IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1257/7/7/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

13 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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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.

Submissions by MR. DE LA MARE (continued)

MR. DE LA MARE: Sir, we have looked at the nature of the unfairness being alleged -- the remote risk of claims being made turning into a collective vindication of claims -- and we have looked at the impossibility of remedy, but is there anything in substance in the allegation that there is some unfairness or unlawfulness sounding in A1P1?

Forgive me for motherhood and apple pie, but in order to show a breach of A1P1, you need to show three things: you need to show that A1P1 is engaged by the measure, the measure effectively falls within the protected scope provided by the right to property. If there is some form of engagement, you have to categorise the interference. You have to decide whether it is a control on use, an interference with property or a deprivation of property, because that categorisation in turn affects the last stage: the process of justification. It is, of course, only in relation to deprivations of property that the most intense scrutiny is required under *the Convention*. It is only when you are taking or destroying someone's property -- and not providing compensation -- that a special justification is required.

That is a test that goes all the way back to cases like *James v United Kingdom*, you will remember the case about leasehold reform, the trustees of the Duke of Westminster complaining about the fact that leases could be enfranchised without compensation. That is where the test for deprivation of property comes from.

In performing that analysis, that three-stage analysis, there are, in my submission, two critical factors in play. Factor 1, as I mentioned, is that if there is any A1P1 right plainly engaged, it is the rights of those with accrued rights of action. An accrued right of action under the *Pressos Cia naviera* test is a property right. Just as, for instance, a legitimate expectation can be a property right.

So all of the claims of all of the represented persons are property rights. The impact or any putative impact upon the property rights of Pride is only to the extent that it is a reflection of that fact. It is effectively the corollary of the fact that because there is a liability established by law they will have to deplete their assets to meet it.

To the extent they will have to deplete their assets to meet the liability that, of course, is fully justified. No one is complaining that it is somehow unjustified to have a liability to compensate for damage caused by uncompetitive action.

The second critical fact is that there has been no change whatever in the underlying substantive law. It is no part of this regime to alter the boundaries of substantive liability. It is not just me that says that; it is you that say that, in paragraph 6.3 of your guide to proceedings where you state in relation to collective proceedings --

THE PRESIDENT: It is clear from the Act --

MR. DE LA MARE: It is clear from the Act that it is no part of the Act that creates or the regime to create new substantive liability. That is the predicate of the guide. All that has changed is the practical means by which enforcement is achieved.

If you like, what is done is a form of agglomeration to achieve economies of scale. There is no difference in substance between what the Act does and, let us say, a mechanism that compulsorily transferred all of the rights of action of individual claimants to an SPV set as a parameter or governing rule of that SPV that it should distribute the recoveries pursuant to some formula to all of those whose causes of action have been gathered together and then allows us effectively, through that mandatory statutory assignment, that which has always about there to be sued upon.

That is functionally identical to what the act does. If that was the form of the proceedings -- compare and contrast and I will show you again paragraph 38 and 39 of the *Welsh Asbestos* case -- there could be no conceivable complaint whatever.

What we therefore are really faced with is a set of procedural reforms designed to remove, if you like, to put it in competition law terms, transactional costs, to remove transactional barriers to effective vindication of rights, that presently, until the Act comes into force, operate to foreclose the ability to assert your rights.

That SPV example is helpful because it does reveal, in my submission, the limitations of what has been the central complaint, which is the agglomeration of claims or the aggregate nature of damages because every cartel case -- every cartel case -- involves that process: you do not look to see what the overcharge is on a particular transaction, you do not even do that when the nature of the cartel is indeed in the nature of bid-rigging that may affect, let us say, hundreds of contracts and thousands of contractual variations. You resort to statistical analysis to generate a fair reflection of the overall damage of all of those separate infringements as a whole.

That is effectively what the Act is doing: it is allowing the individual claims to be treated, if you like, as if they were made by one owner so that they can benefit from that economy of scale or that overview analysis, so long as it is fair to do so and so long as it will be capable of fair distribution.

THE PRESIDENT: It requires us to go to about it in a particular way --

MR. DE LA MARE: Yes.

THE PRESIDENT: -- by an aggregate --

MR. DE LA MARE: Absolutely.

THE PRESIDENT: -- figure which one might not otherwise do. One might say it is, say, 7 per cent higher than it would be for each individual --

MR. DE LA MARE: Absolutely right.

THE PRESIDENT: -- and you would have to show what you paid and get your 7 per cent.

MR. DE LA MARE: But the key insight, sir, with respect, is that the question of fairness that arises at that stage is not as between the represented parties and the defendant.

The defendant in many ways has no skin in the game at all at that stage. It is simply paying in aggregate what it should be paying for the damage it has caused. The questions of fairness at that stage arise as between the individual represented parties and whether or not effectively they are getting sufficient justice as between themselves in reflection of the fact that their properties rights have effectively been mandatorily gathered in, subject to their right of opt out and then distributed amongst themselves.

So the only area that there is any plausible argument that Article 1, Protocol 1 is engaged at all is in its operation in effect to mandatorily gather those claims in the first place. That is not an argument, with respect, that lies in my learned friend's mouth.

THE PRESIDENT: You say there would be no -- if it was a mandatory statutory assignment of all claims and an SPV that could bring them, there could be no possible complaint.

MR. DE LA MARE: None at all.

THE PRESIDENT: You say that follows from the *Wales* case?

MR. DE LA MARE: Yes, it does.

THE PRESIDENT: Can we look at that.

MR. DE LA MARE: Of course.

THE PRESIDENT: You said you wanted to take us to that.

MR. DE LA MARE: Somewhere out of course, but we can do it now. I wanted to make some points --

THE PRESIDENT: If you want to come back to it --

MR. DE LA MARE: I am definitely going to take you to it, do not worry.

THE PRESIDENT: I just think it would be helpful because you said that would was clear from the *Wales* case that there could be no problem.

MR. DE LA MARE: It is.

So before we get there, let us then explore why those two factors are so important and it is really for this reason: Article 1, Protocol 1 only plausibly bites where the scheme of vested substantive rights is being altered. The reason why there is such an argument, both in the case of an entirely new form of liability which is effectively the factual context of *Wales*, or

in the case of a new head of liability which is head of liability for a party who is already liable, which is the factual context of the *AXA* case or -- and I readily accept it is analogous and to be treated as the same -- in the circumstances where rules of limitation have operated to extinguish a claim and the claim is revived. They are all three categories in the same case because what is happening is that a new liability or head of liability is being created or liability is being restored and the effect of that is, in substance, to transfer property.

Let me give you a very simple example by reference to a limitation rule: if I have a debt to you of £1 million and there is a limitation period of 6 years, I cannot complain during the period of time that the limitation period is running about changes in the procedural rules that may make it easier or harder for me to enforce the debt of £1 million, whether you alter the rules on cost funding, et cetera; I am not altering the underlying liability. It is nothing to the point from the perspective of Article 1, Protocol 1; it is a topic of access to justice and how a court organises its justice system.

As and when limitation kicked in and that debt is extinguished by law, I cease to owe you £1 million. Your property right at that juncture is destroyed, my liability is removed and, as such, the sum total of my assets is increased. If I reverse the effect of the limitation effect therefore, I am restoring a liability and depleting the assets to that extent. That is why it engages Article 1, Protocol 1.

The example in relation to *AXA* is a different variant. In *AXA* there had been a longstanding perception based upon lower court authority that there was a head of authority owed. The *Rutherford* case overturned that and the effect of the legislation on *AXA* was to reverse that superior court decision and restore parties to where they thought they had always been. That was obviously a special factor for justification because in those circumstances, where all the insurance contracts had for many years been priced against this being the exception of the law, you could not argue that it was somehow to fundamentally reverse or reorder the bargain that parties had entered into. That was why special justification was permitted in that case, notwithstanding the fact that it was a deprivation on taking of property case.

In *Wales*, by contrast, there was no preexisting liability of any form, still less to the parties who were to be the beneficiaries of the scheme, which was the Welsh government. The way that the *Wales* scheme was going to work was that in reflection of a charity effectively of the National Health System for many years in treating asbestos suffers for free, which charity had the effect of relieving sufferers of charges which in turn diminished the claims that they could make against those who had cause from asbestos, effectively the government was saying, you have been getting a free ride for all of these years, we are going to bring a

claim to reverse the effect of this charitable provision by the NHS by creating a liability directly as between the Health Service and those who have caused the harm.

It was a completely new head of liability and the answer to it given by the insurers was: that is not now how we priced our business, we priced our business in the knowledge and understanding of what were the reasonable risks and they included free provision of health care and you are fundamentally rewriting our liability and our exposure under the policies by creating this new head of liability. So that is the context of the *Wales* case.

Let us now turn it up --

THE PRESIDENT: If one puts it in terms of how we priced and conducted our business, that becomes a slightly slippery slope because people might conduct their business on the assumption that there is no practical means for small victims suffering small loss to bring claims. That might go to issues of justification.

MR. DE LA MARE: With respect --

THE PRESIDENT: Your real argument is a step before that, is it not, that the A1P1 is not engaged because if there is no new liability or new head of liability --

MR. DE LA MARE: I think the answer --

THE PRESIDENT: The expectation point comes a bit later, does it not, when you can say can whether it be justified or not.

MR. DE LA MARE: The answer to that is in part in the contractual matrix underpinning the case where the very essence of what was going on were contractual rights agreeing to take on certain risks and what was being changed was effectively, by dint of the legislation, a risk that had not been contracted for was being added mandatorily to the policy.

THE PRESIDENT: It is a good time to go back by example of conditional fees -- or insurers could say, we assume that a lot of smaller injuries suffered would not be claimed for because the amount to be recovered is not that great and the cost of doing so will be beyond the means of most people and they would not get Legal Aid and then all of a sudden we find the conditional fees, not only that but we have to pay higher costs because of the uplift than we had expected --

MR. DE LA MARE: Yes.

THE PRESIDENT: -- and therefore we priced our policies on a different basis, but that still would not engage A1P1.

MR. DE LA MARE: No, it would not, because the answer that emerges from Lord Mance's speech is that was part of the risk that you have priced under the policy and if it is part of

the risk that you have priced under policy, if that risk, however remote, comes to eventuate itself, you have to pay and that is the risk that you have assumed as an insurer.

That is the answer: it is the very fact that the scheme was effectively rewriting the contracts of insurance themselves which was the thing that engaged A1P1 because then it is altering settled rights and expectations between the parties and you see that from the entirety of paragraph 6 and paragraph 7, which I do not think you were directed at in the *Wales* case.

THE PRESIDENT: Shall we get it out?

MR. DE LA MARE: Tab 27 of bundle 1. I think you were only referred to (i), page 6, 1025.

Lord Mance is describing the characteristics of bill.

THE PRESIDENT: Right.

MR. DE LA MARE: First, by section 2, it imposes novel statutory or quasi-tortious liability toward the Welsh ministers on compensators as defined, so employers and insurers.

This liability is a liability for pure economic --

THE PRESIDENT: No, I do not think compensators are insurers, are they? I think section 2 is the employers and section 14 is the insurers.

MR. DE LA MARE: Yes, that is right, that is right. I am sorry, it is the employers:

> "This liability is a liability for pure economic loss which does not exist and has never existed at common law."

So this is not a new head of liability; this is a new form of liability because it is owed to a different party: not the victim of the asbestos but the charitable party treating it. A completely new head of liability:

> "It does not reflect any liability which the compensator had to the victim since the victim had no liability to the Welsh ministers."

The reason for that is there was no charging scheme in the NHS, it is free at the point of provision:

> "C. The liability exists whether the compensation is paid to the victim with or without admission of liability."

So it will hoover up any settlement of any form whether it is without admission to liability:

> "D. The liability is based on future compensation payments made in respect of actual or potential wrongs, the operative elements of which were committed many decades ago."

So there is no back claim, if you like, to the 6 years predating the act; it is just a new form of liability operated rolling going forward.

But then (ii):

"By section 14, the bill imposes new contractual liability on the liability insurers of compensators."

So this is effectively mandatorily extending cover to cover any liability which compensators have as a result of section 2.

So it is rewriting the contract of insurance. It is altering the bargain that was made between the parties. It imposes this new liability on any insurer whose policy would to any extent cover the composite.

It is not hard to see why that was done. Asbestosis is a long-term illness. Many of the employers who might have exposed their employees to asbestos may be long gone, insolvent, no longer in business, and this is a chase after the deep pockets, which perhaps explains why it is only the insurers who appear and instruct Mr. Fordham and Mr. Pobjoy(?) of my chambers to intervene in the case.

Third:

"Section 15 provides the Welsh ministers must, in the exercise of their function, have regard to the desirability of securing an amount equal to that reimbursed is applied and this is how the pot is distributed."

From that Lord Mance concludes at 7:

"The bill thus imposes new liabilities on compensators in respect of past conduct and on liability insurers under past contracts."

That is the effect of those provisions. Then let us pass to the critical passage on "Does the bill infringe A1P1?" That starts at 35, page 1035. 36 points out -- about halfway down:

"The effect of the bill is therefore to impose on compensators in the first instance and their insurers in the second instance burdens which had not previously existed."

Burdens is plainly used in the sense contemplated by 7, ie liabilities:

"The intervenors submit [the insurers] that the bill does thus deprive both the employers and their insurers of their previous legal freedoms from exposure."

That is absolutely right. So by imposing the liability, their assets are subject to the corollary of depletion that I explained earlier. Then look at the arguments as they proceed about alternatives at 38 and 39.

At 38 the Counsel General points out correctly that insurers could have had no complaint if the sufferer had decided to use and had the means or insurance to cover the hospitalisation in a private hospital. So if I pay for cover, that would have been recoverable. The sufferer could then have held the compensator liable and the compensator could have looked to any insurer that he had.

That is true, but the liability would have arisen by the conventional route and the likelihood or unlikelihood of it arising -- this is the point in answer to the point you were asking me earlier, sir -- is something which the compensators and their liability insurers could assess and factor into their accounts and plans. In reality, the likelihood of liability arising by this route must always have been small.

Then, at 39, the Counsel General also points out correctly that:

> "Neither the compensators nor their insurers could have had any complaint if the present legislation had imposed charges on the sufferer. The compensator would have had to meet them, as any other loss, and they would have been recoverable from the liability insurer of the compensator subject to the terms of cover. In such circumstances [and this is the kernel, in my submission] Mr. Fordham for the intervenors accepts that the compensators and insurers would have no case under A1P1. Their possessions would not have been disturbed because what would have happened would have been within the scope of the legal obligations which they had incurred under the existing law of tort and the insurance contracts into which they had entered."

But then Lord Mance goes to say:

> "However, for reasons already noted in 32 and 33 above, this scenario is an unreal one."

The reason it is unreal is that there are competence problems with the Welsh NHS being able to do that under the terms of the devolution settlement and, as he points out at 32 and 33, introducing such charging into the NHS is effectively unthinkable. That is the argument. But the test the principle is contained in that concession accepted by Lord Mance from Mr. Fordham, that there would have, in those circumstances, been no disturbing of possession because what would have happened would have been within the scope of the legal obligations.

That, in my submission, is the essence of the test and it is re-enforced by paragraph 41 where he explains why he agrees with Lord Thomas that Article 1, Protocol 1 is engaged:

> "It is engaged both as regards the compensators and liability insurers. Both are affected and both are potentially deprived of their possession in that the bill alters their otherwise existing legal liabilities and imposes on them potentially increased financial burdens arising from events long passed and events long ago."

The two go in tandem and you cannot read the latter bit, as Mr. Armitage would have you, without reference to the former bit. The reason why it leads to potential liabilities arising is

because the scope of the legal obligations themselves has first been changed. That is the point.

In my submission, that analysis is entirely dispositive of this case. More to the point, it reveals what is the entirely sensible, entirely reliable and entirely proper rule of thumb underpinning the substantive procedural distinction.

What that rule of thumb reflects is that for the most part procedural rules will not alter vested rights. It will not alter the substantive boundaries of liability to compensate, which is the stuff of A1P1. That is not to say that there will not be some cases where, by dint of what has been done and what has been promised, some form of legitimate expectation case might not arise. That is a different animal.

Legitimate expectation can arise from a procedural representation, a substantive representation about how you are going to treat someone and itself is a form of property right when it arises and there is untold case law in the European Court of Human Rights, *Pine Valley* and all the cases that flow from it, that say legitimate expectations can create property rights.

Where a party can point to a procedure in that way of creating some form of legitimate expectation then there may be a further species of claim but in general there is no legitimate expectation that procedural rules will go unaltered they are, and are well known to be, liable to change from time to time and that is why all of the potential transactional barriers in the form of procedural rules that may constitute practical obstacles to change, when they are changed by legislation, are changed to all cases in hand or capable of being brought by reference to facts already passed.

Take some of the bars: court fees. Court fees are charged at the point that you initiate the claim and not by reference to with when the claim arose. Rules on consolidation, like the rules for GLOs introduced at the time with immediate effect to past claims.

THE PRESIDENT: When were they introduced, do you know?

MR. DE LA MARE: They were introduced in about 2003 as I recall. The first 15 or so cases, as I also recall, having been involved in the later one, were almost exclusively environmental tort or nuisance cases connected with smelly rubbish dumps and things like that where the events had occurred substantially before the legislation.

Rules on champerty and maintenance, public policy rules on assignment will be changed from time to time to whatever causes of action one may have in one's hand. They are obviously important to things like the creation of SPVs and other routes to removing transactional costs.

Cost recovery rules. One-way cost-shifting and all of those subjects beloved of Lord Justice Jackson: when you change the costs rules, you do so to the panoply of cases before you. Legal funding rules, the examples you have given, sir: CFAs, DBAs, ATE policies and all that go with them. They have all been changed by reference to the claims that have already arisen, with some provision being made in relation to policies already written.

The reason why there are transitional provisions for policies already written is that then you are in the range of conduct induced by the rules which it would be unfair retrospectively to reverse.

Rule on balance of proof. We gave an example in our response of the changes initiated by EU law in sex discrimination introduced to cases in hand.

Rules on security for costs: a very, very substantial barrier to entry in many cases and a feature of this regime. Those are all changed from cases from time to time.

Rules on disclosure, the same. Rules on amendments the claims, subject to the provisions for time barred claims and amendments that introduce what is in effect new claims which you can amend as you like.

The reality of this case is that the reason that the individual claims have not been brought is that the agglomeration of all of those procedural rules makes the chase of a small claim by a small guy practically unviable. But you cannot point to the fact that all of those procedural bars have changed, so as fundamentally to alter the risk of a claim like this being brought and pretend on that basis that there has been any change to underlying substantive law; there simply has not and in my submission that is the end of the A1P1 analysis. You do not even get to the threshold of engagement.

But if I am wrong on that, what you cannot do, as my learned friend does, is logically leap from engagement to the question of the nature of the engagement because at the very most the high point of his case can only be that there has been some form of control on use or interference with property and that takes you to a very different place in terms of justification because the justificatory burden for a deprivation of property without compensation -- and I emphasize those words "without compensation" -- is that you have to meet the heightened burden applied since the *James* case and applied in *AXA*.

But where you are dealing with a control on use there is no such special burden and the test under A1P1 for the states to justify controls on use is notoriously generous.

Even setting aside the difference between national margins of appreciation recognised by the Strasbourg court and our shadow concept of deference, this is an area where this tribunal and any court -- a JR court or whatever you like -- will pay the very closest of attention and

deference to what are plainly policy choices made by the legislator and this is a case where the legislator has made those policy choices with open eyes and decided that the vindication of the represented parties' property rights and their effective protection by a regime that removes procedural barriers to effective protection is of paramount importance and justifies any adverse consequences for those who are tortfeasors.

THE PRESIDENT: The point you make, Mr. de la Mare, that in control of use cases the test is, I think you said, notoriously generous. I am just looking at your skeleton argument, if you have --

MR. DE LA MARE: I am not sure we flagged that point. I can supply --

THE PRESIDENT: I do not think so. It may be just the relevant -- although the textbooks are a bit out of date now, are they not?

MR. DE LA MARE: Not on this point with respect. The parameters of *Trade Tactra* (?) and where it takes you --

THE PRESIDENT: So the relevant passage in (inaudible: coughing) --

MR. DE LA MARE: *Lester & Pannick.*

THE PRESIDENT: That would be helpful.

MR. DE LA MARE: Absolutely we will happily provide that --

THE PRESIDENT: We can have that perhaps for tomorrow.

MR. DE LA MARE: -- with a proper updated tab by 10 o'clock; I take your entirely polite chastisement on board.

So that is the fundamental problem. If there is any question of justification, the justificatory burden is manifestly passed.

I hate to make the old jury point, but the reason why my learned friend has struggled to find any cases about A1P1 being applied to changes and rules of this kind is because it would be patently hopeless. No one is going to challenge a change to the DBA regime, which let us face it, was subject to fundamental assault in the *Campbell* litigation by the newspapers using every argument that they could. At no stage did they say it was an A1P1 infringement, so far as I recall, and certainly any such argument was rejected. The problem was the argument does not get off the ground and therefore, with respect --

THE PRESIDENT: There were such arguments, I think, in more recent litigation about --

MR. DE LA MARE: There was the --

THE PRESIDENT: Very complex, it went lent three times to the Supreme Court in a rather complicated way --

MR. DE LA MARE: Yes, I was tangentially -- you are thinking of the *Lawrence v Fen Tigers* case, I think, which was again once of these group litigation cases about, in that case, noise from a motor racing circuit.

The question was whether or not the group litigation order that had been put together on the back of ATE insurance led to an excessive premium and whether or not it was unfair. But as I recall -- and I was not involved in that part of the case -- the arguments were from the perspective of Article 6 rather than Article 1, Protocol 1. It was said effectively to lead to a species of blackmail litigation which made the litigation unfair rather than altering the parameters.

That goes to my point, really, that insofar as there is any legitimate grievance here, it is not the terrain of A1P1; this is the court regulating access to justice ensuring parity between the parties. If there were any topic one would invoke, it would be Article 6, not Article 1, Protocol 1.

Yet any such argument here would be hopeless. There is no sensible way this well-equipped defendant can say it has been disadvantaged in terms of its ability to fight its corner.

For those reasons, we say you either fail at the level of interference because there is no interference with vested rights or you fail at the level of distinguishing between experience and control and use because it takes you to a different justificatory test.

But even if, for the sake of argument, you were to consider that somehow all of these factors put together amounted to a deprivation, we would still say it is obviously hopeless, even seen through the lens of special justification.

Why do we say that? Looks at the facts of *AXA*. In *AXA* what was happening was a *Burma Oil* type case. What was happening was that the legislator was reversing a judicial decision that regulated past conduct. The Supreme Court decision that was reversed set what were the parameters of the property rights in play, the causes of action. That was reversed retrospectively by the legislator and that was justified and the reason it was justified in that case in the passages my learned friend took you to yesterday was the particular potency of the argument that this was restoring you to the position that everyone thought it to be beforehand in terms of where the parameters of underlying liability lay.

If you can alter the parameters of underlying liability in that fashion, for those reasons, to vindicate the rights of others. In that case, to go back to the law as it is expected to be and it is a much smaller thing to say, we are going to make procedural changes that are designed

to make effective -- thereby discharging Article 13 or Article 47 of the Charter -- the rights that we have always said you have.

Indeed, you can put it higher than that and you can say this is a further form of justification because the law tends to treat as offensive rights without remedies. It is another way of putting the effective vindication of rights point.

But these rights have always been present. That plainly provides the special justification for the measure. The critical fact is the underlying terms of liability are pre-existent and have not changed one jot.

That then leaves the question of EU law. I have very little to say on this topic because, in my submission, this is a forensic sideshow. EU law is not engaged and nor is the Charter. As you, sir, pointed out the effect of the *Fransson* case is not to bring into scope general national legislation applied to an EU right. For all purposes it only brings it in scope insofar as that general national legislation is being used to adjudicate or vindicate EU law rights.

Let me give you a very simple example. The rules on security for costs are a general application. They may apply to disputes that have absolutely nothing to do with EU law. In a case in the 1980s, *Barclays Bank v McClelland* (?), it was decided that the rules on security for costs were indirectly discriminatory or directly discriminatory on grounds of nationality because they required security to be provided by EU-resident companies -- as a general rule in security for costs, if you are abroad you have to provide security -- and it was said that EU companies are not in the same position, why, because you can easily enforce any judgment against the EU company now that we have the Brussels regulation. That was decided to be right and in effect thereafter you could never get security for costs under the security for costs rules against an EU company, but you could against a foreign company. It simply shows that where you are using a general mechanic in a field touched by EU law, that general mechanic may have to adopt to alter the demands of EU law in that context. But it does not say you can no longer get security for costs against a US-resident company.

THE PRESIDENT: Was that case -- I do not remember the details of it, only the outcome -- decided on the basis that there is a material difference, there is no justification for security because the judgment is readily enforceable or was it decided as a matter of binding EU law?

MR. DE LA MARE: I think, as I recall, it was decided on both grounds and the only basis on which you could attack the rule as being discriminatory was by invoking your generally

directly affected right to non-discrimination on grounds of nationality. So you had on show that was engaged to even get after an attack on the rule.

THE PRESIDENT: You could attack it on the grounds it was (overspeaking) --

MR. DE LA MARE: It was not attacked on the basis of domestic vires; that would have knocked down the entire rule. What happened is that the rule was effectively disapplied.

THE PRESIDENT: Yes.

MR. DE LA MARE: So it is a pretty good example of the distinction between a case where a general rule is being used for a purely domestic dispute and one where a general rule is being used for one that engages EU law.

As you pointed out, here there is no EU dimension and this is a chapter 1 case. The only gateway is Section 60 and it cannot act as a kind of bootstraps trapdoor into EU law. That is particularly so for this reason: Mr. Armitage rightly conceded that there was no substantive difference between A1P1 and the demands of the charter. In my submission, the clear ECJ case law on substantive procedural distinction is again predicated on exactly the same kind of understanding of a reflection of that case law as is reflected by the common law and its concern on vested rights and unfair alterations in legitimate expectation.

So the only reason he seeks to point to EU law is with a prospect of getting some better remedy and he was quite candid about that. He said, in terms, under questioning from you, the main relevance was that you got a better remedy under EU law.

The question therefore -- and you put it to him fairly and with respect to him he did not really answer it -- was: is it really plausible that Section 60 of the *Competition Act* is a gateway to a form of EU law supremacy-based overruling of an act of Parliament in circumstances where that is not delivered by effectively the conventional operation of the *European Communities Act*.

It is absolutely plain that is not what the provision is intended to do. That would be a statutory perversion of a provision that is intended simply to encourage, or even require, the tribunal to develop its law where it can properly, constitutionally within the boundaries of its powers in sympathy with the parallel developments under EU law.

We have given, in our case, the references to the *Pernod* case and the later case which clearly demonstrate there are limits to that principle and to infer from section 50 an obligation --

THE PRESIDENT: 60?

MR. DE LA MARE: -- 60 -- that to disapply an act of Parliament is a step very many too far, in my submission.

The last point I would make is that it is plain, for what it is worth, that this boundary between substantive and procedural is an important one in EU law. It is code for this type of argument and, as you, sir, I know, are well aware, it is embedded -- indeed hardwired -- into the damages directive in Articles 21 and 22 and will, no doubt, be the subject of sustained future argument with debates about how that is transposed.

On that basis, unless you think the point is necessary for determination, I would encourage you not to determine it in any event.

Unless there is anything else I can assist you with further, if you had any further questions in relation to the *Reilly* case, that dense thing I dumped on you --

THE PRESIDENT: I looked at that and I see that is sort of about Section 6 and discretion, is it not?

MR. DE LA MARE: Yes. What it establishes is that you cannot use Section 6 as a device to work around the limitations imposed by Section 3 in circumstances where you can cast around and find some discretion that is generally worded. Because if you have come to the conclusion under Section 3 that it would cut across the grain to read into something in terms of a statutory obligation, then it would equally cut across the grain as a question of ordinary statutory construction to read a discretion that, properly construed, is about something else as conferring a power to undermine the very provision that you have decided is not capable of being construed in accordance with the Convention, such that the ordinary remedy is a (inaudible) in compatibility.

That would make a lawyers' game in which you look for some discretionary power that is not explicitly off topic, but it evidently is and then say, well, because you have got a discretion to do something at some stage or other at some stage in the proceedings, you must always exercise it to refuse relief because we cannot get a declaration of incompatibility. That is an impermissible argument and it was rightly rejected by the Court of Appeal in *Reilly*.

Unless there is anything else I can help with further.

THE PRESIDENT: Thank you.

Yes, Mr. Armitage.

Submissions in reply by MR. ARMITAGE

MR. ARMITAGE: I have some points by way of reply. I will move as quickly as I can. I am conscious there needs to be a break for the transcriber. I may not finish before about quarter to 12, but I will do my best.

THE PRESIDENT: Yes.

MR. ARMITAGE: Mr. de la Mare began his submission yesterday by saying that there was something unreal by Pride's submissions on retrospectivity and characterised those submissions thus that Pride is complaining about the unfairness of having to pay compensation for something that it thought it would get away with. We say that is a gross and deliberate mischaracterisation of Pride's case.

On this portrayal of Pride's case, as complaining about something that it thought it had got away with, I will invite the tribunal to think back to the *Wales* case that we have just been looking at. In this case the complainant's -- or rather the parties affected by the legislation in the first instance were the employers who had caused asbestos-related injuries and their insurers who had willingly insured those employers in respect of liability for such injuries. The new legislation that was in issue before the Supreme Court made the employers liable for certain costs associated with the injuries they had caused. There was no suggestion in the Supreme Court that it was relevant that the employers, and indirectly the insurers, were seeking to escape paying money arising from the costs associated with the harm that they had caused. As Mr. de la Mare put it, the fact that they had previously been given a free ride, to use his language, was not relevant to the Supreme Court's analysis.

What we say is that the *Wales* case, and other authorities that the tribunal has now been to several times, shows that as general principle there is an intrinsic unfairness in changing rules that give rise to liabilities which have retrospective effect. That is precisely why Article 1, Protocol 1 requires special justification in cases of deprivation of possessions and that is so irrespective of whether a complainant can show something akin to a legitimate expectation that is being frustrated.

For the same reason it is not a principle that is confined to changes in the criminal law imposing criminal liability retrospectively. So far from being a case based on some general consideration of unfairness, that is expressly tied and depends on this point about legitimate expectations and foreseeability, which I will return to in a moment, our case is based on the kind of specific unfairness that arises where changes in the substantive law giving rise to legal liabilities or burdens that are changed with retrospective effect.

We saw yesterday that there is a general presumption under the English common law, under human rights law, and under EU law, to the effect -- and indeed in the EU law context you

will recall the long line of settled cause law to the effect that new legislation cannot take effect from a point in time before its publication. So in all those systems of law, the fact that changes in the substantive law should take effect prospectively only is well established and that is indeed common ground.

But that is why we say -- and this is where the mischaracterisation of our case comes in -- it is not right to analyse issues of retrospectivity simply in terms of whether or not the person objecting to the retrospectivity can show that he either did or could have altered his conduct by reference to foreknowledge of the change.

That is certainly a factor that may be relevant to the analysis both of whether there is retrospectivity, the nature and extent of the retrospective effects, and also at the justification stage.

In my submission it is Mrs. Gibson's case on retrospectivity that is unreal because it rests on the premise that legislation permitting the bringing of opt-out actions to claim aggregate damages in the public interest is merely a procedural change. Indeed, we say that does violence to the very concept of procedural.

There are, of course, aspects of Section 47B as amended that are procedural. It is laying down procedures, much like the Civil Procedure Rules do in the context of group litigation orders and so on, for a particular kind of proceedings. We agree that, to the extent that Section 47B is doing that, it should apply to all cases regardless of the times at which the events giving rise to the proceedings occurred. In exactly the same way that changes to court procedures apply in that way in the ordinary course.

So that, for example, if we were concerned with opt-in proceedings brought by a representative consumer body, we would have no objection to the certification of the proceedings being determined by reference to the criteria of just and reasonable suitability of claims, even if the underlying conduct took place prior to 1 October. We would not deny in any sense that the procedural provisions in the statutory criteria in Section 47B would apply in that case. But we say that in this case, the relevant change is obviously substantive.

What we are dealing with in collective proceedings are a combination of purported individual claims under section 47A. As a matter of law, they are tort claims, breach of statutory duty claims, and under well-established principles that have been in place for the whole of English legal history, in terms of tort law, it is an absolutely basic ingredient of a tort claim for damages for breach of statutory duty that you have to have someone who comes forward who has suffered loss and who wishes to be compensated and without that you cannot bring the claim. Then when you do bring the claim, where an individual who

has suffered loss or purports to have suffered loss does so, damages are then assessed by the court or tribunal by reference to the losses actually suffered by those individuals.

As I put it yesterday, Mrs. Gibson's proposed action in contrast involves her acting as something like a private attorney general, seeking damages for all UK consumers' losses in the aggregate and then paying them over to charity to the extent that they are not claimed. We say that is both a radical and a substantive change in the law and that it is not -- rather that it is unreal to suggest it is a merely procedural change.

The fact that the legislative technique used by Parliament to produce the change was to refer to the action comprising individual claims under Section 47A does not show otherwise.

To counter another earlier suggestion made by Mr. de la Mare yesterday, nor does the fact that the change -- the effect of Mrs. Gibson's claim is to extinguish individual consumer's claims, if an aggregate order is made, none of that renders the change merely procedural. Of course the individual consumers can claim against the compensation fund in those circumstances and that is the issue, that is what engages the rules against retrospectivity.

So Mr. de la Mare's first argument that this is not a substantive change rests on the idea that this does not in fact impose any new liability. It is, to summarise, merely parasitic on liability that is already there under Section 47A in the case of individual claims.

My simple point, my short point on that is that in the circumstances of this case that is a distinction without a difference which elevates form over substance. But in any case on this question of the need for a change to underlying liability, we have seen from the EU case law that the prohibition on retrospective legislation covers, first, retrospective changes to premiums that are payable in respect of tobacco production -- that is the *Crispoltoni* case. Second, retrospective changes to the requirements for forwarding contracts -- that is the *Meiko* case. We looked at both of those cases yesterday.

Those changes do not involve imposing liability that did not previously exist. The fact that retrospective burden is imposed in respect of conduct that did not attract such a burden at the time is sufficient to engage the prohibition. You will recall what the Advocate General said in the Crispoltoni case about that.

What Mr. de la Mare says about those cases, if I understood him correctly, is that they are about rules that are designed to shape conduct and that therefore the law on legitimate expectations is engaged in a way that it is not engaged in the present case.

Of course, the *Wales* case was not about any such thing; it was about the retrospective imposition of a new burden reversing the settled state of law that had persisted for a long time.

Lord Mance said there was no problem doing that retrospectively -- prospectively, rather, but that retrospectivity was not permissible and Mr. de la Mare relied on paragraph 39 of the *Wales* case and that was this morning.

THE PRESIDENT: Yes.

MR. ARMITAGE: The concession which was held by Lord Mance to be properly made:

> "There would have been no case to be made under Article 1, Protocol 1 if the legislation had imposed the changes on the sufferers on the compensators."

The employers and the insurers then had to satisfy or provide compensation in respect of those new losses. The reason that that concession was regarded as properly made is because such legislation would not have disturbed the existing tortious and contractual obligations of the employers and the insurers. But, as I have said, and as I submitted yesterday, the present case does alter the position under the previous settled law in respect of Pride. As I have said, it alters the position that you need a claimant and you need to prove your loss individually before one could have tort claim at all.

It is obvious, in my submission, that if victims of asbestos-related illnesses are made to pay the NHS costs associated with those illnesses, then under completely ordinary tort principles their employers would have to compensate them for that and then insurers who had engaged in contractual relationships where they had agreed to cover such losses would also be held to be liable.

In my submission it is not the right analogy. In the present case the analogy is with the imposition on the victims of the asbestos-related injuries of new liabilities to which they were not previously exposed. That was not the point that was considered. The fact that those victims would have claims in respect of their employers and those employers' insurers may provide the justification for an interference with those sort of Article 1, Protocol 1 rights. But, as I say, that was not the point that was considered.

My simple point is it is not the right analogy. It is not surprising that that concession was regarded as properly made and it is entirely consistent with my case.

But in any case, on the point about rules that shape conduct, competition rules themselves are partly about shaping conduct. It is not just a matter of compensation. You can see in the consultation materials, by which the new Section 47B was introduced, that they are designed to have partly deterrent effects, to deter undertakings from committing competition law infringements in the future.

THE PRESIDENT: To some extent, but the fact that exemplary damages are excluded and so on is designed to be compensatory.

MR. ARMITAGE: It is designed to be compensatory in terms of the amount of damages that can ever be recovered, I do not dispute that, but I can give you the references. There are a number of references in the consultation materials which make clear that the purpose of introducing these new proceedings, and particularly opt-out proceedings, are partly justified by considerations of deterrence.

THE PRESIDENT: Yes.

MR. ARMITAGE: I do not have them to hand, but I am sure I can hand them up at a sensible point.

So Mr. de la Mare submissions in respect of the issue of retrospectivity amount to this: he says we are not in the category of the *Wales* case because Section 47B does not impose any new liability and we are not in the category of the *Crispoltoni* type cases because the rules in question are not aimed as shaping good conduct.

I have readily accepted there is no directly analogous case to the present and I have not tried to suggest otherwise. We are in something of an uncharted territory. My point is rather that the principles from the existing case law can and should be extended to cover the present case, given the underlying rationale for the way in which the courts have treated retrospective legislation.

The lack of merits, in my respectful submission, in Mr. de la Mare's argument that the change in this case is simply procedural can be seen by considering the consequences of his arguments being upheld.

Suppose for instance that Parliament passed legislation today saying that in order to fund the NHS law firms, or other bodies acting as representatives, could bring negligence claims against anybody for causing an accident that resulted in injury to multiple victims. There would then, under the legislation I am hypothesising, be aggregate awards of damages which would go into a fund for the NHS, albeit that even in insofar any of the victims submitted claims to the fund for the losses they had suffered personally, those claims would be met from out of the fund.

The practical result of such a change in the law would be that companies and their insurers would have imposed on them multiple large liabilities arising from damage awards made by courts in representative actions in those cases.

Mr. de la Mare's case is that that would be a procedural change equivalent to a change, for example, for the time limit for filing a pleading and that is just divorced from reality, in my respectful submission.

Turning to the submissions on interference with Article 1, Protocol 1 rights. Our primary submission is that there is an interference with those rights because the change in the law postdates the infringing conduct itself and, at the time of the change in the law, that change in the law cannot on any view be regarded as foreseeable. I will go back: at the time of the infringement --

THE PRESIDENT: Yes.

MR. ARMITAGE: -- the change in the law cannot on any view be regarded as foreseeable. Again I will refer back to the Advocate General's opinion in the *Crispoltoni* case, emphasizing that what needs to be foreseen is the concrete and specific elements of the legislation that will be introduced and there certainly was no forseeability in that sense and indeed the consultation itself had not even been published.

THE PRESIDENT: Yes.

MR. ARMITAGE: But Mr. de la Mare was wrong to suggest yesterday afternoon that Pride -- and I apologise if I have misrepresented it -- that Pride was no longer relying on the fact that the change in the law postdated Pride's decision to appeal or not to appeal against the OFT's decision.

Pride maintains that argument. I referred you yesterday to the evidence on the point. What I said yesterday was that our primary point relates to the position at the time of the infringement and that point does not depend on Mr. Allen's evidence.

Nonetheless, the fact remains that at the time when Pride decided not on appeal, the substantive law did not allow opt-out claims for aggregated awards. So the change in the law clearly has retrospective effects --

THE PRESIDENT: But it was foreseeable at that point.

MR. ARMITAGE: Yes.

THE PRESIDENT: Yes.

MR. ARMITAGE: It was, but, as I have said, foreseeability is a relevant factor but it is not the touchstone. Mr. de la Mare's approach on this point proves too much because if it is a complete answer to a challenge to retrospective legislation that a properly advised individual could and should have foreseen the introduction of it by scouring through draft bills, committee records and so on, then the type of change which he accepts as being substantive could legitimately be introduced with by retrospective effect.

Consider a proposed legislative change to a limitation period retrospectively increasing a limitation period so that statute-barred claims are now in time -- it is well established by the *Yew Bon* case that was cited in the *L'Office Cherifien* case in the House of Lords -- and

indeed Mr. de la Mare accepts that this would comprise a substantive change in the law and that that cannot be retrospective without special justification.

THE PRESIDENT: So what is the relevance of foreseeability?

MR. ARMITAGE: The relevance of foreseeability? It is relevant at the stage of the committing of the infringing conduct and that is, as I say, the primary point.

THE PRESIDENT: I understand that point, but you say that you still rely on the fact that -- I thought you said that the change in the law was not foreseeable, but Pride decided not to appeal.

MR. ARMITAGE: Yes.

THE PRESIDENT: But I think I do not understand why it was not foreseeable at that point. It may be Pride was not told about it, but it was foreseeable. It was not some obscure little hidden change, it got quite a lot of publicity at the time, and it was foreseeable that it would be retrospective because if one knew about it and was thinking about whether to appeal, you would look and see and at least look at the bill.

MR. ARMITAGE: Yes.

THE PRESIDENT: So you say it is not a complete answer, but you say it is relevant?

MR. ARMITAGE: We are dealing here with the issue of interference.

THE PRESIDENT: Yes.

MR. ARMITAGE: My submission is that the law is very clear that interference depends on the extent to which legislation can properly be regarded as retrospective. That applies just as much at the stage of the committing of the infringing conduct as at the stage at which Pride was considering to appeal. The fact is that the law at that stage did not have the features that it now has.

That is the point about, in a sense, the irrelevance of foreseeability. Foreseeability is obviously relevant at the stage of justification and that is exactly the way in which it appears in the analysis in the *Wales* case and in all the EU-led case law. That is where the reference to foreseeability and legitimate expectations and so on and arise.

THE PRESIDENT: Yes I see.

MR. ARMITAGE: That is the submission.

THE PRESIDENT: On justification, yes.

MR. ARMITAGE: On the question of justification, Mr. de la Mare said today that this is not a deprivation case within the terms of Article 1, Protocol 1. He said that affected the scrutiny with which the court or the tribunal should look at the question of justification.

It is true that a higher standard of justification applies depending on the nature of the interference with Article 1, Protocol 1 rights. My submission is that this is a case of deprivation because I am relying on an analogy with the *Wales* case and the *AXA* cases for the reasons already given. In those cases the court did regard the risk of interference with financial resources -- emphasis on the word "risk" -- as a sufficient interference to amount to a deprivation of property and that is why in that case they relied on the case law that demands a special justification for the interference.

Regarding the question of special justification, in my submission, again respectfully, there is no merit in Mr. de la Mare's point that Parliament was upholding the Article 1, Protocol 1 rights of those who had claims for losses suffered as a result of the infringements but not been able to deploy them.

If there are any such people, their rights can be protected by means of an opt-in action. If consumers are not sufficiently interested in order to register to benefit from such an action, the reality is they are not going to receive any compensation anyway. He referred on a number of occasions in this context to his clients having accrued rights, by which I presume he meant the class members having accrued rights. One cannot assume at the present stage that the class members had any accrued rights, but although of course we assume for the purposes of this argument that Pride is suffering loss in the future by having to pay compensation into a generalised fund.

THE PRESIDENT: Yes, they would have succeeded.

MR. ARMITAGE: Yes.

As well as the fact that those individuals' rights are satisfied in any event by the possibility of registering an interest in opt-in actions, there are plenty of authorities -- and you can see these in the *Reilly (No.2)* case which my learned friend handed up yesterday that claims with uncertain prospects of success do not count as possessions.

The contrast with Pride is that if the CPO is granted there is a clear effect on its possessions within the meaning of -- or within the scope of the analysis in the *AXA* and the *Wales* case. It will definitely have to expend substantial costs on the litigation and there is a clear risk of having to pay damages on the assumption that a CPO is granted, of course. That risk, in my submission, is sufficient to give rise to an interference. It is not equivalent to a damages claim which may or may not succeed in relation to any particular individual case.

In relation to the *AXA* case, my submission yesterday was that in that case the key point on justification was that the legislation was justified in order to restore a settled legal understanding that had been reversed to everyone's surprise by a House of Lords judgment.

The present case is precisely the opposite: the opt-out legislation reverses a previously understood state of law in the ways identified earlier.

Turning to what Mr. de la Mare said about Section 3 of the *Human Rights Act* and his reliance on the transitional provisions where he went through a detailed analysis of those provisions by close reference to the wording adopted.

My submission is that that analysis takes the position under Article 1, Protocol 1 and Section 3 absolutely nowhere. As I understood his submission, it was intended to show that Pride's approach under Section 3 of the *Human Rights Act* involves rewriting the fundamental features of the legislation contrary to the forbidden interpretive method, as he put it, described by Lord Nicholls in the *Ghaidan v Godin-Mendoza* case.

I have two points in response to that. First, Pride's case on the interpretive obligation under Section 3 does not depend on whether or not Parliament intended the opt-out regime to apply retrospectively. There is a difference between what Parliament intended and the fundamental features of the *Consumer Rights Act (2015*) or else all features of an act will be fundamental, which obviously cannot be right.

The relevant fundamental features of the *Consumer Rights Act (2015)* included permitting opt-out claims but it was not a fundamental feature that collective proceedings should be permitted on an opt-out basis infringements that pre- the introduction of the legislation.

The underlying statutory purpose behind permitting opt-out claims would still be achieved by legislation, albeit with prospective effect only. Indeed the very reason why it is necessary to apply the *Godin-Mendoza* standard of interpretation in a particular case will often be because Parliamentary intention, as evinced by the words of the legislation, was to do something that is contrary to either human rights law.

I have added an authority to the back of bundle and Mr. de la Mare has helpfully indicated that the proposition for which I rely on it is not in dispute. It is the judgment of Lady Justice Arden in the *IDT* case, which I think we have added at tab 81 -- added at 10 o'clock in accordance with your Lordship's indication.

THE PRESIDENT: Just give us a moment.

MR. ARMITAGE: Yes, of course. (Pause)

THE PRESIDENT: Yes.

MR. ARMITAGE: The proposition established in this case, or confirmed at least by Lady Justice Arden, and which Mr. de la Mare has indicated there is no dispute over is simply that the interpretive exercise over Section 3 of the *Human Rights Act* in the light of *Godin-Mendoza* is the same interpretive exercise as under the *Marleasing* principle in EU law. It is

precisely the same exercise. That is clear from the discussion at paragraphs 73 to 92 where Her Ladyship gives a comprehensive overview of the approach to that interpretive exercise in English law and specifically when interpreting English law in order to achieve consistency with EU law. It may be helpful in due course to read through that, it is a very helpful summary of the nature of the exercise.

I rely for the present purposes on two points. At the end of paragraph 89, page 1279 of the judgment, this relates back to the exchanges I had with my Lord yesterday about the precise words which we are seeking to have read into the legislation. You will see that she is quite clear there that:

> "The question of whether Section 3 can be applied does not depend on whether it is possible to solve the problem by a simple linguistic device. It is quite proper, as it is indeed under Marleasing, for the court to adopt a substantial departure from the language used provided that does not interfere with the fundamental or cardinal features of the legislation."

Then at paragraph 92, towards the end of the paragraph, she makes clear that the approach to *Ghaidan v Mendoza* should act as a helpful guide when determining the interpretation under the *Marleasing* principle. I say it follows that the opposite is also true, the two exercises are the same because in both cases the court is trying to construe legislation with particular rights in international treaties if doing so is possible and "possible" is given a very broad meaning under both systems of interpretation but it is certainly not tied to Parliament's intention.

As my Lord will be well aware and as the tribunal will be well aware the reason why courts have used *Marleasing* to read down UK legislation has very often been to achieve a result different from the one that Parliament intended.

The second point I have on Section 3 is that the question of whether or not Parliament intended to introduce opt-out actions with retrospective effect might have been relevant had there been evidence of debates in Parliament in which the proportionality of such retrospective effect had been considered. The European Court of Human Rights, when considering whether or not a particular legislative measure is justified, often does consider debates in that way looking to see whether the national legislator has undertaken a proper balancing exercise and in this case we do not have that kind of assistance, there is no evidence that Parliament weighed the competing rights here by way of that kind of analysis of proportionality itself.

Dealing briefly with the relevance of the transitional rules which I think Mr. de la Mare described as his mastermind subject, or his anorak subject, which I mean without --

MR. DE LA MARE: Guilty.

MR. ARMITAGE: I mean in a way that is not disparaging at all, but as I understood the reliance on those provisions, they relate to the limitation period that applies in respect of claims arising prior to 1 October 2015. So as I understood the point he was contending that Parliament had specifically envisaged that opt-out claims could be brought in respect of periods prior to 1 October 2015, I think that was the point.

We do not of course shy away from that. He suggested that I had made an unguarded comment about Parliament getting it wrong. In fact, under *Ghaidan v Mendoza* it is quite proper and indeed required for the court to depart from what Parliament in fact intended where that is necessary in order to comply with convention rights; that is the submission.

Briefly on Section 6 and the reliance on the *Reilly* case, *Reilly* raised issues under both Section 3 and Section 6. I will not address you on what it said about Section 3 save to say that it is obvious why the court would have difficulty in construing legislation that was specifically aimed at retrospectively undoing the effect of a court judgment in order to achieve consistency with Convention rights. It is quite easy see why the court regarded that as a fundamental feature of the legislation that could not be overturned because the whole point of the legislation in that case was to have retrospective effect in that way.

The main point on which Mr. de la Mare placed reliance on *Reilly (No. 2)* was in its consideration of Section 6 of the Human Rights Act argument.

THE PRESIDENT: Yes.

MR. ARMITAGE: That is an argument we set out very clearly in our response. For the tribunal's note it is core bundle, tab 2, paragraph 68. It is not a new argument that I raised yesterday and nor does my relying on it yesterday detract from our primary case, if I can put it like that, that the court can indeed construe the legislation under Section 3 to achieve a convention compliant meaning.

THE PRESIDENT: What was the reference in your response?

MR. ARMITAGE: It is core, tab 2, paragraph 68.

THE PRESIDENT: 68.

MR. ARMITAGE: I am responding to a hint I think that this was an argument that only assumed prominence yesterday and it is a forensic point.

THE PRESIDENT: Yes.

MR. ARMITAGE: Our position on Section 6 however is that even if you cannot read down the legislation in order to achieve convention compliance in the way that we say you can, nothing in the legislation, even without being read down, requires the court to breach Pride's Convention rights. We are accepting for the purposes of the Section 6 argument that schedule 8 of paragraph 5(2) applies retrospectively. We are not asking you to ignore the section but the fact is, under the legislation which that section introduces you still have a broad discretion to take into account all the circumstances including when deciding the question of opt out or opt in. Even if the Section 3 argument fails and schedule 8-paragraph 5(2) is left in place without any change whatsoever, nothing about that mandates you to grant a collective proceedings order in circumstances such as the present case and that in my submission is the key distinction with the *Reilly (No. 2)* case and the argument that Mr. Jones advanced in that case.

Mr. Jones was seeking to argue and to persuade the Court of Appeal, as he had the Upper Tribunal, that even if the 2013 Act in that case which retrospectively reversed and deliberately did so the effects of the first *Reilly* decision in the Court of Appeal, even if that could not be read down in such a way as to secure compliance with Article 6 rights, the Upper Tribunal should nevertheless exercise its discretion in completely different legislation not to set aside the judgment of the First Tier Tribunal. The position was that the First Tier Tribunal was wrong in law, in light of the Court of Appeal's judgment. The First Tier Tribunal had held that pending claims fell outside the scope of the 2013 Act and the Court of Appeal, upholding the decision of the Upper Tribunal on that point, said that that misread the 2013 Act because that required the judgment in *Reilly (No. 1*) effectively to be undone for all purposes including in relation to pending claims.

So the effect of applying Section 6 in the way that Mr. Jones was arguing in that case was to circumvent the clear terms of the 2013 Act which was primary legislation which, as I say, required the effects of *Reilly (No. 1)* to be undone for all purposes. You are not able to rely on Section 6 to do that because Section 6 does not apply where primary legislation mandates a particular result. That is the balance that the legislation deliberately struck between Convention rights and Parliamentary sovereignty.

The Court of Appeal's key reason, I will turn it up briefly, I think that case made its way into the back of authorities bundle 3.

THE PRESIDENT: Yes, it is at tab 80.

MR. ARMITAGE: Tab 80, exactly.

THE PRESIDENT: Just before the IDT case.

MR. ARMITAGE: Yes, exactly. It is a complex case with a complex procedural history for which I am grateful for Mr. Jones' summary yesterday. But the key aspect of the Court of Appeal's reasoning, you will see at paragraph 145, this concerns a submission that Mr. Jones was making to the tribunal contrary to his primary case on which he was successful in the Upper Tribunal, but in any event he submitted that if, contrary to his primary case:

> "The tribunal was bound to find the decision that the decision of the First Tier Tribunal was wrong in law because of the effect of the 2013 Act it was nevertheless bound by Section 6 of the Human Rights Act to exercise its discretion under a separate piece of legislation at the tribunal's Courts and Enforcements Act by declining to set aside the First Tier Tribunal's decision in order to avoid acting in a way that was incompatible with his client's convention rights."

The Upper Tribunal I think, in an obiter section of the judgment technically, rejected that submission as without merit. On the appeal to the Court of Appeal this was not obiter because Mr. Jones was found against on his primary point.

The key piece of reasoning of the Court of Appeal is at 147. Mr. Jones was saying that the Upper Tribunal had overlooked the existence of the tribunal's discretion not to set aside the judgment of the First Tier Tribunal but the Court of Appeal said that does not meet the point which is that, in light of various provisions of the Human Rights Act, it would be wrong in principle to use that discretion for the purposes of undermining the effect of the 2013 Act. The effect of the 2013 Act, I remind you, being to undo the effect of *Reilly No.1* for all purposes. But in the present case there is no equivalent judgment that would remain in force if the tribunal exercised its discretion to refuse the CPO. There is no error of law that would be allowed to continue in force in the form of a First Tier judgment because that is not what the discretion in Section 47B is about, it is a different kind of discretion. To refuse to grant a particular kind of application or to allow collective proceedings to continue in one form rather than another, based on a consideration of the individual circumstances of the case.

Mr. de la Mare's submission that Section 6, my Section 6 argument, is an invitation to the tribunal to frustrate the purpose of the new legislation ignores the nature and purpose of the discretion in Section 47B as well as its breadth. The discretions in relation to the suitability of claims for inclusion in proceedings, collective proceedings generally, whether they are opt-in or opt-out, as well as the discretion to decide whether a claim should proceed by way of an opt-out action, are intended in part to protect defendants from having to incur the costs of responding to opt-out actions where this would be disproportionate and/or unfair.

This is not case of casting around, as Mr. de la Mare put it, to find a relevant discretion in a completely different piece of legislation. The discretion appears in the legislation which schedule 8, paragraph 5(2) commences. Given the nature of the discretion which is commenced by that provision, the fact that Pride would be subjected to the burden of an action of a kind that could not have been brought either at the time of the infringements or at the time when they decided not to appeal against the decision are surely matters which the tribunal could think relevant in relation to the fairness or proportionality of requiring Pride to defend an opt-out action.

We say, considering the retrospective effect, the effect on Pride's interests of granting an opt-out CPO in this case is something that is well within the ambit of the discretions given to the tribunal by this Section 47B criteria. It is therefore completely different from the *Reilly* case because in that case refusing to set aside the First Tier Tribunal's decision would indeed undermine the purpose of the 2013 Act which was to undo the effect of the first Reilly case for all purposes, including in relation to pending claims such as Mr. Jones' client have. Those are my submissions on Section 6.

I do not make any further submissions on EU law, you have my points on that yesterday. All I will say at this stage is that even if the tribunal is against us on the scope of EU law point, plainly the approach taken by the Court of Justice in cases like *Crispoltoni* and *Meiko* can and should be taken into account because the Court of Justice was considering in those cases the precise issues that arise under Article 1, Protocol 1 cases.

THE PRESIDENT: Yes.

MR. ARMITAGE: That is an invitation to treat those cases of abiding relevance.

THE PRESIDENT: Yes.

MR. ARMITAGE: Yes. Unless I can assist any further, that completes my submissions.

THE PRESIDENT: Yes.

Further submissions by MR. DE LA MARE

MR. DE LA MARE: Sir, before we leave this topic can I just note my concern about this issue of what was in mind in the Court of Appeal has been somewhat revived in reply. I understood that point to effectively have been abandoned, I did not address it in my submissions.

THE PRESIDENT: What was in mind?

MR. DE LA MARE: At the time of the decision as to whether or not to appeal. It seems -- notwithstanding what Mr. Armitage said in opening, that some reliance is still placed upon Mr. Allen's evidence about what was in mind when deciding whether or not in March through to May to appeal the decision or not.

I would have said and I think it is important to put this this marker down that, that quite apart from the fact that we think that this point is a bad one objectively because anyone reasonably and competently advised by a competition lawyer could have well known of precisely this risk, the point made by the chronology which I did not take you through because there was no push back.

THE PRESIDENT: I made that point.

MR. DE LA MARE: Yes, there is this further point and I should just put this marker down. We do not believe that it is write right that Mr. Allen gives evidence in the way that he has. Whilst, on the one hand saying, what was in mind, what was in his mind for the purposes of determining whether or not to appeal, whilst at the same time saying there is no waiver of privilege; you simply cannot do that.

THE PRESIDENT: Yes.

MR. DE LA MARE: If the point being made is, we would have appealed if only we had known, you have to disclose the reasons that go into the appeal including such uncomfortable factors as evaluations of prospects of success and countervailing reasons. You cannot dance around waiver of privilege in the way that has been attempted.

THE PRESIDENT: I understand the point, thank you.

MR. DE LA MARE: I am grateful.

THE PRESIDENT: We have gone on longer --

MR. DE LA MARE: We have.

THE PRESIDENT: -- so that we could complete this part of the case, we are grateful to the transcribers. I think in light of that we will give them a 10-minute break and come back at 12.10 pm and then we move onto your application.

(12.01 pm) (A short break)

(12.11 pm)

Discussion re timetabling matters

MR. DE LA MARE: Sir, the dread topic of timetabling.

THE PRESIDENT: Can I just put away bundle 3 of the authorities. Yes, where are we.

MR. DE LA MARE: We are not doing so brilliantly but we have got the day in reserve.

THE PRESIDENT: Yes.

MR. DE LA MARE: But what has happened has made me question the order as to how we propose to proceed in the timetable.

THE PRESIDENT: Yes.

MR. DE LA MARE: Because, as I have discussed with Mr. Bates, he believes that he is going to be able to make, or certainly make more economically a good deal of the points he wishes to make about the weaknesses he perceives in our case in the course of whatever cross-examination of Mr. Noble he is permitted.

That causes me to wonder whether or not the sensible course would be to put Mr. Noble up for such questioning as you, sir, have now and such questioning as you permit Mr. Bates to advance and then effectively to have submissions in the light of it a bit like the closing submissions. I am quite happy to do it the way that we originally envisaged, but I am wondering, given we have not been brilliant at sticking to time estimates, whether or not I might waste a lot of time going over areas that do not actually show themselves to be areas of debate or real sustained debate, tilting a little bit at windmills, when really what we can and should be doing is getting to the quick of the case that is put the other way as to why this case does not meet the suitability test.

THE PRESIDENT: Well, it does depend, going back to what you said in opening the case, where you referred to some things --

MR. DE LA MARE: Yes.

THE PRESIDENT: -- and you said that the Enron point --

MR. DE LA MARE: Yes.

THE PRESIDENT: -- as you put it, and that is very important --

MR. DE LA MARE: It is.

THE PRESIDENT: -- for -- and that is not for Mr. Noble; that is a legal point --

MR. DE LA MARE: It is.

THE PRESIDENT: -- and how that is put and what we have heard of it because he has taken a certain approach but we have to look initially, legally, at what the infringements are.

MR. DE LA MARE: Yes. The context of understanding the Enron point is not difficult. We are all agreed there are eight findings of the infringement and no findings beyond those. The question is: what in law is the limiting effect of that being the case?

THE PRESIDENT: Yes.

MR. DE LA MARE: There is equally no debate but that Mr. Noble's approach is predicated upon looking at retailer with a big R and retailers with a small R, whereas Mr. Parker's approach is very much more focused on looking at retailer was a big R such that the only spill over effect is what he calls indirect effects are then to retailers with a small R and that is a big factor in the difference in approach between them.

THE PRESIDENT: It is quite a fundamental point.

MR. DE LA MARE: It is quite fundamental but you are not going to decide the Enron point in advance of hearing from Mr. Noble.

THE PRESIDENT: No.

MR. DE LA MARE: So it is hard to see how the fact whether or not we have argued that point one way or another beforehand makes any difference.

That said -- what I can equally well do and I am entirely flexible -- is I can explain what I think the test is under Rule 77 and 89 and explain areas of common ground and difference and I can open my case on Enron. I am quite happy to do that.

What I am more concerned about is potentially opening swathes of the decision or parts of the evidence that may actually not be relevant to the particular concerns raised.

THE PRESIDENT: Yes. Well let me consult my colleagues and decide what to do. (Pause)

Mr. de la Mare, at the outset, you grouped the various issues that you thought arose and there were two broad groups, one being retrospectivity and fairness, that has been completed.

MR. DE LA MARE: Yes.

THE PRESIDENT: Then on suitability, cost benefit, and strength of case.

MR. DE LA MARE: Yes.

THE PRESIDENT: I think you said the first is what approach the tribunal should take under the rules to this sort of case.

MR. DE LA MARE: Yes.

THE PRESIDENT: The second was to what extent is the tribunal confined to the eight infringements --

MR. DE LA MARE: Yes.

THE PRESIDENT: -- and what therefore is the approach to the counterfactual. The third was, what is the strength of the claimant's case? Is it sufficiently strong to merit a CPO --

MR. DE LA MARE: Yes.

THE PRESIDENT: -- and, no doubt, a CPO on an opt-out basis.

I think the third of those points should come after the expert evidence.

MR. DE LA MARE: Very good.

THE PRESIDENT: The first of those points I do not think we need now; you can do that at the end.

MR. DE LA MARE: Which is what?

THE PRESIDENT: What approach, general approach should the CAT take to --

MR. DE LA MARE: I think I can do that very quickly.

THE PRESIDENT: If you would like to --
MR. DE LA MARE: Yes.
THE PRESIDENT: What we would like though is the Enron --
MR. DE LA MARE: Enron.
THE PRESIDENT: -- that is not quite accurate, but what has been called for convenience the Enron point.
MR. DE LA MARE: Right. Very well.
THE PRESIDENT: If you can do that between now and lunch --
MR. DE LA MARE: I thought you were going to say that.
So we can start?
THE PRESIDENT: We can start Mr. Noble straight after lunch and that seems a sensible way of proceeding.
MR. DE LA MARE: Absolutely fine. Submissions by MR. DE LA MARE
MR. DE LA MARE: I think the starting point for the test under the rules -- perhaps if you could turn up paragraph 41 of my learned friend's skeleton. Because I think, having seen that, there is a good deal of common ground between us. So if I can ask you to turn up paragraph 41 of his skeleton and have open the rules themselves.
MS. STUART: The skeleton of the respondents?
MR. DE LA MARE: Of the respondents.
MS. STUART: That is the respondents'?
THE PRESIDENT: Are they in the bundle? CP51.
MR. DE LA MARE: So the relevant passage in the rules is page 3458 of the Butterworth's guide and you may have it loose.
THE PRESIDENT: Just a moment.
MR. DE LA MARE: Before we get into the meat of the rules and the meat of the submissions --
THE PRESIDENT: Just minute let us find these references.
MR. DE LA MARE: It is really Rule 77 and 79 that we are concerned with because for all the to and fro in the written documents there is not really any sustained argument about class representatives and you are going to deal with that on paper.
What we say on that front --
MR. GLYNN: Sorry which page?
MR. DE LA MARE: In the rules?
MR. GLYNN: No, in the skeleton.
MR. DE LA MARE: 41. This is the approach that Mr. Bates urges should be adopted --

MR. GLYNN: Thank you so much.

MR. DE LA MARE: -- when applying the test.

Before he goes through, I propose to go through it paragraph by paragraph and indicate where we agree or have a nuanced or slightly different position.

The first real question is this -- and I know it is a matter you, sir, have expressed interest in: what is the role of comparative authority? A good deal of bundle 2 is made up of comparative authority.

Our principal submission is that the role of comparative authority is as to flagging the types of issues that arise. But in terms of the policy to be applied to those issues the policy is that supplied by our act of Parliament and our rules alone. Insofar as you are looking to comparative authority for the answers to the issues, we think it rarely, if ever, will be appropriated to do so.

Why? This legislation was the product of a sustained and very careful consideration of all kinds of rival systems with their merits and demerits and Parliament has designed its own system and it is not one that is obviously lifted from or based upon or predicated upon any one model in particular. There is no model that anyone says is particularly close. There are shared features but also material differences.

So it is quite unlike, for instance, the *Competition Act* and Chapter 1 and Chapter 2 which is obviously lifted straight from EU law and you have the Section 60 obligation. We are not in anything like that territory. As is ever they way, when you start making arguments about comparative law, you have to be aware of the differences. So just to give a very simple example, the minute you reach for American precedents, you have to appreciate, first of all, the vast complexity and lack of homogeneity in the American precedents as between the different federal circuits and between state and federal law and you have to bear in mind key features of the system that are materially different.

So, for instance, the US system is a class-claim system and class claims are permitted across the board, whereas in the UK we have designed a narrow class-claim system for competition law alone. That is the first difference. Some of the approaches and therefore the policy of the American system will be driven by that..

The second difference for instance is that in the American class-claim system, when dealing with antitrust and Sherman act infringements, the broad rule, as you know, is there is no passing on defence. That makes a certification much more of, if you like, a potential passport to massively unlimited riches because if you are not having to deal with pass on, it

massively inflates the sum at stake and therefore may have a material impact upon the extent to which the court really wants to test the validity of the claim.

The third difference is, of course, that US rules operate on a completely different cost footing or premise to ours. So the prospect of an unmeritorious certification is potentially vast expenditure on cost with no prospect of recovery. Whereas, by contrast, in our system, the emphasis very squarely is upon having adequacy or reasons for not having adequacy of cost cover.

If you are like the starting presumption of our legislation is something close to some form of reasonable security for costs being supplied by means of funding arrangements. That obviously has a massive difference in how you assess the merits of the claim. Now, that is just the US; one can make similar points in relation to the Canadian, Australian systems, et cetera.

THE PRESIDENT: The US is the most different by far.

MR. DE LA MARE: It is the most different.

THE PRESIDENT: But the rules (inaudible: coughing) the essential federal rule is materially different from Section 47B.

MR. DE LA MARE: Absolutely and that, I think, has led to a position where we have both jockeyed with comparative authority, but when you come down to the sharp end of actually applying the rules, no one's actually relying on it. You have got to make your own policy choices and that is one of the reasons why -- and I go back to what I said in opening -- this first hearing is so very important.

THE PRESIDENT: It can be informed by the view of experienced judges --

MR. DE LA MARE: Yes.

THE PRESIDENT: -- in other jurisdictions, not just as to the questions, but also as to how one might approach them as long as you bear in mind the differences.

MR. DE LA MARE: Absolutely.

If you like, another way of putting the point I am trying to convey is it does not provide the answers; it identifies the issues and it is a source of inspiration for potential tools to solve the kind of problems that may arise.

But beyond that, comparative authority is not a straitjacket and I do not think either of us therefore put it at the forefront as to how we say you should be exercising this exercise.

With that in mind, let us turn to the rules themselves because what is plain -- and forgive me for, a little bit, going back over ground we covered with Mr. Armitage -- is that whilst the criteria set out in Section 79 in particular directs a number of mandatory relevant

considerations, they are not exhaustive -- that is point one, we are agreed on that -- although we say they are confined to features that bear upon the suitability of the claim outside the forbidden topics, like transitional arrangements, et cetera.

Secondly, they do not, within each topic, contain any mandatory direction as to how that particular factor is to be weighed or evaluated so to give you a simple example, the strength criterion that comes in only at 79(3) when choosing between opt in and opt out does not contain any threshold test as to the strength of the claim required.

So it is not like the summary judgment test which says, no reasonable prospects of success, and tells you what strength you looking for. You can, according to the circumstances of the case, vary what you think is appropriate by reference to the interplay with the other factors in 79(2) and in (3) and whatever other factors you think are reasonably appropriate.

So what you have is really quite an open-textured discretion where you are to perform a function of balancing these various mandatory factors against you as appears fit on the circumstances of any individual case.

Let us look at paragraph 41. The first point is agreed: of course, the tribunal should not grant a CPO without considering the strength of the claims. It is a mandatory relevant consideration for an opt-out claim. But with respect, that does not really take us much further.

Secondly, the tribunal's assessment of the strength of the claims compromised within the proposed opt out is inevitably preliminary in nature and not a mini-trial. We agree. We think that is a fair assessment.

Given the way that cost protection is provided, given the way that the rules are structured, and in particular -- and I emphasize this -- given that the Act and the rules emphasize that there is close continued case management of the claims and close continued evaluation and reevaluation of the appropriateness of both the CPO order in general and its parameters in particular, we think that that must be right because the tribunal can alter what it thinks appropriate by reference to developments in the case. That is made absolutely express in Rule 85 which gives effect to Section 47B -- I cannot remember --

THE PRESIDENT: Yes.

MR. DE LA MARE: There is a provision that say so in 47B; I will turn it back up in a second.

So if we look at Rule 85. It allows at any time --

THE PRESIDENT: Subsection 9 I think.

MR. DE LA MARE: Sorry?

THE PRESIDENT: Subsection 9.

MR. DE LA MARE: I am grateful:

> "At any time and under its own initiative, or on the application of the class representative or a representative person or a defendant, may make an order for the variation or revocation."

How do you conduct that exercise? Well, you do so effectively under subsection 2 by looking at any material changes and developments in the case.

So this is simply a threshold process at the beginning of a management of a claim. Obviously the larger the claim, the more complicated it is, the more multifold the issues it produces and the more intensely perhaps Rule 85 will be policed.

Proposition C:

> "On the other hand, the tribunal cannot simply take at face value the assertions of [Mrs. Gibson and the economic expert] without examining whether they appear to have a credible bases and are not mere suppositions."

Again we agree with that. You have to be satisfied that the claim is not one for instance --

THE PRESIDENT: If you agree, I do not want you to waste time. If you agree, you can tell us you agree --

MR. DE LA MARE: Yes, agree.

THE PRESIDENT: -- and you do not have to explain why you agree because you are agreeing.

MR. DE LA MARE: Agreed. Well, sometimes explaining why you agree actually does, I hope, advance things. So I hope the point I have made in relation to 85 explains why we agree it is not a mini-trial. I will trying not on waste your time though.

D:

> "The burden is on Mrs. Gibson to say that she has a strong or at least a credible case."

That is our first cavil. There is no inflexible requirement to show that you have a strong case. There is simply a requirement to look at the strength of the case and how strong it is will be but a factor to be taken into account. You cannot begin to sneak into 79(3)(a) something that looks likes a variant upon the summary judgment test.

THE PRESIDENT: But you accept credible?

MR. DE LA MARE: Credible, yes. Because credible means arguable and we should not be allowed to advance unarguable case. We are not arguing for a better position than would be the case in an ordinary civil litigation. So we would accept that as a longstop.

What Mr. Bates is trying to do here is to set a higher threshold than summary judgment or arguability and we do not accept there is any such --

THE PRESIDENT: It is put tentatively, "strong or at least credible". I understand: you put a query around it "strong"; you say it goes too far.

MR. DE LA MARE: Yes. Proposition E:

> "Whilst Mrs. Gibson has not received general disclosure she should be expected to explain how she envisages being able to prove the things that she looks to prove."

Absolutely. We agree with that. But of course, in so doing, the tribunal is going to have to make allowances for a variety of factors and, in the particular context of an opt-out claim and, in particular, one involving consumers and, in particular, one involving a situation where the defendant itself does not have the sort of underlying retail data that is relevant, you are going to have to make allowances for the fact that at this stage there is necessarily an imperfection in the data available and criticisms therefore about that are to be taken with a very large pinch of salt because effectively all that can be reasonably required in those circumstances is to instruct a reasonable responsible competent expert to give a balanced and reasonable expert view as to what they will do and why they think it had at the end of the day there is a case to be answered.

THE PRESIDENT: But surely we can, can we not, consider what data might be available?

MR. DE LA MARE: You can.

THE PRESIDENT: If one is in a situation where even one (inaudible: coughing) loss has been suffered, there just is not any prospect of data being available that enables it to be properly quantified. Even on an estimated basis or in a reasonable way that is fair to the defendant one could say, this case cannot go ahead.

MR. DE LA MARE: If you were in such a set of extreme circumstances, that may well be the response, but for reasons we will come to we are nowhere near.

THE PRESIDENT: In this case, but that is a possibility.

MR. DE LA MARE: Yes, yes. Of course, experts deal with problems of data by the use of proxies all the time.

THE PRESIDENT: Yes. If one was satisfied there is an effective proxy, that is right.

MR. DE LA MARE: Or a reasonable proxy and that then very much feeds into the points I was making by reference to the Lord Justice Longmore's decision in that case, the *Keefe* case, the jeweller's principle, we are in a terrain we say where the starting presumption should be a generous approach. If there is a difficulty of proof that lies from the manner of the infringement then at first blush you should make all reasonable assumptions in the claimant's favour that is consistent with the bulk of the rest of the evidence. That is the

Armory v Delamirie principle and it is applied to this day. You remember the case: a chimneysweep --

THE PRESIDENT: I am not sure my colleagues do.

MR. DE LA MARE: A chimneysweep found a ring setting with a jewel in it, delivered it to have it valued to one of the leading silversmiths of the day, and the gem disappeared from the setting. The approach to quantification was that if they could not produce the gem, then you should proceed on the assumption that the gem was the most valuable type of gem consistent with the size and colour of the gem in question.

So in other words, if the defendant put it out of their hands to have proof as to what their wrong -- in that case, conversion -- had done, then the court should proceed on the basis reasonable assumptions in the claimant's favour.

We say, if only at the stage of certification, that is the proper approach to be adopted -- and I say if only at the process of certification because this is an area where there is obviously a tie-in to the rest of the rules and one of the tie-ins is that there is cost protection provided --

THE PRESIDENT: I am not sure we will have to consider how far that that principal applies.

MR. DE LA MARE: You do not --

THE PRESIDENT: This is not a case where the defendant has put it out of the court's hands or the tribunal's hands to have the relevant data, but it is third parties.

MR. DE LA MARE: With respect, we do not accept that --

THE PRESIDENT: Well --

MR. DE LA MARE: -- because all of these agreements are a function of the policy or concerted practice agreed between Pride and its retailers. The justification that Pride has sought periodically to advance when it is convenient to it is: this is justified in order to provide sufficient margin for our bricks and mortar retailers to be able to provide proper value-added services. In circumstances where it is adopting such a policy, without in any way -- whilst monitoring who is pricing without in any way getting information to show that the policy is justified, they have to take responsibility for that.

THE PRESIDENT: They take responsibility for what they did. I am saying that if data is not available then one can look at what the experts say and what data they would like to have, but quite a lot of it is not data that would come from Pride anyway --

MR. DE LA MARE: I readily accept that.

THE PRESIDENT: -- and I am saying the presumption therefore, it seems to me, would not apply to the absence of that data because it is not Pride that has put it out of its hands. It is not like the silversmith that had lost the jewel.

MR. DE LA MARE: I do not want to suggest the analogy is exact --

THE PRESIDENT: If it was Pride's data and Pride says, well, it has been deleted from our computer, or, it has been destroyed, that might be different; that is the point I am making.

MR. DE LA MARE: Yes in a multi-party infringement, such as this, where effectively you are making a policy that is then acted upon by these retailers, you cannot quite so easily, in my submission, hide behind that allocation of competence if the effect of that is to render it pretty difficult to prove the consequence of what you have done.

In any event, I should emphasize from the outset Mr. Noble has been quite clear -- as is Mr. Haan's statement -- that we need ideally more data from retailers.

I will answer in relation to that and we will get to it in due course. That is a question for appropriate case management, by getting the experts together, working out what robust sample data that is required that is the most proportionate -- we do not need it from all 600 retailers; it is an adequate statistical sample -- and seeking to recover that on a balance basis to deliver enough data points to deliver the kind of analysis that Mr. Noble has done and there is no reason to believe --

THE PRESIDENT: Yes, I mean it is a question of what is available given -- we have seen the inquiries made and we have some data now from one of the eight infringers in Ms. Dunn's statement and that has clearly been helpful to Mr. Noble. We know some have gone out of business and nothing has been retained --

MR. DE LA MARE: Two of the eight, I think.

THE PRESIDENT: Two of the eight have gone out of business and some say -- we have seen the correspondence with Pride's solicitors --

MR. DE LA MARE: Yes. One can well understand why there may be all kinds of sensitivities and a reluctance to provide this information -- or more accurately, I suspect, the access to the data because the most economical way for it to be gathered is by the experts doing is directly, as is often the case.

THE PRESIDENT: Yes, I accept if all you are saying is that there might be third party discovery orders, yes, that is right, but all I am saying is we can, it seems to me, take account of what might be reasonably be expected to become available.

MR. DE LA MARE: Yes of course you can and I do not demur from that.

Then F:

> "It is a factor to be taken into account [yes] alongside other considerations."

But equally we would say, in relation to this third party data issue which is put forward as a major obstacle, one has to adopt a realistic approach as to how much data is likely to be

required and one has to at least get to a situation where one has tested, in this case, first of all, what the, if you like, cooperative interchange between the experts is as to how that data can be gone about to be got and, secondly, whether or not it exists.

This would be a perfect context in that case to operate rolling case management by reference to Rule 85 and keeping the continued existence of the CPO under review in those circumstances. That would be the proportionate way to respond rather than, as my learned friends urge upon you, to simply assume it will always be impossible that the data does not exist and therefore we are stuck with whatever data we have got, the one and only NT Mobility data set being the only one that will ever come to pass.

THE PRESIDENT: We understand that point.

Can you move on to Enron because it is now twenty to one.

MR. DE LA MARE: Exactly, yes.

In relation to Enron, our case is very simple. It is no necessary part of our case to prove the existence of other infringements. Our case is predicated on the fact that there is a difference between the competitive pressure exerted in the factual with the eight infringements in operation and the difference -- and the commercial pressure that would be applied in the counterfactual when the eight infringements and all which necessarily goes with them are removed from the equation.

I say "all that necessarily goes with them" because it is necessarily a "but for" analysis and there is no argument that in the "but for" case, the policy, which is not challenged as unilateral policy in its own right -- there is no dominance case, we are not making those arguments -- but there is a fact that there was such a policy and there is plenty of evidence to suggest that the policy may be a reflection of unilateral practice by retailers, invitations by retailers to engage in such practices, et cetera. You do not have to care about that.

All that matters is that the policy will change. It is suggested that they might have changed to a selective distribution system, but since that has never come to pass, you start off with the counterfactual being the after. In other words, once Pride stops running the eight infringements, what happens to the competitive shape of the market in those circumstances? We do not need to enquire whether or not there were other infringing agreements or other unlawful practices that subsisted only because of, under the cover of, or in combination with the existing infringements and the policy. All that you are interested in is the "but for": what shape would the market have taken when it reached a new equilibrium in consequence of the removal of the agreements and the policies that underlay them?

With respect, the situation is no different to the type of situation that regularly arises in relation to a cartel. Let me give you an example. Let us suppose there is market serviced by A, B, C, D and E and the commission or the OFT or the CMA, find that A and B and C are in a cartel. They start an investigation against D, but discontinue it for lack of evidence, but they do not make a decision on it because they do not reach the relevant threshold of proof and they never think that E, a small-time player, is in the market.

When I bring a claim for umbrella overcharges in relation to the sales made by D and E to me and complain that the effect of the cartel has been to alter the competitive pressure in the market, I do not need to prove whether or not D or E were in the cartel at all. It may be that they were, which is why their prices were so closely shadowing. It may be that they had been and then were cheating just below the relevant level in question. It may be they were perfectly well aware of the cartel, did not participate in it, but priced in reflection to it, or simply did some form of shadow pricing.

The point is it is enough there is an infringement, the removal of the infringement changes the competitive dynamics in the counterfactual, and you then have to assess how and where the market responds to it in those circumstances.

THE PRESIDENT: say you do not need to prove that D and E were in the cartel, it is a matter of how you choose bring your case. You can bring a case saying, I am claiming against D and E because they were in the cartel and I can prove it.

MR. DE LA MARE: Yes.

THE PRESIDENT: That is one case. Or you can say, I am bringing a case against the -- well, you would not bring a case against D and E at all, you would be bringing the case against the cartelist and saying, my price from D and E was an umbrella effect, and it would be a different kind of causation --

MR. DE LA MARE: Exactly.

THE PRESIDENT: -- and that is --

MR. DE LA MARE: That is this case.

THE PRESIDENT: So what you are saying is, as I understand you, there were eight infringements for these particular periods, different periods with each of the eight, and the umbrella effect of those eight was on all the other retailers. That is what I understand you to be saying.

MR. DE LA MARE: We are saying that the counterfactual is a world necessarily without those eight infringements and since, it is admitted as common fact, without the policies that underlay them so what you have to work --

THE PRESIDENT: The policy is not effective.

MR. DE LA MARE: That is an issue. Whether it is effective or not --

THE PRESIDENT: Well, you say it is an issue. Are you -- that is rather important. Is it going to be part of your case to say that beyond the eight retailers this policy was agreed to?

MR. DE LA MARE: No.

THE PRESIDENT: No, it is not.

MR. DE LA MARE: No.

THE PRESIDENT: So there was the wish of Pride to get all the retailers to adopt this course but only eight agreed, that is the situation, and if in the counterfactual there would have been no policy and so the eight had nothing to agree to.

MR. DE LA MARE: Yes.

MR. GLYNN: Or would it be there was no agreement with the eight and leave the question of the policy completely out of it?

MR. DE LA MARE: No, you cannot leave the question of the policy out of it because everyone is clear there would be no such policy. You cannot simply therefore posit that the only thing that changes, which is the approach that Mr. Parker effectively adopts in his model, is the pricing of the eight. The reason you cannot --

THE PRESIDENT: Because you have an umbrella price effect from the eight, but it is not from the policy it is the pricing of the eight infringements caused by the infringement.

MR. DE LA MARE: Exactly. That is right.

THE PRESIDENT: So therefore, to that extent, the policy for the others is irrelevant.

MR. DE LA MARE: The reason I do not need to prove it is because it is plain there is some form of network effect at play -- the OFT's decision says as much in its section on appreciability. They do not feel the need to go on to find out who else is within the network arriving at these decisions, but we do not need to do that either. All with we need to do is to look at the difference in competitive pressure before and after and enquire as to how the competitive pressure has changed between the two. You cannot -- as a matter of economic or legal logic you cannot separate the conduct of the eight retailers from the rest.

Look at it this way: there are four scenarios that may occur if the perspective of any potential customer. A customer may have dealt with a big R retailer and in the counterfactual may continue to have dealt with the big R retailer but at a different price. A customer may have dealt with a big R retailer but in consequence of the added price competition generated by the retailer beginning to price on the Internet aggressively to try and get leads, that engenders price competition that leads others to lower their offers, so you

go from contracting with the big R retailer to contracting with the small R retailer. It may be the case -- and there is a good deal of hinting in Gemma Dunn's evidence that there is the case -- that you do not start off contracting with the big R retailer because if all you are doing is say, call for best offer, and there is someone else cheating or more locally available who has posted prices you see, you go to them and you start off going with the small R retailer and in the counterfactual you would have dealt with the big R retailer. Then the last scenario is you might have always dealt with the small R retailer, but the existence of the competitive prices available from the big R retailer would have led to a dynamic in which the small R retailer lowered their prices.

THE PRESIDENT: We understand that; that is the umbrella effect.

MR. DE LA MARE: Absolutely. That is all we need to prove.

THE PRESIDENT: That is the case you are bringing?

MR. DE LA MARE: That is the case we are bringing.

MR. GLYNN: It does not depend on whether or not you think there was a policy affecting other retailers?

MR. DE LA MARE: It does not depend on whether or not the conduct of the other retailers in not posting prices at the time was a result of their unilateral action, their preferences, a concerted practice or whatever reason. We do not need to enquire. All you need to enquire -- and you do so by appropriate empirical analysis -- is whether or not the prices have moved in consequence of the changed competitive pressure. That is all you need to enquire as to.

We say it is perfectly plausible that a change in these eight retailer agreements will lead to these effects particularly if you are satisfied on a "but for" test the policy is going to fall away.

It is particularly plausible because OFT market report from 2011 -- chapter 5 of which if you have not read I urge you to read over lunch -- shows this is a poorly functioning market. September 2011, slap bang towards the end of the --

THE PRESIDENT: This is the new document you have handed up?

MR. DE LA MARE: That is right.

THE PRESIDENT: We have not read it; we only got it yesterday.

MR. DE LA MARE: I am so sorry; it is chapter 5 in particular.

THE PRESIDENT: We put it somewhere.

MR. DE LA MARE: 79 I think it is -- no, it is 75.

THE PRESIDENT: If someone could produce a new index --

MR. DE LA MARE: Of course.

THE PRESIDENT: -- for bundle 3.

MR. DE LA MARE: A new index and some tabs.

THE PRESIDENT: You have probably got it on your word processor. Yes, the mobility aids study, chapter 5, you said?

MR. DE LA MARE: Yes. I was proposing at some stage to take you through this in more detail. If you, over lunch --

THE PRESIDENT: We will read it.

MR. DE LA MARE: It is particularly sections 1, 2 and the dynamic pricing models and diagrams set out in 2.

THE PRESIDENT: 1 and 2?

MR. DE LA MARE: Sections 1 and 2 of the report.

THE PRESIDENT: Not chapter 5?

MR. DE LA MARE: No. I am trying to give you a filleted list that takes you to what they have investigated and why.

THE PRESIDENT: Yes.

MR. DE LA MARE: Section 3, which is the overview of the mobility aids sector, particularly 3.1 through to 3.5. Then you can skip chapter 4, which is about a different topic, save for page 31 that deals with the particular vulnerability of the consumers at issue here.

THE PRESIDENT: Yes.

MR. DE LA MARE: Then look at chapter 5 which deals expressly with the topic of:

> "Can consumers assess and act on information which enables them to make informed purchasing decisions?"

THE PRESIDENT: Yes.

MR. DE LA MARE: One of the striking features of which is that even at September 2011 there was very, very little online or indeed print price publication information, which led the OFT to makes recommendations.

Our case is that it is enough there is the eight infringements and if we can prove that the eight infringements, if removed and everything that necessarily went to them, led to a materially new competition dynamic that led to new prices and we say it would lead to not only new posted prices, but it also in due course to new, if you like, bottom line prices --

THE PRESIDENT: Negotiating prices. It would have an effect on the ultimate price paid.

MR. DE LA MARE: It would but it would have an effect in two ways: the posted price would change but also the retailers would change their view as to what their bottom line is, if

necessary by making efficiency savings, et cetera, in order to compete more effectively with the Internet or Internet channels.

One cannot therefore assume that their bottom-line price, after the infringement, is static. Therefore you have a change to negotiation where both the posted price entry point and the bottom line deal-or-no-deal point for any particular retailer has changed and that would benefit everyone --

THE PRESIDENT: No, we understand that point.

MR. DE LA MARE: Very well. That is our answer to the Enron point.

THE PRESIDENT: That explains it and I think that is very helpful to us and no doubt to Mr. Bates to have that clarified before we hear the expert evidence.

I think it is sensible, especially as we have been asked to do some reading, to rise now and come back at 2 o'clock.

MR. DE LA MARE: I am grateful.

THE PRESIDENT: Then what is suggested is that you call Mr. Noble; that is what you are proposing to do.

MR. DE LA MARE: Yes.

THE PRESIDENT: We can ask him some questions and Mr. Bates can ask him some questions.

(12.55 pm) (The luncheon adjournment)

(2.00 pm)

MR. DE LA MARE: Sir, before I put Mr. Noble up for your questions and then Mr. Bates' questions --

THE PRESIDENT: Yes.

MR. DE LA MARE: -- having been bounced -- entirely at my own fault -- around in the order a little bit, I realise there are two things I should show you from the decision just to complete the discussion we had before lunch. It should not take me more than 5 minutes, if that is convenient to you.

It is bundle B1, tab 3, the decision. I am not going to take you through it as I know you have pored over it evidently more closely than me, having spotted the continued redactions.

The passages I wanted to show you were the passages dealing with appreciability and, if you like, remedy because these passages make it plain that the decision is premised upon the fact that there is a finding that Pride is attempting to operate its policy on a network-wide basis and that is the basis on which effectively these eight agreements are found to be appreciable effects, effectively applying a *Delimitis* style of approach.

So the relevant section of the decision is section G, page 127 of tab 3, page 3219.

THE PRESIDENT: Paragraph 3219.

MR. DE LA MARE: Paragraph 3219, yes.

The materials that are -- the fact-oriented analysis on appreciability starts at 3222.2, estimated Pride is the largest market share at 3222.2. Its size relative to the other operators is significant; it is twice the size of the next nearest operator, which is obviously relevant to the impact of any network on the market.

3222.4, which is also significant:

> "Based on information obtained Pride is one of the few known brands ..."

That is obviously relevant to the extent to which there is brand premium and therefore intrabrand competition will operate to disclose what the effective price should be for that brand reflecting their brand premium.

It also tells you how many retailers there are in the Pride network out of the overall number. I do not think those figures are confidential but they are in square brackets --

THE PRESIDENT: I think we have been given them elsewhere in the witness evidence non-confidentially.

MR. DE LA MARE: Yes. It is about 600 or 700 retailers out of an overall eight --

THE PRESIDENT: But, I think, not on a regular basis.

MR. DE LA MARE: That is right; some are occasionals.

THE PRESIDENT: It is 250 to 300 regularly.

MR. DE LA MARE: Yes, that is right. Then 3225 is the finding:

> "The OFT considers that price strategy in relation to implementing the below RRPM was intended to apply to the whole dealer network and was widespread ..."

That is the finding:

> "... going well beyond the retailers named in the decision ... overall strategy would only have worked if the majority of dealers adhered to ... had the potential to encompass all dealers within the network ... enforcement extended far wider than the retailers addressed by this decision."

Then 3:

> "Furthermore, retailers were themselves monitoring the below RRP. In some cases these retailers contacted Pride."

That is obviously important because whether or not you are behaving unilaterally or bilaterally, the fact that you know there is this policy which is intended to be and attempted to be applied to the network is part of your internal pricing decision.

THE PRESIDENT: But the policy is not unlawful.

MR. DE LA MARE: Well, the policy is part and parcel of the infringement as found --

THE PRESIDENT: No, it is not; the infringement is the agreement.

MR. DE LA MARE: It is the eight agreements which have appreciable effect. The eight agreements implementing the policy --

THE PRESIDENT: Yes. The policy -- it is the eight agreements that it says have an appreciable effect. The policy that might have been unlawful if Pride was dominant --

MR. DE LA MARE: I agree with that.

THE PRESIDENT: -- but it was not and if insofar all the other dealers said to Pride, well, that might be your intention but we have no intention ourselves of going along with it if it would have no effect.

MR. DE LA MARE: Entirely agreed, sir, but the point I am making is that the existence of and the attempts to enforce the agreements on a market-wide basis is a fact that is found and that is a fact that is known to all retailers and that is therefore part and parcel of their pricing decision.

If we then look at 4.3, what the OFT requires to be done, page 143, they give the parties the following directions:

> "Pride shall within 20 working days from the date of this decision write to each of the [capital R] retailers listed in paragraph 1.9 [that is the eight] and any other small retailers [lower case R] in respect of which it operates the restriction in relation to mobility scooters to inform them that it no longer operates such a prohibition."

That is what the OFT thinks has to happen in consequence of the decision and that is why I say the counterfactual has to be, on the basis of 4.3, a world in which there is no policy. That is accepted factually by Mr. Allen who says that we have to move to another network-wide policy and that is why we say it is relevant that, in the counterfactual, there is no such policy in operation.

THE PRESIDENT: Yes, but it is not at all clear -- there is no finding that the policy actually was agreed to --

MR. DE LA MARE: No.

THE PRESIDENT: -- other than eight retailers for a short period.

Of course the OFT wants the policy changed because others might agree to it in the future apart from anything else --

MR. DE LA MARE: Absolutely.

THE PRESIDENT: -- and that there is the possibility that there might be other infringements, but the only finding is that it is these eight.

MR. DE LA MARE: I agree with that, sir.
THE PRESIDENT: Yes.
MR. DE LA MARE: I am not seeking to argue otherwise. The point I am making is that nevertheless the counterfactual world is one in which there is no policy --
THE PRESIDENT: Yes.
MR. DE LA MARE: -- and therefore whatever pricing, changed pricing decisions and dynamics are, are ones that have to reflect that fact.

Let us say I am a small R retailer who has always done my own thing unilaterally. I sell Pride's products but I know Pride is attempting to operate this policy and I make my pricing decisions in the light of I know what they are trying to do and I price accordingly.

The counterfactual world is going to be one in which I know they are not trying to operate that policy and they are trying to operate something else and I will make my pricing decisions in that world accordingly. That is the point I am trying to make.
THE PRESIDENT: That is not the result of the infringement.
MR. DE LA MARE: No, that is the "but for".
MR. GLYNN: The "but for" we have to address is, had there not been an infringement, not had there not been a policy which was not found to be an infringement.
MR. DE LA MARE: But you cannot have a counterfactual world which is either economically or legally unreal.
THE PRESIDENT: Why is it unreal, if 248 or 242 dealers were not prepared to go along with it, to say 250 were not prepared to go along with it? Why is that unreal?
MR. DE LA MARE: I do not understand the point.
THE PRESIDENT: We have a situation where only out of 250, maybe 300 dealers, only eight agreed to go along with the policy. Therefore 242 --
MR. DE LA MARE: May have. We simply do not know one way or the other.
THE PRESIDENT: We cannot assume --
MR. GLYNN: Well, they were not found to.
MR. DE LA MARE: That is the point. Exactly, with respect, that is the point, you cannot assume one way or the other. What you cannot assume is that there were no infringements either.
THE PRESIDENT: We cannot proceed on the basis that you are seeking to prove loss in this case as brought on a possibility of other infringements which are you are not trying to prove.
MR. DE LA MARE: No but if other infringements are unsustainable in the light of what the other eight are doing and have to be doing lawfully then that will be part of the "but for" analysis. You cannot posit in the counterfactual a world in which the eight infringements

have gone and with them the policy necessarily and yet nevertheless parties continue to operate whatever restrictions there will be. There will be a new equilibrium at that point.

THE PRESIDENT: A new equilibrium because there will not be eight dealers for a certain period, varying as between them.

MR. DE LA MARE: Yes, but there will not be this policy either.

THE PRESIDENT: But there is no evidence that the policy, as such, had an effect.

MR. GLYNN: Yes.

THE PRESIDENT: That is the problem. There is no finding --

MR. DE LA MARE: I do not need to prove that its effect is that it generates further infringing agreements, that is the point.

THE PRESIDENT: You cannot bring a case saying, I want damages because of the policy.

MR. DE LA MARE: Because of the policy or because of the further infringing agreements. I can bring a case in which I say the counterfactual is a world in which there is no eight infringing agreements and no policy.

THE PRESIDENT: Yes.

MR. DE LA MARE: That is my case.

THE PRESIDENT: Yes.

MR. DE LA MARE: So my case is, there is though policy.

THE PRESIDENT: Yes, it is just that it is not found that the policy had an effect beyond the eight, that is all.

MR. DE LA MARE: I agree with that, sir.

THE PRESIDENT: Yes.

MR. DE LA MARE: Shall I now proceed to call Mr. Noble for your questions?

THE PRESIDENT: Yes. MR. ROBIN NOBLE (sworn)

Cross-examination by MR. DE LA MARE

THE PRESIDENT: Do sit down please, Mr. Noble.

MR. DE LA MARE: Would you give the tribunal your full name, please?

A. Robin Philip Noble.

Q. Your professional address?

A. [Address given].

Q. Have you made some reports, some preliminary reports in this matter?

A. Yes I have.

Q. Have you got the core bundle before you?

A. Yes I have.

Q. Do you want to turn up and confirm that those are your reports?
A. Yes, tab 17.
Q. Tab 17 and tab 19?
A. Yes my first report is in tab 17 and my second report is at tab 19.
Q. I think the panel will have come questions for you?
THE PRESIDENT: Has Mr. Noble also got the letter of the 9th?
MR. DE LA MARE: Yes, of course. Did you prepare a letter in response to --
THE PRESIDENT: Is it in this bundle?
MR. DE LA MARE: It should be behind tab 19.
MR. GLYNN: Tab 20.
THE PRESIDENT: We have got it at tab 20, Mr. Noble. Have you got a tab 20?
A. I do not have a tab 20.
THE PRESIDENT: I do not think you have got it. Questions from THE TRIBUNAL
THE PRESIDENT: Mr. Noble, if we could go to your first report which is at tab 17.
A. Mm-hm.
THE PRESIDENT: We see that at page 8, we can see from the bold headings, you talk about a direct impact on online sales and then you talk, after 2.22:

"As a result of umbrella effects the mechanism described above extend to Pride models not subject to the restrictions."

That is the umbrella effect you are talking about, is an effect of pricing, the effect of the restricted models on the -- if I can make a shorthand -- the unrestricted models.
A. Yes.
THE PRESIDENT: In looking at the first direct effect, before one gets to the unrestricted models, do you here distinguish between the eight retailers that were subject to the restriction from all the other retailers selling these models that were not subject to the restriction?
A. Sorry?
THE PRESIDENT: Do you distinguish between the eight retailers that were subject to the restriction and all the other retailers selling restricted models but who were not themselves subject to the restriction?
A. In the analysis here?
THE PRESIDENT: Yes.
A. They are included in the direct effects.
THE PRESIDENT: But do you make any distinction between them, the effect on the restricted retailers and the effect on the unrestricted retailers?

A. Intellectually, there is a distinction, yes. It is the one that we have been talking about.
THE PRESIDENT: Yes, but do you distinguish between them in your analysis?
A. In the summary of damages at the end, no, they are part and parcel of the same group.
THE PRESIDENT: Is the effect on the unrestricted retailers not also a form of umbrella effect?
A. Yes it is.
THE PRESIDENT: On what basis do you assume that the umbrella effect -- that umbrella effect -- is the same as the direct effect on the restricted retailer?
A. Based on the analysis that -- the rogue analysis, for example. That is a during and after analysis. So the rogue price analysis included within it a number of retailers that were not the eight, so I forget exactly how many, it was something like 30 or 40 retailers' data is included in the rogue data. So the numbers you see presented, I think it is at figure 5.1 and in the paragraphs underneath that, the rogue analysis includes both data on the eight and data beyond the eight.
THE PRESIDENT: But in looking at the eight are you treating them as rogues if it is outside the period for which they were restricted?
A. The way this is analysed is that I am comparing data during the -- I think what has been called the supra period with the 2016 data that I have got here.
THE PRESIDENT: Yes, but we agree they are conceptually distinct. What basis, just a matter of rationale logic, do you say that the umbrella effect on the other 240 odd, 260 odd, would be the same as on the eight that are directly restricted?
A. Conceptually?
THE PRESIDENT: Yes?
A. I am looking at that empirically here.
THE PRESIDENT: You start off looking at it conceptually, I thought, at the beginning?
A. Mm-hm.
THE PRESIDENT: You explain how it works and your approach and you have been careful to distinguish an umbrella effect on other models, not empirically, but -- and then you go and look at it empirically -- but is not there a conceptual, not just a conceptual, theoretical difference, but a very important practical difference of a direct effect of someone who is restricted and an umbrella effect on others who are responding to greater or lesser competitive pressure --
A. Yes. There is certainly a conceptual difference.
MR. GLYNN: Should you not have looked for a difference in the empirical evidence on the directly affected models and the others?

A. On the models, yes, that is what my analysis says, but I think your question is --

THE PRESIDENT: On the dealers?

A. On the dealers, yes, and I think, one -- I think I wold have to check exactly what data there is -- but I think one could seek to try and enhance the analysis to look in more detail.

THE PRESIDENT: Would that not be the starting point, that we would try and look at them because they are conceptually so different? Look at them because there might well be a very marked difference in price effect?

A. Yes, there could be a difference, yes.

THE PRESIDENT: Would the difference not depend on how competitive the market is, in part, the umbrella effect?

A. Yes, yes.

THE PRESIDENT: How much shopping around goes on as between consumers so that how price sensitive dealers think consumers are?

A. Yes.

THE PRESIDENT: That could greatly affect the umbrella effect, could not it? The degree to which other dealers feel a competitive pressure or not from the eight who are advertising higher prices?

A. Yes, yes it could and I think the other part that I think is important to bear in mind there as well though is this in the sense the bundle that is inherent to my counterfactual analysis in that there are eight infringements but there is also a policy and the policy has an impact on the -- the policy is the reason that there are the eight infringements because absent the policy you would not have had the infringements. But the policy is also going to impact on the eight during periods when they are not infringing and it is also going to impact on players beyond the eight because they are going to have knowledge that is going to be an interaction between Pride and those retailers. There is going to be a change in behaviour because of that. That is, in a sense, it affects the expectations of those retailers so if you are one who is not one of the eight your expectation that there may be other players who are agreeing to the vertical restraint that Pride is requesting that you agree to, that changes the dynamic that you think you are going to face and therefore it changes the way in which you may behave because you would reasonably anticipate that you might expect less price competition from the internet than you might otherwise have done.

THE PRESIDENT: That is because of the policy? As you know there is this policy that Pride's trying to achieve.

A. Yes.

THE PRESIDENT: You do not know how many people might be involved?

A. No, but absent that conversation, absent the policy -- so in the counterfactual, your retailer who is not approached because there no policy, there is some other arrangement in place, but in the factual you are approached and you will presumably have some expectation even if you do not agree to it that some of the other people might agree to it and because of that your expectations about what the pricing dynamics may be in the market may be changed because of that.

THE PRESIDENT: I see they may be changed, but the degree to which you are affected by that will be depend to a significant extent on how competitive the market is, will it not?

A. Yes it would and I think in a sense that (inaudible: coughing) the empirical question because you are then saying, well, there are many, many factors that affect this, the information people have, the way they negotiate, whether they are good at negotiating, whether they use the internet, et cetera.

THE PRESIDENT: We know quite a bit about this market, do we not and you have looked at the OFT report on the market?

A. Mm-hm.

THE PRESIDENT: Does that suggest to you this, you say: competitive market or uncompetitive market?

A. I think the OFT's highlighted some concerns that they think it is not as competitive as it could be.

THE PRESIDENT: Is that not a gross understatement, with respect? Could you look at that report?

A. Which tab is it?

THE PRESIDENT: Which you have not got. It is called Mobility Aids. Is there a copy for Mr. Noble of the document that you asked us to read? (Handed). If you look for example in this report on page 74, 5.14:

> "In our consumer research one third of consumers did not state price was a factor they had taken into account when purchasing their mobility add and around half of respondents stated they had not shopped around before making their purchase."

Then, 5.15:

> "The high proportion of consumers who did not shop around, who did not take account of prices may explain why several participants in the interview stated they did not (inaudible: coughing) before they made their purchase. In particular these participants appeared to assume that by the time they had made their purchase a better

price could not be obtained by investigating alternative supplies. This indicates some consumers in this sector did not shop around so they misjudge prices or place more importance on their need for the product and less importance on price."

Then they refer to a (inaudible) purchase and the various reasons for that. One then sees on page 79 in the box, 5.2, that:

"(inaudible) ... for example we found the same model and brand of scooter on sale for prices between £1,500 and £4,500. Consumers who did not shop around before buying that product could therefore end up spending £3,000 more than those who do compare prices."

One sees the conclusion at page 89, 5.52:

"While the consumer research conducted reports high levels of satisfaction by the respondent. Many respondents were first-time buyers who did not access or have access to some key information that enabled them to make better informed purchasing decisions."

It observed, a significant proportion of the respondents had needed to make a "immediate" purchase and may not have had access to certain sales channels or information tools to assist them in making an informed purchase decision. Indeed, they complain and express concern that retailers are not advertising prices generally and that is one of their recommendations.

Is this not, altogether, a rather unusual market, is it not? It is extremely uncompetitive when you have price disparities like this?

A. I think if you just read this, I think that is a fair reflection, but I think there is a variety of other information.

THE PRESIDENT: Just pausing, when you say -- do you think this is an accurate study that we could rely on?

A. I think it is very helpful study but I think, particularly when you are talking about price, you need to also look at the actual transaction data.

THE PRESIDENT: Yes.

A. For example, they talk here about very, very large price dispersion referred to at page 39, 1,500 and 4,500.

THE PRESIDENT: Yes.

A. I do not recall precisely what the dispersion is in the Dunn data, but my recollection is that it is nothing like that. There is dispersion but it is narrower than that --

THE PRESIDENT: Sorry, the Dunn data?

A. The MT Mobility actual transaction price data.

THE PRESIDENT: Is that only sales by MT Mobility?

A. Yes it is.

THE PRESIDENT: They are talking about differences as between different retailers?

A. Mm-hm.

THE PRESIDENT: Not within the same retailer?

A. Yes.

THE PRESIDENT: The Dunn data would not reveal anything --

A. Yes but I think also that the rogue data does also give you a degree of price dispersion. I think the point you are getting at is that how can there be an umbrella effect in a situation where there is no competition in the extreme?

THE PRESIDENT: I am not saying that.

A. Okay.

THE PRESIDENT: What I am saying is, the umbrella effect might be, the price of the umbrella retailers, there could well be an effect.

A. Yes.

THE PRESIDENT: Might be very different and not -- we do not quite understand how you could assume it would be the same as for the restricted retailers. Is it not something one would have to look into quite carefully given what we know about the market to see, well, what is the umbrella prices, the prices of the umbrella retailers, even for the restricted model.

A. Mm-hm.

THE PRESIDENT: But you have looked, quite properly and carefully looked at, what about the umbrella model. But you have not, from what we could see, conducted any real attempt to analyse the umbrella retailers which is a very large part of the claim but you have assumed the price is the same.

A. Well, yes and no. Yes, I think you are right, I have not drawn them out separately. But, no, in that sense that, if you look at for example the MT Mobility data they are not actually infringement for a very long period so the majority of the analysis that I have conducted for them is actually for an umbrella retailer. They are one of the eight but I think they are only in for three or four months. So, of the two years, most of that the period is effectively them being an umbrella retailer. So in a sense the majority of what I am measuring there is effectively umbrella as opposed to --

THE PRESIDENT: Have you looked at the difference between the four months and the rest of that period?

A. I have not have looked in detail at that, no.

THE PRESIDENT: You have not looked at it there either?

A. No.

THE PRESIDENT: Because this is proceeding on a methodology that you want to have a class of all online retail sales of affected models, to get one average (inaudible: coughing)?

A. I do not know whether it has to be one average price. I think the way one cuts -- there is a common issue that I highlight in my first point, not that there is uniform overcharge, I should be very clear about that -- the common issue is whether there is an effect on price.

THE PRESIDENT: Is not there a uniform consent?

A. No it is not. I have cut it in particular ways because I have imperfect data at this stage so I have got four boxes in my first report. One could cut it in more detail so you could have, with more data, you could have eight subgroups, for example, or fewer, it depends what the data shows you. If the data shows you that these effects are all the same then in a sense one does not need separate groups. If the data shows you they are different effects then one could divide them up. Another criticism one could level at this is that I have only put the two, the scooters into two baskets, I have got umbrella models and affected models and I have used only one price within those two groups. But of course there is a dispersion.

THE PRESIDENT: Yes, I think that is quite a different point is it not because it appeared that the way you put it in 2.22 is that you are treating all retailers as subject to a form of minimum RPM, not eight retailers, for a certain period and then look to see what umbrella effect might there be on the others. You started with your four classes in a conceptual way and one can see it was clear that this was a very competitive market while prices were aligned, one would not have to worry about that. But is it not abundantly clear this is a market where it is not a very competitive market and that is why the team makes all those recommendations because they are concerned about how uncompetitive it is and how people do not shop around and how there is very little price transparency, et cetera?

A. Yes, but in a situation like that you, if you remove the last (inaudible) reduce yet further the impact of price transparency, the impact of a small number of agreements can be magnified because if those are eight retailers that were well known, they are acting as anchors for those people that do shop around, that can have a significant -- would be likely to have more effect than if you have got 300 retailers all vigorously emphasizing prices. In a sense just to go back to a point you made earlier in the OFT study which is saying lots of people do not shop around, there is still quite likely an effect on them because if you do not shop around but somebody else does their shopping around can affect the posted prices or the degree to

which you as a retailer are willing to negotiate with that person because you cannot perfectly identify whether or not someone that actually has shopped around, even if you ask me, I am not necessarily going to tell you the truth.

THE PRESIDENT: I understand that but it is a matter of degree.

A. Yes.

THE PRESIDENT: As I say, what troubles us, you have not, from what we could see, even attempted, but are asking us to, or suggesting that it is plausible to have one class for everyone who bought online without distinction as to whether they bought from the eight retailers in a restrictive period or from the other 242 or 292?

A. Mm-hm.

THE PRESIDENT: Somehow a very significant number accounting for a much greater part of the market as though they were all within that class because that is the concept of a class, it is a subclass, affected the same way. It seems that exercise has not even been attempted?

A. The common issue I am highlighting between these consumers is that the vertical agreements has an effect on the price they pay. I am not saying that the price that the subgroups within them would all be the same though.

THE PRESIDENT: But we have to award damages for the subclass, the same amount multiplied by the number of people in the class. That is how it works. We are not going to look then at, if you have in your affected models online store between 2,800 and 3,400 people, one would get to perhaps a more accurate figure of how many there are, a more accurate figure of what the average loss is and you just mark them by hand. We are not doing to -- if we prove that class, then get into splitting out that class further. That is a different model.

A. Sorry, can I just understand what it is that you are focusing on as being the subclasses?

THE PRESIDENT: I am looking at your table 5.1.

A. 5.1, yes.

THE PRESIDENT: You have suggested there are four subclasses.

A. Yes.

THE PRESIDENT: The first one is affected models online and that is restricted retailers, unrestricted retailers, altogether?

A. Yes.

THE PRESIDENT: For that we would be coming up with a common figure of loss within that class.

A. Yes. Well I think my understanding of what it is that the CPO would do, and this is a legal question rather than an economics one, is that it decides what the overall class is, but that

the subclasses within them are, in essence, they are still to be fully determined because even whether these are the four relevant subgroups I think is a question that one needs to explore further with the data.

THE PRESIDENT: We need to be satisfied that there can be a sufficient aggregation in definable classes.

A. In definable subclasses.

THE PRESIDENT: Subclasses, yes, and we would be approving it with the subclasses, that is how it works and that, it is reasonable to think, is this sort of figure without anyone having been satisfied that the figure is correct that it is not £25, as it were, it is £1,200, £1,000, £900, for that sort of size of class and analysed that way but if conceptually (inaudible: coughing) that one in fact ought to approach it differently and then see how the data works out, but that has just not been done. Given what we know about the market for which the OFT has very helpfully done a market study at the relevant time, an unusual benefit for us to have, that might be quite important. Do you understand the point I am making?

A. Yes, I think the point you are making is that we need to show that either these are the four subclasses or that if they are not there are a series of alternative groups within there that are likely to be not too dissimilar to what we are proposing here.

THE PRESIDENT: Or whatever it comes out at and that it may be possible in some way to work it out.

A. Yes.

THE PRESIDENT: Maybe that can be done, I do not know. It does not seem to us -- I think it is fair to say -- it is the approach you have taken.

MR. GLYNN: Could I underline something you said in a slightly different way, I am not sure we have got it fully clear between us. One of the Parker reports says that according to the wholesale data from Pride that they sold, I think it was 944 scooters of the classes that were found to be party to the infringement in the relevant period.

A. Mm-hm.

MR. GLYNN: So that one might have expected that (inaudible: coughing) saying, well, we know that there were some sales to retailers who were found by the OFT to have made an infringement, and this is a follow on from the 944 or thereabouts, there might have been (inaudible) but in broad magnitude it would be less than a thousand sales which would have been directly affected by the infringement which the OFT found and for which this is a follow on case. So that is a thousand.

A. Yes.

MR. GLYNN: But if we look at your table 5.1, your affected models come to 10,000 or thereabouts. In the lower scenario you have got 10,300.

A. What I am saying is that these are the affected models.

MR. GLYNN: All we are saying is that the concepts you should have used start with the offence that the OFT found which related just to specified models and specified retailers and specified periods and, had you started with that, and then wanted to say that the same price effect would have been found on other models, an indirect effect on other models, you would have needed to demonstrate that.

A. Yes.

MR. GLYNN: Or at least analyse that.

A. Yes.

THE PRESIDENT: On other retailers as well.

You have done it for other models, you have taken that into account and looked at it separately.

A. Yes. What we are saying is that there is a fifth category that should be here, which is the effective models at the effective retailers at the effective times.

THE PRESIDENT: It is for all the categories that you started with the restricted retailers, see what happened to them, and then they would have perhaps an umbrella effect on their other model and then you look and that is, of course, a much smaller number and then you might look at the umbrella effect on other retailers including, again separating the same model, another model. But you have lumped them all together and therefore averaged everything out between them as though they are equal conceptually.

A. Yes. That is effectively what I have done here. In the scenario in which there is no effect, then you would expect that the empirical analysis would show you zero for both the methods I present in my first report and in my second report.

I think there is two levels of concern here: one is we need to separately identify that direct group as distinct from this direct umbrella effect that I have got here and I have mixed the two and I think you are correct to highlight that.

I think the second concern is empirically is one demonstrating that there is a broader effect and I think my answer to that is I am demonstrating there is a broader effect because the number, the volume that we are talking about these direct umbrella boxes are largely made up of umbrella, what I am identifying empirically is that there does seem to be a price effect there.

If there was not and I had mixed the two and there is a tiny bit of direct and lots of umbrella, the average effect is going to be very close to zero. If you have got a small bit of direct effect and a lot of umbrella and you find a positive effect -- and I found it in three different types of analysis -- then my conclusion from that is that I think there is an effect in there. I think what I cannot tell you is the direct effect distinct from the direct umbrella effect and, I think you are right, I think one can do that and because one has got data one can refine the analysis to analyse that.

THE PRESIDENT: We do not know because you have averaged it out. One can see there is an effect, first of all a direct effect, and maybe, we just do not know, there is some umbrella effect whether what you have shown -- if it is a thousand out of ten thousand. If the direct effect is and the large the umbrella effect is small you will get one result, if they are about the same, but only half as high, you could get the same end number but you would be getting it by quite different -- it would be concealing the fact that the two subgroups are quite different.

A. Yes. I think that is a fair comment.

THE PRESIDENT: If we look at your -- perhaps we should look at the -- I think it is right it say also that you have not, is it correct, that you have not distinguished the period of the individual infringements when you looked at the --

A. Yes, so the.

THE PRESIDENT: When you take your numbers for affected, you are taking the whole of the period for what you would call the supra period?

A. Yes that is correct.

THE PRESIDENT: Because in part of that period, certain parts of it, in fact there were no more than four retailers who were restricted, I think.

A. Yes.

THE PRESIDENT: If we then -- perhaps we should look at your empirical data which, I think -- is it figure 5.1 on page 20?

A. Yes, this is the analysis. There are -- well, there are two empirical approaches that I present here and a third that I present in my supplementary report.

THE PRESIDENT: We will come on to look at that. Is it right that we should not particularly rely on the RPM method?

A. I do not rely on that.

THE PRESIDENT: So we look at the other two. You are looking at the change with -- 2016 is the period that you were looking at after in the --

A. Yes, yes, so both methods rely on data from 2016.

THE PRESIDENT: But of course there could be a whole host of things that have happened by 2016. In particular, it appears that there was a major new entrant in the market who was quite an aggressive competitor and had taken quite a bit of market share. So a change in price could be very much affected by that, could it not?

A. Yes, it could, and that is -- I was limited here by the availability data because I did not have disclosure. The supplementary report addresses that because the time window it looks at is much shorter so it is directly adjacent.

THE PRESIDENT: So that is really more reliable?

A. I regard the supplementary report and the empirical data as being more helpful as it is actual prices for a start and it has more observations, it is a shorter time period, and in fact I think I list out the reasons why I think it is of assistance. It is in --

THE PRESIDENT: Yes?

A. -- paragraph 4.8.

THE PRESIDENT: We will look at that in a second.

I just want to understand a small point. You explain the rogue method and the RRP discount method.

A. Mm-hm.

THE PRESIDENT: I just wanted to see if I understood something: Mr. Parker in his report, which of course you have read, he says -- and it is at page 99 of his report -- at D.1.6 ... if you just read that.

A. Mm-hm.

THE PRESIDENT: He says it is actually the same method because the RRP did not change. Do you have any comment on that, on what he says there?

A. I have not checked the exact maths but the gist of what he is saying, I think, is right because what I am doing with the rogue method and the RRP method is sort of alternative ways around the circle.

The key data that underlines them is the same: you have got RRP data during and after, you have got rogue price data during and after, and I am just comparing them in different ways.

MR. GLYNN: All he does is to say that as a matter of fact the RRP has not changed between the two periods and therefore arithmetically ... but you are happy with that as a concept?

A. Yes, I am happy with that. That is, I think, one of the reasons why they give a very similar answer.

THE PRESIDENT: That would explain it, would it not? You would say they are bound to on that basis -- unless the RRP changed, it is actually not a different method, really.

A. The I think, yes, it is a question of whether it did change. If it had changed then it would --

THE PRESIDENT: I think he accepts that. He just says it did not -- it was hard to tell from your -- it is not a criticism, it is just always difficult from a small figure in a report to see whether between 2011 and 2016 the RRP in a little square is actually different. It looks slightly different, so it might be a marginal change but I would not claim to be clear about that. But he says he has checked it and it did not. You do not disagree with that?

A. I do not disagree with that and I think, even if I did, I do not think it is a material point.

THE PRESIDENT: If we then look at your supplementary or your second report, which is tab 19. I think the new -- and part of it, of course, is in response to Mr. Parker. But the new data, the new analysis is, I think, is that right, at section 4B?

A. 4B, yes.

THE PRESIDENT: On page 12; is that right?

A. Yes that is correct.

THE PRESIDENT: Using the MT Mobility data. As you just said, you point out why it seems more reliable in 4.8 for various reasons: more data closer together and so on.

A. Yes.

THE PRESIDENT: The 192 to ring the infringements, is that the supra infringement period or the MT Mobility infringement period?

A. It is the supra infringement period.

THE PRESIDENT: How is that split between affected and non-affected models, the 192?

A. I do not recall precisely but we can get that number for you. It is in effect hidden inside the data pack.

THE PRESIDENT: With your new letter, there were a lot of tables which I was not tempted to understand. Was it in there?

A. No, it is not in there. It is a number we can find out relatively easy.

THE PRESIDENT: Yes, I think that would be helpful and similarly, because certainly if one is dealing with the MT Mobility infringement period, as such, then it appears, certainly in terms of their purchasing from Pride as opposed to their sales to consumers, which is what you are looking at, they did not actually get very many affected models during their infringement period, which, of course, was only a few months.

A. Yes. We can tell you that as well.

THE PRESIDENT: We know what they purchased and I think it is 14 in a period of about four months.

A. I think this data will tell us how many they sold --

THE PRESIDENT: Yes, it will. So it will not be exact.

What I was not clear therefore is, for affected models, what actually is the numbers used and what the data is for affected and how reliable it is.

A. It sounds as though a table that splits out these different numbers would be of assistance.

THE PRESIDENT: Yes, that could easily be supplied.

MR. GLYNN: You would still be left, if I may come in, with a conceptual difficulty because if the price effect was totally (inaudible) at 16 per cent, let us assume that is an accurate number, and you only have a few of the sales which were subject to the OFT finding, which is what we have to focus on, and you have got all the rest which may also have had a big price effect, that could either point to something else having happened in the market or it could have pointed to a sort of very strong ripple effect of the sort you are assuming. We would have to know -- we would have to have some basis of knowing which of those two it was.

This is an example of a general problem with pre and post -- as you know very well -- pre and post data being used to try and get causality. It might be there are other things altogether which have affected the process of these sales.

A. Yes, and I have been trying to address those and Mr. Parker helped me highlight a number of those, so my paragraph 4.13 addresses those because what I have here is an arithmetic during and after analysis; it is not a regression. In a regression you would put those factors in, if you can measure them, and then you would see what impact they have.

Here, I have not done that. I have looked at them and considered whether or not they are likely to have biased my analysis one way or the another and you see will my answers to that at 4.13.

MR. GLYNN: Yes. There is a general difficulty still, is there not, that the market is, as we agreed from the OFT, starts -- there is a very imperfect market and it is at a time when, as the president has said, there is a new entrant and it is a time when people will be anyway using their computers more often to make comparisons. We have also had the OFT report which, for all we know, might have some effect on reality. So there is all kinds of things going on which could have affected prices in the market in this very imperfect market. So in terms of establishing causality from the offence, this is a real problem for you.

A. Well, no more than, I think, in many other cases because inherently during and after analysis it is using the after period as a counterfactual to say, what would the world have looked like absent something -- in this case the infringements -- and everything during the after analysis has that issue, that other things are going on at once. I think I have sought to deal with those here and I am satisfied that they are not going to bias my analysis.

I think as one gets more data one can make further refinements so that so one can put the additional controls in and, for example, put market shares in so when a new entrant comes in you can try and control and see, well, does this new entrant really have an impact. Internet usage, for example, by the relevant demographic. Again, one can insert that in the model and see whether or not it has an impact on the effects that we are observing.

THE PRESIDENT: Do you know if the OFT recommendations were followed up?

A. You mean the ones in the 2011 study?

THE PRESIDENT: Yes. Were they implemented by their -- I think they are saying that the code of practice is being changed.

A. Mm-hm.

THE PRESIDENT: That would lead, I think -- the code of practice and I am not quite sure who the BHTA are but I think they are a party to which Pride belongs. Is it a trade association of some sort?

A. Mm-hm.

THE PRESIDENT: That then leads to a change and improvement in the market that will make it more competitive. That is, I think, what the recommendation is designed to achieve.

A. Yes, and I think Mr. Allen's witness statement speaks to some of that. He talks about the BHTA code of conduct and how that is evolving somewhat over time. I do not know whether it evolved directly because of the OFT recommendations or whether it has evolved because of other points.

THE PRESIDENT: The OFT says on page 90 --

A. Sorry, which page?

THE PRESIDENT: Page 90.

A. 90, 9-0.

THE PRESIDENT: In recommendation 1, paragraph 5.57, that:

> "The BHTA has agreed to amend its code of practice in order to require its members to provide consumers with actual prices or price ranges as this will enable consumers to make better informed decisions."

So that is likely, is it not, assuming that companies have adhered to the code, to make the market more price competitive?

A. It could make it more price transparent. I think if other parts of the study are correct and if lots of people are price insensitive, then it may not have that big an impact but, yes, I mean again that goes back to answer about the empirical question and the impact of that.

THE PRESIDENT: Yes. Mr. Parker in his report at tab 18(?), at page 12 he refers -- I think, yes, he is referring to your two types of indirect effects there.

A. Mm-hm.

THE PRESIDENT: Yes.

I think you were here this morning, but as you know, we take a break halfway through. That seems a good moment to do that so we will take.

We will come back at 3.10 pm.

(3.04 pm) (A short break)

(3.26 pm)

THE PRESIDENT: Mr. de la Mare, we are very concerned about the position that Mr. Noble has not finished his evidence and Mr. Bates, no doubt, may want to ask him some questions. But without going down that road, Mr. Noble has been, as we would expect, a very frank and helpful witness. He has acknowledged, as we indeed got the impression from reading his report, he has not attempted to make any distinction between those who bought affected models from the capital R retailers, the restricted retailers in the relevant period for each one, and from everybody else, and that there might well be a difference in the outcome. We do not know because nobody has attempted to look at it.

MR. DE LA MARE: Yes.

THE PRESIDENT: We do not, I have to say, feel able to what we have heard to say that there is a plausible case for certifying under Rule 79 that these four subclasses -- as within each subclass, that one could have the expectation of an aggregate award of damages for each subclass.

It needs really to be rethought if it is going to be pursued. We are very conscious of the fact that this is the first application for a collective proceedings order and therefore, in a sense, everyone is learning on the way and we also bear in mind that the class that Mrs. Gibson seeks to represent is in principle a very deserving class of vulnerable people who may have suffered -- or some of them may have suffered, depending on how the subclasses are formulated -- a loss which for them is not insignificant.

So we would obviously have to hear from Mr. Bates and, subject to any question of costs, one possibility, if you so wished, and your clients so wished, would be to adjourn the matter so that you, with your expert, could reformulate the class definitions and look at the loss within each subclass and how that plausibly might be pursued and then come back.

We noted from Mr. Haan's fourth witness statement that there are in fact dealers who are will go to provide further data.

MR. DE LA MARE: If there is an order made.

THE PRESIDENT: One without an order --

MR. DE LA MARE: Yes.

THE PRESIDENT: -- and, I think, quite lot with an order.

MR. DE LA MARE: Yes.

THE PRESIDENT: It seems to us that if you were to apply -- they would have to be served, I think, but just reading that witness statement they are not particularly hostile, they just want an order and they want their costs paid, of course. Rule 63 of the rules might justify making an order for disclosure if you applied for one. But that is one possible course.

We will say, because it will assist your consideration of whether you want to do that, for reasons we will give in due course, we were not persuaded by the Human Rights retrospectivity argument. So that is not a block on this application.

But there is a very serious problem, as we see it, in applying a low threshold. This is not a trial, we are not assessing damages, but we do have to be satisfied that there is a plausible basis on which these four subclasses is put forward to sustain an award of aggregate damages. At the moment, I can tell you we are not.

So that is the position we are in. I would have to hear from Mr. Bates and equally I do not want to put you on the spot immediately at 3.30. You would need to consider the position with your client. If you wish, we could adjourn until tomorrow morning or, if you want 15 minutes we could do that if you prefer, but either way so that you have time to take proper instructions -- or you may wish to try and persuade us that we have just got it all wrong.

But that is where we are at the moment and for that reason I am not sure asking or inviting Mr. Bates to ask further questions is necessarily the way forward.

MR. DE LA MARE: I am very grateful.

It seems to me that where we have got to is that everyone has appreciated that the rogue analysis in Mr. Noble's first report is the best he can do with no data at all. Obviously in that -- no retail data.

In that circumstance, you do not have any pricing information about somebody who is within -- by definition they are not posting their prices on the Internet. So the rogue model is a proxy of that and we would say that it is a proxy that -- I have heard what you said about 2015 and 2016 and the before and after comparison periods and the causation problems you, sir, have raised.

But it is a proxy that effectively captures, if you like, the model umbrella within the dealerships -- if it works, subject to the causation issues -- whereas the recast in Mr. Noble's second report, by reference to the MT Mobility data, I think you have accepted is, if you like, a blend of capital R retailer data and small R retailer data and Mr. Noble had offered to disaggregate the two so that you could see what the numbers look like for the three-month period MT Mobility as an infringer and for the 21-odd month period that MT Mobility is a small R retailer and therefore outside the scope of the infringement because that helps you measure both the umbrella and the direct effect on the model so it may be helpful for him to do that.

But where we have got to, what Mr. Noble's ultimate answer seems to be is you need more data to get to the position to do that. It may be therefore the sensible course is as you have suggested to accelerate that provision of additional data through third party disclosure applications before concluding on the certification of the claim. If you will allow me I will take the offer of taking some instructions now on what you have proposed and canvas that with my client.

THE PRESIDENT: As I say we would obviously need to hear from Mr. Bates who would also have is to take instructions.

MR. DE LA MARE: Of course.

THE PRESIDENT: There may inevitably be some cost consequences subject to argument as well.

MR. DE LA MARE: Yes. Well there is cost consequences on the argument that you have dismissed as well because we spent the best part of the --

THE PRESIDENT: I understand that, of course. If it leads to a further report, as I expect it would and a reconsideration of the classes by Mr. Noble then of course Mr. Parker must have a chance to respond.

MR. DE LA MARE: Of course.

THE PRESIDENT: But we do think it is something that might have been considered at the outset. Would you like 15 minutes?

MR. DE LA MARE: 15 minutes, I would be most grateful.

THE PRESIDENT: Yes and obviously Mr. Bates. Poor Mr. Noble is still in the witness box, technically. I do not know, Mr. Bates, in the light of what I have said, do you want to pursue the quest to cross examine now you have heard the questions the tribunal put?

MR. BATES: I suggest if cross-examination is needed I continue it tomorrow morning.

THE PRESIDENT: Yes, so Mr. Noble, you do not need to -- the only thing is you might want to, depending on what is asked for, consult Mr. Noble -- no, sorry, you will consult Mr. Parker and Mr. de la Mare may want to consult Mr. Noble, that is what I meant, but I do not know if that will arise as he is technically in the middle of his evidence.

MR. DE LA MARE: I suspect it is probably safer not to, to remain under embargo.

THE PRESIDENT: So, Mr. Noble, as I think you know, once you start your evidence you cannot have discussions with anyone else, so technically you are still sworn and under oath and we will decide what to do a little later on. But we will take 15 minutes now.

(3.35 pm) (A short break)

(3.48 pm) Submissions by MR. DE LA MARE

MR. DE LA MARE: Sir, I discussed it carefully with Mrs. Gibson and the wider team and we do invite you, in the light of what you have indicated about your concerns about the quality of data and the evidence and the non-disaggregation of big Rs and small Rs, we do invite you to adjourn in order to allow an application to be made under Rule 63 for disclosure of documents that will furnish evidence in order to enable that to be investigated empirically.

In relation to that Section 63 or Rule 63 application, I would say a couple of things. First of all, those retailers identified in Mr. Haan's fourth witness statement, tab 11 of the core bundle, paragraph 16, those retailers of the 539 sent letters who have indicated they have it and would provide it under order or do not have much of it, et cetera, seem to constitute, in the jargon, the low-hanging fruit and obviously that is a sensible place to start.

But I would suggest it is not necessarily a coincidence between those who are willing to provide data and those whose data might be most useful or most balanced. The sensible thing, it would seem to me, to foreclose or avoid future disputes, is for the experts to discuss between them and seek to agree, so far as possible between them, before any such application is made, some form of methodology to identify, if you like, that data which will be both robust and most sensibly obtained in a proportionate fashion.

Just off the cuff, an obvious metric will be who sold the most models, both relevant models and other models, during the infringing period and the defined counterfactual period thereafter. It may be, for instance, that the 10 or 12 largest dealers active in selling Pride vehicles along with the eight capital R retailers would be sufficient. But that seems to me to

be a matter to be sensibly explored between Mr. Noble and Mr. Parker as to what kind of data they need to build a more robust model rather than simply saying, well, it is enough to go after the 20 or 30 or so who have indicated they might have something and might provide it in certain circumstances.

It seems to me that is the sensible process to go forward with and, if I might say, that replicates how expert economists tend to work in a cartel following a damages claim: they cooperate on areas that they can, like matching value of commerce data, to make sure everyone is working to the same data and they try to build a data set. The points of disagreement tend to be whether or not you have got enough data and how to pass it.

At that juncture then the sensible thing to do is to make an application to you under Rule 63. I think I should flag the issues that are likely to arise at that juncture, which I imagine will include whether it is sensible to require provision simply of documents or whether to offer those who are requested for information an alternative and much more proportionate route in terms of simply giving permission to somebody to come in and gather the data who knows what it is that they are looking for.

Mr. Noble can speak to you about that, if that is helpful, because I believe he performed a very similar exercise at getting in data from third party dataholders in the context of a dispute involving the Local Government Association. The relevant data was spread over a large number of third parties and had to be effectively got in. Again, that seems to me to be an area where there is a potential for acting proportionately to agree a mechanic as to who goes in, what they look for and what they take, so that effectively a common database of data is built in that way.

Then lastly I suspect there may be -- may be, although given the passage of time it seems unlikely -- some issues about confidentiality as between the different retailers but I am sure that that, if it is an issue -- and one would imagine with the very substantial passage of time it is unlikely, but if there is it could be dealt with by suitable undertakings from the experts not to disclose the identity of particular retailers beyond the capital R retailers or something of that kind. That is just an identification --

THE PRESIDENT: There would be aggregation --

MR. DE LA MARE: They would be, yes.

THE PRESIDENT: -- so far as the court is concerned.

MR. DE LA MARE: But if I was appearing for a small R retailer being asked for some data, I think I might in those circumstances ask for some reassurances as to that effect and that the data was held securely, et cetera.

THE PRESIDENT: Yes. That can be dealt with.

I am not sure about -- the impression I got from Mr. Haan's witness statement -- he does not exhibit the letters I think that he got, he just summaries what they say.

MR. DE LA MARE: Yes.

THE PRESIDENT: There is one dealer who is ready to do it anyway without being asked to provide it, but he says, I have it and I can provide it, so you just ask him.

MR. DE LA MARE: Yes.

THE PRESIDENT: That has not been done and it could have been done.

The other 20 say they want either an order or their expenses covered.

MR. DE LA MARE: The reason it has not been done is not, I think, out of any difficulty but because the supplementary report had already been prepared by then.

THE PRESIDENT: Yes, so there should be no problem about getting that one and some of them do not even need an order. He will know -- your solicitor will know which are the ones who said, we want our expenses covered, which can be done without an order.

MR. DE LA MARE: Yes.

THE PRESIDENT: Whether, given what one is asking for here, is really appropriate for anyone to go in to their offices -- people are quite nervous about that -- I doubt, but I suspect it is not, insofar as they have got it, not too difficult and one does not need to get the full amount of data you get to prove a case at trial; it is really just to --

MR. DE LA MARE: Correct, prove concept.

THE PRESIDENT: -- look at the reconsidered definition of subclasses and whether one can -- on that basis, first of all what do the figures show on which it can be said this appears to be the approximate loss. You can average that out. They are not too disparate and then whether taking a narrower period as in MT Mobility so that causation appears more likely.

MR. DE LA MARE: Yes.

THE PRESIDENT: So that is the sort of thing that one would envisage.

MR. GLYNN: Could I possibly add to that: that the question of the sort of information which would speak to causality, I think, should be thought about very much as well. It is not just a question of finding the figures of the prices before and after; you need to be able to show --

MR. DE LA MARE: What the relevant after period is and why it is clean, if you like.

MR. GLYNN: -- the nature of a ripple or indirect effect and how it is working. It is not easy.

MR. DE LA MARE: Yes, and that is, from your questioning -- I well understand the question of showing that the relevant after is not moved by or potentially tainted by other factors that may have moved pricing in competitive pressure.

MR. GLYNN: That is one way of looking at it.

THE PRESIDENT: One can reasonably find a method of excluding any particular factor if there is one.

MR. DE LA MARE: Like the market entry.

THE PRESIDENT: Yes, well, that was a particularly striking one in this case from --

MR. DE LA MARE: (Overspeaking)

THE PRESIDENT: -- the witness statement of Mr. Allen, is it not?

Yes. Well, we had better hear from, Mr. Bates.

MR. DE LA MARE: Yes. Submissions by MR. BATES

MR. BATES: Sir, in relation to the entire package of CPO appropriateness issues, you have yet to hear any submissions at all on behalf of Pride. In my submission it would be egregiously unfair to proceed along the lines that have been proposed for the following reasons.

First of all, Pride is itself a small company -- relatively small company, it has in vested a huge amount of money for it in getting to the point where we have got to today, involving the preparation of very lengthy expert report by Mr. Parker, pointing out some of these very same problems that have been identified by the questions that the tribunal has asked.

The suggestion that the large holes in Mrs. Gibson's case for getting a CPO are anything to do with the newness of the regime simply do not hold up to any scrutiny whatsoever. There are a number of things which anybody looking at the rules and looking at what is stated in the CAT guide can readily understand need to be demonstrated.

One of those things is that there is at least a credible case -- using the language that was accepted by my learned friend in his opening submissions, a credible case that consumers have actually suffered loss or, as I put it a little bit further -- I am not sure if he agreed with this bit or not -- but in that paragraph 41 of my skeleton, loss at least of a level that makes it proportionate to continue proceedings of this kind. So that is not a couple of thousand pounds or even £10,000 in the context of a case like this that is extremely expensive to take forwards. So that is something that they had to demonstrate.

At the moment the tribunal has not come to any view as to whether or not a coherent case, let alone a persuasive case of any kind has been made on the basis of Mr. Noble's evidence that consumers suffered any loss. Ordinarily, we say, that should be fatal to the grant of a CPO and that is whether you can find good subclasses or not: if consumers have not suffered any loss there should not be a CPO and the burden is on the applicant for the CPO to demonstrate that.

So that is the first thing that has to be shown, that the whole class suffered loss. Then, secondly, there is the issue of distribution and that is distribution of any damages, that the aggregate damages might be made at the end. It is in relation to this issue and this issue only that the possibility of subclasses is relevant.

Here I am going to actually agree with the law as stated by Mr. Noble in his evidence. He said that his understanding was that subclasses did not have to be decided at this point in time. Looking at Rule 75(3)(b). This is where subclasses first come in. So 75 is a manner of the commencing proceedings under 47B and then 75(3) is:

> "The collective proceedings claim form shall contain ... (b) a description of any possible subclass and how it is proposed that their interests may be represented."

So that has been complied with by Mrs. Gibson.

Going onto Rule 79, which is the one that we are applying here. 79(1):

> "The tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied by the proposed class representative that the claims sought to be included in collective proceedings are brought on behalf of an identifiable class of person [so that is the whole class] and raise common issues and is suitable to be brought in collective proceedings."

Then --

THE PRESIDENT: Where is that?

MR. BATES: That is 79(1) and then 79(2):

> "In determining whether the claims are suitable to be brought in collective proceedings, the tribunal shall take into account all matters it thinks fit."

D is the size and nature of the class, so that is talking about the class as whole. E:

> "Whether it is possible to determine in respect of any person whether that person is or is not a member of the class."

Then F -- and this is the problem that has been identified here:

> "Whether the claims are suitable for an aggregate award of damages."

So there are two points I make about this. First of all, it is absolutely clear on the face of Rule 79 that one of the things you have got to think about, if you are Mrs. Gibson and putting together your litigation plan, is whether or not the claims are suitable for an aggregate award of damages. Part of that must surely be to think about what goes forward if the CPO is granted in terms of an aggregate award from which consumers will be able to draw by submitting claims. It is part of your litigation plan you have got to think about the whole story. So this is not anything that could not easily have been appreciated.

THE PRESIDENT: Yes, it can be obviously an aggregate of award within each subclass. That is the reason for having subclasses --

MR. BATES: Yes.

THE PRESIDENT: -- but I think you accept that.

MR. BATES: So the low threshold that Mrs. Gibson would need to get over for the purposes of this hearing in relation to distribution/subclasses is that it is at least credible to suppose that one could design a mechanism with subclasses by reference to which a fair distribution of damages could be made. So we do not have to finalise today what the subclasses are.

There are particular issues however that have been extensively argued in written pleadings and in skeleton arguments that are relevant to whether a CPO should be granted which have not yet been determined by this tribunal.

I have mentioned one already, which is whether there is a credible case that any consumer has suffered any loss, but there is another one -- one of many but a particularly important one -- which is the Enron point. Because the whole basis for Mr. Noble's analysis is that one is looking beyond the eight infringements because, if I understood his description correctly of how losses to consumers could arise, it was due to the fact that there is a communication by Pride to the retailers of the policy and that communication somehow is going to alter the behaviour of all these retailers in a way that somehow gives rise to loss.

It does not seem particularly credible, but then when one looks to say, what is the evidence that is being put forward to show that that might be a coherent possibility, all that there is is evidence that shows that there has been a reduction in prices for these particular models over the course of 5 years.

That is not evidence of anything. If I went down to Argos today and bought a new pair of Skull Candy headphones for £80, I would not sensibly expect them to be costing £80 in 5 years' time, even if the RRP was the same and even if the manufacturer's list price was the same.

So that is one problem with the analysis, but more fundamentally it is all premised, actually, on any proper analysis, on looking at the policy rather than looking at the eight infringements.

THE PRESIDENT: That indeed was the problem, but that is why we do not feel it is credible to certify classes today and when I think the rules speak about subclasses, the point is we have to be satisfied that there are common issues. There may not be common issues across the whole class, but there be may common issues across subclasses and that is sufficient. That is the point about the subclasses.

So one may feel that if there is a common issue across the whole class, it is at such a level of generality it does not justify a CPO, but you can overcome that by saying, there are these two, three, four identifiable subclasses and there is sufficient common issue within the subclass such that this procedure makes sense. If the subclasses is of a significant size then the matter can go forward.

That is how it is designed to work and that is why -- simply to say, has everyone in a broad class suffered loss, well, that does not really help anyone because you cannot make an aggregate award on that basis. You have to be satisfied that there is a common issue of how much loss an individual has suffered and you can do that by looking at subclasses as long as there are not too many of them and the whole (inaudible: coughing) makes sense.

MR. BATES: Precisely, sir.

THE PRESIDENT: Mr. Noble indeed sought to do that by having four subclasses, but the point we made, which I do not think you disagree with, is that we do not find those subclasses and what is within them sufficiently common.

MR. BATES: I am certainly not going to disagree with that given that it is a point we have been making, obviously repeatedly, ourselves for quite a long time.

What I do disagree with is that --

THE PRESIDENT: I take your point about the fact that you are a small company and you have been subject to all the costs of Mr. Parker and preparing for this part of the hearing, but that may be why I already indicated there may be cost consequences if the matter is now adjourned.

Of course, just to emphasize, you have other arguments against making the CPO anyway which have not been heard, as you point out, Mr. Bates, and they remain open. So we are not in any way saying, if it were adjourned and we came back, that means the CPO would be granted.

MR. BATES: Indeed not, sir, but I think the question that we are looking at now is simply what is the most efficient way of dealing with the situation that we are in --

THE PRESIDENT: Yes.

MR. BATES: -- given that there are, we say, a number of fundamental problems with Mrs. Gibson's case so there is not just one reason why she should not get the CPO; there is multiple ones. Yet, just because on one of them, the tribunal's found that Mrs. Gibson's case is particularly bad that therefore we should adjourn in order to allow her to repair that aspect before we carry on.

I think one needs to pause for a moment and ask whether that is consistent with the underlying purpose and policy of the certification system which was intended to act as a safeguard in order to protect the interests of defendants against the costs of having to deal with expensive proceedings in these sorts of circumstances without the class representative having done a lot of thinking and done a comprehensive and proper plan dealing with all these issues before asking to be given the green light to take it forwards.

The proposal that is being made by my learned friend now about applying for disclosure, et cetera, et cetera, things which if they thought should be done before today they could have applied for before today is really just -- in a sense it is de facto certification. It is carrying on with the course that he proposed right at the outset of his submissions, which is you make the CPO and then it is all case management, let us do lots of case management, get all sorts of third parties to come up with data, have a look at it, and then, as things go on, if we finally exhaust ourselves such that we cannot actually make a case for the claimants, then we give up. That is not what the policy behind the certification scheme actually intended.

A further problem with all of this is, in my submission, before the tribunal puts us all to the costs of having to go away and have these discussions between experts, get data from third parties, et cetera, the tribunal needs to at least be satisfied that the kinds of data that could be obtained or even might be obtained are actually going to deal with the problem or might deal with this problem of commonality and subclasses that you have identified.

The only data that has been discussed by my learned friend's submissions is that there are those various retailers that have been written to to ask them if they would give data about their sales prices and who have indicated that they might be able to give some data.

Well, what is that actually going to deliver for us? All it is going to deliver for us is more Gemma Dunn style data. I have not yet done my cross-examination of Mr. Noble in relation to the Gemma Dunn data, but in my submission it does not add anything of real substance to the kind of data analysis that he has done by reference to internet prices in Mr. Noble's first report. Because in his first report all he has done is he has looked at differences between prices 2010-2011 versus 2016, said there is a difference, and then attributed all of that difference to the effects of the policy.

Gemma Dunn. What has he done? Exactly the same thing. He has looked at the prices of Gemma Dunn 2010-2011, he has looked at prices before, prices after, going up until very recently, and then said, well, because there has been these changes in prices, again we can infer the cause from the effect somehow.

That is not building a credible or even a rational case for getting an award of damages for anyone.

Is it going to be helpful to have the experts meet with one another to try to agree a list of data? Well, no, because we already know what Mr. Parker thinks because he has set it out in his report. He says that the losses suffered by consumers will be determined by their individual purchasing behaviour and what information they saw prior to actually engaging in a price negotiation with the person from whom they bought.

That data is not available, save for what we have got by way of the Way-Back Machine analysis, which is simply looking at prices that were advertised by retailers on their website back at a particular point in time. That is indicating what was actually on the Internet and that consumers could have seen. Obviously it is not telling you what particular consumers did see but that is the most, to the best of our researches, we have been able to obtain.

I will conclude in a moment, but my primary submission is that we should carry on and see where we are at the end of this CPO application because if there are also other reasons why it should be dismissed, then that would be the end of it. However, if the tribunal is not with me on that, then I would suggest that at the very least there should be consultation this evening between Mrs. Gibson's representatives and Mr. Noble in order to come up with a proposal -- a proper proposal -- as to what data it is that Mr. Noble says, if only he had that data, he would then be able to deal with this problem of the subclasses. Because then we could have a sensible discussion about whether there actually is any realistic point in adjourning these proceedings and running up more costs for everybody.

THE PRESIDENT: Yes, I understand. Just a moment. (Pause)

Mr. de la Mare, do you want to say something?

Submissions in reply by MR. DE LA MARE

MR. DE LA MARE: Yes.

Insofar as the allegation is there are not common issues, I think where we had got to is your thinking is that there is common issues, just not the issues that Mr. Noble has addressed by reference to the subclasses he has identified.

Your concern is whether or not there is sufficient credible evidence that in relation to those properly, in your view, defined subclasses, namely capital R retailers, and then the first level of umbrella effect between retailers with a capital R and small retailers and then the wider umbrella effect as between the models as to whether or not there is evidence to show that there is indeed overcharge in those periods.

It is not a concern that there are not common issues as between those classes as more precisely defined. It would be wrong in principle, in circumstances where Mr. Bates has conceded that the whole issue of subclasses is not set in stone, even at the CPO process, to allow what you consider to be an error in relation to that to defeat the application altogether in circumstances where, as I have shown you, the rules envisage that being precisely the kind of thing kept under advisement by active case management.

So I do not accept classes, with respect, have anything to do with it. What I do accept is something to do with this and that is your concerns about the evidence. As to that, I go back to the points I made at the beginning. You have to be realistic about what sorts of evidence are available to a putative consumer representative faced with a vertical infringement.

There is, in terms of what is publically available, a relative paucity of the information. There is no getting around that. If you are too stringent in the application of these conditions, you are effectively making it practically impossible for this procedure to be used in relation to a vertical infringement.

What we did not do and we flagged right from the outset that we accepted that we would need to do is we did not make the pre-action disclosure applications before the CPO. The reason for that, sir, is that the guide says, in terms, 6.28, that it does not encourage requests for disclosure as part of the application for a CPO:

> "However, where it appears that specific and limited disclosure or the supply of information is necessary in order to determine whether the claims are suitable to be brought in collective proceedings, the tribunal may direct that such disclosure or information be supplied prior to the approval hearing."

It may be that we with read that wrong, but it seems to be a reasonably clear steer that you have to do your best job to make your case on the basis of what is available.

THE PRESIDENT: I am not sure that is quite what it is saying. It is saying we do not encourage it, but where it really is necessary, then it can be made. That is why, in the agenda for the CMC, one of the issues flagged was whether any disclosure is requested.

MR. DE LA MARE: Yes. We tried the voluntary approach, which is the more proportionate route. Of course, that was directed at disclosure. What we are talking about is third party disclosure, which both under your rules and under the CPR, is an altogether different and more narrowly awarded step in any event, not least because of the different cost rules that apply and the different considerations that apply when you are dealing with a non-party.

In those circumstances, if you are satisfied on the basis of at least what you can glean from the Gemma Dunn material that there is a prospect, notwithstanding concerns about causation and clean periods, et cetera, you are satisfied that there is a prospect that more and better retail data will be sufficiently robust to at least demonstrate a credible case for certification, that is not a step, in my submission, that you should foreclose, particularly when taking into account the wider considerations.

To the extent that the market is not a functioning market, it is not to the credit of Pride or any of the other entities in it to the extent that it is said, for instance, that there was a lot of other practices going on that led to distortions and consumers being overcharged. It is not a very attractive basis on which to say at this stage that we should not investigate whether or not it is this practice rather than another practice that led to consumers paying excessive amounts.

There is a real public interest therefore, in my submission, in case like this, as I indicated, attended with all the difficulties of being the first case of this kind, trying to get damages for RPM consumers' individual negotiation to go forward, if reasonably possible, to trial precisely in order to set a framework for potential recovery in cases like this where, for whatever reason, those procedural barriers to effective enforcement I have described beforehand have stopped any claim before.

It is not really satisfactory at the end of the day to have a law that is predicated upon agreements -- on networks of agreements being likely to have anti-competitive effect without there being some opportunity to investigate in fact how much loss has been caused, particularly when, if you like, those consumers who are at most at risk are something of an eggshell skull for an infringement of this kind.

If you are operating RPM in relation to a market with poor transparency directed at a group of consumers who are particularly vulnerable, both through infirmity, age and disability, et cetera, it is not a very attractive argument to suggest that, on this basis, there should be such a final answer at such a stage and in effect therefore if my client is able to it should be allowed a chance to go back and improve its case to satisfy you that there is a credible case to go forward to a CPO.

THE PRESIDENT: Yes, thank you. (Pause)

THE PRESIDENT: Thank you both.

We think that Mr. Bates has a point and has persuaded us it would not be sensible for this matter to be adjourned for further work and expense to be incurred if on other grounds Pride could persuade us that it is inappropriate to grant a CPO.

So we are not ruling out an adjournment. If the issue is whether the classes can be reformulated on the basis of better data, then that is something that we are prepared to do. But we think it would be premature to do that before hearing Mr. Bates' arguments on the other grounds he wants to advance and indeed to explore with Mr. Noble, on his approach to the estimation of the loss, on the assumption which we think is the fair working assumption, that the material that would be obtained from the 20 or 21 or other retailers who are perhaps only a sample of them will be of the same nature as the material that is obtained from MT Mobility. That is to say it will be price data at which they have sold various Pride models, both the relevant models and umbrella models, during the period of infringement and in the year or so afterwards. That is all that we anticipate would be obtained.

It would expand the dataset over what is currently being produced from MT Mobility and perhaps expand it considerably and enable the different calculations to be made as between relevant retailers and other retailers.

I do not think Mr. Bates anticipates it will go any further than that and it will not include, we have little doubt, data on individual sales of the kind Mr. Parker is referring to. We do not think that is a realistic explanation.

So that clearly establishes what is envisaged and should Mr. Bates want to pursue other points, we think it is right you should have that opportunity --

MR. BATES: I am grateful.

THE PRESIDENT: -- and indeed make any other points you wish to add regarding, if you want to, the approval of Mrs. Gibson as an appropriate representative, which is wholly independent of this, of course.

So we will let you continue asking some questions Mr. Noble tomorrow morning and to make your arguments then.

Mr. Noble, are you free tomorrow back tomorrow morning? We hope you are.

A. Yes, yes.

THE PRESIDENT: Thank you.

If, at the end of the day, we think that the remaining problem is really that of the classes -- although we do think this could have been thought through before -- we think that the effect

on Pride in terms of cost to which you referred can be protected by an appropriate order of costs.

MR. DE LA MARE: I am grateful for that.

There was a discussion between you and Mr. Noble as to whether or not you wanted the MT Mobility data broken up and you wanted some numbers.

THE PRESIDENT: I think in the light of this, perhaps that is not necessary because I think --

MR. DE LA MARE: I just wanted to clarify.

THE PRESIDENT: -- that aspect has not been gone into detail and I think --

MR. DE LA MARE: I was just clarifying what you wanted.

THE PRESIDENT: -- the point, as I understand it, Mr. Bates is concerned about is more about causation and Mr. Parker's approach, which is very different.

MR. DE LA MARE: Yes. Grateful sir.

THE PRESIDENT: So if we say 10.30 tomorrow, are we in any danger of not finishing tomorrow? I would hope not.

Bear in mind, Mr. Bates, this is not the sort of cross-examination you would conduct at trial where you would really be inviting us to adopt Mr. Parker's evidence. We are not going to do that on any view.

Perhaps we will say 10 o'clock tomorrow just to be absolutely sure and there is no harm if we finish early. Ten o'clock tomorrow.

Mr. Noble it means you cannot discuss the matter, as you know that, with the team from Mrs. Gibson's side.

A. Understood.

THE PRESIDENT: Thank you.