Competition & Markets Authority (CMA):
Private Motor Insurance Market Investigation

Allianz Insurance Plc Response to the Provisional Decision on Remedies

Allianz Insurance Plc (Allianz) welcomes the opportunity to respond to the CMA's provisional decision on remedies.

For the sake of consistency and for ease of reference we have adopted the numbering and section headings used by the CMA in its published document.

Executive Summary

- Allianz agrees with the CMA's provisional view that there are no adverse effects on competition (AEC) in relation to ToH2 concerning the quality of repairs provided by private motor insurers.
- Allianz believes that the detriment analysis (WP23) significantly under estimates the current net detriment created by the cost of temporary replacement vehicles, inflated cost of insurer managed repairs, and the cost of credit repairs / write offs.
- In addition to estimating the current detriment of insurer-managed repairs Allianz suggests that the full potential detriment should be estimated on the basis that all insurers adopt retail cost models and abandon wholesale bi-laterals. We fear that will be the consequence of the CMA's provisional decision.
- The potential detriment of retail repair cost models, i.e. insurer-managed repairs, is far greater than the current detriment caused by credit hire.
- Unless the over-costing of repairs is properly addressed Allianz predicts a fundamental shift in market practice. Rather than agreeing or maintaining existing wholesale bi-laterals (e.g. RIPE), which are not binding and have been shown to be unreliable (Coles & Others v Hetherton & Others – see comments on Remedy 1D(a)) , insurers will withdraw from such existing agreements and set up retail repair cost models that will be engineered solely to produce the maximum profit margin.

Remedy A

- Allianz is supportive of implementing Remedy A.
- Allianz believes the statement of consumers rights following an accident should make consumers aware that they may incur a personal liability if they are supplied with a TRV on a credit basis and the provider, for whatever reason, fails to recover the full cost.
- Consumers pay a premium in consideration of the insurance product / service they choose to purchase. They do not have any knowledge of, nor therefore have any capability to agree, to their insurer earning a further income from non-fault claims they present. There should be no hidden income streams. Allianz contend that consumers should be made aware of, and agree to, their non-fault claims being used to derive an income for their insurer above the premium they have paid. Allianz suggests that insurers undertaking such income related activities be required to inform the consumer at the policy sales point and FNOL stage.

Remedy 1C and 1F

- The CMA's proposed remedy is in respect of subrogated claims only. A Credit Hire Operator (CHO) will have a contract with the consumer. The consumer is contractually liable for the cost. The TRV claim will be presented in the name of the consumer by the CHO. The CMA describes the CHO as "*standing in the shoes of*

the non-fault claimant". These are not subrogated claims and accordingly would fall outside of the scope of the remedy as proposed. This together with the provisional decision not to address referral fees will, Allianz fears, fuel greater use of credit hire and increase the current detriment.

- Subrogated TRV claims will always be presented at the cap. It might be the case that insurers are able to agree commercial rates with CHCs below the cap. This may especially be the case with larger insurers. The cap may therefore deliver a profit margin ("earned rent") to some insurers.
- Allianz also agree that the remedy should not be extended to TRV claims where the claimant has organised the TRV entirely themselves (as opposed to being referred) on the basis that the risk of circumvention is properly addressed.
- The prohibition of "financial inducements" that might potentially be paid to direct non-fault claimants by TRV providers is akin to a form of prohibition of referral fee [1G]. If the CMA intend pursuing this we suggest they could achieve it most effectively by implementing 1G.
- In theory Allianz agrees that it seems sensible that the cap rate should be set "*slightly above the level cost efficiently incurred in providing a replacement vehicle*". However, issues arise when trying to define what "*slightly*" and "*efficiently*" actually mean.
- The best basis upon which to determine a rate cap must, we suggest be, the existing commercial arrangements between insurers and CHOs.
- The rights of the party against which liability is being alleged have to be balanced against those of the party making the allegations. Allianz does not believe that a requirement to admit liability within three days or suffer the a penalty of higher TRV costs (assuming the claim succeeds) achieves the balance of rights or aligns properly with Treating the Customer Fairly.
- The Ministry of Justice considered the balance of rights, the requirement to adequately investigate, and the appropriate time in which to give a response on allegations of liability. That time period was properly assessed at 15 days. If a dual rate cap is implemented we believe that the appropriate time allowed to respond on liability before tripping to the high rate should be 15 days. In the alternative the current GTA period of five days should be retained.
- It is unclear how the at-fault insurer will be informed of the provision of a TRV i.e. by letter, or phone. Further it is unclear when the proposed three days starts to run from. Either may result in unintended practices and dispute.
- Fraud concerns - Imposing a shorter liability decision making timeframe will risk propagating a greater level of TRV hire fraud.
- A dual rate cap, where the high cap is double the low cap, risks creating new unintended behaviours and dispute. Reflecting on these issues Allianz suggests that there should be a single rate cap or alternatively the differential between the low and high cap rates should be lower. Allianz suggests that a differential of 25% would still an incentive to admit liability but not so great as to propagate the unintended behaviours and issues we raise.
- A high cap set at the current GTA rates would still enable the continued payment of significant referral fees without implementation of 1G.
- Allianz is concerned by both of the provisional proposals intended to address distortion risks. We cannot see they will, on a practical level, address any concern. Nor do we believe the concerns are valid in reality.
- We believe that answers to the mitigation declaration will be "engineered" to produce the most commercial outcome. We do not believe that consumers will properly validate the accuracy of the declaration. They will simply sign a number of documents presented to them, before they take delivery of the TRV, without properly reading them – that is reality.
- In Allianz's view Remedy 1F will serve to introduce a new frictional cost. The accuracy of the mitigation declaration will be investigated and content challenged.

CHC's will find methods of engineering mitigation declarations to support like-for-like hire every time. In reality consumers taking delivery of replacement vehicles will not validate the accuracy of the mitigation declaration.

Remedy 1A – First party insurance for replacement cars

- Allianz viewed this remedy as a potential wholesale solution to the problems associated with the overprovision and overcosting of TRVs the single largest current detrimental effect of this AEC. Allianz remains of the views previously expressed.
- If on receipt of all responses the CMA wishes to revisit Remedy 1A Allianz confirms its willingness to work with other market participants and the CMA to find a practical workable first party model solution.

Remedy 1B – At- fault insurers to be given the first option to handle non-fault claims

- Allianz's response to the Notice of Possible Remedies did not support 1B. We agree with and support the provisional conclusion that none of the variants of Remedy 1B were practicable or would be effective in addressing the AEC and/or customer detriment identified.

Remedy 1D – Measures to control non-fault repair costs

- Remedy 1D(b) - Allianz agrees with and supports the CMA's provisional decision not to pursue this remedy option further.
- Remedy 1D(a) - Allianz is extremely concerned by the CMA's provisional decision not to pursue this remedy. The potential detriment arising from repairs is very significant and greater than that currently associated with TRVs. We do not believe any decision can be reached gauged on the current detriment. If the CMA fails to address this in a robust and consistent manner Allianz believes it will be a lost opportunity for the consumer.

  It is incorrect to suggest that implementation of Remedy 1D(a) would have the unintended consequences of reducing insurers' incentives to properly contain repair costs. Approximately 60% of claims do not offer recovery potential and therefore the full advantage of any commercial arrangements, affecting the cost of vehicle repairs, is retained by an insurer in the majority of claims reported. That will ensure proper procurement management, which contains cost and benefits the consumer, continues.

  Bi-lateral agreements have proven themselves as being incapable of properly addressing the detriment as they are voluntary, non-binding, and rely on trust.

  Allianz urges the CMA to review their provisional decision not to proceed any further with Remedy 1D(a). Failure to do so will, Allianz believes, result in current wholesale bi-laterals being cancelled and the majority of insurers employing retail repair cost models that seek to achieve a maximum profit margin, radically altering the basis on which insurance has always operated. We believe the true effect will be to add 25% to the cost of insurer-managed repairs. Wholesale bi-lateral agreements are simply not the answer.

Remedy 1E – Measures to control non-fault write-off costs

- Remedy 1E(a) - Allianz agrees with and supports the CMA's provisional decision not to pursue Remedy 1E(a) any further.
- Remedy 1E(b) - Allianz does not accept that there are insurmountable design difficulties.

  Whilst Allianz does not take the view that Remedies 1D and 1E are interdependent we agree with the CMA that they are closely aligned. Therefore if the CMA

chooses to review its position in relation to Remedy 1D, as Allianz has urged, it may also choose to include 1E as a matter of completeness. That would protect the consumer not just against current detrimental market practices around control of repair and write off costs but also against those we can now recognise have the potential to cause significant detriment in the future.

Remedy 1G – Prohibition of referral fees

- Allianz believes that Remedy 1G is a key component in the strongest possible interlocking package of remedies.
- Allianz disagrees with the concept that referral fees contribute to lower premiums.
- The risk of circumvention and therefore the complexity of definition of referral fees does not seem a reason not to pursue this remedy. It is capable of achievement. Allianz suggests that referral fees add no benefit to the consumer. They are simply a symptom of unnecessary practices and excess charging within the system.
- If the CMA intends to prohibit financial incentives offered by CHOs, linked to the provision of TRVs, Allianz suggests this can best be achieved by implementation of Remedy 1G.
- Allianz asks the CMA to reconsider its provisional decision not to pursue Remedy 1G.

Remedy 4A - Provision of all Add-on Pricing from PMI providers to PCWs

- Allianz supports the remedy and we believe that customers should be provided with as full information as possible when making their insurance selection, and that this should include the price of the add-ons that the customer wishes to purchase. In this way they are able therefore to make a proper comparison between the real prices of products offered.

- Allianz agrees that there is a risk of unintended consequences, eg in the standardisation of add ons, where customers might not be able to find the product that is right for them, or in reducing the cover provided in competing PMI providers' add ons to a lowest common denominator in order to offer the lowest price for that add-on.

- Allianz agrees with the CMA that since the FCA is currently conducting a market study into general insurance add-on products and is also conducting a thematic review of insurance PCWs, then the FCA is best placed to consider this remedy.

Remedy 4B – Transparent information concerning NCB

- Allianz believes that the recommendations within 4B are designed to provide greater transparency of Protected NCB price and how this relates to the non protected price.

- Allianz agrees with the concept of providing greater transparency in terms of Protected NCB price and how this cover operates.

- Allianz disagrees with the CMA recommendation to provide consumers with an average no claims bonus discount as we believe this will increase consumer confusion and increase complaints. Additionally, we believe that asking Insurers to

provide an annual statement of forthcoming average discounts impedes and hampers our ability to innovate in pricing and product development.

- Allianz agrees with the CMA recommendation that Insurers should provide consumers with more information on the operation of Protected NCB via a statement and additional transparency around this cover and subsequent price protection. However, we disagree that these statements should be prescriptive.

Remedy 4C - Clearer description of Add-Ons

- Allianz supports the remedy and we believe that customers should be provided with as full information as possible when making their insurance selection.
- Allianz also agrees that the remedy should be designed to ensure that it does not lead to reduction in innovation in the provision of add-on products, by restricting product development to fit with standardised descriptions and product types, leading to reduced consumer choice.
- As with Remedy 4A, Allianz agrees with the CMA that the FCA is best placed to consider this remedy

Remedy 5 – Price Comparison websites and MFN clauses

- Allianz believes that the recommendations in the provisional decision are designed to increase competition between PCWs which will benefit the customer as it is likely to lead to reduced commission fees passed on as lower premiums to the customer, and other innovations leading to reduced prices that are not currently possible.
- Allianz agrees that narrow MFNs are essential for the credibility of the PCW model, but that they should be defined precisely, to ensure that the retention of narrow MFNs is effective in maintaining the credibility of PCWs but that it does not result in unintended restrictions on distribution model innovation.

1. Introduction

Allianz agrees with the CMA's provisional view that there are no adverse effects on competition (AEC) in relation to ToH2 concerning the quality of repairs provided by private motor insurers.

We are grateful to the CMA for expressly stating:

> "*We [CMA] have not, at this stage, made a final decision regarding the existence and form of any AEC and/or its resulting customer detriment. Our [CMAs] final decisions on any AEC, and appropriate remedies, will take into account the responses we have received to our provisional findings, and the responses we receive both to our provisional decision on remedies and to the two working papers we have published today [12th June 2014]*."

Allianz does have concerns that the provisional decision on remedies will not act as a complete interlocking package to effectively protect the interests of the consumer. It is concerned that non-fault consumers will continue to be commoditised being viewed as a vehicle to be used to derive the maximum income rather than provide the best service. Allianz believes that the proposed interlocking package of remedies is insufficient and that the market is likely to remain dysfunctional and open to abuse. Our concerns will be expressed in detail within the following sections.

2. Separation of cost liability and cost control (theory of harm 1 – TOH1)

The AEC and the resulting customer detriment

Allianz's position has been consistent through out the PMI investigation. We entirely agree with the provisional finding that the paying (at-fault) insurer often has no control over cost and that the conduct of those parties managing the non-fault claim have focussed on "*earning a rent from the control of claims rather than competing on the merits*" which has resulted in an "*inefficient supply chain involving excessive frictional and transactional costs*". In essence many parties managing non-fault claims have

taken advantage of their control, using it to derive an income by inflating the amount the at-fault insurer is asked to pay – the first additional layer of cost. That results in dispute and frictional cost – the second layer of additional cost.

Furthermore Allianz agrees that the main preferred practices and conduct deployed to "earn a rent" are:

a) "*claims handling and car hire intermediaries charging at-fault insurers more than the costs incurred……..*

b) *some, but not all [our emphasis], non-fault insurers charging at-fault insurers more than the cost of repairs incurred……*

c) *when cars are written off, at-fault insurers sometimes not receiving the full salvage value of the car.*"

We note the CMA's provisional finding that the detrimental effects of this AEC "*were greatest in the provision of replacement vehicles and that the effects were currently [our emphasis] smaller in repairs and write-offs, though recent litigation regarding the cost of repairs may affect the detriment of repairs.*" In WP23 the CMA estimates the size of the net detriment resulting from ToH1 at approximately £113m per annum broken down as follows:

- £87m cost of temporary replacement vehicles
- £11m relating to the inflated cost of insurer managed repairs
- £15m relating to the cost of credit repairs and write offs.

The CMA has relied on these financials (the "*detriment analysis*") in its assessment of the "*proportionality of the remedies*" it is proposing to pursue and those it is not proposing to take forward.

Allianz believes that the detriment analysis significantly under estimates the current net detriment for the following reasons:

- The CMA recognises that the net detriment figures are merely estimates.

- Those estimates are based on a number of assumptions which Allianz are concerned are at best unsafe and at worst result in a significant underestimation of the detriment.

- One of the key assumptions is in relation to the pass-through of costs and revenue to premiums. The CMA has assumed that both the higher costs incurred by at-fault insurers, and the revenues earned by non-fault insurers and brokers, are fully passed through to premiums. Allianz does not believe that referral fees, rebates, profit margins on repairs, etc are passed through to premiums either at all, or in the alternative, at anything remotely close to one hundred percent. This is an unsafe assumption given the impact it has on the outcome of the estimated figures.

  The CMA recognises that they do not have any empirical evidence relating to pass-through.

  The CMA recognises that "*while all insurers told us [CMA] that the cost of a non-fault claim was reflected in their premium quotes, the evidence was somewhat less clear with respect to income on non-fault claims*." Despite this the CMA concludes "*Given the uncertainties involved in the precise determination of pass-through, we assume in our calculation of the detriment*

that both fault insurers' cost and non-fault insurers' revenues are fully passed through to premiums." In Allianz's opinion this is a deeply unsafe assumption.

Allianz contends that further evidence should be obtained in relation to pass through. Insurers should be required to provide evidence to the CMA, on a confidential basis, showing how the non-fault income stream is entered into accounts and how it is passes through into premiums, if indeed they contend that is what occurs. No doubt actuarial evidence can be supplied to show whether, and to what extent, that is the case.

- Many of the revenues are earned by non-insurers i.e. CMCs and brokers, and therefore cannot be passed through to premiums.

- Credit hire: The "*management cost*" an insurer would incur if it directly provides a replacement vehicle has been estimated at £27. Insurers have efficient processes and systems. Provision of a car can be arranged in the region of 10 minutes at a cost of £3 to £5 maximum based on salaries plus on-costs. It is unclear how the figure of £27 has been reached. It appears significantly over estimated.

- Credit repair and write-off: The CMA's estimate of the net detriment takes into account "*the benefit that at-fault insurers get from the delayed payment of credit repair bills*". Allianz disputes that such a benefit exists. In reality the increased cost of the credit repair, or write off, will be recognised by the insurer and held in reserves. It is not clear what benefit the CMA has allowed in reaching its estimated net detriment.

- Insurer managed repairs and write offs: The CMA's starting point in estimating the net detriment is calculating the "*average difference between a subrogated repair bill and what insurers pay for a directly managed repair*." The CMA has recognised that "*some, <u>but not all</u> [our emphasis], non-fault insurers charging at-fault insurers more than the cost of repairs".* The inclusion of insurers that do not <u>currently</u> pursue this practice in the calculation will produce an artificially low figure.

  Furthermore the CMA estimates that insurers incur an average management cost of £113 per claim when they arrange for repairs. Allianz repeats that insurers have efficient processes and systems. It is not explained nor understood how the estimated figure of £113 is arrived at. Firstly Allianz contends that it is significantly over estimated. Secondly Allianz contends that the cost of employing claims handlers to organise repairs is an overhead expense that is incorporated into rating premiums. Such expenses are not currently recoverable by insurers in law and Allianz believes that should remain the case. Accordingly this should not be taken onto account when estimating the detriment of insurer-managed repairs and write offs.

  The current detriment of insurer-managed repairs has accordingly been significantly underestimated.

  In addition to estimating the current detriment of insurer-managed repairs Allianz suggest that the full potential detriment should be estimated on the basis that all insurers adopt retail cost models and abandon wholesale bi-laterals.

- The CMA's own sensitivity analysis shows that the estimate of the total net detriment ranges from £105m to £217m. They have assumed a total net

detriment of £113m. Allianz contends that even the higher figure is too low as the approach taken to estimate the cost of insurer-managed repairs appears fundamentally flawed.

The estimated detriments are based on the current effects and the CMA appears to have recognised that the detriment caused by inflated repair costs has potential to increase.

In our response to Competition Commission's (CC) Working Papers Allianz stated:

> "*It is vital to recognise that the average overcosting of £200 added by non-fault insurers is suppressed by the fact that so far not all insurers have engaged in the moral hazard practices that seek to inflate the claim paid by the at-fault insurer. Isolating those insurers that have engaged in such practices the Working Paper states they, on average, charge up to £270 to £390 (mid point £330) more than the net cost they incur. The average cost added by that cohort of insurers is therefore higher than credit repair (£300). Unless the moral hazard practices responsible can be quashed other insurers must follow, or else accept a competitive disadvantage, and in that event the £200 average reported overcosting will deteriorate significantly*."

and

> *"Unless the Court or the CC take action to address the moral hazard behaviours responsible for overcosting we expect all PMI participants to take advantage of the legally permissible margin resulting in a wholesale shift in the market. Those forced to over-pay on fault claims will have no choice but to over-recover on non-fault claims."*

It is recognised that the CMA's estimate of the detriment has now changed, although Allianz challenges whether it is now more accurate. The latest working paper does not make it possible to identify the extra cost insurers adopting retail repair cost models add to their non-fault claims. Allianz suggests that if that was possible, and the exercise was undertaken, it would demonstrate exactly what was highlighted in response to the original working papers. The potential detriment of retail repair cost models, i.e. insurer-managed repairs, is far greater than the current detriment caused by credit hire.

Allianz offers the opinion that unless this potential is addressed it will become the main focus of attention, of those managing non-fault claims, to compensate for any loss of income (earned rent) they suffer as a result of the remedies implemented to address the detriment of replacement vehicles. The suggestion that Remedy 1D(a) would have unintended consequences that undermine insurers' incentives to properly contain costs is fundamentally flawed and incorrect. There are only recovery prospects for an insurer on approximately 40% of claims reported. That means that any commercial advantage it achieves through its management and containment of repair costs is retained on 60% of claims reported. In addition those insurers with vertically integrated repair models achieve a further 20% tax saving on that cohort of claims as VAT is not chargeable between companies within the same Group. In short notwithstanding Remedy 1D(a) the incentives to operate efficiently remain a business imperative.

Unless the over-costing of repairs is properly addressed Allianz predicts a fundamental shift in market practice. Rather than agreeing or maintaining existing wholesale bi-laterals (e.g. RIPE), which are not binding and have been shown to be unreliable (Coles & Others v Hetherton & Others – see comments on Remedy 1D(a)) , insurers will withdraw from such existing agreements and set up retail repair cost models that

will be engineered solely to produce the maximum profit margin. This will create inflated cost/detriment, beyond that currently contemplated by the CMA, increased frictional cost, and delay in the settlement of consumers' insurance claims, all of which will serve to fuel premium increases. If all, or the majority, of insurers adopt such models the only competitive advantage that can possible be attained is by maximisation of the profit margin achieved.

We ask that the CMA consider the full potential detriment of insurer-managed repairs when assessing the proportionality of the remedies finally decided upon.

Remedy measures the CMA is proposing taking forward (TOH1)

(a) Information on consumers' rights (Remedy A)
In its response to the Notice of Possible Remedies Allianz stated that it "*believes in informing claimants, whether they are customers or non-fault claimants, of their rights and options*". It therefore follows that it is supportive of implementing Remedy A.

We broadly agree with the qualitative consumer research undertaken by GfK NOP Social Research that FNOL is the ideal time to provide information in a brief and focussed manner, and that information provided with policy documentation runs the risk of being unread.

However, we agree with the CMA that it is important to allow for different consumers preferring to receive information in different ways.

- What information should be provided to consumers?

Allianz agrees that:

i) A standard statement of consumer rights (no more than two sides of A4) should be issued at inception with the policy documentation and that the statement should also be published on insurers' and brokers' websites.

ii) Answers to frequently asked questions should be provided with the statement of consumer rights, each insurer providing its own answers to a common set of frequently asked questions.

iii) Targeted short-form information should be provided orally at FNOL to any claimant that is not found to be immediately at fault following an accident. We agree that provision of this information should be managed in a way that does not significantly increase the length of the FNOL call.

iv) Claimants are given the option of being sent via e-mail a copy, or link to, the statement of consumer rights.

Allianz agrees the proposed "Information for consumers under Remedy A" (Appendix 2.2) subject to the following observations:

1) Part A: Statement of consumers' rights following an accident
    i. At 2 it is not a legal requirement to notify non-fault accidents to your insurer
    ii. At 6(a)(ii) the statement should clarify that requirement of the use of original manufacturer parts is limited to where original manufacturer parts have been damaged and/or they are available. If the consumer's vehicle is old the original parts may have previously been replaced or, alternatively, they may no longer be in production.

iii. The statement should make consumers aware that they may incur a personal liability if they are supplied with a TRV on a credit basis and the provider, for whatever reason, fails to recover the full cost. Allianz believes this is a serious omission that may expose consumers to entirely unrecognised risks.

2) Part B: Frequently asked questions – motor insurance policy claims
   i. Insurers and/or brokers should be able to add (enhance) these standard frequently asked questions if they choose.

3) Part C: First Notification of Loss statements
   i. At 1 – it is not a legal requirement to notify non-fault accidents to your insurer
   ii. At 2 "by the at-fault driver" should be added to the end of the sentence.
   iii. At 3 it should read "*Your rights against the at-fault driver [added] include compensation for*:"

- Transparency of income

Consumers pay a premium in consideration of the insurance product / service they choose to purchase. They do not have any knowledge of, nor therefore have any capability to agree, to their insurer earning a further income from non-fault claims they present. There should be no hidden income streams. Allianz contend that consumers should be made aware of, and agree to, their non-fault claims being used to derive an income for their insurer above the premium they have paid.

Allianz suggests that insurers undertaking such income related activities be required to inform the consumer at the policy sales point and FNOL stage.

- Which parties should be required to comply with the remedy?

Allianz agrees the remedy should be binding on:

- All PMI providers in respect of the statement of consumer rights at policy inception, and

- All industry participants handling FNOL and/or who interact with consumers in the provision of post-accident repair services in respect of the first notification of loss statements.

- Implementation issues

Allianz agrees that an enforcement order is the most appropriate means of implementation.

- Timeliness

Allianz notes that the period between the publication of the CMA's final report and the making of an enforcement order will be a minimum of six months possibly extended to 10 months. Against that background we agree that:

1) Part C: First Notification of Loss statements could be incorporated into existing FNOL processes within three months of the making of the enforcement order (a total of nine to 13 months from publication of the final report).

2) Part A: Statement of consumers' rights following an accident, and Part B: Frequently asked questions – motor insurance policy claims could be delivered:

- Online after three months of the making of an enforcement order (a total of nine to 13 months from publication of the final report).

- To new policyholders after three months of the making of an enforcement order (a total of nine to 13 months from publication of the final report).

- To existing policyholders at their first renewal after three months of the making of an enforcement order (a total of nine to 13 months from publication of the final report) such that all policyholders would have received the information on or before 15 months from the date of the enforcement order.

- Monitoring and enforcement

Allianz agrees that compliance can be effectively and proportionately assured by requiring insurers, brokers, CMCs/CHCs, and other industry participants handling FNOL and/or involved in the provision of post-accident services to submit an annual compliance statement set out in a standard format to be signed by a compliance officer.

(b) Measures to address features relating to replacement vehicles (Remedies 1C and 1F)

The CMA proposes that the combination of Remedy 1C and Remedy 1F would provide an effective and proportionate remedy package to address the detriment identified relating to the provision of temporary replacement vehicles (TRVs).

- Remedy 1C

The intention of this remedy is to reduce the cost of the provision of TRVs to non-fault claimants without compromising the tortious rights by:

i) Introducing a dual rate cap on the amount the at-fault insurer is required to pay in respect of subrogated claims.

ii) Reducing administrative and frictional costs. This it is suggested will be achieved by:

a) Improving the efficiency of the administration, and

b) Reducing the frequency of liability disputes.

Allianz wishes to make three high-level observations which raise immediate concerns regarding the effectiveness of this proposed remedy:

1) The CMA's proposed remedy in respect of subrogated claims only. A Credit Hire Operator (CHO) will have a contract with the consumer. The consumer is contractually liable for the cost. The TRV claim will be presented in the name of the consumer by the CHO. The CMA describes the CHO as "*standing in the shoes of the non-fault claimant*". These are not subrogated claims and accordingly would fall outside of the scope of the remedy as proposed. This together with the provisional decision not to address referral fees will, Allianz fears, fuel greater use of credit hire and increase the recognised detriment.

2) Subrogated TRV claims will always be presented at the cap. It might be the case that insurers are able to agree commercial rates with CHCs below the cap. This may especially be the case with larger insurers. The cap may therefore deliver a profit margin ("earned rent") to some insurers.

3) If the value of a TRV claim is lower, due to this remedy, than it would otherwise have been it does not follow that liability will be conceded more easily, or any earlier, by the alleged at-fault party. Insurers must treat their customers fairly and that means advancing strong defences where appropriate. Furthermore the TRV claim will, in all likelihood, only be a small component of the overall claim which may include injuries for one of more occupants of the alleged non-fault vehicle. Allianz does not believe that there will be any frictional saving in relation to liability disputes.

- To whom and to what should Remedy 1C apply?

If Remedy 1C is implemented Allianz agrees that it should be mandatory for all those involved in the provision of TRVs to non-fault claimants.

Allianz also agrees that the remedy should not be extended to TRV claims where the claimant has entirely organised the TRV themselves (opposed to being referred to a CHO by an insurer or broker that may derive a referral fee) on the basis that the risk of circumvention is properly addressed. The CMA proposes to achieve this by prohibiting TRV providers from using "*financial inducements*" to encourage claimants to take TRVs on at direct hire basis at rates above the cap. Allianz suggests that "*financial inducement*" should be extended to include any inducement such as, for example, the provision of ipads, etc. Lessons can be learned from the personal injury referral fee ban, the methods of circumvention identified, and the action currently being taken by the Ministry of Justice to eradicate them.

The prohibition of "financial inducements" that might potentially be paid to direct non-fault claimants by TRV providers is akin to a form of prohibition of referral fee [1G]. If the CMA intend pursuing this we suggest they could achieve it most effectively by implementing 1G.

- How should the cap rate be set?

In theory Allianz agrees that it seems sensible that the cap rate should be set "*slightly above the level cost efficiently incurred in providing a replacement vehicle*". However, issues arise when trying to define what "*slightly*" and "*efficiently*" actually mean. This would be key to setting the rate cap. We suspect that the answers to the definition of these words may be a case of "one man's meat is another man's poison". The end result may be a compromise and a cap rate set too high.

The CMA appears to suggest that insurers should be permitted to recover an administrative cost for arranging direct hire indicated at £37 plus VAT. However, this is an operational expense included within and covered by the insurance premium. In reality permitting insurers to recover overheads included in the calculation of premiums would result in double charging and generate a new income stream. In law, currently, insurers are unable to recover such costs. Allianz believes that should remain the case.

- Daily costs

The CMA has provisionally concluded that the cost of "*direct hire*" is a "*market-determined measure of daily costs*". Direct hire is referred to as being "*currently used for non-fault temporary replacement vehicles mainly by at-fault insurers on captured claims*". Allianz's interpretation of "*direct hire*", on reading of the provisional decision is that it actually means the commercial rate agreed directly between insurers and CHOs. That being the case Allianz agrees that it is a reasonable "*market-determined measure*".

Allianz agrees that geography is irrelevant to setting the rate cap.

Allianz does not agree that the rate cap should be calculated on the basis of the "*average retail spot rate*". That would almost certainly be in excess of "*direct hire*" rates. Further we agree that use of average spot rates by geographic area would be an unnecessarily complex solution which would be onerous to maintain.

The best basis upon which to determine a rate cap must, we suggest be, the existing commercial arrangements between insurers and CHOs.

- Ways to reduce frictional costs by speeding up liability decisions

Allianz recognises the advantages of speeding up liability decisions and thereby reducing frictional cost. The CMA's provisional decision is to incentivise early admission of liability by introducing a high rate cap.

It is provisionally suggested that the low rate cap will apply for admissions of liability within three days of an insurer being informed that a TRV is being provided. The high rate cap will apply for admissions of liability after three days.

It should be recognised that insurers are required to keep their customers informed (Treating the Customer Fairly) and involve them in material issues. Admission of liability is such an issue. The rights of the party against which liability is being alleged have to be balanced against those of the party making the allegations. It may be that both parties hold each other responsible and both intend pursuing claims. Allianz does not believe that a requirement to admit liability within three days or accept higher TRV costs (assuming the claim succeeds) achieves the balance of rights or aligns properly with Treating the Customer Fairly. Instead it incentivises quick "rough and ready", and very possibly unilaterally reached, decisions on a key issue affecting the consumer – assessing fault, right to compensation, and therefore justice. The Ministry of Justice considered the balance of rights, the requirement to adequately investigate, and the appropriate time in which to give a response on allegations of liability. That time period was properly assessed at 15 days. If a dual rate cap is implemented we believe that the appropriate time allowed to respond on liability before tripping to the high rate should be 15 days. In the alternative the current GTA period of five days should be retained.

It is unclear how it is intended that the at-fault insurer should be informed of the provision of a TRV i.e. by letter, or phone. Further it is unclear when the three days starts to run from i.e. the date of any letter or the day it is deemed received by the alleged at-fault insurer? Either may result in unintended practices and dispute for example:

- A TRV provider may be tempted to backdate a letter.
- Alternatively an insurer may be tempted to deny a letter has been received.
- What if a letter genuinely goes astray?
- There is a risk that the incentive may create a pressure and cause the alleged at-fault insurer to admit liability too early and prejudice their policyholder's position.

In reality where liability is uncertain a consumer is more likely to use either a free courtesy car (offered by most insurers) or use first party replacement car cover if they possess it. There are two reasons for this:

- It avoids the consumer exposing themselves to a potential personal liability – if they are eventually found to be at-fault either partially or in full.

- It avoids the TRV provider potentially not being able to recover the full amount charged.

A dual rate cap risks creating of new unintended behaviours and dispute. Reflecting on these issues Allianz suggests that there should be a single rate cap. Alternatively the differential between the low and high caps should be reduced – Allianz suggests 25%.

If there is a dual cap rate the rules setting out how the provision of a TRV will be communicated and when time runs from need to be clear and framed in a way that somehow avoids the potential areas of dispute set out above.

- Fraud concerns

Imposing a shorter liability decision making timeframe will risk propagating a greater level of TRV hire fraud. Hire invoices will commonly feature as a component of fraudulent claims. The pressure that the proposed remedy applies to insurers to admit liability may result in a greater number of fraudulent claims being unidentified and paid.

The remedy makes no reference to fraud or the consequences of a TRV fraud being detected. It would seem sensible that on detecting a fraud any admission of liability previously given by the insurer be non-binding such that they are not bound to pay any TRV costs incurred up to the point of detection.

- Claims involving excluded types of vehicle

It is not currently clear how the remedy, if implemented, will apply when a commercial vehicle is involved in an accident with a private vehicle. i.e.

  - If the commercial vehicle is at-fault and a private car is hired will the rate cap apply?

  - If the private car is at-fault and a commercial vehicle is hired will the rate cap apply?

- How to set a dual rate

Allianz has previously expressed concerns regarding the practical implications of a dual rate.

The CMA states:

> *"….we considered it desirable for a prospective at-fault insurer to have the incentive to accept liability if its initial assessment suggested that the probability of its driver being at fault is over 50% because this would lead to claimants receiving a replacement vehicle if it as more than not they were at-fault."*

By its very nature the assessment of liability is subjective. One person's 60/40 may be another's 40/60.

The availability of a more lucrative high cap may result in some CHOs courting more high risk contentious business. That could result in one of two scenarios:

1. Alleged at-fault insurers prematurely accepting liability, to avoid the high rate cap, without informing its customer.

2. Increased liability dispute and frictional cost.

The CMA suggests a high rate cap of approximately double the low rate cap. We fear that level of differential will fuel the behaviours and issues we have highlighted above. It will also enable the continued payment of referral fees without implementation of 1G.

If implemented in the way provisionally outlined Allianz is concerned that use of the high rate cap will occur far more frequently than the CMA suggests.

Allianz maintains that there should either be a single rate cap. Alternatively if a dual rate cap is pursued we suggest that the high rate should approximately 25% more than the low rate cap. Still an incentive but not so great as to propagate the behaviours and issues we raised.

- Initial and subsequent determinations of rate cap

If the CMA ultimately decides to implement Remedy 1C we agree that it should set the rate cap based upon the evidence they have received throughout the full period of the investigation.

Allianz agrees that costs do not change significantly from year to year and therefore an annual reappraisal is not necessary.

The roll-forward from the rates initially set by the CMA should be driven by indexation with periodic correction.

Allianz suggests that the most appropriate index would be the Consumer Price Index (CPI). CPI ignores the cost of running a home e.g. mortgage payments, rents, and council tax which are clearly not relevant to the matter under consideration. The Retail Price Index includes such costs making it less appropriate.

- Distortion risks

Allianz does not believe that Remedy 1C as proposed would affect a non-fault claimant's ability to obtain their tortious right to a like-for-like TRV subject to need.

- Delivery entitlements

The CMA appears concerned that some insurers may make an "*undecided*" determination of liability in a disproportionate number of claims which may encourage consumers to claim under their own policy which may not provide a like-for-like TRV thereby denying them their full tortious right.

Whilst many insurers, including Allianz, will facilitate the supply of a like-for-like TRV to non-fault customers we recognise that some choose not to. In Allianz's opinion that is a matter of service differentiation.

The CMA makes two proposals:

1) That each insurer be required to inform their customer before the start of the repairs to their vehicle if they consider the customer to be not-at-fault and therefore able to claim against the other party.

   Allianz comment:
   Insurers authorise repairs to customers' vehicles as quickly as they can – authorised repairers have imaging, pre-authorisations, etc. Time to effect repairs is a key service differentiator. With this in mind the insurer probably will have no clearer view on liability than they had at FNOL.

Notwithstanding one insurer's assessment of liability the other may not agree. The other insurer may possess evidence that they have chosen not to share, for whatever reason, or they may be in the process of securing evidence from an unknown witness.

What are the implications if an insurer expresses a view that later turns out to have been optimistic, or fresh evidence comes to light resulting in a reassessment? This is a concern if a customer says they have hired a TRV, based upon what they were told by the insurer, on the assumption they would be able to recover the full cost?

Allianz does not believe this proposal is practical and is concerned that it may have unintended consequences.

2) That insurers' aggregate data on liability assessments be monitored. It is suggested the monitoring process would involve insurers being required to submit data reports on the proportion of fault / non-fault / undetermined / split and liability assessments at three stages:
    1. FNOL.
    2. At the time the information is provided.
    3. The final liability decision is reached.

Further they would be required to report in what percentage of cases they changed their assessment.

Allianz comment:
It is unclear what can be determined from such data and how the CMA would intend to use it.

The reality is that assessments of liability change. Reports may be presented based on false or misleading information, new evidence will come to light, the circumstances may be unclear and require further investigation, etc. A change in liability assessment cannot be assumed to be a bad thing. In many respects it's a sign of an insurer keeping an open mind, investigating, and reassessing.

Allianz believes that the CMA approach may result in insurers adopting a more rigid approach on liability. That would result in greater dispute, more litigation, and significant cost.

For the reason set out above Allianz is concerned by both provisional proposals. Further it cannot see they will, on a practical level, address any concern.

- Efficient delivery of services

Allianz agrees with the CMA that no issues arise.

- Should measures be put in place to cap hire duration?

Allianz agrees with the CMA's provisional proposal to allow no TRV recovery costs 24 hours after the completion of repair or seven days after a total loss payment.

- Dispute resolution

Allianz agrees that if this Remedy is implemented there is no need for a dispute resolution process – any failure amounting to a breach.

- Acceptance of customers

Allianz agrees that if this Remedy is implemented the GTA principle of "first to a customer" should be retained in order to avoid consumers being "caught" between two or more TRV providers.

- Should an online portal for credit hire claims be developed?

If this Remedy is implemented we agree with the CMA's provisional decision that a portal should not form part of the remedy package.

- Monitoring and enforcement

If this Remedy is implemented we agree with the CMAs provisional decision that monitoring should be performed by an independent panel within the CMA that would set the rate cap and undertake the "*periodic correction*".

- Timeliness

Allianz notes that there will be a period of six to 10 months between the publication of the CMA's final report and making the enforcement order. The CMA propose that the rate cap takes effect immediately on making the enforcement order and that all other requirements of the remedy be in place within three months of the enforcement order (nine to 13 months from the final report). Those timeframes appear reasonable.

- Remedy 1F

The CMA expects that this remedy will reduce frictional cost where there is a dispute over the type of TRV provided and the non-fault claimant's need. It seeks to achieve that by enforcing the completion and signing of a mitigation declaration by the TRV provider prior to delivery of the TRV and the countersigning of that declaration by the non-fault driver at the point of delivery.

Allianz wishes to make two high-level observations which raise immediate concerns regarding the effectiveness of this proposed remedy:

1) Allianz expressed the following view in its response to the Notice of Possible Remedies:

"A standard set of questions produced to evidence need will, we believe, result in the development of a set of standard responses engineered over a period of time to be accepted as proving appropriate mitigation."

Allianz remains of this view.

2) It seems that the intention of the countersigning of the declaration by the non-fault driver is that they perform a checking and validation function that the declaration is correct. Allianz considers this extremely unlikely.

Allianz suggests that the reality is that the TRV will be delivered, the non-fault claimant will be presented with a number of papers (one of which will be the mitigation declaration). They will be asked to "sign here, here, and here", which they will duly do without reading every document and considering the content.

In Allianz's view Remedy 1F will serve to introduce a new frictional cost. The accuracy of the mitigation declaration will be investigated and content challenged.

- Monitoring and enforcement

The CMA has provisionally concluded that the remedy is effectively self-monitoring. Allianz has set out its concerns regarding the possible circumvention of this remedy. Taking those concerns into account we do believe that some form of monitoring is necessary.

The CMA has provisionally decided that in the event of a dispute the TRV provider will not be required to give the insurer access to the call record. Allianz considers this would serve to allay some of the concerns regarding Remedy 1F.

If Remedy 1F is implemented Allianz ask that the CMA review its provisional decision regarding the provision of call records.

- Timeliness

Allianz notes that there will be a period of six to 10 months between the publication of the CMAs final report and making the enforcement order. The CMA propose that, if implemented, Remedy 1F will be incorporated into existing TRV provision within three months of the enforcement order (nine to 13 months from the final report). That timeframe appears reasonable.

- The combined effect of Remedy 1C and Remedy 1F

Allianz does not believe that implementation of Remedy 1C and Remedy 1F will address the detriment. In fact Allianz is concerned that they may exacerbate the problem. Exacerbation could arise though the following:

1) The cap may be higher than the rates some insurers and other volume purchasers actually pay for the provision of TRVs.
2) Every TRV claim will be presented at the cap – never below.
3) Mitigation declarations will be easily circumvented. It is not realistic or safe to assume that non-fault drivers will check and validate their accuracy.
4) Insurers will not make "softer" quicker decisions concerning liability and acceptance of the TRV claim. If they do it may result in their policyholder being undermined, who may be pursuing their own claim, and breach Treating the Customer Fairly. It would also have the effect of exposing the insurer to the entire claim – not just the TRV aspect.
5) We believe that the mitigation declaration will become another catalyst for dispute.

Remedy measures not included in the CMA's proposed package of remedies (TOH1)

Allianz notes that the CMA has provisionally decided not to include the following in their proposed package of remedies:

(a) Remedy 1A – First party insurance for replacement cars
(b) Variants to Remedy 1A (proposed by Aviva, CISGIL, and Enterprise)
(c) Remedy 1B – At- fault insurers to be given the first option to handle non-fault claims
(d) Remedy 1D – Measures to control non-fault repair costs
(e) Remedy 1E – Measures to control non-fault write-off costs
(f) Remedy 1G – Prohibition of referral fees

We will comment on each of these in turn.

(a) Remedy 1A – First party insurance for replacement cars

In our response to the Notice of Possible Remedies, whilst recognising the complexity of implementation, Allianz supported remedy 1A saying:

> *"We believe that this is an essential component of the remedies package to address the Harm created by the separation of cost liability and control of temporary replacement vehicles (TRVs)."*

Allianz viewed this remedy as a potential wholesale solution to the problems associated with the overprovision and overcosting of TRVs - the single largest current detrimental effect of this AEC.

The remedy enabled an informed consumer to select their desired level of TRV cover reflecting their personal needs ranging from no cover (perhaps due to the availability of a second vehicle), to free courtesy car, through to like for like. It avoided the consumer being viewed as a commodity from which to "*earn a rent*" by upselling them a TRV to their strict legal entitlement. It needs to be recognised that just because there is a maximum entitlement does not mean that every non-fault consumer involved in every accident requires or wants the maximum – that entails a cost burden which has to ultimately be shouldered by the collective consumer. In our response to the Notice of Possible Remedies Allianz stated:

> "*Currently replacement vehicle claims do not generally reflect the consumers need. They reflect what they are sold by the organisation managing the non-fault claim to be subrogated. We believe this change [Remedy 1A] would align practices more closely to the intention of the existing Law of Tort. We believe the tortious position is being manipulated to increase cost to the detriment of the majority of insurance consumers. The consumer is "up-sold" or overprovided beyond what is needed and they usually have no knowledge of what is happening or the consequences of their choices. Remedy 1A would overcome this and empower consumers to make informed choices in advance about what they will actually need in the event of an accident*."

and

> *"We believe that informed consumer choice will result in more consumers consciously deciding their need for a TRV can be met without a like for like replacement."*

and

> *"Ultimately we believe implementation of Remedy 1A will exert downward pressure on PMI premiums, give consumers informed control over their decisions and cost, and remove the post accident pressures currently experienced by consumers that become a commodity, after an accident, to those that seek to inflate cost and derive an unnecessary profit margin from them."*

To avoid many of the concerns Allianz suggested that consumers could be given the opportunity to upgrade their TRV cover after an accident. This would cater for a change in circumstances or just afford the consumer the right to change their mind.

Allianz remains of the views previously expressed.

Broadly speaking seven out of ten of the largest insurers were supportive albeit with some reservations. With that level of support we believe that pragmatic practical solutions could have been found to make this remedy workable.

The CMA has stated: "*If we believed that the remedy [1A] was the only effective and proportionate remedy, we would pursue it and accept the delay [caused by the need for legislative changes] but we believe that we have identified a more timely remedy package which is effective and proportionate*." Allianz has previously outlined its views

concerning the proposed "*remedy package*" and any revisions that it believes are necessary to improve its effectiveness.

If on receipt of all responses the CMA wishes to revisit Remedy 1A Allianz confirms its willingness to work with other market participants and the CMA to find a practical workable first party model solution. If not we recognise the balanced pragmatic decision the CMA has reached and accept that Remedy 1A will not be pursued.

(b) Variants to Remedy 1A (proposed by Aviva, CISGIL, and Enterprise)

i) Aviva's variant – Allianz was concerned by a first party model that retained subrogation rights. Whilst not requiring legislative changes, and therefore being easier to implement, in our opinion it would only serve to widen the separation of cost control and cost liability. It may therefore compound the existing detriment.

ii) CISGIL's variant – Given that this variant would require legislative changes we can see no benefit over the proposed remedy 1A.

iii) Enterprise's variant – This highlights Allianz's concern that TRV providers will always seek to provide like for like replacement irrespective of whether that is needed or wanted. That is a natural response from an organisation that generates greatest profit by maximising vehicle rental costs. We agree with the CMA that "*requiring insurers to provide non-fault claimants with a like-for-like replacement vehicle goes further than is necessary*." However, we are concerned that is broadly speaking where the package of remedies may lead albeit with capped rates.

We agree with the CMA's provisional conclusion not to proceed with any of the proposed variants. If it was decided by the CMA that it would explore remedy 1A further on the basis that it would "*accept the delay*" in implementation caused by the need for legislative changes we believe that stronger variants could be identified.

(c) Remedy 1B – At- fault insurers to be given the first option to handle non-fault claims

Allianz's response to the Notice of Possible Remedies did not support 1B. We are pleased to note that in general industry respondents were similarly minded.

The CMA's reasons for not taking remedy 1B forward are well founded.

We agree with and support the provisional conclusion that none of the variants of Remedy 1B were practicable or would be effective in addressing the AEC and/or customer detriment identified.

(d) Remedy 1D – Measures to control non-fault repair costs

Remedy 1D comprised of two variants:

- 1D(a): Non-fault insurers would be required to pass on to at-fault insurers the wholesale price they pay to repairers.
- 1D(b): The repair costs recoverable through subrogated claims would be limited to standardised costs. The CC (now CMA) suggested these could be developed using estimation systems and Thatcham standards. This price control would require standard discount rates for parts / paint, and common labour rates and would need to specify when non-OEM parts could be used.

- Remedy 1D(b)

We note that there was more support for Remedy 1D(a) than 1D(b).

We agree with the CMA's conclusion that this remedy option would be complex and costly to regulate.

We agree with and support the CMA's provisional decision not to pursue this remedy option further.

- Remedy 1D(a)

Allianz is extremely concerned by the CMA's provisional decision not to pursue Remedy 1D(a).

The CMA has correctly noted that there are bi-lateral agreements between some insurers that require subrogated claims to be limited to the actual repair cost incurred by the non-fault insurer, taking into account any discounts, rebates, etc. The main bi-lateral agreement is known as the Reduction in Paper Exchange (RIPE). The detail of this bi-lateral arrangement was communicated to the Office of Fair Trading on 6th June 2008. Attached to that letter was a copy of the RIPE Process (Appendix 1). Under the heading "*Reimbursement of accidental damage costs relating to repairable vehicles*" the document states:

> *"At the time of the recovery request, the following information (where applicable) should be made available to the "at fault" participant:*
>
> *Vehicle repair costs (broken down to provide the split between labour, parts, and paint. <u>This figure should be net of any discounts</u> [our emphasis])."*

Allianz agrees with the CMA's finding that there are two critical differences between parties entering into bi-lateral agreements, such as RIPE, voluntarily and a remedy, such as Remedy 1D(a), which would be mandatory; namely:

1) Bi-laterals rely on trust between the parties.

2) A party can withdraw from a bilateral agreement.

Allianz suggests that these are known proven weaknesses.

The CMA is aware of the ongoing litigation in the case of Coles & Others v Hetherton & Others. Two insurers involved in that litigation (one of which is Allianz) were parties to a RIPE bi-lateral agreement. Some repairs in the test cases were conducted whilst that bi-lateral agreement was live. However, unbeknown to Allianz, the claims were not presented "*net of any discounts*" in accordance with the terms of the bi-lateral. This was raised at the first trial in the High Court. Mr Curtis QC appeared for Allianz. Mr Butcher QC for the other insurer. A copy of the relevant part of the transcript is provided (Appendix 2) – it is a matter of public record requiring no redaction. We draw your attention to page 67 line 7 to page 68 line 5:

> *"MR CURTIS: We submit that it would be plainly unconscionable for RSAI, having presented claims on the basis of common assumption between the parties under the RIPE and MOU as extended by the correspondence, to be allowed to pursue a claim for a higher amount than was anticipated by that common assumption. It can do so in respect of claims presented after the termination of the arrangements by the parties but we say claims presented as JB Air Conditioning was before the termination of the arrangements between the parties should be dealt with on the basis of the common understanding.*
>
> *My Lord, I accept that goes further than the analysis in the Benchdollar case and I accept that there's no specific authority I can draw your Lordship's*

attention to support that proposition, but in a case of equity I submit that the equity shouldn't be constrained by narrow rules and that if one were to ask the question, "Is it fair to allow RSA to pursue claims for higher amounts than the common assumption says that they were going to be?", where those claims were presented before the arrangements between the parties were ended, the answer 99 people out of 100, if not 100, would give would be to say "Yes, that's plainly unfair and unconscionable".

By contrast we draw your attention to page 23 lines 8 to 10 and Page 25 line 25 to page 26 line 5. They respectively read as follows:

"Mr Justice Cooke: Is RIPE a contractual arrangement?
Mr Butcher: No, it's not. It says very specifically that it's not a contractual matter."

and

"Mr Butcher: Here the claims which are being brought and defended are as a matter of law and principle between the policyholders on each side. Thos policyholders will have known absolutely nothing about RIPE or its assumptions and there is not any basis for attributing knowledge of any of that to them on either side."

Bearing in mind that the litigation is ongoing, that Allianz is not a law firm, and that it is not necessarily relevant to this process we will not address the legal analysis, save to say that Allianz is of the view that bi-laterals should mean something and that parties entering them should be accountable for their compliance with the terms. It is clear that not all insurers are of the same view, seeing them as non-binding and something that can be circumvented as they are not agreements struck in the name of policyholders – who will ultimately be the named parties in any court proceedings.

Market experience therefore shows that trust cannot be relied upon to enable bi-lateral agreements to operate as a safe remedy.

Bi-lateral agreements may have been hailed by some quarters in the market as a new solution to the AEC created by "*some, <u>but not all</u> [our emphasis], non-fault insurers charging at-fault insurers more than the cost of repairs incurred*" and in doing so "*earning a rent from the control of claims rather than competing on the merits*". However, Allianz wishes to strongly express the view based on the market evidence that:

1) They are not new. Indeed there are longstanding commonly used bi-laterals i.e. RIPE, that were intended to address this very issue.

2) They have not always been operated conscionably by both parties i.e. complied with on the basis of the known common assumption.

3) Trust cannot be relied upon wholesale.

4) Bi-laterals have been seen to fail to address the issue and therefore cannot be relied upon as the remedy.

5) Bi-laterals are labour intensive requiring management and audit controls. Those operational costs erode the financial benefit of a bi-lateral model. The most effective, and lowest cost solution, is to mandate the capping of subrogated repairs at the wholesale rate via an enforcement order.

Insurers are only able to pursue subrogated recovery claims on approximately 40% of claims reported. The other 60% do not offer recovery potential and comprise of the following types of situation:

- Their policyholder was at-fault.
- No other party involved.
- Malicious damage.
- Theft damage.
- Unknown at-fault third party e.g. hit whilst parked and no details left.

Insurers that are most capable, through scale, to negotiate the best commercial rates for vehicle repairs (whilst maintaining quality and service levels) achieve a competitive advantage on these claims, the majority of incidents reported, over other insurers with less commercial bargaining power.

It is Allianz's opinion that any suggestion that a Remedy 1D(a) would reduce an insurers incentive to negotiate the best deals and contain cost is misleading. Notwithstanding Remedy 1D(a) insurers would retain the advantage of their commercial deals in approximately 60% of cases reported. That is incentive enough to ensure they will continue to properly contain repair costs if Remedy 1D(a) was implemented. It would not have the unintended adverse consequences suggested.

Further insurers with sufficient scale to adopt vertically integrated repair models will secure an additional 20% tax saving on 60% of claims where there is no subrogation potential. This is due to the fact that VAT is not chargeable between companies within the same Group.

Commercial arrangements (discounted repairs, vertically integrated repairers, etc) will give the most efficient insurers a very significant advantage irrespective of Remedy 1D(a).

- Transparency and entitlement to profit

As the excerpt of Coles & Others v Hetherton & Others states, any claim for recovery is brought in the name of the non-fault consumer. An insurer has no right of recovery in its own name – only in subrogation.

A consumer pays a premium for a PMI product. That is the amount they agree to pay in consideration of the product / service the PMI insurer provides. No more.

If an insurer therefore brings a recovery claim in the name of their policyholder and in succeeding "earns a rent" on the claim in addition to the premium their policyholder paid is it right from the consumer perspective that they be allowed to keep it as additional income on top of the premium paid?

Allianz suggests that the true cost of insurance should be transparent to the consumer. Further Allianz suggests that the cost of the insurance product / service should be the premium the consumer agrees to pay, not the premium plus any hidden income stream (profit) the insurer can derive from the manner in which they manage non-fault claims.

Allianz suggest that insurers should not be entitled to retain hidden profit earned from the way in which non-fault claims are managed. That profit is claimed in the name of the consumer. The consumer has paid a premium in consideration of the insurance product / service – they have not agreed to pay any more. Therefore it seems only fair to the consumer that any profit earned by an insurer, from that consumer's non-fault claim prosecuted in their name, be paid to them.

Allianz does not believe any PMI policy wording permits an insurer to make and retain profit from non-fault claims.

- Insurer-managed repairs

The CMA has reached two findings:

1. The current [our emphasis] level of transactional / frictional costs for insurer-managed non-fault repairs is low (£9m per annum). In addition there is an additional cost of £15m from credit repairs.

2. There is potential for these costs to increase as a result of this remedy [1D(a)].

Whilst the current cost / detriment may be considered "low" we would like to point out that the potential cost is considerable and greater than the detriment currently seen in the provision of TRVs. In support of this contention we highlight that:

1. The CMA has recognised that currently only "*some*" insurers are charging non-fault insurers more than the cost of repairs incurred.

2. In Harker v Fallows [2011] HHJ Platt stated in his judgment: *"there is nothing to stop every insurer adopting the same procedures [charging the at-fault insurer more than the actual cost of repair] which, if this case is a typical example, will lead to an overall increase of some 25% in the cost of minor motor repair claims. That cannot be in the public interest."*

3. Allianz's own empiric data based on 2,692 claims presented by an insurer "*adopting the same procedures*" is that the additional cost was correctly assessed by HHJ Platt at approximately 25%.

4. Those insurers that are not currently adopting these models will have to do so or accept a commercial disadvantage, which is simply not realistic. For the reasons stated above bi-laterals will not be seen as the safe alternative.

5. Allianz cannot accept the argument that implementing Remedy 1D(a) may potentially increase frictional cost by leading more insurers to challenge whether repair claims are presented on a true wholesale basis. That frictional cost currently exists. Remedy 1D(a) implemented by an enforcement order with a monitoring process would re-establish confidence in the market, introduce consistency, and reduce frictional cost.

- CMC-managed repairs

The CMA states that implementing Remedy 1D(a) "*would remove the incentive for CMCs to control their repair costs as they would not derive any benefit from any discounts and rebates they achieved*". Allianz does not accept that CMCs should earn income in this way. If the consumer employs a CMC they should know what service they are receiving in return for the total income the service provider will receive. Otherwise it is impossible for the consumer to make an informed choice. We suggest that failing to address this would result in a lost opportunity.

Allianz contends that CMCs should not be permitted to "pocket" the difference between the retail and the wholesale cost of repair. The value they add, if any, is the administration of managing via trusted partners at commercial rates. In return they should be permitted to recover an administration fee that represents the cost of running an efficient business plus a reasonable profit margin.

As with insurer-managed repairs Allianz believes that, far from increasing dispute and frictional cost, Remedy 1D(a) implemented by an enforcement order with a monitoring process would re-establish confidence in the market, introduce consistency, and reduce frictional cost.

The CMA has concluded that there is no AEC in relation to the under provision of repairs and post accident repair services by insurers. Taking that into account we question what value CMCs can add in relation to managing repairs.

We do not believe that CMC managed repairs should significantly influence the decision as to whether to implement Remedy 1D(a). Implementation in relation to both insurer and CMC managed repairs is capable of delivery and would protect the consumer from the risk of the full potential of this detriment in the future.

- Definition of wholesale costs

Allianz does not accept the suggestion by "*many parties*" that the wholesale cost cannot be defined. That simply cannot be the case as the bi-laterals referred to must provide such a definition.

It is not the definition of whole cost that is the issue with bi-laterals. It is simply the way in which they have been operated, ignoring the common known assumption, and the lack of trust that has arisen as a result which is central to their success.

Allianz would welcome the opportunity to work with the CMA and market representatives to agree a definition. Alternatively this could be suggested by the ABI or independent lawyers.

- Circumvention

Allianz does not accept that circumvention could be achieved by adopting vertically integrated repair models and rebating excess profit. The definition of wholesale could easily be drafted to address this concern. In addition the enforcement order could address this known possible method of circumvention.
Allianz does not believe this potential concern, capable of being addressed, warrants failing to address a known detriment with real potential for growth.

- Overall view on Remedy 1D(a)

The potential detriment arising from repairs is very significant. We do not believe any decision can be reached gauged on the current detriment. If the CMA fails to address this in a robust and consistent manner Allianz believes it will be a lost opportunity for the consumer.

For the reasons stated above bi-lateral agreements have proven themselves as being incapable of properly addressing the detriment as they are voluntary, non-binding, and rely on trust.

Allianz urges the CMA to review their provisional decision not to proceed any further with Remedy 1D(a). Failure to do so will, Allianz believes, result in current wholesale bi-laterals being cancelled and the majority of insurers employing retail repair cost models that seek to achieve a maximum profit margin, radically altering the basis on which insurance has always operated. We believe the true effect will be to add 25% to the cost of insurer-managed repairs. Wholesale bi-lateral agreements are simply not the answer. They are voluntary, non-binding, and unreliable (as evidenced by Coles & Others v Hetherton & Others).

(e) Remedy 1E – Measures to control non-fault write-off costs

Remedy 1E comprised of two variants:

- 1E(a): Requires the at-fault insurer has the option to handle the salvage in non-captured claims. The subrogated claim would be the pre-accident value of the vehicle and the at-fault insurer would sell the salvage and retain the proceeds.
- 1E(b): Requires settlements to be based on actual salvage values or if estimates are used for the settlement to be adjusted if the actual salvage proceeds vary from the estimate used.

- 1E(a)

Allianz agrees that Remedy 1E(a) would not be effective due to the fact that non-fault insurers would not take up the option of handling non-fault salvage for very good reasons mainly relating to the transfer of ownership.

We agree with and support the CMA's provisional decision not to pursue Remedy 1E(a) any further.

- 1E(b)

Allianz supported Remedy 1E(b) in its response to the Notice of Possible Remedies:

> *"We do not believe that salvage estimates should be used. There is no necessity for it. The subrogated claim should be made once the salvage has been sold, the actual value known, and the net cost of the claim established with certainty. Subject to that revision Allianz does not believe that this remedy, when operating in conjunction with Remedy 1G, gives rise to any distortion or unintended consequence. For that reason it is our preferred remedy."*

In principle Allianz remains of that view although we now recognise that the current detriment is estimated at £2m per annum and the proportionality point. Allianz does not believe that it has the same potential for the detriment to increase in the same way as the control of non-fault repair costs (Remedy 1D).

Allianz does not accept that there are insurmountable design difficulties. Whilst Allianz does not take the view that Remedies 1D and 1E are interdependent we agree with the CMA that they are closely aligned. Therefore if the CMA chooses to review its position in relation to Remedy 1D, as Allianz has urged, it may also choose to include 1E as a matter of completeness. That would protect the consumer not just against current detrimental market practices around control of repair and write off costs but also against those we can now recognise have the potential to cause significant detriment in the future.

(f) Remedy 1G – Prohibition of referral fees

Allianz supported the implementation of Remedy 1G in its response to the Notice of Possible Remedies stating:

> *"Remedy 1G is essential to supporting the effectiveness of Remedies 1A to 1F. It underpins the other remedies and enables them to operate as intended.*
>
> *We do not believe that Remedies 1A to 1F will operate as intended if referral fees remain payable. They incentivise creative solutions to the Remedies and their retention would increase the risk of circumvention."*

Allianz agrees that Remedy 1G is a measure that supports the other remedies proposed as possible remedies. We believe it will make them more effective and enable them to operate as intended. Therefore we believe that Remedy 1G is a key component in the strongest possible interlocking package of remedies.

Whilst Remedy 1G cannot operate on a standalone basis to resolve all detriments identified that is not to say that it has no value in its own right, merely that it is not a "silver bullet" that addresses all identified AECs.

We understand that some respondents rejected this remedy on the basis that other remedies, notably Remedy 1C, Remedy 1D, and Remedy 1E, would achieve the objective of reducing the cost of non-fault claims and restrict the ability to pay referral fees, etc. However, the CMA has provisionally decided not to pursue Remedy 1D or Remedy 1E.

- Possible adverse effects

A decision not to ban referral fees will, Allianz suggests, motivate parties to circumvent the proposed Remedy 1C and 1F to claim the higher rate or to always provide a like for like vehicle irrespective of need.

Prohibition of referral fees will not reduce CHCs' ability to obtain referrals from insurers. Insurers have a need to provide TRVs. They will always therefore have a demand of the services of CHCs. It is merely that the commercial arrangement will be on a different and more transparent basis with no hidden income streams.

Some parties suggested banning referral fees would encourage vertically integrated repair models. Vertically integrated repair models are not an issue in themselves. They only become an issue if the insurer operating them seeks to recover more than the wholesale cost of repair. They clearly offer significant additional benefit to the operating insurers in relation to at-fault repairs and tax saving (there being no VAT between companies in the same Group). Insurers operating these models obtain sufficient competitive advantage via these benefits without the need for referral fees, seeking retail rates on non-repairs, etc.

- Circumvention

Allianz agrees that the remedy would require broad definition to incorporate rebates, profit shares, and other financial mechanisms. However, that can be achieved. Complexity of definition does not seem a reason not to pursue this remedy.

- Alignment with Remedy 1C

The prohibition of "financial inducements" that might potentially be paid to direct non-fault claimants by TRV providers is akin to a form of prohibition of referral fee 1G. If the CMA intend pursuing this we suggest they could achieve it most effectively by implementing 1G.

- CMA's reasons for not taking the remedy option 1G forward

Allianz does not believe that the proposed rate cap set under Remedy 1C would be sufficient to make payment of referral fees unlikely. The existence of referral fees will fuel circumvention of Remedy 1C and Remedy 1F by such means as taking action to ensure the higher rate is payable and/or engineering the mitigation statement so that a like for like vehicle is always provided. It should be recognised that the current GTA rate (the suggested high cap) provides sufficient profit to enable the payment of considerable referral fees.

If the CMA ultimately decides not to pursue Remedy 1D and 1E, which Allianz urges them to reconsider, it does not follow that Remedy 1G becomes ineffective or disproportionate:

a) Allianz disagrees with the concept that referral fees contribute to lower premiums. Referral fees are financed in one way or another through payments by insurers e.g. inflated vehicle repairs or TRV costs. In other words insurers may

receive referral fees in one hand and pay for them out of the other. They are neutral to insurers.

b) Referral fees may not currently be common in relation to write-offs and Allianz accepts that may not be a significant area of potential growth. The CMA states that referral fees paid are "*small*" in relation to repairs. Allianz is concerned that failing to ban referral fees could fuel greater use of credit repair, which the consumer may have no need of, than is necessary.

c) The risk of circumvention and therefore the complexity of definition of referral fees does not seem a reason not to pursue this remedy. It is capable of achievement. Allianz suggests that referral fees add no benefit to the consumer. It cannot be right that they serve to reduce premiums. They are simply a symptom of unnecessary practices and excess charging within the system.

Allianz asks the CMA to reconsider its provisional decision not to pursue Remedy 1G.

3. The sale of add-on products (theory of harm 4)

The sale of add-on products (theory of harm 4)

NCB Information and Protected NCB

1 Implied price of NCB protection and step-back procedures

1.1 Allianz supports the remedy and we believe transparency of the Protected NCB price within the consumer quote process is entirely appropriate. Consumers need to understand at the point of sale what the cost of adding Protected NCB will be. We also agree that at the point of sale and after purchase any step-back procedures relating to NCB are easy to understand and clear in terms of the levels that will apply at the next renewal whether a claim has been made against the policy or not and whether they have Protected NCB or not.

1.2 Allianz provides to consumers a table articulating its step-back procedures whether the NCB is Protected or not. We believe this provides appropriate clarity to the consumer in terms of our step-back process. Allianz does not believe that a prescribed format for Insurers to use would be appropriate and Insurers should be able to present the information in the way that they believe works best for their consumers.

2 Average/typical NCB discount according to the number of NCB years

2.1 Allianz welcomes the CMA finding that it would not be practicable to publish NCB discount levels in view of the potential for consumer confusion. However, Allianz note that the CMA replace their initial proposed remedy with a requirement on the insurer to publish the average discount scale and this would need to be published annually.

2.2 Allianz believes that the fundamental principle of providing any discount whether it be a fixed or average figure drives the consumer to focus purely on this part of the premium calculation. As many Insurers have identified a PMI premium is built up of many factors and relationships between these factors. Allianz cannot see how the publication of an average discount takes away the previous objections in terms of adding consumer confusion.

2.3 Allianz understands the overall objectives of the remedy in terms of enabling consumers to make an informed purchase decision and agree that the value of Protected NCB needs to be clearly explained to the consumer in terms of what may happen to their NCB years. We acknowledge that a key part of the purchase decision will be to understand the cost implications on their next annual premium if they have to make a claim in the current policy period. The

proposed remedy requires the consumer to undertake a 'DIY' premium calculation which we believe is fraught with assumptions and ambiguity.

2.4 Allianz believes this has the potential to drive a poorly informed price expectation from the consumer which is likely to lead to increased consumer complaints on the subject of NCB.

2.5 Alternative solutions need to be considered and Allianz sees some benefit in terms of providing a number of worked examples (clearly marked as examples only) across the NCB range at the point of sale interaction with the consumer. This clearly adds additional material for the consumer to read through and it would add additional documentation change costs into the process.

2.6 'Unfair Contract Terms' requires Insurers to use clear, simple and unambiguous language and this is also reflected in the CMA's own consumer research. Allianz believe that the use of words such as 'may', 'typical' and 'reasonable' contravene this requirement and do not aid consumer clarity or certainty.

2.7 This remedy would require Allianz on an annual basis to change all appropriate consumer facing documentation including policy wordings and any relevant online content. Additional training to operational staff would be required.

2.8 Allianz believes that publishing NCB discount levels for the forthcoming year restricts our pricing flexibility for that particular rating factor and therefore potentially impacts on our ability to differentiate our product and offering from our competitors, thereby causing consumer detriment.

3 Mandatory statements about what NCB protects and does not protect

3.1 Allianz agrees with the CMA that to allow the consumer to make an informed purchase decision around Protected NCB and the benefits to be gained from this element of a PMI, the consumer needs to have clear and concise information on what the Protection provides. Allianz agrees with the intent of the generic statements but feels that a prescriptive approach can be avoided and Insurers are best placed to describe NCB and Protected NCB to consumers.

3.2 Allianz agrees that the proposed statements in 3.52 (a) (i) and (ii) help to provide clarity but is concerned about 3.52 (b) which identifies what NCB Protection will not provide:

> *'No Claims Bonus protection does not protect the overall price of your insurance policy. The price of your insurance policy may increase following an accident even if you were not at fault.'*

Allianz is concerned about this statement for the following reason:

Such a phrased statement might put potential consumers off purchasing this cover. Additionally it introduces uncertain language again in terms of 'may'. Allianz believes that the statement needs to advise the consumer that whilst Protected NCB will protect the number of years earned bonus that they have

(with a link to the step-back process), that NCB in isolation does not determine their premium but this and the interactions with other rating variables will.

3.3 As each Insurer's approach on the application of NCB and the rating factors that they might attach to it vary, we do not agree that these statements need to be standardised across the industry as this has the potential to cause consumer confusion and Insurers should be able to create their own statements but Insurers need to be comfortable that it achieves the intent of the CMA remedy of providing clear and transparent information to the consumer on the application and functioning of NCB and Protected NCB. Insurers need to retain the flexibility to amend the statements.

3.4 The inclusion of the statements will clearly elongate the consumer journey at point of sale.

3.5 Under the proposals (3.62), this remedy would be reviewed by the FCA after 2 years. Allianz believe this period is unacceptably long. If the proposals are found to be defective and do create additional consumer complaints within the 2 year period then we would not be able to change until such time as the FCA had reviewed and therefore this creates potential detrimental outcomes to the consumer.

4 The CMA will assume responsibility for monitoring compliance with this remedy. Insurers and brokers will be required to submit an annual compliance statement setting out the information on average NCB discounts for the forthcoming year.

4.1 Allianz are concerned with (3.61) which requires Insurers to submit an annual compliance statement setting out the average NCB discounts that they propose to provide to consumers in the forthcoming year and the basis for these figures from the prior year. This has the potential to impede and hamper pricing and product innovation over the period concerned, thereby providing potential consumer detriment. As previously stated for various reasons we do not consider the publication of average discounts to be helpful in providing consumers with the appropriate information of NCB and Protected NCB.

Provision of all Add-on Pricing from PMI providers to PCWs (Remedy 4A)

1 Requiring each PMI provider which wishes to offer add-on products to provide pricing information on all the add-ons it offers to the PCWs which list its PMI policies

1.1 Allianz supports the remedy and we believe that customers should be provided with as full information as possible when making their insurance selection, in order that they are able thereby to make a proper comparison between the real prices of products offered.

2 Need to require PCWs to use the information in a certain way.

2.1 Allianz Agrees that PCWs would need to be obliged to use the information in a certain way in order that the prices on competing websites, including add-ons for insurance products are comparable.

2.2 Allianz has considered the comments that have been made in paragraphs 3.75, 3.76 and 3.77 and agrees that PCWs will need to be obliged to offer a given level of information, but that there is a risk of unintended consequences, e.g. in the standardisation of add ons, if this were combined with standardised descriptions on PCWs. In this case, customers might not be able to find the product that is right for them, or PMIs might reduce the cover provided in add ons to a lowest common denominator in order to offer the lowest price.

2.3 Allianz believes that the approach should be regulating in such a way that the needs of the customer are central.

3 FCA to consider the Remedy

3.1 Allianz agrees that since the FCA is currently conducting a market study into general insurance add-on products and is also conducting a thematic review of insurance PCWs, then the FCA is best placed to consider this remedy.

Clearer Description of Add-Ons (Remedy 4C)

1 Requiring each PMI provider which wishes to offer add-on products to provide their description of add-ons to meet Plain English standards and to strike an appropriate balance between providing the relevant information to the consumer and ensuring that the information is understandable and not unnecessarily complex

1.1 Allianz supports the remedy and we believe that customers should be provided with as full information as possible when making their insurance selection.

1.2 Allianz supports the concern raised by the CMA that the remedy should be designed to ensure that it does not lead to reduction in innovation in the provision of add-on products, by restricting product development to fit with standardised descriptions and product types, leading to reduced consumer choice.

2 FCA to consider the Remedy

2.1 Allianz agrees that since the FCA is currently conducting a market study into general insurance add-on products and is also conducting a thematic review of insurance PCWs, then the FCA is best placed to consider this remedy.

2.2 Allianz also believes that the Remedy's design should follow the FCA customer centred approach to regulation and that this further suggests the FCA as the body to consider the remedy**.**

4. Price comparison websites and MFN clauses

Remedy: TOH 5 Prohibition of MFNs, except "narrow MFNs

1 Prohibition of Wide MFNs

1.1 Allianz supports the remedy to prohibit wide MFNs and "equivalent behaviours". We agree that this will enable price competition between PCWs and so benefit the customer. Within this remedy, we believe however that enforcing the prohibition of "equivalent behaviours" will be a challenge and must be taken into account in any regulation. Aside from delisting an insurer, there are several ways in which a PCW could disadvantage a PMI provider partner if it chose to do so. These include, but are not limited to, slow response by the PCW to IT requests from the PMI, charging punitively high commission rates where single homing is significant and the PCW large, or perhaps targetting campaigns for customers to switch at renewal on the customers of a given PMI provider.

1.2 Allianz therefore supports 4.42c i.e. the adoption of behavioural remedies which would seek to prevent "equivalent behaviours when they are for the purpose of stopping insurers from pricing differentially based on different commission rates or other costs of doing business."

1.3 Allianz is concerned that a means of enforcing the regulation to prohibit "equivalent behaviour" needs to be found other than resorting to the use of civil proceedings, except in extreme cases. Otherwise, due to the complexity of the judicial process, it would be possible for equivalent behaviours to be a material problem. A potential solution might be enforcement through the FCA where, since wide MFNs have been shown to be adverse to the consumer, the adoption of appropriate auditable principles, enforced on PCWs by the FCA, might have sufficient effect.

1.4 Allianz agrees that measures to reduce customer single homing rates should not be pursued (4.75). This position is derived from the PCWs legitimate marketing activity to create customer loyalty, and although considerations of market dominance and oligopoly are necessary, single homing measures might have the unintended consequence of reducing innovation between PCWs to the detriment of the customer.

2 Narrow MFN clauses

a. Allianz agrees that the remedy should not be extended to include narrow MFNs as these maintain the credibility of PCWs in the eyes of customers.

b. Allianz agree that narrow MFNs are essential for the credibility of the PCW model, but that they should be defined precisely, to ensure that the retention of

narrow MFNs effective and does not result in unintended restrictions on distribution model innovation

c. Allianz is concerned that the provisional decision (4.112) is not clear in the need for a precise definition of “narrow MFNs” however, and given the range of channels exploited by PMI providers now and in the future (e.g. social media, affiliates, Cashback sites etc) this should be rectified.

d. A clear definition of “narrow MFNs” would enable the emergence of future sales channels or distribution models, while maintaining the credibility of PCWs.

Allianz

Appendix 1

RIPE Bi Lateral Process

Allianz response to CMA private motor insurance investigation provisional decision on remedies

Reduction In Paper Exchange (RIPE) Process

This process is designed to facilitate the recovery of Accidental Damage outlays between participants, without the need for supporting documentary evidence at the time of the request.

The benefits of this are of ultimate benefit to the premium payer, by enabling participants to reduce administration costs and shorten the lifecycle of such claims thus obtaining productivity savings.

By participating in this process, there is no intention that this forms a contract between participants and the terms of the process are not enforceable in a Court of Law.

Terms of Process

The participants agree that, once liability has been agreed, copy documents will only be requested at the time of the recovery request to substantiate the Accidental Damage outlay claimed, in exceptional circumstances.

Reimbursement of accidental damage costs relating to repairable vehicles

At the time of the recovery request, the following information (where applicable) should be made available to the 'at fault' participant:

Vehicle repair costs (broken down to provide the split between labour, parts and paint. This figure should be net of any discounts)
Amounts paid in respect of personal effects
Recovery costs
Storage costs
Courtesy car costs (including daily rate and number of days car provided)
Applicable excess

Reimbursement of accidental damage costs relating to total loss vehicles

At the time of the recovery request, the following information (where applicable) should be made available to the 'at fault' insurer:

Agreed pre-accident market value
Amounts paid in respect of personal effects
Recovery costs
Storage costs
Courtesy car costs (including daily rate and number of days car provided)
Applicable excess
Income from sale of salvage

Payments

After settlement is agreed, payment should be made as soon as possible, but no later than 21 days after the request for payment.

Audit

Audits will be conducted every six months – dates as follows:

- ✓ 1st of March – completed by the 31st of May
- ✓ 1st of September - completed by the 30th of November

The Auditor and Auditee will follow the **Audit Timeline document.**

An audit schedule **RIPE Form A** will be distributed identifying: -

- The participants who have bi-lateral agreements
- Of the participants, who have bi-laterals, which participant will audit another participant with whom they have a bi-lateral agreement
- The timescales for various milestones within the audit process and the date for completion and submission of audit results

The Auditor will select 50 claims on which they have received and paid requests for Accidental Damage outlays from the Auditee, payments should have been made in the last 6 months.

The selected claims should cover as wide as possible a range of claims values and include a selection of total loss claims. Where identifiable, selection should be made across the range of the audited company's subsidiaries, trading names, claims handling locations and business classes.

A list of the selected files is to be sent to the Auditee using **RIPE Form B.** This will contain sufficient information for the claims to be identified. Once a selection has been made no changes or substitutions are to be made.

For each file on the list, the Auditor will request documentation supporting the amount claimed and paid. The documentation must provide sufficient detail to show that the amount requested matched the amount paid and was correctly recovered in line with the bi-lateral agreement between the two participants.

The Auditee will supply supporting documentation within 28 days of the receipt of the request using **RIPE Form C.**

When auditing the following should be checked for each claim:

- ✓ Whether documentation has been supplied
- ✓ Whether it supported the amount requested and paid
- ✓ The +/- value of any difference between payment and documentation
- ✓ That recovery has been correctly pursued in line with the bi-lateral agreement between the two participants.

To pass the Audit, the Auditee must produce documentary evidence on not less than 90% of the cases audited. Any deficit in providing documentation for 100% of cases will be filled with screen prints showing evidence of the outlay.

90% of the files audited should be correct i.e. the amount requested is in line with the amount paid out by the participant and demonstrates correct application of this process.

The Auditor will, by Day 71, provide to the Auditee a schedule of the cases reviewed using **RIPE Form D** showing the **initial findings.**

The Auditee must respond and raise any challenge to the Auditor where they believe that the Audit is incorrect. The requirement being that by Day 92 there is an agreed Audit result.

The Auditor will report to the Audit Manager by the due date using **RIPE Form E.**

The Audit Manager will present results prior to the next meeting detailing the following:

- ✓ Whether the Audit was a Pass or a Fail
- ✓ The number of screen prints provided

If the Audit was a fail, the generic reason for the failure (taken from the list below) should be given:

- ✓ Vehicle repair costs incorrect
- ✓ Vehicle repair costs unsubstantiated
- ✓ Amount paid for personal effects incorrect
- ✓ Amount paid for personal effects is unsubstantiated
- ✓ Recovery costs incorrect
- ✓ Recovery costs unsubstantiated
- ✓ Storage costs incorrect
- ✓ Storage costs unsubstantiated
- ✓ Courtesy cars costs incorrect
- ✓ Courtesy car costs unsubstantiated
- ✓ Income from sale of salvage has not been correctly factored into the amount requested
- ✓ Excess incorrectly applied

Details of the specifics of the cases, which have failed should only be discussed between the Auditor and the Auditee, as the detail will relate to the correct/incorrect application of the bi-lateral agreement between both parties.

Audit Review

If an Audit is reported as a Pass, any other participant, who has a bi-lateral agreement with the participant who has passed, can, accept the Pass or if they choose to, exercise their right to separately audit the participant. This should be arranged independently between the two parties.

If an Audit is reported, as a Fail, any other participant, who has a bi-lateral agreement with the participant who has failed, can, if they choose to, exercise their right to separately audit the failed participant. This should be arranged independently between the two parties.

If a participant fails the audit review, depending on the reason for the fail, all of the other participants, who have a bi-lateral agreement with the failed participant, could request that one of the following courses of action is taken:

- A further Audit(s) is/are undertaken between participants with separate bi-lateral agreements with the failed participant

And/Or

- The failed participant is required to send documentary evidence to support all Accidental Damage outlay requests for a period to be agreed by the reciprocating participants

And/Or

- No action is taken by some/all of the reciprocating participants depending on the reasons for failure

Criteria for Participation

To ensure harmony and optimisation of the audit process, companies wishing to participate in the process should be both payers and recoverers of Accidental Damage outlays.

Requests to participate will be directed to the current Chairman. Subject to the minimum criteria for participation being met, the Chair will communicate this request to all other participants. The Chair will provide the new participant with contact details at the current participants to allow them to discuss whether or not they wish to enter into a bi-lateral agreement with the new participant.

Where bi-lateral agreements are made, details of which participants have entered into bi-lateral agreements with other participants will be disclosed to facilitate the audit process.

A high level matrix will be held by the Chair and the Audit Manager providing details of all participants and with whom they have bi-lateral agreements.

Committee Meetings

The Committee is composed of representatives from each of the participating organisations. The Committee is focused by the management group, which consists of a Chairman, a Secretary and an Audit Manager. The management group is purely administrative in function and carries no superiority in terms of committee decisions.

The management group is elected from the Committee by the Committee from time to time. Terms served are for a minimum of 12 months.

The Committee will meet every 6 months to review the audits. Discussion at these meetings will be strictly limited to Audit results (i.e. whether a participant has passed or failed and the generic reason for the fail where applicable) and, where necessary, any proposed change to this process, which would require agreement. Participants are urged to ensure that they are represented at each of these meetings.

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Appendix 2

Transcript:

Coles & Others

V

Hetherton & Others

Thursday, 4 October 2012
(10.30 am)
Submissions by MR BUTCHER
MR BUTCHER: May it please your Lordship. As you know, I appear for the RSAI policyholders. Otherwise your Lordship is familiar with the representation, it is the same as last time.
MR JUSTICE COOKE: Yes.
MR BUTCHER: As your Lordship knows, this hearing has been fixed in order to deal with certain outstanding matters that in consequence were not dealt with in your Lordship's judgment. In fact, there are only a limited number of matters which we would say are relatively short dividing the parties and it is the hope at least on this side that the hearing will not need to take up the whole day or indeed anything like it.
My Lord, can I just remind your Lordship that there was an order for determination of three preliminary issues. There was also an application to strike out various parts of the defendants' pleadings. Obviously there was a considerable amount of overlap between the subject matter of the preliminary issues and the strike-outs. That has allowed for the agreement in relation to a large number of parts of the pleadings that they should be struck out and there are only

a limited number of points which still remain.
MR JUSTICE COOKE: Yes. It's strike-out rather than summary judgment.
MR BUTCHER: Well, some of them may be summary judgment.
MR JUSTICE COOKE: Those that follow inexorably, so to speak, from what I have already decided, it's a strike-out, but those where there are potentially at least some issues of fact may be more suitable for summary judgment.
MR BUTCHER: The application --
MR JUSTICE COOKE: If at all.
MR BUTCHER: -- was made under both. There are at least two areas where one could say that summary judgment might be in a sense the appropriate route. For example, the suggestion that there are administrative costs.
MR JUSTICE COOKE: Yes.
MR BUTCHER: There is no evidence whatsoever that there are administrative costs. That could be dealt with as a matter of summary judgment. We would say actually it could be dealt with by strike-out as well because it doesn't matter whether there are, but even without that you could dispose of that as a matter of summary judgment.
So, my Lord, can I just proceed, if I may.
MR JUSTICE COOKE: I'd like to ask one preliminary question.

MR BUTCHER: Yes.
MR JUSTICE COOKE: Which relates to the pleading point.
MR BUTCHER: Yes.
MR JUSTICE COOKE: Because it seems to me that if a claim was to proceed on the basis of being a claim for specific special damages in the shape of repair costs claimed by the policyholder, though actually incurred by RSAI, then each and every item on the bill would be susceptible to challenge and all the points that are made about were they incurred, summary charges, and so on, would be of significance, but if the claim proceeds on the basis that you were putting forward last time round and which I've accepted as being an appropriate jurisprudential basis, then one is simply looking at the question of whether the repair costs, and I mean true repair costs and I know there are some questions round the edges as to what might be included and what might not, but whether the overall figure for repair costs is simply a reasonable, objective commercial repair cost, and then all the points about the individual items effectively fall away.
It seems to me that inextricably follows from what I have already decided. Obviously I will wait and hear what Mr Curtis has to say about it but the pleading point therefore does seem of some importance because all

Mr Curtis's points about individual items may well be good points or at least certainly raise factual issues if one has to descend to looking at every single item.
MR BUTCHER: We do indeed intend to put it on the first of those bases.
MR JUSTICE COOKE: I am sure you do.
MR BUTCHER: If necessary, we can produce the pleading now. As your Lordship says, there is no substance in a pleading point. Once it's been made clear what the law is, we intend to proceed by reference, as we have always made clear, to the first way of putting that. That is how we intent to proceed in relation to these claims in the next stage.
MR JUSTICE COOKE: Yes. I follow that.
MR BUTCHER: Of course I do accept, and it is quite highlighted by this hearing, that there are certain matters which if we intend to claim we will have to plead by way of consequential loss.
MR JUSTICE COOKE: Yes.
MR BUTCHER: Or special damage, and they include --
MR JUSTICE COOKE: The delivery charges, collection charges and courtesy vehicles.
MR BUTCHER: Exactly, but subject to that, no.
MR JUSTICE COOKE: I suspect, as you say, that in reality the differences between you are small once that

distinction is recognised between the way the case is currently framed and the way in which Mr Butcher puts the case. Am I wrong about that? Am I optimistic, Mr Curtis?

MR CURTIS: My Lord, on the issues such as administrative charges and the issue about is it reasonable cost of actual repairs or reasonable cost of reasonable repairs, to take two examples, on points like that we have advanced arguments in our supplemental note, but essentially, without making any concession, what it might be said that we're saying is simply that these are points that are not expressly covered in your Lordship's judgment to date and, for the assistance of courts up and down the land that are going to have to deal with these matters, if your Lordship clearly meant that we failed on those points and I suspect from what your Lordship has said already that that is what is meant, all we're saying is that it would be helpful if that was spelt out.

To take an example, in the Fallows case His Honour Judge Platt specifically dealt with the administrative charges point. If that wasn't covered in your Lordship's judgment, then somebody in some other court might take the point that there are two conflicting views on it. As I say, I rather --

MR JUSTICE COOKE: I think it might carry a little more weight than Judge Platt but the Court of Appeal's view would doubtless carry even more weight.

MR CURTIS: My Lord, of course, but imaginative advocacy somewhere might persuade somebody to a different view, particularly if it's in front of an assistant district judge in a court who knows where.

MR JUSTICE COOKE: In Romford.

MR CURTIS: Your Lordship can say that. I can't possibly agree.

My Lord, so on points like that I suspect there isn't a great deal of argument between us.

MR JUSTICE COOKE: Yes.

MR CURTIS: Can I just though, if I may, correct one point that Mr Butcher made which is he said there is agreement that there should be a strike-out, apart from the few points that I highlighted are in dispute. As we have expressly said, we don't concede anything at all.

MR JUSTICE COOKE: Understood.

MR CURTIS: We are simply saying that we're not going to waste the court's time, obviously enough, by taking up or attempting to take up time repeating points that we have made already, but we don't concede summary judgment or strike-out.

MR JUSTICE COOKE: No, I understand entirely. There are no

concessions and I follow.

MR CURTIS: There are no concessions at all.

My Lord, I suspect that the two points on which there is likely to be most argument are, first of all, the estoppel point, although that may be comparatively short because I don't think there's any disagreement between us as to what the legal principles are. It's simply whether or not we have an answer to Mr Butcher's three points that he makes against us. He says we must inevitably fail for any one of those three.

Then the other point is the point about courtesy car and the question of whether or not it's a good answer for us to say to that that the policies didn't provide an indemnity in respect of loss of use. That is the narrow point I think between us and, therefore, this case falls into a Dimond situation where the cost of the courtesy car cannot be recovered.

My Lord, that really involves just going through, and I think it's quite quick, the points that we have made, I think five points in our skeleton argument. So I would agree with Mr Butcher that I don't think we're going to be anything like the whole day.

MR JUSTICE COOKE: Very good. Thank you very much. That's very helpful.

MR BUTCHER: It is helpful. I certainly didn't intend, when

I said there was agreement on the strike-out, it's just that there is no challenge which is being made today to -- or time is not going to be taken as a result of certain parts. Of course I apprehend that Mr Curtis is going to ask for permission to appeal and he may well want to take all of these points to the Court of Appeal.

MR JUSTICE COOKE: Yes.

MR BUTCHER: So, my Lord, can I go in the light of that helpful indication to the subjects where there may be some argument and one part which I should mention, although it hasn't been mentioned by Mr Curtis in those two points, is the issue of delivery and collection charges. It's paragraph 20 of our note. I think it's right to say here that both parties have developed their thinking in relation to this a little bit. The result of our thinking is effectively set out in paragraphs 21 and 22.

The only remaining point which was preserved for argument today by Mr Curtis was the issue of the terms of issue 18, which is set out in his note at paragraph 26. In particular, the answer given:

"It was not reasonable in any of the transferred cases involving Provident and Allianz policyholders because (a) the damaged vehicles were roadworthy."

MR JUSTICE COOKE: Yes.

MR BUTCHER: What we say is effectively that the position is more complicated than that and it's as set out in paragraph 22 of our note. There is clearly a category of case where the cost of the collection of the vehicle is part of the repairs. It's an obvious case where the vehicle simply can't be moved.
MR JUSTICE COOKE: Yes.
MR BUTCHER: So all cases probably where the vehicle is not roadworthy, the cost of collection is going to be part of the reasonable cost of repairs.
MR JUSTICE COOKE: I take it that's not a very likely situation where the repair bills, for the most part we're talking merely hundreds of pounds rather than write-offs.
MR BUTCHER: Or nearly.
MR JUSTICE COOKE: Yes.
MR BUTCHER: I don't know exactly how common it is but that may be --
MR JUSTICE COOKE: It's a theoretical possibility. The other one is the one you mention your footnote 4, isn't it?
MR BUTCHER: Quite.
MR JUSTICE COOKE: Is there anything outside that?
MR BUTCHER: I wouldn't like to say that we have captured all the possibilities. All I'm saying is you couldn't

draw the line simply at roadworthiness, strictly roadworthiness. That the only point we're making here. It's not a question for your Lordship to try and determine what the exact bounds are, I would say, although you may be able to give some indications, but we're just saying that it's not simply roadworthiness.
In other cases it may be entirely reasonable for the policyholder to avail himself of a collection or delivery service, in which case the charge will be a consequential loss and have to be claimed as such.
MR JUSTICE COOKE: That could arise in the context of remote garages and that sort of thing or remote places where the car is at the time and presumably questions of the owners' time.
MR BUTCHER: Absolutely.
MR JUSTICE COOKE: That's the other element that presumably comes in in terms of looking at consequential loss, loss of use and the owner having other business to get on with which means that there may be economic and indeed proper mitigation.
MR BUTCHER: I speak with feeling having found myself going to a garage in the sort of outer suburbs and needing to be in court at 10.30. It's sometimes not entirely straightforward.
MR JUSTICE COOKE: But how does that work in terms of

mitigation of loss to pay for someone to collect your car, as opposed to you driving it to the garage yourself?
MR BUTCHER: It's a reasonable part of your -- it's an expense which is incurred as a result of the accident and it's a reasonable expenditure as part of the process of avoiding your loss or reducing it because otherwise, theoretically, you might well have a claim for your lost time or the inconvenience.
MR JUSTICE COOKE: That's what I was thinking.
MR BUTCHER: And it mitigates that or avoids it, but if I may say so, my Lord, I think having identified what the difference of the legal principle is, one shouldn't try and go into too much detail about the facts because --
MR JUSTICE COOKE: I follow that but in practical terms it seemed to me that I probably don't strike out anything in that area, is that right?
MR BUTCHER: No, you do indeed strike out, we would say. I would say you should strike out the whole of the answer to 18 because it suggests that there are absolute rules here where the position is not like that because it says that it wasn't reasonable in any of the transferred cases because the damaged vehicles were roadworthy, as if that's an absolute rule. If they were

roadworthy, then it could not have been reasonable. In fact, it's going to be somewhat more complicated than that.
Equally, the mere assertion that the RSAI policyholder should reasonably have collected his/her vehicle from the repairer, there's no underpinning to that as a matter of generality. I'm not saying that this can't be argued in the particular cases and indeed the whole thrust of what I'm saying today is these general pleadings have now served their purpose.
MR JUSTICE COOKE: I understand that, in which case whether I strike out or what I do is in a sense irrelevant. The important thing is that I should say what the principles are --
MR BUTCHER: Indeed.
MR JUSTICE COOKE: -- for the parties' benefit and my inclination would be to leave this intact on the basis that I understand Mr Curtis is saying in fact in each of those particular cases this applies. He may be right or he may be wrong.
MR BUTCHER: If he's saying that, then of course I understand. If this is just going to be what his defence is in relation to these claims in the particular cases, then I have no real problem with it. I do have a problem with it if it's meant to be some sort of

statement of general principle.
MR JUSTICE COOKE: I follow.
MR BUTCHER: So that is that.
My Lord, I think the next topic is the perhaps slightly more difficult one of the courtesy car. What is said in the defendants' pleadings at the moment is that there can be a determination in principle that there can be no recovery for any element in respect of such a vehicle. As your Lordship knows, it is correct that the principles in relation to recovery in respect of a replacement vehicle are somewhat different from those of damage to the vehicle. It's on the other side of the Burdis v Livsey divide which your Lordship has referred to, but they're not difficult principles. We set them out in paragraph 74 of our original skeleton argument. It's 74. As we say in (a):
"Where a person is deprived of his assets for a period of time he can recover substantial damages for its loss of use and it is no answer to say that he might not have used it. Where he hires his damages should be assessed by reference to the cost of hire, provided there had been no failure in mitigation."
The third, the (c) is perhaps the most significant here:
"Where the person's insurer provides a replacement

vehicle his damages should be assessed by reference to the reasonable cost of hire to the insured person."
What we say is that the damages can be considered to be general damages for loss of use, or special damages but the categorisation doesn't matter. The measure of damages is still the same. We refer to Bee v Jenson.
MR JUSTICE COOKE: Yes.
MR BUTCHER: Effectively this point is in our submission covered by Bee v Jenson number 2. I don't know whether your Lordship wants to see it again. It's in the authorities bundle at tab 66 of bundle 2.
MR JUSTICE COOKE: Isn't this already effectively in my judgment?
MR BUTCHER: It is effectively, yes. Lord Justice Longmore says at the end that the fact that it was provided by an insurer means that you have no regard to it and that the claim, as it were, can still be made.
MR JUSTICE COOKE: Quite.
MR BUTCHER: We say, therefore, that this point is effectively covered.
Now, the only answer which is given to this -- well, there are two answers. Both are in my submission obscure.
MR JUSTICE COOKE: Opaque I think you say, rather than obscure, in your submissions.

MR BUTCHER: It's one or the other or perhaps even both. The suggestion is that this arrangement here is a benefit and that is not the same as an indemnity. Entitlements under insurances are very often called benefits. They can be and very often are indemnities. Here, in our submission, what is provided is indeed an insured benefit and the benefit indemnifies the policyholder against the loss of use of the vehicle. It holds him harmless against the loss of use of the vehicle.
MR JUSTICE COOKE: Mr Curtis, is this a construction point, a point of construction of the policy?
MR CURTIS: My Lord, it is. We submit that when one looks at the policy, however Mr Butcher tries to phrase it, there is plainly no indemnity under the policy in respect of loss of use. The insurer provides no such indemnity. In fact, it would be very unusual if a motor insurance policy did provide such indemnities. The absence of such indemnities is what led to the growth of the credit hire industry.
The policy in this particular case, and I say "the policy" and the point applies to all of the different forms of the policy that we have, what it does is provide a benefit in this sense: the policy primarily offers the insured the choice either of having his car

repaired by the Recommended Repairer route which we know means going down the MRNM route primarily. The alternative is for him simply to arrange to have the car repaired himself and then present the bill to his insurer, RSA. Of course if insureds were to take that second option it would deprive RSA of the benefits it achieves by having its insureds' vehicles repaired under the Recommended Repairer route. So what it does is offer a series of incentives to its insureds to persuade the insured to go down the Recommended Repairer route. One of those incentives is the provision of a courtesy car.
So in our skeleton argument we describe it as a benefit. Perhaps one can refine it even more and say it is simply an incentive that is offered to persuade an insured to use the Recommended Repairer. Other incentives are the lifetime warranty on the repairs that are offered under the policies.
We submit that the key question is to ask: does the policy provide the insured with an indemnity in respect of his loss of use? The answer to that we submit is plainly no. We submit that that is the essential point which distinguishes this from Bee v Jenson.
In Bee v Jenson number 2 we submit that what the Court of Appeal clearly had in mind when it was talking

about cars provided by an insurer being ignored for the purposes of assessing damages was this: cars provided by an insurer as an indemnity under the policy. Here the cars are not provided as an indemnity under the policy because there is no indemnity under the policy in respect of loss of use. We say that is the distinguishing point.

I'll take you in due course, as we do in the skeleton argument, through the authorities to demonstrate why we say as a matter of law that that is the key point which --

MR JUSTICE COOKE: Policy in Bee v Jenson being different.

MR CURTIS: In Bee v Jenson the position was that the car was provided, I think it was under a second or separate insurance policy, but it was provided as an indemnity. In this particular case the car was not provided by way -- as a form of insurance indemnity because there was no indemnity under the policy in respect of loss of use.

MR JUSTICE COOKE: Thank you.

MR BUTCHER: My Lord, we would say that the critical question is in fact whether the benefit, whatever, is a fruit of insurance, whether it is the fruit of the insurance arrangements which the prudence of the insured, he has taken out. If it's the fruit of the

insurance, then it will be disregarded. A nice attempt to distinguish between a benefit and an indemnity after an insurance are not relevant, but in fact we would say that this distinction is one which dissolves if you start to look at it and you start to look at one of the policies.

Mr Curtis says all of the policies are the same, or all have the same effect. I will, if I may, take the one which is at tab 17 of core bundle 2. If you go to page 251, it starts with 249. 249 is "Your complete guide to your car insurance" and at 250 it says, this is in the right-hand column under "Welcome":

"This booklet is designed to help you ... to reassure you ...

"The booklet also includes all the details you need to know about your policy."

If you go to page 251, "Your cover at a glance -- "Your cover at a glance" -- "Standard benefits", courtesy car is included.

Then if you go to 253, "Quality cover that goes a bit further". Then it says "Keeping you mobile" in the right-hand column:

"Using our Recommended Repairers also means that you'll be provided with a courtesy car whilst yours is being repaired (Comprehensive Cover only)."

Then if you go to page 256, this is in the "Key facts":

"Standard features. The following will automatically be included in your policy according to the cover you have selected.

"Courtesy car [the third one down]. While the car is being repaired by one of our Recommended Repairers, following an insured incident."

So that is taken out if it's comprehensive.

Then page 261. This is a heading, "Policy wording. Some key benefits in a little more detail."

Under the third heading down, "Courtesy car (comprehensive only)":

"If your car is being repaired by one of our Recommended Repairers following an incident covered by your policy and you have our Comprehensive Cover, we will provide a small loan car whilst your own car is off the road."

Now, in our submission that is an unequivocal undertaking by the insurer to provide such a car. There is not a discretion about it and if the insurer, for example, refused in the circumstances mentioned to provide the car, it would be in breach of contract.

This is thus an obligation which the insurer has undertaken as part of the insurance arrangement. It's

undoubtedly a fruit of insurance, an enforceable fruit of insurance, part of a package which provides an indemnity and, indeed, it indemnifies as well.

If you take the rationale of why the arrangements with insurers and the fruits of insurance are not taken into account in assessing the loss, it is that the insured who has made prudent arrangements should not thereby confer a benefit by his own expenditure of money on the tortfeasor, Parry v Cleaver. That applies exactly to this case. Why should a person who has taken out comprehensive rather than ordinary third party liability cover thereby effectively be conferring a benefit on the tortfeasor? It's exactly in parity, as we would say, with other payments or benefits received under insurances.

So, my Lord, we would say that in any event the claimants are entitled to recover an amount in respect of loss of use and any benefit provided by insurers is not to be set off against that claim. So the first objection to recovery of a courtesy car simply is unsustainable.

The second suggestion is that no amount can be recovered when the courtesy car is provided by a repairing garage at no cost. That equally is unsustainable. The car is provided pursuant to

arrangements made by the insurer. It has been sourced by the insurer through commercial channels and the nature of those arrangements is entirely irrelevant to the claim. Accordingly, as we say, the claimant remains entitled to recover against the tortfeasor the reasonable cost of hiring a replacement vehicle and it doesn't matter that there was no cost to him of the vehicle, any more than it mattered in Bee v Jenson.

So, my Lord, that is essentially what we say in relation to courtesy cars.

My Lord, the only other point which I think necessary for me to develop in opening is the estoppel point. In our submission this is of all the points that Mr Curtis has taken the very worst. It is an argument which has been raised by Allianz alone. It wasn't even mentioned at the initial hearing in front of Mr Justice Walker in which directions were given as to how these cases would proceed and it is an extreme oddity. It is a plea of an estoppel which it is said prevents the present various claimants -- in fact actually only one of them -- from recovering the amount they claim on the basis that there was a reduction in paper exchange process between RSAI and Allianz from 2008 to 1 February 2011 which led to the handling under that process of a number of claims, the suggestion being

that Allianz presented and paid claims as part of that process on the basis that the sums stated were for no more than the amounts charged by garages which performed the physical repairs to the cars.

That's what they say they assumed. They say we knew and acquiesced in that assumption and that led to Allianz paying claims on the basis of that assumption. It's confirmed by Mr Curtis that this is intended to be a plea of estoppel by convention.

Clearly we dispute any of those factual averments, but the truth is that this is a hopeless allegation because the present claims have ex hypothesi not been settled by Allianz as part of the RIPE process. They can defend themselves and are actively doing so and they can defend themselves precisely on the basis that they say that the amounts being claimed exceed the amounts which were charged by the repairing garages in some cases.

In other words, the precise nature of the points they are taking in this court to defend the claims are the ones which they say under the RIPE regime they have a different understanding about.

So if you ask yourself what is the common assumption --

MR JUSTICE COOKE: You say this is really a claim for breach

of RIPE?

MR BUTCHER: Indeed. They have intimated, I should say, that they may have some claims in relation to breaches of RIPE or -- I don't think they would say breaches but would say misrepresentation or something like that. Obviously that would be strongly contested, but it's not for these cases. These cases are the ones which --

MR JUSTICE COOKE: Is RIPE a contractual arrangement?

MR BUTCHER: No, it's not. It says very specifically that it's not a contractual arrangement.

MR JUSTICE COOKE: Yes.

MR BUTCHER: So whatever the position may be in relation to those, it clearly can't apply to these where we are actually having an argument which is precisely founded on the fact that they have not paid the claim on the basis that they understand full well what the position actually is and so they have been able to protect themselves by taking exactly these defences in relation to this particular claim.

So the idea that an estoppel by convention could apply in these circumstances is completely novel. There is not the slightest suggestion in the authorities that it can apply. As we say, we have identified at least three reasons why it can't apply. The first is --

MR JUSTICE COOKE: Aren't your first and third reasons

pretty much the same?

MR BUTCHER: They are. They are pretty similar.

MR JUSTICE COOKE: I thought as much. Where do I find them? 78, is it?

MR BUTCHER: 78 to 87. They overlap in the first and third; they are not exactly the same. The first highlights that estoppels by convention apply to a transaction and attached to that transaction -- this is paragraph 83, Lord Justice Eveleigh in AIP v Texas Commerce, which I don't think we need to turn up:

"The estoppel does not go beyond the transaction in which it arose. The representation or assumed state of facts are not to be held irrefutable beyond the purpose for which the representation or assumption was made."

Then the next point:

"Estoppel by convention doesn't have a prospective effect, in that once a belief has been revealed as erroneous the estoppel does not apply to future dealings between the parties."

I just wanted to show your Lordship in that regard the first reference which we give there which is to the Vistafjord. The Vistafjord is at the authorities bundle number 1 at tab 38. At page 352 Lord Justice Bingham has been setting out a long passage from a judgment of Mr Justice Peter Gibson in Hamel-Smith v Pycroft. Part

of what he sets out at page 352, in the right-hand column, just before the break between the first and second paragraphs:

"Once a common assumption is revealed to be erroneous, the estoppel would not apply to future dealings between the parties."

Here, as we would say, this is clearly a future dealing as far as the RIPE process is concerned. It has not been processed through RIPE. This is a dealing subsequent to the assumption being shown to be erroneous, namely the presentation of the claim and its being resisted.

So what Allianz has to do here is to adopt what we say is a completely artificial approach of trying to characterise the RIPE protocol as a transaction. It wasn't the relevant transaction here. It was a means of handling a series of transactions, namely the various different claims of policyholders.

What this mischaracterisation is really trying to do is by reason of a supposed estoppel to compel settlements of unresolved claims in accordance with the protocol, but that cannot be done.

Our second point is that an estoppel by convention works only between the parties to the understanding. Here the claims which are being brought and defended are

as a matter of law and principle actions between the policyholders on each side. Those policyholders will have known absolutely nothing about RIPE or its assumptions and there is not any basis for attributing knowledge of any of that to them on either side.

The attempt to answer that by Allianz is to say, "Well, the claims were put forward under the protocol when they were put forward under the RIPE protocol by RSA and could be dealt with having been submitted by RSA".

That is no answer. Each individual policyholder has a vehicle damage claim in tort. Yes, his insurer may have authority to settle the claim by reason of its contractual rights but the policyholder can't be estopped from pursuing an unsettled claim by virtue of a commercial understanding shared by his insurers but not shared by him.

Mr Curtis will struggle, I would suggest, to find any authority which begins to suggest that an estoppel can work in that sort of situation.

Finally, your Lordship says it overlaps but it is a different point in a sense because reliance is always a critical feature of an estoppel. Allianz hasn't relied on the alleged assumption in relation to this claim. On the contrary, as I said at the outset, it has

very specifically not relied on that assumption. It has been making a great deal in front of your Lordship of the actual facts.

I should just mention one further point, if I may, which is that there was reference in Mr Curtis's skeleton argument and there is a case which is in the bundles called the Revenue & Customs Commissioners v Benchdollar. One of the things which it says is that the effect of the party becoming aware of the untruth of a shared assumption is not necessarily to kill the estoppel stone dead there and then. True, but what was being said there by the judge was that if the reliant party has been acting under a mistaken assumption, he will be given a limited time in which to protect himself from the consequences of the discovery of the true legal or factual position.

Fair enough, but that has absolutely no relevance here because Allianz has indeed taken the steps to protect itself from the consequences of the discovery of the true position. It has not paid the claim pursuant to RIPE and has been actively defending the claim on the basis of the true position.

So, my Lord, for those reasons, we say that this estoppel plea is hopeless and should be struck out.

My Lord, I would only wish to develop any further

points to the extent that they are causing your Lordship trouble in relation to the various different paragraphs of the pleading and so on. I am not going to say anything at the moment about the future conduct of the litigation, which presumably it will be more sensible to return to at the end of the hearing, but otherwise I didn't understand really from Mr Curtis that there was going to be any huge debate about other parts.

MR JUSTICE COOKE: Yes. Perhaps it's easiest if I hear from Mr Curtis and see what is in issue. Thank you.

Submissions by MR CURTIS

MR CURTIS: My Lord, the easiest starting point is probably going to be our note for the resumed hearing and just to touch briefly on the various points there that we mentioned at the very beginning, but which Mr Butcher -- no criticism here -- hasn't expressly covered so far in his submissions.

MR JUSTICE COOKE: Yes.

MR CURTIS: If one turns to page 2 of our note, the first area --

MR JUSTICE COOKE: Bear with me for a moment, Mr Curtis, sorry. I am just trying to find where I have put it. It's at the back of the core bundle, is it?

MR CURTIS: I think it has been inserted at the back, yes.

MR JUSTICE COOKE: I think I have put it somewhere else.

(Pause) Yes, I am with you. Thank you.
MR CURTIS: My Lord, if one goes to the bottom of page 2, the first area of the application that we deal with relates to the introductory sections of the pleadings. My Lord, you will see highlighted in bold the fifth sub-paragraph.
MR JUSTICE COOKE: Yes.
MR CURTIS: There there's simply a short point which is that we submit that shouldn't be struck out, perhaps only with this amendment to it, that the word "evidence" should be substituted for the word "measure" because we say that once that substitution is made, sub-paragraph 5 accords with your Lordship's judgment and is simply making an averment about the nature of the evidence that is the best evidence for the assessment of damages.
Your Lordship's judgment, as I understand it, says that it's going to be a matter for the individual judges in individual cases and in the first instance for the Mercantile judge in these cases to decide what evidence he or she does or doesn't accept when deciding what the reasonable cost of repairs is. The averment that we have made there we submit is simply consistent with that if the word "measure" is removed and replaced with the word "evidence".
So it's a small point but we submit that there is no

need and indeed that it would be wrong for that paragraph to be struck out.
To put our cards on the table, we will submit in due course, when this matter comes before a Mercantile judge, that your Lordship's judgment defines the legal test that the question of what evidence should be relied on or acted on in order to decide how that test is applied and what the result of applying the test is would be a matter for the Mercantile judge and the Mercantile judge might, for example, accept a submission that in the managed cases the best evidence of what a reasonable cost of repair is on your Lordship's definition is, for example, the evidence in the garage invoice in a particular case, rather than the evidence in the BIC, rather than any expert evidence that RSAI may call. It's a question of evidence at that point and all this paragraph is doing is simply reflecting that.
My Lord, it is perhaps, as I say, not a hugely significant point.
The next one which deals with the hourly labour rate, that in the end is the argument about administrative charges. As I understand the position, although it's not expressly stated in your Lordship's judgment, your Lordship's judgment should be understood by the parties and understood by Allianz and Provident

as saying that because what matters is the reasonable cost of repair according to your Lordship's test, it is therefore irrelevant to portion up that overall reasonable cost and because it's irrelevant to portion it up, it's equally irrelevant if the actual repairs that were carried out and the actual cost of them --
MR JUSTICE COOKE: Are you having trouble?
THE STENOGRAPHER: Yes.
(Discussion re technical issues)
MR JUSTICE COOKE: Let's take a ten-minute break now.
(11.22 am)
(Break taken)
(11.28 am)
MR CURTIS: My Lord, can I invite your Lordship just to go very briefly to paragraph 42 of your judgment which I think is in two places, but one of them is tab 15A. Paragraph 42 is the paragraph in which your Lordship sets out your conclusion on preliminary issue 1.
MR JUSTICE COOKE: Yes.
MR CURTIS: About halfway through, the paragraphs reads:
"Thus a court can assess the reasonable costs of repair by reference to any evidence which is sufficient to discharge the burden of proof."
Your Lordship will be familiar with the paragraph. I won't read it all out. It concludes:

"In each case it will be a matter for the court to determine whether the claimant has made out its case, whether or not repairs have been done and whether or not an invoice is produced for the repair costs."
It was in the context of paragraph 42 that I submitted that the passage in the introductory section of the pleading, (v), that's highlighted on page 3 of our note should stand.
MR JUSTICE COOKE: Yes.
MR CURTIS: Just to clarify that point.
My Lord, then I come on to deal with the hourly labour rate on page 4 of our note. My Lord, I was about to draw your Lordship's attention to paragraph 12 down at the bottom of page 4. That's where we summarise the effect of the highlighted words that we seek to preserve. They aver that administrative charges are irrecoverable. We submitted that the judgment does not decide or does not decide expressly that they are recoverable. The judgment does not say that it's irrelevant if part of the actual repair cost relates to an expense which is irrecoverable in law.
Then it goes on to say:
"The defendants resist the summary judgment strike-out on the grounds set out in paragraphs 129 to 137 of their skeleton argument for the last hearing."

My Lord, can I take you very briefly to some passages in those paragraphs in the original skeleton argument.

MR JUSTICE COOKE: Yes.

MR CURTIS: My Lord, I do so simply to remind your Lordship of the point that was being made at the last hearing. It's page 45 of the skeleton argument. In paragraph 129 we made the submission that:

"As to administrative functions, the administrative costs an insurer incurs are not recoverable as damages in the subrogated claim. This is because they are not part of the cost of repairing the damage to the claimant's car and do not form part of any other recognised head of damages which the claimant is entitled to recover from the defendant tortfeasor as a result of the tort."

My Lord, we then note that there is a dispute in the evidence as to whether or not administrative costs are claimed for within or are recovered within the hourly rate. The point being made was simply that if the hourly rate that's charged is covering in part the administrative costs of the insurer, then to that extent the hourly rate is irrecoverable because it is seeking to recover administrative costs which are irrecoverable in law.

The hourly rate of course is an hourly rate charged by MRNM to RSA under the terms of the services agreement.

MR JUSTICE COOKE: Yes.

MR CURTIS: The point that we made was that RSA, before setting up the RSA scheme, must in the ordinary way, when having its insureds' vehicles repaired under the old-fashioned way of doing it, have incurred administrative expenses. We submitted that it appeared highly likely that those administrative functions were now being carried out by MRNM and recovered within the hourly rate.

Putting it another way, to use the subcontractor model, our case was that essentially RSA, it was likely, had subcontracted the administrative burden to MRNM, MRNM is now carrying it out and recovering the costs in the hourly rate. Therefore we submitted if we were right about that, the hourly rate couldn't as a matter of law be recovered in full because it included an administrative element or an element for administrative costs within it.

MR JUSTICE COOKE: Yes.

MR CURTIS: My Lord, we then noted in paragraph 137 that, as we understood it, the claimants contend that it's legally irrelevant if the actual cost incurred includes

an amount for administrative costs incurred by RSAI/MRNM. We drew attention to Mr Reston's first witness statement in footnote 48.

Then we went on even, it seems, if it is an amount which is irrecoverable in law:

"The underlying logic of RSAI's approach requires the claimants to contend they are entitled to recover the total amount claimed so long as that amount does not accede the reasonable costs of repair as the claimants define that term, even if the total amount claimed includes an amount in respect of something that does not sound in damages. If they are right, they will be able to recover the costs of the administrative services provided by RSAI or by MRNM on its behalf, even though that cost is irrecoverable in law."

My Lord, although it's not expressly stated in the judgment, as I understand it from the discussion at the start of the hearing this morning, the conclusion that we should draw from the judgment is that your Lordship has found that because what matters is the bottom line, the total figure, it is irrelevant if the actual cost that was incurred for actual repairs includes an administrative cost of the sort we have identified and that therefore this is not a good defence. If we have correctly understood it, then, my Lord, I'm not going to

repeat the submissions all over again today.

I simply wanted to make it clear that that is what we understand the position to be. We're not making any concession. There is clearly no point in me making further submissions on this point if your Lordship has already found against us on it, as I understand your Lordship has.

MR JUSTICE COOKE: Yes. As you say, it's the difference between looking at the special damages where you look at everything and the way Mr Butcher puts the case in terms of diminution in value of the car by reference to a figure.

MR CURTIS: My Lord, yes. Again --

MR JUSTICE COOKE: It's very simple really.

MR CURTIS: -- there may nonetheless when it comes to the hearing before --

MR JUSTICE COOKE: There may be other questions, indeed. If you find that in any given inference there is a figure for work not done or something, one would have thought that would impact upon your conclusions as to whether the overall figure was reasonable, but that's evidential, isn't it?

MR CURTIS: My Lord, yes, and that may well be a debate that we resurrect in front of the Mercantile judge.

MR JUSTICE COOKE: Yes.

MR CURTIS: My Lord, I took your Lordship to those passages just to clarify what the position is as we understand it.

Then going back to our note for today, the next item is the sundry services charge.

MR JUSTICE COOKE: Yes.

MR CURTIS: My Lord, I sought to highlight what I understood to be the bone of contention between the parties on this with regard to an example which in fact doesn't relate to sundry services but takes a simple example of damage to a front wing. This is paragraph 15 of our note.

MR JUSTICE COOKE: Yes.

MR CURTIS: We say:

"If the front wing of C's car is dented and C pays £100 to have the dent knocked out, the judgment means C can recover £150 from the defendant provided C can prove that £150 is the reasonable cost of knocking out the dent."

That essentially is the sort of approach we understand RSA would intend to take.

MR JUSTICE COOKE: Yes.

MR CURTIS: In other words, to say whatever it cost to have the dent knocked out, here's some expert evidence from a surveyor who has looked at the photographs of the damage and he says it would cost £150. That would be

a reasonable cost so that could be claimed.

Then we ask:

"What is the position if it would have been reasonable to replace the front wing instead of knocking out the dent and if replacing it would have cost £200? Does the judgment mean that C can recover £200 as the reasonable cost of repair regardless of the fact that the repair was in fact carried out by knocking out the dent and not by replacing the wing?"

We say, I hope not impertinently in the light of the judgment, obviously not because the answer is in the light of the judgment, as I understand it from the debate this morning, obviously yes.

MR JUSTICE COOKE: It begs the question, doesn't it, as to what is the reasonably objective costs of repair in order to restore the car to the status quo ante? If it requires a new wing, it requires a new wing. If it can be done by banging out the dent, then it's banging out the dent and whatever the reasonable cost of that is so isn't that a question-begging exercise?

MR CURTIS: My Lord, we raise this as an example because in the context of sundry services there is a flat rate charge under the services agreement of three hours.

MR JUSTICE COOKE: Yes.

MR CURTIS: Your Lordship heard our submissions last time

that that figure is claimed in each case regardless of whether there is any evidence about what was done.

MR JUSTICE COOKE: You say there may be no service done at all. Mr Butcher says there may be one of three different services, I think, done.

MR CURTIS: Indeed. So we said that it was for the claimant to prove whether any sundry services were done and, if so, what they were before being able to recover this charge.

MR JUSTICE COOKE: Yes.

MR CURTIS: But the approach that has found favour is that provided the total figure claimed is reasonable, then one doesn't look. One doesn't unpackage the bundle, as it were, and look at the individual items.

MR JUSTICE COOKE: Yes.

MR CURTIS: Therefore as we understand it the effect of the judgment is that it will not be relevant to examine whether any and, if so, what sundry services were provided in any of the individual cases. It will be sufficient for RSA to prove that the total figure claimed meets "the reasonable cost of repair".

My Lord, in those circumstances the only perhaps invitation that I would make is this: if the effect of the judgment is that a claimant is entitled to the reasonable cost of reasonable repairs, not the

reasonable cost of the actual repairs, whether that could be said in terms in any further judgment because there is the distinction, my Lord. All of the cases before your Lordship are cases where the repairs have been carried out. They are cases where there is no suggestion that the repairs did not restore the car to its pre-accident condition. There is no suggestion that the repairs were carried out through charity or an act of kindness. In those circumstances it was our case that the actual cost of repairs in the real world was all that could be claimed, subject to reasonableness.

If it's the position that the claimant is entitled to recover not simply the reasonable cost of those actual repairs, where the reasonable cost is higher than the actual cost, but is also able to recover the reasonable cost of reasonable repairs, where the actual repairs were different, then we would invite your Lordship to clarify that point because otherwise it's going to leave room for argument in courts up and down the land.

MR JUSTICE COOKE: But isn't the question very simply what is required to restore the status quo ante?

MR CURTIS: The tension exists, my Lord, in a case where actual repairs have been carried out and where a claimant, rather than trying to claim the reasonable

costs of those actual repairs, says, "I don't need to prove what the actual repairs were. I simply say here's a report that says what the reasonable repairs would be and what their reasonable costs would be". In those circumstances is it any answer for a defendant to say, "Hang on a moment, you didn't replace the wing in my example. You only knocked out the dent. Therefore, you cannot claim the reasonable costs of replacing a wing"?

The same applies to sundry services. Is it, as I apprehend, no defence for a defendant to say, "There's no evidence that any sundry services were carried out at all" and no defence for him to say that there's no evidence that those sundry services, if they were carried out, were caused by the accident?

My Lord, it would assist the Mercantile judge in these cases and no doubt judges in other cases but, as I say, we don't make any concessions but clearly it is an old point and we are simply going over old ground and that wasn't the purpose of this note.

My Lord, then the next point. Perhaps before moving on to parts, can I just come to paragraph 21 of our note which still deals with the question of sundry services.

MR JUSTICE COOKE: Yes.

MR CURTIS: The position that was originally advanced by RSA was that it was entitled to claim a collection/delivery

service regardless of whether or not a delivery service or a collection service was provided; in other words, they could claim the costs even if there was no evidence that they provided the service. That was the position clearly set out in Mr Reston's witness statement. That was modified at the last hearing and the position now appears to be that insofar as it's found that the collection/delivery service is a consequential loss --

MR JUSTICE COOKE: Which it seems to me it has to be, unless the car is undriveable or the driver is unfit and those are the only two examples Mr Butcher has been able to come up with. Those are the only circumstances I can think of or he can think of anyway, otherwise it has to be consequential loss, hasn't it?

MR CURTIS: One would expect the concession then to have simply have been -- I said it was, but that's wrong. One would expect the concession to be that insofar as the collection/delivery service was consequential loss, then unless there is evidence that it was provided it couldn't be claimed but, as I understand it, the concession certainly as originally made went further than that. It was simply that there could be no claim for a collection and delivery service unless there was evidence that a collection/delivery service was provided.

The collection/delivery service extends to the collection of the damaged vehicle. If the damaged vehicle is unroadworthy, then we submit that the cost of collecting it would in fact be part of the cost of the repair.

MR JUSTICE COOKE: Indeed.

MR CURTIS: In those circumstances the broad concession that was originally made went so far as to say that unless there was proof that the unroadworthy vehicle was collected, it couldn't form part of the claim. Whereas one wouldn't have expected that concession to be made if it was part of the cost of the repair, in other words in respect of an unroadworthy vehicle, because in those circumstances, on the basis of RSAI's case and your Lordship's judgment, one would expect that element of the collection/delivery service simply to be embraced in the overall bottom line figure for the cost of repair and whether it was reasonable or not.

My Lord, that --

MR JUSTICE COOKE: You would have to establish in those circumstances to make it a cost of repair unroadworthiness or driver unfitness though, wouldn't you?

MR CURTIS: My Lord, if so, then that --

MR JUSTICE COOKE: So in a sense it's a slight nuance in the

general proposition so to speak.

MR CURTIS: My Lord, it may be that it is a nuance or a refinement upon the general proposition, but in that connection you will recall that your Lordship posed the question to Mr Butcher this morning in the context of Mr Butcher's -- posed a question in the context of Mr Butcher's difficulties with having his cars repaired or car repaired in the suburbs. There was a debate about whether or not going and getting somebody else to do it or doing it yourself and losing time, et cetera, was a question of mitigation.

MR JUSTICE COOKE: Recoverable consequential loss or not, yes.

MR CURTIS: But in those circumstances, so far as a car that is unroadworthy is concerned, it's all part and parcel of the cost of reasonable cost of repair.

MR JUSTICE COOKE: Yes.

MR CURTIS: Now, if that is right, then, as I understand your Lordship's judgment, the question of mitigation of loss is out of court. It's irrelevant.

MR JUSTICE COOKE: Indeed.

MR CURTIS: But, again, when your Lordship posed the question to Mr Butcher, we would submit that your Lordship in fact posted right question, namely that it is, as one would naturally speak of it, an issue of

mitigation. We can't re-visit that topic but we submit that it does show that perhaps the matter is a little more refined or nuanced than one might immediately suspect.
MR JUSTICE COOKE: Be as blunt as you like, Mr Curtis. You're quite entitled to say I am wrong.
MR CURTIS: My Lord, I may have to make that submission in due course.
MR JUSTICE COOKE: Elsewhere, yes.
MR CURTIS: But --
MR JUSTICE COOKE: I see the point. There's an issue, but I don't think it presents a problem for this reason: if you establish that the car is undriveable, it's simply, as you say, a cost of repair perfectly simply. What's the difficulty with that?
MR CURTIS: My Lord, I --
MR JUSTICE COOKE: If it was undriveable, then it would self-evidently have been the subject of delivery in any event, wouldn't it?
MR CURTIS: Well, yes, but the fact that it was collected doesn't mean that it was self-evidently undriveable.
MR JUSTICE COOKE: Oh no, absolutely.
MR CURTIS: My Lord, in any event, perhaps this isn't a debate that it's profitable to have at this stage of the hearing.

MR JUSTICE COOKE: No, but it may be helpful if I spell out in my judgment what the parties are saying and as I see it.
MR CURTIS: Yes.
MR JUSTICE COOKE: Then the Mercantile judge can found himself upon it if he so wishes or on any revision of this that may take place elsewhere.
MR CURTIS: My Lord, the next point in our note was the question of parts. Again, just briefly revisiting the case that we advanced, it was as follows. It's a short point. We simply submitted that the claimants were restricted to claiming the costs of the parts that were actually used, not different parts. The difficulty --
MR JUSTICE COOKE: Can you remind me quite how this arose because the BIC was an advanced assessment, is that right, and Mr Reston's evidence was, which you may or may not accept, but Mr Reston's evidence was, I think, that when the parts were actually provided wasn't necessarily part of the same part or the same make, is that right, and so the bordereau might have referred to something different to what the BIC referred to? Is that right?
MR CURTIS: It's a neat summary. The short point was that one of the documents is produced by looking at the Audatex, which is carried out in advance, and another

document is produced by looking at what was actually supplied and so one can end up with a situation where the BIC claims, as I understand it, for items that were in the Audatex and in fact when the repair was carried out slightly different parts were used to those that were in the Audatex and that is why they will feature in the garage invoice that was sent to MRNM. I hope I have correctly --
MR BUTCHER: I think you have missed out the critical point which is that the amount charged only relates to the part actually used, even though the things which are put in the BIC, because of the way in which they are based on the Audatex, the actual bill was that the parts charged were the ones that were actually used.
MR JUSTICE COOKE: I know that was an issue as to whether that was right or wrong, but I know that's what your case is.
MR BUTCHER: That's what the evidence is.
MR JUSTICE COOKE: Is it?
MR BUTCHER: Yes. That is --
MR JUSTICE COOKE: When the claim form goes in, it goes in with the BIC, doesn't it?
MR BUTCHER: No, but the claimed amount is the amount which has been paid by RSAI to MRNM.
MR JUSTICE COOKE: In accordance with the bordereau.

MR BUTCHER: Exactly. Let's not exaggerate the importance of this. The changes between the Audatex and the actual parts used are going to be very minor in most cases but where there has been any change, even though the BIC has been filled in by reference to the Audatex in terms of the detail, the amount which is actually charged by MRNM to RSAI is the amount in respect of parts actually used.
MR JUSTICE COOKE: But what appears on the BIC form that accompanies the claim form in terms of expense for parts?
MR BUTCHER: I beg your pardon?
MR JUSTICE COOKE: No, sorry, have you absorbed that?
MR BUTCHER: I have.
MR JUSTICE COOKE: The question is: what appears on the BIC form which accompanies the claim form in respect of the figure for parts?
MR BUTCHER: The BIC figure is adjusted to match the bordereau.
MR JUSTICE COOKE: So they change the BIC?
MR BUTCHER: To get the figure right, but they don't change all the individual parts.
MR JUSTICE COOKE: The detail.
MR BUTCHER: The detail.
MR JUSTICE COOKE: We know what their case is anyway.
MR CURTIS: As I understand it, their position is that the

figure is right, even if the parts --
MR JUSTICE COOKE: The detail is wrongly described.
MR CURTIS: Even if they have listed the wrong parts, they have given the right figure for the right parts.
Our position was a short one which was that where a claimant in any form of claim is advancing a claim that includes cost of work and materials provided, the claim should claim the right materials, not the wrong materials.
MR JUSTICE COOKE: Yes.
MR CURTIS: It was a short point, but it may well be, again, that this is encompassed and in your Lordship's judgment, although not expressly dealt with, that it's summarised in paragraph 42, namely all that one looks at is the bottom line as it were.
My Lord, I don't make any further submissions on that.
The next live issue that we have identified in our note was the delivery/collection charge. I understood your Lordship to be presently of the view that this should stand. This is our answer which says:
"It was not reasonable in any of the transferred cases involving the Provident/Allianz policyholders because the damaged vehicles were roadworthy and the RSAI policyholders should reasonably have collected

his/her vehicle from the repairer."
MR JUSTICE COOKE: That's an assertion of fact it seems to me.
MR CURTIS: It is and it's going to have to be examined on the evidence in each individual case and it may well be met by the sort of arguments that have already been referred to by Mr Butcher, namely that even if the vehicle was roadworthy it was reasonable to have it picked up for some other reason, and once those arguments have been put forward in individual cases they will need to be resolved by the individual judges.
My Lord, one then moves on to the next point which is the courtesy vehicle. This is page 10 of our note, paragraph 29, and issue 20 is:
"Is RSAI entitled to recover a fee for the provision of the courtesy vehicle, even though the repairing garage providing the courtesy vehicle to the RSAI policyholder made no charge for the provision of the courtesy car? It is Allianz's position (a) RSAI is not entitled to recover such sums by way of subrogated claims as the service provided is a benefit under the motor policy rather than by way of indemnity according to the More Th<n policy wording available online."
We set out in our original skeleton argument at paragraphs 183 to 191 our analysis of the authorities

and we submitted that those authorities supported the plea in paragraph 20A.
My Lord, can I take to our skeleton argument for the last hearing. Paragraph 183 is on page 58. My Lord, can I take you to the authorities in a moment, but for the moment can I just set out or refer to the propositions themselves that we advance. Paragraph 185:
"Where a claimant's car is damaged and has to be repaired, he suffers the loss of use whilst he is unable to use his car during the period it is repaired. The cause of action for loss of use accrues at the date of the accident but is not then the quantifiable."
187:
"The inconvenience the claimant suffers whilst his car is being repaired is a form of loss of use for which general damages are recoverable. It is open to the claimant to mitigate his loss of use by hiring another vehicle. If he does so, he must act reasonably to mitigate his loss. The cost of hire then becomes the measure of the claimant's loss and he can claim the cost as special damages provided the cost is reasonable."
Pausing there. I suspect that those propositions are uncontroversial since they repeat essentially verbatim what is said in Blagdon and Copley.
MR JUSTICE COOKE: Yes.

MR CURTIS: But I can, if necessary, come back to the authorities.
Moving on:
"Loss of use of a chattel is in principle a loss for which compensation should be paid. However, compensation is not paid for an avoided loss. If the claimant is able to avoid suffering a particular head of loss by a process which is not too remote, as is insurance, the claimant will not be able to recover in respect of that avoided loss. If the loss is only avoided by incurring a substituted expense, it is that substituted expense which becomes the measure of that head of loss. Under the doctrine of mitigation it may be the duty of the claimant to take reasonable steps to avoid his loss by incurring that expense."
My Lord, again, that is taken essentially verbatim from Lord Hobhouse's speech in Dimond.
Then moving on, perhaps to the crucial point, paragraph 189:
"The fruits of insurance which the plaintiff himself has provided and the fruits of the benevolence to third parties are not taken into account when assessing damages the claimant is entitled to recover."
Pausing there, my Lord. There's a long line of authority for that proposition. They are the two

exceptions, as it were, to the avoided loss rule.
MR JUSTICE COOKE: Yes.
MR CURTIS: And they are referred to and applied in Dimond and in Burdis.
MR JUSTICE COOKE: Yes.
MR CURTIS: Then to sum-up, Lord Justice Longmore in Bee v Jenson:
"Accordingly, where the claimant's insurers indemnify him against his loss of use by paying for the hire of an alternative vehicle or by providing him with an alternative vehicle, the indemnity is ignored when calculating the claimant's damages".
My Lord, it may be necessary to come back to paragraphs 19 to 24 of Lord Justice Longmore's judgment in a moment, but on the basis of that analysis of the authorities our submission is that in each of the cases the position is as follows. This is 191, point 1:
"The claimant was unable to use his car whilst it was being repaired."
Point 2:
"The claimant could have hired an alternative vehicle himself. If he had done so, he could have claimed the reasonable cost of hire as special damages. Not having done so, he cannot."
Point 3:

"The claimant's insurers RSAI could have agreed under the policy to indemnify the claimant in respect of his loss of use by providing the claimant with a hire vehicle paid for by them or by paying the cost of an alternative vehicle hired by the claimant. If the insurers had done so, the benefits of the policy would have been ignored when assessing the claimant's damages. However, no such indemnify was provided. The policies do not indemnify the policyholders in respect of loss of use."
My Lord, pausing there. Can I ask your Lordship to look at the policy that Mr Butcher took you to earlier this morning. It's in the core bundle behind tab 17 and it's the More Th<n car insurance policy that applies in the case of Woodard v Ward. My Lord, he took you through various passages in this policy. There's one page that he didn't take you to and which I would like you torque due to now which is at page 264 of the bundle. You'll see, about a third of the way down the page in bold, capital letters, what is not covered. The second item is losing or spending money because you cannot use your car when it is damaged or stolen.
My Lord, that's a plain exclusion of loss of use and we submit makes it quite clear that there is no indemnity under this policy for loss of use. When the

policy is read as a whole, taking the passages Mr Butcher took you to in conjunction with that passage, it is, we submit, clear that what is being provided is no more than an incentive. The incentive provided by RSA to its policyholders to use the recommended repair option is to offer them, amongst other things, a courtesy car and they also offer a lifetime warranty for repairs, but they do not provide an indemnity in respect of loss of use. Their policy says so.
MR JUSTICE COOKE: If the insured who has paid his premium for the policy chooses to exercise the option of going down the Recommended Repairer route, then you accept, I imagine, it would be a breach of the policy for the insurer not to provide a car?
MR CURTIS: The terms of the policy say that if the Recommended Repairer option is pursued, then a courtesy car will be provided.
MR JUSTICE COOKE: Yes.
MR CURTIS: And I accept that --
MR JUSTICE COOKE: It must follow.
MR CURTIS: Yes. The fact --
MR JUSTICE COOKE: So --
MR CURTIS: But the fact that it does so doesn't mean that there is an indemnity provided under the policy in terms of loss of use. What the policy says is that it will

provide an indemnity in respect of loss or damage to the claimant's vehicle, but that's the indemnity.
MR JUSTICE COOKE: I understand.
MR CURTIS: Where that indemnity is triggered, the policy gives the insured an option as to how he is indemnified under the policy in respect of the physical damage to his vehicle and he can be indemnified in respect of that physical damage in one of two ways. One of them is the Recommended Repairer route and the incentive to the insured to go down that route is the offer of a courtesy car. We submit that when the policy is read as a whole this is not a policy that provides indemnity in respect of loss of use. All that it does is indemnify in respect of the damage to the vehicle.
My Lord, we submit that that is key because the two exceptions to the avoided loss route, one of which is insurance, we submit clearly anticipates that it's insurance providing an indemnity. Where someone has paid for an indemnity then that is not to be taken into account in assessing their damages. But in this particular case none of the claimants paid for an indemnity in respect of their loss of use. They paid for an indemnity in respect of physical damage to their vehicles.
We therefore submit, at 191.5, that the provision of

a car at no cost mitigated the claimant's loss of use so that he didn't suffer any measurable loss. The claimant does not have a claim for special damages for the cost of hire. The claimant doesn't have a claim for general damages for loss of use. So no special damages for the cost of hire, no general damages for loss of use. The claimant is in a similar position to Mrs Dimond in Dimond v Lovell. The claimant's insurers are in no better position than the claimant when pursuing the subrogated claim.

My Lord, I can take you through all of the authorities if necessary but they are authorities your Lordship has been taken to at the last hearing. My submission is that the crucial issue here is the one that your Lordship identified this morning, which is is this an issue of policy construction, to which I gave the answer "yes". In my submission, this turns on whether or not the policy provides an indemnity in respect of loss of use. Is that what the insurer paid for? We submit not.

My Lord, then the next point of substance, going back to our note for today, is the question of estoppel. Will your Lordship just give me a second?

MR JUSTICE COOKE: Yes.

MR CURTIS: My Lord, the estoppel argument is set out,

again, in our skeleton argument for the last hearing, but before going to it in any detail can I deal very briefly with the points that are made against us. The first is the transaction point. Mr Butcher is correct, that we submit that on a proper analysis of the facts here there is a single overarching transaction which is the operation of the RIPE agreement and the MOU.

On that analysis the reliance by Allianz is to be found in its reliance on the common assumption or its own assumption known of by RSA when making a great many payments in respect of claims advanced to it under the MOU and the RIPE by RSA. So, in other words, earlier claims that were paid. That supplies reliance and the overall operation of the agreement is the single transaction.

MR JUSTICE COOKE: But you told me that RIPE isn't a contract.

MR CURTIS: It's not a legally enforceable agreement, no, but, my Lord, that doesn't detract from the point I make about --

MR JUSTICE COOKE: But why is it a transaction in any way or sense of the word if you can always resile from it?

MR CURTIS: The position originally, up until June of 2008, was that a number of insurers were parties to a Memorandum of Understanding.

MR JUSTICE COOKE: Yes.

MR CURTIS: That Memorandum of Understanding set out the basis on which subrogated claims would be dealt with between them.

MR JUSTICE COOKE: Yes.

MR CURTIS: And it contained terms as to how those claims would be dealt with. The Memorandum of Understanding is not contractually binding. Over and above or laid on top of the Memorandum of Understanding was the RIPE agreement -- RIPE is the acronym for Reduction of Paper Exchange -- and it was a way of allowing insurers who were parties to both RIPE and the MOU to be able to conduct their arrangements under the MOU on a paperless basis. For competition reasons, in about 2008 it was necessary to end the agreement which those insurers who were party to the agreement had signed up to. The single agreement was replaced by bilateral arrangements between individual insurers.

It is the bilateral arrangements between RSA and Allianz that are pleaded to give rise to the estoppel and it is the operation of those arrangements.

My Lord, perhaps it's necessary to just go very briefly to the pleadings in core bundle volume 1, just to see how the point is put. It's set out in most detail in the reply in relation to issue 34. It's

page 65 of the core bundle.

MR JUSTICE COOKE: Yes.

MR CURTIS: Your Lordship will see at paragraph 34.5 --

MR JUSTICE COOKE: Sorry, which page are we on?

MR CURTIS: It's page 65 of core bundle volume 1.

MR JUSTICE COOKE: I'm looking at it in a different volume. Anyway, it's paragraph ...?

MR CURTIS: Paragraph 34.5 refers to the termination of the collective MOU and RIPE on 30 June. Then paragraphs 34.6 and 34.7 set out an exchange of correspondence between Arlene Turner of Allianz and John Hall of RSA. It's on the basis of that exchange that Allianz pleads on page 67, paragraph 34.9:

"The common assumption of RSAI and Allianz before and after 30 June was that the insurer seeking to recover an Accidental Damage outlay from the other insurer in respect of the vehicle repair costs would request payment of the sum equivalent to the amount charged by the repairing garage. Further or alternatively, RSAI must have known that this was Allianz's assumption and RSAI acquiesced in it."

Then 34.10:

"In reliance on the common assumption and/or Allianz's assumption that RSAI must have known of and acquiesced in, Allianz paid to RSAI the sums RSAI sought

from Allianz under the RIPE Agreement believing that the sums sought by RSAI represented sums equivalent to the amount charged by the repairing garage."

Point 11:

"That reliance is sufficient to give rise to a defence of estoppel by convention in relation to any claim where RSAI first made the claim prior to the suspension of the RIPE Agreement between Allianz and RSAI, including those claims where Allianz refused to make payment once it suspected that RSAI was claiming sums that exceeded the amount charged by the repairing garage."

Point 12:

"JB Air Conditioning is one such claim. It is irrelevant that Allianz has not paid the claim made in JB Air Conditioning and is defending it."

My Lord, naturally we accept the point that is made, that in JB Air Conditioning Allianz has not relied on the common assumption and made the payment. Of course not. In JB Air Conditioning, as in the other managed cases, Allianz hotly disputes the sums that are being claimed.

Our submission is, on the basis of the authorities, that once the true position becomes known, the estoppel is not killed stone dead. We submit in short that the

estoppel will continue to apply in those cases where claims were made by RSA under the arrangements set out in the exchange of correspondence that I just referred to in the pleadings.

We submit that it would be inequitable if RSAI were allowed to pursue a claim for the full amount in respect of claims that were advanced under the common assumption prior to the termination of RIPE and the MOU.

My Lord, the point is made against us that the claims are being advanced by the individual claimants. They are not claims being advanced by the insurer that we say shared the common assumption.

Our response to that is quite simply that the doctrine of estoppel is a flexible doctrine and although there is no authority, as such that we can specifically point to, it would, we submit, be manifestly inequitable and unjust for RSAI to be able to pursue a subrogated claim for an amount that infringed the common assumption upon which the parties acted.

Putting the point another way, we submit that if all other ingredients of the estoppel are made out, it's no answer for Allianz to say, "Ah, these claims are being advanced by our insured, not by us". The reality of the position is clear for all to see. The reality is that these claims are being advanced as subrogated claims by

Allianz. The position might be different if they were being advanced in cases where no indemnity had been provided, and that was the sort of situation Mr Butcher averted to earlier on. But that is not the position here. On the facts of these cases they are subrogated claims where the insured has been fully indemnified. In those circumstances, we submit that it would be inequitable and unjust if the estoppel did not affect RSAI.

My Lord, the only authority that I was going to take you to is in the authorities bundle volume 3. It's at divider 69, the Benchdollar case. My Lord, the facts of this case perhaps couldn't be more different from the facts of the managed cases. Can I just briefly outline what the background was. It concerned National Insurance contributions and a large number of employers had sought to avoid payment of National Insurance contributions on higher earnings for higher paid employees by entering into what they believed was a lawful arrangement, a three-cornered arrangement, the effect of which was that their employees received benefits in kind rather than cash, and the plan was, or the idea was that the National Insurance contributions weren't payable on those benefits in kind.

If only life were so simple. Not surprisingly perhaps, it was eventually found that the scheme did not have the effect the employers hoped it would.

Before that was determined by proceedings before Special Commissioners and General Commissioners, the limitation period began to approach for any claim to be made by the Revenue against the employers to recover the unpaid National Insurance contributions.

So the Revenue was faced with a situation where, with an impending limitation period, it might have to issue suddenly thousands of claim forms against thousands of employers, only then to have to adjourn them all until the Special Commissioners had decided whether or not the schemes worked or not.

In order to avoid that, one might have expected that perhaps the Revenue would have entered into standstill agreements with the various employers. Instead of doing that, what it sought to do was to make use of section 29(5) of the Limitation Act and it invited the employers to acknowledge the debts, so extending the limitation period. The problem was that the acknowledgements were expressly made on the basis there was no admission of liability and so what they seemed to be taking with one hand they lost with the other because such an admission didn't work for the purposes of

section 29.5.
Both parties approached matters on the basis that it did but when the Revenue subsequently started proceedings outside the limitation period to recover the National Insurance contributions, they were met with a limitation defence from the employers.
My Lord, one can then pick up the story in the judgment at paragraphs 29 to 31. Those paragraphs set out the circumstances in which the Revenue came to realise that the scheme that it had hatched was probably not going to work under section 29.5.
Paragraph 29 gives the first date. On 5 October 2000 a firm of solicitors, Eversheds, acting for an employer, questioned whether the scheme worked under section 29.5. Then if one goes up to the next page, the fourth line down, the next relevant date is 22 March 2001 where the Revenue solicitor advises there's a strong possibility that there's a problem with the limitation section 29.5 point.
Then 30, nonetheless the Revenue continued to use that scheme, the acknowledgement scheme, until on 9 August 2001 they received detailed and unqualified written advice that the acknowledgement scheme was ineffective.
Then paragraph 31:

"By that date the primary limitation period ...(reading to the words)... protective writ should only be issued in respect of new cases."
That was the policy adopted. So one can see that the relevant dates are on this page 22 March 2001, the informal advice that the acknowledgement scheme doesn't work. 9 August 2001, formal advice that it doesn't work, and then a decision on 10 and 11 September 2001 to press on regardless.
The judge then analyses the law of estoppel by convention over the succeeding pages from paragraph 32 through to paragraph 57 which it's unnecessary, I think, to take your Lordship to, but then one picks up the story again at paragraph 57. Could I perhaps invite your Lordship to read paragraph 57 through to paragraph 62 over the page.
MR JUSTICE COOKE: Yes. (Pause) Yes.
MR CURTIS: My Lord, the position in this case is different from that in the Benchdollar case, in as much as the defendants are able to protect themselves and to protect their position by raising the defences on the merits that they have raised within these proceedings, but, my Lord, the consideration of the issue of the estoppel being killed stone dead arises in the context of unconscionability and injustice, as is clear from

paragraph 57 of the judgment which introduces the topic by saying:
"All the other elements in estoppel by convention being established, I turn to the question of injustice or unconscionability."
MR JUSTICE COOKE: Yes.
MR CURTIS: We submit that it would be plainly unconscionable for RSAI, having presented claims on the basis of common assumption between the parties under the RIPE and MOU as extended by the correspondence, to be allowed to pursue a claim for a higher amount than was anticipated by that common assumption. It can do so in respect of claims presented after the termination of the arrangements by the parties but we say claims presented as JB Air Conditioning was before the termination of the arrangements between the parties should be dealt with on the basis of the common understanding.
My Lord, I accept that that goes further than the analysis in the Benchdollar case and I accept that there's no specific authority I can draw your Lordship's attention to to support that proposition, but in a case of equity I submit that the equity shouldn't be constrained by narrow rules and that if one were to ask the question, "Is it fair to allow RSA to pursue claims for higher amounts than the common assumption says that

they were going to be?", where those claims were presented before the arrangements between the parties were ended, the answer 99 people out of 100, if not 100, would give would be to say, "Yes, that's plainly unfair and unconscionable".
My Lord, I can't put it any higher than that.
My Lord, unless I can help you further, those are the submissions we want to make on the outstanding points.
MR JUSTICE COOKE: Yes, thank you very much.
Reply submissions by MR BUTCHER
MR BUTCHER: My Lord, can I start with Mr Curtis's first issue which is the introductory section of the pleading. It's paragraph 9 of Mr Curtis's note by reference to paragraph 2(b)(v) of the reply and the bolded passage there:
"Further or alternatively..."
MR JUSTICE COOKE: I have it.
MR BUTCHER: You will probably recall it anyway. The simple point here is what is that getting at:
"Further or alternatively where the insurer of the vehicle/owner arranges for the repairs to be carried out at a higher cost than the insurer could negotiate, the actual cost of repair will not be the most cogent, practical and accessible measure of the direct loss

consequent on the physical damage."
The purpose of this averment was not simply to make what is now an entirely uncontroversial point that the repairs actually carried out will not necessarily or the cost of them will not necessarily be the evidence as to the recoverable amount. It was to make a point about insurers. That has been disposed of by your Lordship's answer to the second preliminary issue and there is no purpose in this pleading in those terms. It's as simple as that.
My Lord, the hourly labour charge. I don't actually understand there to be anything in issue as to this, save only to say this, and it's paragraph 11 of Mr Curtis's note. Your Lordship will recall that effectively Mr Curtis accepted that these parts go on the basis of your Lordship's judgment because it's the total amount which is relevant. I will just repeat what I said right at the outset of today, which is that these paragraphs could also be disposed of under CPR Part 24 because there is no evidence at all of any part of them being administrative functions.
Mr Reston deals with the matter expressly in his evidence. I can take your Lordship to that. It's in his third statement which is in core bundle 1, tab 11, page 152 to page 153. It's paragraphs 8 and 9 where he

sets out specifically what it is which are the services which are provided by MRNM to RSAI. Indeed, if your Lordship then looks at the terms of the service agreement, which your Lordship will have seen before, that sets out quite specifically what the services are which are provided by MRNM to RSAI. It's actually in core bundle 2, tab 37. The services agreement, tab 37, at page 468, clause 3, says what are the services which RSA, also known as MRNM, has to provide?
Those services are the services which are detailed in schedule 1. The services which are in schedule 1 start at page 486. As Mr Reston has summarised in that paragraph of his witness statement which I've just shown you, those services are exactly the sort of services which a substantial network of garages would be expected to provide to a motor insurer, neither more effectively nor less. Your Lordship will see the nature of the services just by looking through them, but they include, for example, dealing with the customer, estimating the repairs, authorising the start of work.
Your Lordship might just look at paragraph 2.6.11 on page 490 which ways that the MRNM has to provide the service that the repairs will be properly complete, performed and in accordance with repair methods identified, and so on.

There is no provision here for the performance of the sort of administrative functions unrelated to the conduct of the repairs to which some sort of reference was made by the defendants. So quite apart from the general point that this issue doesn't arise in your Lordship's judgment, it's just unsustainable as a matter of fact. The evidence is all one way. You have seen the agreement. There is no evidence to the contrary and so applying the standards which are appropriate to an application under CPR Part 24, this can be the subject of summary determination as well.
My Lord, sundry services. Here, again, I don't actually understand there to be any significant issue, but to clarify in relation to Mr Curtis's point about the reasonable cost of reasonable repairs, rather than the reasonable cost of the actual repairs. The simple question which the court has to address is what is the diminution in value of the vehicle which will be judged by the amount of the cost of putting it right so that it isn't diminished in value. If that assessment is made, this sort of question doesn't arise. There will be an objectively correct figure. You can't claim more than that. You can't claim more than the amount which is necessary to restore the vehicle to its status quo ante.
But of course if what is ultimately done is

sufficient to put the vehicle into a good state, back into a good status quo ante, it's going to be difficult to persuade a judge that the diminution in value should be assessed by reference to some other repairs.
So that's a question of evidence. The legal principle is in our submission clear. Mr Curtis asks your Lordship to -- well, to add to your Lordship's judgment that it can be the reasonable cost of reasonable repairs. In my submission your Lordship's judgment doesn't actually need further elucidation on this point. The legal test is quite clear, but of course it's clearly a matter for your Lordship.
MR JUSTICE COOKE: There's an awful air of unreality about this, Mr Butcher, because at the end of the day all these claims, if they ever come to court, no one is going to produce extensive expert reports and survey reports saying what would be a reasonable cost. It will be done in the way that has so far been done. You may formulate the claim differently in terms of the pleading but ultimately you will be producing invoices, just the same way as everybody always has.
MR BUTCHER: What you are likely to be deciding is that the retail cost is X.
MR JUSTICE COOKE: Yes.
MR BUTCHER: Even if the wholesale cost is Y.

MR JUSTICE COOKE: Indeed. One assumes that you would be able to get some expert who would produce a report that you could produce for each and every case which essentially says retail cost is different from what we can get by way of block bargaining, block discounts and leverage of an insurer, but it's not for me to tell you how to run your case, but there is a sort of air of unreality about how these cases are going to be proved at the end of the day, once water has flowed under the bridge and we have all this out of the way and people understand each other and what they are trying to do and what the principles truly are.

MR BUTCHER: Exactly. I think the essential point here is what is the legal principle.

MR JUSTICE COOKE: Yes.

MR BUTCHER: My submission would be that that's quite clear from your Lordship's judgment anyway, but it's a matter for your Lordship.

MR JUSTICE COOKE: Yes.

MR BUTCHER: Just a note in relation to the collection and delivery. Unroadworthiness is in our submission a clear case where it's going to be part of the repair costs.

Now, I am just reminded that unroadworthiness may extend to situations which aren't sort of type of repairs which your Lordship perhaps had in mind when you put the point

to me before. You could have unroadworthy vehicles in fact --

MR JUSTICE COOKE: If you haven't got any brake lights.

MR BUTCHER: Exactly.

MR JUSTICE COOKE: I have spotted that.

MR BUTCHER: I kept on being told it but your Lordship had already --

MR JUSTICE COOKE: I do understand that, yes.

MR BUTCHER: Your Lordship said there are going to be those cases where there is unroadworthiness and there are going to be cases where the driver isn't fit to drive but those are the only two cases. I think, as I say --

MR JUSTICE COOKE: Never say never, I understand that. That's all you have been able to think of so far.

MR BUTCHER: Well, there's the case of where it is thought that the vehicle may be -- I say reasonably thought that the vehicle may be unroadworthy but in fact at the end of the day you find that it isn't.

MR JUSTICE COOKE: Yes.

MR BUTCHER: But no one would want to take the chance, given the nature of the collision. Of course that's only going to apply to some or others, but I think your Lordship can see that it's dangerous to be too prescriptive in relation to this, given the multi-faceted nature or the infinite variety of

circumstances which can arise, but certainly that is another category which might arise.

There was some talk about the concession which we made in relation to this aspect. The concession which I made actually in front of your Lordship was merely that if in that one case it hadn't been provided, then it wouldn't be claimed. The reason we made the concession is that if no delivery or collection charge is made -- no delivery or collection occurs, then that isn't a service which MRNM has provided under its service agreement and there should be no charge to RSAI. So there should be no such cases.

That's the nature of the reason for why we made the concession and we have repeated it in correspondence and not confined to the one case, but that concession has no bearing at all on the principles which relate to anything which can properly be said to be part of the repair cost.

Parts. I merely say that in relation to parts that can be dealt with under Part 24 as well as under the strike-out, because, as I tried to say while Mr Curtis was speaking, there simply is no factual issue here. The charges are all for the parts which are actually used. Mr Reston spelt that out in very clear terms in his evidence and it has never been contradicted. It's

at Mr Reston's third statement at core bundle 1, tab 11, page 160 to page 161. What he says there, especially in paragraph 30 and paragraph 31, the last part of paragraph 30:

"Any difference between the parts listings will generally be minimal because of the small financial margin of variation permitted. The amount claimed will be the same as the invoice sum actually charged to RSAI and that invoice sum will be based on parts actually used."

As you see, if there's more than a £25 difference, then MRNM requests a breakdown of the repair costs and that breakdown will later be used to produce the BIC document. So there is no factual point here, quite apart from its irrelevance as a matter of law.

Delivery and collection charge, I don't believe that I need to say anything further. I think the position is now clear as to what we say. Whether that paragraph, answer 18, is or is not struck out in a sense doesn't matter provided it's understood that that is their factual case in relation to each of these individual cases. On that understanding, in my submission it doesn't essentially matter very much.

The courtesy vehicle. The question your Lordship should ask in my submission is: is the provision of the

courtesy vehicle the fruits of insurance, as indeed it is put in paragraph 189 of my learned friend's first skeleton, or, if your Lordship wishes to put it in the terms used in Dimond v Lovell, which is in the authorities bundle, bundle 2, at tab 54 at page 398, where Lord Hoffman is referring to the judgment of Lord Reid in Parry v Cleaver, page 398, my Lord, he quotes Lord Reid as saying:

"It would be unjust for damages to be reduced to take into account benefits that the plaintiff received from the benevolence of his friends or relations or of the public at large so that the only gainer would be the wrongdoer."

Lord Reid also said:

"The benefits from insurance taken out by or for the plaintiff should be disregarded because the plaintiff has bought them and it would be unjust that the money which he prudently spent on premiums should inure for the benefit of the tortfeasor. He applied that reasoning to hold that benefits from a contributory disability pension fund should also be disregarded."

Of course I make the point that it's benefits, that's the language used, but also the rationale that it's the arrangements with an insurer which he has prudently paid for which should not then go to inure

simply to the benefit of the tortfeasor.

In our submission the provision of a courtesy car, as it's called, under a comprehensive insurance is clearly a benefit provided by an insurer and it's provided as part of the consideration for the premium. Mr Curtis didn't blanch from accepting that there was a contractual right to the courtesy car; in other words, it is a contractual obligation provided as part of the insurance arrangement.

Now, there's a clever argument which I haven't hitherto seen articulated that it doesn't arise because there's an exclusion in terms of payment under the insurance for loss of use of the car, but, of course, that has to be read with the fact that there is an entitlement to a car in the case if you have taken out comprehensive insurance, then you have a right to have a courtesy car if the conditions are met and that the exclusion will, as it were, operate around the edges of that entitlement. In other words, because of that you will have no loss of use if you have taken up the courtesy car in the case of comprehensive insurance and the exclusion is to be read in those circumstances as applying to loss of use if you haven't taken up that offer. It's a perfectly reasonable exclusion in those circumstances.

So clever argument though it is, it doesn't actually get you anywhere. This car to which you have a contractual entitlement is still a benefit of insurance and it falls exactly within the Parry v Cleaver reasoning.

The exclusion relates to loss of money. Effectively you can't make a claim for loss of money, a money claim for loss of use.

My Lord, finally, estoppel. There is no dispute that RIPE and the successor arrangements were non-contractual, they were not contractually binding arrangements. They were a non-binding arrangement under which a whole series of different claims it was intended would be dealt with. In those circumstances, it's very difficult to see how those completely different claims arising between different people out of different events simply handled under a non-contractual arrangement can constitute one transaction for estoppel purposes. There is no binding consensus that any of them have to be. They don't have to be. So it's very difficult to see how that can be said to be one transaction.

The second point is that there will be completely different parties to which Mr Curtis simply says, "You can see what the reality of the situation is, that there are subrogated claims". English law is very clear and

very strict on this point. The claims which are being brought are the claims of the individual car owners or drivers and their claims are against the individual policyholders of Allianz. There is no basis for saying that those policyholders, whose claims they are and whose claims they are alone, cannot pursue them because of something which was done in relation to other claims by their insurers in the past.

Finally, my Lord, in relation to Benchdollar. It's perhaps somewhat troubling, just as a taxpayer, that the Revenue didn't know of the possibility of entering into standstill agreements and, as it were, initiated this scheme of their own, but it didn't work. All that the judge was saying in Benchdollar was that it may be that in that case the Revenue will have had a short period of time, having learnt what the true position was, to take steps to protect itself because only after that period would it then be just for the Revenue to be held to what would otherwise be its strict legal position.

That has absolutely no relevance at all to the present case where, as Mr Curtis accepts, Allianz has had time to protect itself in relation to its discovery of the true position. It is indeed protecting itself in relation to the true position. He says, "Oh, well, the judge raised this in the context of inequitability and

whether it's equitable or not that the estoppel comes to a complete halt". He wasn't divorcing these two points. If you have had time in which to protect yourself after the discovery of the true position, then there will be no inequity. If you have protected yourself, there is no inequity. In our submission that is what the position is here and Benchdollar doesn't bear on it at all.

A point which I did make very quickly which is that the exclusion in the policy, the exclusion in relation to the courtesy car, page 264 of core bundle 2 --

MR JUSTICE COOKE: Just bear with me a moment. (Pause) Yes.

MR BUTCHER: It's exclusion 2. It's "losing or spending money because ..." so it's quite specific.

MR JUSTICE COOKE: That might have an impact on collection or delivery charges if you were otherwise going to lose time in driving up to the suburbs to pick it up.

MR BUTCHER: Of course the question --

MR JUSTICE COOKE: It's a different point.

MR BUTCHER: The question between the insured and the insurers is a different matter to what can be recovery in the tort action.

MR JUSTICE COOKE: Yes, indeed.

MR BUTCHER: My Lord, unless there's some other point on which I can help you at this juncture, that is my reply.

MR JUSTICE COOKE: Yes, very good. Mr Curtis, is there anything you want to say?

Further submissions by MR CURTIS

MR CURTIS: Just one small point and it's in relation to sundry services. Mr Butcher invites you to make an order for summary judgment, as well as a strike-out, in respect of sundry services because he says there's -- sorry, administrative costs, I do apologise. Let me go back.

In respect of administrative costs Mr Butcher invited you to make an order for summary judgment, as well as strike-out, on the basis there's no evidence that administrative costs are in any way sought to be recovered as part of the hourly rate.

MR JUSTICE COOKE: Yes.

MR CURTIS: My Lord, we dealt with this in --

MR JUSTICE COOKE: You say it arises as a matter of inference because what on earth --

MR CURTIS: We say it arises AS a matter of inference, and that's paragraph 132 of our original skeleton argument, and then paragraph 133 we refer to Mr Reston's third witness statement, paragraph 8, and we say there that he lists the sort of functions that would be the sort of functions an insurer would have to carry out as part of the job of administering claims. We have given the

reference. I can take you perhaps if you want quickly to the paragraph. It's core bundle 1, page 152.

MR JUSTICE COOKE: Yes.

MR CURTIS: It's paragraph 8, down at the bottom of page 152.

MR JUSTICE COOKE: Yes.

MR CURTIS: Essentially, to set the scene, what Mr Reston is doing here is responding to a suggestion by Mr Parker in his witness statement that it's unclear what MRNM does, if anything.

MR JUSTICE COOKE: Yes.

MR CURTIS: He says they do the things that are set out in the service agreement:

"In essence, these are the kinds of services which any substantial network of garages would be expected [to] provide to a motor insurer under a business agreement. They involve undertaking repairs ... and ensuring that set service standards are met. The process of arranging repairs through subcontractors involves a range of services ... such as (i) validating sums invoiced and confirming the conclusions of assessors; (ii) invoicing and payment arrangements with subcontractors, (iii) obtaining from repairers any information ..."

Absolutely. Those are exactly the sort of

administrative functions an insurer would have to undertake itself and incur the administrative cost of carrying out if it was not using a scheme like the RSAI scheme. What has happened is that under the services agreement those administrative functions have been subcontracted to MRNM. So we say that our inference is in fact supported, not contradicted, by Mr Reston's witness statement.

MR JUSTICE COOKE: Yes. I think the simplest thing would be if I give judgment this afternoon, if that's not inconvenient. Shall we say half past two. Thank you very much indeed.

(1.07 pm)

(Luncheon Adjournment)

(2.30 pm)

(Draft judgment extracted into a separate transcript awaiting approval)

(3.24 pm)

MR JUSTICE COOKE: I think I have dealt with everything but I may not have done.

MR BUTCHER: It deals with everything that your Lordship had on that agenda. There will arise consequential matters.

MR JUSTICE COOKE: Yes.

Discussion re costs

MR BUTCHER: The first matter is costs. Straightforwardly

we would say that we have succeeded today so we should have the costs of today. Your Lordship has already indicated what the costs would be in relation to the hearing in May, but more generally what we would say we should be entitled to now is the costs of the actions from the date that they were either transferred into the Commercial Court in the case of our actions, which has been started in the County Courts, or in the case of the Provident actions which were commenced here in the Commercial Court from inception, because what has happened up to now in the Commercial Court has all been aimed at clearing out of the way the general points. So I'm not going to be seeking any costs which were incurred in those actions before transfer, but I would be seeking the costs up to today --

MR JUSTICE COOKE: For arguing all the general points.

MR BUTCHER: For arguing all the general points.

MR JUSTICE COOKE: I see.

MR BUTCHER: I would also ask for interest on those costs to be ordered today. I have to ask because otherwise it could be argued that they were interlocutory costs and no interest would flow until the final costs order, but here we have been dealing with the general matters and so I would ask for interest on those costs. I would ask for that from today. Theoretically we could have gone

back and asked for interest from the date on which the various costs were incurred, but we think that that would be more trouble than it is worth, finding out what that all was, so I ask for interest on those costs.

MR JUSTICE COOKE: You couldn't have them from the date costs were incurred. You can only have the date costs were paid.

MR BUTCHER: Yes. I am not asking for that. I simply say from today.

MR JUSTICE COOKE: Do you have any indication as to what sort of level of costs we're talking about?

MR BUTCHER: Indeed. We would also be seeking a payment on account of costs. We have been discussing this issue with the other side and indeed a cost schedule but confined to May was sent to the court a few days ago. Your Lordship was probably hasn't seen it.

MR JUSTICE COOKE: I don't think I have.

MR BUTCHER: Indeed it was sent under a covering letter which said, "Mr Justice Cooke is not expected to have absorbed the contents of this by today".

MR JUSTICE COOKE: It never got to me I'm afraid to say.

MR BUTCHER: Anyway, what I would however suggest in relation to that, if time permits, which I think it probably will, is that once your Lordship has said what should happen in relation to costs my learned friend and

I may be able to agree an amount by way of an interim amount. I am certainly not asking -- that only applies to an interim amount on account of costs. In relation to the costs as a whole, I would say it ought to be assessed, if not agreed, rather than your Lordship having to undertake some summary assessment in relation to costs.

MR JUSTICE COOKE: I can't do a summary assessment, can I? More than a day I think is --

MR BUTCHER: Indeed, it's now three days. I should just make it quite clear in relation to the costs order that I'm seeking, the costs from the date of transfer or starting, that we of course particularly include in that the hearings in front of Mr Justice Walker and Mr Justice Teare. Mr Justice Walker who gave the directions for this process which led to the general statements, and Mr Justice Teare who ordered the preliminary issues.

So, my Lord, that's costs. I don't know whether you want to deal with these things separately.

MR JUSTICE COOKE: Tell me what else is on the agenda and then I'll decide how to deal with it.

MR BUTCHER: Anything which need to be said about further directions in relation to the action. I am going to be very short about that because my suggestion is that

these matters should now be transferred to Judge Mackie effectively in the Mercantile Court here. Your Lordship has given a clear indication as to what remains and for the avoidance of doubt our understanding is that the only exercise with which he will be concerned is the assessment of damages in the individual cases, and that that is therefore the issue which he will have in those cases and that all questions of further directions for the conduct of those actions should be dealt with by the Mercantile Court. That's my appraisal.

MR JUSTICE COOKE: On an individual case basis.

MR BUTCHER: Exactly.

MR JUSTICE COOKE: I see. Shall I hear what Mr Curtis has to say about any of that?

MR CURTIS: My Lord, so far as costs are concerned, can I take it in stages. The first point is that we submit that no order for costs in favour of the claimants should be made other than in relation to the applications that are before the court. There is no reason to make an order for costs for the action generally up until this point.

MR JUSTICE COOKE: So what does that leave out then, Mr Curtis? Obviously it leaves out the original claims in the County Court but what else does it leave out?

MR CURTIS: For example, one obvious example would be the

initial hearing in front of Mr Justice Walker. There's no reason why that ought to be included in a costs order in favour of the claimants. As to the detail of what other costs there might be, I am not in a position at the moment, without taking detailed instructions, to go into what those other costs might be that would not be included, but, my Lord, that leads on to the second point that I would make which is this: until the claims for damages have been assessed, it is, we submit, unclear whether the victory that the claimants have obtained so far is going to prove to be no more than a pyrrhic victory.

They have by making these applications taken up a great deal of time on establishing principles that may in the end yield them no benefit at all because in line with paragraph 42 of your judgment, the judges who deal with this at first instance may conclude that they're not entitled to the higher sums they claim on the basis of evidential and factual arguments which we will make at those hearings, many of which will reflect the arguments that we have made so far.

So our submission would be that it would be premature to make an order for costs at this stage of any sort in the claimants' favour until the final battle has been fought and the dust has settled and one can

see --

MR JUSTICE COOKE: How many actions are we talking about?

MR CURTIS: There are a total of 13 or 14 managed cases, but we had always understood that those were going to be dealt with by the Mercantile judge essentially at one sitting, albeit that each of them will have to be dealt with separately because it's quite clear that common issues are going to arise in respect of all of the cases. So we submit that the appropriate time for making any order for costs in respect of these proceedings is when the dust has settled at the end of the proceedings.

My Lord --

MR JUSTICE COOKE: What happens if they succeed on seven cases for the sum claimed but get less on six?

MR CURTIS: My Lord, much would depend upon the basis upon which it happened because it wouldn't be simply what number had been obtained and who ended up with the higher amount. That's not what I'm suggesting at all. It's whether or not, for example, Judge Mackie, if it were Judge Mackie dealing with it, whether Judge Mackie acceded to arguments about evidence about what the best evidence and the most reliable evidence was that essentially rendered many of the points that have been argued so far largely unimportant. So we submit that

the appropriate time to take stock and make an order for costs is when the dust has settled.

My Lord, if you're inclined to accede to the application to make any order for costs today in the claimants' favour, it's not a simple matter that the claimants have succeeded on the applications for summary judgment, strike-out and the preliminary issues. Essentially what your Lordship's judgment today does is to say that if the claims were claims as pleaded for special damages, the actual costs that had been incurred, then the points that have been taken by the defendants would have been good points to take, but because of an --

MR JUSTICE COOKE: Arguable points to take. Whether they are good points would have to await.

MR CURTIS: Arguable points to take. Because of the fact that a late amendment essentially was made to present the claims for general damages, the points are not arguably good points.

My Lord, in those circumstances, although perhaps the expression "a score draw on issue 1 and a strike-out follows from" it wouldn't be entirely apt, it is not right to say that we have lost because on issue 1, what is the reasonable cost of repair, our arguments would have succeeded but for the late amendment of the

pleadings. My Lord, in those circumstances, in my submission they should only be entitled to recover a percentage of their costs on preliminary issue 1 and the strike-out that follows on from it.

As far as preliminary issue number 2 is concerned, namely is it a reasonable cost to the insurer or the insured, I accept that on that we have not succeeded, but overall they should at the most, if an order is made today, only be entitled to a percentage of their costs on the preliminary issues and no more than that, but our primary submission is that we should wait until the dust has settled. The costs of course should not be reserved to the Mercantile judge. I say "of course". We submit they should not be reserved to the Mercantile judge, they should be reserved to you, to be dealt with at the point when the Mercantile judge has made his decision on the cases referred to him.

MR JUSTICE COOKE: Yes. Thank you.

MR BUTCHER: I have seldom heard a more unrealistic submission in relation to costs. Your Lordship will recall how come this is in the Commercial Court. We transferred it because we had identified that there were some points of principle. There were indeed some points of principle, as became quite clear in front of Mr Justice Walker, and Mr Justice Walker said what the

important thing is, forget the points of principle identified. We then had their initial Statement of Objections which took all these point of principle, including above all the question of are you limited to the amount that has actually been charged, and all the rest of those innumerable questions which they put in their ISO.

Nowhere in there do we have any specifics about why the amounts we are asking for exceed the reasonable cost of repairs in any of the cases.

We have spent all of this time in front of Mr Justice Walker, Mr Justice Teare and in front of your Lordship debating the issues of principle and we have never yet got to the question of how much our costs may exceed the reasonable cost of repair. That is why all the costs in the Commercial Court have been generated by their general objections on which they have completely lost because there is nothing which survives of their objections and it is exactly as we said it always would be, which is that we should go to the Mercantile Court and we should argue how much our claim exceeds the reasonable cost of repairs. That is the true position.

MR CURTIS: My Lord, it's not correct to say all of our objections have failed. The objections that are the subject of the strike-out have failed but so far neither

of us has sought to go through an analysis of what remains in order to determine precisely what directions are going to have to be made by His Honour Judge Mackie or anybody else, but it's an overstatement to say that everything has been struck out. The passages that were the subject of the applications have been struck out.

My Lord, the appropriate time to determine this and to see precisely the extent to which there has been success overall and the extent to which there has been success on the strike-out applications will be at the end of these proceedings. There is no harm to the claimants in waiting until that point so that one can identify with precision precisely what the real effect of these applications were.

MR JUSTICE COOKE: Mr Curtis, am I right in thinking that you agree that what remains to be done is to transfer these matters to the Mercantile Court for decisions on individual cases? In other words, there's no other point of principle that this court needs to be concerned with?

MR CURTIS: I'll confirm that my understanding is correct, but my understanding is that we agree that the proceeding be transferred now to the Mercantile judge. At that point it will be necessary to go back to the pleadings and identify what points remain in issue

between the parties and what directions are appropriate --

MR JUSTICE COOKE: I wouldn't be sending anything back to Judge Mackie if I thought there were issues of principle that still needed to be resolved, as opposed to issues of evidence and fact in relation to the individual claims. That's why I'm asking the question because I had thought -- maybe I misunderstood the position -- that the whole point of Mr Justice Walker and Mr Justice Teare's directions was to get all the points of principle out of the way in the Commercial Court so that the ground was then clear for the individual cases to proceed. Have I misunderstood that?

MR CURTIS: My Lord, the purpose of the application so far as the claimants were concerned was to identify what they regarded as the main points of principle to be determined. My Lord, you will recall that the list of preliminary issues that they initially put before the court contained a list of five and Mr Justice Teare said that two of those were not suitable to be determined as preliminary issues because he could see that they perhaps involved findings of fact.

My Lord, I confess that we have not gone through the pleading with fine-tooth comb to try and marry up as between the ISO, the defence and the reply precisely

what remains in issue between the parties, but I agree that directions will need to be made and that the appropriate time to make those directions is not now. The appropriate time for making those directions will be when the parties have had time to digest the result of today's judgment, return to the pleadings and look at precisely what remains in issue to be resolved.

MR JUSTICE COOKE: I want to give directions today. It seems to me that nothing that has happened today could have been very unexpected in the light of my earlier judgment, however right or wrong you think the earlier judgment may be. Most of what I have decided today has simply followed on from what I had already decided.

MR CURTIS: My Lord it's not been suggested to us before today, if this is the suggestion being made, that the proceedings and the pleadings before the court should be treated as though they have disappeared as a result of the orders that have been made. We are approaching the matter and have always approached the matter on the understanding that once the issues have been determined, the proceedings will then be transferred to the Mercantile judge.

My Lord, I suspect that it is right that there are -- in fact I'm fairly confident that it's right that there are no major points of principle to be determined

in the light of your Lordship's first judgment, but I don't want to formally concede, as in effect I'm being invited to do, that the whole of the proceedings, the whole of the pleading should be treated as having been struck out. This hasn't been a matter, as far as I'm aware, that has been debated between the parties in correspondence or elsewhere. So we simply at the moment don't have a formulated view or conclusion as to whether it is right to essentially say the pleadings and all of the issues raised in them should be regarded as having been disposed of.

MR BUTCHER: I note that Mr Curtis has not referred your Lordship to anything which does survive. In paragraph 4 of our first skeleton, before the May hearing, we said that if the submissions of the RSAI policyholders are fully accepted, then the issues which will be left for resolution after this hearing is whether the sum claimed in each case exceeds the reasonable cost of repair. That issue will be one of assessment by reference to appropriate evidence which may, for example, include evidence of motor assessors/engineers assessing the reasonable costs of repairs. To manage the case it could sensibly be transferred to the Mercantile Court to resolve that issue.

MR JUSTICE COOKE: Are you inviting me to transfer today,

Mr Butcher? I thought I had understood you to be submitting that effectively the case is over so far and the Commercial Court is concerned and ought to now simply go to Judge Mackie to deal with each case on an individual basis.

MR BUTCHER: Indeed. I have yet to hear of any issue which is still one which the Commercial Court should deal with.

MR JUSTICE COOKE: Mr Curtis wants to reserve his position because he wants to have a think about it. That's the current state of play so far as you are concerned?

MR BUTCHER: It is, indeed. As to the costs, it is quite clear that we have succeeded today. We have succeeded in front of Mr Justice Teare in getting the preliminary issues ordered which your Lordship has determined in our favour and the whole process of these --

MR JUSTICE COOKE: They obviously are all costs in these issues.

MR BUTCHER: Exactly, they are all costs in these issues.

MR JUSTICE COOKE: What do you say to the pleading point, Mr Butcher? It does seem to me that there might be room for an argument about a measure of discount.

MR BUTCHER: The pleading point, no, not at all in front of your Lordship. Our pleadings in front of your Lordship, which if your Lordship will remember is the defence for

the ISO, made our case so clear. It's absolutely clear. We haven't had to amend that one word and so in the Commercial Court we have always said there are these County Court claim forms which will need amending but the pleadings before your Lordship have not been amended at all.

MR JUSTICE COOKE: I am conscious that Mr Curtis needs time to consider his position, but in my own mind I am satisfied that all the matters of principle have been resolved in this court and therefore it is right that this court should deal with the costs of the proceedings here in the round and then make directions for transfer of the cases to Judge Mackie in the Mercantile Court.

What I'm going to do is to make an order with liberty to apply so that Mr Curtis has an opportunity to reflect further should there be something that has slipped through the net that I haven't spotted, some particular point of principle that he thinks still remains to be resolved here, because I would be very unhappy should there be any point of principle that left this court to be decided by Judge Mackie. It would be directly contrary to the whole aim of Mr Justice Walker and Mr Justice Teare's order.

It also seems to me plain that on all the points of principle which have fallen to be determined Mr Butcher

has succeeded and I can see no reason why he shouldn't have his costs. The only question therefore is whether there should be an interim payment. So it's costs from the point of transfer to the Commercial Court to the point of transfer back out again to the Mercantile Court.

MR BUTCHER: My Lord, as I say, we do seek an order for an interim payment. I'm not sure which is the best way of dealing with this. The sum which was put in in relation to the hearing in May was a sum of £13,000, of which we sought 50 per cent, but that's only by way of an interim payment. That was only the hearing in May. That hasn't dealt with today. We would seek an interim payment in the amount of, let's say, £250,000 which your Lordship --

MR JUSTICE COOKE: The £400 figure includes the Walker and Teare --

MR BUTCHER: No, it includes the pleadings and it includes the pleadings --

MR JUSTICE COOKE: It doesn't include those here.

MR BUTCHER: It doesn't include Walker and Teare, no. So that's what I'm seeking.

MR JUSTICE COOKE: Yes. Your estimate of costs for today?

MR BUTCHER: We haven't done that.

MR JUSTICE COOKE: I'm sure Mr Reston will give you some idea.

MR BUTCHER: It's about 100, so we --
MR JUSTICE COOKE: So we're looking at 500,000, plus Teare and Walker hearings, whatever they are.
MR BUTCHER: Exactly, so we say 250,000 sounds relatively defensible in those circumstances -- well, more than relatively defensible. Modest.
MR CURTIS: My Lord, the only figures that we have seen are the figures that were put in the schedule as being referred to. We haven't seen any other figures for today or earlier and we have seen the 50 per cent figure that was put forward and we were invited to agree to. We can't comment on any other costs because we're simply not in a position to and we haven't had the opportunity to look at the figures. So if there's to be an order, it should be no more than has been properly put forward in a schedule that the court has seen to date which would be the figure of whatever it was, 205,000-odd.
MR JUSTICE COOKE: I can be very confident that there will be recovery of £250,000 so I'm going to order that as an interim payment. How long do you need for that? 28 days?
MR CURTIS: Yes, 28 days.
MR JUSTICE COOKE: What about this interest? Do you want to ask for interest or something or are you going to leave that until later?

MR BUTCHER: No, I would ask for interest on -- well, I suppose your Lordship has made an order nisi, in effect, about costs. What we would like is interest to run on all --
MR JUSTICE COOKE: What I'm doing is to give Mr Curtis the opportunity, just in case -- it doesn't affect the costs issue so far as I can see. It really just a question of making sure there's nothing else this court needs to decide.
MR BUTCHER: But you have made an order as to costs so I would like interest from today on those costs.
MR JUSTICE COOKE: You'll have to forgive me, Mr Butcher, I've forgotten how this works. If I have given you a judgment today for costs, including an order for interim payment, don't you automatically get interest at the judgment rate on the element of cost or does it only then follow from the point at which they are assessed? Is that the point?
MR BUTCHER: Mr Hough is now going to put you right.
MR HOUGH: My Lord, there's a general discretion under CPR 44.3(6)(g) for the court to make an order for interest on costs from or until a certain date, including a date before judgment. The difficulty is whether your judgment is considered a final judgment or an interlocutory judgment because if it were considered an

interlocutory judgment, we may not get interest on costs until a time considerably in the future. That's why it's --
MR JUSTICE COOKE: If in doubt, you want a specific order.
MR HOUGH: Yes.
MR JUSTICE COOKE: As to rate?
MR HOUGH: 1 per cent above LIBOR.
MR JUSTICE COOKE: Is there anything you want to say about that?
MR CURTIS: No.
MR JUSTICE COOKE: Very good. I'll order immediate transfer then to Judge Mackie who I warned about it at lunchtime. Shall I give you seven days, liberty to apply within seven days, in case there's something you want to raise?
MR CURTIS: Yes, thank you.
MR JUSTICE COOKE: That will give you enough time to consider the position, will it?
MR CURTIS: Yes, if we can have liberty to apply. I don't anticipate that there is anything.
MR JUSTICE COOKE: No, but I understand your caution.
MR CURTIS: Indeed my caution was primarily expressed in the context that there may be points in the pleadings that have been taken on our side that are not points of principle but are points essentially going to evidence and argument that one would expect to be dealt with by

Judge Mackie. My caution was primarily that I didn't want it to be thought that in some way we were agreeing to or had conceded that any of those points should be struck out as being without merit when in fact they haven't been the subject of determination by the court.
MR JUSTICE COOKE: No.
Discussion re permission to appeal
MR CURTIS: My Lord, on our side we would apply for permission to appeal on preliminary issues 1 and 2 and on the strike-out and summary judgment application which essentially also means preliminary issue number 3. I'll take instructions but I think the one area on which, subject to on instructions, we would not be applying for permission to appeal is the estoppel point which is a discrete point.
My Lord, we would submit that, if I can deal with it very briefly, permission to appeal should be granted for a number of reasons. First of all, the points of principle that your Lordship has dealt with are points of principle relating to the assessment of damages in relation to damaged chattels, but they're also capable of application in other fields as well, for example damage to buildings.
I hope I don't do your Lordship's first and second judgments an injustice if I say that essentially, as we

understand it, they suggest that the appropriate practice and principles to apply to the assessment of damages turns really on a pleading point or may turn on a pleading point. If a claim is presented as a claim for special damages for the actual costs incurred in carrying out actual repairs, then all of the points that we have made either are or may be good points to be taken, whereas if on the other hand the pleader is ingenious enough to plead the claim as a claim for general damages, then one doesn't pay any attention to what the actual costs were and what the actual repairs were and one can, as a claimant, recover a higher sum than was expended.

That would mean that your Lordship's approach essentially jettisons, we would submit, the restitutionary principle of damages on the basis of a pleading point. We submit that the approach that your Lordship outlined in your judgment this afternoon is in fact the correct approach in any case where the damaged chattel has been repaired and where the repairs restore it to its pre-accident value and where there is no question of kindness or charity or anything of that sort.

My Lord, we submit that it cannot be right that the entire approach depends upon a pleading point and in

support of that we do in fact and did at the last hearing relied on Dimond, Burdis and Kingsway, all cases that your Lordship referred to in your Lordship's first judgment, where we submit that the speeches of Lord Hobhouse, the judgment of Lord Justice Aldous in particular, support quite clearly the proposition that where actual costs have been expended then subject to reasonableness that is the recoverable figure.

My Lord, if it's helpful to go back simply to the passage where we quote the relevant extracts, it's our original skeleton, paragraphs 60.3.

My Lord, the importance of those authorities, and this really leads on to a separate point, is this: even if our reliance on Derbyshire v Warren is incorrect, then we would say that Dimond, Burdis and Kingsway, a decision of the House of Lords and two decisions of the Court of Appeal, support our approach. They support your Lordship's analysis in your Lordship's judgment this afternoon. We say that analysis applies whether the claim is presented as one for special damages or general damages. One cannot recover more than one expended.

The next point is that we submit that there are a number of other points of general importance that deserve -- or to be resolved by the Court of Appeal.

They include whether a claimant is entitled to recover a sum in excess of his actual repair costs, whichever way the case is pleaded, and also whether or not there is any role in claims of this sort for the doctrine of mitigation where the owner takes steps to have the chattel repaired.

In that context your Lordship has described the decision of the Court of Appeal in Derbyshire v Warren as an aberration. My Lord, Derbyshire v Warren is not a decision that languishes in the footnotes of more obstruse legal texts. It's a case that is, for example, discussed at length and referred to at length by the authors of McGregor on Damages in the context of the measure of loss in vehicle damage cases and, again, we submit that where a case of that importance and vintage, which is referred to in the textbooks as a case upon the measure of damages in this area, is held to be an aberration in a decision at first instance, it is a point that merits the attention of the Court of Appeal in order to clarify the law.

So far as the courtesy car point is concerned, we submit that it is important to clarify the scope of the insurance exception in the context of avoided loss in the law of damages generally. Our submission is that it only applies where there is an indemnity against the

relevant loss and that that was not the case in respect of the policies here.

MR JUSTICE COOKE: I am so sorry Mr Curtis, I was looking back at the judgment. I've missed the last sentence or two of your submissions.

MR CURTIS: The courtesy car point. We submit that the scope of the insurance exception in the context of the rule that avoided loss cannot be recovered is something that, again, merits the attention of the Court of Appeal. Our case is that it only applies where there is an indemnity against the relevant loss, not where, as here, there is not such an indemnity.

My Lord, we submit in summary that all of these points which go really to the first preliminary issue and the strike-out that follows on from it are points upon which there is a realistic, as opposed to a fanciful, prospect of success. Furthermore, that there's another compelling reason for an appeal, namely the clarification of the law and in particular the role played, if any, by the law of mitigation in the context of damages claims such as this.

My Lord, that's a whistlestop tour of some of the submissions that we made and the points on which we say there is a realistic prospect of success in respect of preliminary issue number 1 and the strikeout that

follows on from it.
So far as preliminary issue number 2 is concerned, there are now two decisions at first instance, your Lordship's decision and the decision of His Honour Judge Mackie which both question and seek to place limits on the scope of the passage in the judgment of Lord Justice Longmore in Copley v Lawn which says that in some circumstances the actions of the insurer are to be taken into account; in other words, to what extent is Lord Justice Longmore's judgment in Copley v Lawn an exception to or provide an exception to the rule in Bee v Jenson number 2, if I can put it that way.
My Lord, in that context we do submit that there is importance in the fact that in Bee v Jenson the agency argument had already been struck out by Mr Justice Cresswell before the subsequent battle that became Bee v Jenson in front of -- I forget the judge at first instance and then Bee v Jenson in the Court of Appeal ever took place.
So we submit that our situation is different because at the time of the argument before your Lordship the agency point was still a live point and had not been struck out in the way that it had in Bee v Jenson.
Again, we submit that on preliminary issue number 2 there is a realistic prospect of success and,

furthermore, that there is a compelling reason to allow the appeal which is to clarify the extent, if at all, to which Lord Justice Longmore's judgment in Copley v Lawn provides an exception to the rule in Bee v Jenson, if I can put it that way as a shorthand.
My Lord, it was submitted that your Lordship's conclusions would result from long-established principles of law in the marine cases and Jones v Stroud District Council. We submit, and submit still, that those cases in fact explore the underlying rationale of the measure of damages in difficult cases other than the simple cases which are before the court; in other words, cases where the damage has not been repaired, will never be repaired where there's no proof of what the loss was, but they don't impinge upon the simple straightforward cases that are before the court.
Again, it's said that the decision on preliminary issue number 2 results from long-established authority that one does not have regard to the insurance arrangements between the parties. Again, as far as that is concerned, we always took that on board but argued that in this particular case, because of the agency point and because of the decision of Lord Justice Longmore in Copley v Lawn, the situation was different.
So the arguments about long-standing authorities

simply do not take into account, we submit, the more recent cases to which we have referred and rely on, again which we submit give rise at the very least to a realistic, not fanciful, prospect of success says on the appeal on both preliminary issues 1 and 2.
Given that the strike-out follows on from those decisions, we submit that we have a realistic prospect of success on the strike-out summary judgment application as well. The one exception, as I have said, that we do not seek permission for is the estoppel point. Courtesy car is a separate point. I have already addressed your Lordship on that and why we say that on courtesy car there is a realistic prospect of success.
MR JUSTICE COOKE: Thank you very much.
MR BUTCHER: My Lord, we do oppose permission to appeal. In relation to the preliminary issues which you have decided we do indeed say that their resolution depended on extremely clearly established principles from authority stretching a very long way back and reconfirmed recently by the Court of Appeal in Stroud and by the House of Lords, in particular by Lord Hobhouse, in Dimond. There is no realistic prospect of the answers that your Lordship has given to any of the preliminary issues being successfully

appealed.
In particular, the first issue, there is an abundance of well-established authority and on the issue which was actually raised and decided, the answer which your Lordship gave was the inevitable one from those authorities.
As to the second preliminary issue, insurance, the only point which seems to be made is that there was reference to Copley v Lawn. The submission in relation to Copley v Lawn was an extremely optimistic one in my submission. Your Lordship has been the second judge to have given it short shrift and there is no realistic prospect of the Court of Appeal doing anything other than saying that it wasn't intended to alter Bee v Jenson in the dramatic way which Mr Curtis has suggested.
As to the issue of courtesy car, that seems in fact to be a fairly narrow point of construction on which, as we would submit, your Lordship is clearly right and not meriting the consideration of the Court of Appeal anyway.
So we do oppose permission to appeal.
MR CURTIS: My Lord, can I just clarify one point on preliminary issue number 2? We put that in a number of ways, one of which was squarely on the basis of Copley v

Lawn. The other was more generally that where the insurer acts as the agent of the insured in arranging the repairs, then there is no reason not to look at the resources of both together.

It may well be that that was putting the Copley v Lawn point in another guise without referring to Copley v Lawn, but we submit that the suggestion that somehow our approach to the cases has been fanciful -- to be fair to Mr Butcher I don't think he's gone quite that far -- does not accord with authority simply flies in the face of the fact that as we said at the beginning of our original skeleton argument, we're not like Star Trek exploring new universes where no one has ever gone before. The principles that we were arguing and the practices that we were contending for are we submit the ones that have been followed in the County Courts for decades and that if there is going to be an approach which says that essentially everyone can ditch the cost of actual repairs by pleading their claims as claim for general damages and that as a result claimants and/or their insurers will be able to make a profit by pursuing claims of this sort, we submit that that is a matter which, with respect, has a realistic prospect of being successfully appealed to the Court of Appeal and certainly merits the attention of the Court of Appeal in

order to clarify precisely where the law stands.

MR JUSTICE COOKE: Yes. I think I am against you Mr Curtis. You will have to go to the Court of Appeal and persuade them that you have realistic prospects of success in the light of the well-known line of authorities that I like to think that I have followed. To my mind, the problems which arise here arise essentially from the sort of matters that I understand the OFT is investigating, the practices of insurers which give rise to them creating profit centres out of their business. It's not a matter for me to comment on but I think the problems arise because of that, rather than anything else, where the principles that relate to what is and is not recoverable are relatively straightforward and the shorthand form that people have used over the years of just putting in invoices in order to make good their case has been a perfectly acceptable and reasonable way of achieving a result consistent with principle until you get to the sort of contrivances we have been looking at here.

It seems to me, Mr Curtis, that should you wish to take advantage of the liberty to apply on the basis that there is some other matter that this court ought to concern itself with and resolve, it would be sensible to get back here as soon as possible so we can discuss it whilst matters are still fairly fresh in everybody's

mind.

MR CURTIS: We'll do that. I think it's extremely unlikely that we'll be troubling your Lordship.

MR JUSTICE COOKE: Indeed, but I just thought I would mention it should that arise. Will you draw up an order between you and agree it and I'll initial it.

Thank you both very much for all your help and the juniors likewise. I'm very grateful to you all.

(4.15 pm)

(The court adjourned)

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