IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1257/7/7/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

12 December 2016

Before:

THE HONOURABLE MR JUSTICE ROTH
(The President)
DERMOT GLYNN
JOANNE STUART OBE

(Sitting as a Tribunal in England and Wales)

BETWEEN:

DOROTHY GIBSON
Applicant / Proposed Class Representative

- and -

PRIDE MOBILITY PRODUCTS LIMITED
Respondent / Proposed Defendant

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5 Chancery Lane, London EC4A 1BL
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

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CPO APPLICATION HEARING

A P P E A R AN C E S

Mr de la Mare, Mr Jones and Mr Cashman (instructed by Leigh Day) appeared on behalf of the Applicant / Proposed Class Representative.

Mr Bates, Mr Armitage and Mr Williams (instructed by Band Hatton Button LLP) appeared on behalf of the Respondent / Proposed Defendant.

MR. DE LA MARE: I appear with Mr. Jones and Mr. Cashman for the intended representative, Mrs. Gibson. Mr. Bates, Mr. Armitage and Mr. Williams are for the intended defendant, Pride. I hope you have got the five bundles, the three bundles of authorities and our skeletons. As is ever the way, there is few last minute handups which is probably best to get out the way right now. Mr. Jones has a clip, which he will pass up and I will just briefly explain what treat lie in store. (Handed)

The first thing in the offering is what one might call a retrospectivity pack. It is a chronology behind which there are various enclosures explaining the progress of the *Consumer Rights Bill*, the main stages the main components of the bill and various interchanges with the various committees considering the bill and is simply designed to make the point that the contents of Schedule 8 were known well in advance of the decision in this case and the intended retrospectivity of that section was well known well in advance it goes to my learned friend's appeal point. We thought that would be helpful as objective material.

The second enclosure is the OFT's 2013 market study.

THE PRESIDENT: We have got a clip which --

MR. GLYNN: They are not in that order.

MR. DE LA MARE: A 2011 market study on mobility aids, OFT1374. The relevance of this document lies in the fact that it is extensively referred to in Mr. Noble's and, to a lesser extent, Mr. Parker's evidence and it is part of this background materials by which the impact of the restrictions in the market has been assessed and there is lots of good material in here as to the factual state of the market in 2011 which is slamdunk in the middle of the infringement period. I will be referring to that reasonably liberally when we get to the question of suitability and merits.

THE PRESIDENT: Yes. This is 2011 -- do we have that date?

MR. DE LA MARE: I do not believe there is --

THE PRESIDENT: There is a response, it says, by 20 October, so it is obviously --

MR. DE LA MARE: -- from memory it is June but we can check and supply that date but certainly there will be something on the Internet showing when it was published.

THE PRESIDENT: I am sure there would be something in it but no.

MR. DE LA MARE: Mr. Cashman, no doubt, will be ferreting away as I speak.

THE PRESIDENT: It would be helpful because it is in the middle to know when in 2011.

MR. DE LA MARE: Yes.

The third thing is the Commission communication on quantification of damages. It is a very short document and an extract from the underlying guide on quantification of damages and it is really --

THE PRESIDENT: Just a moment. Where is that? Yes. We are not in the order you are going --

MR. DE LA MARE: I am so sorry.

THE PRESIDENT: That is all right but it just means we are primed. Communications from the Commission. Yes.

MR. DE LA MARE: It is really relevant for two points which again I will develop in due course: one for the encouragement to use a broad axe because we are in the process of estimation and it is not an exact science; and, secondly, to make good a point that is an important point and I will come onto, which is there is actually no guidance or guidelines or experience to draw upon when assessing damage in relation to the effects on consumers or downstream parties of vertical agreements and what is striking about the actual guide is it is all about cartels and quantification of cartels and there is very precious little indeed in relation to vertical (inaudible) and, for reasons I will come onto explain, that is something that we have to accept as terra nova.

THE PRESIDENT: Just a moment. I think we ought to start putting these away.

MR. DE LA MARE: Yes, I was going to suggest putting them all at the back of A3.

THE PRESIDENT: A3 at the moment goes up to tab 74.

MR. DE LA MARE: Yes. Have you supplied us with any terms (overspeaking). I am sorry that would have been a sensible thing to do.

THE PRESIDENT: So if we put the -- the mobility age study, we can keep the bill maybe separately, shall we?

MR. DE LA MARE: You can stick that behind our skeleton argument, probably the best place for that.

THE PRESIDENT: We will put the market study --

MR. DE LA MARE: That is 75.

THE PRESIDENT: 75.

MR. DE LA MARE: I am told it is September 2011.

THE PRESIDENT: Thank you. Communications, 76?

MR. DE LA MARE: Then you should have the case of *Keefe v the Isle of Man*.

THE PRESIDENT: Yes.

MR. DE LA MARE: That is a recent application of the age-old principle from the case of *Armory v Delamirie*, which I will explain in due course --

THE PRESIDENT: Yes.

MR. DE LA MARE: -- which is that where the wrongdoer, by the nature of their wrong, has put out of their hands the proof of the consequence or value of the harm caused by their wrong, the court proceeds by making those assumptions consistent with the evidence that can be made in favour of the claimant --

THE PRESIDENT: Yes, we will come back to that.

MR. DE LA MARE: We will indeed.

THE PRESIDENT: Shall we make that 77?

MR. DE LA MARE: 77. Might I suggest that we put the authority that the tribunal has furnished us with at 78.

THE PRESIDENT: That is *McDonald*, yes?

MR. DE LA MARE: That is am *McDonald*.

Then there are some materials from my learned friends which are probably sensibly inserted at this stage; I will let Mr. Armitage pass them up if he wants to. They should sensibly go at 79.

THE PRESIDENT: We have in your clip something from *Oxera*.

MR. DE LA MARE: I was going to suggest you put that behind Mr. Noble's second report in the core bundle because the letter from *Oxera* is effectively the answer to the points raised in paragraph 74 of the skeleton argument which are, if you like, an attack on the robustness of what Mr. Noble has done with the data from NT Mobility to sense check his calculations. That should go in the core bundle.

THE PRESIDENT: Yes.

MR. DE LA MARE: The last tab behind Mr. Noble's report, which is the logical place to put that.

MR. GLYNN: Which tab is that?

THE PRESIDENT: 19. That is the housekeeping. Hopefully we are all --

While you are on that --

MR. DE LA MARE: Yes.

THE PRESIDENT: -- we have been given what is said to be the confidential version of the OFT decision, the unredacted version, but in fact it continues to have certain redactions and, in particular, the table at the end, annex D, is redacted if you look at our bundle 3, at tab 23. We would like a fully unredacted version, if you go to page 195.

MR. DE LA MARE: Yes.

THE PRESIDENT: Could we be given that for tomorrow?

MR. DE LA MARE: That is a request for Mr. Bates rather than me because obviously we do not have that.

MR. BATES: I am not sure we have it, sir. What we provided is the less redacted version that was provided by the OFT. We can ask the OFT if they have a fully unredacted version.

THE PRESIDENT: I see, but you were not given the turnover of the retailers?

MR. BATES: I think that is right sir, yes.

THE PRESIDENT: I see.

MR. DE LA MARE: That does make sense.

THE PRESIDENT: Yes.

Submissions by MR. DE LA MARE

MR. DE LA MARE: As you know, sir, there are two principal groups of issues that have been condensed down by the skeleton argument. There is a good deal of other issues that have been canvassed in the defendant's response to the CPO application and our reply, but by the time we have got to the skeleton argument there are really two groups of issues.

The first group of issues is those concerned with retrospectivity and fairness or unfairness. You have directed that, in relation to those, you would like to hear from Pride first. I think you have agreed with our suggestion that that is a self-contained gobbet of issues that is sensible to hive off from everything else and it certainly makes the rest of the hearing more digestible.

The second group of issues is concerned with the linked issues of suitability, cost benefits and strength of case which in turn boil down to three main issues: firstly, what approach should the tribunal be taking to those issues under its discretionary powers in Rule 77 through to 79? I think we are all agreed there are wide discretionary powers with lots of factors to be taken into account, how should you approach that exercise of discretion is issue one.

The second key issue that has emerged with the fullest vigour from my learned friend's skeleton argument and it has kind of gradually increased in volume -- it was nowhere present in the letter before action, it is present in the expert reports and is now front and centre in the skeleton arguments is the *Enron* point: to what extent are we somehow confined to the 8 infringements such that it is impossible or impermissible to look beyond

them in any way and the counterfactual and factual is predicated only on changes in the conduct of the eight infringing parties. That is the second issue.

Then the third key issue is: what is the strength of the claimant's case as contained in its experts preliminary reports from Mr. Noble? Is it sufficiently strong to merit, all other factors being taken into account, the making of a CPO?

Those are the three issues. Before I handover in relation to the retrospectivity issues, can I just, if you like, float certain other issues and make three key points?

The first point is I am not intending in opening to address you beyond those issues on points of detail that seem to have very much fallen to a second order of complaint like the suitability of Mrs. Gibson to be class representative, the comments about Leigh Day's pursuit of these claimants, et cetera. Those seem to me to be of an entirely different order to these issues and the parties' respective cases on those, which are really all issues which go to the Rule 78 issues, the class representative.

They are adequately set out on paper. If you have any particular concerns or if my learned friend opens his case on any of those hard I will reply to them. But I do not intend -- unless there is some topic in that remit that you want me to direct my submissions to, I do not intend to focus my limited time those issues.

THE PRESIDENT: If we have any questions on that we will raise them with you but beyond that I think that is --

MR. DE LA MARE: Of course I should flag up that our internal division of competence is that Mr. Jones is the keeper of all points of detail in relation to the case plan and the notification plan involving Signal, so he will field any questions in relation to that. That is the basics bit.

You have parked off the issues of the cost-capping order but nevertheless, as I understand it, the issue of costs and security in general is potentially one of the issues under consideration. The difference between us on that front is relatively modest, I would suggest, but we can explore that issue when I have heard what my learned friends have to say on that topic when they open their case.

Before handing over, let me just identify what I think are the three features about this case that makes it particularly remarkable or noteworthy.

The first, which is obvious, but worth stating, is that this is the first application of any kind for any kind of CPO and in particular for an opt-out CPO. Of the innovations that the act contains introduced by the CRA, there is no doubt that the opt-out provision is the most radical departure from what has gone before because in many ways an opt-in procedure is

the CAT's functional equivalent of a group litigation order; it effectively enables claims that are being brought to be sensibly marshalled in much the same way that a group litigation order operates.

So it is no part of my case to deny that the opt-out procedure is, compared to everything else in the CPR and in civil procedure, much more of a procedural innovation. However -- and it is important not to lose sight of this -- it is an innovation with the very strongest of justifications, justifications that are targeted directly at competition claims.

It is important to note that the despite the clamour for CPOs on an opt-out basis to be introduced in other areas -- environmental claims, consumer claims for consumer legislation, et cetera -- the opt-out procedure has been introduced exclusively in competition law. It is not hard to discern the purpose of the procedure: it is to provide an effective remedy to enable the small guy to obtain redress and justice for small claims.

The small guy, be it an SME or be he/she a consumer, does not claim for £10 or £15 or £100 or, even in these days of inflated court fees, more. It is the anti-competitive action or effect that affects thousands, tens of thousands, or for the benefit of the jury of my peers that are here from the merits case shadowing this claim, the millions of people that may be affected by anti-competitive actions that justifies providing effective redress for competition claims so as to agglomerate those claims and allow them to effectively be pursued.

In fact we are all agreed that, if you like, the counterfactual to the CPO is that none of these claims would be made. That is the whole essence of the case of fairness being made against me. So that is the first point. It is only an opt-out claim that will enable any form of consumer redress in this context. However you approach the CPO, it is going to have a precedential effect in at least two ways: first of all on the retrospectivity issue, which is liable to be of extreme importance for all horizontal and vertical infringements for some considerable period of time, but secondly it is going to set the tenor or the framework for how these powers are used and how people put these claims together.

The second key feature -- and this is perhaps not one that has been picked up so much compared to the first -- is that this is either the first or one of the very first claims, certainly in the UK, that I can think of -- and I have asked a good deal of others who know a lot more about competition law than me -- in which a third party has sought damages in consequence of the effect of a vertical agreement.

You have the *Courage v Crehan* litigation, but that is as between the parties to the agreement with the principal aim being to escape the agreement and trigger consequences, in restitution or otherwise, for having been party to an unfair agreement. But I cannot think

of any other situation in which there has been a competition damages claim arising out of a vertical agreement. That is very important because effectively all of the literature and all of the analysis is very much at the regulatory level, very much at the theoretical level. There is actually a relative dearth of empirical evidence upon which one can draw one way of the other by reference to analogy.

It is not surprising that there have been no cases in the EU, so far as I am aware, outside, I am told, perhaps a regulatory claim in relation to regulated energy in Denmark because of the difficulties of disclosure that confront European claims.

Then we have the third key feature, which is closely linked to the first and second, and it is this: it is an accepted feature of this market that there is an appreciable degree of individual price negotiation by consumers. So to compare and contrast a case like football shirts, this is not a case of a consumer good subject to price fixing in which there is a market price for the replica kit in question that pretty much everyone pays, subject to discounting and promotions, et cetera; there is evidence of a degree of individual negotiation.

I think there is a gap between the parties as to how appreciable that individual negotiation is and actually how wide the spread is. Our case, as you will hear in due course, is that the rogue prices, the Internet prices that were available, set an effectively de facto benchmark for the posted prices and operated as the price that people tended to pay -- indeed that is confirmed by Ms. Dunn's evidence.

Our case, our essential case as to the damage done is that there is a difference in the competitive pressure applied pre and post that explains why prices, due to the increased vigour of Internet price competition, would produce. So, yes, there is plenty of rogue pricing and plenty of other pricing by people in the Pride network that provide prices, but it is nothing like the intensity and the breadth. The only way you can test that is empirically, which is effectively what Mr. Noble has done in a variety of ways.

It is not helpful in our submission to go through the Way-back Machine and episodically or anecdotally pick up particular instances of particular pricing and it is not even helpful to look at the extent to which people cheat because a rational way to cheat is to cheat only so much as you need to cheat to get the business whilst keeping the inflated margin.

So that is why we say it is empirical evidence which is required, but you are going to have to --

THE PRESIDENT: You are going quite deeply into the, I think, the --

MR. DE LA MARE: I was literally going to stop on that topic.

THE PRESIDENT: -- second and third part of your --

MR. DE LA MARE: I was going to stop on that topic but the point I am trying to give is this: the consequence of that degree of negotiability of price is that you are going to have to grapple also with the provisions about aggregate damages which raise a question of policy as to, how do you prefer imperfect but at least partial compensation that may produce a degree of winners and losers as between the claimant class, but deliver overall justice vis a vis the defendant in the sense that they in total represent a fair estimation of the damage caused as a whole, or do you allow considerations like this to deny the claimants any remedy at all? Our case, very squarely, is going to be rough justice as between the claimants is better than no justice at all.

THE PRESIDENT: Yes.

MR. DE LA MARE: Putting two and three together, I would submit this is a very different competition damages case to many of the cases that this tribunal has considered before. It raises very different issues to the conventional business-to-business cartel like the vitamins cartel or the air cargo cartel or even those cartels involving project bid-rigging such as car glass or car bearings or other such cartels.

That being so -- and this is really the last point I want to make before I sit down -- you are going to have to confront some challenges that are presented by this type of case in this context because consumers are very different beasts to companies: they have different priorities, they behave in different ways.

Consumers are not record keepers, they are not professional price watchers, they are not, in the jargon, repeat players; they are one-time purchasers or maybe two-time purchasers who have very limited reference points compared to somebody who may be recurrently buying automotive bearings or recurrently buying air cargo services. Consumers have very different priorities to (inaudible: coughing) --

THE PRESIDENT: It is not about consumers, it is about this product, I think. I mean, if it is sugar, then consumers might be very regular buyers.

MR. DE LA MARE: That is a fair point and I totally accept that.

THE PRESIDENT: It is the nature of the product and the nature of the consumers who are purchasing it that creates this situation --

MR. DE LA MARE: It is the interface between the two; I totally accept that.

THE PRESIDENT: But I think we have got that point very much in mind.

MR. DE LA MARE: The only other point I was going on make in this connection is the different priorities that consumers have compared to businesses, factors like the local availability of the store, or the preference of the targeted group, which is predominantly the elderly or the

immobile, for a local business with which they can deal, will extend the extent to which the better-option analysis, which is one predicated on a entirely rational business with few or other transaction costs or considerations, choosing on price alone will affect the extent to which that is really a realistic way to assess how matters work.

With those comments, I will sit down and hear what my learned friend has to say on retrospectivity.

THE PRESIDENT: Thank you.

Yes, Mr. Bates we will take a break mid morning for the benefit of the transcribers when we get to a convenient point roundabout 11.30/11.45.

MR. BATES: Yes, sir. On our side we have also adopted a certain division of labour within the counsel team. Consistent with my modus operandi, much of the heavy lifting has been allocated to others and Mr. Armitage has been working very hard on our case on retrospectivity so I have asked him to deal with it orally if that is okay with the tribunal.

THE PRESIDENT: Thank you.

Mr. Armitage?

MR. ARMITAGE: Yes, I am very grateful.

May I also begin with two small pieces of housekeeping. I have also handed up two documents which I hope have reached the bench.

THE PRESIDENT: Yes.

MR. ARMITAGE: I propose that these be added to the back of the third authorities bundle as new tabs 79 and 80. Just to explain what those are --

THE PRESIDENT: What are they?

MR. ARMITAGE: Tab 79 is simply the notice of the claim in the *JJB* litigation.

THE PRESIDENT: Just one moment.

MR. GLYNN: I do not think I have got --

MS. STUART: There were just two.

THE PRESIDENT: You have both?

MS. STUART: Yes.

THE PRESIDENT: Are we one short?

MR. ARMITAGE:Mr. Jones has helpfully handed me a spare; we gave them an extra one, I think.

So the first document, my Lord, is simply the notice of the claim that was brought in the *JJB* litigation. That litigation ultimately settled and I only include that just to show the tribunal that the date of the relevant OFT decision in that case, if documented proof of that is needed, was 1 August 2003; you can see that from the first footnote. That is relevant to a

submission in my learned friend's skeleton argument about the fact that the previous version of Section 47B had retrospective effect --

THE PRESIDENT: Yes.

MR. ARMITAGE: -- and I will come to that.

THE PRESIDENT: That is the notice of the football shirts decision?

MR. ARMITAGE: That is the notice of the football shirts decision -- or rather of the claim that was brought by the Consumers' Association in respect of that decision --

THE PRESIDENT: Yes. The damages claim?

MR. ARMITAGE: Yes.

Then I suggest we include behind that the second document I have handed up, which is the explanatory memorandum that accompanies -- that Charter of Fundamental Rights in respect of Articles 17 and 51. That explanatory memorandum is referred to at various points in the written submissions of the parties and I spotted yesterday it had not been included in the bundle. It may be that we need not turn it up just for completeness.

THE PRESIDENT: Yes. I see. We have the Charter at tab 5, have we not?

MR. ARMITAGE: You have the Charter in the first authorities bundle. The alternative, which may be more sensible, my Lord --

THE PRESIDENT: Shall we put it as 5A?

MR. ARMITAGE: The would be a sensible idea, I agree. I am grateful.

THE PRESIDENT: I will just say this for both sides: if there are significant additions in this way, if you arrange for them to be provided at 10 o'clock in the morning they can be inserted before we come into court so we do not waste time with collective refiling.

MR. ARMITAGE: I am sorry about that and we will take that approach.

THE PRESIDENT: That applies not just to you but to Mr. de la Mare and his team.

Yes.

Submissions by MR. ARMITAGE

MR. ARMITAGE: MY Lord, members of the tribunal, if I may begin just by making absolutely clear what the (inaudible) case is on retrospectivity and, just as importantly, what Pride does not contend.

THE PRESIDENT: Yes.

MR. ARMITAGE: Pride is not challenging the applicability of the amended version of Section 47B in collective proceedings generally. Pride accepts that Section 47B, as amended by the *Consumer Rights Act (2015)* is the currently applicable statutory basis for collective proceedings generally, whether those proceedings are bought on an opt-in or opt-out basis. Likewise, Pride accepts that the relevant procedures for seeking a CPO are those provided in the new Section 47B and elucidated further in the 2015 CAT rules.

Pride's submission, however, is that there is nothing in Section 47B or the 2015 rules which requires the tribunal to grant a collective proceedings order where this would be contrary to the Human Rights Act or to principles of European law. In that connection, Pride's case has two components: first, Pride contends that to grant a collective proceedings order on an opt-out basis, at least in the specific circumstances of this case, would be contrary to Article 1 of Protocol 1 to the Convention on Human Rights -- which I will refer to as "A1P1" by way of shorthand.

Secondly, Pride contends that granting an opt-out CPO would also involve a breach of general principles of European law and/or of Article 17 of the *Charter of Fundamental Rights*.

Again, that submission rests on the specific circumstances of this case in a manner that I will go on to develop. In very broad outline, the reason underlying Pride's submissions in respects of both those systems of law is that the effects of allowing Mrs. Gibson to pursue an opt-out claim against Pride would be deeply unfair in light of the substantial impact of opt-out proceedings on Pride's interests and the fact that the relevant infringement in this case was committed many years before the opt-out system became a part of English law. We say that whether analysed under human rights law or European law, the result is the same: this is the kind of unfairness that those systems of law simply do not permit.

THE PRESIDENT: Just to be clear: is it accepted that Article 17 of the Charter goes no further than A1P1?

MR. ARMITAGE: Yes. In fact, that relates to the document I just handed up, which makes clear the legislature made clear in publishing that explanatory memorandum that the scope of Article 17 is intended to reflect and match that of Article 1 Protocol 1. So in terms of the substance, it may be that I do not need to make any additional submissions on the Charter. The only potential difference is because that is a provision of EU law, the consequences of a finding that the Charter would be contravened by granting a CPO in this case may be different because, of course, pursuant to the standard principles of the supremacy of EU

law, the tribunal may be required to go further than merely attempting to read down the legislation.

THE PRESIDENT: Yes.

MR. ARMITAGE: Again, I will go on to develop that submission.

So against that general background I intend to develop my detailed submissions by reference to five key topics, which I will set out briefly now.

First, I will address you on the new version of Section 47B itself and specifically the nature of the change of the law which that amended legislation brought about.

Secondly, I will address the tribunal on the affects of that change in the law on Pride and the extent to which those effects can properly be regarded as both substantive and retrospective.

Thirdly, I will develop the submission that the bright line distinction between procedural and substantive rules that Mrs. Gibson seeks to draw in this case is not determinative, or even particularly helpful, in relation to a provision such as Section 47B.

Fourthly, I will deal with the position under A1P1.

Fifthly, I will address you on the position under European law, including the threshold inquiry as to whether this case is within the scope of EU law and/or within the scope of the Charter at all, which is a point made against us by Mrs. Gibson.

So beginning with the first broad topic, and specifically the change in the legislation that was brought about by the *Consumer Rights Act 2015*. This is dealt with in our response at paragraphs 14 to 29, just for the tribunal's note, but I will develop that orally in a slightly different way.

Particularly I wish to highlight four important aspects of the new regime which, in my respectful submission, highlight the nature of what Parliament has done. These are aspects which did not exist prior to 1 October 2015 or indeed at any point in the long legal history of the United Kingdom. Those four important aspects are: one, that collective proceedings can now be brought by anybody subject to satisfying the just and reasonable requirement of the legislation. It is no longer only a body that has been specified by the Secretary of State that can bring a collective claim.

Indeed, the person who can now act as a class representative under Section 47B does not even have to be a member of the class they purport to represent. So that a claim can be brought by somebody such as Mrs. Gibson who has herself suffered no loss.

Two, a collective claim can be brought without any collective steps whatsoever being taken by the persons to whom the underlying causes of action belong. In particular, there is no longer any requirement, which was a feature of the previous regime, but the possessors of

the individual claims must consent to their being brought on a representative basis by the specified body. That is the opt-out regime which is unprecedented in this jurisdiction.

THE PRESIDENT: Well, that is true of the opt-in as well: they have to then opt in but the commencement of the claim does not require their consent.

MR. ARMITAGE: That is correct, yes. There is a stage at which, obviously when we look at the legislation, they have to take a positive step in respect of the proceedings; that is the submission, yes.

THE PRESIDENT: Yes.

MR. ARMITAGE: The third major legal development: it is implicit in the introduction of opt-out proceedings that a firm can end up defending a claim for, in this case, many millions of pounds in the absence of any individuals who have indicated that they wish to sue the firm in question. That is exactly the circumstances which (inaudible) contained in this case. The fourth and final major development is that there is now a very real possibility that a defendant to an opt-out claim will end up being obliged to pay damages into a fund that, if unclaimed by the represented persons, will be disbursed to charity and/or to the class representative herself and/or to her lawyers without a single penny going to anybody who suffered a harm as a result of the infringement.

THE PRESIDENT: When you say to the class representative, they go to -- well, the tribunal has to consent. I do not see how it would consent to money being -- going to pay ... other than costs and disbursements and then it has to go to charity.

MR. ARMITAGE: That is quite right.

THE PRESIDENT: I do not think it can be a bonus for the class representative.

MR. ARMITAGE: That is quite right and we will go through the legislation. I did not intend to suggest otherwise. It is in respect of legal costs and disbursements.

THE PRESIDENT: Yes.

MR. ARMITAGE: So turning to the legislation itself, just to see how these changes came about. The position prior to 1 October 2015 can be seen from the extracts from the pre-amended version of the *Competition Act*; that is the first tab in the authorities bundle. I am afraid, unhelpfully, these pages are not numbered but I can take you to the relevant page.

THE PRESIDENT: We are looking at sections, yes, which are --

MR. ARMITAGE: So skipping onto the second -- I am hoping that the tribunal's bundles are simply double-sided.

MS. STUART: Yes.

MR. ARMITAGE: If you turn over one page, you will see Section 47A, "Monetary claims before the tribunal". So this is the pre-1 October 2015 position.

THE PRESIDENT: Yes.

MR. ARMITAGE: I just draw the tribunal's attention to that provision, just to remind the tribunal, if it is necessary, that the position that obtained there was only follow-on claims could be brought in the tribunal and stand-alone claims had to be brought in the High Court. That is, of course, well known.

THE PRESIDENT: Yes.

MR. ARMITAGE: Then if we turn to the pre-amended version, if you like, of the provisions in Section 47B, you will see from Section 47B(1) that claims brought on behalf of consumers had to be brought by the specified body. That was a body specified in secondary legislation by the Secretary of State and the only body that was ever specified was the consumers' association, Which, which was of course a representative claimant in the *JJB* litigation.

At subsection 1 you will see that that provided for the specified body to bring proceedings which comprised consumer claims made or continued on behalf of at least two individuals.

Consumer claims are defined in subsection 2 by cross-reference to subsection 7. Essentially they are claims in respect of goods and services which individuals have received otherwise in the course of the business or indeed have not received, depending on the nature of the infringement in question.

Section 3 is the requirement that such claims could only be made or continued with the consent of the individuals concerned. So that was a requirement right at the outset for people with individual claims to opt in to proceedings.

Then, just to complete the submission on the old version of Section 47B, subsection 6, provided that:

> "Any damages awarded in respect of claims by a specified body must be awarded to the individual concerned, albeit that the tribunal could, with the consent of the specified body and that individual, order that the sum awarded be paid to the specified body."

THE PRESIDENT: Yes.

MR. ARMITAGE: Then we turn to look at the amended legislation to see what changed. The relevant extracts are at tab 3, which is the extract for the amended legislation, the *Consumer Rights Act (2015).*

You will see from Section 81 there is a provision that schedule 8, private actions in competition law, has an effect and then schedule 8 at the bottom of the page provides for certain amendments to the *Competition Act*.

THE PRESIDENT: Just a moment, which page are you on?

MR. ARMITAGE: The first page, sir, of tab 3 of the first authorities bundle.

THE PRESIDENT: Yes, schedule 8 starts half way down the page and that is the material part.

MR. ARMITAGE: It provides for certain amendments to the *Competition Ac*>. Paragraph 4 of schedule 8 amends Section 47A and in particular permits both stand-alone and follow-on claims now to be brought before the tribunal.

THE PRESIDENT: Yes.

MR. ARMITAGE: Section 47B then covers what are now called collective proceedings before the tribunal and you will see this on page 3 of the extracts at the top subsection 1 of the new 47B refers to combing two or more claims to which Section 47A applies. So that is the point that the new amended provisions depend on the existence of claims under Section 47A by individuals.

Subsection 2 provides that:

> "Such proceedings must be commenced by a person who proposes to be the representative."

What is important is that the representative does not have to be a specified body. Under Section 47B(8):

> "The tribunal may appoint anyone as the class representative provided it is just and reasonable and indeed whether or not that person is a member of the class of persons."

THE PRESIDENT: Yes.

MR. ARMITAGE: Then Section 7(e) introduces the distinction between opt-in and opt-out proceedings. Opt-out proceedings, collective proceedings, are defined in subsection 11 at the bottom of the page. They are:

> "... proceedings which are brought on behalf of each class member, except for anybody who opts out [positively opts out] or anyone who is not domiciled in the United Kingdom at the relevant time and does not positively opt in."

So other than those two caveats, it's everybody in the class.

THE PRESIDENT: Yes.

MR. ARMITAGE: Then in subsection 2 of paragraph 5 -- you will see this about halfway down page 4 -- that is the temporal provision that is at issue in relation to retrospectivity.

THE PRESIDENT: Yes.

MR. ARMITAGE: That provides that the new Section 47B applies to claims arising before the commencement of the this paragraph as it applies to claims arising after that time. We do not advance any argument that that provision, as a matter of common law, should be interpreted in accordance with some presumption against retrospectivity. We agree that, on its face, that provision permits a claim such as that which Mrs. Gibson purports to bring. It is the application of human rights law and principles of EU law that requires a tribunal to take a different course. But the common law position is something I will address you on briefly and it is also touched upon briefly by my learned friend in his written submissions.

THE PRESIDENT: One has the same provision in paragraph 4 that introduced Section 47A on the two pages before -- the pages are numbered at the top -- of page 2.

MR. ARMITAGE: Yes I ought to have pointed that out.

THE PRESIDENT: -- one has Section 47A.

MR. ARMITAGE: I think the position there is that the provision in paragraph 5(12)(b) would you be useless if at no time underlying claims of sales could not be brought, so it is in order to bring that provision into line.

Just very briefly, the new version of Section 47C which covers damages and costs -- we are on page 4 -- we will see from subsection 1 there is carve-out for exemplary damages and how they cannot be ordered in collective proceedings. In subsection 2, however:

> "The tribunal may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person."

So this is the aggregate damages point.

THE PRESIDENT: Yes.

MR. ARMITAGE: Subsection C(5) deals with the situation that may arise in opt-out proceedings where damages go unclaimed by the represented persons within the period specified by the tribunal. They must go to charity and the charity selected by the Lord Chancellor is the Access to Justice Foundation, as we know.

Subsection C gives the tribunal -- this was my Lord's point:

> "The tribunal may order that all or part of any damages not claimed within the specified period is instead to be paid to the representative in respect of all or part of the costs and expenses incurred by the representative engaged in the proceedings."

So that is the nature of the changes in the legislation.

THE PRESIDENT: Perhaps worth noting -- are you leaving the new act?

MR. ARMITAGE: Yes.

THE PRESIDENT: Well, within paragraph 8, that section introduces the new Section 47E, which is limitation.

MR. ARMITAGE: Yes.

THE PRESIDENT: Well, on page 6 the layout is a bit confusing because after 7 we get what looks like a two, but it is actually at paragraph 2 of paragraph 8:

> "Section 47E does not apply in relation to claims arising before the commencement of this paragraph."

So because that is a limitation condition it is expressly not made retrospective so Parliament obviously considered what should be retrospective and what should not.

MR. ARMITAGE: Yes, that is right. We do not suggest that Parliament did not draw that sort of destination. What we say is it was wrong to draw the destination where it did.

I am grateful for that intervention. What we see when we look at the authorities -- including in the common law context -- is that changes to the limitation periods are often regarded as falling on the substantive side of the line, thereby giving rise to the presumption against retrospectivity, although I am going to submit that that distinction is at best a rule of thumb.

So essentially what Pride says is that in order to achieve compliance with human rights law and/or EU law an interpretation such as that you see in, as you say, paragraph 2 of -- subparagraph 2 of paragraph 8 of the schedule 8 *Consumer Rights Act* should apply.

MR. DE LA MARE: Sir, before you put those provisions away, can I just ask you to note also the similar provisions in relation to collective settlements? They all proceed on the 47A and B model.

THE PRESIDENT: Yes.

MR. ARMITAGE: Thank you, I am grateful.

Turning then, my Lord, to the effects of the changes in the legislation on Pride in the present case. I have three short submissions on this point.

The first is that the infringement to which the OFT's decision related in the present case covered a period between February 2010 and February 2012. For the tribunal's note you can see that from paragraph 1.110 of the underlying OFT decision, which is in the non-core bundles at bundle 1, tab 3, page 11.

I am grateful for the chronology that my learned friend has -- and perhaps if the tribunal has this to hand as we look at it. I had not seen this before court this morning, but it does set out helpfully the timescale over which the new amended legislation was introduced.

THE PRESIDENT: Yes I think we are getting it.

MR. ARMITAGE: I am not sure if that went behind a particular tab, but I think Mr. de la Mare QC suggested putting it behind the skeleton argument, but perhaps if you could have it to hand.

THE PRESIDENT: We have that.

MS. STUART: I think we decided to keep it out.

MR. ARMITAGE: If you can keep it out -- yes, I am grateful.

THE PRESIDENT: Yes.

MR. ARMITAGE: The important point for the purposes of the first aspect of this submission is that it was not until April 2012 that the consultation was issued in which the possibility of collective actions were first put forward.

Very briefly, just to show the tribunal the way in which the possibility was put forward at that stage -- well, the first point, my Lord, is that this postdated the infringement in the present case.

THE PRESIDENT: Yes, well, at that point the detail had not been worked out.

MR. ARMITAGE: Not only had the detail not been worked out -- yes, you are right in April 2012 the consultation simply put forward an option for consideration and consultation, but, as I have said, the infringing conduct was complete and in front of the OFT by February 2012, so a number of months before even that consultation question was put out.

The OFT's infringement decision in this case was issued on 27 March 2014. That did postdate the government response document, which is included in the bundles, but it has also been helpfully included behind this chronology.

THE PRESIDENT: It is in the chronology?

MR. ARMITAGE: It is in the chronology.

THE PRESIDENT: The point is a short point, is it not?

MR. ARMITAGE: The point is a very short one.

THE PRESIDENT: At the time of the infringement, Pride would not have known the prospect of collective actions, but at the time of the OFT decision, it would have known not only of the prospect, but that there was a bill before Parliament -- if not would have known, should have known or could have known that there was a bill before Parliament which had what became Section 47D and the same commencement provisions. So its advisers would have been able to tell it, well, there is a bill going through Parliament which, if enacted, will enable people to bring collective proceedings with regard to this infringement.

MR. ARMITAGE: Yes. You will have seen, my Lord, that there is evidence in the file that in fact that was not the position on the ground.

Mr. Allen has given evidence that at the time of the OFT decision and at the time of the decision about whether to appeal the decision was taken -- and, my Lord, you have seen reference to that in our skeleton arguments and I will not go through that. So that is the evidence but --

THE PRESIDENT: He says nobody told him, that may be, but Pride was being professionally advised through the OFT proceedings and certainly, when he talks about a decision whether to appeal, no doubt -- indeed he says, we have legal advice and we are not going to disclose it and (inaudible) what it is.

Properly advised, someone would have been made aware of this prospect.

MR. ARMITAGE: Yes.

My Lord, of course, the submission does not depend on that evidence from Mr. Allen. The key consideration is that at the time of the conduct in question was carried out, this was not even a possibility in a consultation document; this simply was not on the table. That is the key point. When we come to look at the authorities -- particularly the EU law authorities -- it is clear that is the relevant time at which to conduct the analysis.

THE PRESIDENT: That does not help very much on unfairness, does it? You cannot really say, can you, I would not have broken the law -- I knew it was against the law, maybe I did not know whether I might be penalised financially because of complicated turnover considerations, but I would not have done it if I had realised that people might have a better way of claiming their loss from me than they did and therefore it is unfair and I would have kept the law if I had known that.

MR. ARMITAGE: I think my response to that -- and I will have to develop the response by reference to the authorities, but I will submit that when looking at, particularly the authorities on Article 1, Protocol 1, that is indeed the way in which the courts approach this issue.

THE PRESIDENT: It is one thing if it would have been lawful at the time, I can see that, but it is entirely right you should not be penalised for doing something that was lawful when you did it if it subsequently became unlawful.

But to say, it was unlawful but I still would not have done it if I thought people could get compensation --

MR. ARMITAGE: Yes.

THE PRESIDENT: -- myself, I find that a rather difficult argument on fairness.

MR. ARMITAGE: Yes. My Lord, perhaps I can address that most helpfully by reference to the authorities and to see how these kind of issues are being played out.

The starting point, I have to say, my Lord, is this is not a situation that has been considered in any of the authorities. This is something of a novel situation so I am not suggesting there is a directly analogous authority, but my submission is that when one looks at the way in which this is has been treated in the human rights context and in the EU law context, then in fact this is precisely the kind of situation in which the presumption -- or rather the substantive protection against retrospectivity does arise.

The simple fact, as I have said, is that absent the change in the law issued by the *Consumer Rights Act*, Mrs. Gibson could not have brought the claim that she now seeks to bring. That is common ground.

So in substance that creates a potential liability in damages on Pride's part that was not foreseeable at the time of the conduct in question.

THE PRESIDENT: Why not? The liability was foreseeable in practicability because its not a liability to Mrs. Gibson; it is a liability to the clients.

MR. ARMITAGE: Yes.

THE PRESIDENT: The potential liability was there. The practicality of having to fulfil the liability, you say, is not there. I do not see how you can say the liability was no there.

Suppose, for example, if instead of introducing collective proceedings, the government, in a fit of munificence with public money which it is not generally found, said, we are going to extend Legal Aid for such claims before the tribunal and we will not have collective proceedings as we do not like opt-out proceedings, but we will give Legal Aid --

MR. ARMITAGE: Yes.

THE PRESIDENT: -- (inaudible) on the same basis and after the passage of the legislation, Legal Aid can be granted even though the claim arose before.

MR. ARMITAGE: Yes.

THE PRESIDENT: That would enable people like the purchasers of mobility scooters to bring claims they otherwise would not have brought and it is really not different, is it, from that situation?

MR. ARMITAGE: The question -- and this is clear from the authorities -- is whether, in dealing with a Article 1, Protocol 1 situation, there being no dispute that there is a legitimate purpose that is pursued by this legislation, firstly, whether the provision in that A1P1 is engaged -- I say that it clearly is -- and, secondly, whether there is a special justification for the retrospective effect of the legislation, as opposed to the ordinary position in which legislation is prospective. The submission I am advancing at the moment, my Lord -- and I will come onto this directly -- is simply that, drawing this distinction which my learned

friend draws between procedural and substantive changes occludes, if I may put it that way, the clearly substantive effects that procedural changes may have and that is clear on the authorities.

What cannot be denied is that this does have retrospective effect and substantive effect on Pride. That I do not think can be disputed. I take my Lord's point and, as I say, I will address it by reference to the authorities, but I think in certain circumstances a change in the Legal Aid regime could indeed have the same effect and I do not shy away from that submission, just so that you have it. But of course it would depend on the specifics and it has to be a fact-sensitive inquiry.

THE PRESIDENT: Expect this has been -- all these changes are like conditional fees when they came in because it was a major, radical change and enabled lots of cases to be brought in practice where people would not have brought them. Therefore defendants were exposed to financial claims which they would not have been exposed to, but that was similarly made as collective proceedings were made to apply to claims arising before the date of introduction of conditional fees.

MR. ARMITAGE: Yes.

THE PRESIDENT: So the logic of your argument is that that also contravened Human Rights A1P1.

MR. ARMITAGE: The logic of my argument is that looking at the specific circumstances of this case, the conduct in the question took place -- it began in February 2010 and it was concluded by February 2012. That is well over three years before the relevant legislation was introduced. You have that submission.

My submission, my Lord, is that the line has to be drawn somewhere. The logic of Mrs. Gibson's case is that Parliament could legislate in order to permit collective proceedings to be brought in respect of, let us say, a cartel that was in operation 20 or 30 years ago, 40 years ago --

THE PRESIDENT: If you change the limitation period, then that has been fairly well established in EU law clearly and it has been addressed that you are infringing human rights because you are exposing people to a liability that had been terminated.

MR. ARMITAGE: Yes.

THE PRESIDENT: So changing limitation is always viewed with great rigour in terms of -- and we see that even in the drafting of this act and that is why the new section, 47E, is not retrospective.

But when you are dealing with the mechanism to enforce a liability that has always -- that is not changed, it is just the practicalities of enforcement that are changed. It is rather different.

MR. ARMITAGE: Taking up my Lord's limitation period example -- my submission is that in the circumstances of this case we are really in a very similar situation indeed. As I said, we have conduct that took place well over three years before the introduction of the opt-out procedure, a claim by Mrs. Gibson that then came at the end of the limitation period in respect of the underlying OFT decision. In reality, just as with limitation, as I will come to directly, my Lord, the position with limitation periods is that they are regarded as engaging the presumption against retrospectivity because although on one view they are a procedural change, they can have the effect of effectively extinguishing or reviving liability.

That is my simple submission: that is what has happened with this legislation. There is no chance that Pride would have had this liability absent the changes. That is the submission on the effect on Pride.

THE PRESIDENT: That is not as a matter of liability; that is a matter of practicality. But you say that is why one should take a sort of substantive, realistic view on that --

MR. ARMITAGE: My Lord, yes. That is a function of the Parliamentary drafting technique that has been adopted which refers to underlying claims under Section 47A.

THE PRESIDENT: Yes.

MR. ARMITAGE: Yes. Just to -- I was going to suggest a break for the transcriber, but just to finish this point on -- to take up my Lord's point about Legal Aid changes.

The point about Legal Aid changes, my Lord, is that they (inaudible) if Legal Aid was extended to allow somebody who could not otherwise bring a claim to bring a claim, that is a specific change which enables somebody who has suffered a loss to claim that loss. But, as I have said, in this case the substantive reality is that Mrs. Gibson brings claims in respect of losses that individuals are not likely themselves to receive. That is specifically provided for in the legislation.

THE PRESIDENT: Well, they may not all recover it if they are not astute and they do not respond to wide publicity, but in theory they mostly will recover it. If we thought most of them are unlikely ever to put in for the money, that might be a reason to disallow the action quite independently of human rights.

MR. ARMITAGE: What we do know, my Lord, is that, as I say, the claim against Pride has been brought right at the end of the limitation period. There is no evidence of any individuals

affected by the conduct in question who have come forward and indicated even informally they willingness to be involved or their desire to recover damages.

In those circumstances it is proper to have regard to the very, very real possibility that Mrs. Gibson is going to recover damages that reflect no liability -- and of course the way in which liability is calculated is by reference to the aggregate damages provision and it is not carried out by reference to individual damage suffered by particular individual.

Of course liability in this context is not what is established by the OFT's decision. That establishes an infringement but of course the action is an action for breach of statutory duty which requires to be completed by loss and we have not got to that stage yet.

THE PRESIDENT: No but we are assuming that -- I mean, that is a second part of the argument which we will get to this afternoon or maybe tomorrow, for sure, about whether the loss is sufficiently established. We are assuming for this purpose it is; if it is not then that is quite independent ground and nothing to do with human rights or retrospectivity.

MR. ARMITAGE: Quite.

THE PRESIDENT: So we are assuming that loss is established, in which case the individuals who suffered loss have a claim and is just a small amount and, as you say, no individual realistically would have pursued it.

MR. ARMITAGE: Yes, the simple submission -- and it is a simple and, I say, a common sense one -- is just that the distinction between a change in the mechanism and a change in the substantive liabilities or obligations is one of form rather than substance and I am urging the court to adopt an approach that favours substance rather than form. That is what I say the authorities demand. That is the submission.

If that is a convenient point, I was about to turn to my third topic which was just to look at some of the common law principles.

THE PRESIDENT: I think that is probably a sensible point. We will be back in 5 minutes.

(11.40 am)

(A short break)

(11.53 am)

MR. ARMITAGE: Before moving onto what I describe as my third topic, I just want to clarify and round up what I say is my essential submission on the part of Pride on the nature of these changes.

My Lord gave various examples of changes to collective funding arrangements and Legal Aid and so on. What we say is the essential difference between the present legislative

changes and those kinds of changes to the mechanism for bringing claims is that in this case there is a genuine substantive effect that results from the amended legislation.

If these claims had to be brought by individuals those individuals would have to prove the individual loss they each suffered before any liability and damages on Pride's part would arise. But we have seen from the provisions of the amended Section 47B that that is not the case in respect of a claim by a representative person such as Mrs. Gibson. The tribunal can award a global sum of damages on a aggregate basis and it can expressly do so without having to enquire into the individual damage suffered by the possessors of the individual claims. We say that is a substantive difference as a matter of law that engages the various legal principles concerning retrospectivity. That is the submission.

THE PRESIDENT: Yes.

MR. ARMITAGE: Against that background I want to turn to dealing with the --

THE PRESIDENT: Just one moment.

MR. ARMITAGE: Yes.

THE PRESIDENT: That is the Section 47C(2), the aggregate award of damages.

MR. ARMITAGE: Yes:

> "The tribunal does not have to undertake an assessment of the amount of damages recoverable in respect of the claim of each represented person."

THE PRESIDENT: But it does have to ensure that the total loan reflects the aggregate of all the individual claims, does not it? We could not award more, we thought, all the individuals in the past put together recover.

MR. ARMITAGE: No although it does as I have said raise the very real possibility that elements of the -- and this is the key difference from the opt in regime that existed before -- the very real possibility that elements of that global pot of damages if you like will go to charity or go to satisfying Mrs. Gibson's legal costs rather than any liability in damages, rather to the pocket of anyone who suffered damage. That is why we say it is essentially different from the examples that my Lord has given. This now shades into the third topic which is to deal head on with this distinction between procedural and substantive although we have already covered it to some extent in the exchanges before the break. The nub of Mrs. Gibson's case on this issue is that the new Section 47B creates no substantive rights or liabilities and is instead a procedural mechanism and that, like almost all procedural changes, that applies regardless of whether the underlying facts occurred before the change was introduced. That is the way it is put in my learned friend's skeleton at paragraph 28.

The first aspect of Pride's response to that submission is that the distinction which Mrs. Gibson relies on so heavily cannot be determinative and that is precisely because as I have just submitted changes to procedures can themselves have substantive consequences so that characterising a particular legislative change as procedural cannot determine the approach that the law should take. I wanted very briefly to take the tribunal to the *L'Office Cherifien* case which in the first authorities bundle at tab 12. This was a case concerning the common law presumption against retrospectivity and, as I have made clear I hope, Pride does not rely directly on any such presumption as an act of common law. But what the court said in this case about retrospectivity and the procedural substantive distinction in my submission is helpful. The case concerned the introduction of a new statutory power allowing arbitrators to dismiss arbitral claims for want of prosecution. The legislation introducing that statutory power came into force on 1 January 1992 and the question, the appeal point was whether that allowed the arbitrator to take into account delays that occurred prior to January 1992. The Court of Appeal, and then upheld by the House of Lords -- or rather the Court of Appeal overturned by the House of Lords held that the statutory power could not be applied retrospectively but the Court of Appeal's analysis of the law was effectively endorsed by Lord Mustill in the House of Lords and, indeed, Sir Thomas Bingham, Master of the Rolls as he then was, his analysis in the Court of Appeal is relied upon by my learned friend as well and we accept that it is the right analysis.

THE PRESIDENT: You accept that what the Master of the Rolls said --

MR. ARMITAGE: Yes.

THE PRESIDENT: -- is the right analysis.

MR. ARMITAGE: Yes. Of the law.

THE PRESIDENT: Because he said, citing longstanding authorities and -- looking at page 495 -- he quotes from (inaudible):

> "Perhaps no rule of construction is more firmly established than this. The retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matter of procedure ...(Reading to the words)... cannot be avoided without doing violence to the language of enactment."

Then it says:

> "This procedural exception is well established."

Then letter D quotes Lord Blackburn saying:

> "Alterations in the form of procedure are always retrospective unless there is some good reason or other why they should not be."

To reflect the policy for that, he explains, by reference to Bennion, the quote at letter E:

> "Procedural change is expected to improve matters for everyone concerned or at least improve matters for some without inflicting detriment on anyone else who uses ordinary care, vigilance and promptness."

He does adopt and approve as well established a procedure versus substantive distinction, does he not.

MR. ARMITAGE: Yes. He refers to the exception as being well established. Two points on that. The first point is to look at what kind of changes are regarded as falling within the ambit of that exception. We can see that most clearly from the quotation just below letter B from the *Wright v Hale* case and Pollock CB:

> "Laws which affect the vested rights of interested parties and those which merely effect the proceedings of course."

The examples are things like, what shall be deemed good service; what shall be the criterion of the right to costs, how much costs shall be asked, the manner in which witnesses should be paid and so on.

We say there is a very, very clear and striking difference between the kind of changes that are at issue in the present case for the reasons I have already outlined. We see again at letter E, a reference to what Bennion says about the exception:

> "The basis for the distinction between procedural and substantive is the procedural changes improve matters for everyone concerned or at least for some without inflicting detriment on anyone else who uses ordinary care, vigilance and promptness".

THE PRESIDENT: Yes.

MR. ARMITAGE: Then, letter F to G, and this is where I say that I accept the analysis of the Court of Appeal -- or rather I submit that the analysis of the Court of Appeal is of a piece with Lord Mustill in the House of Lords in the same case which is that the exception is grounded in fairness as indeed is the general rule that substantive statute should not be construed retrospectively.

THE PRESIDENT: Yes. Where it says the exception only applies where application of it would not cause unfairness or injustice.

MR. ARMITAGE: Yes.

THE PRESIDENT: You say that is the case here.

MR. ARMITAGE: You will see over the page at 496 there is a reference to the *Yew Bon Tew* case. This concerns my Lord's point about limitation periods. You will see in the second sentence:

> "If the limitation is shortened but a plaintiff still has time to sue then he is likely to be statute barred if he does not sue within the shortened period. But if a limitation period is extended after a previous shorter period ad already expired, then the plaintiff will now be unable to take advantage of the new period because it would not be fair to deprive the defendant of the defence as offered by the expiry of the limitation period."

THE PRESIDENT: Yes.

MR. ARMITAGE: Yes. Then just briefly again on the *Yew Bon Tew* case, in the judgment of Lord Justice Kennedy, which was concurring with that of Sir Thomas Bingham, over at page 502, just above letter C, I just rely on the dictum of Lord Brightman in that case which emphasizes that:

> "An act which is procedural in one sense may in particular circumstances do far more than regulate the course the proceedings because it may on one interpretation revive or destroy the cause of action itself."

Again we say that is essentially what has happened in the present case: it may be regarded in one view as a procedural -- a mere procedural change, if I may put it like that, but in reality it revives the cause of action on the part of individuals. Substantively it has that effect. As I have said, it changes the substantive elements of claims that individuals would need to prove if pursuing claims in their own right.

Very briefly -- and I am conscious of the time -- I will then turn to the position under A1P1 and just take you to what Lord Mustill said in that case although without doubting the analysis of the Court of Appeal, somewhat further in relation to the procedural exception, so the relevant section of his judgment starts at page 523. You will see at letter E he is deal with the arbitrators' conclusion in the first instance. The arbitrator had concluded that Parliament intended for -- and this was introducing, you will recall, the power to dismiss proceedings for want of prosecution:

> "... concluded the Parliament intended for tribunals to proceed on the basis that that power had been there since 1950 because of the way in which the amendment was introduced."

Lord Mustill, now over the page at 524, just below letter B, did not think it was possible that Parliament could have intended that, saying that:

"The real contest is not whether Section 13A was retrospective in the ordinary sense but whether a provision which was undeniably prospective in the conferring of powers enabled those powers to be exercised by references to acts or omissions which had taken place before the new section came into force."

That is the way in which the presumption against retrospectivity arises in that case and indeed it is same in the present case in that on one view the relevant legislation is clearly prospective -- but if one looks at the exercise of the new powers by reference to acts or omissions which have taken place before the new section came into force.

The point I particularly rely on from Lord Mustill's judgment is at the bottom of the page where he owns up to reservations about the reliability of generalised presumptions.

Then, over the page, the reason that he owns up to those reservations is that the basis of the rule is no more than simple fairness. Then that general distrust of the presumptions feeds into his approach to the procedural exception which he considers at page 527.

Towards the bottom of the page, just below letter H, he talks about the distinction being firmly embedded reflecting what we saw Sir Thomas Bingham MR, as he then was, say about the well-established nature of the distinction. Lord Mustill cautions that:

"The firmly embedded nature of the presumption can lead easily to an assumption that every right can be characterised uniquely as either substantive or procedural and that the assignment of a particular right to one category rather than the other will automatically yield an answer to the question of [retrospectivity]."

In short. He goes on to say that that sort of analysis would be unprofitable and indeed misleading because it leaves out of the account the fact that some procedural rights are more valuable than some substantive rights and partly because I doubt whether it was possible to assign rights such as the present unequivocally to one category rather than the other. So he prefers to look to the practical value and nature of the rights presently involved.

So in my submission that is all of apiece with the analysis put forward by Sir Thomas Bingham, who, although he refers to an established procedure exemption, emphasizes that that distinction yields to fairness in the circumstances of the case.

As I say I rely also on the extracts from the *Yew Bon Tew* case as emphasising that procedural changes can indeed lead to substantive effects in particular in relation to limitation periods.

THE PRESIDENT: That is in the quotation in Lord Justice Kennedy's judgment, the *Ubuntu*.

MR. ARMITAGE: Yes, exactly, my Lord, and also the discussion in Sir Thomas Bingham's judgment at page 496, A to B.

THE PRESIDENT: Yes.

MR. ARMITAGE: Effectively I say it is approved here and therefore I rely on it only for the legal principle.

My Lord, I will turn then to my fourth main topic which is the position under Article 1, Protocol 1.

Our written submissions on this issue are principally found in our response at paragraphs 35 to 45, just for the note of the tribunal.

Our submissions on this point are advanced under two heads. We say, first, that as a matter of law the possibility of being liable in damages pursuant to a court judgment in the course of collective proceedings is sufficient to engage the human right to property, as enshrined in A1P1. We rely for that submission on the two Supreme Court cases that we cited in written submissions of *AXA* and *Welsh Asbestos Bill*.

Secondly, while we do not dispute that the amended Section 47B pursues a legitimate aim by reference to the high threshold which has to be surmounted to show that an aim of Parliamentary legislation is not legitimate, we submit that it would be disproportionate, and hence unjustified, to permit the proposed opt-out claim to proceed against Pride in the present case. The authorities require special justification for retrospective effects of this kind and no such justification is offered in my submission.

So dealing first with the question of engagement of Article 1, Protocol 1, could I take the tribunal please to the case of *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill*of 2015 in the Supreme Court -- which I will refer to as "Wales" by way of shorthand --

THE PRESIDENT: Yes.

MR. ARMITAGE: -- that is in the second authorities bundle at tab 27.

THE PRESIDENT: I think it is in the first, the first one.

MR. ARMITAGE: It seems to have made its way into my second.

THE PRESIDENT: I think it is the one we have just had for *L'Office* at tab 27.

MR. ARMITAGE: It will be a bundling gremlin at my end.

THE PRESIDENT: For some reason we go on up to 28.

MR. ARMITAGE: To all events, its behind tab 27.

THE PRESIDENT: We have it.

MR. ARMITAGE: That case concerned proposed legislation by the Welsh Assembly relating to the costs for NHS treatment for asbestos-related diseases. Because I rely on the analysis of proportionality as well, it is helpful just to look at the nature of the legislative provision that

was at issue in that case. It is summarised helpfully at paragraph 6 of Lord Mance's judgment on page 1025.

Just to summarise, I hope accurately, what the bill did was it imposed a new quasi-tortious, as Lord Mance puts it, liability on the part of compensators -- that is people, particularly employers -- who make compensation payments to victims of asbestos-related diseases. What the bill does is make those employers and other compensates, as Lord Mance describes them, liable to the Welsh ministers for any costs associated with the treatment of the victim by the Welsh National Health Service.

You will see from paragraph 6(d) that this new form of quasi-tortious liability is based on future compensation payments and so the proposed bill is prospective in that sense. But it is in respect of:

> "Actual or potential wrongs, ie the exposure to asbestos-related harm, the operative elements of which were committed many decades ago."

Then the other aspect of the bill, which is summarised at paragraph 6(ii), is that a new liability is also imposed contractually on the insurers of those who are required to make compensation payments. So when compensators incur liability in respect of Welsh NHS costs, the bill also makes the relevant insurers liable under their existing contracts of insurance even if the relevant liabilities are outwith the scope of those contracts of insurance.

Again you will see from (c) in paragraph 6(ii) that that contractual liability is imposed in relation to policies issued before as well as after the dates that the legislation comes into force so it therefore is in relation to policies issued and covering events occurred many decades ago. So in that sense it is retrospective in precisely the way that I say the present case is.

Formally speaking, the issue that arose on the appeal was whether the bill was in the competence of the Welsh Assembly and part of the judgment is concerned with the construction of the *Government of Wales Act* and that is paragraphs 11 to 34 of Lord Mance's judgment.

Happily, that is not relevant to the issues before the tribunal. But one feature of the devolution legislation is that the Welsh Assembly is not permitted to legislate in a way that contravenes Convention rights and that is why Article 1, Protocol 1 was relevant in this case.

Lord Mance, although given his conclusions on the point of construction of the *Government of the Wales Act*, noted that it was not strictly necessary to consider the point under Article

1, Protocol 1, said that the point had been fully argued and he therefore gave a view on it. That begins at around paragraph 35 on page 1035 of the judgment.

So dealing first, as Lord Mance does, with the question of engagement, you will see from paragraph 36 that the intervenor in that case -- and that was the Association of British Insurers who had an obvious interest in demonstrates that bill was contrary to A1P1 -- had said that the effect of the bill was to deprive them of their previous legal freedom from exposure to the relevant charges and of their possessions in the form of the assets he would have to use to discharge the new liabilities created.

I should say that that relates to the provision in A1P1 which is set out just above in Lord Mance's judgment. The second sentence of A1P1 refers to:

> "No one being deprived of his possessions except in the public interest and subject to conditions provided for by law."

In relation to this point about engagement of that provision, at paragraph 41 you will see that Lord Mance, who was in the majority in this case, but in agreement with Lord Thomas, who was in the minority, held that Article 1, Protocol 1 was indeed engaged as regards both the compensators, the people who would have to pay out in respect of this liability, and their insurers who would ultimately foot the bill.

What I rely on in particular is that, in Lord Mance's view it was sufficient that:

> "... both are affected and potentially deprived of their possessions in that the bill alters their otherwise existing liabilities and imposes on them potentially increased financial burdens arising from events long passed and policies made long ago."

THE PRESIDENT: It is the alteration of legal liabilities, is it not? It has that effect. Is it not fundamental to his approach that, as he said in the summary of the two sections of the bill that you took us to in paragraph 6, it is imposing a liability -- one he describes as quasi-tortious, the other contractual -- that did not exist. They were just -- whether people had bothered to enforce it or not, they just were not liable for these costs before.

MR. ARMITAGE: Yes.

THE PRESIDENT: So that is fundamentally different from the situation with collective proceedings, is it not?

MR. ARMITAGE: My Lord, in my submission, no, for the reasons already given.

The present case is one in which -- for all practical purposes, this is the point about emphasizing form over substance. The new legislation does create a new liability, it is a liability that there is no possibility of Pride being subject to, absent the change in the legislation.

THE PRESIDENT: This is not focusing on practicality; this is focusing on liability. It is a completely new liability. Obviously it has got to be a liability that has financial effect, but it is not just a change having financial effect; it is a new liability you are exposed to.

MR. ARMITAGE: In my submission that is not essential to the decision and in fact Lord Mance here endorses the judgment of Lord Hope in the earlier *AXA* case -- this is still at paragraph 41:

> "The way in which Lord Hope put the issue [was] that a person's financial resources are capable of being possessions [within the meaning of A1P1] and then the question is simply in terms of engagement whether the alleged victim is a member of a class of people who risk being directly affected by the legislation."

Then Lord Reid in the same case noted at paragraph 111 that the Convention was intended to guarantee rights that were practical and effective and argued for a correspondingly broad concept of "victim".

So there is no suggestion in the way in which Lord Hope formulated the test that the fact that there was a new primary liability was decisive in this question of whether A1P1 is engaged:

> "It is a low threshold reflecting the need to make these rights practical and effective."

My submission, by analogy with *AXA* and the *Wales* case, is that Pride is indeed a victim within the meaning of A1P1 because if an opt-out CPO is granted there is indeed a risk that Pride will be directly affected in the form of a liability to pay damages into a fund for distribution to the class members or indeed distribution to charity if funds are left unclaimed.

We can see a similar approach, the imposition of a low threshold for the engagement of A1P1 from the *Burden* case in the European Court of Human Rights, which is behind tab 48. That is right at the end of my --

THE PRESIDENT: Are you going to take us to the *AXA* case or do you the summary in paragraph 42 is enough?

MR. ARMITAGE: In terms of the applicable test, yes, in the sense that it was approved expressly by the majority, and indeed Lord Thomas, in the *Wales* case. So on this question of engagement I rely simply on the summary set out there.

THE PRESIDENT: Yes. A little hard to follow exactly what was going on in --

MR. ARMITAGE: I am happy to go to the *AXA* case just to see what was going on. That is behind tab 21.

This was a case which concerned Scottish legislation which reversed a House of Lords decision to the effect that a condition called plural plaques did not constitute damage or physical injury for the purpose of tort claims. The effect of that House of Lords decision, which reversed a long-established interpretation that had been given by lower courts, was to make employers liable for loss that was not previously recoverable -- or rather, I should say, the effect of the legislation was to make employers liable for loss that was not previously recoverable.

The discussion of victim status begins at paragraph 24 of Lord Hope's judgment --

THE PRESIDENT: Which paragraph?

MR. ARMITAGE: Page 904, paragraph 24 of Lord Hope's judgment.

THE PRESIDENT: The appellants were employers, were they, or were they insurers?

MR. ARMITAGE: Yes, the appellants were the insurers who, of course, in light of this remedial legislation, contended that they faced the risk of being liable under existing contracts of insurance --

THE PRESIDENT: I think that is a different point. Whether they are victims. If Section 47B created a new liability one can see Pride would be a victim because they are the person actually being sued. It is the antecedent question: does it create a new liability? That is a different question, is it not?

MR. ARMITAGE: The way in which Lord Hope approaches the problem treats the question of victim status as essentially overlapping; it is the other side of the coin to the inquiry about the question of engagement.

THE PRESIDENT: I see.

MR. ARMITAGE: You will see that from page 295. He proceeds immediately, having concluded that the insurers were victims for the purposes of the Convention on the basis that there was a risk of being required to pay out money in light of the legislative change, to considering compatibility with the appellants' Convention rights.

So he regards victim status as being synonymous with the inquiry as to whether the Convention rights are engaged and that is how it is also approached in the *AXA* case.

THE PRESIDENT: You are referring to which case as being similar to the *AXA* case?

MR. ARMITAGE: I am sorry, in the *Wales* case.

THE PRESIDENT: In the *Wales* case.

MR. ARMITAGE: Because in *Wales* Lord Mance relies on this section of Lord Hope's judgment in concluding that Article 1, Protocol 1 is engaged.

THE PRESIDENT: It is part of the engagement, I see that, of Article 1, Protocol 1 that it effects people -- there has to be a victim -- but it is still the nature of the way in which they are affected.

MR. ARMITAGE: The way in which Lord Hope deals with that, as you will see in paragraph 28, he concludes this the insurers would be victims. He also says:

> "I would also hold that the amount of money that they would be required to pay to satisfy their obligations under these insurance policies is a possession for the purposes of A1P1".

So it is the risk of having to pay out that engages the article where you have a victim.

THE PRESIDENT: Yes.

MR. ARMITAGE: We have seen from the authorities on limitation periods it is not determinative whether some form of new liability is created or destroyed for that matter; the question is whether -- or at least the question can be whether some new burden is imposed on a particular party. It is the imposition of that burden which engages A1P1 where the burden in question is a potential liability to pay out damages.

As I have said, my Lord, we quite accept the present case is one which has not received -- there is no directly analogous case on the authorities --

THE PRESIDENT: Yes.

MR. ARMITAGE: -- but we say it is clear from these judgments that a low threshold is adopted for engagement and it is met in the circumstances of this case.

THE PRESIDENT: It would follow then, going back to the examples I gave you, shortly before, other than the distinction you sought to about aggregate loss, that introduction of Legal Aid or conditional fees would also come within A1P1 because in reality they lead to financial burdens from claims being brought that would not have been brought.

MR. ARMITAGE: Yes well.

THE PRESIDENT: Indeed that was the whole purpose of allowing the conditional fees --

MR. ARMITAGE: Yes.

THE PRESIDENT: -- was to assist people in being able to make claims, a similar purpose really to collective proceedings.

MR. ARMITAGE: It may be that those kinds of provisions would engage the exemption in relation to the -- I say engage the exemption, engage the Convention right, by the way in which that is approached. I am not sure that that specific issue has been considered in the authorities but when we come to proportionality, that is where the distinction may be drawn and, as I have said, a key point is that the 2015 Act changes the substance of what needs to

be shown in order to establish the liability of Pride as claimed in this case. That includes, most basically, the requirement for claimants who want to bring the claim. That was a prerequisite of the old legislation.

THE PRESIDENT: Yes.

MR. ARMITAGE: Effectively Mrs. Gibson is acting as a private attorney general. She is claiming for damage suffered by others in a way that was simply not possible before and that, we say, is a substantive change and that now shades into the analysis of proportionality --

THE PRESIDENT: Yes.

MR. ARMITAGE: -- which is ... Again, if we return to the *AXA* case -- I am sorry, to the *Wales* case --

THE PRESIDENT: Yes, as 27.

MR. ARMITAGE: -- at 27, it is common ground that this effectively involves considering two questions: firstly, the question of legitimate aims; and, secondly, the question of proportionality.

That is the approach that is adopted by Lord Thomas, that is the summary of the approach at paragraph 105, at the bottom of page 1054, but, as I say, it is common ground that those are the two questions that need to be considered.

It is likewise common ground that the legislation pursues a legitimate aim and, principally, the aim of making it easier for individuals to gain compensation for breaches of competition law.

The test for impugning a legitimate aim represents a high hurdle. It needs to be shown that the legislation is manifestly without reasonable foundation; that is the test as articulated by Lord Mance at paragraph 51.

THE PRESIDENT: Yes, you accept it was --

MR. ARMITAGE: As I say, that is accepted.

THE PRESIDENT: Yes.

MR. ARMITAGE: But the question of proportionality involves no such high threshold and I rely on what Lord Mance says as paragraph 52. He refers here -- there is something of a confusion because he approaches this as four stages rather than two but that is because the second, third and fourth stages are all aspects of proportionality --

THE PRESIDENT: Yes.

MR. ARMITAGE: -- but the key inquiry that he identifies the court as having to carry out is:

"Simply whether, weighing all relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest being promoted and the other interests involved."

Also:

"The hurdle to intervention [as he puts it] will not be expressed at the high level of manifest unreasonableness."

Then at paragraph 53, he notes that in the case of retrospective legislation -- this about half way down the paragraph:

"Special justification will be required before the court will accept that a fair balance has been struck."

Just to complete the legal position, at paragraph 54 he confirms that the concept of a margin of appreciation is not applicable at the domestic level and that applies where Strasbourg is considering national legislation of contracting states. There is obviously room for a concept of deference to Parliament, but there is no applicable margin of appreciation as the authorities at Strasbourg-level require. So that is just the legal position.

In terms of the application to the present case, this is kind of what I have already said to an extent --

THE PRESIDENT: Shall we just see how he applies it in the *Wales* case?

MR. ARMITAGE: Yes of course.

THE PRESIDENT: Have we got that in front of us?

MR. ARMITAGE: Yes.

THE PRESIDENT: I think for the insurers ... There are of course two categories: the employers and the insurers, two different sections. It is paragraph 57, I think. We are talking about both there.

MR. ARMITAGE: Yes so the Counsel General, arguing against the application of Article 1, Protocol 1, referred to the fact that there was no legitimate expectation or rather -- there was no legitimate expectation that the bill would not be introduced with retrospective effect. There is then discussion with specific points relating to the bill at issue in that case. What I had intended to take the tribunal to was the analysis beginning at paragraph 62 --

THE PRESIDENT: Yes.

MR. ARMITAGE: -- where there is a reference to the European Court of Human Rights decision in *del Rio Prada v Spain* case. It may be helpful just to read that paragraph, but what I say is that clearly here the question of legitimate expectations is relevant to the analysis under A1P1.

THE PRESIDENT: Shall we read 62?

MR. ARMITAGE: Yes I would be grateful my Lord, yes. (Pause)

Then the final words emphasize that:

> "Whether the issue of retrospectivity arises in a statutory or common law context, there are potential constraints which reflect the legitimate expectations of those affected."

Then the second aspect of the analysis is to distinguish the *AXA* case which likewise, as can be seen from paragraph 63, involved a statute that affected all outstanding and future claims. The Counsel General was submitting that *AXA* was a stronger case for treating the legislation as incompatible with A1P1 than the present and yet the Supreme Court did not in *AXA* find an interference of A1P1.

THE PRESIDENT: So they found it was -- because we did not look at that -- engaged but then that it was justified?

MR. ARMITAGE: Exactly. I rely in particular on what Lord Mance says in subparagraph B of 63 --

MR. DE LA MARE: Shall we read all of 63?

MR. ARMITAGE: Of course.

THE PRESIDENT: It says "to differ in other respects", yes. (Pause). Yes.

MR. ARMITAGE: Mr. de la Mare is quite right to ask you to read the entirety of the paragraph.

Subparagraph A, I concede, is a point of similarity with the present case in that there is a sense in which paragraph 47B, as amended, is about rectifying -- if not a perceived injustice, then it is about making it easier to recover compensation. So there is an effect on victims of breaches of competition law and I do not shy away from that.

But what I rely in particularly on are subparagraphs B and C:

> "A Scottish statute in *AXA* was passed to restore an established legal position that had been understood at first instance for some decades whereas the present bill aims to change a well-understood position which is existed since the NHS was created by introducing a new right of recourse which has never previously existed."

We say that that is, if not on all fours with, then it is at least very close to being on all fours with the present case. It changes a well-understood position that in order to bring a claim for damages, both in competition law and generally, that has to be done -- well, at most, in the competition law context, on an opt-in basis. There was never any provision for opt-out, it is a completely new innovation, much like the quasi-tortious liability in the *Wales* case.

Also (c):

"The Scottish statute in *AXA* built on established legal principles requiring liability to exist before compensators could be compelled to meet claims for plural plaques."

As I have submitted already, my Lord, there is an important sense in which the legislation in the present case departs from established legal principles; that is in the form of the aggregate damages provision and the ability of an individual who is not a member of the class, has not themselves suffered any loss, to bring a claim. That is a real departure.

THE PRESIDENT: Well, bring a claim on behalf of --

MR. ARMITAGE: Yes.

THE PRESIDENT: -- others.

MR. ARMITAGE: Yes but with the possible result that Pride or other defendants to collective proceedings are required to pay damages to -- in the absence of individuals opting in in order to receive those damages and assessed by reference to a global analysis rather than the individual assessment of claims that would have to be carried out if those individuals had brought claims separately in their own rights.

THE PRESIDENT: Yes.

MR. ARMITAGE: Then just finally on the analysis of proportionality in the *Wales* case, at paragraph 66 Lord Mance emphasizes that:

"Parliament could certainly have decided to introduce legislation of this kind without any legal problem in relation to future events giving rise to liability claims but rewriting historically incurred obligations to impose in relation to future Welsh costs or liabilities is a quite different step for which special justification is necessary and none is shown."

As I made clear right at the outset, my Lord, Pride does not for a minute suggest that it was not -- Parliament was not entitled or could not proportionately introduce legislation that provided for opt-out claims in relation to future breaches of competition law or perhaps even breaches that were ongoing at the time of the introduction of new legislation.

Pride does not for the a minute suggest that but Pride does say, by reference to the analysis of the Supreme Court in this case, that allowing an opt-out claim in respect of conduct that ended over 3 years before the introduction of the new legislation goes too far and does not strike a fair balance between the aims pursued by the legislation and Pride's private rights and interests.

In my submission, Pride's -- Mrs. Gibson's essential case on justification is that the retrospectivity is justified because otherwise the claims could not be brought at all and, in

my submission, that is the kind of circular submissions that you will see is rejected in *Wales* at paragraph 66.

The Counsel General had submitted that special justification exists for the retrospectivity in the bill because without it the bill could not achieve its legitimate policy aim. Lord Mance rejected that submission. The legitimate purpose of the legislation, which Pride does not contest, cannot itself justify the retrospectivity.

My Lord, I need to deal briefly with the consequences that follow, unless the tribunal has any questions on the issue of proportionality.

THE PRESIDENT: When you say the consequences --

MR. ARMITAGE: Yes, if the tribunal is with me and with Pride that there is a breach of -- it would involve a breach of Article 1, Protocol 1 to grant the CPO in this case.

THE PRESIDENT: Yes. I mean we are obviously not going to decide whether we are with you or not, but I think you can on proceed on the assumption that that is made out.

MR. ARMITAGE: Yes, of course.

THE PRESIDENT: This is the question about the Parliamentary language, the statute, which obviously on its face would allow such claims; is that what you mean?

MR. ARMITAGE: That is what I mean, my Lord. That is a context in which that issue arises.

THE PRESIDENT: Yes well I am clearly -- or, conversely, if the language cannot be read down, then this issue does not arise other than in a European context.

MR. ARMITAGE: My Lord, with respect, that is not right.

THE PRESIDENT: Is it not?

MR. ARMITAGE: No, and my primary submission is that although we say that the legislation can be read down in accordance with the Section 3 interpretive obligation, it may not be necessary for the tribunal to do so and that is because of the effect of Section 6 of the *Human Rights Act* and this is a point of distinction also with the *McDonald* case, which the tribunal helpfully circulated this morning.

I will start with that, if I may, before dealing briefly with the submission about Section 3 of the *Human Rights Act*. So the *Human Rights Act* is in authorities bundle --

THE PRESIDENT: It is tab 2 of this bundle?

MR. ARMITAGE: Yes. Tab 2 of the first authorities bundle.

You will see Section 6 refers to acts of public authorities and provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

Subsection 3(a) refers to -- stipulates that a public authority includes a court or tribunal.

THE PRESIDENT: Yes.

MR. ARMITAGE: So if the tribunal reaches the view, if it is with me, that Article 1, Protocol 1 would be breached if the CPO were granted in this case, then granting the CPO would be acting in a way that is incompatible with a Convention right.

Where primary legislation requires a public authority, such as a court or tribunal to do that, then the prohibition in Section 6(1) does not apply and that is Section 6(2)(a):

> "If, as a result of one or more provisions of primary legislation, the authority could not have acted differently ..."

That reflects a balance that has very carefully been struck by Parliament in the Human Rights Act of course. We say in contradistinction to the *McDonald* case where the statutory conditions for the making of a court possession order were made out, the court was required -- "The court shall make the order" -- that is not the case here. We have seen from the legislation that the tribunal has a discretion to make the CPO if the relevant statutory criteria are made out.

So this is not a case in which, assuming for the sake of argument, that article 1 would be contravened by the granting of a CPO; the tribunal is positively required by the mandatory provisions of legislation to act in a way which breaches Pride's Convention rights. It can -- and indeed, under Section 6(1), must -- exercise the discretion that it is to decline to grant the CPO.

THE PRESIDENT: But we would be exercising our discretion directly contrary to the way Parliament has expressly said. We would be taking something into account which Parliament has expressly said we should not take into account, would we not, in primary legislation?

MR. ARMITAGE: That why the way in which the court has approached these issues under the Section 3 obligation is relevant.

THE PRESIDENT: Yes.

MR. ARMITAGE: In a sense these provisions do overlap.

But the point under Section 6(1) is that the question of it exercising discretion in a particular way -- the issue of whether it contravenes the fundamental features of the legislation introduced by Parliament, that is an issue which arises under Section 3, but it does not arise under Section 6(1). All the requirements --

THE PRESIDENT: I understand that. But in this case, Section 6(1) -- and the fact it includes courts is obviously very important with regard to the common law. Enabling rights of privacy to be protected, for example, and not doing anything by court order that might contravene a right of privacy under the Convention.

But that is where you are outside the scope of primary legislation. It seems to me one goes back, does one not, to the Consumer Rights Act. Of course the grant of a collective proceedings order is not mandatory because a whole lot of things have to be considered before making an order. But the paragraph of the *Consumer Rights Act*, schedule 8, that introduces this provision which we looked at earlier, which says that it applies to claims arising before the time of commencement as it applies to claims arising after that time is expressly directing us that we should carry out the same exercise of discretion before and after in the same way, is it not?

If we now say, it will not apply to anything arising before that time, then we are acting directly contrary to that paragraph in the legislation. That is why I am struggling to see how Section 6 here helps.

MR. ARMITAGE: My Lord, just briefly on that before turning to what we say is the position under Section 3 --

THE PRESIDENT: Do you understand the point I am making? It is seems to be that we are in Section 6(2)(a).

MR. ARMITAGE: Well, my Lord, looking at Section 47B(5), which is the test the tribunal has to apply, there is no limitation in that section on the circumstances which the tribunal may take into account when exercising its discretion.

THE PRESIDENT: No, but we cannot just look at Section 47B(5); we have also got to look at paragraph 5(2) of the <Consumer Rights Act> -- of schedule 8 to the *Consumer Rights Act*, I should say.

MR. ARMITAGE: Yes.

THE PRESIDENT: You cannot ignore that and that we should approach it as though that as, oh, that is not there, and so we are only looking at Section 47B and that that is a discretion of provision. We have got to look at the other bits of primary legislation, do we not?

MR. ARMITAGE: Well, my Lord, my simple submission is that this is a case in which there is a discretion and it is one that is expressly not limited, contrary to the provision that was at issue in the *McDonald* case. It is not exhausted by the satisfaction of the specific statutory criteria and therefore Parliament has made a decision that the tribunal can take into account other circumstances, such as effects on Convention rights.

I do not submit -- and I think I made this clear at the outset or I hope I did -- that the second bit of legislation that of course the tribunal has to consider namely the temporal provision in paragraph 5(2) is inoperative in all cases.

My submission is that in the present case nothing in that provision requires the tribunal to grant the CPO in this case, assuming that the other statutory criteria are made out.

THE PRESIDENT: You say it does not apply in all cases, but in what case could one have retrospective application, if your basic submission is correct?

MR. ARMITAGE: Well, one situation would be exercising your discretion to grant the proceedings to grant the collective proceedings order on an opt-in rather than an opt-out basis.

One possibility might be that opt out proceedings did not involve a breach of Article 1, Protocol 1 in a situation where the relevant infringement pre-dated the introduction of the act but postdated the consultation where it was made very clear that the relevant new legislation was going to be adopted.

I do not seek to submit when in other hypothetical cases the --

THE PRESIDENT: Yes.

MR. ARMITAGE: That is my point on 6.

THE PRESIDENT: I see the opt-in point and I am trying to see, because you made a great point of the fact that this is an opt-out claim, but in an opt-out case you -- I suppose you could say that is where the infringement occurred after the bill was introduced in Parliament, perhaps. So that is how you put that argument on Section 6?

MR. ARMITAGE: That is how I put the argument on Section 6. I do also say that the legislation can be read down on Section 3. I see the time I am conscious I have taken longer than indicated in advance, for which I apologise.

THE PRESIDENT: As Mr. de la Mare said at the beginning, this is whole argument is an important argument because, if you are right, it has very significant consequences well beyond this case, even though you say it does not apply in all cases, but clearly it would apply in many others. So it is right that you are given time to develop it.

We will come back at 2 o'clock and I think we will need to look at Section 3. Then I think you will go on to European law which, of course, if it applies, it has the consequence of -- one does not want to use the word "trump" so much these days, but it would override the domestic law and you have then a point about Section 3.

MR. ARMITAGE: I assure you there will be no use of "trump" in my submissions this afternoon.

(1.02 pm)

(The luncheon adjournment).

(2.05 pm)

THE PRESIDENT: Yes, Mr. Armitage.

MR. ARMITAGE: Good afternoon.

I was dealing with the position under Section 6 of the *Human Rights Act*. Just to complete that submission, before looking at the issue of Section 3, my submission is that the rule in Section 6(1) means what it says and therefore that, if the tribunal takes the view that granting the CPO in this case would be contrary to Pride's Convention rights, then it would be unlawful for the tribunal to grant the CPO, save if the exceptions in subsection 2 of section 6 applied.

The point of those exceptions is to preserve Parliamentary sovereignty and that was the balance that was struck by Parliament when introducing the *Human Rights Act* so that if primary legislation positively requires a public authority to act in a way which is contrary to Convention rights, then that would not be unlawful --

THE PRESIDENT: Yes.

MR. ARMITAGE: -- although that may give rise to the basis for a declaration of incompatibility which, of course, we do not seek, and indeed the tribunal cannot make.

Just to reiterate, my submission is that because the statute that is in issue in the present case gives the tribunal a discretion, it cannot be said that the tribunal is positively required by legislation to act in a way which is contrary to Pride's Convention rights.

I wanted just to highlight what the procedural rules in the CAT Rules 2015 say about the nature of the discretion. I do not think we need to turn them up, but the essential point in Rule 79, which concerns the eligibility of claims for inclusion in an opt-out or opt-in collective proceedings. At two stages the tribunal has a very, very broad discretion as to the matters that it can take into account. So under Rule 79(2), if the tribunal has that.

THE PRESIDENT: Yes.

MR. ARMITAGE: "In determining whether the claim is suitable to be brought in collective proceedings, the tribunal can take into account all matters it thinks fit."

Then there is a non-exhaustive list of matters that can be taken into account.

That is for opt-in or opt-out proceedings. So that is at the first stage of the analysis.

THE PRESIDENT: Yes.

MR. ARMITAGE: Then the same wording is used when it comes to determining whether collective proceedings should be opt-in or opt-out and that is Rule 79(3).

Again, the tribunal is expressly permitted to take into account all matters it thinks fit and then it sets out certain specific matters such as the (inaudible) of the claim.

Indeed, under Rule 79(2) there is a mandatory requirement on the tribunal to take into account all matters it thinks fit. In relation to the question of opt out or opt in, that discretionary language is used.

So in my respectful submission, where you have legislation which gives the tribunal a discretion as to whether to grant or not grant the CPO and where the applicable procedural rules recognise that there is no limit on the matters that the tribunal can take into account then, when deciding whether to grant a CPO and, if so, whether to grant it on an opt-in or opt-out basis, it cannot be said that the court would be acting contrary to the legislation by taking into account the effect on Pride's A1P1 rights. On the contrary, the legislation and the rules expressly permit matters of that kind to be taken into account.

We say there is nothing in the legislation which suggests that Parliament positively turned its mind to the question of whether Section 47B should be able to be relied on in a case such as the present, where it is, of course, an opt-out claim that is proposed.

THE PRESIDENT: Well, you have said nothing that indicates Parliament turned its mind to it. How does that fit with the fact that in Sections 47A and 47B, 47C, each of them, there is a paragraph in the CRA schedule which says whether it will apply to the claims arising before or not? They obviously thought about that and made a distinction between the limitation provision which is at paragraph 8 of Schedule A and collective proceedings in paragraph 5 of Schedule A. Parliament was thinking about it and that is why we do not have to have any presumptions; it is actually indicated.

MR. ARMITAGE: Yes, but the relevant provision governs both opt-in and opt-out proceedings.

THE PRESIDENT: Yes. So are you saying that if one of the things we have to decide is if we authorise this should be opt in or opt out, if we did opt in, then there would not be any infringements of your clients' Convention rights.

MR. ARMITAGE: I think the submission is that the balance would be shifted considerably by that fact. If we were here faced with an opt-in claim, it would be more difficult for me to stand here today and say that gave rise to a breach of Human Rights law or rather European Union law. That is particularly the case, of course, because opt-in claims were possible under the preexisting legislation.

Our retrospectivity argument is solely focussed on the way in which Mrs. Gibson is indeed intending to bring these claims.

THE PRESIDENT: The old Section 47B, the Consumers' Association --

MR. ARMITAGE: Yes.

THE PRESIDENT: Although that did not allow aggregate damages.

MR. ARMITAGE: No. As I have said, that was a very important element in the consideration for the tribunal. Those are my submissions on Section 6.

In my submission, the question of whether the legislation can be construed in order to achieve compliance with Convention rights under Section 3, does not probably even arise but in any event, my submission is that the legislation can be construed in such a way and I rely on for that purpose on the well known *Ghaidan v Godin-Mendoza* case, which is in the authorities bundle at tab 13.

THE PRESIDENT: Yes.

MR. ARMITAGE: I will go to that very briefly. That was a case -- (Pause)

THE PRESIDENT: Tab 13?

MR. ARMITAGE: Does the tribunal have that?

THE PRESIDENT: Yes, thank you.

MR. ARMITAGE: This was a case concerning rights of succession to tenancy by the surviving spouses of the original tenants. Legislation provided that those rights of succession also covered individuals who were living with a tenant as his or her wife or husband and the question was whether that discriminated against homosexual partnerships contrary to Article 8 read with Article 14 of the ECHR. It was held that there was indeed unlawful discrimination within the meaning of those provisions.

The question was then, whether the legislation could be construed in such a way as to achieve compliance with the Convention. Lord Nicholls, whose judgment I rely on, and whose judgment was agreed with in terms of the reasoning by all other members apart from, I believe, Lord Millett, starting at paragraph 29 which is on page 571 -- sorry starting at paragraph 28, Lord Nicholls is here considering what the meaning of the world "possible" is in Section 3 of the Human Rights Act because it is only where it is possible to achieve a Convention meaning that the interpreted obligation in Section 3 applies. He says:

> "One reading of that would be it is only available in cases of ambiguity."

But Lord Nicholls holds that is not what is intended and a much more far-reaching interpretative obligation is required. He describes it specifically as an obligation of "an unusual and far-reaching character" and it:

> "... may require the court to depart from the legislative intention, ie to depart from the intention of the Parliament which enacted the legislation."

Then at paragraph 32 Lord Nicholls says that:

"The conclusion is inescapable that the mere fact that the language under consideration is inconsistent with a Convention-compliant meanings does not of itself make a Convention-compliant interpretation under Section 3 impossible."

So then as Section 3 goes as far as requiring a court to read in words which change the meaning of the enacted legislation so as to make it Convention compliant. Then at paragraph 33 the only limiting factor on the far-reaching obligation is that the court cannot adopt a meaning which is inconsistent with the fundamental feature of the legislation. That would be to cross, he says, the constitutional boundary that Section 3(6) seeks to demarcate and preserve between the sovereignty of Parliament and the interpretative duty of the courts. It is my submission that in the present case, applying that analysis of the interpretative obligation in Section 3 that a Convention-compliant interpretation of the relevant legislation is possible. It would not contravene a fundamental feature of the collective proceedings regime to read the legislation so as to preclude proceedings that would reach Pride's Article 1, Protocol 1 rights.

THE PRESIDENT: How would we read paragraph 5?

MR. ARMITAGE: What I have in mind -- yes, well what I had in mind, my Lord, was an approach akin to that adopted by the House of Lords in another case which is relied on and approved by the House of Lords in the *Ghaidan* case.

THE PRESIDENT: Yes.

MR. ARMITAGE: That is set out helpfully by Lord Steyn at paragraph 47. It is the case of *R v A (No. 2)*. It concerned the so-called "rape shield" legislation which has arisen recently in relation to the Ched Evans that the tribunal may be familiar with.

THE PRESIDENT: Yes.

MR. ARMITAGE: The legislation at issue, Section 41(1) of the *Youth Justice and Criminal Evidence Act (1999)* contained a blanket exclusion from evidence in criminal trials of prior sexual history between the complainant and the accused subject to some specific and narrow categories in the remainder of the section.

The unanimous view of the House was that firstly that this would contravene Article 6 rights because there may be cases where evidence of sexual history is so relevant to the issue of consent that it would be unfair and prejudice the right to the fair trial in Article 6 for such evidence not to be admitted. We see from the indented quotation from *R v A*, the way in which the House of Lords adopted -- or rather the way in which that legislation was read down. If I could invite the tribunal just to read that quotation. (Pause)

THE PRESIDENT: Yes.

MR. ARMITAGE: Sir, in my submission, that does show the incredibly far-reaching nature of the obligation because what you had in that case was a specific legislative provision this particular kind of evidence could never be admitted and the House of Lords says, no, in order to achieve compliance with Convention rights, there will be circumstances in which such evidence should be admitted and it does not cut against the grain or fundamental purpose of the legislation to allow it in those cases.

THE PRESIDENT: Because they are sort of exceptional cases; is that right?

MR. ARMITAGE: Yes. The test that is put in the *A* case is:

> "Whether the evidence is so relevant that to exclude it would endanger the fairness of the trial."

It does not refer to exceptionality per se; it makes it clear that not in all case such evidence would have to be admitted.

THE PRESIDENT: You can see that is a judgment and the relevant judgment is very fact-sensitive for the trial judge in a criminal case. But to go back to my question, what do you say? How should we read paragraph 5? Perhaps it is helpful to look at it.

MR. ARMITAGE: Yes.

THE PRESIDENT: I think tab 3, is it? At the top of page 4. Just above 6, there is (ii):

> "Section 47B of the *Competition Act (1998)* applies to claims arising before the commencement of this paragraph as it applies to claims arising after that time."

So how should that be read when applying Section 3 of the *Human Rights Act*?

MR. ARMITAGE: In order to prevent the application of Section 47B to claims where doing so would contravene Article 1, Protocol 1 rights.

THE PRESIDENT: That is just a statement of the principle.

The example you gave, set out in *Ghaidan*, looks at the degree of relevance:

> "... so relevant as to endanger the fairness of the trial."

One could understand that, but the formulation you have given us begs all the questions. Are you saying except where it is an opt-out claim? Is that what we should do?

MR. ARMITAGE: No.

THE PRESIDENT: I do not myself understand the way it is to be read that enables it to be understood how it will apply.

MR. ARMITAGE: The submission that Pride advances is based on the specific circumstances of this case. We are not inviting the tribunal to go any further than that.

THE PRESIDENT: But what are the specific factual circumstances?

MR. ARMITAGE: They are that the claimant, who is not a representative body of any kind, who is not a member of the class, wishes to bring collective proceedings on an opt-out basis in respect of conduct that took place not only before the introduction of the legislation but before the consultation which even set out the possibility of opt-out proceedings. Those are the specifics features.

THE PRESIDENT: Just a moment. A claimant who is not a representative body, not a member of the class, bringing a claim re conduct which took place before the consultation which led to the introduction of collective proceedings.

Not a member of a class, on an opt-out basis. Have I left anything out? On an opt-out basis.

It is important it know how it should be read because we are looking at interpreting the language and reading it down. One can understand -- I mean, in *Ghaidan* it is clear it was to be read down as though "husband and wife" could include same-sex couples, as I understand it. I think that is right, is it not?

MR. ARMITAGE: That is right. That is what happened in *Ghaidan*.

THE PRESIDENT: So you can say that is the way it should be read. In the criminal case of *R v A*, according to the relevance, that it is so relevant that it will impair the fairness of the trial. So those are general criteria which have been applied to the legislative text.

You are applying a very specific series of criteria simply tailored to the circumstances of your client. If you are going to read it down, it has to be in a way that is read down for a generality of claimants, does it not?

MR. ARMITAGE: Yes.

My Lord, forgive me if I was not clear. The submission was not that those words should be read down into the legislation; I was identifying the factors, reminding the court of the factors that give rise to the issue.

THE PRESIDENT: I understand that.

MR. ARMITAGE: What my submission was that, as in the *A* case, where the court effectively read in a rider to the blanket exclusion in the legislation which did not relate to the individual circumstances of that case, but simply said, evidence can be admitted where although otherwise excluded by the operation of the section, excluding it would be contrary to Article 6 rights.

I am suggesting it was admitting --

THE PRESIDENT: The point is -- I am sorry to interrupt, but it does not quite say that; it says:

"... where excluding it would be contrary to Article 6 rights."

They said regarding -- it is quite clearly goes beyond that: regard was being paid to the importance of seeking to protect the claimant form the indignity and from humiliating questions, whether the evidence is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial.

So it is not just saying it shall not be excluded when that will interfere with Convention rights, it is spelling it out. I think we need to spell it out a bit to understand what it is. That is why I was saying, expect where it is opt out; that would be a test which can then be applied, but you say that is not the right one --

MR. ARMITAGE: Certainly --

THE PRESIDENT: -- (overspeaking) opt out and it arose before the consultation or whatever.

But it is for you to tell us how you think it should be read down.

MR. ARMITAGE: The way in which the legislation in the *A* case was read down is no more specific than the rider that I am inviting the tribunal to add.

If one wanted to read down the legislation in the present case with the language of "so great an interference that it have rise to an A1P1 infringement", then that may be the way to go.

The point in the *A* case was that the legislation could not be permitted to have an interpretation which allowed for breaches of Article 6. That is the meaning of the phrase.

THE PRESIDENT: So great ... where to allow the claim would be --

MR. ARMITAGE: Contrary to the Article 1, Protocol 1 rights of the proposed respondent.

Put another way, my Lord, one might say, again tying it to the specific circumstances in this case, add a rider to the effect that a CPO may apply to claims arising before 1 October 2015 expect where the grant of an opt-out CPO would have a retrospective effect contrary to Article 1, Protocol 1.

THE PRESIDENT: That is clearer because that limits it to opt out.

MR. ARMITAGE: Yes.

THE PRESIDENT: Yes, I see. Amended legislation.

MR. ARMITAGE: Those are my submissions on Article 1, Protocol 1.

THE PRESIDENT: Do you want to say anything about -- how do we deal with the passage in Lord Rodgers' speech which was then adopted by the Supreme Court in the recent case?

MR. ARMITAGE: Yes.

THE PRESIDENT: Perhaps we can take it from the recent case.

MR. ARMITAGE: Yes the *McDonald* case.

THE PRESIDENT: The *McDonald* case which has now been put in at the end somewhere.

MR. ARMITAGE: I will deal with *McDonald*.

THE PRESIDENT: It is on Section 3, is it not?

MR. ARMITAGE: It is on Section 3.

THE PRESIDENT: It is at the end of bundle 3.

MR. ARMITAGE: We added it as tab 78.

THE PRESIDENT: This is the judgment of the whole court?

MR. ARMITAGE: It is the judgment of the whole court.

If we could look first at the provision that was in issue in that case and then I will come to Lord Rodger or the adoption of Lord Rodger's approach from *Ghaidan*.

THE PRESIDENT: Yes.

MR. ARMITAGE: Page 10 of the judgment sets out the relevant provision and Section 21(4) of the *Housing Act (1996)*, I believe.

THE PRESIDENT: I think summarised at paragraph 26.

MR. ARMITAGE: Yes. What you have there is the provision where the court shall make an order for possession of the dwelling house in various circumstances provided it is satisfied that the criteria in A and B are satisfied.

THE PRESIDENT: Yes.

MR. ARMITAGE: I have already said, my Lord, that that is a clear difference from the present legislation where there is no mandatory requirement.

THE PRESIDENT: I understand. That is your Section 6 point?

MR. ARMITAGE: It is my Section 6 point, but it is also relevant to this the question of interpretive obligation because what one is impelled to do as a court or tribunal is to consider whether adopting a Convention-compliant interpretation would be contrary to a fundamental feature of the legislation.

A fundamental feature of this legislation, in my submission, was that Parliament had decided that, if these two requirements were met, a court had to -- "the court shall make an order for possession".

THE PRESIDENT: Yes.

MR. ARMITAGE: So that is a relevant factor in the consideration of whether the fundamental features of the legislation would be contravened.

Turning to what Lord Rodger said set out in paragraph 69 of *McDonald*, at the top of page 23, what Lord Rodger says -- it is worth noting that he agreed with the conclusions and analysis of Lord Nicholls in that case and he chose to give his own judgment and chose to describe the approach in a slightly different way -- what he cautioned against was:

"... using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles. That falls on the wrong side of the boundary between interpretation and amendment of the statute."

In my submission, it can readily be seen why it was thought to be inconsistent with the fundamental features of the legislation in *McDonald* because of the way in which the legislation was framed.

THE PRESIDENT: Yes.

MR. ARMITAGE: I have already submitted that we are not in the same situation. In the present case we have a legislative discretion fleshed out in procedural rules of court which emphasize --

THE PRESIDENT: Yes but I am looking at paragraph 5(2), which is the bit we are trying to read down. Section 47B of the *Competition Act* applies to claims arising before commencement of this paragraph as it applies to claims arising after that time.

MR. ARMITAGE: Yes, but with one has it look at is not just the provision in question, but the scheme of the legislation in order to identify its fundamental features. In my submission, the fundamental feature of the new Section 47B is that the tribunal has a discretion which is not limited to consideration of specific statutory criteria but applies to both opt out and opt in collective proceedings and there is nothing contrary to that fundamental feature arising from adding the rider that I have suggested, limited as I have said it may be to opt-out proceedings.

THE PRESIDENT: Yes. I think your submission, if I might say so, has greater coherence if it is the second formulation of your read out expect where the granting of a CPO would have retrospective effect contrary to A1P1.

MR. ARMITAGE: Yes. I am happy to adopt that second formulation; that is the essence of what we were asking the tribunal to do.

THE PRESIDENT: Can we forget about the first?

MR. ARMITAGE: We can assign it to the dustbin of history.

THE PRESIDENT: It is just that we need to know. I am not being facetious, but as you will appreciate, it is a very important submission, which is why we are content to let you go on longer than the timetable because it is as Mr. de la Mare said at the outset: this is a very important point.

MR. ARMITAGE: Yes I am very grateful.

With that in mind, my Lord, if I may turn to the position under EU law.

THE PRESIDENT: Yes.

MR. ARMITAGE: There are two questions which arise in this context. The first is the threshold question of whether this case is within the scope of EU law at all. Mrs. Gibson says it does not fall within the scope and therefore regard to EU law principles is not permissible.

THE PRESIDENT: Yes.

MR. ARMITAGE: Then, secondly, on the assumption that the case is within the scope of EU law -- and I should say that I am including the Charter of Fundamental Rights in EU law here, the scope test being the same in my submission -- what restrictions do the EU law placed on retrospective legislation?

Third -- I think I said I had two points but I have a third -- simply on the consequences of a breach of the EU law, which in my submission are different than the consequences that my arise under human rights law alone.

THE PRESIDENT: Yes.

MR. ARMITAGE: On the scope of the EU law points, my submission is straightforward. It is common ground that the phrase "the scope of EU law" on the authorities is to be given a broad interpretation, at least insofar as the relevant principles were summarised by the Advocate General Sharpston in the *Bartsch* case.

My learned friend and I have in mind the fact that that case helpfully sets out the relevant principles.

THE PRESIDENT: That is quoted in your --

MR. ARMITAGE: Yes, it is in Pride's skeleton. I am told it is behind tab 3 of the core bundle -- tab 2 of the core bundle, rather, which is Pride's response to the CPO application and it is in paragraph 51. For completeness I know it it is also relied on in my learned friend's witness skeleton in paragraph 57.

There are three situations identified by the Advocate General and my submission based on that characterisation of the law is that what is clear is that it is not necessary in order for that EU law to apply --

THE PRESIDENT: Just minute.

MR. ARMITAGE: I am sorry.

THE PRESIDENT: It is in Pride's skeleton at?

MS. STUART: 51.

THE PRESIDENT: 51.

MR. ARMITAGE: Pride's response to the CPO application, at tab 2 of the core bundle.

MS. STUART: Tab 2, 51.

THE PRESIDENT: I was in the wrong document. Yes.

MR. ARMITAGE: I think the confusion came because I was noting for completeness that that same formulation is relied on in Mrs. Gibson's skeleton, paragraph 57.

THE PRESIDENT: Mrs. Gibson's, I am sorry.

MR. ARMITAGE: Yes.

THE PRESIDENT: I was in the wrong skeleton, yes.

MR. ARMITAGE: My learned friend Mr. Williams points out there is an error in Pride's response, which refers to Advocate General Jacobs rather than Advocate General Sharpston and it should be Advocate General Sharpston, just to add to the confusion.

So my first submission is that it is clear from that summary of the position under EU law that in order for EU law to apply to a particular situation before the national courts, it is not necessary for a member state to be implementing or derogating from a specific provision of EU law. It is sufficient that some specific substantive rule of EU law is applicable to the situation at hand.

In my submission what we have in the present case is a new collective proceedings mechanism which will be the process by which collective proceedings for breaches of both EU law and UK law will be brought henceforth. So the tribunal will be required in those circumstances to apply specific substantive rules of EU law.

THE PRESIDENT: But in other cases --

MR. ARMITAGE: Yes.

THE PRESIDENT: -- not in this case.

MR. ARMITAGE: Well, insofar as substantive questions of UK competition law arise in this case, it will be necessary to interpret them pursuant to Section 60 of the *Competition Act* and therefore consistently with UK law -- with EU law.

THE PRESIDENT: Then one is saying that any time you apply UK competition law without applying EU law, EU law is applicable; is that what you are saying? Insofar as you are applying EU law, it is a question governed by EU law. Is this related to your Section 60 argument?

MR. ARMITAGE: There are two aspects to this submission. The first is that collective proceedings pursuant to Section 47B will involve the tribunal applying substantive provisions of EU law. The relevance of Section 60 is that, in proceedings under Section 47B, such as the present case where the tribunal is concerned with an infringement of UK law only, a parallel approach mirroring the approach in the EU law should be applied.

THE PRESIDENT: But that is the only way that the tribunal will be applying substantive provisions of EU law in case, is it not?

MR. ARMITAGE: My Lord, the second aspect of the submission is that when one looks at the way in which EU law and the European policy, if you like, treats competition law and the approach that it has taken to private damages claims, it is similarly clear that this is an issue which is within the scope of EU law, so it is not just the Section 60 point. I have relied in particular on two documents emanating from the EU --

THE PRESIDENT: It may be that I am being a bit slow.

If it is not -- this is a case where the only breach is UK competition law, right, there is no allegation of breach of EU competition law?

MR. ARMITAGE: No.

THE PRESIDENT: So, if it were not for Section 60, we would not look at any EU law in this case at all, is that right, in the argument? We would not be concerned and there would be no basis on which anyone could invoke EU law --

MR. ARMITAGE: I have also made a practical point in the skeleton that it would obviously be desirable for the tribunal to adopt the same approach to this question given it is going to be applying -- considering collective proceedings under both UK law and EU law but Section 60, if you like, provides a positive obligation on the court to take account of the position at EU level.

THE PRESIDENT: But you say it is undesirable but there might be all kind of rules about the way actions are brought which sometimes will apply in the case of EU law and many times will not. It does not mean EU law applies to everything else, even if you end up with two different regimes. I do not see how, other than through Section 60, EU law is engaged in this case.

MR. ARMITAGE: My Lord, can I take you to an authority which shows in my submission the scope of EU law is interpreted very broadly indeed and it does indeed covers national measures which do not implement provisions of EU law. I rely in that regard on the *Fransson* case but as I say and as you will see in my written submissions the same approach applies essentially to the scope of EU law. That is an authority is tab 39. Second bundle --

THE PRESIDENT: Bundle 2. Yes.

MR. ARMITAGE: -- starting at page 1309, paragraph 16 under the heading "Jurisdiction of the Courts". You will see that that paragraph this was a case concerning tax penalties imposed on a Mr. Akerberg Fransson and criminal proceedings brought against him under national legislation, national Swedish legislation. The various governments, including the Swedish government, were contending that that was outside the scope of the Charter.

THE PRESIDENT: Yes.

MR. ARMITAGE: At paragraph 17:

"The charter's field of application, as defined in Article 51 thereof, applies only where member states are implementing EU law."

On its face, that appears to be a narrower approach than is taken under EU law more generally as summarised by Advocate General Sharpston in the *Bartsch* case.

But paragraph 19 rather refers to the fact that EU law, general EU law provisions in cases on the issue of scope, suggesting that the same approach should -- approach should apply.

Then paragraph 21, over the page, completes the analysis and says in particular that one cannot have a situation where national legislation which falls within the scope of EU law is not also subject to the protection afforded by the fundamental rights in the Charter. So that is why the same approach to the issue of scope has to apply.

What we had in Fransson -- and this is the way in which this issue of scope was determined in this case -- was national legislation which imposed penalties and gave rise to the possibility of criminal proceedings in respect to breaches of obligations to declare VAT.

THE PRESIDENT: Is not VAT a tax imposed pursuant to EU regulations?

MR. ARMITAGE: It is, but the point is that the national legislation itself was not implementing or was not part of the EU law --

THE PRESIDENT: If these are collective proceedings for an Article 101 claim, that seems to be exactly what this is addressing. The introduction of collective proceedings as a mechanism does not implement EU law. There is no requirement under EU law for collective proceedings, but it would be in respect of a claim for -- concerning substantive provisions of EU law. So although it is not implementing EU law, it is within the scope of EU law.

But where it is collective proceedings for an alleged breach or an actual breach of UK law and not EU law, then it seems to me exactly the situation set out by the court in paragraph 22.

MR. ARMITAGE: My submission -- and I will not trouble the court with it much longer -- the point is, in my respectful submission, is that in that in *Fransson* you have a general sphere of activity in which EU law does make substantive provision, namely VAT law. Then you have national legislation which does not correspond to any particular provision in EU law but which is aimed at -- or at least aimed partly at making it possible to bring criminal proceedings in respect of non-payment in relation to the area that is covered by EU law.

My submission is simply that EU law also obviously makes substantive provision in the field of competition law and that substantive provision has become mirrored in the *UK Competition Act*. The European Union likewise encourages member states to adopt

measures -- and this is under the Damages Directive my Lord -- to make it easier to recover compensation for breaches of competition law.

THE PRESIDENT: But not collective action. That is quite expressly left out of the Damages Directive, subject to a recommendation but it is non-binding and it has no legal force.

MR. ARMITAGE: My Lord, yes. My submission is that a broader approach to the issue of scope should be taken.

THE PRESIDENT: Yes, I have that.

MR. ARMITAGE: I am grateful.

I will deal briefly then with what the substantive position under EU law is in relation to retrospectivity.

THE PRESIDENT: Yes.

MR. ARMITAGE: I will take the tribunal to just one case which is the case of *Crispoltoni*, in authorities tab 34. Does the tribunal have that?

THE PRESIDENT: Yes.

MR. ARMITAGE: I have given what -- I rely on the analysis in the Advocate General in that case and I would be grateful to start there. That is behind the judgments.

THE PRESIDENT: Tab 34?

MR. ARMITAGE: Yes.

THE PRESIDENT: We have got in front of that.

MR. ARMITAGE: For some reason it is behind in mine but it is more logical to have it in front.

THE PRESIDENT: We have it anyway.

MR. ARMITAGE: For all events you have got it.

This case, which we rely on at some length in our CPO response, concerned an underlying EU regulation which provided for the payment of a premium to tobacco producers which was amended in 1988 to introduce a system of maximum guaranteed quantities. If those maximum guaranteed quantities were exceeded, if that quota was exceeded in any given year, in any given harvest, that had an effect on the premiums to which producers were entitled. There was then a further regulation, an implementing regulation if you like, that was adopted in relation to the 1988 harvest in particular, which covered the variety of tobacco produced by Mr. Crispoltoni. As one can see in paragraph 5, the effect of those amending regulations was to reduce the premium owed to Mr. Crispoltoni retrospectively because the maximum guarantee quantity for tobacco in the 1998 harvest was exceeded by the quantity that was actually produced. So he ended up having to pay refund to the relevant national authority.

There is a discussion in paragraph 69 of whether there was a genuine dispute in the national proceedings which led to the preliminary reference. That is not relevant, but then at paragraph 10 the Advocate General turns to consider the substance of the problem and the National Court has expressed doubt as to the validity of the two regulations on the ground that:

> "They are contrary to the principles of the protection of his legitimate expectations and ...(Reading to the words)... legal certainty."

Then at paragraph 11, by reference to a long line of judgments, the Advocate General refers to a general principle of legal certainty precluding a community measure from taking effect from a point of time before its publication and then the exceptional circumstances in which that general principle may be departed from.

What my learned friend says is -- he does not dispute the existence of this general principle of EU law but he contends that it only applies in cases which are set out there involving measures taking effect from a point in time before their publication. He says that is not the kind of measure we have in the current case. But importantly the Advocate General in this case did not regard that issue as decisive. That is paragraph 13 to 15 --

THE PRESIDENT: Can we read 13 to 15?

MR. ARMITAGE: Yes. He is dealing with the issue that my learned friend has raised about a measure only taking effect after its publication.

THE PRESIDENT: Yes. (Pause)

So you are saying that effectively it does apply although formally it does not take effect from the date before publication in effect because the relevant decisions about your crop, the tobacco crop, are taken before then and in effect it does apply.

MR. ARMITAGE: Yes. I rely in particular on paragraph 14.

The critical point is that by the time the regulations have been published, the producers had already determined what they were going to do in relation to the relevant harvest. I infer that they have already planted the tobacco; I presume that is what is meant by that. They had regulated their conduct regards to the legal position prior to the amending regulations. So he said that that was enough to bring the case, in principle, within the scope of that general principle that precludes measures taking effect before a point in time before their publication. There is no reference there to any procedural versus substantial distinction although I will come to what EU law does say about that momentarily.

What Advocate General Mischo says is that therefore the measure can only be justified -- this is paragraph 12, sorry to skip back. He says that the matter can be justified only where

the two conditions laid down by the court are satisfied and he summarises those as being whether the retroactive application of the new system is indispensable and whether the legitimate expectations of those concerned were respected.

In my submission that broadly reflects the approach that was taken under A1P1. I just briefly want to show the tribunal what he said about those two requirements. So the first requirement is about indispensability and he addresses that at paragraph 17. He emphasizes a need for a statement of reasons, or rather the inclusion in the statement of reasons on which that retrospective legislation is based of particulars which justify the desired retrospective effect. He says that that is absent in the present case.

He then goes on to note, beginning at paragraph 18, that the purpose of the legislation was to curb any increase in the community's tobacco production. He said that that is not the sort of purpose that could possibly be achieved by legislation applying retrospectively to decisions about production that had already been made for obvious reasons.

So that is what he says about indispensability. I rely in particular on what he says about the principle of legitimate expectations because although the provisions of the new Section 47B are partly about deterrents, as in this case, they are also about improving the ability of individuals to obtain compensation. So there is not a direct analogy on that issue of indispensability. But what he says about the legitimate expectations is highly relevant in my submission.

At paragraph 26 he says that there are two questions that must be asked. The first question is whether the persons concerned should have anticipated the introduction of the new regulations and accordingly taken precautions to avoid being adversely affected by these measures.

THE PRESIDENT: Yes.

MR. ARMITAGE: I dealt with that at the start of my submissions today.

At the time of the conduct in question it is not to be expected that Pride would have foreseen the introduction of opt-out proceedings let alone opt-out proceedings that apply retrospectively.

THE PRESIDENT: Should they have taken precautions? The issues here is, should they obey the law; is it not?

MR. ARMITAGE: Yes. I accept, my Lord, that this is not on all fours with the present case in that sense but the question here, as articulated by the Advocate General, reflecting the long line of settled case law that he refers to -- if my Lord has in mind the precaution of not committing an infringement of competition law that is not a point which has been dealt with

in the authorities. But the point is, in my submission, that that is not the kind of precaution that the EU -- that the Advocate General has in mind here because the question of whether a precaution should have been taken is linked -- and you see that from the use of the word "accordingly" with a little (a) at paragraph 26 -- to the question of foreseeability --

THE PRESIDENT: Yes.

MR. ARMITAGE: Just in terms of the degree of foreseeability that is required. According to paragraph 36, what is required is that the essential concrete detailed rules of the new system are foreseeable and not whether some general provision about limiting guarantees was foreseeable.

We say -- well, there is a two-fold submission. The introduction of opt-out proceedings itself was not sufficiently foreseeable at the time of the conduct in question because the consultation had not even been launched. But certainly what was not foreseeable at any of the relevant periods was the detailed operational requirements, the detailed concrete rules as the Advocate General puts it.

Then there is a second aspect that arises under EU law, which we can see from paragraph 26B, which arises if the alteration in the law was not foreseeable and that is whether relevant competent institution provided advocate transitional measures to protect the interests of the people who had made their decisions under the old regulations. It is a short point and we have seen that there are no transitional measures in the present case.

THE PRESIDENT: Yes.

MR. ARMITAGE: There are other cases that arise under EU law, but they all, in my submission, follow this basic analytical approach. I note that in this case the Court of Justice upheld the Advocate General's opinion. For the tribunal's note, you can see that in the judgment at paragraphs 20 to 21.

THE PRESIDENT: Yes.

MR. ARMITAGE: There is also, without turning it up, the case of *Meiko-Konservenfabrik*, at authorities tab 32, which was another example of a regulation being struck down on grounds of retroactivity, but I do not rely on that for any separate legal principle.

So, in my submission, what these cases illustrate is that there is a general principle of EU law that measures cannot take effect from a point in time before their operation and that covers not only measures that are formally retrospective of measures that take effect retrospectively, but with respect to conduct that pre-dates their introduction.

The question that arises when considering whether such measures are justifiable are answered by reference to questions of legitimate expectations and whether the measure in

question is indispensable to the purpose of the legislation. In that sense there is a clear similarity with the approach under A1P1.

What is absent from that analytical framework under EU law is a distinction between procedural and substantive rules. Indeed, in the *Meiko* case, just very briefly, that concerned a regulation about the payment of production aid to fruit producers, a regulation which altered the time limit within which the relevant contracts had to be forwarded to the national authority. So it was a change in the procedure in that sense and there was no suggestion that some different rule applied.

My learned friend, I think, will address you on the authorities that do refer in the EU context to a distinction between procedural and substantive law. There is a case of *Jinan Meide Casting Co Limited*, which is in the authorities tab 41. I think, given the time, I will wait to hear what he says about that. My simple submission is just that nothing in those cases casts doubt on the principle that was set out in the *Crispoltoni* and the long line of settled case law that the Advocate General referred to in that case.

I do not propose to deal separately with the Charter. It is very clear under the explanatory note that I added to the bundle --

THE PRESIDENT: Yes, you say it is the same.

MR. ARMITAGE: It is the same approach. The only difference is in terms of consequences and, in terms of consequences, the submission is brief.

If the tribunal is with me that the granting of a CPO in this case on an opt-out basis would contravene EU law principles and that it is not possible to interpret the legislation to achieve compliance with EU law, then EU law goes as far as requiring the tribunal to disapply the legislation in this case. For that reason, Pride disputes the suggestion at paragraph 62 of Mrs. Gibson's skeleton argument that it is not possible to apply the EU law principles referred to in this case.

THE PRESIDENT: Yes. That is on the basis of Section 60, yes.

MR. ARMITAGE: Yes. The issues that arise to an extent overlap with those under A1P1. It is the same sort of consideration but the court goes somewhat further under EU law as is well established.

THE PRESIDENT: I think what is said is EU law does not apply directly; it only gets in through Section 60. So it is not the full force of EU law which would override primary legislation, as might apply if we were engaging with Article 101. It is only EU law through Section 60 and Section 60 imposes a limit on the interpretive obligation. That is what is said.

MR. ARMITAGE: That is what is said against me, yes my Lord.

THE PRESIDENT: The limit here is spelt out in that paragraph 5 of schedule A.

MR. ARMITAGE: That is what is said against me and it depends, as if we are outside of scope of the EU law and I have set out my case on that.

My Lord I apologise and I apologise to my learned friend; I have gone on for somewhat longer --

THE PRESIDENT: We interrupted you or I have interrupted you and, as I say, it is an important point and it is important that we understand it. I think it is probably right that we should take our short 5-minute break now.

We do not feel concerned if all of today is taken up with the -- as it looks as though it will be, I think -- *Human Rights* argument. It may even spill into tomorrow morning. We have got, I think, Wednesday reserved.

MR. DE LA MARE: We do, sir.

THE PRESIDENT: Yes. So 5 minutes.

(3.13 pm)

(A short break)

(3.26 pm)

Submissions by MR. de la MARE

THE PRESIDENT: Yes, Mr. de la Mare.

MR. DE LA MARE: There is something unreal about Pride's submissions on retrospectivity.

The premise of this argument has to be that the application of opt-out CPO procedures will result in an aggregate award of damages that fairly reflects the extent to which the vulnerable consumers at issue as a whole were overcharged. So the aggregate award, we have to assume, is going to fairly reflect the totality of loss inflicted upon the class.

Yet it is said that the conduct of that exercise, that assessment of that aggregate harm, and the distribution of that aggregate sum, the pot in the manner approved by the Act, an exercise which I emphasise extinguishes the claims, the underlying claims of the individuals, is the unfairness. The unfairness is in fact having to pay compensation for something you thought you would get away with, in effect.

I say it extinguishes the claims and that is absolutely plain from a provision you were not shown, Section 47B(12) which provides that a judgment in the proceedings is binding and effectively it creates a cause of action estoppel that extinguishes or precludes the possibility of any individual action by consumers.

THE PRESIDENT: You can opt out, I think.

MR. DE LA MARE: You can opt out, of course.

So in short, a collective redress system that is going to provide a fair and reasonable estimation is the very nub of the unfairness. That really is the sum total of it because from the exchange this morning, the second variant of the case they are putting forward, oh, it has effected us and our appeal rights have fallen away, that point is evidently hopeless. If they were competently advised they should have known about the risks of this scheme being retrospective at the time. It was absolutely plain from the exchanges with the committee that that was the intention and from the version of the bill in force at the time of the decision.

With respect to my learned friend, that issue, the fact that fair compensation will be assessed, that techniques of aggregation will be used was the only basis upon which he pinned his claim of unfairness. When it came to treat the case law, there was this elision into case law about legitimate expectation.

Legitimate expectations, cases like *Crispoltoni*, *Meiko*, et cetera, are about a very different form of provision. They are about provisions that are designed to shape conduct, to promise a benefit or a reward if a certain form of conduct is followed, which expectation is then altered or changed by subsequent legislation. That was the vice of the various tariff cases, the subsidy cases: planting tobacco in accordance worthwhile what you thought was going to be the basis of the regime, only to have the regime pulled from under your feet. There has been a spate of litigation in our domestic courts concerned with windfarm subsidies and matters of that kind, about people opting into windfarm schemes or renewable solar schemes, only to have the rules of the scheme changed on them after they made the initial investment.

That is an entirely different category of case Grounded in legitimate expectation, grounded in principles of non-retroactivity, grounded in the same foundations of concepts of legal certainty but with a very different form of unfairness.

No one commits a cartel, no one adopts an anti-competitive practice shaping their conduct as to the belief as to what the limitation rules in question will be.

The reason why principles of legal certainty do bite when they do bite in relation to changes in limitation is precisely because changes in limitation in certain narrow circumstances may lead to changes in vested rights.

That is the basic reason why the distinction between procedure and substance is so important. Because, if you like, what has been entirely missing from this solipsistic account of unfairness is any fair consideration of the countervailing interests, indeed, rights at play.

This is not a case with an A1P1 right existing in glorious isolation. My clients have had, at all material times, vested A1P1 rights, parties represented, A1P1 rights, to fair compensation in accordance with EU, and domestic law -- in this case domestic law -- which have been impeded only by the procedural barriers to the effective vindication of their rights.

If you want the defining principle or the defining objective of this legislation, it has been to vindicate those A1P1 rights of those who, for whatever reasons, have been practically unable to deploy them.

If you want to analyse it in Convention terms, the function of the act is to choose to discharge the state's obligations under Article 13 ECHR or Article 47 of the Charter to provide an effective remedy for Convention rights in a different way because it is quite plain that the existing regime for protecting the consumers' rights in this case to compensation has not been effective. That is the predicate, that is the premise. That is why it is so very important when you are looking at these cases to look at the state of play in terms of causes of action. It is why, for instance, the elapsing of a limitation period is a significant and distinct event in the analysis. Why is that? When a limitation period expires, that right for instance that my clients, the underlying class originally had, is extinguished. It is extinguished by virtue of the operation of the limitation period. The consequence of that extinguishment is that it is effectively a transfer the property, a debt, or a potential liability, arising correspondingly on the defendant's side is expunged. Once that has happened you do enter legitimate expectation periods, considerations, because once you are told that a liability that you having had to plan for is no longer extant, that is gone, you are entitled to shape your commercial conduct in reliance on that. But Mr. Armitage's basic problem is that his clients have never been in anything like that position. This litigation was brought at a time when all of the existing underlying class had rights that they could have vindicated under one or other of the options available to them. Most particularly, they could have vindicated those rights by claiming the High Court or by a follow on claim under the old Section 47A. The reason they did not were the practical barriers to entry that were removed by this new process.

That is why, if you like, you cannot junk or jettison the procedural substantive distinction. Indeed, it is the met-wand(?) that runs through the *AXA* case, the *Welsh Asbestos* case, etc, because what is material in each and every circumstance is whether or not settled patterns of vested rights are being altered, whether new liabilities or new heads of liability are being created and, if so, what the justification therefore is.

That is the first problem, the fairness problem. You cannot have account of fairness without looking at what it really is that is being said to be unfair. It is not a legitimate expectation case, it is something else. It is that practical barriers to enforcement of rights are being removed and that means that there was a greater prospect of my liabilities, my risks, coming home to roost.

THE PRESIDENT: You could not retrospectively though increase a penalty, could you, for infringement of competition laws?

MR. DE LA MARE: No, that is because it takes you into the terrain of the criminal bar to retrospective -- which is much stricter. It is nulla poena sine lege, one of the special provisions in one of the protocols I cannot remember which we have adopted in the Convention and there are equivalent conventions in the Charter. It is well accepted much stricter rules are applied in relation to criminal and civil. The reason for that is, if it is a criminal offence you do perform the calculus of saying, might someone have committed the offence thinking about what the penalty was for the offence at the time in question. That is the first problem, it is the unfairness problem.

The second problem is the ever-changing target for this argument because what really is going on here is that what should be attack upon the legislation is being disguised as an attack upon a discretionary decision by this tribunal. What is the vice? Well, it was given away by an unguarded comment by my learned friend early on when he was asked first about Article 5(2) and he said in terms, I made a very careful note of it, "Parliament got it wrong" is what he said. He got it wrong in his account because instead of making separate provision for opt-outs and opt-ins, Parliament has clearly legislated in a way that says, the rules will apply to all categories of claim. I am going to show you all of the provisions and I am going to seek persuade you on the basis of all of the provisions that were asserted by the CRA that the form of carve out, advocated by my learned friend, is a direct attack on one of the fundamental features of the legislation. It seeks, in effect, to rewrite it.

But the second problem he has is that the way that the provisions in paragraph 5(2), indeed the other paragraphs of similar ilk are implemented, is not by discretionary rules for this tribunal. They are implemented by the transitional rules contained in Rule 118 of the CAT rules. I see you smile, sir, knowing it is a specialist chosen anorak subject of mine, but the reason why that point is important is this: the way that the scheme of the legislation is implemented is, if you like, topic based. The topic for paragraph 5(2), for 4(2) and for all the other equivalent provisions is the topic of commencement provisions and the topic of transitional provisions in the CAT rules to provide for limitation. As you well know, one of

the peculiarities is that Section 47A disapplies all limitation periods and unless and until Section 47E comes into force no statutory provision replaces the limitation periods, to frame Mr. Hoskins and I so entertained you with the in *Peugeot* case.

The reason why therefore there is a transitional provision needed is to make a transitional provision for limitation, the brining into force of all the provisions. Yet, what in no way does my learned friend address is the fact that the topic in question therefore is dictated solely through Rule 118 and it is no proper part of this tribunal's function, when exercising its discretion under Rule 77 and Rule 79, to seek to rewrite the transitional rules and yet that is what in effect he is inviting you to do.

Let me make that point good by reference to the materials. First of all let us look at the legislation as altered by the CRA, it is tab 3 of authorities bundle 1. You have the point that paragraph 4(2) is in exactly the same form.

THE PRESIDENT: Just a moment. Tab 3, paragraph 4(2).

MR. DE LA MARE: Paragraph 4(2), the provision directed at Section 47A. It is in exactly the same form as paragraph 5(2). That raises the obvious question: how is it you can begin to interpret this exact identical formulation of words in different ways and different context? That is going to be the first problem we have encountered. As you can see it is used in other contexts which are plainly intended to embrace collective claims. Paragraph 4(2) is effectively implemented by the commencement provisions that bring this into effect from 1 October 2015.

Then you have paragraph 5(2) which is the one we have looked at so much, exactly the same wording. You will note that there is no equivalent wording in 47C because the plain intent is that that section will effectively go with and only make sense with paragraph 47B. Paragraph 47D takes much the same form, there is no special provision, again, it goes with 47B. Then 47E, which is a crucially differently worded paragraph, deals with limitation and it expressly provides in paragraph 8(2) that the Competition Act 1998 does not apply in relation -- the new 47E -- does not apply to claims arising before the commencement of this paragraph.

What that is evidence of is two things: the first thing it is evident of is the fact that these distinctions were clearly in the mind of the legislator and conscious and deliberate decisions were being made as to which provisions to bring in and when. The second thing that you can infer from this is that the reason a different provision was made in this context is connected with the content of Section 47E. The content of Section 47E is relevant because it contains what in group parlance would be called a tolling provision. It basically says if

you try to bring a CPO under Section 47B but it in the end it turns out that the application is refused, limitation under the conventional Limitation Act which is now being ported over, will not run in that period so that you do not have to go to the potentially very substantial cost of issuing protective proceedings for all of the claims putatively got together in the CPO. That is the tolling provision.

What Parliament has decided in this context is that that additional protection which is a change to the general regime of limitation, and is going to be potentially applied but for this provision to accrue claims, should not be applied to accrued claims. If that is what is going on it makes it impossible to argue that somehow these types of considerations were not live in the drafting of paragraph 4(2) or 5(2).

THE PRESIDENT: I think it is clear that they were live and I think, when it was said that Parliament got it wrong what Ms. Johnson(?) meant was that although they were trying to have regard to the Convention in the way they dealt with 5(2) and 8(2) they did not correctly apply the safeguards that the Convention requires. That is what was meant and that is why it is necessary to read it now. Whenever you have to read post-Human Rights Act legislation down one is saying the same to Parliament got it wrong.

MR. DE LA MARE: Yes but whether you can read the legislation so it does not cut across the grain depends on how Parliament got it wrong. My point is this: this is a conscious choice. This is the terrain of necessary implication. Even were you to accede to the underlying fairness argument -- which I will seek to persuade you you should not and that argument is in itself hopeless under A1P1 -- there is no prospect of a remedy in circumstances where Parliament has deliberately designed these regimes, knowing all of the stakes at play, so as to make these careful and distinct calibrations. If you like, Parliament has made the choice, we are going to address the transitional regime and the question of transitional limitation, but only so as to disapply the tolling provisions in Section 47E and not for the rest of the procedures or the rest the scope of the section. For instance, no one has sought to argue that Section 47A which is now in force does not now permit stand alone claims. It does but with this peculiarity we are aware of that stand alone claims are permitted so long as the damage has occurred in the last two years and that leads to a situation where the provision made for stand alone claims is unworkable in practice for certain types of wrongdoing. But, nevertheless, this now new provision for stand alone does not replicate what was gone on before.

THE PRESIDENT: Of course you could always bring stand alone claims in another forum.

MR. DE LA MARE: That is right.

THE PRESIDENT: So it is not creating new --

MR. DE LA MARE: I readily accept that the particular magic lies in the opt-out procedure because as I indicated in opening there was not really that much substantive difference between a GLO and an opt-in procedure.

THE PRESIDENT: Yes. A GLO, for those not familiar with it, a group litigation order.

MR. DE LA MARE: A group litigation order, exactly. Before we leave that section as well it is probably also helpful to look at the provisions on collective settlements because these too follow the same scheme, so look at 49A as inserted by 10(1). It, too, goes back to the conventional rubric of applying justice to claims arising before and after.

THE PRESIDENT: 10(2)?

MR. DE LA MARE: 10(2) Section 49A of the Competition Act, this is page 8, applies to claims arising before the commencement of this paragraph as it applies to claims arising after that time. So you can make a collective settlement in situations where a collective proceedings order has been made. So on its face that would seem to allow for a very valuable provision, collective settlement to come into force immediately even in relation to past claims.

There is no sensible way that that provision can be construed as marching out of step with Section 47B and the point is even starker in relation to section 49B, collective settlements where a CPO order has not been made because this provision contains a provision in 49B(1)(b) that requires you to disregard any limitation or prescriptive period applicable to a claim in the collective proceedings. In other words, in order to avoid disputes about whether or not the tribunal has statutory jurisdiction it is unequivocally for the purposes of endorsing collective settlements where CPO orders have not been made disapplies any limitation or prescription period.

That must, if a party consents, enable a party to settle a claim such as this. But, yet again, the consequence of this provision which once again in 11(2) over the page at 10 has the familiar rubric is that it must be incapable of application to this case. This is an argument which, in terms of the structure of this whole set of provisions, does very fundamental violence to the manner in which it operates.

THE PRESIDENT: Yes. What is interesting about paragraph 10, Section 49A, which as you say, paragraph 2, 10(2), says it is applies to claims arising before the commencement as it applies to claims arising after, it only applies for opt-out claims.

MR. DE LA MARE: Yes, absolutely. It is just compelling proof that this scheme as a whole was deliberately intended to apply to opt-out claims both for settlement and for contested litigation. That is my learned friend's first problem and that is why this case founders even

before we have to get any further on the rocks of Section 3, because it is quite impossible to construe this respecting the grain and thrust and the major plank of the legislation pace their various Lordships in Ghaidan v Mendoza, in a way that does so by inserting the form of words that we finally got to for the first time earlier on this afternoon.

I suspect that is the reason why this argument which was very clearly predicated in its first iteration in the response and in the skeleton primarily upon Section 3 has moved so significantly towards Section 6 and the attack on discretion. Because go back and look at the response, the primary argument in each case is purposively construe Section 47B; well you cannot do that.

That then leads one to the next problem which is that Section 3 and Section 6 of the Human Rights Act march in tandem and authority for that is Ghaidan v Mendoza itself and in particular paragraph 110 which you were not shown from the speech of Lord Rodger, that is tab 13 of the bundle.

MS. STUART: Which paragraph?

MR. DE LA MARE: Paragraph 110. What Lord Rodger is effectively doing --

THE PRESIDENT: Just let us get there. Page 596.

MR. DE LA MARE: That is right. Maybe you would like to read it.

THE PRESIDENT: Yes, why do we not do that. Paragraph 110. (Pause).

MR. DE LA MARE: Where you have a clear provision like paragraph 5(2) the manner in which it is implemented cannot effectively be used to create language but contains an ambiguity, an alleged ambiguity that then is the foothold for a Section 6 argument. The two provisions are designed, as Lord Rodger explains, to work in tandem.

It is therefore very careful to look on a topic-by-topic basis what is actually going on in the path of implementing measures that flow from the particular enactment. Let us look at the implementing measures before we come to the Section 6 arguments and then I am going to take you to an authority that I think is properly dispositive of all of these arguments.

The first thing to look at is the commencement provisions which are in bundle 1, tab 4. The relevant bit of the commencement provisions is paragraph 3 on page 3 which brings the relevant sections in line with the instructions contained in the CRA itself into force. So the following sections come into force on 1 October, Section 81, private actions in competition law to the extent not already in force and then, schedule 8, private actions in competition law to the extent not already in force. That is the primary mechanism.

THE PRESIDENT: Yes.

MR. DE LA MARE: Then let us look at Rule 118, probably the best place to look at that is in your Butterworth guide, at 119. Savings, the page number is 6.194 and it is page 3473 of the guide.

THE PRESIDENT: Rule 119? Not 118.

MR. DE LA MARE: Not 118, I am so sorry, I was getting fixated with that annoying telephone number.

THE PRESIDENT: I thought it was engraved on your heart, Mr. de la Mare.

MR. DE LA MARE: Obviously not that well! So sub-rule 1 does not concern us because these are not proceedings commenced before 1 October. Then there is a saving for Rule 31(1) to (3) of the 2003 Rules which continue to reply in respect of a claim which falls within paragraph 3 for the purposes of determining the limitation of prescriptive period which would apply in respect of a claim if it were to be made on or after 1 October in (a) proceedings under Section 47A of the act or (b) collective proceedings.

This is the governing set of transitional rules, the limitation rules, if you like, that determine which are the collective proceedings that may or may not be made. It is a set of rules that are made fully compatibly with paragraph 5(2) and which cannot be attacked by reason of Section 6(2) (a) and (b) of the Human Rights Act on the basis of some argument of incompatibility because they are dictated by the primary legislation. Then (3) says:

> "A claim falls within this section if it is a claim to which Section 47A of the 1998 Act applies.""

Well, there is no dispute that that is true:

> "... and the claim arose before 1 October 2015." That is also true because all of the underlying claims arose when damage was suffered in and around February 2010 to 2012.

Then paragraph 4 provides:

> "Section 47A (7) and (8) of the 1998 Act as they had effect before they were substituted by paragraph 4 of schedule A to the Consumer Rights Act continue to apply to the extent necessary for the purposes of paragraph 2."

That is for the purposes of the old 2003 rules which is where we then have to go to back in this same section of the notes. You will find that at page 3411, Section 6(32) of the Butterworth book. These are the provisions therefore that govern in the interim:

> "A claim for damages must be made within a 2-year period beginning with the relevant date."

It is the relevant date that is dictated by the old Section 47A:

"The relevant date for the purposes of paragraph 1 is the later of the following: the end of the period specified in Section 47A (7) or (8) of the Act."

That, crudely put, is the date in which any infringement decision becomes final by dint of non-appeal or final appeal and disposal on appeal and a lapse of appeal periods, if there are any:

"Or, the date on which the cause of action accrued."

Because there is no now longer any constraint in Section 47A which has changed and which is in force, Rule 31(2)(b) now operates as a provision authorising, effectively, full-blown, stand alone claims for those cases where you get going within the two years:

"The tribunal must give its permission for a claim to be made before the end of the period referred to in paragraph 2(A) after taking into account any observations of a proposed defendant."

That discretion which was exercised in one way under the old rules will now in all probability be exercised very differently now. What is notable, sir, is this:

"Rule 31(4) is not continued by Rule 119."

But look at the content of Rule 31(4) because this rule, as well as everything else, tells you what the transitional provisions were for the old follow on claims. The transitional provisions for the old follow on claims had a proviso in Rule 31(4) that said these new rules, for what were then follow on claims, cannot be used to revive claims that have already become time barred. That was the safeguard thought appropriate when the follow on claim was introduced, do not bring back to life dead claims. That, of course, crosses my line in terms of whether or not you are talking about legitimate expectation, a claim having been extinguished.

But of course the old follow on rules themselves effected a massively significant change to the operation of limitation periods because they allowed you to sit back and wait potentially for many, many, many years while the general court in particular and CJEU took its time in deciding the inevitable appeal. It was a fundamental change in limitation and that fundamental change in limitation that massively extended, that told if you like the limitation period, was applied to all live claims in relation to causes of action that had already accrued by the time of this change so long as claims were not dead. That basically meant that you had knowledge, plus six years, for practical purposes.

The logic of my learned friend's argument is of course that provision at the very least engages and interferes with Article 1, Protocol 1 rights and no doubt he would say, yes, it engages it but in the circumstances of that case because there is no aggregation, there is a

different balancing exercise. But you, sir, were putting lots of questions about DBAs, about CFAs, about ATE insurance. In many ways, the closest analogue were the substantial changes in limitation made by the Enterprise Act 2002, when it introduced Section 47A with these rules.

To conclude the point in relation to the rules, the topic of transitional provisions, or the topic of prescription and limitation periods, is dealt with exclusively by the commencement provisions and by the rules. Yet, what my learned friend must seek to persuade you to do is to somehow re-inject that whole topic which has been comprehensively dealt with in those provisions into the exercise of your discretion under Rule 77 and 79 as fleshing out the very bare bones of the statute.

What was telling in my submission was that there was no attempt to apply the purposive interpretation to the contents of the new Section 47B as inserted. The argument was directed exclusively at paragraph 5(2), not the provisions in Section 47B that are given effect to by these rules. Yet, it is the discretion being exercised under these rules, giving effect to Section 47B and C that is said to be the discretion on the basis of which you can effectively rewrite the limitation period. That is how this Section 6 argument works. If this argument works at all it will require for every opt-out case predating either 1 October 2015 or in the alternative formulation, predating the first substantive bill or maybe the first White Paper, it will preclude the operation of Section 47B in an opt out fashion to those rules. It is an axiomatic and generic argument.

THE PRESIDENT: I do not quite follow why you say it rewrites the limitation period; it rewrites the commencement period, does it not?

MR. DE LA MARE: It rewrites, well, yes. It rewrites the transitional provisions I think is a better way of putting it.

THE PRESIDENT: Yes. The limitation will still be the same.

MR. DE LA MARE: Yes. It rewrites the effective commencement of the legislation. But look at 77 and 79, and look at what the tasks are being done here --

THE PRESIDENT: This is our rules.

MR. DE LA MARE: Of your rules, current rules. There are two tasks: deciding under 77(1)(a) as to whether or not the person in question can be authorised as a class representative, and that topic is then expanded in 78; and deciding upon eligibility for inclusion in collective proceedings in accordance with Rule 79. That tells you what Rule 79 is all about. It is about eligibility for inclusion in the claim. It is nothing to do as a topic with whether and when provisions should be commenced or whether and when the procedures should be

applied. We are within the procedures now, Parliament having made whatever choices it has made and made whatever commencements provisions or rules that bind. We are now within the exercise of deciding on what are plainly substantive criteria, criteria about the shape and form and nature of the content of the proposed group action, whether or not it should be certified or blessed with the group action procedure. That is plain, it is not plain from the word eligibility in 77(1)(b), from the contents of 79(2) and 79(3). Once my learned friend places a great deal of emphasis on the words shall take into account all matters it thinks fit, or may take into account all matters it thinks fit in (2) and (3), basic statutory construction suggests that they have to be construed in the light of what follows and in the light of the governing function under 79(1)(b) and the particular Section 47B that they implement.

The topics addressed are nothing to do with commencement or retrospectivity or choices about limitation or anything about that kind whatsoever. The topics are about whether or not this action in its substantive nature is appropriate. You can see that from the criteria A through to G in Rule 2. You can see that also in (3) where the two things that are, if you like, mandatory relevant considerations, in choosing between opt ins and opt outs, are the strength of the claims and the practicability of bringing claims as opt-in claims rather than opt-out claims. We are simply off topic.

To interpret this discretion conferred for a completely different purpose as a Trojan horse by which to import arguments that are forbidden arguments in relation to the statute itself, is simply an impermissible exercise of statutory interpretation.

But do not take my word for it, take the Court of Appeal's word for it because Mr. Jones and I were involved in a case called *Reilly (No. 2),* in which Mr. Jones, in good company with Mr. Armitage, tried pretty much exactly the same argument that Mr. Armitage tried both in relation to Section 3 and in relation to Section 6. Now the context of this case is somewhat complicated.

THE PRESIDENT: Where is it?

MR. DE LA MARE: I am going to pass it up. We have given Mr. Armitage a copy already.

Forgive me for the insertion of this belatedly but here we have the arguments evolved, bells went off in both of our heads. (Handed). It has a somewhat tortured factual background. It is all to do with legislation introducing automatic sanctions in the job seekers allowance context where effectively parties do not attend return-to-work schemes and have their benefits removed in consequence. The history of *Reilly (No.1)* very shortly was that a variety of the arguments were raised, including a vires argument about the manner in which

the scheme was introduced. That argument succeeded all that is material for present purposes in the Court of Appeal. Immediately upon its success, on the day of judgment, the Department of Work and Pensions introduced curative legislation blessing retrospectively that which had been unlawful and without legislative foundation by dint of the vires problems. So they effectively backdated legislation to provide a backdated legal basis for the sanctioning in question.

The case went to the Supreme Court which upheld the findings of vires and refused to engage with the question of relief because of the passage of legislation and that led to the starting of *Reilly no.2*, which is this case.

The issue in the Administrative Court that went up to the Court of Appeal was whether or not there was an entitlement to a declaration of incompatibility either under Article 6 or Article 1 Protocol 1 and Mrs. Justice Lang granted a declaration of incompatibility in relation to the Article 6 argument. She said it was an unfair system to effectively rewrite the rules of the game after somebody had been sanctioned so they could not argue about the rules enforced at the time. She rejected the Article 1, Protocol 1 arguments on the basis that effectively these type of social security property rights were always subject to the legislative schemes by criteria of eligibility being changed and that was what was going on.

Meanwhile, the ever inventive Mr. Jones is fighting parallel cases in the Upper Tribunal and advances two arguments to the Upper Tribunal, one based on Section 6 and one based on Section 3. The arguments were directed at a peculiar, somewhat obtuse provision, of social security law that gave a discretion effectively to not take action consequent upon a finding of illegality, on the basis it would make no difference.

Being in the happy position of having won the case at first instance, effectively what Mr. Jones argued was that provision should be purposively construed or alternatively treated as a discretion that would entitle that provision to be used as a basis for upholding the original judgment and circumventing the change of legislation. He lost -- get this the right way round -- on the Section 6 argument but won on the Section 3 argument. The issue was appealed to the Court of Appeal and both arguments were roundly rejected by Mr. Justice Underhill. It starts at 127. You will see some familiar case law.

THE PRESIDENT: This is the cross appeal.

MR. DE LA MARE: Effectively, yes, because Mr. Jones having won, Mr. Eadie appealed this result and the case was joined up with the appeal in relation to the declaration of incompatibility so there was a cross appeal on this issue. That is why I had to give you the somewhat lengthy explanation. The key bit is probably at 142 through to 148.

THE PRESIDENT: Would it be sensible, given the time, because this a somewhat complex case, you tell us what we should read and we read it overnight.

MR. DE LA MARE: Yes, I think that would be very sensible. 127 through to 148. I hope what I have explained by way of the background facts --

THE PRESIDENT: Yes, it is helpful, there is fair bit of reading.

MR. DE LA MARE: Mr. Jones is going to explain something, he knows far more about it than I do.

THE PRESIDENT: Yes Mr. Jones.

MR. JONES: I am grateful to have the opportunity to argue this point for the third time, this time hopefully with better prospects. 127 is where the tribunal and the upper tribunal has its decision on the construction of the Act is considered by the Court of Appeal. This is the Section 3 point. One sees, for instance, at paragraph 130 -- I apologise I should point out first, 129, the majority reached the conclusion that essentially on the point of construction my client would succeed, that would not have retrospective effect as regards her. 130, the judge on that tribunal of three people disagreed. Then you will see at 131 the Court of Appeal agreed with the judge. But the important point for today's purposes is the Section 6 point from paragraph 142.

THE PRESIDENT: Yes.

MR. JONES: My essential argument was the argument which Mr. Armitage has been running today which is, even if I fail on the construction point, when one looks at section 12 of the tribunal's Courts and Enforcement Act, which is addressed in paragraph 143, which is the Act which governs appeals to the Upper Tribunal, you find that if the Upper Tribunal decides that the First Tier Tribunal made an error of law, a, it may but need not set aside the decision of the First Tier Tribunal, so that was the discretion. My argument was, well, in a case where you can see that there is going to be a breach of human rights if you set aside that decision, you must not set it aside. One sees the Court of Appeal there cites at 144, section 4 of the Human Rights Act on the declarations incompatibility, Section 6 on the Act of Public Authorities, identifies my argument in 145. It is really 146 and 147 which contains the key reasoning.

THE PRESIDENT: Yes.

MR. DE LA MARE: The point I would add my Lord is, what indeed is missing from the piece and fortifies it is that paragraph at 110 of *Ghaidan v Mendoza* that I refer to that explains how Section 3 and Section 6 march step-in-step. Effectively, what was being attempted there much as here is to use Section 6 to circumvent an argument that could not work under

Section 3 when directed at the proper target. By a different route and without citation of 110, the Court of Appeal came to what we say is exactly the same conclusion.

THE PRESIDENT: Yes.

MR. DE LA MARE: That is what I wanted to say about what the target is and what the remedy is under the HRA. I will address the European law argument in due course.

THE PRESIDENT: We will put this --

MR. DE LA MARE: I think it is 80 or 81.

THE PRESIDENT: In the ever-expanding bundle.

MR. DE LA MARE: I am so sorry. The next topic which I was going to as was the topic of analysis under Article 1, Protocol 1.

THE PRESIDENT: Would that be sensible then for tomorrow?

MR. DE LA MARE: It probably would be. I have probably got somewhere in the region of 45 minutes to an hour of material to go through on this.

THE PRESIDENT: Yes well it will probably help you if you can gather it together overnight. It sometimes shortens the argument if you have more time to think about it. Yes, good, so 10.30 tomorrow. We will look at *Reilly*. If there is anything else that you particularly want me to look at?

MR. DE LA MARE: Simply I am going to be returning to *AXA* and *Welsh Asbestos* but have very much in mind this vested rights point and the key critical factual distinction when thinking about those passages you refer to, in the difference between a party having an extent property right of its own and the situation at play in those cases where effectively new rights would be created for new parties which were running in parallel with already existing rights of the victims of asbestosis plural plaques.

THE PRESIDENT: Yes, good. 10.30 tomorrow.