify the relevant counterfactual at trial? That's the gap in the methodology. That is fine. You fire away. I am sorry. I missed you.

MR FORRESTER: I asked you to repeat that slowly, just the last bit.

MR HOSKINS: The core issue is not, having identified the counterfactual, could it be plugged into Mr Holt's methodology? The core issue is how is the Tribunal to determine the counterfactual to be plugged in at trial? That is the limited but very important question our submissions focus on.

I can say to you with a high degree of confidence that it is almost certain that, in the counterfactual, the performance commitments and ODIs and indeed the ultimate revenue allowances set by Ofwat would have been different. You don't have to take my word for that, because Ofwat has told us what the position would be.

If we can go to Ofwat's skeleton, bundle 1, tab 14 at page 745 --

MR JUSTICE ROTH: Skeleton for?

MR HOSKINS: This is for today.

MR JUSTICE ROTH: For today.

MR HOSKINS: Bundle 1, tab 14, page 745.

MR JUSTICE ROTH: Paragraph?

MR HOSKINS: It is paragraph 15.1. Ofwat explains:

"Ofwat makes price control decisions on the basis of the evidence available to it at the time. If the information available to it had been different at the time of a price control decision, it may have reached different decisions both in terms of methodology and determinations."

So, for example, it may have adopted a wholly different methodology for performance commitments. It may have adopted a different methodology for ODIs. That's what Ofwat tells us.

The task for the Tribunal at the trial, given that basis that Ofwat has explained, is the Tribunal would have to determine that counterfactual.

Now a number of issues with the PCR's proposed methodology were identified in Mr Williams' report and I know you have seen that, so I am not going to go back to the detail of that. They are also flagged up in paragraphs 85 to 97 of our consolidated response, which is at tab 6 of this bundle at page 250. It is the same bundle, tab 6, page 250.

If you turn to page 252 and read paragraphs 89 to 90. (Pause.)

So the first issue that we have highlighted is that it cannot be assumed that in a counterfactual in which a materially greater number of pollution incidents were being reported the targets set by Ofwat in the performance commitments and ODIs would have remained the same. Mr Holt doesn't take account of that.

You were shown this morning Mr Williams' report, who referred to the fact that there was a mechanical relationship. He actually goes further than Mr Holt on this. Mr Williams doesn't provide the answer to this methodology issue because, as I have shown you, Ofwat has said it is not just the determination that may have been different;

the methodology may have been different.

MR JUSTICE ROTH: Mr Hoskins, we don't have to decide that the methodology that Mr Holt put forward is necessarily correct either in totality or in every aspect. We have to decide if it is a plausible method, not if there is another plausible method that can be used.

MR HOSKINS: Yes.

MR JUSTICE ROTH: So Mr Williams makes a point, for example, in looking at targets -- he has I think a bar chart, if I can find it. It is on page 467 in his report, bundle 1, tab 3, page 467, his figure 6 -- saying that, in fact, the number of Pollution Incidents were required in, if I have understood it correctly, in PR19 by just under 30% by the number of pollution incidents reported in the PR14 period. So they required a 30% reduction. So that's how the targets were changed.

Another plausible methodology is then to say "Right. Mr Holt gives us an estimate of the actual number of Pollution Incidents that should have been reported in PR14. Set your target. Apply the same logic. Reduce it by 30%". That can be done. Mr Holt can adjust his method by substituting those targets.

MR HOSKINS: I agree, and that's why I said, although Mr Holt has not done that exercise, Mr Williams has, and I absolutely accept that the Tribunal can look at what Mr Williams has done and say "Actually this solves the problem".

MR JUSTICE ROTH: Well, it doesn't solve the problem but it shows there is an alternative method.

MR HOSKINS: It solves the problem of providing a methodology.

MR JUSTICE ROTH: Yes.

MR HOSKINS: But it doesn't solve the problem used in that sense because, as I have shown you, what Ofwat has told us is that the methodology used to set the PCs may have been different in a different factual circumstance. So, for example, whilst we are

told that the PR19 was set by reference to the upper quartile, and therefore if you accept that that remained the same, you just have a mechanical exercise by plugging in the figures to come up with a different upper quartile, that methodology may not have been adopted at all in PR19 according to Ofwat.

MR JUSTICE ROTH: The Tribunal will have to take a view on the balance of probabilities and listening to argument that you will advance on what you say would have been likely to happen, because nobody knows, but what's the most probable position, listening to the class representative saying what they say is the most probable position, and no doubt having some assistance from Ofwat, as we have been offered at this hearing and I assume Ofwat will offer us at the trial.

MR HOSKINS: I will come on to that. What I am doing at the moment is I am identifying the issues that certainly would come up at trial and there's a question then of whether there's a mechanism for dealing with it.

Now what the PCR is saying to you at the moment is "We will have legal submissions. We will have factual evidence. We will have expert evidence". I want to come on and address that as to whether that should satisfy the Tribunal at this stage. So absolutely I am going to come on to that. If helpful, I will deal with it quickly. I will just flag up the other particular elements of the issues that are certainly going to come up that have to be dealt with so we can frame the question we are asking ourselves.

MR JUSTICE ROTH: Yes.

MR HOSKINS: The second point that we flag up -- this is at paragraph 96 of our response -- is that in terms of the evidence that would be required is that relevant performance commitments and ODIs were determined on the basis of the performance of all WaSCs and not just the Proposed Defendants. So there is an evidential question there. How do you deal with that?

MR JUSTICE ROTH: We know what the performance of the other defendants is.

MR HOSKINS: There may be an issue as to what would happen in the counterfactual. We may have to get the information from Ofwat. That would have finance implications. I am going to come on also to the litigation plan and the budgeting for this, Sir.

MR JUSTICE ROTH: But I don't understand -- we know they took account of the performance of all WaSCs. Performance of these defendants would have been different but there is no allegation against anybody else. So in the counterfactual, one assumes it is the same.

MR HOSKINS: My point is an evidential one, that the information would have to be obtained of the details.

MR JUSTICE ROTH: Of how?

MR HOSKINS: Of the figures for the other WaSCs.

MR JUSTICE ROTH: How the target was arrived at, yes. Well, that shouldn't be -- Ofcom (sic) has gone through all this calculation, produced its targets for PR19. It has the figures.

MR HOSKINS: I am going to come to the practicalities. I promise you I am not going to shy away from it.

MR JUSTICE ROTH: I don't see a problem.

MR HOSKINS: I understand that.

The final point I would like to flag up is, when we are looking at the counterfactual we are not just looking at what the Performance Commitments would have been in the counterfactual, and the reason for that is the revenue allowances were determined in the round. So the Performance Commitments and ODIs were only one aspect of Ofwat's price control regime and there were many other factors that went into mix in order to decide the allowable revenue that a WaSC could obtain and, of course, that would then feed into the prices they could charge to the class members.

Now in deciding what level of allowable revenue to set, Ofwat had to have regard to

its statutory duties, and those include protecting the interests of consumers and they also include securing that the WASCs are able to finance the proper carrying out of their functions. That's section --

MR JUSTICE ROTH: Is this your paragraphs 93 and 94 in your response?

MR HOSKINS: Yes, that's right. It is dealt with there. So we are not just looking at Performance Commitments. We are looking at the setting of the revenue allowance. It is a larger world than the PCR has focused on.

If you go to our annex 2 in our Response, so that's still in bundle 6, still in this document indeed, at page 320, you will see the heading "Relevant Ofwat regulation: price controls and information requirements."

What we have done there is set out a high level description of what is involved in a price review in order to arrive at the revenue allowance which is permitted. I will quickly take you through the steps. Looking at the top of page 321, paragraph 294:

"The price review process is broadly as follows: First: Ofwat publishes information about its approach to the price control. This may include information about what WaSCs should include in their business plans, its approach to reviewing business plans and its methodology for determining the level of the price controls."

“296. Second: WaSCs prepare business plans and submit them to Ofwat. Ofwat may ask WaSCs to revise and resubmit their plans following an initial review.

297. Third: Ofwat publishes draft determinations setting out the outcomes the WaSCs must deliver (i.e. PCs); the allowed revenue it can recover from its customers; and how Ofwat determined allowed revenues based on its calculation of efficient costs and the allowed return on capital...

300. Fourth: after receiving representations on the draft determinations, Ofwat makes its final determination for each WaSC."

Then if you could read, please, paragraphs 301 to 303. (Pause.)

Finally, at paragraph 311 you are told what the actual performance commitments -- the methodology, if you like, for the Performance Commitments for PR19, but bear in mind, as I have shown you, that Ofwat has said the methodology may have been different if the facts had been different.

Those are the issues or some of the issues, central issues, that would have to be determined by the Tribunal at trial or addressed at trial, of course.

PROFESSOR SMITH: Can I just ask whether -- it is the last point you made, Mr Hoskins. In practice, is it really going to be different from the points that have already been discussed about what the benchmark of performance for Pollution Incidents should be, that if we were faced with a counterfactual in which the PR19 requirements for the WaSCs were to be unrealistically large, then that would have financial implications for the whole plan, but if you make an adjustment to the assumption, counterfactual assumption, so that the expected improvement in performance in PR19 is as it was in the actual PR19, then the likelihood of there being substantially enough other problems in the model as to require a rethinking of the methodology beyond the adjustment of the pollution target -- it is not obvious why that should be.

MR HOSKINS: Well, the starting point is, at the moment, Mr Holt assumes that the PC stays the same. We say that's not viable. The next question is Mr Holt will have produced his figures for what he says should have been reported. We will then have to ask what would the PC have been set at? In assessing that, one of the issues about where would it have been set at would be having an eye on the broader statutory requirements, which includes protecting consumers and ensuring the financeability of companies to deliver. A balance has to be struck between them.

Now you are absolutely right. A balance could be struck in a certain way by adopting a particular methodology for the PC at a certain level and that would be satisfactory to

meet all the requirements. I simply make the point that that 'in the round' would have to be fed into the identification of the counterfactual PC, but I understand the point you are making to me, which is if the methodology for the PC, that might be the answer to the problem. We don't know and that's why it is a counterfactual. My only point is we do have to consider the wider picture.

MR FORRESTER: You are listing a number of arithmetical conceptual challenges. You are not saying they are impossible. You are just noting this is going to be tricky.

MR HOSKINS: I say they are not arithmetic challenges. They go beyond that.

MR FORRESTER: I agree.

MR HOSKINS: You are absolutely right. I am trying to establish the complexity of the considerations. They are not just arithmetic. They are value judgments to be made by Ofwat and they are value judgments faced with statutory requirements that you can see would pull in opposite directions potentially. You are absolutely right. That's the point I am trying to establish.

MR JUSTICE ROTH: As I understand it, the reason for having the collars is precisely to protect the companies from too great a penalty, which would affect -- might affect their financial viability. That is having regard to that issue. So Ofcom (sic) has made a judgment in setting the collars.

MR HOSKINS: I am going to correct you. You keep saying "Ofcom". You picked me up.

MR JUSTICE ROTH: Yes. Ofwat. That is the judgement it made at the time of the maximum penalty that should be permitted, having regard to the financial statement that they had made that they take account of. What was the expression you used -- to ensure the companies can finance their functions.

So we have their judgement in terms of the collars. It would be a good reason for assuming there would be something completely different, that the finances of the water

companies are not changing, the counterfactual. What's changing is the number of Pollution Incidents.

MR HOSKINS: Well, if the number of Pollution Incidents reported were higher -- I mean, one of the points that Mr Gregory made to you yesterday, showing you the PR24 preparatory targets, is different environmental targets may be considered appropriate and if --

MR JUSTICE ROTH: It might have been a lot tougher but in your favour the case being advanced against you is that basically PR19 would have had roughly the same sort of structure, but the levels, the targets might have been different.

MR HOSKINS: That's right. I take that point.

MR JUSTICE ROTH: You say he shouldn't have used the same targets but the methodology will accommodate that change. They might have thrown it overboard and done something completely different, which would make your life much harsher, if possible, but that is not a case being run against you and it seems that it is not necessary to go that far, which might lead to potentially much higher damages. That is not the case you have to meet.

MR HOSKINS: No. The case I have to meet for certification purposes, as I pointed out to you, it is common ground that the methodology you have been presented with simply assumes that the PCs in the counterfactual for PR19 would have been the same. That's the methodology you have in front of you. I am making the submission that that is not sufficient, because there are a large number of moving parts.

I am not trying to convince you that the most extreme examples would occur. I am simply pointing out that at trial that is going to be a battle ground between the parties inevitably, because the suggestion that the PC -- the performance commitments at PR19 would stay the same is going to be challenged. So that is an issue the Tribunal is going to have to determine. That is an issue, according to the Court of Appeal, the

PCR has to put forward a methodology so that you are comfortable when it comes to trial it can be dealt with.

In a sense the "methodology" you have been given is that at trial there will be legal argument, there will be factual submissions and there will be economic evidence. That's what has been put forward, if you like, as the solution to this issue.

I would just like to look at what that actually means and what the implications of that are. This is the nub of the submission.

MR JUSTICE ROTH: Shall we take a break?

MR HOSKINS: At that dramatic moment.

MR JUSTICE ROTH: We will return at 12.15.

(Short break)

MR JUSTICE ROTH: Yes, Mr Hoskins.

MR HOSKINS: So I have identified the fact that the issue is very likely to be broader than currently addressed by Mr Holt. We have seen and heard that the PCR's proposed approach to the broader counterfactual is a mixture of legal argument, factual submissions and economic evidence.

Let's just consider for a moment what that actually means and what's proposed. The documents relating to PR24 do not provide an answer. As Professor Smith observed yesterday, the world before PR19 was very different from PR24. Whilst it is no doubt right that the PR24 documents will be produced in evidence, they are not a solution. They are just a part of the puzzle. So that's not a complete answer there.

MR JUSTICE ROTH: They show that Performance Commitments, targets, collar, cap. That method has not been thrown out.

MR HOSKINS: I understand. I think I am always quite careful not to pitch too high. It would certainly be produced but it wouldn't necessarily be the answer.

MR JUSTICE ROTH: It is quite powerful evidence.

MR HOSKINS: I understand.

MR JUSTICE ROTH: That Ofcom (sic)-- any counterfactual one is trying to go do, the court or Tribunal will say "What's the most probable situation?" because nobody knows what it would actually have been, because it didn't exist. PR24 is powerful evidence that they would probably have adopted the same broad approach.

MR HOSKINS: This would be a matter for trial, so I would accept it would clearly be relevant. At trial we will have to see how relevant because, for example, the political situation has changed. The economic situation has changed. The technology situation in the industry has changed radically in terms of monitoring. So there are fundamental differences that have occurred since PR19 and that would have to be taken account. Would it be relevant? I absolutely accept. The degree of relevance, in my submission, is we can't forejudge that now.

Can we go to the PCR's reply, which is bundle 1, tab 7, at page 373? This is where they explain with detail what their approach would be to this issue at trial. Paragraph 100.

"If the second factual question did arise, it would require the Tribunal to determine the Pollution Incident Performance Commitment targets/collars that would have been imposed by Ofwat in the counterfactual if, absent the abuse of conduct, the relevant defendant and other WaSCs had reported higher numbers of Pollution Incident."

I have already submitted to you that it is not simply a question of looking at the Performance Commitments and certainly not just the targets and collars. It's a wider exercise than that. Then they say:

"In respect of such factual issues it is likely that the parties would wish to adduce relevant evidence, for example, evidence from a factual or expert witness familiar with the process through which Performance Commitment targets were/are set. As it is an intervener in these proceedings, Ofwat – which is obviously familiar with its own

processes –would possibly wish to adduce evidence, which the Tribunal could take into account."

So that's the proposal. I would just like to break that down a little.

In relation to Ofwat I am not going to put words into Ofwat's mouth, the suggestion, for example -- well, it is not even suggested, but the possibility that Ofwat would voluntarily re-run PR19 on the basis of Mr Holt's increased reporting figures is clearly fanciful. They have enough to do in their day job without redoing PR19 for the purposes of a damages case.

MR JUSTICE ROTH: I don't think that's being said at all, Mr Hoskins. That's not what's being said here.

MR HOSKINS: No. I didn't say that's what's being said. I am just making the point that Ofwat are not going to do that.

MR JUSTICE ROTH: Yes, but then you are tilting at windmills. Yes.

MR HOSKINS: Then the question is what would a question of disclosure, etc, be from Ofwat. I will come to that in a minute.

So one therefore has the next suggestion, which is there would be evidence from a factual or expert witness -- I am so sorry.

MR JUSTICE ROTH: That's not what's being said. It is not disclosure. It is not that Ofwat would re-run PR19. It is that Ofwat would explain the process through which Performance Commitments were set.

MR HOSKINS: Yes, and that --

MR JUSTICE ROTH: That's something that Ofwat could give evidence of, explaining the process, what sort of things they take into account, how they take them into account. They could produce clearly a witness. It won't be difficult, because they have done it recently.

MR HOSKINS: Again, Sir, you say it would be easy. Ofwat has told us in its skeleton

argument that the approach it adopts depends upon the factual evidence available at the time and it may adopt a different methodology and a different determination depending upon the facts at the time. Now if what you are putting to me, Sir, is Ofwat can explain what it did in PR19, then absolutely that's right. If the point you are putting to me is that Ofwat can explain what it would have done in the counterfactual, then I would take issue with that. That's a very different issue. I don't think one can readily assume that that would be easily done by Ofwat or indeed that they would be very keen to do that in the context of this case.

MS BOYD: Sir, might it help if I just make a few comments on what Ofwat may or may not be prepared to do? You referred earlier to Ofwat providing assistance of the sort it has provided in the context of this hearing, and Ofwat would be very happy to continue to do that, to explain the processes it adopts, to explain what it has done in the past and why. Ofwat would have no enthusiasm at all for giving speculative evidence about what it might have decided counterfactually in PR19 on the basis of evidence it didn't have, for what I think are obvious reasons. The output of the price review process is the output of a long and complex process that takes into account a wide matrix of relevant factors and is based on industry consultation. I think the idea that someone from Ofwat -- it is, of course, a decision by Ofwat, the organisation, as well, not of any individual -- the idea that an individual might give evidence and be cross-examined on what it might have done hypothetically I think would be problematic for a number of reasons. So that at the moment is not in contemplation and I don't believe that is what is being suggested by the Tribunal either.

MR JUSTICE ROTH: No. You are quite right. It is really how Ofwat took account of the incidents that were reported in developing the commitments that were set and the collars and the caps in PR19. So factual evidence of what it did, but drilling down a bit more than one might see from simply looking at the commitments or PR19 itself. Yes.

MR HOSKINS: I am very grateful for that. That was in a sense the position I was presenting. So I am very grateful for that indication.

The other aspect that was suggested by the PCR is evidence from a factual or expert witness familiar with the process through which performance commitment targets were or are set.

So you have these very high level suggestions about how this would be approached, but when one looks at the litigation plan, one does not see reflected therein these sorts of exercises that are now being said would be necessary and taken account of in the litigation plan.

I will show you the details, but if it is right that the PCR's litigation plan doesn't address the need for this sort of evidence to be produced, then in my submission it must follow the budget must also not take account of that, because by definition they haven't thought of it when producing the litigation plan and budget.

The litigation plan is in bundle 3 at tab 4. First of all, there is a heading on page 137 "Disclosure by a non-party to the Parallel Proceedings".

"The PCR considers, especially in light of Holt 1, that there are areas where the Environment Agency and Ofwat may be able to assist with the production of certain limited data and documents."

So we are in bundle 3, tab 4 and I am at page 137 and I have just read from paragraph 56. So possibly limited data and documents from Ofwat and the EA.

"For example, Mr Holt intends to seek from the EA details of (and the basis for) its methodology for assessing whether a spill occurred as a result of snowmelt such that it would not be classified as an unpermitted dry spill. It will also likely become necessary to seek disclosure from Ofwat about the operation of its price control processes relevant to the Parallel Defendants and/or the scope and processes of its investigations mentioned at paragraph 54 above."

So that is getting closer to the mark, but you will see that is caveated by certain limited data and documents. I hope you have a sense from my submissions of the breadth of the issues that will possibly have to be considered at trial.

In relation to factual witnesses, if we go to page 138, paragraph 60, "How necessary witnesses will be identified and steps that will be taken to establish their evidence":

"The PCR is filing a factual witness statement from Professor Hammond as part of each of her applications for CPOs."

You have seen that. Then over the page:

"The PCR and her legal team do not at this stage", that's the certification stage, "expect to adduce any other factual evidence, but will keep this under review as the proceedings progress... The PCR anticipates that, in the event of certification, the Parallel Defendants will wish to adduce evidence of fact from witnesses, although it is too early to anticipate the precise scope of this evidence. The PCR reserves her position on whether it will be necessary to advance positive or rebuttal evidence in such circumstances."

So the submission that's being made today in relation to this issue is that the matter will be determined by evidence and that the PCR may wish to obtain evidence from factual witnesses who are familiar with the process through which performance commitments are set, but that is not reflected in this proposal in the litigation plan.

In relation to expert evidence, you see the heading "Expert evidence" on page 139. There is the explanation at paragraph 63 that the PCR has instructed an expert economist, Mr Derek Holt. Then at 64:

"The PCR considers that additional experts will likely be required and she will make relevant proposals if CPOs are granted once pleadings are closed. Provisionally, such experts might include:

64.1. a water industry expert with engineering experience."

You will see the nature of the issues that might be addressed by that person.

Then at 64.2:

"a climatology expert who could give evidence to assist Mr Holt to establish whether any particular spill was due to rainfall."

So no reference to an expert in relation to the manner in which Ofwat sets its price controls.

So we do say that we raised these issues. We made the point that at trial the counterfactual issues would go well beyond that recognised by Mr Holt, who doubles down on the PCs would have remained exactly the same in the counterfactual. The response came from the PCR, "This will be dealt with through dealings with Ofwat, factual evidence and expert evidence", but one does not see that necessarily intensive, expensive exercise reflected in the litigation plan.

As I said, I do submit that if it has not been recognised and if it's not been taken account of in the litigation plan, it almost inevitably follows that the budget does not account for this considerable stream of work.

MR FORRESTER: Not being frivolous, at least not meaning to be, you are listing a number of -- I wrongly used the word "arithmetic" -- a number of technical, factual verification steps that would be involved and you are saying, "These look expensive". Will you be offering a less expensive or more efficient method assuming and assuming and assuming the matter goes forward, a style and organisation of the process which would be more efficient or economical, or are you merely -- when I say "merely", I don't mean to criticise at all -- or are you merely noting the possible unquantified potential extra costs that would be involved?

MR HOSKINS: Absolutely correct. If this matter is certified, it will be case managed by the Tribunal to ensure it is done in a proportionate and cost efficient way. However, given the nature of the issue, even with such active case management, this is clearly

going to be a fairly extensive and costly exercise. My point is that the litigation plan simply hasn't acknowledged that this exercise will have to be carried out and doesn't cater for it, but you are absolutely right. It is not that we are going to come and rack up costs, because we will not be allowed to do so. The Chair will not allow us to do it. I know him too well. So that's not the submission. Even with active case management this is clearly a very substantial stream of work and it lies at the heart of the case.

MR FORRESTER: You imply by comparison to other certified cases the difficulties of estimation, quantification and so on would be greater in this case than others of which you have experience.

MR HOSKINS: This is a particularly difficult counterfactual. I think I can, hand on heart, say that, yes.

MR FORRESTER: Thank you.

MR HOSKINS: Unless you have any other questions, that's what I wish to say in relation to that part of it.

Sir, there is one statement I wanted to make, and it may be it is a good time to do it now before Mr Gregory stands up.

Ms Boyd yesterday made a reference to Ofwat's enforcement powers. You may remember.

MR JUSTICE ROTH: Yes.

MR HOSKINS: I can just read you from the transcript yesterday. She said:

"Section 18 does permit and require enforcement orders in cases of regulatory breach that make such provision as is requisite for the purpose of securing compliance, and it is Ofwat's position that in the case of a breach of a condition requiring the levying of charges in a way best calculated to comply with the price control, securing compliance could include some direction that the companies undo the effect of the overcharge, i.e. that there is, under that statutory enforcement power, a route by which in the case

specifically of a breach of this kind, which concerns overcharging, where that money could find its way back to the pockets of consumers under the statutory scheme."

I have done that in a much more wooden fashion than it was originally delivered, but you remember the point.

Now I have been given instructions by each of the defendants that they accept in principle Ofwat would have such a power. Obviously I have to caveat it would depend on the particular circumstances of the case, the nature of the enforcement order that's being proposed, etc, but I am instructed to say to the Tribunal that, in principle, the defendants accept that such an enforcement order could be made in the right circumstances.

I am sorry. That goes to a different part of the case, but while I was on my feet I thought it was helpful to raise that.

MR JUSTICE ROTH: Yes, it is.

Yes, Mr Gregory.

Submissions by MR GREGORY

MR GREGORY: Sir, I imagine you will be pleased to hear that I will be very brief. I just note that Mr Hoskins started by stating that the defendants were no longer taking any point in relation to PR14. So we no longer have any challenge whatsoever to the counterfactual methodology insofar as it relates to PR14.

The class definition point that I will come on to simply goes to the wording of any collective proceedings order that may be granted.

MR JUSTICE ROTH: Yes, the class definition point isn't a certification point, isn't it?

MR GREGORY: Yes. Mr Hoskins stressed that the initial methodology simply assumed that the counterfactual PR19 targets would have been the same as in the actual. I explained during my main submissions that we did not want to anticipate

what points the defendants may take about this, in particular, because the implications depend on how they put it. So if they said that the only counterfactual adjustments that should be made were to the reporting of the individual defendant in the claim, that may not affect the upper quartile figures at all, but irrespective of whether you think we should have addressed this or not in the initial materials, I have shown you that Mr Holt's methodology will produce estimates that can be used both for the purpose of identifying what the PR19 counterfactual targets would have been and for establishing how the defendants would have performed against those targets.

In relation to the points made about the litigation plan, I will leave it to Mr Williams KC -- that's the other Mr Williams, the one that's sitting to my left -- to address you on the potential implications for funding. The litigation plan was obviously drafted before the defendants raised this point in their response, but on the implications for the evidence Ofwat's approach to setting Price Controls is apparent from numerous extremely lengthy public documents. If Ofwat wishes to summarise its approach in these proceedings, it obviously can, but the Tribunal will be capable of determining the issue without any specific submissions from Ofwat.

From the PCR's perspective, I commented in my main submissions that both Mr Holt and Dr Latham were familiar with charge control processes from their work, and it is entirely possible that the evidence that the PCR puts forward as to what the counterfactual PR19 would have looked like would come from Mr Holt and/or Dr Latham.

As to evidence from the defendants, paragraph 65 of the litigation plan expressly notes that:

"The defendants may wish to instruct economic experts and potentially other subject matter experts."

I will just give you the reference for that. It is bundle 3, tab 4, page 140.

MR JUSTICE ROTH: Paragraph 65. Yes.

MR GREGORY: In any event, I took you to the Supreme Court judgment in Merricks first thing this morning. It is not necessary for the Tribunal to determine the counterfactual regime precisely. In fact, it is accepted that that's impossible. The Tribunal will closely supervise the proportionality of the evidence that is advanced by the parties in relation to this issue, the context being that the Tribunal actively case manages collective proceedings claims throughout the litigation.

Finally, the first document you were taken to was actually the Court of Appeal's judgment in the MOL case. Can I ask you to briefly turn that up again? So it is bundle 6, the authorities bundle, tab 10.

MR JUSTICE ROTH: Yes.

MR GREGORY: All I am going to show you is the headnote, because it shows you what happened in that case. Halfway through the first part of the headnote:

"The Competition Tribunal (1) ..."

MR JUSTICE ROTH: Page?

MR GREGORY: Page 524.

"The Competition Appeal Tribunal (1) having held that on the evidence the silo model of pricing advanced by the class representative was plausible, certified the claim ..."

A couple of lines down:

"A group of the defendants appealed on the ground that the Tribunal had erred because the class representative's methodology, which did not address the overall pricing case but confined itself to explaining the silo price theory, was defective, and that in the light of the Tribunal's error the claim should be struck out or set aside."

In the "Held (1)" the appeal was dismissed. So the attempt to overturn the certification decision was not successful.

If you turn over to page 525, what the paragraph "But (2)" says what the Court of

Appeal thought actually, having identified the main battlelines, the points of dispute between the parties, is it should have given more thought to how that issue was likely to play out during the litigation, but it did not overturn the certification decision. Instead you see at the end of sub (2):

"... it was appropriate to remit the claim to the Tribunal so that it could reconsider case management of the dispute between the parties as to the approach to pricing."

I don't think it is relevant to take you to them, but the relevant paragraphs in the judgment are paragraphs 50 to 52.

MR JUSTICE ROTH: Yes.

MR GREGORY: I hope I've satisfied you that there is no serious blueprint to trial issue here for the reasons that I've given you, but even if you thought there was, and in particular taking into account that no point is now taken in relation to the PR14 methodology, the appropriate course would not be to refuse certification, but to certify the claims and then simply use the Tribunal's case management powers to require this aspect of the case to be fleshed out in more detail.

I now turn to the class definition, unless you have any more questions on the counterfactual issue.

MR JUSTICE ROTH: Class definition. This is the question of whether the class can include members who only started to suffer loss between the issue of proceedings and the grant of a CPO.

MR GREGORY: Exactly.

MR JUSTICE ROTH: As I understand it, you recognise that this was considered in Merricks and decided, and then reconsidered in Sony, which followed Merricks.

What I wanted to clarify with you is this. I appreciate you say they were wrong, which, of course, you are entitled to say. The approach of the Tribunal, like the High Court, is that it will not differ from a previous decision in the Tribunal, though we are not

technically bound, unless we are convinced that it is wrong, in other words, whether it is manifestly wrong.

What I would like to know is whether it is your case here it is manifestly wrong or whether you are seeking to put down your marker and say, "We wish to take this point. We are not going to try to convince the Tribunal it was manifestly wrong, but we would like to take it before a higher court", which, of course, doesn't apply that principle.

So are you wishing to argue it here on the basis that we should be convinced that the two previous Tribunals were clearly wrong or are you seeking, as it were, to lay down the point and pursue it elsewhere? Obviously, that's quite different, because if that's what you want, as it were, a judgment following previous ones, about which you can then say, "It is incorrect", that will save quite a lot of time.

You are entitled to say we are clearly wrong. Don't be embarrassed about doing that just because I was Chair in the Merricks case. I am not so arrogant to think I can't be wrong.

I would point out, however, that there have been quite a number of rulings in Merricks. Those were extensive proceedings. It is one of the very rare rulings against Mr Merricks that he did not even seek permission to appeal.

You will also have noted that in Sony in a Tribunal of an entirely different constitution, including an experienced Court of Session judge, took the view that this was the only sensible interpretation, but it is a matter for you to clarify which course you want to take.

MR GREGORY: I will give you a short answer directly to that and then I want to make a second point, which is actually that this issue may now have actually limited practical consequences.

In relation to your question, I think what I would say is the issue as it arises in this claim is slightly different to the issue as it arose in Merricks and Sony. In Merricks you

were actually concerned with the domicile dates, not specifically the class definition dates. There is a specific paragraph in which you comment -- in a way it is almost obiter to the domicile dates issue. You said it was axiomatic to the regime that the claim should have crystallised by the date of filing.

That was then picked up by the defendants in Sony, who used it to oppose the class definition end date. The issue as it arose in Sony was whether the class definition end date could be the date of final judgment or earlier settlement of the claims, which was the wording which was used in many of the initial cases, or whether it had to be the date of filing. The Tribunal in Sony -- and at the hearing counsel for the class representative just basically conceded the point and didn't argue it.

So far as I am aware nobody has actually argued the specific point that we have raised here. We accept that in the CPO order the end date cannot be the date of final judgment or settlement. The latest possible date is the date of the CPO.

Whether that is right as opposed to the date of filing, that narrow point has never as far as I am aware been the subject of a Tribunal judgment, but the second point that I should probably make before lunch is that while this issue has been developing in these proceedings, the Tribunal's practice has been changing. The ground has almost been moving under us.

So the initial claim form was filed in the summer of last year prior to the Sony judgment. Five of the other claim forms were then filed shortly after the Sony judgment. Over the course of this year a new practice seems to have emerged in the Tribunal based on a reading of the transcripts for CMCs in some of the cases, and that practice is that the end date for the class period can be updated periodically throughout the litigation -- right throughout the litigation up to the PTR through a combination of amendment to the claim form and amendment to the original CPO order.

If the Tribunal amends the original CPO order to bring the end date up to, for example,

the first day of the relevant CMC, it then has a discretion to allow a further opt-out period, which would allow the additional claimants who have been brought into the class through that amendment to opt out of the proceedings if they want to. Although that is discretionary, the Tribunal generally indicated that it does want an additional opt-out period to be offered.

What has been suggested in one case, and I think accepted, is that because it is possible that the class period end date will be extended several times throughout the proceedings, instead of having several different opt-out periods, you can just have one at the end around the time of the PTR to sweep everyone else up and give them a chance to opt out.

That practice, so far as I am aware, has not been recognised or approved in any judgments from the Tribunals, but it is apparent from the CMC transcripts and reflected in the wording of some of the orders.

So last week, given that -- it was the defendants actually that drew the transcripts to our attention. We pointed out there may now be no practical impact here. If the defendants are willing to -- if the defendants say, "Well, you can just keep updating the class period end date throughout the litigation", why do you oppose having the end date and the CPO order being the date that the CPO was granted? They said, "First of all, we reserve our position in relation to any future applications" and, secondly, they see this as a legal question for the Tribunal and it will sort of gatekeep people all over the proceedings.

I think if the defendants were prepared to say, "Well, we can have the initial CPO with the date of filing, but then we will agree to amendments to the claim form and the CPO shortly thereafter, which would bring the class period dates up to date", then we would be very happy with that and we would not press the point at all.

MR JUSTICE ROTH: I mean, you always have the option, of course, of issuing fresh

proceedings and then saying, well, on the basis of the certification judgment, assuming that these are certified, it follows that -- it is the point exactly -- the ground is exactly the same, so there is no limitation issue, those should be certified and then they are just joined together.

So you can always deal with the point that way. You may not wish to go through, as it were, the hassle factor of doing that, but again there are ways one can shortcut that by seeking agreement from the defendants that if you were to, as it were, write a letter before action saying, "If we do that, can you agree to extend time for issuing proceedings until later?" So there are ways to deal with, as it were, the jurisdictional question.

MR GREGORY: Yes. I think the Sony judgment referred to it as “the procedural gymnastics” that would be required to sweep up the other people.

MR JUSTICE ROTH: Yes.

MR GREGORY: I think the point is just that those procedural gymnastics involve costs being incurred and a certain amount of time for the Tribunal, and in certain cases it may not be considered worthwhile to incur those costs to sweep in the extra people, which would result in a situation where certain claimants would not have a claim brought on their behalf, and which may well be the only realistic way in which their losses will be compensated.

MR JUSTICE ROTH: Dealing here with this case, people generally only started being a customer of a relevant defendant in the time since the proceedings against that defendant were started and the grant of a CPO.

MR GREGORY: Yes. So the class --

MR JUSTICE ROTH: When were the proceedings -- they start in December '23. So you are looking about a year, yes.

MR GREGORY: So the effect of that in the Severn Trent claim would be that about 2

- 3, - 400,000 people may not be brought into the class because of the different class period end dates. I mean --

MR JUSTICE ROTH: How many?

MR GREGORY: A few hundred thousand.

MR JUSTICE ROTH: New customers in 2024?

MR GREGORY: Yes. We know that from -- the Holt report estimates the likely class size over time and you can see there is an increment for -- a one year increment that you can identify. The collective class across all six claims is extremely large. It is about half the size of the country. I mean, you don't say that you simply multiply up the figure for Severn Trent by six, because some people will be moving between the areas of appointment of different defendants, but we could easily be in a position where you might have several hundred thousand to a million people who would be brought into the claim with the different end dates.

MR JUSTICE ROTH: That suggests it might be worth starting going through the (inaudible). If you have not discussed it already, you can discuss with counsel for the defendants, but at the moment you say there is a practice regarding amendments and adding later. That may be.

What I think you are asking us to do is to say -- and I haven't read it carefully enough to see whether it was strictly obiter -- but nonetheless to say that that statement, which is clearly contrary, indeed inconsistent, with the submission you are advancing, is one we should not follow.

MR GREGORY: Yes. Just looking at the time, I wonder if it may be appropriate to break for lunch and I can take instructions.

MR JUSTICE ROTH: You can consider where we are on that. We will come back then at 2.05.

Ms Boyd, you are excused, because I don't think Ofwat -- or indeed Ofcom -- have any

interest in the rest of this hearing specifically and the matters being argued.

MS BOYD: I am grateful.

Could I just flag one thing? We have talked in high level terms about Ofwat's ongoing involvement. In the event of certification, it is likely that Ofwat would have some submissions to make about the appropriate scope of that involvement and indeed the costs of that ongoing involvement. Those are obviously matters for a CMC at a later date in the event of certification, but I just wanted to put down a marker.

The final thing is also the question of stay is not before you today. In the event that that is at some point before the Tribunal in future, that is again something that Ofwat may have something to say about.

MR JUSTICE ROTH: Oh, absolutely, because I think that would be very much tied to what Ofwat is doing. Thank you and thank you to those behind you for your assistance.

We will come back at 2.05.

(1.00 pm)

(Lunch break)

(2.05 pm)

MR JUSTICE ROTH: I must correct the misstatement I made before the lunch adjournment. The ruling in Merricks was appealed, but it was appealed by Mastercard unsuccessfully, and the Court of Appeal in its judgment, which I think is not in the bundle, quotes that paragraph from the CAT judgment with approval.

MR GREGORY: Sir, the fact I have vacated the centre ground to Mr Williams reflects the fact that we are not going to press the class definition point. We asked the defendants whether they were willing to consent in principle to the dates being updated after the date of the CPO. They have said "no" on the basis that it is premature to consider that at this stage. So if the CPO is granted, it will be our intention to take

steps to sweep in the additional claimants, but if the CPO is granted, then it can be granted with the dates of filings of the different claims and we can provide the Tribunal with an updated draft order that reflects that.

MR JUSTICE ROTH: Then there is the question of amendment which is for another day.

MR GREGORY: Yes. The only other point I was going to mention before I sit down is I think there was time allocated in the hearing timetable to case management issues. The parties do not think there are any remaining case management issues. The Tribunal you may recall reserved the week in January for a further hearing. The parties have written to the Tribunal to indicate that neither of us thinks that week needs to be maintained. So it can be vacated.

MR JUSTICE ROTH: Yes.

MR GREGORY: I am grateful.

MR JUSTICE ROTH: (Inaudible). Thank you very much, Mr Gregory.

We turn then to funding. Is that right?

Submissions by MS BLACKWOOD

MS BLACKWOOD: Yes, sir. I have liaised with Mr Williams and it is agreed that it would probably be most sensible if I made my submissions first, to which he could then respond.

MR JUSTICE ROTH: The Tribunal also has matters to raise on funding independent of points that the defendants are raising.

MS BLACKWOOD: Sir, you will have been aware from correspondence that the funding issues between the parties have narrowed considerably, although they have not been fully resolved. There remain two issues that the Proposed Defendants have in relation to the priorities agreement. The first is whether clause 1.5 needs to be

amended to prevent costs attributable to one set of the parallel proceedings being paid from the damages which have been awarded in another entirely separate set of parallel proceedings.

Now we understand that the point of principle -- there is no longer a point of principle between the parties on this matter and it is simply an issue with dealing with the drafting of clause 1.5.

The second issue with the priorities agreement is whether it is necessary to amend clause 1.4 to introduce a mechanism for apportioning the common costs between the parallel claims in advance in order to avoid conflicts between the class members on the one side and the PCR, her insurers, funders and lawyers on the other side.

The final issue that we wish to raise is the potential impact of the appeal in Gutmann v Apple on these Parallel Proceedings.

Prior to turning to my substantive submissions I would like very briefly to address the PCR's suggestion in their skeleton argument, which was repeated in the letter sent yesterday, that the points we raise on funding should somehow be met with scepticism because, and I quote "They do not concern the proposed defendants".

With respect, we think that misses the point this is not a standard inter partes hearing. The PCR is applying for the right to represent the proposed class members and the Tribunal has to be satisfied that the authorisation requirement has been met.

In that context it is entirely proper for us to raise issues with the Tribunal that might impact upon the PCR's ability to fairly and adequately act in the interests of class members where we have identified those issues in the process of reviewing the funding documents, and indeed I think it would be odd if we didn't bring those points that we have noticed to the Tribunal's attention, having identified them.

So irrespective of the PCR's scepticism as our motive for raising the issue, whether valid or not, it does not alter the fact that these are still substantive issues that need to

be grappled with.

If I could ask you to turn to bundle 6 -- bundle 7, the correspondence bundle, tab 50, internal page 131, you will see --

MR JUSTICE ROTH: This is the letter of 3rd September.

MS BLACKWOOD: Yes. So that's the letter of 3rd September. Appended to that are the PCR's funding arrangements. We can see at tab 50.2, it is a proposed amended priorities agreement.

MR JUSTICE ROTH: Yes. Sorry.

MS BLACKWOOD: At 50.3 is the ATE policy. We don't have a red line version of that, but we don't need it for today's purposes.

MR JUSTICE ROTH: We have 50.1 and 50.2. One is the red line.

MS BLACKWOOD: Yes.

MR JUSTICE ROTH: And the other is the ...

MS BLACKWOOD: Yes, sir.

MR JUSTICE ROTH: Yes. Sorry.

MS BLACKWOOD: Just to repeat, at tab 50.2 is the amended priorities agreement in red line. At tab 50.3 is the ATE policy and at tab 50.6 is the red line of the litigation funding agreement.

So what you will see is that the PCR has chosen to have a single litigation funding agreement, a single ATE policy and a single priorities agreement which seeks to aggregate all six separate sets of proceedings.

It is this unusual approach that has thrown up a number of issues in these proceedings. The original versions of the funding arrangements were drafted in a manner that did not -- were drafted in a manner as if they were dealing with a single claim as opposed to six separate sets of proceedings. No allowance was made in those documents, for example, as to how funding arrangements would work if one set

of proceedings settled in advance of others.

It is for that reason that you will see in our amended response in paragraphs 98 to 136 that we had a raft of issues with their funding arrangements.

One of the key issues that we raised was that the funding arrangements permitted costs attributable to one set of proceedings to be paid out of the damages awarded in a wholly separate set of proceedings, and we indicated that this is highly problematic. First of all, it would be unfair to the class members to pay the costs attributable to separate sets of proceedings from their own damages, thereby effectively cross-subsidising those proceedings.

In any event -- this is the second point -- we did not think that the Tribunal had the power to make such an order under section 47C(6) of the Competition Act.

Thirdly, we were concerned that it gave rise to conflicts of interest between the class members on the one hand, and the PCR, her lawyer and funders and insurers on the other, because it would be in the interests of each class to only pay those costs attributable to its own parallel proceedings, but by contrast it would be in the interests of the PCR to fund a lawyer and ensure to maximise their recovery, and where damages were not recovered in a particular set of proceedings, you can see that they might seek to recover the costs attributable in those proceedings from damages recovered in the remainder of the claims.

MR FORRESTER: Has a solution been found?

MS BLACKWOOD: Partially but not entirely. I am sorry to take the time to spell this out. That's the background to the problem with clauses 1.4 and 1.5 of the priorities agreement.

MR FORRESTER: Yes.

MS BLACKWOOD: We no longer take any issue with the drafting of the ATE policy or litigation funding agreement, but it is worth looking very quickly at the ATE policy so

you can see how important the priorities deeded and how the ATE policy interrelates with it.

So if I could ask you to turn to tab 50.3 and in particular page 203. 203 is the schedule to the ATE policy.

MR JUSTICE ROTH: Yes.

MS BLACKWOOD: It sets out some important definitions that then feed into the main document.

You will see at 2 that the insured is obviously the PCR, Carolyn Roberts.

Then at 4 dispute is defined as "A collective action brought on an opt out basis against the opponents."

So that's obviously not quite right, because there are six sets of collective proceedings.

Then in 6 opponent is then defined as the six Proposed Defendants in the six collective proceedings.

At 9 it sets out the premium levels in the claim -- in the policy.

At 12, on the following page, is the definition of successful outcome. It says:

"The recovery by the Insured", the PCR, "on behalf of class members at the Conclusion of the Dispute" -- if you recall, dispute is all six sets of proceedings and that was confirmed in correspondence; that is what it was intended to mean -- "of any sum of money from the Opponent", so any sum of money from any of the six Proposed Defendants, that is the successful outcome.

Sir, if I could then take you back into the policy to page 196, clause 3.12. Clause 3.12 says:

"The Insured", the PCR, "agrees that in the event of a Successful Outcome", that's the payment of any sum from any of the Proposed Defendants at the conclusion of all six sets of proceedings "the Insured shall, subject to the terms of the Priorities Deed, reimburse the Insurer."

There is a similar approach taken in clause 5.5, which relates to the payment of the contingent premium. It is due in the event of a successful outcome, but subject to the terms of the priorities deed.

MR JUSTICE ROTH: What was the second clause?

MS BLACKWOOD: I am so sorry. It is 5.5 on page 198.

So you can see that the ATE policy itself does not properly distinguish between the different claims and the contingent premium and the reimbursement of the insurers' costs relate to all six sets of proceedings, but there is nothing in the ATE policy to restrict those costs which are incurred across all six sets of proceedings from being paid from the damages awarded to one class in one set of proceedings.

That's why the priorities agreement and the drafting of the priorities agreement is so important, because that is the restriction on the PCR from being able to allocate costs in that way.

If I could ask you to turn to the priorities agreement at tab 50.2, page 160, you will see that the priorities agreement is between the funder, the PCR, the lawyers and the insurers. On the following page, on page 161 you will see at clause 1.1 this explains that the priorities agreement was entered into in connection with the LFA, 'litigation funding agreement', and this is how the priorities agreement appears to apply to the obligations on the PCR in the LFA to pay the Funder for its outlays and profit shares.

As I indicated before, there doesn't appear to be a dispute between Proposed Defendants and the PCR, but on the point of principle that damages obtained in one set of proceedings may only be applied to the outlays attributable or connected to that set of proceedings, and that is purportedly what clauses 1.4 to 1.6 are intended to achieve.

The PCR says in their skeleton argument, paragraph 128:

"There is no prospect of outlays being recovered in one parallel claim when they, in

fact, relate to another claim."

So, Sir, and members of the Tribunal, if I could ask you to read clauses 1.4 to 1.2, I will then address you on those.

MR JUSTICE ROTH: Just a minute. This is the priorities agreement under "Definitions and interpretation"?

MS BLACKWOOD: Yes, sir.

MR JUSTICE ROTH: 1.4 to 1.6?

MS BLACKWOOD: Yes, sir. (Pause.)

Sir; I must confess --

MR JUSTICE ROTH: Can I just ask, there are definitions elsewhere. In the priorities agreement is claim defined?

MS BLACKWOOD: The definitions are in the funding agreement. You can see that from clause 1.2. And claims is supposed to mean all six sets of proceedings.

MR JUSTICE ROTH: Oh, I see. It is 1.2:

"Unless otherwise defined they have the meaning given to them in the funding agreement."

I see. So one reads across the definition.

MS BLACKWOOD: Yes, sir.

MR JUSTICE ROTH: Just a minute. Can I just check?

MS BLACKWOOD: Yes, sir.

MR JUSTICE ROTH: So the funding agreement, which is page 249 I think, "Claim" means all the parallel claims.

MS BLACKWOOD: Then there's the definition of "Parallel Claim" in 5.25.

MR JUSTICE ROTH: Then "Parallel Claim" means each of the individual claims. Yes, I see. So that's where the definition is coming from. Just a moment. (Pause.) Yes.

MS BLACKWOOD: I must confess when we first tried to understand clauses 1.4 to

1.6, we didn't entirely see how they were supposed to be working together, so we wrote to the PCR to clarify how these clauses were intended to function together, and we understand from paragraph 129 of her skeleton that these provisions are supposed to work as follows.

If a parallel claim settles under clause 1.4 the PCR will seek an initial payment of a portion of the outlays attributable to the parallel claim from the proceedings, the damages, awarded in that parallel claim. That's supposed to be the intention of clause 1.4.

Then under clause 1.6 a further portion of the proceeds awarded in the parallel claim will then be ring-fenced in anticipation of a future further payment of the remaining outlays attributed to that parallel claim.

Then finally --

MR JUSTICE ROTH: Just a minute.

MS BLACKWOOD: I am sorry, sir.

MR JUSTICE ROTH: So this explanation falls in paragraph 127?

MS BLACKWOOD: 129. (Pause.)

MR JUSTICE ROTH: Yes.

MS BLACKWOOD: As I said, clause 1.6 a further portion of the proceeds awarded in the parallel claim would then be ring-fenced in anticipation of future payment of the remaining outlays attributable to that parallel claim.

Then under clause 1.5, the PCR will then seek a final balancing payment to pay the remainder of the outlays attributable for the parallel claim from the ring-fenced damages, but that balancing payment will not be sought until after all six parallel claims are concluded.

We understand that's a product of the way in which the parallel proceedings have been aggregated, for example, in the ATE policy, whereby the Funder is not due their

contingent premium until all six sets of proceedings have concluded.

In relation to clause 1.5 -- this is the balancing payment clause -- our concern is that there is nothing in that clause that limits the payment of the remainder of the outlays to the damages recovered in any particular claim. So if you see in the middle of the clause:

"The Class Representative shall apply to the CAT for any shortfall on Outlays to be payable."

But it doesn't say from where or by whom. So the PCR has argued that this issue, this problem we have identified is addressed by the fact that outlays is defined in clause 1.4 as the outlays just relating to a particular parallel claim.

Now, I am not sure we actually accept that on a plain reading of that clause. If you look, the term "outlays" appears to be the capital outlay, insurer outlay, insurance premium, total fee and legal costs, because that defined term "outlays" is then immediately used at sub-paragraph (1) in clause 1.4:

"... those outlays specifically attributable ..."

MR JUSTICE ROTH: Sub-paragraph (1)?

MS BLACKWOOD: I am sorry. There is a (i) within clause 1.4. I probably didn't express that as clearly as I could have done. In a sense even if they are right --

MR JUSTICE ROTH: Well, outlays is doubly defined I think, because outlays is also defined in the litigation funding agreement.

MS BLACKWOOD: Yes.

MR JUSTICE ROTH: Which, subject to the opening words of 1.2 suggesting it can be given here a different definition, is there defined as -- is it defined there? Perhaps it isn't.

MS BLACKWOOD: It is capital outlay which is defined.

MR JUSTICE ROTH: Yes, capital outlay is defined.

MS BLACKWOOD: As opposed to just outlay.

MR JUSTICE ROTH: Yes. You are quite right. Capital outlay.

MS BLACKWOOD: I don't want to get us too distracted on this, because even if they are right on their interpretation of their definition of outlays, which we don't think is correct, it still doesn't help them for clause 1.5 because there is still nothing in that clause that restricts the proceeds from which those outlays are to be paid.

So if this is not remedied it gives rise to the concerns that I highlighted earlier, including an issue of conflict of interest between the class and the PCR and those instructed by her.

MR JUSTICE ROTH: The waterfall below referred to in paragraph 1.5 is what?

MS BLACKWOOD: The waterfall is the order in which people get to take out of the pot, first the funder, the insurer, the solicitor and so on.

MR JUSTICE ROTH: Where is that?

MS BLACKWOOD: I am sorry, sir. That is at clause 2.1. If we start at page 162:

"Any party receiving any portion of the proceeds agrees to hold those proceeds on trust for parties in accordance with the terms of this agreement."

Then it says:

"First to pay ..." and so on, the funder.

MR JUSTICE ROTH: As provided for in -- this clause 2.1 has been deleted and the waterfall is substituted as a special term. Is that defined somewhere?

MS BLACKWOOD: I think the waterfall is probably another definition that will be in the LFA:

"Waterfall given the meaning in key terms."

MR JUSTICE ROTH: The key terms which are at page 272:

"As set out in the priorities agreement".

MS BLACKWOOD: Sorry, sir. There is also a defined term at the top of page 162.

MR JUSTICE ROTH: I see the waterfall of priorities set out below is the waterfall. Sorry. I am making heavy weather of this. So that's the waterfall. That doesn't distinguish between the particular claims at all, does it?

MS BLACKWOOD: No, Sir. So in order to address this issue we did suggest some wording, which can be seen at tab 73 of the bundle you are currently in. I don't know if it might be most convenient to take that letter out of the bundle so you can keep the primary funding documents open and then just see the additional drafting.

MR JUSTICE ROTH: Yes. This is a letter of 19th September.

MS BLACKWOOD: That is correct.

MR JUSTICE ROTH: There on page 3 you have a revised draft.

MS BLACKWOOD: In paragraph 14 we suggested some wording. You can see that in green in 1.5.

MR JUSTICE ROTH: I am not sure -- is there a problem about 1.4?

MS BLACKWOOD: There is a separate issue about 1.4.

MR JUSTICE ROTH: What is the problem with 1.4. I understand your point about 1.5 and 1.6 but what is the problem as such with 1.4?

MS BLACKWOOD: Our concern with 1.4 is, as currently drafted, it doesn't apportion the common costs between the parallel claims. It leaves it open. It says those outlays -- a reasonable proportion of those outlays which are common to the claim as a whole.

We say there should be more specificity from the outset to avoid a conflicts issue in this case. I will come on to develop that.

MR JUSTICE ROTH: Yes. So when you say when it is -- have I got your point? Such sums as the CAT approves as reasonable.

MS BLACKWOOD: Yes.

MR JUSTICE ROTH: So the CAT has to approve them as reasonable and what is

reasonable constituting those outlays specifically attributable to the relevant claim and what the CAT approves as reasonable as being a reasonable proportion of those outlays which are common.

MS BLACKWOOD: Yes, and sir --

MR JUSTICE ROTH: So what is the problem with that?

MS BLACKWOOD: Well, our concern with that, and I will come on to that, is that there's a risk that by failing to specify the mechanism now for determining common costs it gives rise to a conflict in that the class members will want to -- will want a minimum amount of costs deducted from their damages, but the PCR will want to maximise their recovery of damages by potentially loading the common costs on to those claims which are successful where damages have been awarded.

MR JUSTICE ROTH: But it is not left to the PCR to decide, is it?

MS BLACKWOOD: Well, Sir, perhaps if I could take you to some authorities to make my point good.

MR JUSTICE ROTH: Before you do that, it is not a question of authorities. At the moment it is a question of what this means, which is nothing to do, with respect, with authorities.

MS BLACKWOOD: Our point is --

MR JUSTICE ROTH: The proportion to be paid as reasonable under 1.4 has to be approved by the CAT, doesn't it?

MS BLACKWOOD: Yes, sir, but --

MR JUSTICE ROTH: And the CAT in approving what proportion of common costs should be paid out of damages for that claim will have regard to the interests of the claimant under that claim and the interests of claimants under other claims.

MS BLACKWOOD: Yes, Sir, but we do say that it is sensible from the outset to put in a mechanism for apportioning costs, because at the time -- because there is this

temptation for the PCR to seek to load costs on to a particular set of proceedings.

MR JUSTICE ROTH: I see, but she will have to persuade the CAT that that's reasonable.

MS BLACKWOOD: Yes, Sir.

MR JUSTICE ROTH: You are not suggesting that the CAT has a temptation to favour one side.

MS BLACKWOOD: Certainly not, Sir, but nonetheless --

MR JUSTICE ROTH: Because it would be very difficult to apportion common costs.

MS BLACKWOOD: I will come on to explain why it is actually standard procedure in group litigation orders and in cases where there is a management of parallel claims where the claimants are not connected. So it is actually the default cost position in those sets of proceedings. That's why we don't think it to be a particularly radical suggestion.

MR JUSTICE ROTH: Yes.

MS BLACKWOOD: The fact that the Tribunal has the power to control the costs and how they are allocated, I mean, that would be a reason for saying there should be no specificity at all, whereas there is a good and sensible reason why all the class members should know at the outset precisely what costs are going to be attributable to their proceedings and could be taken out of the damages awarded in their case.

MR JUSTICE ROTH: Okay. Well --

MS BLACKWOOD: It might make sense if I move swiftly on to the authorities that I wanted to draw your attention to.

MR JUSTICE ROTH: Before you do that I just want to make sure I have fully understood what is being said in these clauses, because they are quite dense, which is not a criticism of the drafting. Your proposal indeed expands them even further. If that covers all the costs, all that's payable under the waterfall, then that's that and

you don't go further. It probably won't, because the waterfall includes the funders' total capital outlay, which is most unlikely to be covered by settlement of one or two of the claims.

So then you get into 1.5 and 1.6. Then it says payable. Then they apply to the Tribunal and in the ... (reading sotto voce).

1.6 -- have I understood it right -- kicks in. That is not at the conclusion of the claim. That will happen together with 1.4, because that's preserving the money.

MS BLACKWOOD: That's how we understand it works.

MR JUSTICE ROTH: That must be right, must it not? Then payable -- so reasonable proportion of damages are held back as security for payment under 1.5. 1.5 kicks in at the conclusion and there you say 1.5 is not so specified as to how it is apportioned, even a reasonable proportion. It just says "to the extent approved by the Tribunal".

MS BLACKWOOD: 1.5 we say is a different issue, which says:

"The Class Representative shall apply to the CAT for any shortfall in outlays to be payable."

But we say there should be additional wording to say:

"Payable from the sums recovered in the parallel claim to which those outlays relate."

Because as currently drafted clause 1.5 doesn't draw that link. Therefore it is open for these costs to be recovered from the damages in any set of proceedings just on the basis of the wording. We know that's not the PCR's intention, but that's what the clause as drafted does.

1.4 is this first stage of payment of costs and 1.5 concerns a second stage at a later time of payment of costs out of a ring-fenced amount. They are two separate stages.

MR JUSTICE ROTH: Sorry. I think it is the same point. 1.5 is only dealing with the balance of what cannot be recovered under the apportionment made under 1.4, isn't it?

MS BLACKWOOD: Yes. So it is right --

MR FORRESTER: So the same principles that are set out in 1.4 would presumably apply in 1.5.

MS BLACKWOOD: But you are right that all that is seeking to be recovered in 1.5 is the residual lump that they couldn't -- that was not paid at the first stage.

MR FORRESTER: Yes. Forgive me, is this proposition disputed?

MS BLACKWOOD: It is disputed whether or not clause 1.5 is good enough that it specifies where this second payment should be made from, what pot of damages. It is a very simple bit of drafting to fix and that's why we put in some suggested wording. I am not really sure why that's so problematic and why the PCR would not want to make that amendment to clarify this clause.

MR FORRESTER: Are we sure it is problematic?

MS BLACKWOOD: Well, that's certainly my position, because I see nothing in clause 1.5 that explains they applied to the CAT for a shortfall in outlays to be payable, but then this is right at the end of the claim when you have lots of different pots of damages presumably -- perhaps not. This claim may not be certified, but on the hypothetical that you are at the end of the claim and there are a series of pots of damages being awarded across the six separate sets of proceedings, there is actually nothing in clause 1.5 that says where this residual payment is to be taken from.

MR JUSTICE ROTH: I understand your proposed amendment to 1.5, which is a very simple one.

MR FORRESTER: Yes.

MR JUSTICE ROTH: We can hear from Mr Williams on that. That's a separate point from your point under 1.4 as I understand it.

MS BLACKWOOD: Yes, sir.

MR JUSTICE ROTH: And not a point depending on authority. It is a point really of

principle that you say it should come from that claim, not from other claims.

MS BLACKWOOD: Yes. So in relation to clause 1.4 it is a separate issue. This is about -- should the common costs be apportioned from the outset so there is clarity, so there is no risk of excessive loading of costs on to one particular set of proceedings.

MR JUSTICE ROTH: Yes. This is a different point, at 1.5.

MS BLACKWOOD: This is my second issue with the priorities agreement.

MR JUSTICE ROTH: Yes.

MS BLACKWOOD: If I could ask you to -- hopefully you will have bundle 6, volume 5. It is the authorities bundle. It is a light one for a change.

MR JUSTICE ROTH: The bundle is large but the contents are light. I am not sure Mr Forrester has it actually. Have you got it? Yes.

MS BLACKWOOD: If I could ask you to turn to tab 73, you will see set out there CPR rule 46.6, and, of course, we don't suggest that directly applies in this case, but it is instructive and it is worth looking at.

You will see at paragraph 2 that a distinction is drawn between individual costs and common costs and we see that reflected in the PCR's drafting of clause 1.4.

If I could ask you to read clauses 3 and 4, you will see from that that default position is that common costs between the claimants are to be shared equally on a per proceedings basis.

If I could then ask you to turn to tab 71, I am going to take to you two authorities just to make clear that this approach to costs is not just adopted in the GLO context but is seen as appropriate in other cases where there are management of parallel claims where the claimants are not somehow connected.

MR JUSTICE ROTH: Yes.

MS BLACKWOOD: At tab 71, it is Ward v Guinness Mahon and it is a judgment by Sir Thomas Bingham, as he then was. Now this case concerned a number of claims

that had been brought by individuals who had invested in one or more of three companies which ultimately collapsed and those individuals claimed that there had been material misrepresentations in the prospectuses seeking subscriptions for those companies.

If I could ask you to turn to page 3928 and just ask you to read the first full paragraph there, that just sets the context of this decision. (Pause.)

If you could then turn to page 3929, internal page number 900, at the bottom by letter H:

"The broad question, as it seems to me, is: what, in this situation, does fairness demand? Mr. Leaver ..."

MR JUSTICE ROTH: Sorry.

MS BLACKWOOD: It is internal page numbering 900, if that helps, or 3929. Sorry. 3932. My mistake.

MR JUSTICE ROTH: Just above letter:

"The broad question, as it seems to me ..."

MS BLACKWOOD: Yes, Sir:

"Mr Leaver suggests it is premature to make any order at all as to what the outcome at the end of the trial might be. But that submission, I think, runs counter to Sir John Donaldson M.R.'s commendation in Davies (Joseph Owen) v. Eli Lilly & Co… of the practice of giving an indication which would enable the plaintiffs to know where they stand before they start (subject, always ..."

MR JUSTICE ROTH: Pausing there before you get into it. So this was a situation where six cases go ahead and 93 are stayed.

MS BLACKWOOD: Well, I think there are claims against three companies, claims against one of the three companies was chosen to go ahead and then out of those claims six were chosen to be lead claimants.

MR JUSTICE ROTH: Yes. So there will be claimants against the other companies who don't go ahead at all and there will be 93 as against Lockton Shops Plc, which are stayed.

MS BLACKWOOD: So the issue arose as to the appropriate costs order that should be made and whether that should be made in advance. That's where I was picking up, Sir.

MR JUSTICE ROTH: This is a costs order in the six lead actions, isn't it?

MS BLACKWOOD: No. As I understand it, it is the costs order in relation to the claimants more generally. You will see because there is a concern that otherwise --

MR JUSTICE ROTH: Well, it affects the claimants in the other actions, but they have been stayed. There were writs.

MS BLACKWOOD: Well, the concern that arises in these cases is that people -- claimants are not going to want to be chosen to be lead claimants if they are responsible for all the costs.

MR JUSTICE ROTH: Yes.

MS BLACKWOOD: The approach of fairness is that an order is made in advance that you have this large group of claimants. Some may run ahead. Some may be held back, but the appropriate costs order is that you split the common costs equally on a per-proceedings basis and that the individual costs that are attributable to a particular claim, well, then the claimant will pay those costs on top.

MR JUSTICE ROTH: Exactly as you said, Ms Blackwood, claimants won't want to be lead claimants if they don't know what the limits of their cost exposure is.

MS BLACKWOOD: Yes. You heard from Mr Gregory earlier today that one of the ways in which they might propose to manage the case, these six sets of proceedings is that there might be lead cases, although that is still to be determined.

MR JUSTICE ROTH: Yes, but we can make -- then we could deal with costs order in

all the cases. I see. It is a cost order -- it is a liability for costs in the lead actions that were being addressed here, yes.

MS BLACKWOOD: So to pick it up back at H -- sorry to repeat myself here.

JUDGE LAWTON: Yes.

MS BLACKWOOD: "... that the commendation in Davies (Joseph Owen) v. Eli Lilly & Co… of the practice of giving an indication which will enable plaintiffs to know where they stand from the start (subject, always, to the discretion of the trial judge to modify the order at the end of trial as seems appropriate)."

Then Sir Thomas Bingham went on to say:

"I am persuaded… that it is, in all circumstances, appropriate to make an order that the liability of individual plaintiffs be limited to the proportionate share of the overall costs whether incurred by the plaintiffs or payable by the Plaintiffs to the defendant, and that such liability shall be several and not joint."

The point I am seeking to draw out of this Court of Appeal authority is it is self-evidently not a GLO case, but the Court of Appeal nonetheless adopted the same approach where parallel claims between unrelated claimants were being managed together and that the appropriate costs order in those circumstances was that they should each be liable for their share of the common costs on a per proceedings basis, and that it was helpful for the claimants to know from the outset their position on costs, and incidentally I think that is also helpful in terms of settlement discussions for the parties to know where the costs fall between --

MR JUSTICE ROTH: Only six actions are going to trial. If the Court doesn't make this order and Guinness Mahon wins, it says "You six claimants are liable for our costs". The poor six claimants are stuffed, to put it bluntly. That was the problem facing the court in that case.

MS BLACKWOOD: What it does indicate is that where you have parallel claims being

managed together where the claimants are not related -- it is not a situation where you maybe have various family members bringing claims relating to the same issue but separate claim forms, for example. They are not associated because they are both directors of a company bringing claims in parallel. There is no connection between the different class members and the different sets of proceedings. In those circumstances the court's approach has been to say "Well, we determine at the outset that the common costs are allocated equally between each set of proceedings."

MR JUSTICE ROTH: When they say "The proportionate share of the overall costs", that should be the order, what is the order the court made?

MS BLACKWOOD: Sir, I don't have the order the court made.

MR JUSTICE ROTH: Well, they say:

"Make the order for which Mr Guthrie asks."

MS BLACKWOOD: Well, it says --

MR WILLIAMS: Sir, I think 97F. That's the order the plaintiffs were seeking and that's what I think they got. That's the page number of the report, not the bundle.

MR JUSTICE ROTH: 3929. Yes.

MS BLACKWOOD: There was an order across all of the claimants for proportionate share. If I could ask you ...

MR JUSTICE ROTH: Yes.

MS BLACKWOOD: Sir, if I could ask you to turn to tab 72, this is the case of Rowe v Ingenious Media and is a decision by Mr Justice Nugee, as he then was, in 2020. This case we submit confirms the approach taken in Ward, and the relevance of the standard costs position in GLO cases being applicable in other situations where parallel claims are being managed together.

The background to this case is summarised in paragraph 4 of the decision. I will try to skip through that quickly:

"From 2002 to 2007 a number of schemes, eight in all, were promoted under the name "Ingenious". The schemes were promoted as tax-efficient vehicles through which individual taxpayers could contribute funds to a limited liability partnership for investing in films and set off their share of the LLPs losses against taxable income."

We come down to --

MR JUSTICE ROTH: It is really a claim against the promoters of the scheme, which was a sort of tax avoidance scheme.

MS BLACKWOOD: It is a tax avoidance scheme.

MR JUSTICE ROTH: It doesn't work. They lost money and so they are suing the promoters.

MS BLACKWOOD: So there were a large number of claims being brought that were issued by three sets of firms.

MR JUSTICE ROTH: Yes.

MS BLACKWOOD: Now if I could ask you to turn to paras 14 and 15, which is on page 3940, the question asked at paragraph 14 is:

"Should the Stewarts and Peters & Peters Claimants' liability for adverse costs be several?"

He answered yes.

Then at paragraph 15(iv) the judge notes the case of Ward v Guinness and then comes on at paragraph 5 to say:

"It is noticeable that not a single case has been put before me whether under a formal GLO where cases have been managed without a formal GLO in which any order has been made for joint and several liability among the claimants for potential adverse costs to defendants. Every single case I have been shown and the orders which Mr Bacon showed me have been on the basis of several liability. I accept that this is not a GLO, but I do not see that that changes the fundamental question. The case,

although not yet and may never be the subject of a formal GLO, shares many of the characteristics of the sort of cases that are suitable for a GLO and in particular the characteristic that a very large number of claimants are bringing claims. In those circumstances I do not see why the principles applicable under CPR46.6 do not apply equally in this case."

If I could then ask you to turn on to paragraphs 22 and 23, which is on page 3943, at the end of paragraph 22 the judge says:

"Costs, as I have said, are always discretionary, but on a question like this there is much to be said for uniformity of practice where possible not only because like cases should as a matter of principle be treated alike, but also because it helps the parties if costs are relatively predictable."

Then at paragraph 23:

"None of the other cases cited to me indicates that the guidance given by Sir Thomas Bingham has been subsequently modified or overtaken by developments."

Then he goes on:

"Nor was I shown any case in which the litigation of this type, which without seeking to define it exhaustively, I take to be litigation where a large number of claims are brought that raise common issues and which are to be managed by the court, very often by selecting some claims to come to trial before others, an order has been made for the claimants to be jointly and severally liable for the other side's costs rather than severally liable."

The point that I am simply trying to make is that there is a fairly orthodox approach to costs where you are managing a number of claims together, some of which might end up being the claimants', that it is sensible to make clear from the outset how those costs are apportioned between the claims.

MR JUSTICE ROTH: It says they are jointly and severally liable.

MS BLACKWOOD: This was the argument -- in a sense I am anticipating a point that is made in the PCR's skeleton. They say "No, no. What about the situation where we -- there is a common issue across, say, six sets of proceedings. One of those proceedings is unsuccessful and damages are not awarded for an entirely different reason. Perhaps there is an issue on the facts. They say in those circumstances it may well be appropriate for the order to be that the five remaining sets of proceedings should pay the whole of the common costs.

We say that falls into the very concern we have about conflicts and also is contrary to the standard approach adopted in these types of cases where from the outset costs are apportioned equally between the claimants.

MR JUSTICE ROTH: Is Mr Justice Nugee saying they are appointed equally or is he saying --

MS BLACKWOOD: He is saying --

MR JUSTICE ROTH: Just a moment, please, Ms Blackwood.

The choice is between making the claimants severally liable or making them jointly and severally liable and he says it wouldn't be right to make them severally liable, that anyone could be fully liable for all the common costs. They should be jointly and severally liable. Isn't that what he is saying --

MS BLACKWOOD: No, Sir. He is saying they shouldn't be jointly and severally liable. They should be severally liable. He then goes on in this judgment to determine how the costs should be apportioned and in this case it is not done on a per proceedings basis. It is done on a basis of the level of capital investment, because he says it is not fair that you might have somebody who has invested 50,000 and someone who has invested 5 million. The risk/rewards are not apportioned in those cases. Therefore, we apportion but apportion by reference to investment.

Now we don't see the basis for apportioning other than on a per proceedings basis in

this case, but it doesn't alter the fact that the court's approach has been to apportion in advance. Just like in the GLO situation, they say it is sensible where these parallel claims are managed together and there are going to be common costs for you to figure out in advance how those costs are divided up.

MR JUSTICE ROTH: Yes. I am sorry. You are quite right. It was several rather than jointly and severally liable.

MS BLACKWOOD: Yes.

MR JUSTICE ROTH: Where does it deal with the manner of apportionment?

MS BLACKWOOD: Apportionment comes in paragraph 34 onwards. This is the --

MR JUSTICE ROTH: The pro rata point.

MS BLACKWOOD: -- Pro rata point. This is where instead of just splitting the costs exposure equally between all of the claims -- they recognise that some people are going to get more out of the litigation than others and therefore the division of costs risks should be apportioned accordingly.

MR JUSTICE ROTH: It is not necessarily per capita.

MS BLACKWOOD: It is not necessarily per capita in these cases, but I think from our perspective we couldn't see why there would need to be -- other than a per proceedings division in these cases or certainly it would be difficult to see how that would be made in advance, but that is one option if the Tribunal preferred it, to look at the claim value and split on that basis, but we say the simpler approach is simply --

MR JUSTICE ROTH: Look at the number of people within each claim.

MS BLACKWOOD: That might be an alternative means.

MR JUSTICE ROTH: And weigh them. Isn't that the benefit rather than trying to work all that out now at certification, which speaking for myself I would like to hear much more argument about what manner of apportionment is actually the fairest, to say that it is left to the discretion of the Tribunal to do it on a reasonable basis, which is what

1.4 says.

MS BLACKWOOD: Well, I think what we are concerned about is that conflicts point and we were trying to identify -- because you have an odd situation here. You have the PCR representing six separate classes. There is a conflicts risk of loading on costs, common costs, on to the successful claims and that causes an authorisation requirement issue, because all of a sudden there is a conflict between the PCR and the classes and there is an issue about whether she can fairly and adequately represent them all equally.

So what we were proposing here was to take a fairly orthodox approach that we saw in the GLO and other contexts where parallel claims are managed together to provide a solution to that.

MR JUSTICE ROTH: Ms Blackwood, we can see the force of what you are saying and it may be the right way to apportion, but equally -- and you have shown us one case where the judge hearing about investments and costs put in, actually concludes that it wasn't the right way and it should be a different way and there may be, depending on various common costs and how the sizes of the different classes in the different claims and what the common costs, the particular aspect of common costs may relate to where it might be a different apportionment that's appropriate.

So it seems to us, and indeed you recognised that and said the Tribunal could take a different view, that really the question is should the Tribunal be doing it now at the outset -- yes, that tells all class members what it will be -- or should it rather be doing it at the time when damages of one claim come in, when it will know considerably more about what the common costs actually are and attributable to, because under clause 1.4 the apportionment is done by the Tribunal. They approve it as reasonable, such sums as the CAT considers reasonable. So it is going to be done by the Tribunal, the apportionment.

It is a question of whether we do it now right in advance or you do it at the time when the payment has to be made. Isn't that really what it comes down to?

MS BLACKWOOD: Well, Sir, our position would be that that doesn't fully eliminate this conflicts concern that we have raised, but also that it is incredibly helpful for class members to know their costs exposure, what's going to be taken out of their damages, and it will aid settlement that all the parties are able to swiftly work out what costs are going to be attributable in the different sets of proceedings and I am not --

MR JUSTICE ROTH: We find it quite difficult I can tell you to know what is a reasonable basis at this stage without knowing a lot more about the composition of the different classes, the way possibly there are differences between the extent of maybe over reporting in different claims which may make some of the common issues more relevant to some claims than others, even though they are still common across claims. There are a whole lot of --

MS BLACKWOOD: There is a couple of --

MR JUSTICE ROTH: -- of potential problems which we are just not really in a position to form a view upon that we can be comfortable is a fair one.

MS BLACKWOOD: Well, there are a couple of points to distinguish, Sir. One point you make is about how can we know -- if the costs are common we will not know that until we have seen the litigation. Well, that's already addressed by an amendment that we have suggested to clause 1.4, because this was a point which was fairly raised by the PCR, that common costs are not necessarily common to all of the claims. There might be certain costs which are only common to a sub-set of claims.

MR JUSTICE ROTH: Yes.

MS BLACKWOOD: And provision is already made for that, but I don't see how waiting for the litigation to progress is going to improve your ability to work out how costs as a point of principle, once you have got that pot of common costs, be it common to

three of the claims or to six of the claims. Once you have got that common pot you need to know how you would split it. Are you splitting it equally? Are you splitting it by reference to other aspects of the proceedings? Well, we would say not. We would say the sensible approach is simply you divide it equally.

That's the standard approach taken in GLO cases unless there is a good reason to divert from that. There's been no suggestion that -- I understand it in a sense, because the PCR says there should be no apportionment from the outset at all, but we say there is no reason why the standard approach of an equal division of costs between the sets of proceedings shouldn't be the default position.

Of course, if the Tribunal has concerns that matters may develop such that a different order is appropriate, there is, of course, flexibility within clause 1.4 for that, because --

MR JUSTICE ROTH: Sorry to interrupt. We have not looked -- I know the values are I think in Mr Holt's report, at the different values put on the different claims. I mean, are they equally valuable, each of the claims?

MS BLACKWOOD: There are different anticipated recoveries by the class members.

MR JUSTICE ROTH: How great a variation?

MS BLACKWOOD: I think this is -- they are all under £100 million I think.

No. A violent shaking of heads over there. It is not -- it is certainly £300 and below for a class member. That is a point I will have to check, but I suppose the substance of the point is that the Tribunal's position to decide this, yes, we might need to look at some of the details of the claims, but that's not going to improve --

MR JUSTICE ROTH: Just a second. We have got -- Mr Collyer has helpfully drawn our attention it is in the PCR skeleton.

Anglian's maximum is put at £69.5 million. Yorkshire's maximum -- there is a range but the maximum potential recovery £390 million. It is a huge range.

MS BLACKWOOD: Yes, Sir.

MR JUSTICE ROTH: That's another possible approach.

MS BLACKWOOD: I do take on board your comment or your pushback to me that how you split up, how you decide to apportion -- you might not want to do it on the basis -- a per proceedings basis, but you might want to do it by reference to a different measure, but that is not going to change as proceedings progress. That should be capable of being known now, and if it is considered appropriate to apportion costs in advance, then that is an exercise that doesn't need to be delayed.

MR JUSTICE ROTH: But just pursuing that for a moment, here are two alternative ways of doing it, per capita or per value of claim. Both may have good arguments in favour or against. Speaking for myself, I just don't feel in a position now to decide which is more appropriate. I don't know enough about the individual claims, whether there is any real difference between them and whether the -- I haven't looked at more than the Severn Trent claim form. It is only now that I have picked up the difference in value. There are said to be some special features of the Yorkshire claim, which we haven't gone into. It is just -- I don't feel, speaking for myself, that this Tribunal is now in a position to do that. It may be at some later CMC we will be in a position to form a proper view.

MS BLACKWOOD: I find that indication very helpful and I am conscious that we may be coming up to a transcriber break. Would it been possible for us to take the break and then I can take instructions?

MR JUSTICE ROTH: Yes. Can I say on the other hand I can see the force -- and obviously we have not heard from Mr Williams -- of what you say and it is made very clear in the proposed amendment to 1.5, which is a completely different point. We will hear from Mr Williams on that.

So we will take our break and some back in a bit more than ten minutes.

(Short break)

MR JUSTICE ROTH: Yes, Ms Blackwood.

MS BLACKWOOD: Sir, I am grateful for the indication you gave before the break. I have had the opportunity to take instructions, and we can see the force in your point, Sir, that you perhaps don't feel you have all the material before you today to determine how costs should be apportioned between the six sets of proceedings and that it might be more sensible for this matter to be revisited at the first CMC post certification, should the claims be certified, when more material could be put before you on the issue of apportionment.

MR JUSTICE ROTH: Yes. I mean, we can ask for an amendment. Obviously the agreement has to be entered into, but we can indicate we think it should be amended, but at the moment I think, and we have obviously had a chance over the short break to discuss it among ourselves, we don't see -- are not satisfied that there is a problem with the existing approach in 1.4, and if there were, we are certainly not satisfied what is the preferable pollution when there are various ways of apportionment.

I mean, even your proposal is on a per proceeding basis. Some of the other authorities seem to do it on a per capita basis, which would be the total number of claimants in each proceeding, which we will not know until the end of the opt out period anyway. So there are all sorts of ways it can be done.

MS BLACKWOOD: Yes, Sir, and it might be that it doesn't need to be specified in this document, but nevertheless an order can be made at a subsequent CMC should claim proceedings be certified.

MR JUSTICE ROTH: Particularly if it says subject to the CAT, contrary directions. So there will be the prospect for the CAT stating something later.

MS BLACKWOOD: Yes, sir. Just before we put away the priorities agreement, I just wanted to very briefly draw your attention to one oddity that arises as a result of clauses 1.4 to 1.6 and that's at -- it is likely to give rise to either a delay in distribution

of damages to class members or some form of two-stage distribution. We are not taking a certification issue in relation to this, but we simply flag it as an oddity of the structure of these clauses.

Just to put down a marker that should there be a two-stage distribution process, we don't accept we should be responsible for distribution costs, but we certainly strongly resist any suggestion that as a result of the way in which the PCR has chosen to organise her funding arrangements we should, therefore, be liable to pay anything towards a second set of -- a second stage distribution.

MR JUSTICE ROTH: Yes. You have put down your marker very clearly.

MS BLACKWOOD: Thank you, sir.

So the last issue is the impact of the appeal in Gutmann v Apple.

MR JUSTICE ROTH: Yes.

MS BLACKWOOD: The funding arrangements envisaged the Funder will be paid otherwise than out of undistributed damages. This was permitted by the Tribunal in the case of Gutmann v Apple, but this issue is now on appeal to the Court of Appeal and we understand it has a hear by date of March 2025.

As noted in paragraph 134A of our amended response, our position is that the Tribunal does not have the power to permit payment of funding costs other than out of undistributed damages, and even if it was permitted by law, it is inappropriate for the reasons set out within that paragraph.

MR JUSTICE ROTH: The paragraph number again?

MS BLACKWOOD: I am so sorry. Paragraph 134A of the amended response. The reason, Sir, I am not asking you to turn that up now is we are conscious, as you indicated earlier, that the Tribunal is not minded to depart from their previous approach unless it is manifestly wrong, and the matter is currently on appeal and is going to be determined by the Court of Appeal in relatively short order. So rather than pressing

the point today or seeking to resist certification on this basis we reserve our rights in relation to this issue pending the judgment of the Court of Appeal in Gutmann v Apple. Should the claims be certified we say that the CPO should make provision for certification to be revisited as necessary following the judgment in Gutmann v Apple.

MR JUSTICE ROTH: If Gutmann v Apple in the Court of Appeal holds that is not permissible, I imagine the funders will wish the funding agreement to be amended.

MS BLACKWOOD: Yes, Sir. There's a further matter in relation to --

MR JUSTICE ROTH: That will come to them because they will be concerned. So it seems to me it will inevitably have to come back to the Tribunal to look at it.

MS BLACKWOOD: Certainly. In the way the PACCAR judgment impacted many funding agreements and had to be revisited.

MR JUSTICE ROTH: Yes.

MS BLACKWOOD: But there is a further issue that I want to raise in relation to this. If I could ask you to turn briefly to bundle 6, volume 2.1, tab 24.

MR JUSTICE ROTH: Yes.

MS BLACKWOOD: Paragraph 6.

MR JUSTICE ROTH: Just a minute.

MS BLACKWOOD: I am so sorry, sir.

MR JUSTICE ROTH: Paragraph?

MS BLACKWOOD: Paragraph 6. Page 1344. If I could ask you to read that paragraph. (Pause.)

You will see that whilst the Tribunal in Gutmann v Apple included that funder's fee may be paid out of damages which are not distributed, it did recognise that this conclusion was arguably inconsistent with obiter statements in other cases and that the Court of Appeal may well reach a different conclusion.

I simply draw your attention to that, because it highlights that this is very much a live

issue that has not been settled by the courts.

MR JUSTICE ROTH: Yes.

MS BLACKWOOD: It is particularly significant for the viability of the funding arrangements in the present sets of proceedings in light of the PCR's skeleton and the comments made therein.

At paragraph 118 of the PCR skeleton they make clear that the PCR and the Funder expect distribution of damages in this case to be very high. That is understandable, because one. Methods for distributing damages is because they are aware of the customers of the water companies.

MR JUSTICE ROTH: Yes.

MS BLACKWOOD: We were concerned about the impact of Gutmann v Apple going against the PCR, so we wrote to the PCR asking them to confirm whether or not the findings of the Court of Appeal, if it went against them, would amount to a material adverse change would permit the Funder to cease funding the claim, and we also asked whether or not the Funder would give any indication or provide an undertaking that they would continue to fund the claim if the judgment went against them.

They didn't respond at all on the material adverse change point, and they obviously refused to give an undertaking.

Now we accept that that is completely commercially understandable, and, as the PCR put it, the Funder would not want to be tied to supporting litigation if because of extraneous events it later becomes commercially unviable, but what the PCR skeleton highlights is that there's a high risk in this case that the funding will fall away if the Funder cannot recover costs other than for undistributed damages.

So we see that there is a clear risk that the judgment of the Court of Appeal in Gutmann v Apple if it goes against the PCR would effectively be dispositive of these proceedings.

MR JUSTICE ROTH: I see your point. I don't want to take up time speculating on that. All sorts of things like happen. Equally Parliament might reverse PACCAR and that might change the funding landscape. As you know, there was a bill to reverse PACCAR. It fell with the election. There are various possibilities. We will know where we are when the Court of Appeal gives judgment.

MS BLACKWOOD: The substance of my point, Sir, is given there is a significant risk that this case could collapse on funding grounds, that the Proposed Defendants should not be required to take costly or substantive steps in these proceedings pending the Court of Appeal handing down its judgment.

MR JUSTICE ROTH: You are protected -- if the proceedings are withdrawn, presumably you can apply for your costs and various insurance in place to cover your costs. So you are not at risk.

MS BLACKWOOD: That's the position of the PCR, Sir, but we say that there are further costs to which we are exposed. The first is that there will inevitably be some irrecoverable costs because the usual practice is the successful parties are not awarded 100% of their costs. So there is usually some sort of discount unless the PCR, which I don't imagine they are proposing, intend to pay our costs on an indemnity basis.

It also doesn't compensate the Proposed Defendants for the internal costs associated with managing proceedings, so their clients having to take time to find information, carry out disclosure.

MR JUSTICE ROTH: Let's take it in stages. We have not decided to issue a CPO yet. There are a lot of arguments we have to address in the judgment. The judgment is not going to be extemporary and delivered tomorrow, in case you were anticipating that. Then you get a judgment, even that there is always a possibility one side or other may seek to appeal. We are well used to that, this Tribunal, in these cases. The case

is going to the Court of Appeal in March. The Court of Appeal on that sort of issue is usually fairly quick on giving judgment as long as it doesn't get appealed further.

So, you know, let's take things step by step. I have your point. You are concerned about that, but I think --

MS BLACKWOOD: It may be that should the proceedings be certified which, as you rightly say, has not yet been decided, that this issue can be considered.

MR JUSTICE ROTH: We will see where we are. I think we should hear from Mr Williams then on the -- I think what we are left with, Mr Williams, is clause 1.5.

Submissions by MR WILLIAMS

MR WILLIAMS: Yes. Let me say, Sir, immediately, I am not going to be dogmatic about that and if this letter is making some suggestions for revisitation and hadn't arrived on Friday and hoping to arrive in the context of an agreement which has no fewer than 13 parties, one of which is an agent for six different underwriters, so you will appreciate it is just difficult to take instructions from all interested parties in the time that was left. That's not in any sense a criticism of the Parallel Defendants. It is just an explanation as to why we haven't been able to achieve as much as you might have thought we could have achieved when the differences between us on clause 1.5 are truly semantic and, as you have heard, there is not a dispute about the principle.

For what it is worth, if I may respectfully say so, the way in which Mr Forrester looked at it, was the way in which we looked at it. Firstly, it is inherent that 1.5 is a follow on from 1.4. It is only there to sweep up anything that's not been paid under 1.4 because 1.4, we assume is at an interim stage. I appreciate you might not want me to go into the undergrowth but just to explain why we have done it in that way.

It is our expectation -- obviously the predicate here is one case settles early. If the case settles early the stakeholders ask the PCR to make an application at that stage

for some money towards their outlets. That may or may not be something which the Tribunal smiles upon. It may say "No, you can't be patient", but if it does smile upon it, the likelihood is it will not be for 100% of the outlays for the very reason the case will be ongoing. As you have heard from the debate about 1.5, a huge amount of the outlays will be common costs.

Now at the point one case settles and potentially five others keep going, the Tribunal at that stage may be in no position at all to even work out what is the appropriate incidence of common costs, let alone to quantify them, because the idea it would quantify common costs in one/sixth of the cases when five/sixths of them are continuing and the common costs are still at large in those cases. It is just not going to happen. So that's why we have structured matters in that way. We accept it leads to a certain density. That is just the reality of the position which we thought we had to address when the whole premise of this part of the agreement is that there is a part settlement rather than a total settlement. So that's the premise.

As I said, against that premise the idea was that 1.5 was a sweeping up that which was not recovered at an interim stage under 1.4. In other words, it is sort of implicit and with that premise that Mr Forrester, if I can respectfully say so, expressed so well. On looking at matters again we appreciate that really all the defendants are saying is let that which is implicit be explicit. I am not going to stand here and argue against that. What I can't do is say I am instructed to agree their words, because there are 13 parties and six underwriters, as I have said, but it is a matter that if the Tribunal's judgment is that as a premise of certification the common ground that there can't be cross deductions, so by one pot of damages is reduced to take account of costs which are, in fact, attributable to a different pot of damages. That needs to be expressed in clause 1.5, we don't contend against that. We accept that is reasonable for them to want something to be made explicit, notwithstanding, of course, there are other

safeguards like 1.5 is also subject to what the Tribunal approves being deducted. So there is that additional safeguard as well, but again we are not going to waste time with a sort of brass necked wish, to be dogmatic when there is no need for that.

So if 1.4 of the inter parties agenda, which is 1.4, 1.5 and Gutmann, if 1.5 is all that's left, I hope that that essentially disposes of that.

I am, of course, mindful of your words at the outset that there are certain matters that the Tribunal is concerned about.

MR JUSTICE ROTH: It is very helpful. If you could I think it is always better if things are explicit rather than implicit. Even though what you have said is on the record.

MR WILLIAMS: Yes.

MR JUSTICE ROTH: As you said, it is not on the record on express instructions of everyone because there are too many people to have consulted at short notice, so if either those words or words to the same effect can be inserted then we can proceed on that basis and the judgment will say that on that understanding you are satisfied.

MR WILLIAMS: Yes. Unless I am -- there is no alarm from behind me, sir, on that prospectus.

MR JUSTICE ROTH: You will probably have your confirmation before that --

MR WILLIAMS: On the assumption -- not the assumption -- the indication to our shock judgment is being reserved, I would very much hope that -- I would very much hope in that unexpected interval that we would be able to make some further progress.

MR JUSTICE ROTH: Thank you very much. Can we then raise with you the matters that we have some concerns about?

MR WILLIAMS: Yes.

MR JUSTICE ROTH: As you know, in these proceedings we are in the slightly unusual position that we have an opt-out proceedings where the class members who are the actual claimants as such are not giving instructions, don't really particularly see the

documents, and while we appreciate that the class representative may be very diligent, the Tribunal has, as it were, a duty to protect the interests of class members.

MR WILLIAMS: Of course.

MR JUSTICE ROTH: The particular concern with funding is always in what circumstance can the Funder withdraw funding.

MR WILLIAMS: Yes.

MR JUSTICE ROTH: So if we could look at the LFA, which I think we have a red line copy, but I think the final version -- final draft is at 55.5 of bundle 7.

MR WILLIAMS: Yes.

MR JUSTICE ROTH: It has not been signed yet.

MR WILLIAMS: No.

MR JUSTICE ROTH: But, as I take it, this has been approved by the funders.

MR WILLIAMS: This has been approved and we have, as it were, held it in escrow precisely because we anticipated there might be a certain dynamism to the way in which drafting issues arose in the course of the hearing.

MR JUSTICE ROTH: Yes. If we go to, as it were, the termination clause, although it is not so-called, on page 259 of the bundle, which is clause 11.1:

"Material adverse change.

If the Funder determines that a Material Adverse Change", and that's what I think we are concerned about really, not really default, "has occurred in respect of the claim or in relation to any Parallel Claim, the Funder may give written notice to the Class Representative exercising the rights under this clause. When the Funder provides notice to the Class Representative, it will identify whether the Material Adverse Change is in relation to the Claim in respect of one or more Parallel Claims. Following notice under this clause, any outstanding payment request will be deemed immediately withdrawn, and unless any dispute is resolved in the Class

Representative's favour in accordance with the Dispute Resolution procedure, no further payment requests may be delivered in respect of the claim, if the notice relates to a claim, or relevant parallel claim, if it relates to parallel claim."

But that's the entitlement of the Funder to cease the funding by giving written notice of a material adverse change.

Then one has the dispute resolution procedure if the class representative says no. I don't think this is a material adverse change. The dispute resolution procedure is explained at I think it is 1.17 on page 251.

MR WILLIAMS: Yes.

MR JUSTICE ROTH: "Dispute Resolution Procedure means the following procedure will apply. If a default is notified by one party", presumably in this case it is the funder, "within five business days of receipt of notice non-terminating party may give written notice to terminate the disputes. The relevant event occurred. If so the terminator must promptly instruct an independent appropriate qualified third party, in most cases a KC that specialises in the relevant area related to such dispute to determine as soon as reasonably practicable whether the material adverse change has occurred. Parties and the solicitor will be entitled to make representations to the reviewing third party. The decision of that third party will be binding."

So that's the procedure.

MR WILLIAMS: Yes.

MR JUSTICE ROTH: So what we have is suppose the Funder notifies the class representative "Material Adverse Change" under clause 11. Then the class representative has five business days to give notice that it invokes, or she invokes the dispute resolution procedure. If that's done, then a KC is appointed, instructed. Then both sides make representations to that KC and then, having considered the representations, the KC gives her or his decision, which is binding."

That's how I understand it.

MR WILLIAMS: Yes.

MR JUSTICE ROTH: The first question is now that process is going to take on an optimistic basis some six weeks I would have thought.

MR WILLIAMS: Yes, I would have thought.

MR JUSTICE ROTH: Maybe longer, because we will look at material adverse change in a minute. It is not straightforward. The first question is what happens to the conduct of the claim and the class representatives conducting the claim during those six weeks, because she may well be successful and the KC may decide in her favour, in which case the Funder can't pull out. That doesn't seem to be covered.

What happens also to the outstanding payment requests which under clause 11.1 are deemed withdrawn? That's for previous costs, because what one finds in clause 11 is in 11.2 with the situation when there's notification of a material adverse change, no dispute resolution is invoked, which is one possibility, and clause 11.4 deals with the situation where there's been a notice of material adverse change and the dispute resolution procedure is invoked and is settled in favour of the funder. There doesn't seem to being anything, unless I have missed it, saying what happens if the material adverse change notice is given, there is dispute resolution and it is settled in favour of the class representative.

We are concerned about that gap, because if there was, it would deal with these points that concern us. It does seem to us that if the class representative is successful with the dispute resolution procedure, then the funding obviously ought to cover outstanding funding requests -- sorry -- payment requests they are called -- ought to be paid.

MR WILLIAMS: Yes.

MR JUSTICE ROTH: They were deemed withdrawn but they can be reinstated and

must be paid. Indeed, funding must then cover that period of the dispute resolution procedure. So that's the first point that we would like you to consider.

MR WILLIAMS: Yes.

MR JUSTICE ROTH: We hope that we are not being optimistic in thinking that's just a lacuna in the way that the agreement has been drafted, because it seems to us the points we are making are somewhat obvious and that there should not be an objection by the Funder to remedy this lacuna. So that's the first point.

MR WILLIAMS: Yes. That's understood.

MR JUSTICE ROTH: I think you can see exactly the point we are making.

MR WILLIAMS: If I may say so, that's very clear. Thank you.

MR JUSTICE ROTH: The second point, which is perhaps more substantive, concerns the definition of material adverse change in clause 1.23. I think that was raised in the response. It has been amended I think, but still we are looking at the final version, which is on page 252.

MR WILLIAMS: Yes.

MR JUSTICE ROTH: "Material Adverse Change means in the reasonable opinion of the funder:

(a) Prospects of success or recovery, either the Claim as a whole or one or more Parallel Claims are materially worse than the funder's assessment of those prospects on or about the signing date or,

(b) Amounts reasonably expected to be recovered in the Claim are such that even if the Claim is successful, the Funder will no longer earn a commercially viable return under this Agreement."

So, in other words, it's saying if it's the reasonable opinion of the funder, either (a) or (b) -- I think (b) is that it will no longer earn a commercially viable return -- if both the Funder were to give that notice the class representative disputes it, what is the case

we are having to decide, to decide whether it is a reasonable opinion of the Funder that the prospects of success are materially worse, and that seems to us a very, very low threshold. We wonder why the words in the real opinion of the Funder need to be there or are appropriate.

Either the prospects of success are in the determination of the KC materially worse than the funder's assessment at the signing date or they're not, and it seems to us that that ought to be the criterion that protects the funder, but for the way it is written it is arguable at least that all the KC can decide is whether that is the reasonable opinion of the funder. That is a very low protection we think to the class representative.

We are separately concerned about (b):

"... no longer earn a commercially viable return".

Actually how one can look at that on any objective basis and what that really means, economic circumstances change or an example that my colleague Mr Forrester gave when we were considering this, the Funder has new ownership. They take a different view of what sort of return they think their investment should produce. So they say it is no longer commercially viable. Again we think that gives rather weak protection to the class representative and that the more appropriate approach would be to say that there has been -- looking at the way (a) is worded, the commercial -- likely commercial return is materially worse than it appeared to be or than it was at the time the agreement was entered into.

MR WILLIAMS: Yes.

MR JUSTICE ROTH: And that that gives one an objective basis on which a dispute about material adverse change can be determined as between Funder and class and should give the Funder -- we, of course, recognise the Funder must be entitled to cease funding in certain circumstances, but none of those circumstances are determined.

I am conscious of the time and, secondly, that these are matters you may need to raise with the funder.

MR WILLIAMS: Yes. I am grateful for that, because obviously I would like to help, but it is not within my powers, not least because I don't represent the funder, but if I can respectfully say, sir, that's all very clear, and obviously it is not a case where I can say "Actually there's been a misunderstanding because you have missed clause X" or something of that sort.

So I think in those circumstances all I can respectfully offer the Tribunal is to say can we take that away and revert as soon as we can. Now whether that can be before the hearing ends I don't know. I will need to take some instructions on that. Obviously at least with this the counterparty is just the Funder. It is not the 13 plus six as in the other agreements.

MR JUSTICE ROTH: Yes. Well, we are making good time I think in the case.

MR WILLIAMS: Yes.

MR JUSTICE ROTH: What I would suggest is if we rise now. There is no particular point I think going on for another ten or fifteen minutes. Nor do I think we need to sit at 10 o'clock, as was envisaged, because I think originally this was listed with Friday in reserve and I just thought we would start early and we won't have to come back on Friday. I don't think there is now any concern that if we start at 10.30, we won't finish tomorrow. So if we start at 10.30, and I hope that will give you time at least to take instructions, or those instructing you to take instructions, communicate with the Funder. Whether the Funder is observing the proceedings online or not, of course, I don't know, but sometimes they do.

MR WILLIAMS: Yes, indeed. I would certainly hope, unless key personnel aren't available, there can be progress, but obviously I can't speculate as to how complete, but we will do our best to make it as complete as possible.

MR JUSTICE ROTH: Yes. Thank you.

Yes, Ms Blackwood.

MS BLACKWOOD: Sir, just to interject, we are not aware of any further issues that will need to be dealt with tomorrow beyond this funding issue.

MR JUSTICE ROTH: No other issues, are there?

MR HOSKINS: I think we are done. Apart from the issues the Tribunal has raised everything on the agenda has now been covered.

MR JUSTICE ROTH: I see. Well, that's very good news.

MR HOSKINS: Indeed.

MR JUSTICE ROTH: In those circumstances, Mr Williams, how do you suggest we deal with this? If the Funder -- and obviously your client as well -- agree to these matters being changed in the way we have outlined -- we are obviously not drafting in the hearing --

MR WILLIAMS: Yes.

MR JUSTICE ROTH: -- then there is no problem. If they don't, well, there might be a problem --

MR WILLIAMS: Yes. Well, I am very reluctant --

MR JUSTICE ROTH: -- and you will wish to address us why we should nonetheless certify.

MR WILLIAMS: Yes. Sir, you have far more experience than I as to how these sorts of procedural issues have been processed. If I throw my mind all the way back to when Mr Hoskins was sat on the correct side of court, and I was with him in Merricks v Mastercard, although I have to say the losing side of the court as it then transpired --

MR HOSKINS: You're not going to press this!

MR WILLIAMS: I was there, you see. I'm just your shaman. What I would say -- I think they too you, Sir, accepted that there were some infelicities in the funding

agreements and you did give an opportunity for it corrected post hearing rather than -- I am very reluctant to reassemble the cast of thousands tomorrow when it may be that I simply say, "Sir, we need more time before I can give you a total resolution". Again unless there is a different view from behind ...

I am reminded that there is an express requirement in the agreement between the PCR and the Funder for good faith negotiation and for reasonable amendments and such like. So I would very much hope that if we were to be given some sort of breathing space, we would be able to put in a proposed amendment.

Obviously if that leads to controversy, there can, if absolutely necessary, be a restoration, but one would hope that it would enable you either to make -- well, enable you to deal with matters on paper.

MR JUSTICE ROTH: Yes. Well, that sounds very sensible. If we say, if possible, if you can or those instructing you revert to the Tribunal on this for -- on Monday, that would be appreciated -- but if you need more time, say so -- obviously copying the defendants.

MR WILLIAMS: Of course, yes.

MR JUSTICE ROTH: It is not a point that has been raised by them. It doesn't directly concern them, but they are entitled to comment on it.

MR WILLIAMS: Can I just take instructions?

MR JUSTICE ROTH: Yes, of course.

MR WILLIAMS: Can we say by close of business on Monday?

MR JUSTICE ROTH: Yes. That will be fine. Then if there's any problem, we hope it can be dealt with in writing, and I think we are all reluctant to have to convene another hearing.

MR WILLIAMS: Sir, I am very grateful on behalf of the class representative for you articulating those concerns so clearly and we will do what we can to address them.

MR JUSTICE ROTH: Anything anyone else has at this stage? No? Well, thank you all very much. As we have just indicated, judgment will be reserved and you will be notified in due course.

(4.23 pm)

(Hearing concluded)