Neutral citation [2024] CAT 51

Case Nos: 1289/7/7/18

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

2 August 2024

Before:

THE HONOURABLE MR JUSTICE ROTH
(Chair)
DR WILLIAM BISHOP
PROFESSOR STEPHEN WILKS

Sitting as a Tribunal in England and Wales

BETWEEN:

ROAD HAULAGE ASSOCIATION LIMITED

Applicant / Proposed Class Representative

RHA USED TRUCKS LIMITED

Proposed Sub-Class Representative

- v -

(1) TRATON SE
(2) MAN TRUCK & BUS AG
(3) MAN TRUCK & BUS DEUTSCHLAND GMBH
(4) STELLANTIS N.V. (FORMERLY FIAT CHRYSLER AUTOMOBILES N.V.)
(5) CNH INDUSTRIAL N.V.
(6) IVECO S.P.A.
(7) IVECO MAGIRUS AG
(8) PACCAR INC
(9) DAF TRUCK N.V.
(10) DAF TRUCKS DEUTSCHLAND GMBH

Respondents / Proposed Defendants

- and –

(1) DAIMLER AG
(2) VOLVO LASTVAGNAR AKTIEBOLAG

Objectors

Heard at Salisbury Square House on 4-5 June 2024 and 18 July 2024

RULING: COLLECTIVE PROCEEDINGS ORDER
(NON-CONFIDENTIAL VERSION)

APPEARANCES

James Flynn KC, David Went, Harriet Hartshorn and David Illingworth (instructed by Backhouse Jones/Addleshaw Goddard) appeared on behalf of Road Haulage Association Limited.

David Scannell KC and Laurence Page (instructed by Tyr) appeared on behalf of RHA Used Trucks Limited.

Daniel Jowell KC and Tom Pascoe (instructed by Slaughter and May) appeared on behalf of the MAN Proposed Defendants.

James White (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Iveco Proposed Defendants.

Meredith Pickford KC and Nikolaus Grubeck (instructed by Travers Smith LLP) appeared on behalf of the DAF Proposed Defendants.

Ben Rayment (instructed by Macfarlanes LLP) appeared on behalf of the Daimler Objector

Mark Hoskins KC (instructed by Freshfields Bruckhaus Deringer) appeared on behalf of the Volvo Objector

Jamie Carpenter KC (instructed by the solicitors to the Proposed Defendants) appeared at the hearing on 4-5 June 2024 on behalf of the MAN, Iveco and DAF Proposed Defendants.

Note: Excisions in this Ruling (marked "[✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

A. INTRODUCTION

1. Both the Road Haulage Association ("the RHA") and UK Trucks Claim Ltd ("UKTC") commenced collective proceedings before the Tribunal pursuant to s. 47B of the Competition Act 1998 ("CA 1998") seeking to claim follow-on damages from various truck manufacturers arising from the trucks cartel which was the subject of the decision of the European Commission of 19 July 2016: Case 39824 - *Trucks*. By a judgment issued on 8 June 2022, the Tribunal determined that the application of the RHA for a collective proceedings order ("CPO") pursuant to s. 47B(4) CA 1998 should succeed in preference to that of UKTC: [2022] CAT 25 ("*Trucks Collective – CAT*"). The RHA proceedings are opt-in proceedings whereas the UKTC sought to bring opt-out proceedings: see CA 1998 s. 47B(10)-(11).

2. The decision as between the RHA action and the UKTC action was based on a number of reasons, but one of them was that the class covered by UKTC's application covered only new trucks whereas that of the RHA included used trucks and the evidence showed that about half the operators who purchased trucks acquired only used trucks, of which the prices may have been affected by the cartel: *Trucks Collective – CAT* at [203]-[204].

3. However, the Tribunal did not proceed to make a CPO, since both UKTC and the proposed defendants indicated that they would appeal. In broad summary, UKTC's appeal contended that its application should have been preferred, whereas the proposed defendants' appeal contended that claims for used trucks should have been excluded from the RHA proceedings because of a conflict of interest with the claims for new trucks. If a CPO had been issued at that stage, giving potential class members ("PCMs") the detailed form of notice of collective proceedings pursuant to rule 81 of the Competition Appeal Tribunal Rules 2015 (respectively, a "rule 81 notice" and the "CAT Rules") with a requirement to opt-in by a specified date, it would have caused PCMs considerable confusion if the CPO had been subsequently set aside and collective proceedings then authorised on a different basis: in that event, the process of issuing a rule 81 notice and opt-in or opt-out by many thousands of PCMs would have had to start all over again.

4. The Court of Appeal gave judgment on 25 July 2023: [2023] EWCA Civ 875 ("*Trucks Collective – CA*"). In essence, the Court of Appeal dismissed the appeal of UKTC and largely dismissed the appeal of the proposed defendants save that it held that the Tribunal's approach to addressing the potential conflict of interest between claims for new and used trucks was inadequate and that further steps were required within the RHA to address that conflict. In particular, the Court held that the claimants for new trucks and claimants for used trucks should be constituted as two separate sub-classes for the purpose of the issue of resale pass-on, which gave rise to a conflict of interest between them. We address this aspect of the Court of Appeal judgment in more detail below.

5. On 26 July 2023, the day after the Court of Appeal judgment, a separate appeal by one of the truck manufacturing groups concerning the distinct question of litigation funding was decided by the Supreme Court: *R (on the application of PACCAR) v Competition Appeal Tribunal* [2023] UKSC 28, [2023] 1WLR 2594 ("*PACCAR*"). The Supreme Court held that the litigation funding model used to fund both the RHA and the UKTC proceedings (and which was in common use at the time) constituted a "damages-based agreement" under the relevant legislation and was therefore unlawful.

6. By its order made on 29 September 2023, the Court of Appeal ordered that the matter be remitted to the Tribunal for it to give directions in relation to the arrangements for the two sub-classes, and to approve a revised form of notice to PCMs, in accordance with the guidance given in *Trucks Collective – CA*. This took some time since the RHA had not only to develop new arrangements for the used trucks sub-class and for the management of conflicts between the two sub-classes, but also fundamentally to revise the funding arrangements in the light of *PACCAR*. Only once those matters had been resolved could the Tribunal issue a CPO.

7. A hearing of the matters remitted by the Court of Appeal, along with some other issues raised regarding the scope of the class, was held in the Tribunal on 4-5 June 2024. We resolved various matters by rulings given in the course of that hearing. However, we reserved our decision on one issue concerning the

treatment of dissolved companies and allowed further submissions on another, concerning the position of leases of used trucks during the run-off period. On a third matter, regarding the arrangements to deal with potential conflicts, we were not satisfied with the explanation in the evidence then before the Tribunal regarding the funding arrangements. We also had concerns as to whether the RHA had secured funding to cover an up-to-date costs budget. We therefore adjourned those aspects with directions for further evidence. As a result, a further CPO hearing was held on 18 July 2024.

8. This ruling accordingly addresses:

(1) What, if any, provision should be made in the class definition for companies which had been dissolved but might be restored to the register;

(2) Whether claims by the second and further lessees of used trucks should fall within the extended run-off period for used trucks; and

(3) Whether the arrangements put in place by the RHA satisfy the requirements directed by the Court of Appeal in relation to the conflict of interest between claims for new and for used trucks.

B. DISSOLVED COMPANIES

9. The definition of the class in the proposed CPO had, as is usual, a number of exclusions. One of those concerned dissolved companies. In the draft CPO this was expressed as:

> "Any dissolved legal person who was dissolved for a continuous period of six years or more as at [the date of the CPO]."

Some confusion was caused by what appeared to be a revised approach in the RHA's skeleton argument, but Mr Flynn KC clarified that the above wording represented the RHA's position. By contrast, the proposed defendants submitted that the exclusion should be for:

> "Any dissolved legal entity in respect of which an application to restore [to the register] has not been made within the six year period before [the date of the CPO.]"

10. The reason this potentially matters is as follows. Given that the proceedings concern purchases or leases of trucks potentially made as long ago as January 1997, it seems clear that a number of companies which would otherwise have come within the class will have since been dissolved. A dissolved company does not exist and therefore cannot claim. But pursuant to ss. 1024 and 1029 of the Companies Act 2006 ("CA 2006"), an application may be made to, respectively, the registrar or the court to restore a company to the register. If such restoration is made, then ss. 1028(1) and 1032(1) provide, in materially identical wording, that the effect is that:

> "the company is deemed to have continued in existence as if it had not been dissolved or struck off the register."

On that basis, the company may then pursue a legal claim. Given the multitude of entities in the UK which acquired trucks over the 17-18 year claim period, the number of such dissolved companies for which an application to restore might be made is not insignificant. However, for both routes of statutory restoration, there is a cut-off: an application to restore cannot be made after the end of a period of six years from the date of dissolution of the company (subject to limited exceptions in the case of an application to the court, which are not material in the present context): CA 2006, ss. 1024(4) and 1030(4).

11. The difference between the RHA's draft exclusion and the proposed defendants' draft exclusion is that under the RHA's formulation, it would be possible for an application to restore a dissolved company to be made *after* the date of the CPO, (provided that the company had not been dissolved more than six years earlier), and if the company were restored it could then opt-in to the proceedings. Since the making of the CPO would be publicised by the RHA, no doubt with encouragement to PCMs to opt-in, that might trigger a number of applications to restore dissolved companies. It is impossible to speculate whether that number would really be significant in the context of the overall claim.

12. In our view, an express exclusion concerning dissolved companies is neither necessary nor appropriate. These are opt-in collective proceedings. Rule 82 of the CAT Rules provides, insofar as relevant:

> " (1) A class member may on or before the time and in the manner specified in the collective proceedings order—
>
> in the case of opt-in collective proceedings, opt into the collective proceedings;
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> …
>
> (2) A class member who does not opt in or opt out in accordance with paragraph (1) may not do so without the permission of the Tribunal.
>
> (3) In considering whether to grant permission under paragraph (2), the Tribunal shall consider all of the circumstances, including in particular—
>
> (a) whether the delay was caused by the fault of that class member; and
>
> (b) whether the defendant would suffer substantial prejudice if permission were granted."

13. As stated above, a company which has been dissolved or struck off the register does not exist and therefore cannot opt-in. The Tribunal determined that the date to be specified in the CPO by which potential class members can opt-in is 31 December 2024. If a company which was previously dissolved is restored to the register by that date, then it will be able to opt-in since pursuant to the statutory deeming provisions set out above it is treated as if it had never been dissolved. Since an application to restore after more than six years cannot, for present purposes, be made, the RHA's formulation appears to do no more than reflect the statutory position and it is therefore unnecessary. Indeed, including it might cause confusion since it might suggest that any company dissolved more than six years before the CPO (e.g. on 1 July 2018) cannot opt-in even if an application to restore had been made within six years of dissolution (e.g. on 1 May 2024) leading to its restoration before the opt-in date (e.g. on 1 December 2024). We see no reason to impose an additional limitation on the statutory scheme for restoration of dissolved companies.

14. The hypothetical example given above would not be excluded under the formulation of the proposed defendants. However, their formulation would have the more dramatic effect of excluding any company dissolved prior to the making of the CPO for which an application to restore had not been made *at*

any time within the six years period prior to the CPO: for example, a company dissolved on 1 May 2024, for which an application to restore is made only on 30 September 2024 leading to restoration of the company by the end of December. We consider that there is no principled basis for such an exclusion.

15. The statutory scheme of CA 2006 limits the time within which an application may be made to restore a dissolved company. The statutory scheme under the CAT Rules prescribes the time within which an application may be made to opt-in to the proceedings. If a previously dissolved company is not restored by 31 December 2024, it will not be able to opt-in by the specified date and will have to apply to the Tribunal for permission to opt-in. The question whether to grant such permission will then be determined in accordance with rule 82(3), and the defendants will have the opportunity to make representations as to why such permission should not be granted.

16. We should add that by reason of the statutory deeming provisions, the position here is wholly distinct from that regarding claims which do not exist at all at the date of the CPO, addressed in *Neill v Sony Interactive Entertainment Europe Ltd* [2023] CAT 73, on which reliance was placed by the proposed defendants. Further, our decision on this question should not be taken to indicate the approach the Tribunal might adopt in the context of opt-out proceedings, which may give rise to different considerations affecting inclusion in the class.

C. LEASES OF USED TRUCKS AND THE RUN-OFF PERIODS

17. In its application, as is frequently the case in cartel damages cases, the RHA sought a run-off period for the claim beyond the end of the period of infringement, on the basis that after the cartel concluded it would have had a continuing effect on prices thereafter. As noted above, the RHA's proceedings covers both new and used trucks. In *Trucks Collective - CAT*, at [213], we determined that there should be a different run-off period for new and for used trucks in these proceedings as follows:

> "Any cut-off will inevitably be imperfect and risks leaving some potential claimants outside the class, but a reasonable line has to be drawn. We consider that it is necessary to distinguish between different aspects of the claims. We

> see no difficulty about including in the class persons who entered into contracts to purchase or lease trucks during the cartel period and a fairly short run-off period, even if all or part of the price was paid, and the physical truck was delivered, subsequently. Secondly, we acknowledge that since the RHA action includes used trucks, a longer run-off may be appropriate for used trucks. On the basis of the material we have seen and in the circumstances of this case, we consider that a reasonable run-off for the RHA action is 31 January 2014 for new trucks and any EURO emissions claim, given that this covers the date when EURO VI emissions trucks became mandatory; and one year later (i.e. 31 January 2015) for used trucks to allow a modest extension for resale."

18. The RHA class comprises lessees of trucks as well as purchasers of trucks. In considering the delineation of the run-off periods for the purpose of the CPO, the question arose as to how leases of trucks should be categorised. It is an important question since many operators lease rather than purchase the trucks which they use. Truck rental companies, whose business is the leasing out of trucks (i.e. lessors), are not included in the class. But it is obvious that the same truck may be leased out to successive lessees. Therefore, the first such lessee will be renting a new truck whereas subsequent lessees will be renting a used truck.

19. The RHA contended that all leases except for the first lease of a new truck, should be treated as claims for used trucks, and therefore benefit from the longer run-off period, i.e. to 31 January 2015. The proposed defendants argued that all leases should be subject to the shorter run-off period, i.e. to 31 January 2014.

20. Mr White, who argued this issue on behalf of all the proposed defendants, submitted that the Tribunal has determined in the above passage that the run-off period for all leased trucks is to 31 January 2014. We reject that submission. The question of how to treat leases of trucks for the purpose of any run-off period was not argued before the Tribunal in the hearing which led to the judgment in *Trucks Collective – CAT*, nor did we give it any consideration. There were of course a large number of other, more fundamental issues which were addressed in that hearing. Accordingly, this question is now open before us.

21. Since the RHA's contention concerned the used sub-class, the argument was advanced by Mr Scannell KC on behalf of the proposed used sub-class representative. He submitted, in essence, that used truck lease rates were likely

to be a reflection of used truck purchase prices. The run-off period for leases of used trucks should therefore be the same as that for purchases of used trucks.

22. Mr White submitted that this alleged price effect was unclear and unsubstantiated, and asked rhetorically why a second lease which is entered into following a very short first lease of a new truck stands to be treated as a lease of a used truck rather than a lease of new truck.

23. Following questions from the Tribunal at the June hearing, this matter was addressed in two short reports from Mr Brett Wilkinson, the expert economist instructed on behalf of the proposed sub-class representative. He explained why he considered that the mechanisms that may cause new truck prices to impact the price of used trucks apply in principle to both purchased and leased used trucks, and that "although the pricing strategies of lessors … will only become fully apparent after disclosure", lessors are likely to reflect in their leasing prices an allowance for the capital cost of the truck as at the time of the lease. On that basis, the time when the truck was purchased new is not material.

24. In his short reports of 7 June and 1 July 2024, Mr Wilkinson very properly made clear that his opinion on this question is based on the information currently available to him. He also expressly acknowledged that as regards spot hires, he would need to investigate whether they are sufficiently similar to other rental contracts to be treated together, and that it may be that, following disclosure, "I revisit the run-off period for Spot Hire contracts specifically."

25. The proposed defendants in their written submissions criticised Mr Wilkinson's approach as being based on assumptions without any factual basis. We consider that criticism is misplaced. This is a very preliminary stage of the proceedings. No disclosure has taken place. The economic experts for a class representative are expected at this stage only to provide an initial analysis presenting a plausible methodology which presents a realistic prospect of establishing loss. That reflects the *Microsoft* test adopted in collective proceedings on the basis of the Canadian jurisprudence. As Rothstein J stated in the *Microsoft* case, in the passage quoted in *Trucks Collective – CAT* at [120], "to require the plaintiff to demonstrate actual harm, would be inappropriate at the certification stage." We

emphasise that we are not expressing any view as to whether those who entered into the second or subsequent leases of a truck in the period 1 February 2014 – 31 January 2015 actually suffered any loss. But we note that Iveco (who argued this issue on behalf of all the proposed defendants) presented no compelling reason why Mr Wilkinson's opinion is obviously mistaken. It may well be that for spot hire, in particular, the rental prices relate to current new truck prices so that no loss can be claimed for such hires in the extended used truck run-off period. Mr Wilkinson has expressly acknowledged this. But these are all questions for trial. At this point, we consider that in the light of the expert evidence, it is appropriate for claims for leases other than the first lease of a new truck to be included in the used truck sub-class, irrespective of when the truck was purchased by the lessor, and therefore those claims are subject to the longer run-off period.

D. ADEQUATE FUNDING FOR THE CLAIMS

26. One of the outstanding issues from the June hearing concerned the level of funding for the proceedings available to the RHA. The RHA's original application for a CPO exhibited a costs budget in the total amounts of £10.42 million up to and including the CPO hearing and a little under £14 million (plus £2.7 million for the balance of the ATE insurance premium) over the following 2½ - 3¼ years to the end of a 12 week trial. The application showed that the RHA had secured litigation funding from a third party funder ("Therium") in the amount of £27 million. The Tribunal heard objections to the funding arrangements of both the RHA and UKTC as a preliminary issue and, after full argument, held that these arrangements on the part of the RHA were sufficient for the Tribunal to be satisfied that the RHA would be able to act fairly and adequately in the interests of class members for the purpose rule 78(2)(a) of the CAT Rules: [2019] CAT 26 ("*Trucks Collective – Funding*") at [68]-[75].[1]

27. However, that budget was filed in 2018, with the expectation of a trial by 2021. By reason of the various appeals, we are now in 2024 and we accordingly requested a revised costs budget. This was produced for the adjourned hearing.

[1] This aspect of the judgment was not challenged on appeal.

The RHA's revised budget showed total costs from the granting of the CPO to the end of trial (and post-trial) in the amount of £12.55 million, after applying a discount to reflect the fact that solicitors and counsel are acting on a 50% conditional fee. That budget was broken down as between solicitors, counsel, expert fees, and other disbursements, over eight stages plus a general contingency.

28. Therium has agreed to provide the RHA with additional funds of some £10.9 million. We were told that a little over £1.6 million remains from the original budget. On that basis, the RHA should have access to funds that would be sufficient to cover RHA's revised budgeted costs to the end of trial.

29. Mr Pickford KC, appearing for DAF but making submissions on this issue for all proposed defendants, submitted that the £12.55 million budget was unrealistic. He drew attention to the significant over-spend as against the previous budget on costs to date. However, beyond that general submission, he was not able to point to any particular aspect of the revised budget that he could suggest was too low or unrealistic.

30. We are concerned now with the costs going forward, whatever may have happened in the past. Moreover, as explained below, the proposed sub-class representative has secured separate funding in the amount of £6 million. As stated in *Trucks Collective – Funding* at [75], although the funding arrangements are a relevant consideration, it is not a condition for the making of a CPO that the Tribunal must determine the likely costs of the proposed class representative to the end of trial and be satisfied that they have sufficient funding in place to cover those costs. Taking everything into account, we do not regard the revised costs budget as unrealistic. On the contrary, £12.55 million is a very substantial sum and we consider that it should certainly be possible to bring a case of this nature to trial by expending that amount on costs. Therefore, applying the test set out in *Trucks Collective – Funding* at [52], we are satisfied that appropriate and adequate arrangements have been made by the RHA to fund the claims it wishes to bring, so that the class members will have the benefit of effectively conducted proceedings.

E. CONFLICT OF INTEREST BETWEEN CLAIMS FOR NEW AND FOR USED TRUCKS

31. While all class members have a common interest in seeking to show a high overcharge on new truck prices as a result of the cartel, on the issue of re-sale pass-on there is a conflict of interest between those claiming for new trucks and those claiming for used trucks: see *Trucks Collective – CAT* at [232].

32. In that judgment, we took the view that this conflicts issue could be addressed simply by informing PCMs in the rule 81 notice and seeking their consent: see at [246]-[255]. However, the Court of Appeal held that this approach was inadequate. In *Trucks Collective – CA*, Sir Julian Flaux C, in his judgment with which the other two members of the Court agreed, explained what was required:

> "88. I am firmly of the view that the conflict between new truck purchasers and used truck purchasers over resale pass-on which the RHA faces can be addressed by the erection of a Chinese wall within the RHA organisation for the purposes of dealing with that issue. This will need to involve a separate team within the RHA acting for each of the two sub-classes, instructing different firms of solicitors and counsel and a different expert or experts. I also consider that a different funder will need to be involved for one of those sub-classes, given that the conflict potentially extends to funding. As Green LJ pointed out during the course of Mr Flynn KC's submissions, the RHA will have to be able to satisfy the CAT that the funding arrangements put in place do not interfere unreasonably with ordinary independent decision-making in the litigation including as to settlement. In my judgment, the safest way of ensuring that will be to have separate funders for the two sub-classes, thereby avoiding the risk of a funder siding with the members of one of the sub-classes.
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> …
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> 92. On the basis that the RHA will be able to put a Chinese wall and the necessary safeguards of the respective interests of the two sub-classes in place to eliminate the conflict over resale pass-on, I see no reason to disturb the CAT's decision that there should be only one class representative authorised and that that should be the RHA, not UKTC.
>
> 93. However, I do consider that the CAT erred in some of its conclusions in the section of the judgment dealing with the conflict.
>
> 94. First, I consider that the CAT erred in its conclusions at [253] to [255] that (i) there was only a potential conflict of interest at this stage; (ii) that it was not necessary to identify the sub-classes of new truck purchasers and used truck purchasers in the CPO at this stage; and (iii) that the potential conflict could be dealt with in the future by active case management by the CAT. In my judgment, the OEMs and UKTC are right that there is an actual conflict already (demonstrated by the RHA's pleading of the used truck overcharge and Dr Davis' second expert report). Indeed as Mr Jowell KC pointed out in his reply

> submissions, Dr Davis fairly and properly acknowledged in his oral evidence the direct nature of the conflict between new truck purchasers and used truck purchasers. That obvious conflict requires to be addressed at the start of the proceedings when PCMs opt in, rather than at an indeterminate point in the future; and it requires the RHA to put in place separate representation and a Chinese Wall of the kind I have described, and then to obtain the informed consent of the PCMs to the RHA acting for them under that arrangement.
>
> 95. Second, I consider that the CAT was wrong to accept the suggestion that Dr Davis could be the expert for both sides of the new/used divide, and it was also wrong to suggest, in [247], quoted at [35] above, that a suitably worded Rule 81 notice would mean that there was informed consent on the part of the PCMs to abide by the determination of the RHA, following Dr Davis' expert advice, as to the appropriate or acceptable level of new-used pass-on to be advocated in the proceedings.
>
> 96. This approach ignores the fact that any regression analysis and determination will be highly sensitive to the assumptions made and data input. There is an inevitable element of subjectivity both in the selection of the data and these assumptions. Without in any way being critical of or doubting the integrity of Dr Davis, complete objectivity in expert economic evidence cannot really be achieved. This was a point made by the CAT in Royal Mail in relation to the expert evidence there on overcharge at [475] to [480]. Since there is no single, objectively ascertainable, "right" answer to the overcharge pass-on issue, and the decision of how to advance an argument on this issue in the proceedings will inevitably involve some strategic considerations, it cannot be sufficient for the divided loyalty which the RHA owes to the two groups of PCMs to be resolved by a vague promise that the RHA will decide how to act on the basis of advice from Dr Davis.
>
> 97. In my judgment, the conflict can only be avoided, not just by an appropriately worded notice but by putting in place now of a Chinese wall and separate representation by a different team, as described in [88] above so that the best interests of both the new truck purchaser class members and the used truck purchaser class members are fully protected. Only through putting that in place now will the RHA comply with its duty to act in the best interests of all class members…."

33. Following that judgment, the RHA reconsidered how the proceedings should be managed. It set up a new company, RHA Used Trucks Ltd ("RUTL") to act as the proposed sub-class representative ("PSCR") for class members with claims for used trucks. A separate group was established within the RHA to form the PSCR team. The sole director of RUTL is Mr Philip Snowden, who is not a statutory director of the RHA and has had no prior involvement with the trucks collective proceedings other than in assisting to publicise them to the RHA membership in his role as the RHA's membership director (a non-statutory director).

34. RUTL has instructed separate solicitors to act for it in these proceedings after interviewing four law firms. Those solicitors have in turn instructed separate senior and junior counsel. Accordingly, the PSCR is now advised by a wholly distinct legal team.

35. Mr Snowden filed a detailed witness statement setting out his own professional background and the composition of the separate RUTL team. RUTL's registered office is the RHA's Bradford office where Mr Snowden is based, with one of the two other RHA employees in that team working from home in Scotland, whereas the team involved in the case for the RHA itself as the class representative work from its head office in Peterborough. The RUTL team also includes two external members, who are directors of long-established haulage companies that have purchased only used trucks.

36. The only RHA employee who is a member of the RUTL team and is based in the RHA's Peterborough office is Ms Jade Barsby, the RHA's financial controller. Ms Barsby usually works for two days a week from home and when in the office she has access to private meeting rooms. She obviously has broader responsibilities in the RHA unrelated to these proceedings, and has signed a confidentiality undertaking (exhibited to Mr Snowden's second witness statement) which contains detailed provisions to keep information concerning RUTL and the used trucks sub-class confidential from anyone outside the RUTL team and their advisors. The undertaking covers such matters as emails and hard copy documents.

37. Furthermore, an information barrier has been set up, and fully specified in writing, to ensure that there is no inappropriate cross-over of information between the RHA as the PCR and RUTL as the PSCR. It came into effect on 25 September 2023. The terms and implementation of that information barrier as regards electronic documents and communications (including the setting up of separate SharePoint sites) are described in a separate witness statement from the RHA's head of IT. We have reviewed the terms of the information barrier and consider that it is comprehensive in its approach. All members of the RHA main team and the RUTL used trucks team have received training on the information barrier and signed personal undertakings to comply with it. The

RHA and RUTL have agreed that if any new members are to be admitted to either team, their names will be notified to the Tribunal (copied to the defendants) and those new members will similarly receive training and be required to sign personal undertakings.

38. In addition, in order to ensure that it is properly managing any conflict of interest, the RHA has retained Mr Giles Maynard-Connor KC purely to act as a conflicts supervisor. Either the RHA or RUTL can refer any matter arising out of the conflicts issue to him for an independent opinion as to the adequacy of their proposals as to how it should be dealt with.

39. RUTL and its solicitors have produced a litigation plan for the PSCR, which was revised to take account of comments by the proposed defendants. RUTL will enter a separate litigation management agreement with class members wanting to claim in respect of used trucks. A costs budget estimate is attached to the litigation plan. On the basis that RUTL's solicitors have agreed to act on a discounted rate conditional fee agreement, the costs estimate for RUTL taking the case to trial with an appeal contingency is £5.96 million plus VAT; and it has now been confirmed that RUTL can be registered for VAT such that the VAT is recoverable. Funding has been secured from Therium for £6 million to cover this budget. The funding arrangements are discussed further below.

ATE Insurance

40. As regards ATE insurance to cover potential liability for the Defendants' costs, the RHA has such a policy and Mr Fidler of RUTL's solicitors explained that if RUTL were to procure wholly separate cover that would mean an immediate and substantial increase in the cost. The much more economical route is for RUTL to seek to retain the benefit of the policy by extending it to cover the potential liability of RUTL. The proposed course involved a revision of the existing policy obtained by the RHA to include RUTL and recovery by the insurers of any liability for costs out of their respective share of total damages recovered. For reasons given in our ruling delivered during the course of the hearing on 4 June 2024, we rejected the submission on behalf of the proposed defendants that this arrangement was unacceptable because of the conflict issue.

41. The inclusion of RUTL in the policy has been achieved by an appropriate endorsement, which was finally signed by the last of the insurers involved on the day of the resumed hearing before the Tribunal. The proposed defendants subsequently confirmed that they have no objections to the terms of the executed ATE policy.

Expert

42. A separate economic expert has been engaged to advise on the sub-class claim. As mentioned above, he is Mr Wilkinson of Kairos Economics, who was previously for over five years in the economics practice of KPMG.

43. Mr Wilkinson has produced a report of over 40 pages setting out the approach he proposes to take to evaluate the loss suffered by purchasers and lessees of used trucks. Although no objection is taken by the proposed defendants to Mr Wilkinson's proposed methodology for estimating loss to sub-class members, it is nonetheless necessary for us to be satisfied that he presents a plausible and reasonable method for quantifying damages.

44. Mr Wilkinson proposes an estimation approach strongly similar to that of Dr Davis in his reports for the RHA: see *Trucks Collective – CAT* at [124] et seq. Indeed, Mr Wilkinson cites Dr Davis extensively. This is appropriate as it avoids wasteful duplication while maintaining independence of the expert to RUTL.

45. Using essentially the same data sources as Dr Davis, Mr Wilkinson proposes to estimate separate equations for the impact of the cartel on Cash Price Contracts (i.e. sales and sales-like contracts) and Non Cash Price Contracts (i.e. leases and rental-like contracts) for used trucks. As Mr Wilkinson notes at paragraph 81 of his report, his methods "broadly reflects the methodology set out in Davis-1 for estimating the cartel effects on prices of used Relevant Trucks in support of the RHA's previous application, which was granted by the CAT."

46. In table 2 on pages 29-30 of his report, Mr Wilkinson sets out the explanatory variables (with examples) that he will use, listing the source of each. Like Dr

Davis, Mr Wilkinson plans two approaches to estimation: a single step method and a multi-step method. The single step method estimates used truck prices and rentals using many explanatory variables. The multistep method incorporates estimation of the effect of coordinated list prices on used truck prices and rentals, employing equations in which average markdown from list is the estimated variable. Again, he notes a parallel to the multistep approach proposed earlier by Dr Davis. Mr Wilkinson will calculate but-for prices for used trucks based on the equivalent prices for trucks when new relying on Dr Davis' estimates of the new truck average overcharge.

47. For both the single-step and the multi-step approaches, Mr Wilkinson sets out 'extensions' to enable him to estimate, for example, the effect of coordinated delayed introduction of new emissions technology.

48. We think that Mr Wilkinson has advanced a well-thought-out plan for the estimation of cartel effects on used trucks, which satisfies the *Microsoft* test for economic expert evidence at the certification stage. We note that none of the proposed defendants sought to suggest otherwise.

49. We should add that in one of our rulings on 4 June we explained that there is no objection to Mr Wilkinson discussing with Dr Davis the approach which Dr Davis proposes to take to the assessment of new truck prices or delayed compliance with emissions standards. Those are not issues which give rise to any conflict.

50. Accordingly, we are satisfied with the arrangements made within the RHA and as regards the establishment of the new sub-class representative which has appointed separate solicitors, counsel and expert, to address the conflict of interest as between claims in respect of new and claims in respect of used trucks.

Funding

51. Therium is a well-established litigation funder and was originally the funder of the whole claim. That litigation funding agreement ("LFA") was made with two entities in the Therium group, Therium Litigation Funding IC ("Therium

LF") and Therium RHA IC ("Therium RHA"), who jointly committed to the funding. However, those funding arrangements had to be revised to take account of *PACCAR.*

52. Following the Court of Appeal judgment in this case, the Tribunal directed the RHA to submit its revised application for a CPO which would appropriately address the conflicts issue, by 15 March 2024. That date was subsequently extended to 28 March 2024.

53. RUTL made sustained efforts to find a new funder that would fund the used trucks claims. As explained in the evidence of Mr Fidler, a partner in RUTL's solicitors, the proposition was novel and challenging, as RUTL was seeking a funder who would take over funding for only part of the claimant class where the original funder would retain a financial interest for the common issues for all class members. A new funder therefore had to be integrated into the remuneration arrangements being concluded with Therium. Given the complexity of the situation, the requirements of funders in terms of legal and expert advice, and the Tribunal's deadline, this was particularly challenging. Although funders normally require exclusivity as the price of progressing detailed negotiations, because of the tight timeframe RUTL's solicitors entered into concurrent discussions with three well-known funders. Mr Fidler explained that RUTL's solicitors then identified a fourth funder who was able to move more quickly than the other three, and by 7 March 2024 commercial heads of terms had been agreed between that funder and RUTL. However, on 26 March 2024, two days before the extended deadline for the revised application to the Tribunal, that funder abruptly pulled out.

54. It was in those circumstances that the RHA sought, and was granted, further extensions of time from the Tribunal, ultimately to 18 April 2024, and Therium then agreed to step in and provide a separate stream of funding to RUTL. Mr Fidler states that the commercial terms offered by Therium were more advantageous to used truck sub-class members than the terms which had been offered by the independent funder before it withdrew. Nonetheless, RUTL's solicitors made further approaches to the other funders and on 12 April 2024 one of them offered commercial heads of terms. However, those terms were

materially worse for members of the used truck sub-class than the terms offered by Therium. Accordingly, RUTL reached an agreement on third party funding with Therium, whereby the funding would come from Therium Litigation Atlas FP IC ("Therium Atlas"), a distinct entity from Therium LF and Therium RHA. A revised application for a CPO was served on 18 April 2024, accompanied by evidence exhibiting a revised draft LFA between Therium LF, Therium RHA and the RHA ("the RHA LFA") and a draft LFA between Therium Atlas and RUTL ("the RUTL LFA").

55. The basis on which Therium will provide funding to RUTL and how that will be separated from the funding provided to the RHA, is explained in the evidence of Mr Neil Purslow, a director and the chief investment officer of Therium Capital Management Ltd ("TCML"). He explains that TCML is wholly owned by Therium Group Holdings Ltd ("TGHL") and is the company to which TGHL has delegated the role of advising the relevant Therium investment vehicles on funding litigation in the UK.

56. As noted above, Therium Atlas, as a separate investment vehicle from Therium LF and Therium RHA, will be the provider of funding to RUTL. The separation between the various Therium entities, and the way TCML will operate, was outlined in Mr Purslow's second witness statement, but in a manner that raised many questions. Accordingly, following the June hearing and in response to the Tribunal's direction, Mr Purslow made a fourth witness statement giving a much fuller explanation.

57. Mr Purslow states:

> "Once an investment vehicle has entered into an LFA, [TCML's] role comprises entering into discussions with the funded parties to any case and/or their respective advisers so as to keep itself appraised of the status and conduct of the case, monitoring the performance of the portfolio and making recommendations in relation to that, including as to the manner in which rights conferred upon the relevant investment vehicle by an LFA should be exercised by the vehicle and providing information to the vehicle on the administration of investments. In practical terms, therefore, in relation to the funding arrangements involved in this litigation, TCML is responsible for the ongoing day-today management of these investments and reporting back to the investment vehicles …."

58. Mr Purslow states that an information barrier has been created within TCML to separate the individuals responsible for day-to-day management of the claims for new trucks and the claims for used trucks, referred to as the "New Trucks Restricted Group" and the "Used Trucks Restricted Group." A copy of the document fully setting out that information barrier was exhibited to his third witness statement, and it came into effect on 31 May 2024. The New Trucks Restricted Group comprises Mr Purslow himself, Mr Charlie Temperley and Ms Deniz Shefki. The Used Trucks Restricted Group comprises Messrs John Byrne, Fred Bowman and Chris Wilkins. Mr Byrne is the chief executive officer ("CEO") of Therium. All these individuals have signed undertakings whereby they agree to comply with the information barrier and not disclose any confidential information relating to the respective claims between them.

59. Of the two entities that will be providing the funds to the RHA, Therium LF operates through an investment committee, which makes recommendations to its board. The investment committee comprises three individuals, A **[✂]**, B **[✂]** and C **[✂]**. A is the sole director of Therium LF and an employee of TGHL. C is a non-executive director of TGHL (as was B until 22 July 2024); B is a non-executive director of TCML. But Mr Purslow states that none of these three individuals have any role in the work of TGHL or TCML and that they have no access to information within TCML relating to the new and used truck claims.

60. Mr Purslow states that B had given an undertaking that he will not discuss the RHA claim with anyone in the Used Truck Restricted Group. At the Tribunal's request, C agreed to give an equivalent undertaking. Although initially those undertakings were merely contained in confirmatory emails, they have now submitted signed formal undertakings.

61. Therium RHA, the other entity providing funds under the RHA LFA, does not have an equivalent investment committee. Its board now comprises two directors, Ms Lorie Del Rosario and Mr Tapiwa Munyawiri. Both are employees of CSC Global, which acts as the fund administrator.

62. Therium Atlas, which provides the funding to RUTL, now has two directors, Mr David Wilson and Mr Nigel Crocker, and Mr Luke Aubert is an alternate for Mr Wilson. Like Therium LF, Therium Atlas has an investment committee which makes recommendations to its board. The investment committee comprises Mr Wilson, Mr Crocker and Mr Aubert. However, it has been agreed that because of his involvement in Therium LF, Mr Wilson will not attend any future meetings of either the board or the investment committee of Therium Atlas which relate to the used trucks claim and the information barrier established by Therium and CSC Global will ensure that he is excluded from all communications in Therium Atlas concerning the used trucks claim. The relevant decisions will accordingly be taken by Mr Crocker and Mr Aubert.

63. All these Therium companies are described as "investment vehicles" and, as we understand it, are not the source of the funds, which come from outside investors. However, in the case of the monies provided to RUTL by Therium Atlas, all that money comes from X, which is one of its shareholders. X is also the sole owner of Therium RHA and the source of all funds for Therium RHA.

64. Mr Pickford KC, on behalf of the proposed defendants, mounted a sustained challenge to these arrangements, submitting that a significant conflict of interest remained within the funders such that these arrangements were wholly unsatisfactory. We stated at the conclusion of the argument on 18 July that, following the further steps taken within Therium after the June hearing, we regarded the arrangements finally proposed as adequate to address potential conflicts relating to funding, taking a realistic view in all the circumstances. We here set out our reasons for that conclusion.

65. In assessing the objections raised to the funding arrangements, we consider that it is important to bear in mind the following considerations.

66. First, the interests which may be prejudiced by a conflict of interest between claims for new and claims for used trucks are those of the class members. This conflicts issue does not directly impact on the proposed defendants. Although PCMs may object at the certification stage to a proposed CPO, and many of the PCMs are well-established commercial entities, it is notable that none raised

any objections even to the original funding arrangements. The sustained opposition to the funding arrangements by the proposed defendants should therefore be viewed in the context where their commercial incentive is not to protect the interests of PCMs but to reduce the scope of the claims, if not to undermine the proceedings altogether.

67. In that regard, it was notable that the day before the adjourned hearing DAF raised a further basis for opposition in that the common investing entity behind Therium Atlas and Therium RHA is in turn sharing the provision of those funds with another litigation funder. DAF alleged that this appeared to involve an exchange of confidential information between potential competitors, and therefore an infringement of the Chapter I prohibition in the CA 1998, which the Tribunal should not countenance. We summarily rejected that argument as misconceived: the sharing of funding of risky ventures is commonplace, for example in syndicated loan agreements involving a number of banks. But the fact that DAF sought to advance this argument indicates the extent to which it sought to contest the provision of the funds required for these proceedings to continue.

68. Secondly, the role of a commercial funder is much further removed from the conduct of the proceedings than are solicitors and counsel, or the experts, or of course the class representative who is bringing the proceedings. The funder does not run the case or provide instructions to the lawyers. Hence clause 9.1 of the RHA LFA states:

> "The Parties recognise that the Solicitors must at all times comply with their duties under the Solicitors Code of Conduct 2011 (as amended from time to time) to act independently and in the best interests of the RHA and/or the other Claimants and in accordance with their other professional duties (including their duty to the court). Nothing in this Agreement entitles Therium to interfere in the conduct of the Claim and/or the Proceedings."

Clause 9.1 of the RUTL LFA is identically worded, save that the reference there is to "the best interests of RUTL".[2]

[2] "Therium" in the RHA LFA is defined as both Therium LF and Therium RHA, whereas in the RUTL LFA it is defined as Therium Atlas, and "the Solicitors" are respectively defined as the solicitors to the RHA and the solicitors to RUTL.

69. Further, following observations submitted by DAF, the RHA LFA was amended so that the obligation in clause 9.2.6 for the solicitors to report to Therium on any developments in, and the progress of, the proceedings expressly excludes the claims advanced on behalf of the used trucks sub-class in relation to used trucks.

70. Thirdly, Mr Pickford made clear that the thrust of his submissions was that the commercial interests of Therium, and the various entities involved in the funding, would favour the claims for new trucks over the claims for used trucks, so that the used trucks sub-class would be prejudiced. In his submissions on 4 June 2024, he said that these respective financial incentives were "the crux of the problem" and that "Therium will see that its bread is buttered in terms of favouring the RHA claim rather than the RUTL claim." This was developed in his further submissions on 18 July 2024, when he presented calculations showing how the funder's incentives could potentially diverge from the incentives of the used trucks class in terms of the level of pass-through. Mr Pickford acknowledged that this was based on the assumption that the number of new trucks being claimed for significantly exceeds the number of used trucks being claimed for. We accept that this seems likely on the information currently before the Tribunal, although it is not certain. Therefore, this potential conflict could only be resolved by RUTL obtaining wholly separate funding for the used sub-class. But the evidence of RUTL's solicitors, summarised above, showed that it had proved impossible in practice to obtain third party funding for the used sub-class on satisfactory terms. Accordingly, if DAF's submission were to be accepted, the likely consequence would be that the claims of the used sub-class could not be pursued at all.

71. Against that background, we address the three grounds on which Mr Pickford contended that Therium could influence the litigation.

72. First, he relied on the right of the funder to terminate under clause 16.3 of the LFAs. Clause 16.3 of the RHA LFA states:

> "If Therium reasonably ceases to be satisfied as to the merits of the Claim or Therium reasonably believes that the Claim is no longer commercially viable, then Therium shall be entitled to suspend until further notice by Therium [*sic*]

> or terminate this Agreement by giving 5 Business Days' Notice to the RHA. … Therium would cease to be satisfied as to the merits of the Claim only where Therium has received a written legal opinion from independent King's Counsel in which it is stated the prospects of securing Recovery are 51% or less. Therium would reasonably believe that the Claim is no longer commercially viable only where Therium has received a written legal opinion from independent King's Counsel stating that no reasonable privately paying litigant who, with the objective of achieving to Therium payment at least of *[sic*] the Reasonable Costs Sum plus the Contingency Fee and/or as the context requires the Reasonable New Costs Sum plus the New Trucks Contingency Fee, and having proper regard to the commercial viability of the Collective Proceedings Claim as providing a reasonable return to the Claimants above such a return to Therium, would continue the Claim."

Clause 16.3 of the RUTL LFA is very similar, save that the final provision is expressed as:

> "no reasonable privately paying litigant who, with the objective of achieving to Therium payment *from the Used Claim Proceeds* of at least the Reasonable Costs Sum plus the Contingency Fee and having proper regard to the commercial viability of the Collective Proceedings Claim as providing a reasonable return to the Claimants *from the Used Trucks Proceeds* above such a return to Therium, would continue the Claim." [our emphasis]

"Recovery" in the RHA LFA is defined to mean "any Claim Proceeds" whereas in the RUTL LFA it is defined to mean "any Used Claim Proceeds."

73. Although the respective Therium entity's rights to terminate under these LFAs is dependent on receipt of an opinion from an independent KC, Mr Pickford stressed that this is only a threshold condition: Therium could still continue to fund the proceedings. He therefore contended that Therium still retained a broad discretion. However, under the arrangements described above, the investment committee within Therium Atlas which would advise the board of that company whether to cease funding the RUTL claims is separate from those advising the two Therium entities jointly funding the RHA claims. The focus of Mr Pickford's submission was therefore on the position of the investor X, which was the sole funder under the RUTL LFA.

74. We recognise that investor X might well be consulted by the board of Therium Atlas before any decision was taken. But if Therium Atlas received an independent KC's advice either that RUTL had a less than 51% chance of recovering for used trucks claims or that a reasonable private litigant would not think it commercially viable to get a reasonable return for its claim after paying

the amounts due to Therium Atlas, we regard the risk that if X would have otherwise been content for Therium Atlas to continue to fund the used trucks claims it would object to it doing so because X was also a partial investor in the RHA claims for new trucks (X has no interest in Therium LF, the other investment vehicle for the new trucks claims) as remote. We cannot say that this risk is impossible or wholly fanciful. But in our judgment, it is not such a significant factor as to provide a basis for withholding authorisation of RUTL as the sub-class representative.

75. Secondly, Mr Pickford said that a conflict would arise if there was a significant overspend on the budget such that the RHA and RUTL had to come back to Therium and seek more money, or after judgment on the issue of appeals. He said that in either of those circumstances the relevant Therium entity would have to exercise its discretion to fund again. In taking that decision, Therium Atlas, and its investor X, would take account of the impact of a higher pass-through on the level of recovery for new trucks (again assuming that the number of new trucks exceeded the number of used trucks).

76. However, the costs budget for RUTL is just under £6 million and, as noted above, Therium Atlas has committed to funding that budget. There was no submission from the proposed defendants that this budget was unrealistic given the limited scope of RUTL's role in the proceedings. (Mr Pickford's criticism, as set out at para 29 above was directed at the separate costs budget of the RHA). Of course, one cannot exclude the possibility that this budget will be exceeded, but there is no basis for supposing that this is a likely development.

77. As regards an appeal, aside from the point that the level of pass-through seems likely to be a question of fact, whereas appeals from this Tribunal are restricted to points of law, we think this submission fails to have regard to the way appeals are dealt with in the RUTL funding arrangements. Clause 4.2 of the RUTL LFA states:

> "In the event of an Appeal, Therium shall provide funding in respect of the Costs of dealing with the Appeal provided that adequate cover is available under the ATE Policy (to Therium's satisfaction) and subject always to the total amount of Committed Funds under this agreement."

78. Unlike the costs budget for the RHA, the RUTL costs budget includes £250,000 as a contingency for a potential appeal to the Court of Appeal. We think that is a reasonable sum. As we have just observed, it is possible that the £6 million funds are exhausted by the end of trial, or that the costs of an appeal turn out to exceed £250,000; and that in those circumstances Therium Atlas would decline to advance further funds for an appeal: clause 4.3. It would then be open to RUTL to seek funding elsewhere which, depending on the terms of the judgment, may be much easier to obtain than at the outset of the case. The situation once a judgment has been given is very different from that at the present stage, when the substantive proceedings are just beginning.

79. We should add that clause 4.2 of the RHA LFA is very differently worded so that the funders under that agreement have a wide discretion as to whether to provide funding should there be an appeal. But the concern articulated by Mr Pickford was focused on the funding of the used trucks sub-class, not the new trucks claims.

80. Moreover, when it comes to a potential offer of settlement, which is a particular matter regarding the conflicts issue mentioned by the Court of Appeal, the RHA LFA and the RUTL LFA contain an identically worded clause 27.2 which provides that in the event of a dispute between Therium and the claimants, a KC shall be instructed to provide an opinion as to the appropriate level of settlement, which shall be final and binding on the parties.

81. Altogether, the concerns here articulated by Mr Pickford appear to us very speculative and not sufficient, in our view, to undermine the separation of decision-making put in place by Therium.

82. Thirdly, Mr Pickford submitted that there were various deficiencies in the arrangements put in place by Therium. He pointed to the fact that Mr Byrne, as the CEO of Therium, would have an interest in favouring the overall return of Therium from these proceedings, over and above his responsibility as a member of the Used Trucks Restricted Group advising Therium Atlas: see para 57 above. He submitted that since a number of individuals in Therium had resigned from positions which could give rise to a potential conflict of interest, it was not

satisfactory that C had failed to do so, despite the personal undertaking which he has given. And he stressed that while there was an information barrier within Therium, with various safeguards had been put in place, none of that applied to investor X, which was the sole source of the funds being provided under the RUTL LFA and a partial source of the funds provided under the RHA LFA.

83. We think that there is very limited force in these points. Mr Byrne is a solicitor and, apart from his professional obligations, by reason of his position will have an interest in Therium's overall reputation. Therium is a long-established litigation funder, established in 2009, and is a founding member of the Association of Litigation Funders. These factors are in our view likely to influence the approach of Mr Byrne as against any potential incentive to exercise his role in advising Therium Atlas to disadvantage the used trucks sub-class which Therium Atlas is funding.

84. As for the other points, the question before us is not whether the separation of the funding arrangements is perfect but whether the arrangements put in place are sufficient and adequate to address the conflicts issue in a realistic way. In *Trucks Collective – CA*, the Chancellor said, at [88] that "the safest way of ensuring that [the funding arrangements put in place do not interfere unreasonably with ordinary independent decision-making in the litigation including as to settlement] will be to have separate funders for the two sub-classes". We respectfully agree. But those words are not to be read as a statute and, in any event, the Chancellor did not say that this was essential.

85. The order of the Court of Appeal following its judgment was that the matter be remitted to this Tribunal for it "to give directions in relation to the separate representation and separate teams within the RHA and separate funding for the two sub-classes in relation to the issue of resale pass-on". The Court of Appeal obviously could not be aware of the practical difficulties which then arose in obtaining wholly discrete funding for the used trucks sub-class. In all the circumstances, having regard to the terms of the two LFAs and the involvement of separate funding vehicles, we are satisfied that the steps taken by Therium, as developed and set out in Mr Purslow's fourth witness statement made for the adjourned hearing on 18 July 2024 and buttressed by the personal undertakings

from two relevant individuals sent to the Tribunal following that hearing, are sufficient and adequate to address potential conflicts as regards funding.

F. CONCLUSION

86. For these reasons, we resolved to authorise RUTL pursuant to rule 78(4) of the CAT Rules as the sub-class representative for the sub-class of claimants seeking damages in respect of purchases and leases of used trucks. We will therefore make a CPO in favour of the RHA as the class representative in this case.

POSTSCRIPT

87. We have noted above that we were not satisfied with the evidence regarding the funding arrangements presented to the Tribunal for the June hearing. In *PACCAR*, Lord Sales stated at [11]:

> "… the effectiveness of group litigation may depend on the use of third party funding, since such litigation often involves high numbers of claimants who have individually suffered only a small amount of loss, where the pursuit of claims on any other basis would be uncommercial."

In this Tribunal, third party funding from commercial funders effectively provides the fuel which enables the vehicle of collective proceedings to operate.

88. However, with that significant role comes responsibility. We regret to say that we consider that the second witness statement of Mr Purslow, the chief investment officer of TCML, was less than frank about the arrangements which Therium was at that point proposing. In that evidence, he stated: "As a result of the funding of the PSCR being provided by a separate investing entity to that of the RHA, there will be a complete separation of personnel, not only at the level of TCML, but also at Investment Committee and Board level" [of the different Therium investment vehicles funding the RHA and RUTL]. At the time it was made, that statement does not appear to have been correct. It is only since that statement that Mr Luke Aubert (an alternate director of Therium Atlas) has resigned as an alternate director of Therium RHA, and that Mr Munyawiri (a director of Therium RHA) has resigned as an alternate director of Therium Atlas. Furthermore, a third individual, C, who is on the investment

committee of Therium LF, continues to be a director and member of the investment committee of Therium Atlas, although he will not participate in any meetings or communications there concerning the used trucks claims.

89. In the light of the further evidence from Therium provided for the adjourned hearing, which set out what we understand to be the full picture, we do not consider that this deficiency is a ground on which to reject Therium's evidence altogether, or to deny authorisation of the RHA or RUTL. But we hope that in future Therium, along with other third-party funders, will take proper care that the information which they provide to the Tribunal, or indeed the courts, is accurate.

The Hon Mr Justice Roth
Chair

Dr William Bishop

Professor Stephen Wilks

Charles Dhanowa OBE, KC (*Hon*)
Registrar

Date: 2 August 2024