IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Thursday 25th March 2021

Before:
The Honourable Mr Justice Roth
Jane Burgess
Professor Michael Waterson
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Walter Hugh Merricks CBE

-v-

Mastercard Incorporated and Others

A P P E A R AN C E S

Marie Demetriou QC and Victoria Wakefield QC (On behalf of Walter Merricks CBE)
Mark Hoskins QC, Matthew Cook QC, Hugo Leith and Jon Lawrence (On behalf of Mastercard and Others)

Digital Transcription by Epiq Europe Ltd
Lower Ground 20 Furnival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epiqglobal.co.uk

Thursday, 25 March 2021

(10.45)

MR JUSTICE ROTH: I have to start with a warning, these proceedings are being live streamed and are being heard remotely. But they are as much court proceedings as if everyone was here physically present in the Tribunal in Salisbury Square House.

There will be an authorised transcript prepared as I have just indicated. But it is a criminal offence and a contempt of court for anyone to make an unauthorised recording whether audio or visual of these proceedings and punishable as such.

We will take breaks, a break midmorning and mid-afternoon, both for the benefit of the transcribers and indeed also for all of us because remote hearings are that bit more tiring than live hearings.

And if any of you have a connection problem at any time just send a message through to the Tribunal and we can pause the proceedings until you return.

So thank you both sides, for your helpful skeleton arguments, all the better for being brief. And we see the issues that arise and also we have had your agreed timetables. So I think it's over to counsel for Mr Merricks to begin.

MS DEMETRIOU QC: Sir, members of the Tribunal, I appear with Ms Wakefield for Mr Merricks. And Mr Hoskins appears with Mr Cook, Mr Leith and Mr Lawrence for Mastercard.

As the Tribunal knows we are asking the Tribunal to make a collective proceedings order in the form set out in draft at bundle C, tab 7, page 67.

May I ask the Tribunal whether you are working from a hard copy of that bundle or an electronic copy?

MR JUSTICE ROTH: I think all three of us are working from paper copies.

MS DEMETRIOU QC: I'm grateful. So you'll find the draft order, as I say, behind tab 7 of bundle C which is the main bundle for this application.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: And I hope it might be helpful if I summarise where we say matters currently stand on the two statutory criteria that need to be satisfied before the order is made. So namely the eligibility criteria and the authorisation criterion.

In its 2017 judgment the Tribunal refused a collective proceedings order on the basis of eligibility, but found that the authorisation criterion was satisfied.

As regards authorisation now, there have been a small number of changes since the original application. Those are described in Mr Merricks' second witness statement, which you also have in the bundle. The most significant of these changes is that there has been a change of litigation funder. And the Tribunal has again the new funding agreement in this bundle.

Mastercard has not raised any objection to the funding agreement however it does seek an undertaking from the funders to the Tribunal that the funders will pay Mastercard's costs directly. And that's something we will have to come back to.

As regards eligibility and following the judgment of the Supreme Court, our position is that the eligibility criterion is satisfied. And again, Mastercard does not oppose these proceedings being certified but raises two objections as to the form of that certification. As the Tribunal has seen, it says first of all that claims by estates made in respect of loss suffered by persons who have since died should be excluded from the class. And secondly, they say that the collective proceedings order should not include the issue of compound interest.

Now with the Tribunal's permission we were proposing to address first the two substantive points raised by Mastercard and Ms Wakefield will address you on estates and I will address you on compound interest. And I'll then also touch on Mastercard's request for an undertaking from the funders. And we are then of course happy to address any additional points the Tribunal may have because of course we are very conscious that it's for the Tribunal to be satisfied that the statutory criteria are met.

So if that course seems acceptable to the Tribunal, and unless there are any other preliminary matters that you would like me to address, I propose to handover to Ms Wakefield to deal with the first of the substantive matters raised by Mastercard which is the question of deceased persons' estates.

MR JUSTICE ROTH: Shall we deal with authorisation first in the same order as you have, very helpfully, in summarising the position?

MS DEMETRIOU QC: Yes.

MR JUSTICE ROTH: First of all you have mentioned that there are some changes and there is a new litigation funding agreement. And the fact that Mastercard hasn't raised any issues doesn't mean of course the Tribunal may not because we have to bear in mind in these proceedings particularly the interests of the class members as our responsibility and obviously not Mastercard's.

The new agreement I think is also in this bundle C.

MS DEMETRIOU QC: It is, it's behind tab 4.

MR JUSTICE ROTH: Yes, so if we just look at that for a moment.

MS DEMETRIOU QC: So yes, sir, you see the agreement starts at page C 34.

MR JUSTICE ROTH: And just before we look into it, as I understand it nothing is confidential in this document, is that right?

MS DEMETRIOU QC: That's correct.

MR JUSTICE ROTH: Yes. So we have looked at that briefly. We see the increase in the amounts being provided in clause 3 which obviously are helpful.

The two particular concerns that we always consider in these collective proceedings cases are whether there can arise any conflict at any time between the interests of the funder and the interests of the class members. And the two potential occasions for conflict can be settlement or termination.

And if we look at settlement in clause 7 on page C 42, we see that is dealt with there and very clearly and it provides that if any differences between the funder and the applicant, that's Mr Merricks, they shall seek to resolve their difference of opinion by referring it to a Queen's Counsel, according to the process set out in clause 18.4. And the decision of the QC is not binding but the ultimate decision, whether to reject or accept a proposed settlement, will be solely for Mr Merricks.

MS DEMETRIOU QC: That's right.

MR JUSTICE ROTH: So we think that is in our view satisfactory.

If we turn to termination at clause 12 on page C 45, 12.1. "The funder is entitled to terminate this agreement upon giving not less than 45 days' written notice to Mr Merricks, if (i), the funder reasonably ceases to be satisfied about the merits of the claims or proceedings. Or (ii), the funder reasonably believes the claims or proceedings are no longer commercially viable for the funder to fund because it's unlikely to obtain at least £179 million as a return".

And then 12.2, "Should the funder seek to exercise the right to terminate pursuant to clause 12.1 the funder shall before doing so provide the applicant a reasonable opportunity to address the funder’s concerns."

Now we were struck by the fact there seems to be a difference between the

settlement arrangement and the termination arrangement in that the settlement arrangement provides that if there's a difference of opinion there will be a reference to an independent QC, although non-binding. And there's no such protection in the termination arrangement if there's a difference. And we did wonder why that is and if there's any reason why there is not that protection if the funder and the class representative don't agree about terminations.

MS DEMETRIOU QC: Sir, I'll have to take instructions on why that is because obviously I was not involved in the drafting of or the conclusion of this agreement. But I can see that there is a difference between the two situations which might explain the difference that you've identified which is that this provision is concerned ultimately with the funder's rights. And so if it becomes clear that in fact this is going to cause the funder to lose money because the merits of the claim change dramatically, such that it's no longer a viable proposition for the funder to continue, then that directly impacts their rights.

And so it's only fair that they have a wider ability to terminate the agreement. Whereas when it comes to settlement, then plainly it's not simply the rights of the funder that's impacted. It may be that the funder would like a quick and lower settlement because that gives them a quicker return. But that more directly impacts what the class members are likely to receive.

So that's the reason for the greater protection in that --

MR JUSTICE ROTH: Yes, although in practical terms of course, if the funder pulls the plug by terminating, that has a huge impact on the class. They're then scrabbling around to find another funder quickly in the middle of litigation.

So I can understand why the funder has a right to terminate, we see that. It's really, and it says "reasonably". But reasonably is a rather vague word and people

can differ on what's reasonable. And there does seem to be a slight contrast with the previous funding agreement in this regard which no doubt you will have noticed where there was a little more protection.

And perhaps it's helpful to look at the previous funding agreement which I think is in bundle A 2.

MS DEMETRIOU QC: Yes. Sir, I think that's behind tab 13.

MR JUSTICE ROTH: Indeed, and the relevant clause is 2.4, section 2.4, on page A448.

And it's sub clause B, "If purchaser" and that's the funder. Perhaps we'll call it the funder because it's so much easier to understand.

"If funder reasonably ceases to be satisfied about the merits of the litigation provided that", that's Mr Merricks, "has been given a reasonable opportunity to address funder's concerns about the merits of the litigation. Or (ii), funder reasonably believes the litigation is no longer commercially viable because the quantum likely to be recovered is less than would allow recovery of the total investment return, such a view to be reached based on independent legal and expert advice that has been provided the purchaser."

So there is there the protection that the funder has to take independent legal advice. And I appreciate it may be said, well the funder can't reasonably cease to be satisfied about the merits if it hasn't taken independent advice, but there might be an argument the other way saying, we've got our in-house lawyers and they've advised us, why do we have to go to an outside lawyer? And one wants to avoid that sort of dispute because ultimately if the funder terminates all that Mr Merricks can do is bring an arbitration claim, which is not really of great help to the class.

So I think where I'm getting to, and we have discussed this the three of us, on the

Tribunal, would feel a little more comfortable if there was in clause 12 some more protection about the reasonable belief, whether it's through reference to a QC or reasonable on the base of independent legal advice or something of that sort.

But I think you understand the point.

MS DEMETRIOU QC: Sir, yes. I understand the point, so I'll take instructions in relation to that point, and those instructing me will liaise with the funder to discuss the point that the Tribunal's raised.

MR JUSTICE ROTH: I mean we hope it's not a controversial point and that maybe you can provide us with an answer tomorrow.

MS DEMETRIOU QC: I hope to be able to do that, so we'll take instructions, but we fully understand the point.

MR JUSTICE ROTH: And the other issue on Mr Merricks, you will have seen that the Tribunal has had submissions from Mr Stocks, who obviously had a very bad experience through a property scam, in effect. And then there was a reference to the trade body, or professional body, the RICS. I think Mr Merricks at the time was the senior complaints reviewer for the RICS. And Mr and Mrs Stocks obviously aren't happy with his ruling. That's not directly a matter for us.

But in his considered submission which is dated 22 March, the one point in particular I'd like help on. In paragraph 18 Mr Stocks says, "How will Mr Merricks overcome binding", I think that's financial ombudsman service final decisions, "that currently award liability elsewhere yet fees within them may be included in his own claim totals against Mastercard."

I didn't quite follow that in fact, but are you able to help on that?

It's suggesting that there's a potential conflict.

MS DEMETRIOU QC: The honest answer is I'm not immediately able to help but I will seek to take instructions from Mr Merricks to see if we can get to the bottom of it and provide the Tribunal with an answer.

MR JUSTICE ROTH: I mean otherwise we have to read this carefully. It is fair to say that Mr Stocks did write to the Tribunal before the last hearing but not with anything like the degree of detail that we've now received. And the fact that he is very dissatisfied with Mr Merricks' ruling on that particular issue, while obviously a matter of greater concern to Mr Stocks, we don't think that in itself is sufficient to call into question Mr Merricks' suitability given his other experience and credentials to be the class representative in this case. But we were just a little concerned about if there's some conflict in terms of fees as seems to be suggested in that paragraph.

So if you're able to clarify that at an appropriate point, we'd be grateful.

MS DEMETRIOU QC: Sir, yes of course, we'll do that. I wouldn't want to try and clarify it without speaking directly speaking first to Mr Merricks about that.

MR JUSTICE ROTH: Absolutely yes. Well, he will no doubt be well aware of that case and he will have read the letter.

So I think those are the two matters on authorisation that we wish to raise. And then we can proceed to eligibility and it is, it seems to us, in the light of the Supreme Court ruling it's clear that there were two independent reasons, as you know, why the Tribunal decided in its previous judgment that these claims should not be eligible. And both those reasons have been overturned. So there's no outstanding objection other than the two that are now raised. Although whether one's an objection or whether one is more a question of whether you need to amend your claim form, is something we'll no doubt hear about.

MS DEMETRIOU QC: Sir, I'm grateful, in that case I am going to hand over to Ms Wakefield who will deal with the first of the issues relating to estates.

MR JUSTICE ROTH: Yes, Ms Wakefield?

MS WAKEFIELD QC: Sir, our position is that the claims may be brought by individuals who suffered loss by paying inflated prices for the goods and services in the period of the infringement but who have subsequently died. Those claims can be brought on an opt out basis in these proceedings.

Now the Tribunal will immediately see that this is a point of some broader importance. Many collective proceedings will involve claims where loss has been suffered by a person who is now deceased.

That's particularly the case in follow on claims which may relate to infringements which took place and caused damage many years ago. The investigation and the decision making process by the CMA or the Commission will take time, as will any appellate process.

And of course in the present case the Commission commenced its investigation in 2004, issued its infringement decision in 2009, and Mastercard's appeal was finally dismissed by the ECJ in 2014. But even leaving follow on claims to one side, in all claims the infringement may endure for many years. And of course in the present case, it lasted for 16 years. And of course, even post-issue, and pre-domicile date, some class members will die. And that's particularly true in a case such as the present with a lengthy appeal process, over four and a half years between issue and the hearing we have today.

And of course it's a point which may apply with varying force depending on the nature of the class and there may be classes which are predominantly elderly or more vulnerable members of the class.

MR JUSTICE ROTH: Well, Ms Wakefield, we fully appreciate that it's a point of

significance. When a person is deceased who brings a claim for breach? I mean the person can't because they're no longer alive. Isn't it normally brought by the personal representatives?

MS DEMETRIOU: So if claims are brought individually it's true that to bring proceedings individually in court one needs a personal representative, an executor or an administrator. But we say that those same requirements don't apply here. And that flows from the nature of opt out proceedings.

MR JUSTICE ROTH: So if it's a -- can I interrupt you. If it's a claim under section 47A it has to be the personal representatives, the administrator or executors? You accept that?

MS WAKEFIELD: Yes, sir.

MR JUSTICE ROTH: A dead person can't bring a claim?

MS WAKEFIELD: Individually they couldn't bring a section 47A claim.

MR JUSTICE ROTH: Well I mean I think the issue that I'd like help on is why is it that they can be the class members rather than the personal representatives? It's clear that claims can be brought on behalf of the estates of deceased persons and there's no reason they can't be in collective proceedings. But is the class member then not the person who has the claim which is the personal representative?

MS WAKEFIELD: Sir, we say no and we say that the class member is the individual who suffered the loss at the relevant time. And we also say that it's instructive perhaps to look at rule 77 in this regard. It's not in the bundle but I think, sir, your instruction was not to put the rules on the bundle so I have it in my purple book.

MR JUSTICE ROTH: Yes. Just a moment. Should we perhaps start with the statute before we go to …?

MS WAKEFIELD: On the question of whether --

MR JUSTICE ROTH: Before we go to the rules, which I think is in the bundle, in authorities 1 at tab ... I'm not sure it's all in the bundle but …

MS WAKEFIELD: It's at tab 7, sir, but it's not all in evidence is it?

MR JUSTICE ROTH: Yes. It's not there. But I mean if you look at 47A you accept it's only for a deceased individual. The person who makes the claim is the personal representative. That's accepted. 47B(1). Proceedings may be brought combining two or more claims to which section 47A applies. So I'm not quite clear at the moment how you can combine into collective proceedings a claim to which section 47A wouldn't apply because that would be a claim by the executors.

MS WAKEFIELD: I see the point, sir. So we say that the distinction is between the cause of action, the claim and the requirements imposed by court process and procedure, which have to be fulfilled before that cause of action can be litigated. And we say that the new collective proceedings regime fully occupies the space of that second consideration.

MR JUSTICE ROTH: And you say the person, the class member, is who? Who is the class member if the individual has died?

MS WAKEFIELD: So we say that the word individual in the class definition is apt to cover individuals who have subsequently deceased. If we are wrong on that --

MR JUSTICE ROTH: But where is individual in the definition? In section 47B. I thought that the reference is person. And claims.

MS WAKEFIELD: Class definition. I apologise, sir.

MR JUSTICE ROTH: Yes. I'm looking at the statute. It refers to claims. Who is the class member when the individual has died?

MS WAKEFIELD: So our class definition is the word individuals and we say that the claim of that individual, a class member, is still that individual and of course --

MR JUSTICE ROTH: So the class member. If the individual has died who is the class member in respect of that claim? Is it the dead person or is it the executor?

MS WAKEFIELD: Sir, it's either the dead person or their estate but it's not the executor.

MR JUSTICE ROTH: Yes. The estate can't be a person.

MS WAKEFIELD: The estate isn't a person. And that's why the better view is for it to be the individual still. But it's not --

MR JUSTICE ROTH: So how does section 47B(11) work? 47B(11)(b).

MS WAKEFIELD: It works by the representative, the class member, electing to opt out and contacting us via the normal opt out process.

MR JUSTICE ROTH: But the class member you said is not the executor.

MS WAKEFIELD: The class member has a representative for this purpose. The reason, sir, I don't want to take you off where you would like me to be and the points you would like me to address, but the reason I wanted to take you to rule 77 is the fact it's a position of children and those who lack capacity.

MR JUSTICE ROTH: Yes. Well we can come back to that in a minute. But I'm just trying to -- before we go to the rules I wanted to start with the statutory scheme. So if a class member, a dead person who's abroad, wants to opt in, that's the person who opts in is … Who is that? It has to be the class member that opts in. You say they do it, how, if they're dead?

MS WAKEFIELD: Via the executor or administrator or next of kin. The same way that a child class member would opt in presumably via their litigation friend. And the rules are --

MR JUSTICE ROTH: So they are the ... They act as their representative?

MS WAKEFIELD: They act as their representative for the purpose of the litigation. But they're not the class member.

MR JUSTICE ROTH: Yes, I see.

MS WAKEFIELD: And the same for a person --

MR JUSTICE ROTH: Just a minute. Just one moment.

MS WAKEFIELD: I'm sorry, sir.

MR JUSTICE ROTH: But not the class member. So the class member, the actual class member, is the deceased individual and they act through their representative being the personal representative or administrator or executor. Is that -- that's how you put it?

MS WAKEFIELD: Or next of kin, yes, sir.

MR JUSTICE ROTH: Well next of kin if they are the personal representatives because it's -- which they may be normally, but ... Yes, I see. Thank you. That's just what I wanted to understand. Right. And now you want us to look at rule 77?

MS WAKEFIELD: Yes, please, sir.

MR JUSTICE ROTH: Yes.

MS WAKEFIELD: So 77(2) says: "If the Tribunal makes a collective proceedings order it may attach such conditions to the order or give such directions as it thinks fit including [if you ignore (a) and then (b)] directions regarding any class member who is a child or person who lacks capacity". So I rely on that to make good my point that class members don’t need themselves to be in a position where they can litigate and they can be represented for the purposes --

MR JUSTICE ROTH: Although a child can litigate, can't they? They do it through

their next friend.

MS WAKEFIELD: They do it through their next friend but --

MR JUSTICE ROTH: But the claim is in the name of the child.

MS WAKEFIELD: I think it is in the name of the child via their litigation friend but they need a litigation friend in order to bring the cause of action for litigation unless the court rules that they're incompetent, I think.

MR JUSTICE ROTH: But the cause of action is in the child.

MS WAKEFIELD: That's true sir.

MR JUSTICE ROTH: Whereas the cause of action of a deceased person is not in the deceased person. It's in the estate.

MS WAKEFIELD: The estate is the beneficiary of the cause of action and the cause of action itself vests in the personal representative, you're right, my lord, sir.

MR JUSTICE ROTH: So there is that difference isn't there?

MS WAKEFIELD: There is that difference. There is that difference. But, nevertheless, we do say that the regime foresees that the class members are not necessarily those who could go to the CAT tomorrow and issue a section 47A claim.

MR JUSTICE ROTH: Yes. Because I mean on the point that you started with, that it would be a great hole in the regime if the interests of those who are deceased can't be in the class, I think we're with you. But if the personal representatives are the class members that takes care of that because they then become the people bringing the claim for the estate, and we don’t then have that gap.

MS WAKEFIELD: Yes, sir.

MR JUSTICE ROTH: Yes.

MS WAKEFIELD: Can I take instructions for one moment? (**Pause**)

MR JUSTICE ROTH: Yes.

MS WAKEFIELD: I'm grateful, sir. So if I might, first of all, address the two original points, if I can put it that way, that were raised by Mastercard back in the hearing in 2017 and in their submissions which they filed in February. And those are of course the pure points of law which is in respect of the meaning of the words domiciled in the UK in the statutory regime and whether those words, properly construed, exclude the claims of persons now deceased. And then the second practical difficulty which they say arises.

MR JUSTICE ROTH: Well before you do that this is a change, isn't it, to your case from the claim form?

MS WAKEFIELD: Sir.

MR JUSTICE ROTH: I mean if we look at the claim form, which I think is in bundle C, the claim form's not been, perhaps it's not in bundle C. All right. Maybe bundle A1 is it?

MS WAKEFIELD: Yes, sir.

MR JUSTICE ROTH: Sorry. And it's not been amended. And you say there's the class definition in part 2, description of the class, paragraph 22. And you say, picking it up in the middle: "All individuals who are living in the UK as at the domicile date to be determined by the Tribunal and the CPO and who meet this definition, are proposed to be included within the proposed class". So when you issued the claim form for people who are living in the UK at the domicile date. So you're excluding people who might have been in the UK between 1992 and 2008 and now live abroad and you're excluding people who are no longer alive. And you explain that in the next paragraph, 23, at sub-paragraph (d). And you say: "The proposed class representative is aware that this class definition excludes some individuals who might have good claims… (iii) The estates of individuals who meet the proposed class

definition but who passed away before the domicile date". So that was your position in the claim form. So this is a change, isn't it?

MS WAKEFIELD: Sir, yes, it is a change but the change is in our approach to the legal meaning of domicile date.

MR JUSTICE ROTH: No, I understand that but it's a change of … It's not the legal meaning of domicile date. I mean I know there's an argument about domicile date but the domicile date is not going to be before the CPO is made, is it? It's going to be -- and you're not suggesting the domicile date is going to be 1992, are you?

MS WAKEFIELD: No, sir.

MR JUSTICE ROTH: No. It's going to be sometime in 2021.

MS WAKEFIELD: Yes, sir.

MR JUSTICE ROTH: Yes. So you were restricting the claim to all individuals living in the UK as at the domicile date and now you're saying it should not be so restricted. And, indeed, the exclusion that you correctly identified in 23(d)(iii) is now to be included. That's my understanding of what you're asking.

MS WAKEFIELD: Sir, the class definition is the words which are italicised in the first sentence of paragraph 22.

MR JUSTICE ROTH: But the claim form explains it.

MS WAKEFIELD: The claim form does explain it. The claim form does explain it.

MR JUSTICE ROTH: Yes. And you are wanting to change that, aren't you? I mean it seems to be pretty clear.

MS WAKEFIELD: We are absolutely changing our understanding of the meaning of domicile date. But our intention in the claim form, and we say the way in which the claim form should be read, naturally be read, is that our constant references to domicile date indicate that what we were seeking to do was to

reflect our then understanding that a deceased person could not be domiciled. Which is of course the very legal point ran against me now by Mr Hoskins.

MR JUSTICE ROTH: Yes. Sorry. You've said in terms that this definition excludes the estates of individuals who meet the -- that was the way you put the case. And now, as I understand it, you want to ... That's no longer your position. You're not saying this class definition excludes the estates of individuals who meet the proposed class definition. Isn't that right?

MS WAKEFIELD: That is right, sir, but --

MR JUSTICE ROTH: And indeed your expert calculated the size of the class making that exclusion, didn't they?

MS WAKEFIELD: Yes.

MR JUSTICE ROTH: And they explained in some detail how they did it because they had to look at the figures for people who died and so on and that's why one of the things you had to specify under the rules, I think, is the estimated size of the class. That's rule 75(3)(c). And you did that, at 46.2 million, by excluding people as estimated who have died in that period. So you want to change that as well, don't you?

MS WAKEFIELD: Yes, sir.

MR JUSTICE ROTH: Yes. So I mean do you not need to apply to amend the claim form? Because it seems to me this is not the case that's pleaded there.

MS WAKEFIELD: Sir, might I take you to two subsequent documents? The first --

MR JUSTICE ROTH: Yes. I know it was raised in the hearing and it was discussed in the hearing and the Tribunal didn't rule on it because it thought that the case can be dealt with in a different way. But the claim form that we are being asked to approve is one that both in terms of rule 75(3)(a) and in terms of rule 75(3)(c) excludes deceased persons. And it seems to me you now want to

amend it to include deceased persons. And you may have good reasons for doing so. Understand that. But it does seem to me that on any fair reading of this document it's a change, it's a significant change, as we know numerically. And you then need to apply to amend.

MS WAKEFIELD: I'm grateful, sir, and I will in due course, if I may, come on to an application to amend. We say under rule 32 rather than rule 38. But if I may just take you to two further documents. The first is our skeleton argument for the CPO hearing in 2017. Sir, that's in volume 3 of the A bundles.

MR JUSTICE ROTH: Yes.

MS WAKEFIELD: In tab 25. And if we start in paragraph 34 which is on page A822.

MR JUSTICE ROTH: Yes. Yes, just one moment. (**Pause**)

MS WAKEFIED: So we see in paragraph 34, the complaint raised by Mastercard that, although you point out, sir, we did not include the deceased persons in the estimate of the class, we did include the associated quantum, and that was the complaint made against us in the response.

JUDGE ROTH: Yes.

MS WAKEFIELD: In 35, that we replied to that, that estates could be included in the class or that the aggregate quantum could be reduced commensurately in the future. In 36 we say, after the former point, strictly speaking estates are not currently excluded from the class definition. That definition is silent on the issue of whether estates are included, as there is no reference to proposed class members needing to still be alive rather, the applicant took the view that estates are excluded by dint of the domicile date. A deceased person is not, at least on one view, domiciled in the UK on the domicile date.

JUDGE ROTH: Yes.

MS WAKEFIELD: If I may, I've taken -- I'm going to take you to three documents,

albeit quickly.

JUDGE ROTH: Then you said at 38, you say one alternative is that they should be included, and the other alternative is reduce the quantum.

MS WAKEFIELD: (Overspeaking)

JUDGE ROTH: Yes.

MS WAKEFIELD: But it was understood that they could be included in the class definition as formulated. If I take you to tab 29 in that same bundle, and this is the footnote to our note that we handed out in the hearing in which we say is common ground of the class definition itself, would include a person who subsequently died, since it does refer to the need still to be alive. The question of whether and how such a person could participate is addressed further in those submissions. So that's the position in 2017.

Then in the submissions for this hearing, which are in Bundle C, Mastercard's first set of submissions before its skeleton argument, we have paragraph 2, which is on page C71.

JUDGE ROTH: Just a moment. This is Bundle C, tab 8.

MS WAKEFIELD: Tab 8, paragraph 2(a). Mastercard says, "First, the proposed class definition includes deceased persons." So, that was common ground that the definition did include those deceased persons from at least skeleton arguments before the hearing last time in 2017, and up to and including submissions being filed for this hearing. So, it's for that reason that it's something of a surprise for us now to be confronted with an argument that in fact the class definition excludes those claims, such that those claims have got time barred and if they're to be included, we need to make an application to amend. Presumably, that application to amend, since the class definition does not refer to any need still to be alive, will take the form of a striking out of

some of the commentary in the claim form, in particular paragraph 23d, that must be the suggestion that that's what's needed.

JUDGE ROTH: Well, and -- I mean which -- the amendment, I would have thought it's not just to -- if we go back to the claim form, I think we just went through this, because these are -- dealing with the statutory requirements.

MS WAKEFIELD: Yes.

JUDGE ROTH: So, it's, I would have thought, in paragraph 22, the sentence I took you to, that's the sentence immediately after the italicised quotation, you would delete the words, I don't know, "Who are living" or, I don't know quite what -- I mean I'm not going to draft your amendment, but that has to change and, more significantly, paragraph 25 has to change.

MS WAKEFIELD: Well, My Lord, the 25 --

JUDGE ROTH: Because of the last sentence.

MS WAKEFIELD: Of course, sir. Of course. Well, for the last two sentences in paragraph 22, they can simply be deleted. They are unnecessary. 23d, sub-3, (iii), again can be deleted. Then for the estimate for number of class members, of course we provided the increased number in Mr Merrick's second witness statement.

JUDGE ROTH: Yes.

MS WAKEFIELD: It should, I would hope, be relatively straightforward --

JUDGE ROTH: No, it's not a difficult amendment to make and the question is whether you should be allowed to make it.

MS WAKEFIELD: Of course, sir, and I apologise for not coming today with a prepared form of wording. As you might appreciate, the lateness of the point took us something by surprise. If it would be of any assistance, I could

prepare something in writing, overnight perhaps, for the Tribunal to consider tomorrow.

JUDGE ROTH: I think that probably would be helpful and helpful to Mr Hoskins too.

MS WAKEFIELD: Yes.

JUDGE ROTH: Because the question then is whether that amendment should be allowed and whether there's a limitation problem. That's really the issue. Because I think this claim was issued right at the very end of the limitation period.

MS WAKEFIELD: It was, sir.

JUDGE ROTH: So even -- although this wasn't picked up during the hearing, the hearing was after the limitation period had expired.

MS WAKEFIELD: Yes.

MR HOSKINS: Sir, can I ask a practical issue? Which is that on the timetable, I'm due to start making my submissions to you this afternoon and clearly, I need to know what amendment is being sought before I start my submissions.

JUDGE ROTH: Well, Mr Hoskins, there might be some issue on the exact wording, but the point's very clear, isn't it? It's going to make clear that it's not excluding people who are deceased and restricted to individuals who are living, and the class numbers are going to be put up. You've got indeed the figures in the expert's report, and I think you've provided figures as well, or perhaps it's Mr Merricks, someone's produced a table of what the numbers are. So, I think you -- to be fair, you do know the point that's being raised. If when you see a written text there's something else that you hadn't anticipated that you want to make observations on, of course you'll be able to do so.

MR HOSKINS: Well, sir, I'm happy to proceed on that basis. I'm just not sure whether it's going to be a very useful use of our time because, as you say, if

an amendment is now to be made, the issue then principally, the first issue on this heading becomes should that amendment be allowed. Another suggestion, and I'm obviously entirely in your hands and obviously it's a matter for Ms Wakefield and Ms Demetriou as well, is that if we were now to deal with the compound interest issue in its entirety, so that here Ms Demetriou, I make my response, she makes her reply, that will give Ms Wakefield some time to take instructions and to put forward an amendment, and then we can deal with the deceased persons. Otherwise, I am worried, I am, you know, potentially tilting at a windmill that may then move my submissions.

Just in terms of the efficient use of time, that would seem to me at least a reasonable proposal. I hope that strikes you that way as well.

JUDGE ROTH: Well, that might be subject to counsel for Mr Merricks. I mean would that inconvenience you, Ms Demetriou, if we reversed order?

MS DEMETRIOU: No, not as such, but I think it may inefficient, in the sense that Ms Wakefield's already developed part of her submissions on this point and I would suggest that, as you said, sir, the proposed amendment is very clear, we can produce it over the short adjournment and send it to Mr Hoskins so that we don't have to stop the submissions that Ms Wakefield's in the process of developing, which doesn't seem to me to be fair to her. I mean if the Tribunal takes a different view, I'm very happy to start compound interest. It just seems inefficient that we're sort of jumping about. We can produce the amended draft over the lunchtime and send it to Mr Hoskins. It's not going to look, we can tell him, any different to what Ms Wakefield just said. So it's not going to surprise anyone.

JUDGE ROTH: Yes. Well, let me just consult my colleague. So, we'll just withdraw

for a few moments.

11.34am

(Adjourned for a short time)

11.43am

JUDGE ROTH: Are we ready to resume? Mr Hoskins, we've considered this. You are of course not concluding your submission this afternoon. You've got the whole of tomorrow morning on the timetable. So, we think the sensible thing is to let Ms Wakefield continue, you'll get a draft, possibly over lunch, but certainly at the end of the day. As far as your response is concerned, we're quite content for you to reverse order and say that you want to deal with the compound interest first so that you come back to deceased persons when you've had an opportunity to consider the draft amendment and we think -- so you shouldn't be handicapped and we'll let, on that basis, Ms Wakefield continue. Yes?

MS. WAKEFIELD: Thank you, sir. So on the basis that the form of the amendment will follow in due course, might I address the Tribunal on the jurisdiction to allow this amendment?

JUDGE ROTH: Yes.

MS. WAKEFIELD: On the basis that limitation has expired and the exercise -- the discretion to allow that amendment to be made.

Sir, it's suggested against me by Mr Hoskins that the appropriate rule is Rule 38, which deals with additional parties and confers a power on the Tribunal after the expiry of the relevant limitation period to add a party to the claim --

JUDGE ROTH: Yes.

MS. WAKEFIELD: -- in certain very limited circumstances. So, Mastercard said that rule applies in theory here because it's the addition of a party, they say, but

we don't need meet any of the conditions to allow that jurisdiction to arise. I say that Rule 38 is the wrong rule here, and I say it's the wrong rule because class members are not parties to collective proceedings. The relevant party which they would be if they were any kind of party, is of course a claimant. We see in Rule 74, which is under Part 5 "Collective Proceedings", 74(2): "References in Part 4 to claim form and claimant are to be read respectively to collective-proceedings claim form and class representative".

MR JUSTICE ROTH: Just a minute. Rule 74. Yes. You're looking at 74(2).

MS WAKEFIELD: Yes, sir. So "claimant" means "class representative", and so too, I say, when the word "parties" is used, and that word obviously encompasses "claimants, defendants, interested parties", "claimant is the relevant word", and Mr Merricks is the claimant for the purposes of Rule 38.

MR JUSTICE ROTH: Because Rule 38 is Part 4.

MS WAKEFIELD: It is. It is.

MR JUSTICE ROTH: Yes. So I think, because you said it's the wrong rule, you're saying, aren't you, "No, it's the right rule, but for the purposes of collective proceedings, the reference in Rule 38 to a claimant means the class representative".

MS WAKEFIELD: So it could apply, were we to add a class representative.

MR JUSTICE ROTH: Yes.

MS WAKEFIELD: But I say the rule which applies to allow me to make the amendment which I seek to make is Rule 32.

MR JUSTICE ROTH: Rule …?

MS WAKEFIELD: Rule 32, sir.

MR JUSTICE ROTH: Rule 32.

MS WAKEFIELD: "Amendments to Claim Form."

MR JUSTICE ROTH: Yes.

MS WAKEFIELD: What I am trying to do.

MR JUSTICE ROTH: Yes, I'm with you. Rule 32.

MS WAKEFIELD: Even actually if I just make one final point on the additional-parties rule, Rule 38, we see: "(2) An application for permission under this rule should be served on the parties to the proceedings", and of course were class members each individually to be parties, one would, for example, have to serve all such applications on all parties. Of course parties are used on various occasions through the rules. They have various rights and obligations and, on no occasion, does that map on to the position of a class member. So we say that Rule 38 is the wrong rule --

MR JUSTICE ROTH: Yes, I see.

MS WAKEFIELD: -- for what we're trying to do.

MR JUSTICE ROTH: Yes. Rule 32 is therefore the right rule. Yes, the relevant rule.

MS WAKEFIELD: Exactly. Exactly so. That's the relevant rule, and that allows us: "to apply to add or substitute new claims where those claims arise out of the same facts or substantially the same facts as the claim in respect of which the party applying for permission [Mr Merricks] has already claimed a remedy in the proceedings".

I say that those jurisdictional preconditions are satisfied here. In particular, the new claims of course arise out of entirely the same facts as the claims which are already brought by Mr Merricks in the claim form. But their inclusion would not place the defendants in a position where -- to use the High Court test, and the same would apply here -- "they have to investigate facts and obtain evidence on matters outside the ambit of those which they could reasonably

have been expected to investigate for the purpose of investigating the unamended claims". But they add nothing by way of investigative burden; they raise no additional facts or issues as individual courses of action.

In terms of the remedy, of course, sir, we in fact already claimed the relevant remedy. That was the complaint against us, that we sued in respect of this item without pleading for it properly.

MR JUSTICE ROTH: You mean the quantum, yes.

MS WAKEFIELD: The quantum, sir, yes. The aggregate damages award requires no amendment to allow me to pursue these claims.

So we say that jurisdiction does arise here and we say as to exercise of that discretion, all the factors favour our application. We say that the delay with which the application is brought is attributable entirely to the fact that it has always been common ground that we don't need this application and that the claims are already within the class definition.

MR JUSTICE ROTH: Yes.

MS WAKEFIELD: We say there'd be no prejudice to Mastercard at all -- it adds nothing to the claim; it causes them no extra work or extra burden -- and of course the aggregate damages is the sum for which we're suing on the face of the claim and which, were deceased claims properly to be excluded, we would have to then go on to exclude those sums from that aggregate-damages award that quantified loss to the class as a whole, including the deceased people, the persons now deceased.

So for those reasons I would say, respectfully, that you do have jurisdiction, sir, and that in this instance you should exercise that power.

MR JUSTICE ROTH: Yes. The reason you excluded them before in explained in your claim form, in paragraph 23(d) on page A9 of bundle A1. You say:

"These exclusions are the consequence of seeking to create a clearly defined class with parameters that can easily be understood by potential class members in order to determine whether they are within the class. Further, it is important these exclusions are designed to facilitate, in a proportionate manner, the assessment of damages and the administration of any damages that are received."

Well, the assessment of damages, you've just explained, doesn't change, because in fact the aggregate damage calculation did include deceased persons. But it's the second part of that -- "the administration of any damages that are received". I mean, obviously a lot of thought went into preparing this claim at the time and it appears it was thought, "Well, we ought to exclude individuals who've passed away", and the explanation given that seems to apply is because of facilitating the administration of any damages that are received.

Was that thinking too simplistic? Why is it that you now think actually it's not going to be a problem?

MS WAKEFIELD: Sir, so we think it's not going to be a problem, and we thought it wasn't going to be a problem by the time of our reply, so back in November or December 2016. That initial thinking was too simplistic. I think as well the pleading, which of course I am in no small part responsible myself, but I think it suffers from seeking to deal with the three different categories in the different Roman numerals in that subparagraph. So, the exclusion of those under the age of 16; the imposition of the three-months' residency requirement; consumers using their cards here, rather than also in Europe; and as well the estates of individuals, which, again, we linked back to the domicile date. As I took you to earlier, that links to our earlier position on the legal question, namely how domicile date interacts with persons now

deceased. So that isn't good pleading.

Our position changed on the administration point very quickly thereafter, and our position remains that it poses no difficulty, or no particular difficulty, at the administration stage. As I think we've said in various documents going through the proceedings, by the time we get to distribution, of course we can always engage consultants or specialists for further assistance at that point, depending on proportionality concerns at that stage.

MR JUSTICE ROTH: I suppose the concern we have, you've come up with a very simple, practical -- we thought at the CAT, as you know -- too simple but fair and clearly workable, and has all those benefits -- system of distribution, everyone gets an equal share.

Now this would involve executors or personal representatives of people who died. I think with the best will in the world there isn't going to be any fund to administer before one would have thought 2022. Upwards of up to 30 years ago, and certainly quite a lot, 15 years ago, 20 years ago, coming forward, saying, "Well, I was the personal representative of X who died in 1996 …" Is there not a practical difficulty, (a) in that just the sheer unlikelihood of people doing it, which of course leaves a nice fund for the funder, and (b) just showing that they were … the administration of most of these estates is long completed.

MS WAKEFIELD: So, sir, the status of being an administrator or an executor is, as we set out in our submissions, a lifetime appointment; it's not something which completes. Of course there are stages in the process at which one thinks there are no further assets to be brought into the estate, but when such further assets arise, their personal representatives remain under a professional obligation to collect those assets for the benefit of the estate.

As to the lack of paperwork, there are readily publicly accessible searchable databases -- as set out in our submissions -- for wills and for grants of probate. As to the degree of evidence which we might require, it may well be the case that for many representatives, including those such as next of kin who don't have that formal administrator status but nevertheless are habitually allowed to deal with low-value assets, that essentially it is self-certification, perhaps with a degree of one-in-a-hundred verification, which is the sort of thing which I think we discussed at the last hearing.

MR JUSTICE ROTH: I can see the legal obligation is still there. I think what slightly concerns us, we're not talking about many thousands of pounds which will stir people into action. We're talking about, and I think on your estimate was on a class of 46 million, it was about I recall a figure of about £300 a head. Presumably on a class of 58 million, divided per capita, the individual amounts go down.

So is it realistic that for £250 people are going to do this for money that won't actually come to them; they've got to administrate according to the will. So some cases, it will go to them. Well, then they might do it. But in other cases it goes to the beneficiaries under the will. Or in the case of intestacy, there are rules of who it goes to. Is it really going to happen? That's in the real world. Not that they haven't got a legal obligation.

MS WAKEFIELD: Sir, in the case of next of kin, the next of kin is a colloquial term to mean the person who has the right to inherit under the intestacy rules. So for those people, they will receive the money themselves. For the professionals for next of kin who've been appointed as administrators, they are under the obligation to collect the money in, but also as individuals, they will themselves be class members very probably. So they will hopefully be very aware of our

glorious victory at this stage and they will contemplating making their application themselves, and all they have to do is make an application in parallel for those who they represented.

And if they're a professional representative, and they have many estates who they've represented, they'll be making a lot of applications.

So we don't say that in the real world it can be taken they will be disinclined to make these applications.

Of course the infringement took place a long time ago. We accept that. Then there was the long appellant process to which I referred at the beginning at my submissions, but that refers to the class as a whole. Those same considerations obtain across the piste. We say, actually if anything, probably the odds are more favourable to incentivise claims on behalf of persons now deceased, because either professional obligation or the next of kin who will have that as an additional element to their own claim.

MR JUSTICE ROTH: Yes. If there are three children, then it's split three ways.

MS WAKEFIELD: That's true, sir.

MR JUSTICE ROTH: The incentive to do things is all about, in crude terms, how much bother it is for how much you might get. That's what it comes down to in real life, doesn't it?

MS WAKEFIELD: It does.

MR JUSTICE ROTH: Yes. Yes, thank you.

MS WAKEFIELD: Sir, shall I address you on the meaning of "domiciled in the UK"?

MR JUSTICE ROTH: Yes.

MS WAKEFIELD: The first of the points taken against me by Mr Hoskins.

So in a nutshell, my submission is that the domicile test performs a jurisdictional function and that it distinguishes between those claims over which the

Tribunal can exercise an opt-out jurisdiction because of a sufficient connection with the UK, and those which have an insufficient connection with the UK, and so should only be litigated here if a class member so choose.

We say that domicile is not intended to distinguish between the living and the dead; that it's common ground of course that tortious claims survive death, and you have the relevant provision from the Law Reform (Miscellaneous Provisions) Act 1934 in the bundle.

MR JUSTICE ROTH: Sorry to interrupt you. So I just understand the submission you make. This is on the assumption, is it, that the deceased individual is the class member?

MS WAKEFIELD: Yes, sir.

MR JUSTICE ROTH: Because if, on the alternative view, which is that the executor is the class member, there's no problem. I mean, the executor will be domiciled in the UK or he or she won't. Usually for people living in the UK, their executors are in the UK for practical reasons. If they're not, they can opt in. So you wouldn't have any difficulty about domicile at all.

MS WAKEFIELD: Well, domicile would not have the same impact, it's true, on a claim if the claim was properly seen as transferring to a personal representative, and that has the consequence that their personal representative was the class member, or the personal representative from time to time, because of course that can change who is the class member, and that their own domicile established the relevant jurisdictional power for the Tribunal. It's true it would have a markedly less significant impact on opt-out proceedings.

MR JUSTICE ROTH: It's no different from someone who would be a class member but now lives abroad at the domicile date. They lived in England between

1992 and 2000, but now they live in Holland, they can opt in, and they've got a good claim and, as you say, it'll be well publicised, we'll expect them to opt in. The executor who's abroad and sees there's a good claim for the deceased, can opt in. It gets over all these issues about "What's the meaning of domicile?" in a practical way and it means that it's people within the jurisdiction who don't have to opt out, and people are automatically included, and people outside the jurisdiction are not brought into the case with then obligations that may follow, and rights and so on, unless they choose to opt in. That would be another way of addressing the problem --

MS WAKEFIELD: It would.

MR JUSTICE ROTH: -- and solving, it seems to me, any issue about domicile.

MS WAKEFIELD: I see that, sir. That would be a way through it. As I indicated in my earlier submissions, our preferred course is to have individuals as the class members and not to include personal representatives and next of kin as an additional layer of class representative. We do say that that is closer to the tort which is actually being litigated. So if one were to think, "Oh, well, a person who's always lived in the UK, suffered loss throughout the entire period of the infringement, died resident -- within the meaning of section 41 of the CJJA -- in the UK, but then their next of kin lives out of the jurisdiction, and for that reason that person's claim is treated as being insufficiently jurisdictionally linked for the power of this Tribunal to deal with that claim in their absence, which is what knocked-out claim is. But that strikes me as a slightly strange result, and I put it no higher than that.

MR JUSTICE ROTH: You could say it's no stranger than saying a person who lived in the UK suffered loss, didn't die in the UK, but went to live elsewhere is not automatically included.

MS WAKEFIELD: I see that, sir. Perhaps it feels different because they chose to move somewhere else and they're now subject to the jurisdiction of a different court.

MR JUSTICE ROTH: Yes.

MS WAKEFIELD: Sir, you have my preference of the two, but we certainly don't throw up our hands in horror if it's the second course that you take, sir.

Is it helpful for me to take you through the statute and the rules in respect of domicile? Or do you have them already in mind?

MR JUSTICE ROTH: I think it is helpful because I think it may be said that, I don't know what would be said, neither whether it is appropriate. But in any event you want to say that the individual can be the class member, that's your primary submission.

MS WAKEFIED QC: It is, so we have section 47B(11) of the Act which is in Authorities' bundle 1, tab 7.

MR JUSTICE ROTH: Yes.

MS WAKEFIELD QC: So section 47(11), "Opt out collective proceedings are collective proceedings which are brought on behalf of each class member except", and then "(a) Any class member who opts out by notifying the representative in a manner and by a time specified that the claim should not be included in the collective proceedings". And "(b) Any class member who is not domiciled in the United Kingdom at a time specified, and does not in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective proceedings".

So the statutory drafting seems at first blush a little odd, and I say it's only because of course it doesn’t impose the requirement to be domiciled in the United Kingdom in terms in little a. So plainly that must be the right reading of a and

b. And that becomes obvious when one looks at the rules as well. So one can only be in a, in that opt out jurisdiction if the class member is domiciled in the United Kingdom.

Turning over the page in the bundle we have section 59 of the Act. And then turning the page again, we're now on Authorities' page 35, we have (1B) sub section (1B) section 59 and that provides sections 41, 42, 45 and 46 of the *Civil Jurisdiction and Judgments Act 1982* "Apply for the purpose of determining whether a person is regarded as “domiciled in the United Kingdom” of the purposes of this Part".

And then we have section 41 in tab 3 of the Authorities' bundle. Section 41 is the relevant section for our purposes, Domicile of Individuals. Then sub 2, "An individual is domiciled in the United Kingdom if and only he is resident in the United Kingdom and the nature and circumstances of his residence indicate that he has a substantial connection with the United Kingdom".

And then 6, "In the case of an individual who a, is resident in the United Kingdom or a particular part of the United Kingdom, and b, has been so resident for the last three months or more. The requirements of sub section (2)(b), or (3)(b), should be presumed to be fulfilled unless the contrary is proved".

So that's how the statute addresses the requirement of domicile.

If we go then to the rules, in rule 73.

MR JUSTICE ROTH: This is the CAT rules?

MS WAKEFIELD QC: The CAT rules, yes sir. And 73 is the Scope and Interpretation provision in part 5, part 5 being the part which addresses collective proceedings.

And we have in sub 2 a definition of the domicile date. "Domicile date means the dates specified in a collective proceedings order or collective settlement order

for the purposes of determining whether a person is domiciled in the United Kingdom."

And under "Represented Person" that means, "A class member who in accordance with rule 82 has opted in to opt in collective proceedings, was domiciled in the United Kingdom on the domicile date and has not opted out of opt out collective proceedings, or has opted in to opt in collective proceedings".

And there we see the “domiciled in the United Kingdom” requirement expressed positively, if I can put it that way. So linked with the opt out jurisdiction rather than along with the need to opt in to opt out claims.

In rule 80 of the collective proceedings order, in sub (1), which sets out what needs to be in a CPO, in (h) under (1), we have (g) is specify the domicile date and then (h) is "Specify the time and the manner by which in the case of opt in collective proceedings a class member may opt in; in the case of opt out collective proceedings, a class member who is domiciled in the United Kingdom on the domicile date in the opt out; and in the case of opt out collective proceedings, a class member who is not domiciled in the United Kingdom on the domicile date may opt in".

So there we see “domiciled in the United Kingdom” applied to both categories.

And rule 82, similarly addresses opting in and opting out of collective proceedings, indeed that's the whole purpose of rule 82. And again we see in (1)(b), roman (ii), "If not domiciled in the United Kingdom the domicile date, opt in to the collective proceedings".

MR JUSTICE ROTH: Yes.

MS WAKEFIELD QC: And in the guide, the CAT guide in paragraph 6.8, which is the last paragraph in the introduction, so section 6 which addresses collective proceedings, it provides, "Where a class member opts in".

MR JUSTICE ROTH: Just a moment, we need to find it.

MS WAKEFIELD QC: Sorry, I know I'm going too quickly, apologies.

MR JUSTICE ROTH: You know where you're going, at least we hope you do but we don't. Yes it's para 6.8.

MS WAKEFIELD QC: Yes, sir.

MR JUSTICE ROTH: Yes.

MS WAKEFIELD QC: So 6.8 provides that "Where a class member opts in to opt in proceedings, or if he or she is domiciled in the UK on the domicile date, does not opt out of opt out proceedings, that member becomes a represented person. Similarly a foreign class member who opts in to opt out proceedings becomes a represented person".

So sir, that's the Statute, the rules and the guide. And we say that the purpose of domicile in all of those provisions is jurisdictional in the sense of jurisdiction is a matter of private international law to exercise the unusual opt out jurisdiction over the claims of class members in their absence, essentially, without their having given authority.

And you will have seen in our skeleton argument that we cite the government's express consideration of this issue in the consultation response which preceded the enactment of this regime.

Now the extract is bundle C at tab 11.

MR JUSTICE ROTH: Sorry, which bundle?

MS WAKEFIELD QC: Bundle C, so the bundle for the hearing at tab 11.

MR JUSTICE ROTH: Yes.

MS WAKEFIELD QC: So this is as you'll see from the cover page that government response to the consultation on options for reform, and there on page C117 under the heading "Jurisdiction" we have a paragraph in which the

government recognises that "Business would rightly have concerns if a claim could be brought against them in the UK courts on behalf of anyone in the world, and that these concerns would be exacerbated if there was a risk of them paying compensation twice for the same offence". It notes that, "Both the CJC in its court rules for collective proceedings and the drafters of the Financial Services' bill," which of course was the predecessor to the enactment but it didn't get through in the wash, "proposed that foreign claimants would have to actively opt in to a claim rather than automatically being included. And the CJC noted in the explanatory notes to the rules that these provisions were intended to avoid any arguments in relation to national sovereignty which might arise if the provisions purported to assert jurisdiction to decide cases for foreign domiciliaries who have taken no active part in the proceedings".

And the concluding paragraph, we see 5.57, the government's decision, it's "therefore decided that the 'opt-out' aspect of a claim will only apply to UK domiciled claimants, although non UK claimants would be able to opt-in to a claim if desired".

So we say that's a very clear indication of the statutory context and of the mischief at which this provision was intended.

Mastercard in paragraph 13 of its skeleton argument distances itself from these consultation materials and says that they "cannot alter the true interpretation of the Statute," and they rely in that regard on the recent Court of Appeal decision in *R (McConnell) v Registrar General for England and Wales.*

Now you should have that in tab 28 of the Authorities' bundle.

So sir, this is the case, you may well be familiar with it, the case of a transgender man who gave birth to a child and wanted to be recorded on the birth

certificate as the child's father. And paragraph 37 of the judgment of the Court of Appeal, it was a unanimous judgment of the Court of Appeal states the well-known legal position in respect of explanatory notes, in this instance, not consultation documents, but the position is essentially identical: “In principle the explanatory notes to an Act of Parliament are an admissible aid to its construction… However, as Lord Steyn said, this is insofar as the explanatory notes “cast light on the objective setting or contextual scene of the Statute and the mischief at which it is aimed".” And the court goes on to say, "We do not consider that the explanatory notes to the GRA are inconsistent with what we regard as the correct interpretation of sections 9 and 12. But in any event if they were," so if the explanatory notes were inconsistent, "Those notes could not alter the true interpretation of the Statute. Our task is to construe what Parliament has enacted, not what the explanatory notes say can enact it".

Now I say that's entirely unobjectionable. One does look at consultation materials, one does look at explanatory notes. They assist with the context, aim, objective, mischief, we know all of this.

But fundamentally if the consultation document were to contradict the Act, plainly it couldn’t change its meaning.

MR JUSTICE ROTH: Do the explanatory notes to this Act, to these provisions, which came in in the Consumer Rights Act, do they assist? Because you have been referring to, this is about explanatory notes, not consultation documents.

MS WAKEFIELD QC: I don't know, sir, I don't know. I can check in the short adjournment. I must have checked at some point but I can't give you the answer. The consultation documents in this case, we say, are of the same

weight as explanatory notes, they are an admissible aid to construction.

MR JUSTICE ROTH: But they are a bit different, sorry to interrupt you. Because the explanatory notes are the notes to what is actually being enacted. The consultation document, it doesn't always follow that the Statute, when produced, mirrors what is envisaged in the prior consultation, that's the reason for having a consultation in fact. And things get amended in Parliament and so on. I'm not suggesting one shouldn't look at it and that it's not valuable. But it does seem to me there is a difference between consultation documents and explanatory notes.

MS WAKEFIELD QC: Sir, the Supreme Court in this case referred to the consultation documents, I absolutely take your point that there may be a difference between consultation and explanatory notes, perhaps. But in 28.1 we have Supreme Court --

MR JUSTICE ROTH: In terms of the general objective of the collective regime and so on, yes. Sorry, I interrupted you.

MS WAKEFIELD QC: No, not at all. So both Lord Briggs of the majority and Lord Sales and Lord Leggatt both set out passages from these consultation documents and were informed by them. And there is House of Lords authority. I think Lord Neuberger expressly endorsed the hearing of consultation documents which I don't have with me but I can bring for tomorrow.

MR JUSTICE ROTH: I am not saying it's irrelevant for a moment. I'm just saying there's a slight difference.

MS WAKEFIELD QC: And then moving away from the consultation documents, which in my submission clearly show the purpose of the rule, of course we have the decision to define domicile by reference to the well-established

statutory test in the *Civil Jurisdiction and Judgments Act*. We have the references in the guide to the shorthand of foreign to refer to class members who are not domiciled here, so distinguishing between class members in this country and in other countries rather than between the living and the dead.

And also in our skeleton argument we refer to the views of Professor Mulheron and we have her article on this in Authorities' bundle 2, tab 33. And of course she is really the preeminent academic on this issue and again was referred to in passages of a different article set out in the judgment of the majority.

So this article is entitled, "Asserting personal jurisdiction over non-resident class members, comparative insights for the United Kingdom".

And I would draw your attention just to two parts of it now, if I may. One is on page 683 and at the top of the page is --

MR JUSTICE ROTH: 683 in the bundle?

MS WAKEFIELD QC: 683 in the bundle, sir. It's the second sentence of her introduction to her article, "In the case of opt out class actions the question immediately arises, how is the court to assert personal jurisdiction over non-resident class members, ie those class members domiciled in places outside the jurisdiction of the court in which the class suit has been filed".

So that's the core question which we say the domicile test is intended to answer in our regime. And the second part of her article to which I would draw your attention if I may is over the page on page 685, two pages on, in which she summarises the UK regime and she says, the paragraph starting first, "First the UK legislature has provided that the UK court may properly assert jurisdiction over non-resident class members in an otherwise opt out action only where those non-resident class members opt in or specifically submit to the UK courts' jurisdiction. This is achieved by means of the following

provision, the UK's jurisdiction provision," she calls it. And then sets out section 47B(11).

So I say --

MR JUSTICE ROTH: She doesn't by any chance refer to deceased persons anywhere in this article, does she?

MS WAKEFIELD QC: She doesn't, sir.

So I say that there is ample support, universal support, for my construction which is that domicile serves a conventional private international law purpose. And there is no support in any of the materials for Mr Hoskins' submission. Namely that its intention is to exclude deceased persons.

And indeed we say that the exclusion of claims of deceased persons would be a very surprising thing and --

MR JUSTICE ROTH: Yes, I think we're with you on that.

MS WAKEFIELD QC: I am grateful my Lord, I won't push that any further then. Mr Hoskins' submission I think essentially reduces down to the language of a domicile, namely whether the language of being resident or having a domicile is language which can ever happily be applied to a person now deceased.

And of course that's the position which we set out in our claim form and that's the position of the question of law on which our position has changed.

But we say that we were wrong initially and that we're right now and that Mr Hoskins is wrong. And we say that because domicile is a legal construct which establishes sufficiency of jurisdictional links.

And we say that where one has all of the information or needs to determine that question, in particular looking back at the facts relating to the individual when they were alive. And one can say absolutely definitively what that individual's domicile was at the date of their death, and in a regime such as this where

there is no facility for that domicile to change subsequently. And I take Mr Hoskins' point that in the inheritance tax regime there is a limited facility for domicile to change on election after death.

But there isn't that facility here, and no one is saying there is.

So in all of those circumstances domicile at death, we say has continuing effect. And it answers --

MR JUSTICE ROTH: So you just, you say … I mean does residence continue after someone's death? I mean if you died in 1996 can you say you're resident in the UK in 2022?

MS WAKEFIELD: So the question of residency would be determined by the facts at the date of death and then would continue for all necessary legal purposes subsequently. If the law had to ask of someone after their death where is that person resident, which would be the relevant question to determine residency of the estate, then one would go back and look at the facts predating death and then say they are relevantly resident now, they continue relevantly to be resident in the UK, looking back at those facts which occurred in their lifetime and which cannot be changed or developed. They're crystalised. So it has continuing legal effects. And that establishes the continuing sufficiency of jurisdictional connection for the Tribunal.

MR JUSTICE ROTH: So you continue to be relevantly resident I think is the expression.

MS WAKEFIELD: Resident, yes.

MR JUSTICE ROTH: Relevantly resident in the UK.

MS WAKEFIELD: Relevantly, yes, sir.

MR JUSTICE ROTH: After your death.

MS WAKEFIELD: And, sir, this is an important --

MR JUSTICE ROTH: That's what you're submitting, is it?

MS WAKEFIELD: Yes, sir.

MR JUSTICE ROTH: And remain so for all purposes.

MS WAKEFIELD: Yes. And most importantly of course for present purposes for the cause of action that survives death.

MR JUSTICE ROTH: Well the cause of action passes to the estate, doesn't it? The dead person can't start a claim. It's the estate.

MS WAKEFIELD: It survives for the benefit to the estate, it's true, and the cause of action vests in the --

MR JUSTICE ROTH: Yes. I mean that's the -- the cause of action vests in the estate, doesn't it? Yes.

MS WAKEFIELD: So, sir, those are my submissions on the meaning of domicile. I already addressed you on Mr Hoskins' second point in substance at least which is the practical objections which he says arise. There is an ancillary question perhaps as to where those practical questions properly belong in the analysis which the Tribunal has to conduct today and there's been some movement on that I think between his submissions and his skeleton argument. So, first of all, it was said I think practical concerns would give rise to a lack of commonality, a lack of suitability.

And we say well commonality doesn't need to be fulfilled in respect of the conditions which might apply to opt out of a claim, for example, or to claim distribution at the end. Common issues relate to the issues of fact or not which arise for the determination of the claims.

MR JUSTICE ROTH: Sorry, is it said that including deceased persons gives rise to a lack of commonality?

MS WAKEFIELD: Yes, sir. So that's in paragraph 23 of their submissions in tab 8,

bundle C.

MR JUSTICE ROTH: It's not in the skeleton, is it?

MS WAKEFIELD: No. No, it's not. It's changed.

MR JUSTICE ROTH: Well I think ... I don't think ... You needn't address it unless we hear from Mr Hoskins about it.

MS WAKEFIELD: I won't address suitability either then. The way it's put now I think is just in support of their argument on statutory construction and no more than that. So it doesn't fit in to the matrix of questions which you otherwise ask yourself in respect of eligibility of claims. It's just a question, the question of law, what's meant by domicile.

MR JUSTICE ROTH: Yes. Yes.

MS WAKEFIELD: And I say as you know, my Lord, that there's absolutely no indication at all that domicile was chosen deliberately because Parliament took the view that estates were too difficult to manage as part of opt out proceedings. If that were to be the consequence of the word domicile it would be by a side wind. It's not because Parliament designed it to have that effect. There's no evidence for that.

MR JUSTICE ROTH: Yes.

MS WAKEFIELD: So I say that's wrong.

MR JUSTICE ROTH: Yes.

MS WAKEFIELD: I've addressed you already on the pleading limitation point and of course I owe you my proposed amended claim form. Is there anything else which I can assist you on in respect of deceased persons?

MR JUSTICE ROTH: Let me withdraw to confer. We'll take a moment.

MS WAKEFIELD: Thank you, sir. (**Pause**)

MALE SPEAKER: We are ready to resume.

MR JUSTICE ROTH: Thank you very much, Ms Wakefield. That was very clear.

MS WAKEFIELD: Thank you.

MR JUSTICE ROTH: Yes, Ms Demetriou?

MS DEMETRIOU: May it please the Tribunal I'm now going to address you on the compound interest issue. Could the Tribunal first of all please take up the draft collective proceedings order which is in bundle C behind tab 7? You've already seen it but let me take you to paragraph 3.5 which is on page 68 of the bundle.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: You can see there, so you see, at paragraph 3.5 that the remedy sought is an aggregate award of damages together with interest on a compound basis, or alternatively, on a simple basis. And so that's where it appears in the order but in the alternative.

And then if the Tribunal could turn up the claim form which as you know is in the first of the A bundles behind tab 1. And it's pages 44 to 45 under the heading interest.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: And so if the Tribunal has that on page 44 you'll see at paragraph 114 that compound interest by way of damages is claimed on the losses as set out in the summary above. The members of the proposed class are entitled to full compensation for the loss and damage caused to them by the proposed defendants' breach of statutory duty, in particular, and then we have a number of sub paragraphs. So (a) "those proposed class members who effectively borrowed money and/or increased their borrowings suffered charges on a compound interest basis on those borrowed sums."

And then you have, at (b), "those proposed members who were in credit to any bank

or savings institutions lost on a compound basis the return of investment on those sums."

And then you see, at (c), "both groups set out above were kept out of and denied the use of their money on a compound basis either to decrease their borrowings or to increase their savings/investments."

And then, at (d), "for the avoidance of doubt, some proposed class members may have fallen into both categories, either sequentially or concurrently, although it's averred that all class members will fall at least into one or the other of the categories above."

And just pausing there. We say that last part of (d) we say that that must be right. It is difficult to imagine, in my submission, that there will be any member of the class who did not, at least at some point during the 16-year period covered by the claim, either borrow money or have savings. And if they did either of those things it's our case that they would have been caused some loss as a result of having been charged an overcharge.

And so the starting point in relation to this issue is therefore that the inclusion of a claim for compound interest is much more likely to be reflective of the true loss to the class than the exclusion of such a claim.

Now we as the --

MR JUSTICE ROTH: When you say that applies to everyone, the last --

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: You then went on to say at least at some time in the class period.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: I mean it may apply for 3 years and not for 11 years.

MS DEMETRIOU: Sir, that may be the case although it's unlikely actually that for

adults living in the UK they're not going to have any point in time either a borrowing or a saving. So.

MR JUSTICE ROTH: When you say you mean … Everyone will always be either a borrower or a saver you're saying?

MS DEMETRIOU: Well, my lord, yes. Unless there's a vanishingly small category of adult person living in the UK who doesn't have any money in a bank and doesn't have a loan. So it may be that there are a small number of people who keep their cash in the curtain linings, for example, but --

MR JUSTICE ROTH: Well some people don't have cash to keep. They just have to spend what they get.

MS DEMETRIOU: Yes. And in relation to those people it's likely that they will have some borrowings. So it's unlikely --

MR JUSTICE ROTH: If they are able to borrow. Not everyone ... I mean one's making assumptions. There are lots of studies of these things. I don't know. But I mean if what you say is right every individual claim by an individual can recover compound interest on any damages. You don't need Sempra Metals really for individuals because it's just assumed that all individuals get compound interest. But that's not -- I mean that might have been a rational development of the law but it's not the way the law's worked out, is it?

MS DEMETRIOU: Sir, if I might take this in stages because we say --

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: And just to foreshadow where I'm coming to. So we say that what we're seeking here, and the Tribunal has seen this, is an aggregate award in respect of the compound interest losses of the class as a whole. And so in relation to that -- and I'm going to now just in a nutshell foreshadow where I'm going but I would then like to take it a little bit more slowly in stages.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So we say that we are seeking an aggregate award in respect of the compound interest losses of the class as a whole and that when it comes to quantification of that award my Lord has of course the points in the Supreme Court's judgment about the broad axe. And the points that my Lord puts to me now about well it may be that for some parts of that period there are some people that were neither borrowers or savers those are, if I can put it this way, all broad axe points.

Now the point made against me by Mr Hoskins is he says well the broad axe isn't enough to -- doesn't help you because although it might help you on quantification it doesn't help you on causation. So causation is a separate thing and you need to show that every member of the class has been caused loss.

And, sir, that's where I come back to. That's why it doesn't matter if at some stage in the 16-year period every member of the class, or near to every member of the class, was either a borrower or saver. And so all I'm saying at this stage is that it's vanishingly unlikely that the class is going to contain individuals, or at least any significant number of individuals, who haven't at some stage in the 16-year period been a saver or a borrower. And that's all that's needed for causation. Everything else is quantification and broad axe.

So, sir, that's in a nutshell where I'm going but can I now row back, as it were, and take that in stages.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So the aggregate award of damages. We've shown, if I can turn to our submissions for this hearing, which are -- we're back in bundle C behind tab 10. So bundle C tab 10. These are our submissions, our written

submissions, page 104. And at the bottom of page 104, so you see that that's in a passage of our submissions where we say that Mr Merricks has sought the advice of these experts on likely methodology and data sources. And, sir, what we say at paragraph 46 really shouldn't come as any surprise to anyone which is that there is significant data, and you see this over the page, in respect of prevailing interest rates for savers and borrowers over the claim period. These data relate to a spread of different types of saving accounts and deposits and different types of debt. And there's also data relating to the proportions of savers and borrowers.

And then you see the point at (c). We say well at the moment there doesn't appear to be an obvious data source which addresses the overlap and so we are acknowledging that there are some limitations to the data. But the key point, in my submission, is that there are data concerning the borrowing and saving habits of the general population which can be used to construct the losses of the class as a whole. And so that's the proposal of Mr Merricks in terms of proving the aggregate loss in terms of the compound interest losses of the class.

Now --

MR JUSTICE ROTH: So in other words you're not, have I understood this correctly, because this goes to a slightly different point I think which is, assuming it's a common issue on causation, and you're right on that, is there a, I think the expression was credible methodology to --

MS DEMETRIOU: A plausible.

MR JUSTICE ROTH: Plausible methodology. Same thing I think. To calculate the amount.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: And that is recognising that not everyone will fall into this category and not 100 per cent will be entitled to compound interest each year. Is there a way of then computing it on an aggregate basis?

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: And you're addressing that point here as I understand it and saying, yes, there is. And that is one of the things we have to be satisfied, which we were satisfied, even the Tribunal was satisfied, there's a credible methodology to calculate the aggregate loss before you get into interest, which the experts put forward. And it was just a question is there the data to do it? And here you're saying well there is some data but there is a problem about the overlap.

MS DEMETRIOU: Yes. So we're recognising that, as presently advised, so obviously we haven't produced our expert evidence on this at this stage in time. We're at the certification stage. But there is data about the borrowing and spending habits of the general population in relation to the period in question which can be used to calculate the loss, the compound interest losses, in aggregate, of the class as a whole. And, sir, turning -- there was some discussion about this at the last CPO hearing and I just want to show you that.

MR JUSTICE ROTH: Well the data you do cite.

MS DEMETRIOU: Yes.

JUDGE ROTH: If I may interrupt you a moment, supports a view that well, it's going to be at least 50 per cent of the class, isn't that right? I mean that's what "B" shows.

MS DEMETRIOU: That 50 per cent have savings and a similar percentage have debts.

JUDGE ROTH: Yes. So it's going to be at least 50 per cent. So it's question of what the overlap is to whether it goes to 60, 70, 80, 90 per cent.

MS DEMETRIOU: That's right. So, it could -- so, in terms of the calculation, that's correct, so I (inaudible) with how you're reading it sir.

PROFESSOR WATERSON: Yes. Could I just make a suggestion here if I may.

MS DEMETRIOU: Please.

PROFESSOR WATERSON: The -- you don't cite as possible source, the 'British Household Panel Survey' but it may well be that that will assist. It's obviously a sample, but it is a deliberately chosen random sample of people who are followed over a number of years. They won't match the years of the claim exactly but -- and there is quite a lot of information in there, I haven't examined it in detail, I think that's for you. There's quite a lot of information in there as to people's financial behaviour, and that may well assist you in refining your understanding of the information that's available.

MS DEMETRIOU: Well, we're very grateful for that, Professor Waterson, and it's a very helpful suggestion. If I may say so, it's an indication of the fact of the point I'm making, which is that there are data out there which will help us construct --

JUDGE ROTH: Potentially, yes.

MS DEMETRIOU: Potentially, exactly so -- and our experts are satisfied that there are data out there which will enable then to produce a report which estimates, or which provides their estimation of the loss in aggregate of the class.

Now, turning -- I was going to take you to the discussion about this. There was some discussion about this at the last CPO hearing, and that's in the second authorities bundle behind tab 21. Sorry, I have a wrong reference, it's -- I think it's in the first authorities bundle. I think it is tab 21 but let me just check.

Yes, it is. So it's the first volume of authority, it's behind tab 21. It's on page 380. You'll see there that the -- that Professor Mayer said to Mr Hoskins, "If I could just pick up the point you made about interest, and while I accept of course people are in different positions regarding borrowing or saving and how that may vary over time, it is still the case that there's a conventional time preference rate that's thought to apply and that therefore, it's reasonable to at least, in some respects, to take account of the time and value of money so the notion that one is making some adjustment for that would prima facie seem to be a reasonable one to be putting forward." Then you have Mr Hoskins' answer. So he says, "Well, I had this debate or discussion with economists on a number of occasions because I absolutely agree, as a matter of economic principle, the position you've put to me is correct as a matter of economic principle. The question is then is whether the economic principle is the same as the legal principle, because the legal principle is established in 'Sempra Metals.' If a claim is for compound interest, it must be pleaded and provided as an actual loss and the question there would be whether if I came to court seeking compound interest and rely purely on the economic principle, will that be sufficient for the court-“ along similar lines, so there's really, we say, an acceptance there. So the point being made by Professor Mayer, and being accepted by Mr Hoskins, is that as a matter of economic reality it is reasonable to assume that members of the class will have suffered losses reflecting the time and value of money, and it's reasonable to apply an average or conventional rate.

JUDGE ROTH: But isn't Professor Mayer really saying that from many economists' points of view there ought to be compound interest in any case where people have been kept out of their money and that basically the English law rule that

you get simple interest only, unless you can show otherwise, doesn't accord with economic reality.

MS DEMETRIOU: Sir, yes but the first -- I agree that -- I agree with the point you're putting to me. But the first point about the economic reality is an important point because it really goes to the question of -- so Mr Hoskins is saying, "Well, you need to prove causation on an individual basis." We'll come in a minute, to what Mr Hoskins says in his written submissions. But what's being said here is that the economic reality is that these losses will have been suffered. We see that also in the 'Sempra Metals' case, which is relied on by Mr Hoskins, of course, and that's back in the first bundle of authorities behind tab 17 at page 248.

JUDGE ROTH: Although again, if I may interrupt to what you took us to just before in your submissions and discussion about the data and methodology, you recognise that it's not going to be calculated on the basis that every one of the 46, or if you're successful on the deceased persons, 58 million, are entitled and would have a compound interest, the aggregate calculation will use the broad axe to reach an estimate of what proportion of them meet the conditions and it will an estimate and rough and ready, but you will take that into account. That's the method that you just took us to.

MS DEMETRIOU: Yes. Sir, there are two points which I think need to be distinguished. The first point which relates to causation is this, which is all that needs to be shown in causation terms, if one is looking at causation on an individual basis, all that will need to be shown is that every individual member of the class has suffered this type of loss at some point in the claim period. What does that mean? That means that at some point in the claim period that person was either a borrower, or a saver, or both. It's that point

which I say is -- one can take as being read, because it's vanishingly unlikely that the class -- that there will be class members or any significant material proportion of the class that wasn't at some point, during the 16-year period, either a borrower or a saver, and that's all that needs to be shown for causation purposes.

Then the second point that needs to be distinguished from that is the calculation of the loss, and that's the point which I was just addressing you on, which is the broad axe point, and so there are those two points, in my submission, that need to be distinguished. I'm going to come onto explain how I say causation is addressed in this statutory framework.

JUDGE ROTH: Yes.

MS DEMETRIOU: But just going to 'Sempra Metals' first, which is in the first authorities bundle behind tab 17, and I want to take you to page 248 and paragraph 52 at the beginning of the judgment of Lord Nicholls.

JUDGE ROTH: Just one moment. Yes?

MS DEMETRIOU: This is a point that we made in our written submissions but there, Lord Nicholls is recognising, at paragraph 52, the same economic reality that Professor Mayer recognised in the passage that I took you to. So he's saying there, "Money's not available commercially or on simple --" sorry, "commercially on simple interest terms. This is the daily experience of everyone, whether borrowing money on overdrafts, or credits, or mortgages, or shopping around for the best rates, when depositing savings with banks or building societies. If the law is to achieve a fair and just outcome when assessing financial loss, it must recognise and give effect to this reality." We see, just while we're on this page, the conclusion actually just above that at paragraph 50 in the judgment of Lord Hope, where he agrees with Lord

Nicholls and Lord Walker, that the claimed restitution ought to be measured by an award of compound interest at conventional rates, calculated by reference to the rates of interest and other terms applicable to borrowing by the government in the market during the relevant period. So the exercise is looking at market data and that rates applicable in the market, the exercise of calculating compound interest. So the --

JUDGE ROTH: Lord Nicholls go on to say, of course, at 53, "To a significant extent, the law remains out of step with everyday life in the 21st Century."

MS DEMETRIOU: Sir, yes.

JUDGE ROTH: Which is the point Mr Hoskins was making to Professor Mayer.

MS DEMETRIOU: Sir, yes, and the key point, and I'm going to come to this, but the key point for the Tribunal is, is Mr Hoskins right to say that -- that 'Sempra Metals' that the principles he relies on in 'Sempra Metals' so the restrictions in terms of advancing compound interest claims, do they survive in this context, section 47C(2) and the ability to claim an aggregate award of damages? We say that they cannot. That's essentially the point the Tribunal has to grapple with. The logic, we say, of the Supreme Court's ruling in this case is that the aggregate claim for compound interest should be certified. I want to take you through -- I know you're very familiar with it, but I want to take you back to the judgment and show you a few paragraphs which we say are important in this context.

JUDGE ROTH: Yes.

MS DEMETRIOU: The two points that I wish to make, just to flag the points at the outset by reference the Supreme Court's judgment, the first concerns quantification and the broad axe, and the second concerns the relative nature of the suitability assessment, as found by the majority. So essentially -- and if

we can turn up the Supreme Court's judgment, so this is in the first authority if behind tab 28.1, so as the Tribunal will know very well, the Supreme Court found that difficulties in quantifying the loss caused to the class should not render claims unsuitable to be joined in collective proceedings. If we pick up the judgment at page 568.27, so it's paragraph 51, that paragraph comes at the end of a passage in the judgment of the majority which leads up to this point. You see at 51, "In relation to damages, this fundamental requirement of justice that the court must do its best on the evidence available" is often labelled the "broad axe" or "broad brush principle" and the court there says it applies in competition cases.

Moving back to paragraph 48, which is a couple of pages previously, the court there is saying that “a resort to informed guesswork, in other words, the broad axe rather than, or in aid of scientific calculation, is of particular importance, when (as here)” -- of course the court there was dealing with the primary loss issue, the pass-on issue, “when (as here) the court has to proceed by a reference to a hypothetical or counterfactual state of affairs. The loss may have to be measured by reference to what the court thinks the claimant would have done if the defendant had not committed the wrong complained of. Sometimes the quantification depends upon what a third party would have done." So what the court is saying there, in my respectful submission, is that the broad axe principle is particularly important where one is not -- one is not assessing what actually happened in the real world but, by definition or ex hypothesi, the determination that the court or Tribunal is having to carry out, is necessarily imprecise because the Tribunal or court is in the business of determining what would have happened in a hypothetical, counterfactual. Of course, the same -- precisely, that's precisely the case in relation to a claim for compound

interest because one's not asking in a compound interest claim such as this, "What did the class members do with their money" that isn't the question, the question is if they hadn't suffered the overcharge, what would they have done with the additional money that they would have received. So it's necessarily a counterfactual exercise and, for the same reason as that the court has said at paragraph 48, it's -- that's an additional reason why that the broad axe is applicable because, in any event, the calculation, the quantification exercise is not a real-world exercise, it's what would have happened in the counterfactual. That's necessarily the case with this compound interest claim.

Sir, you're looking sceptical.

JUDGE ROTH: Well, I can see why it's a counterfactual exercise when you're dealing with pass-on and with what might have happened. But I thought 'Sempra Metals' is based on -- the test is based on actual evidence and whether at the time you suffered the loss you were a borrower or you were -- you had borrowings or you had savings, and that's a factual question. I agree there's, in theory, you could say, a counterfactual question, namely, if you had this money would you have reduced your borrowings or would you have saved it. But it's approached on a factual basis.

MS DEMETRIOU: Sir, I think that that's not right in terms of -- so, you're right -- it's wrong and it's right. If I can explain what my answer is.

JUDGE ROTH: Yes.

MS DEMETRIOU: So, 'Sempra Metals' was also a counterfactual case, so it's a question of the premature payment of a tax, and so if it hadn't been paid prematurely what would, in the counterfactual, the payor have done with the money of which they were deprived during that period. So the question the court is looking at is a counterfactual question. Now, in considering the

counterfactual question, one does look at real-world evidence in the same way that one does in relation to pass on, look at real-world evidence. But what you're doing is you're using the real-world evidence to draw conclusions as to what would have happened in the counterfactual. It's an important distinction, with respect, because the task is a counterfactual task. So here, just as with the main claim, one is asking, "Well, what -- what in the counterfactual would have happened if the overcharge had not been -- had not been charged, would --" So too with the compound interest claim, the question is, "Well, had this overcharge not been borne by the class members, what would they have done with the extra funds that they would have had in that counterfactual, hypothetical world"? Of course, in answering that question you do look at real-world evidence, so you can look at real-world evidence, which is, "Well, are these people generally borrowers or savers?" because that's informative as to the hypothetical, counterfactual question that the court has to answer, and that, sir, we say is the correct analysis.

So -- and so where -- so the point I'm making really for these purposes is that given that it's a counterfactual question that the Tribunal has to determine, then the broad axe is particularly pertinent, as the Supreme Court has found at paragraph 48. So, sir, that's the question -- that's the question that -- that's the point I wish to raise. So just to -- just to sort of summarise, that's the point I wish to make about broad axe and quantification.

JUDGE ROTH: Yes.

MS DEMETRIOU: To summarise, the question is not going to be, "What did members of the class actually do with their money during the 16-year period" it's what they would have done with additional money, and obviously, not just -- not one clump of additional money but a trickle of additional money

throughout the 16-year claim period had they not suffered the overcharge. We say that that question is necessarily going to be the subject of an imprecise assessment.

So, sir, my next point on the Supreme Court is -- relates to the suitability criteria, and I just wonder if now's an appropriate --

JUDGE ROTH: Yes, that might be a sensible -- yes. Well, shall we say 2 o'clock?

MR HOSKINS: Sir, sorry to be a -- sorry to jump in. Can I just raise a practical issue, which goes to the amendments?

JUDGE ROTH: Yes.

MR HOSKINS: You'll understand I am keen to see precisely what is (overspeaking).

JUDGE ROTH: Yes.

MR HOSKINS: Can I just ask by the time we rise today -- I don't want to be in a situation where we finish today and I'm waiting, and I don't know when it's coming. Is it possible for it to be done please by 4 o'clock?

JUDGE ROTH: Well, I think counsel would like to see it if it's being prepared by -- while the court is in session. If I ask for it to be provided to you by 5.30 this evening, that will give you ample time before tomorrow, is that going to be feasible? Ms Wakefield indicated that it's not a difficult amendment.

MS DEMETRIOU: I think so. We'll obviously do our very best to meet that deadline.

MR JUSTICE ROTH: I'll say by 6.00 pm. I think you've had ample warning early on. Ms Wakefield was suggesting it could be done over lunch. You've got, I'm sure, a team as well as the two of you working on this case, and that will give you time to review it. As Ms Wakefield herself said, it's not exactly an amendment that calls for a lot of elaborate drafting.

MS DEMETRIOU: No.

MR JUSTICE ROTH: So I'll say that it is to be served by 6.00 pm and also supplied

to the Tribunal.

MS DEMETRIOU: Of course.

MR JUSTICE ROTH: Of course we don't start before 10.30 am so Mr Hoskins has time in the morning. I don't think we are under concerns of running out of time in this case.

MS DEMETRIOU: No.

MR JUSTICE ROTH: Very well. 2 o'clock.

(1.06)

(Adjourned until 2.00 pm)

(2.05)

MR JUSTICE ROTH: Ms Demetriou, Mr Hoskins, looking at the timetable, I see you haven't left scope for a mid-afternoon break. I think if Ms Demetriou, you could finish at 3.25 pm and then Mr Hoskins start at 3.35 pm, then that gives us ten minutes in the middle of the afternoon.

MS DEMETRIOU: Of course. Sir, members of the Tribunal, I think just before the short break, I was making two points, two preliminary points, on the Supreme Court's judgment. The first related to quantification and the broad axe.

The second point that I wish to raise relates to the suitability criteria and the finding of the majority that that's relative in nature. So the question is whether forensic difficulties that will arise in proving the aggregate lost would be any easier for an individual claimant to overcome?

Just picking up, I'm going to take you back to some of these passages when addressing Mr Hoskins' submissions, but just to pick up paragraph 73 of the judgment of the majority, which is in the first authorities bundle behind tab 28.1 on page 568.35. You see that point being made there. You see there that what the majority say is that: "In the context of suitability for collective

proceedings or aggregate damages, it's no answer to say that members of the class can bring individual claims. They would face the same forensic difficulties in establishing merchant pass-on and insuperable funding obstacles on their own, litigating for small sums for which the cost of recovery would be disproportionately large."

So we say equally in relation to the compound interest losses that is also the case, because the reality of the matter is that in order for any individual member of the class to recover damages for the compound-interest losses, they would have to bring an individual claim if this were not certified if an aggregate award was sought.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: That would similarly face insuperable difficulties of the type referred to here by the Supreme Court.

MR JUSTICE ROTH: Not as regards compound interest. Just show I had a mortgage through this period.

MS DEMETRIOU: Well, sir, the question is --

MR JUSTICE ROTH: What they were addressing was the problem of the variety of pass-on by different retailers and different areas of goods and so on, which would be a huge problem for an individual. But to show that you had a savings account through the period for an individual shouldn't be a problem at all.

MS DEMETRIOU: Well, sir, the proportionality issues remains, which is that of course -- you have my point already, which is that it may not be enough simply to show -- Mastercard may say, "Well, it's not enough to show that you had a savings account during the period", because you have to show what you would have done with this extra amount of money. Sir, that's not a

spurious point, or at least I think it is a spurious point, but it's not spurious in the sense that it's not one that Mastercard -- it's not spurious to say that Mastercard would make the point, because it is the point made by Mr Hoskins in his skeleton. He says, "Well, even if you had a savings account, you may have spent the extra money, and if you spent the extra money, any extra money that you would have got, you haven't suffered a compound-interest loss". That is one of the key points he makes in his skeleton argument.

So, standing back and considering the proportionality of the matter, if actually what were required were each individual member of the class to bring a claim for the compound interest as a separate individual claim for their compound-interest losses, that would be disproportionate.

Sir, just to address the point you just put to me. Of course in order to determine the compound-interest of each individual, you have to first determine the amount of overcharge which they've suffered. So that's an important point. Of course there are going to be members of this class who have suffered -- because of the variations in spending levels, just thinking about the principal loss -- say tens of thousands of pounds worth of over charge and members of the class that have suffered maybe a couple of hundred pounds worth of overcharge. So there are going to be significant variations. Of course an individual is not going to be able to prove their compound-interest loss. It's not enough to say, "I had a bank account", because they are going to have to demonstrate what their primary loss is first, because the compound-interest losses are parasitic on the primary loss.

Sir, what has been established so far in these proceedings by the Supreme Court is that it is unnecessary for each individual member of the class to establish their primary loss, because what we've established is that we can seek an

aggregate award in respect of the primary loss, and that can be distributed on per-capita basis, so the £300 that you were referring to.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: So, sir, if an individual were to seek their compound-interest losses, they couldn't simply rock up to the Tribunal and say, "Here's my £300 worth of loss. I had a bank account." That wouldn't do at all. They would have to actually establish their primary loss.

So we say that that really is an insuperable difficulty, and so the only way that these compound-interest losses can be recovered is by means of an aggregate award, and that's because they're parasitic on the main loss.

So, sir, I'm going to turn to Mr Hoskins' argument, but just to summarise where we've got to so far.

We say that it's really for the reasons I've given thus far that the claims for compound interest raise common issues and are suitable to be brought in collective proceedings. They raise common issues, precisely for the same reason that both the Court of Appeal and the Supreme Court held that pass-on raises common issues. That's because, as I was just explaining, the compound-interest losses are to be determined on an aggregate basis by reference to common data. So that's why they raise common issues.

They're suitable to be brought in collective proceedings because they are not better addressed on an individual basis. On the contrary, they could not be addressed, for the reasons that I've given, on an individual basis.

Sir, members of the Tribunal, I invite you to stand back and to consider the main claim, the claim for the overcharge made by the class. The Supreme Court of course has found that that claim is suitable for determination in collective proceedings in circumstances where pass-on will necessarily be determined

in a broad-brush way, wielding the broad axe: in circumstances where individual members of the class, as I've just said, will all have different spending patterns over the period of the claim; they won't all have spent in the same sectors; pass-on rates may vary as between sectors and over time; there may be some sectors with 100 per cent pass-on and some sectors with no pass-on at all; and spending levels will of course vary as between individuals. But it is in those circumstances -- and the Supreme Court has so held -- permissible to seek an aggregate award of damages and permissible to distribute that award on a per-capita equal basis.

So, as I've said, it may well follow that every member of the class gets, say, £300 in circumstances where some lost £50 and others lost £10,000. We say in that context, it's unreal, in my respectful submission, to suggest that compound interest is in a different position. It's the same point. It's an aspect of the same damage, the same loss suffered by the class. Compound interest would make up a proportion of that £300, but the difficulties presented by its recovery, by means of an aggregate award, are no different in nature to the difficulties to the issues that arise in relation to the primary loss, and they're not more difficult. The opposite is true. There's no distinction really to be drawn between them.

So we say that it follows from the judgment of the majority that it's permissible, it's suitable to add the compound-interest claim into the proceedings, because no different issue of law arises.

MR JUSTICE ROTH: Isn't the difference this, as I understand it? You've got to separate -- as the Supreme Court emphasised -- distribution from quantification. For quantification purposes, the aggregate primary loss can be calculated -- it's theoretically on the method that we've got, provided the data

is there -- because it's the total amounts that was spent and passed on. You don't know. It will vary a lot between individuals in the class, but you know what the total is, so you can get an aggregate award of damages.

Then you've got the separate problem of how do you distribute it? And you could do that in a fair way which doesn't have to be compensatory. But the quantification you've done is compensatory for the class as a whole, because it represents the loss of the class as a whole.

The compound interest is more difficult because you don't know the total compound interest of the class as a whole. That's the difference, isn't it? And that's your causation point which you said you're going to address, which you'll come on to. But that does seem to me the distinction between them, and I think, from what you said about causation, it's something you've got well in mind.

MS DEMETRIOU: Yes, I've got that well in mind, but can I just make this point before I'll come to causation? Which is that I don't accept that there is that distinction actually because, you've said on the one hand you can calculate the loss to the class as a whole in relation to the primary loss. Sir, that is true, but you are calculating the loss still to the class as a whole, wielding a broad axe because of all the difficulties that the Tribunal emphasised in its first judgment, about the pass-on analysis. So necessarily it's not going to be a scientific calculation necessarily.

Sir, in my submission, precisely the same -- but actually probably to a less extent -- in principle arises in relation to compound interest, because one is taking data relating to the population as a whole during that period, and one is estimating the aggregate loss to the class. So you're doing it in a way which is necessarily imprecise, but you're still undertaking the same estimation. So in my submission, there is no distinction in principle between those two

approaches.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: Now, I'm going to turn now to Mastercard's argument, and we pick up their skeleton argument, which is in bundle C. I don't know if you have it separately, or if you've got it in the bundle. It's behind tab 14.2 of bundle C. I'd ask you to turn, please, to page 131.12, where you'll see the heading "Compound Interest". Starting at paragraph 21, you see the argument. So you see this: "In order to recover compound-interest losses, a claimant must claim and prove their actual individual interest losses. The common law does not assume that compound interest losses have been suffered. A claim for compound interest requires proof that the infringement caused a specific compound interest loss and the quantum of that loss." You'll see that *Sempra Metals* is footnoted. This is the legal principal which underpins all of Mastercard's submissions, and you see that in their earlier written submissions and in this skeleton argument.

Now, pausing there, we say that that principle that's set out at paragraph 21 cannot be applied as stated in the context of the collective-proceedings regime where an aggregate award of damages is sought, because it is flatly inconsistent with section 47C(2) of the Act.

So just making the obvious points, what Mr Hoskins says in his skeleton is: "A claim for compound interest requires proof that the infringement caused a specific compound-interest loss and the quantum of that loss". And he says that each individual needs to prove that. Of course the power of the Tribunal under section 47C(2) to make an aggregate award of damages is precisely to make an aggregate award -- and I am quoting from the statute -- "without undertaking an assessment of the amount of damages recoverable in respect

of the claim of each represented person".

So the first point to make is that *Sempra Metals* and the principles relied on by Mr Hoskins did not address the position under section 47C(2) of the Act.

Now, Mr Hoskins then goes on to apply those principles to the present case. So you'll see at paragraph 22 of the skeleton argument, he says, "Well, on our own case, some class members will have borrowed money, some will have saved money, and some class members will have been in both groups". Then you see the point at 23 which he makes about, "Well, there may have been. There's also a further option that some people may have spent some or all of any additional money which they would have received".

Then at 25, he makes the point that the position of individual class members will have changed over time, and he says: "Any claims for compound interest will therefore be highly individualised. They can't be said to raise common issues." To which we say, "Well, not if they're being brought individually, but they do if what's being sought is an aggregate award reflecting the compound-interest losses of the class as a whole".

The Tribunal has my point, which is that whatever Mr Hoskins says here is equally applicable to the main loss, because of course if you've got a claim for breach of statutory duty, that is also highly individualised. Spending patterns are different, pass-on rates vary by sector, which is going to matter because you have to look at which sectors each individual spent in. That is the law if you're bringing an individual claim. But what is not being addressed at this stage is the aggregate claim, which is the claim that we are bringing, both in respect of the principal loss and the compound-interest losses.

So what is Mastercard's answer to our point on aggregate damages? Well, the point really, the real answer you can see at paragraph 34, and this is the causation

point. So it's over the page. "The power to award aggregate damages is limited to the quantification of loss. It does not sweep away the requirement that, in order to be recoverable, any losses must be shown to have been caused by the relevant infringement."

Now, before I address that -- you see that is a very different submission. The first point is that that's a very different submission to the submission made at paragraph 21 and following, which talks about the individualised position of claimants in respect of compound interest, which would give rise to different quantifications for each individual.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: It's a very different point. So what do we say by way of response to that point?

Well, the first point I've made already. Our first response, I've made already, which is that when one is looking at causation, as opposed to quantification, all that needs to be demonstrated -- and this as a general proposition -- is that a person has suffered some loss -- some loss. So the first point we make is that it's vanishingly unlikely, we say, that there is going to be any member of the class who hasn't suffered some loss during that 16-year period. That's the point I made at the outset. In relation to Mr Hoskins' point at paragraph 23 of his skeleton, where he says, "Well, ah ha, you know, even if you had borrowings or savings, you may have spent the additional money", we say that that's an entirely unrealistic way of looking at things because as he recognises in paragraph 23 the question is not a factual question, but a counter factual question; what would have happened?

Money is of course fungible one isn't looking at £500 worth of over charge on a certain date saying, "What would a claimant have done with that £500?" It's a

trickle of over charge in all likelihood, across the claim period.

And the question is if that over charge hadn't occurred, what would have happened. And so it's unrealistic to say, "Well, any individual claimant may have spent it all. And that is something that's going to be determined on the facts in all likelihood of the case". It's just unrealistic.

So we say the first point we make is that it's simply unlikely that there are going to be members of the class who haven't suffered some compound interest loss.

And it comes back to the point made at paragraph 52 of *Sempra Metals*, and also and also the economic reality point made by Professor Mayer at the last hearing.

MR JUSTICE ROTH: Why do you say they all have to suffer some loss? I mean isn't it inherent that there will always be some class members who may not suffer loss? And as long as your aggregate award is in the right amount then that's a matter for distribution.

MS DEMETRIOU QC: Sir, yes. Exactly.

MR JUSTICE ROTH: But you said one does need to show that everyone is in the class. I mean even in your primary loss there will be some people, someone who is for example, in a care home, who may have not purchased anything over that period. And as we all know there are rather a lot of people in care homes, as has been brought out tragically over the past year.

I mean I don't know why you're projecting that every single class member has to suffer some loss.

MS DEMETRIOU QC: Sir, forgive me, but that's no part of my argument, that's Mr Hoskins' argument. So I completely agree with the point that you're putting to me, which is that we don't have to show that every single member of the class has suffered loss.

MR JUSTICE ROTH: I thought all you were saying all that needs to be, have I got it right? All that needs to be demonstrated is every class member has suffered some loss.

MS DEMETRIOU QC: Sir, if I put it like that, I misspoke. So let me just dial back, so I am addressing a point made by Mr Hoskins relying on *Sempra Metals*. So he says in relation to *Sempra Metals* that as a matter of law every individual member of the class has to show that they've been caused loss. And I make two points. The main point I haven't yet made, I'm going to come on to it. Which is the point you've put to me, which is; no, that's just not right. It's not right.

When one looks at the Supreme Court judgment in this case it's plainly not right. But I say in any event it's not something which needs to really trouble anyone because the overwhelming likelihood, just as with the principle loss, is that most members of the class have suffered some loss.

So we say it's not necessary to show it as a matter of law, but it's not something which needs to keep anyone awake at night either. Because for the same reasons as arose in relation to the principle loss. But sir, you're right, the real point here is the legal one. And what we say in relation to that is that it follows from the Supreme Court's judgment and from its approach to the primary loss, that Mr Hoskins is wrong to say that each individual member of the class, in order to recover compound interest losses, needs to show that they have been caused those losses. That is just wrong because that is contrary to section 47C(2). And it's contrary to the reasoning of the Supreme Court in this case. And you have my point that there is no material distinction between the primary loss and the compound interest losses in that regard.

And we say that one could start, as it were, before I go back to the Supreme Court,

perhaps you could pick up the Court of Appeal Judgment, which is in Authorities bundle 1 behind tab 26. Because the Court of Appeal make this point. And if you could turn to page 520. And it's the top of page 520 paragraph 47. So what the Court of Appeal say here is, "To require each individual claimant to establish loss", so we're talking about causation, not quantification, causation. "In relation to his or her own spending… would run counter to the provisions of section 47C(2) and require an analysis of the pass-on to individual consumers at a detailed individual level which is unnecessary when what is claimed is an aggregate award. Pass-on to consumers generally satisfies the test of commonality of issue necessary for certification".

So that's what the Court of Appeal said. That was never challenged by Mastercard, that finding about causation. And going to --

MR JUSTICE ROTH: And that's why that's the basis on which they said we were wrong to say that pass-on is not a common issue.

MS DEMETRIOU QC: And that's exactly right. And it's why it's a common issue in relation to compound interest too, because essentially where one is seeking an aggregate award to compensate the class, and one is using common data in order to do that, it is a common issue. That's why the Court of Appeal said that you were wrong. You see that actually, sir, just to give you the paragraph, it's the previous paragraph, paragraph 46 that makes that point.

MR JUSTICE ROTH: And probably 45, a critical issue.

MS DEMETRIOU QC: Yes, and 45.

MR JUSTICE ROTH: Yes, it's "Whether it's necessary to determine, to prove at trial that each member of the proposed class has in fact suffered some loss". If that's what you're addressing.

MS DEMETRIOU QC: Exactly, that's what I'm addressing.

MR JUSTICE ROTH: Correct.

MS DEMETRIOU QC: And so moving on to the Supreme Court judgment behind tab 28.1, let's go back to that, so starting at paragraph 54 for these purposes on page 568.28. And these passages that I am taking you to, sir, just to make a submission in advance, so what they're showing is that the Supreme Court, the majority is proceeding on the basis that the principal loss and pass-on is a common issue because an aggregate award is being sought, so they find that. And also on the basis that when you seek an aggregate award of damages you don't have to circle back and say, "Right, you've now got to show individual causation in respect of each individual member of the class". Because just standing back and thinking about for a moment, that would be completely contrary to their findings. So they found that you can seek an aggregate award, that you can carry on, you don't have to look at individual spending, that you can distribute it on a per capita basis that doesn't actually correspond to each individual loss. To say at that point, "Well you've got to now circle back and prove causation in each individual case", would completely undercut that. It would be very odd if they had thought it, and if they had thought it, they would have said it. Undoubtedly. But they didn't.

And if you look at these passages, so starting at paragraph 54, and the second part of that paragraph, so, "On the contrary, as the Court of Appeal observed at para 59, a refusal of certification of a case like the present is likely to make it certain that the rights of consumers arising out of a proven infringement will never be vindicated because individual claims are likely to be a practical impossibility. The evident purpose of the statutory scheme was to facilitate rather than to impede the vindication of those rights".

And then at 55 you have the point about suitability being a relative concept. And then at 56, the bottom of 56, "A reflection upon the central purpose of the collective proceedings structure… suggests that “suitable to be brought in collective proceedings” has the second of those two meanings. This is because collective proceedings have been made available as an alternative to individual claims where their procedure may be supposed to deal adequately with, or replace, aspects of the individual claim procedure which have been shown to make it unsuitable for the obtaining of redress at the individual consumer level for unlawful anti-competitive behaviour".

And then you see at 57 that, "The pursuit of a multitude of individually assessed claims for damages, which is all that's possible in individual claims under the ordinary civil procedure is both burdensome for the court and usually disproportionate for the parties. Individually assessed damages may also be pursued in collective proceedings, but the alternative aggregate basis radically (**pause** at 8.16 audio drops out)

MR JUSTICE ROTH: Ms Demetriou, can you hear me? Hello? Ms Demetriou, are you back, you froze. Something happened, you were in 58.

MS DEMETRIOU QC: So yes, I was pointing you to the bit in 57 that talks about the aggregate award radically dissolving the disadvantages that can be associated with bringing individual claims.

And then at 58 you see that where aggregate damages are to be awarded, section 47C removes the ordinary requirement for the separate assessment of each claimant in the plainest terms.

And then moving on to 66 you have the point about common issues. So this is on page 568.33, and so pass-on, so both the Court of Appeal and the Supreme Court found that pass-on was a common issue. And of course pass-on in this

case is critical to individual causation because just again thinking about how this might all pan out, let's say that you have as you put it to me, sir, somebody in a care home who's not spending money in lots of sectors of the economy but may not be spending very much money at all.

Then whether or not there's pass-on in relation to any particular sector of the economy is going to, may well be determinative, of whether that person has suffered loss at all. Yet the Supreme Court has still found that an aggregate award for the class can be sought.

And then you've already seen I think, sorry paragraph 76 on page 568.36, the same point really is made in relation to, in the context of distribution. So as I've already noted section 47C of the Act radically alters the established common law compensatory principle by removing the requirement to assess individual loss in an aggregate damages case. Nothing puts it back.

MR JUSTICE ROTH: Yes, that's just repeating summarising what -- and then Lord Briggs goes on to discuss distribution which is a separate issue.

MS DEMETRIOU QC: Sir, that's right. And really the point that I derive from these passages is that it wouldn't really be very radical if Mr Hoskins were right. And that the aggregate award is limited in this kind of context to the question of quantification and to distribution but that what one has to do in parallel as it were or separately is for each individual then to demonstrate by reference to their own spending patterns that they have been caused loss.

That simply doesn't fit with all of these passages.

And think for a moment what the case would be if that were correct. So the Tribunal would determine the VOC, the volume of commerce on an aggregate basis. The Tribunal would determine pass-through on an aggregate basis. But then each individual member of the class would need to adduce individual

evidence demonstrating that there had been caused loss because they had purchased goods or services from particular sectors during periods where pass-through had occurred.

But that exercise would be totally pointless because the Supreme Court has also held that in the circumstances of this case it's perfectly legitimate to distribute the aggregate award on a per capita basis to the class.

And so we say it's obvious that the majority were not on Mr Hoskins' side, as it were, in relation to causation.

And had they considered it were necessary for that to be proven on an individual basis they would have said so.

Now of course Lord Sales and Lord Leggatt made the point about causation being a class issue explicitly and you can see in the judgment at paragraphs 94 to 95 and 97, so that starts on page 568.42.

MR JUSTICE ROTH: Yes. They expressly make the point that you've been making really, don't they?

MS DEMETRIOU QC: They do, they expressly make the point that I've been making. And you see that really very clearly and you see it in 97, the summary, that section 47C(2) is phrased in broad terms and is properly read as, "Dispensing with the requirement to undertake "an assessment of the amount of damages recoverable in respect of the claim of each represented person" for all purposes, antecedent to an award of damages including proof of liability as well as the quantification of loss. Such an interpretation better accords both with the language used and with the statutory objective of facilitating the recovery of loss caused to consumers by anti-competitive behaviour".

And we say that first of all that part of the judgment, so Mr Hoskins says, "Well that's

all a dissent, you can ignore it", but we say that part of the judgment isn't really in the part of the -- it isn't in part of the judgment that constitutes the dissent.

This is an explanation of the statutory regime and in my submission the minority and the majority were *ad idem* on this point. And what's explicit in this reasoning is necessary implicit in the reasoning of the majority. And you see it's explicit in the Court of Appeal's reasoning too, I've shown you that.

And my point which you have is that the position with the compound interest claim is no different. And it would be really surprising if it were different because it is a damages claim which is being sought, being pursued on an aggregate basis.

And it's all part and parcel of the same loss caused to the class by the same infringement.

So for those reasons, sir, I think I'd be repeating myself if I said anything more. For those reasons we say that we respectfully invite the Tribunal to certify this aspect of the claim.

You'll have seen in our submissions we have put forward a fall-back position which is certification of a sub class of borrowers. We don't actually think that's necessary to do it at this stage, it remains an option going forward. If for the sake of argument the Tribunal were to accede to our request to certify the compound interest claim as a whole, which we think is the right way to go, we think that is the principled correct way, that properly reflects the Supreme Court judgment.

And if our experts were then to put in an expert report which Mastercard succeeded in demonstrating was insufficiently robust, even having regard to the broad axe and so on. Then it would obviously be open to the Tribunal at a later stage to say, "We're not going to certify this part of the claim after all because

we think that your evidence is insufficiently robust, or let's certify a sub class where the evidence looks stronger".

MR JUSTICE ROTH: That would be very difficult to sub-class, wouldn't it, because you'd have to do it almost year by year. Some people might have been entitled to compound interest some years and not other years.

MS DEMETRIOU QC: Sir, that may well be right and that's why it's --

MR JUSTICE ROTH: Hugely complicated and then your whole, the attraction of your method of distribution as regards the sub class goes out the window because you've then got a very complicated exercise.

MS DEMETRIOU QC: Sir, yes. I'm not positively pressing that. My submission really is that the compound interest losses on the same basis as the principal loss that it should certified as an issue for the class as a whole. And you have my submission as to why.

Sir, that's all I wanted to say about compound interest unless the Tribunal has any questions for me.

There are a couple of residual matters, one is Mr Stock, so shall I just pause to see if the Tribunal does have any questions on compound interest?

MR JUSTICE ROTH: Yes, a slightly more complicated exercise to ascertain that when we're all in different places, as you understand.

We'll just pause the hearing for a moment.

(14.44)

MALE SPEAKER: We're ready to resume.

MR JUSTICE ROTH: No, Ms Demetriou, we've nothing further to ask you.

MS DEMETRIOU: Thank you. So may I briefly attempt to deal with the point that the Tribunal raised with me about Mr Stocks' letter which, just to remind you, is at bundle C, tab 24, point 1. And you took me to the passage on page

164.4 paragraph 18.

MR JUSTICE ROTH: Yes. Just a moment. Yes.

MS DEMETRIOU: Now we are somewhat struggling to understand the point and I say that with the benefit of a discussion with Mr Merricks as well. But hopefully I can cut through it in this way which is that the underlying fraud that Mr Stocks is concerned about was investigated by RICS. And Mr Merricks' role was to review, to conduct a review, it was a procedural review, as to how RICS handled the complaint. So essentially it was a complaint about an entity which was regulated by RICS. RICS investigated that complaint and Mr Merricks' role was to conduct a procedural review of how RICS had investigated the complaint. So sort of one stage removed. Not to examine the substantive complaint itself.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: That review was concluded in 2012 and you have the report, I think it's in bundle A, Mr Merricks' report in 2012 in bundle A.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: And the point is that it was concluded -- and I don't know if you've seen the report but he does sympathise with the predicament in which Mr Stocks found himself but he could not find any flaw in the manner in which RICS had investigated it. And the simple point in my submission is that there can't be any question of a conflict of interest because Mr Merricks' review concluded several years before his involvement in these proceedings. So he has no ongoing role in relation to that fraud or the investigation of it or the review of it and he had no role in that when he took on his responsibilities in this collective action. And so, on that basis, we're unable to see that there is any conceivable conflict of interest.

MR JUSTICE ROTH: Yes.

MS DEMETRIOU: Now Mr Stocks also does complain about various financial ombudsman decisions and although Mr Merricks, that was one of his appointments as financial ombudsman that ended, he left there in 2009. And these various complaints of Mr Stocks I think all post-date, as far as we can see, that period. So those don't seem to have anything to do with Mr Merricks at all. He wasn't involved.

MR JUSTICE ROTH: I see. Well I suppose that's indicated by the last sentence, is it, of paragraph 18 of finding our first final decisions that currently were elsewhere whilst the current FOS chief ombudsman refuses to.

MS DEMETRIOU: Yes.

MR JUSTICE ROTH: Yes. Whereas Mr Merricks ceased to be. Was his title chief ombudsman?

MS DEMETRIOU: Yes, that's right.

MR JUSTICE ROTH: In 2009.

MS DEMETRIOU: Yes. So he didn't investigate -- my understanding is that Mr Merricks didn't investigate this issue at para 18 in his capacity as chief ombudsman. You can see that from the first sentence. The FOS, the financial ombudsman, investigated the same serious fraud as Mr Merricks' reviewed on behalf of the RICS investigation.

MR JUSTICE ROTH: Yes. Yes.

MS DEMETRIOU: So he wasn't acting in his FOS capacity at that stage. He was reviewing the adequacy of the RICS investigation. And that concluded in 2012 before these proceedings were a twinkle in anyone's eye.

MR JUSTICE ROTH: Yes. Yes, I see. Thank you.

MS DEMETRIOU: So that's I think as much as I can say about the point that you

raised with me. It doesn't seem to give rise, in my respectful submission, to any conceivable conflict of interest and there's nothing else that we've seen, and we have obviously asked Mr Merricks to review this. There's nothing that he's drawn to our attention that gives us any concern that I feel that I have to raise with the Tribunal for any reason.

So, sir, the only remaining matter is the funding agreement. I will give you an update on that as soon as I can but we've asked the funders and they're currently considering the position so I can't at the moment give you an answer but we will as soon as we're able.

MR JUSTICE ROTH: You hope to be able to do so tomorrow?

MS DEMETRIOU: That's certainly what we've asked so I hope to be able to do so tomorrow.

MR JUSTICE ROTH: Well it would be helpful because of course the hearing concludes tomorrow.

MS DEMETRIOU: Of course.

MR JUSTICE ROTH: Yes. Very well. And then the other issue you'll address in response to Mr Hoskins is the question of the undertaking?

MS DEMETRIOU: Sir, I think it's better to do it in response.

MR JUSTICE ROTH: No, that's fine.

MS DEMETRIOU: (inaudible) put forward any reason for it. Of course the Tribunal has a discretion under the rule. We recognise that. We've asked several times for them to explain the basis on which they say that the discretion should be exercised and really all they've said is well a similar undertaking was given in the Gutmann proceedings. And we just don’t think that that's enough.

So it's not that the funders are refusing to provide an undertaking. It’s just that we

want to make sure that we understand why it's being sought because it doesn't seem to us at the moment to be necessary. But once I've heard from Mr Hoskins I'm happy to respond.

MR JUSTICE ROTH: Yes. There's been correspondence about that presumably?

MS DEMETRIOU: Well there has but the correspondence unfortunately hasn't yielded any substantive basis for the undertaking other than to say well one was given in the Gutmann proceedings.

MR JUSTICE ROTH: Yes, I see. Very well. Well you've finished very happily ahead of time, Ms Demetriou.

MS DEMETRIOU: Indeed.

MR JUSTICE ROTH: Perhaps we'll take a … Although we have only been going 50 minutes but perhaps, if we're doing well like that, we'll take a short break now and resume at 3.00pm.

(2.52pm)

(Adjourned until 3.00pm)

(3.06pm)

MR JUSTICE ROTH: Yes, Mr Hoskins?

MR HOSKINS: Thank you, sir. Good afternoon members of the Tribunal. Just to explain I'll deal with compound interest and the deceased persons point and Mr Cook is going to deal with the undertaking point at an appropriate moment so let me begin with the compound interest point.

Let me make it quite clear what the basis of our submission is. Our submission is

that any CPO in this case should not include claims for compound interest on the basis that they do not raise common issues. In Mr Merricks' submissions there was a mixing and frequent elision of suitability and commonality but our objection is on the basis of commonality. And as all members of the Tribunal will be well aware one finds the requirement of commonality in section 47B(6) of the Act. If we can quickly turn that up it will be familiar to you. It's authorities 1 tab 7 page 30. So 47B(6) on authorities page 30. "Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law." So that's one requirement for the grounds for a CPO. "And are suitable to be brought in collective proceedings." So a second and distinct requirement is that the claims are suitable to be brought. So commonality, suitability, are different things and we're relying on commonality.

Can I ask you next to go into the Tribunal rules, please? To rule 74(6) which, if you have the 25th edition of the purple book, is at paragraph 6.82. So rule 74(6). "A collective proceedings order and a collective settlement order may be limited to only some parts or issues in the claims to which it relates." So there is no doubt that this is not an all or nothing decision for the Tribunal. You can decide to certify certain aspects of the claim while still deciding not to certify compound interest.

And the guide has some elaboration on this. If you go to the purple book, 6.191, and that's paragraph 6.37 of the guide, you'll see para 6.37 the second bullet has a heading in italics, “the claims must raise common issues”. If I could ask you to briefly refresh your memory as to what that said and I'm particularly drawing attention to the words towards the second half of that bullet which began with: "For example, the determination of liability".

MR JUSTICE ROTH: Yes.

MR HOSKINS: So the rules expressly provide for compound interest not to be certified if that's what the Tribunal thinks is appropriate. And the guide expressly recognises that issues such as those relating to causation may render it inappropriate to certify a particular issue such as, we say, compound interest while certifying other aspects of a claim.

Let me deal then with the nature of a claim for compound interest. I need to go back to Sempra Metals and show you some paragraphs that you haven't yet seen. But just to give you the principle that we rely upon. The common law does not assume that compound interest losses have been suffered. A claim for compound interest requires proof both that the infringement caused a specific compound interest loss and proof of the quantum of that loss and causation. And quantum are separate things and I'll come back to that theme during my submissions.

Let's return to Sempra Metals. Authorities 1 tab 17. And if I could pick it up please, tab 17 at page 257. And this is in the speech of Lord Nicholls. And if I could ask you please to read paragraphs 94, 95 and 96 but just the first four lines of 96. When you get to London, Chatham and Dover railway please stop.

MR JUSTICE ROTH: Thank you. We'll do that. (**Pause**)

MR HOSKINS: If I could just then highlight three points from those paragraphs. First of all paragraph 94 makes it clear that the general principles such as remoteness, failure to mitigate etc apply to compound interest claims. Paragraph 95 tells us that the nature of compound losses may vary, ie they will be fact and claimant specific. And paragraph 96 tells us expressly that an unparticularised and unproved claim for 'damages' will not suffice. General damages are not recoverable, if you have the point, because the common law

does not assume that delay in payment of a debt will of itself cause damage and loss must be proved.

Now it's quite clear therefore that the law is not the same as economic theory. Some might think that the economists are further ahead than the law in relation to this but certainly, as far as the law stands, there is no assumption of compound interest losses. They must be specifically pleaded and proved.

And another point, just at this stage, is that again this is not an all or nothing point on interest. If compound interest is not certified that will not prevent the proposed class representative from seeking simple interest in respect of aggregate loss on the part of the class. And you've seen, Ms Demetriou took you to, the draft order that the claim is for compound interest, in the alternative, simple interest. So it's not an all or nothing.

And I think it also follows from that that if the Tribunal were to refuse to certify compound interest and were at the end of the day to make an award of damages on an aggregate basis and to award simple interest on the basis of that aggregate damages. And that award of aggregate simple interest would of course be distributed to the members of the class. It may be the case, it may well be the case, that actually a limited number of class members would actually have an interest in bringing a compound interest claim. So it’s not a case of the *in terrorem* that if you don't certify compound interest now you will then have to deal with individual claims by every single class member for compound interest. That is clearly very unlikely.

And of course --

MR JUSTICE ROTH: Could they still bring a claim? Wouldn't they be out of time?

MR HOSKINS: To bring a claim for compound interest?

MR JUSTICE ROTH: Yes. After judgment in this case.

MR HOSKINS: Well that's not the way that they … You've stopped me in my tracks because, for example, in terms of the guide that I just read to you the suggestion is that there will be a claim on behalf of the class and then, in so far as there are individual issues that haven't been dealt with on a common basis, the individuals can still claim. I must confess --

MR JUSTICE ROTH: I see. You mean. Well then it's within the claim but it's not part of the collective judgment.

MR HOSKINS: Yes. Exactly. Correct.

MR JUSTICE ROTH: And then they can pursue individually that part.

MR HOSKINS: That was my understanding.

MR JUSTICE ROTH: Yes. No, that's right. I thought you were saying they could sort of start a new action.

MR HOSKINS: No, no, no. I mean be before the Tribunal in the context of these proceedings. It would just be (inaudible)

MR JUSTICE ROTH: Yes. Yes.

MR HOSKINS: And of course if we come to the day when there is a judgment in this case there will be submissions made to you about what the rate of simple interest should be. And I'm not obviously prejudging anything but obviously the Tribunal will have a degree of discretion as to the rate of simple interest.

So, again, this sort of black and white argument that if you don't certify compound interest the class is going to all suffer is a bit too simplistic.

Can we look next at Lord Hope's speech at page 237? We are into diminishing returns but I think it's important I do show you the main parts of the judgment. Paragraph 17 of Lord Hope. Perhaps I could ask you to read that to yourselves. That would be the …

MR JUSTICE ROTH: Yes.

MR HOSKINS: Simplest. You'll see he's echoing what we've seen in Lord Nicholls.

(Pause)

PROFESSOR WATERSON: Can I just check, I wasn't previously familiar with 'Sempra Metals at all, so Sempra Metals is an individual claimant, presumably?

MR HOSKINS: It was as -- Ms Demetriou is right, it was a case in which tax had been paid when it shouldn't have been.

PROFESSOR WATERSON: Yes. Right.

MR HOSKINS: The principle that was established, the House of Lords took the occasion to clarify the law and compound interest which had (overspeaking).

PROFESSOR WATERSON: Yes. I was just wondering whether -- whether the rules regarding common actions were any different from the rules which were pertaining to Sempra Metals.

MR HOSKINS: Well, what one starts with, Professor, is the basis of -- the collective actions' regime is that you can bring on a collective basis, claims that could be brought on an individual basis. So collective actions are a gathering together of individual claims, and then once you have collected the individual claims there are certain provisions, such as the power to award aggregate damages, which are then specific to collective proceedings, but there is nothing specific to collective proceedings in terms of compound interest.

Before we leave Lord Hope, I'd just like to draw attention to the final sentence where he makes the point which that goes, to a certain extent, if I just say it which at certain circumstances the law will say, "Well, we're going to do simple interest because it's just more convenient and more straightforward." Now, given the level of likely claims for compound interest here, particularly if it were to be done, as the claimant's suggesting, on an aggregate basis, the primary loss,

at its height, if was to be about £300 a head, if you go into the compound interest on that you're talking probably, at its best scores, rather than hundreds of pounds for each claimant, and there is an issue then as the House of Lords recognised in saying that this is the law, in saying that, "We're going to insist on these requirements for compound interest because, in truth, simple interest in most cases is going to be perfectly adequate as a means of compensation."

Then finally Lord Scott, this is at, page 265, paragraph 132, and if you could just read please (a) and (b) at the side in that page and stop at, "The recovery of alleged losses." (Pause). In particular, the sentence opposite (b) where it says, "Interest losses caused by a tortious wrong should be held to be in principle recoverable, but subject to proof of loss, remoteness of damage rules, obligations to mitigate and other relevant rules." This is important because again, in the submissions made on behalf of Mr Merricks, certain important and distinct legal concepts were mixed together. The notion of causation is one legal issue. Has the infringement caused loss? The question of quantification of loss or quantum is a separate issue. How much loss has been caused? Thirdly, the notion of mitigation: to what extent has the loss which has been suffered been mitigated or otherwise avoided, is the third and distinct legal issue. Again, I'll return to those distinctions during the course of my submissions. But they are clearly and arguably distinct legal concepts.

Let's turn now to the nature of the claim in this case, and I can take this pretty quickly because you've had it with Ms Demetriou. The claim form --

JUDGE ROTH: Can we put away Sempra Metals?

MR HOSKINS: Putting away Sempra Metals. It's the claim form, so Bundle A,

tab 1, page 44. So you have the categories that the applicant has identified in terms of how compound interest losses may have been suffered by members of the class. Some might have borrowed more as a result of paying the overcharge, or to look at it another way, the way Ms Demetriou put it, they might have borrowed less had it not been for the overcharge. Those are two sides of the same coin.

Some class members may have saved less money than the overcharge. Again, they may have saved more money had it not been for the overcharge. The applicant recognises that some class members will have fallen into both groups.

Now, there's another category again, which Ms Demetriou has alluded to but was not very keen on, which is of course that some class members may have spent more had it not been for the overcharge. So if a class member, absent infringement, would have had an extra £2 in their pocket every month, unlike a very wise Ms Demetriou, they may not have saved that money or reduced their borrowings with the £2, they might have stayed in the pub for an extra half-an-hour and had another pint of beer. Ms Wakefield's giving me a look that suggests she would have spent the £2 on an extra pint of beer. But the point is that if you spend the money in that way, that is not a compound interest loss. So there are ways in which, had it not been for the overcharge, individual members of the class may have used the extra money in their pocket in a way which did not give rise to a compound interest loss.

Now, it's also important of course to realise that the nature and extent of borrowing, saving and/or spending, on the part of each class member, may have altered over time. In our submission it is therefore incontestable that the individual claims for compound interest which are to be gathered into these collective

proceedings, will therefore be highly individualised.

JUDGE ROTH: Just to interrupt you for a moment. The point you're making, if I understood correctly, is even if you were a borrower, you had a mortgage say, or you had a savings account and you were a saver, that doesn't mean that the extra money that you would have had, had there not been this overcharge, would have gone into your savings account or been used to reduce your mortgage, you might have just spent it. In which case, you wouldn't have a compound interest claim.

MR HOSKINS: That's right.

JUDGE ROTH: Yes.

MR HOSKINS: Or your compound interest claim might be less.

JUDGE ROTH: Yes.

MR HOSKINS: The question for commonality is not whether it can be said that some members have suffered no compound interest loss or they must all have suffered some compound interest loss, the issue, when we're looking at commonality, is that all the members of the class will have suffered different compound interest losses (if any), and they will have suffered any such losses in different ways, that's the commonality part.

Now, the way in which the applicant tries to meet what we say incontestable analysis in terms of commonality, is the aggregate damages card. The applicant suggests that lack of commonality is not an obstacle to certification because compound interest can be assessed on an aggregate damages' basis. (Overspeaking).

JUDGE ROTH: I think they say two things, don't they? They say it is a common issue because, like pass on, see Merricks in the Court of Appeal and the Supreme Court, they also say you can deal with it by way of aggregate

damages.

MR HOSKINS: I'll deal with that and that's a better way of --

JUDGE ROTH: That's my understanding of how they put their case.

MR HOSKINS: That's very helpful, sir, and I will deal with both -- both aspects. The first point is that unlike the question of merchant pass on considered by the Supreme Court, the same issues would not arise in individual claims. So just for those who haven't been involved in this case for the duration like some of us pro-campaigners, the issue in the Supreme Court was that there was an overcharge in terms of the interchange fee charged by Mastercard, that interchange fee was passed on by the banks who operated the system, to retailers. So there was an infringement; it caused a loss; it caused a higher overcharge, that overcharge was passed onto the retailers, and then the issue was to what extent did the retailers pass on the overcharge to their customers, and that's the shorthand merchant pass on is used to refer to. That's what the Supreme Court was actually concerned with.

In the context of this claim, in order to establish any compound interest loss on the part of consumers, a claimant, an individual claimant would not need to prove the extent to which different retailers passed on the overcharge to their customers. Let me just unpack that a little bit by going to the Supreme Court judgement in this case. Its authority is 1, tab 28.1, and it's paragraph 55 in Lord Briggs' judgment. I think you were shown this by Ms Demetriou but not necessarily in this context. So can I ask you just --

JUDGE ROTH: Sorry, which -- which paragraph?

MR HOSKINS: Paragraph 55.

JUDGE ROTH: 55, thank you.

MR HOSKINS: It's on page 28 of the judgment, page 29 of the bundle. So, this is in

the context of suitability not commonality and you -- if you -- simply ask you to re-read paragraph 55. Then I'll make the point I wish to make in relation to it. (Pause)

Now, the important bit for my purposes is the sentence, "But an individual consumer would still have to address the same issue in every sector of the retail market in which that consumer was active." So what Lord Briggs is imagining is a situation in which these claims are brought individually. What he is saying is that if they're brought individually the individual claimant would still have to do a broad assessment of the extent of merchant pass on across a range of retailers because, as individuals, we don't just spend all our money with one retailer, we shop in all sorts of different places. So he was saying in this context, merchant pass on, you have to deal with it in a collective action, but you'd have to also deal with it in the same way in an individual action.

JUDGE ROTH: Not quite. You'd have to deal with it in an individual action but not in quite the same way.

MR HOSKINS: Correct --

JUDGE ROTH: The last few words indicated, "in which that consumer was active."

MR HOSKINS: That's right.

JUDGE ROTH: So if you're a consumer, for example, you didn't own a car, you wouldn't be concerned with petrol station pass on. If you were a consumer who did own a car and were an active driver, you would have probably quite a lot of petrol purchases as part of your household budget and you would have to deal. So it would vary quite a bit between class members, wouldn't it?

MR HOSKINS: It would, but the point that the House of Lords, that Lords Briggs -- the Supreme Court, Lord Briggs is making is that there is a sufficient overlap in the issue when they look at it in terms of relative suitability, "What would an

individual consumer have to do. What would have to happen in the collective action." What they're saying, part of the justification for their final conclusion is, "An individual consumer would also have to do a broad look at retailer pass on." But he says, for example, at least for the years in which he or she was making purchases from merchants, absolutely the court is recognising that, but they are saying there is a similarity between what individual claimants have to do and what the collective claim would have to do.

JUDGE ROTH: Of course, common issue doesn't mean identical.

MR HOSKINS: No.

JUDGE ROTH: Okay, it's broader than identical.

MR HOSKINS: Absolutely. Oh absolutely. It's clearly -- it's a sliding scale. There's a judgement call to be made because you could just start and say, "Well, whenever there's a causation issue, that's sufficiently common. Whenever there's a quantum issue, that's sufficiently common." But clearly, there has to be a degree of judgement applied by the Tribunal. There has to be enough commonality on the facts of the case, the criteria to be satisfied.

JUDGE ROTH: Yes.

MR HOSKINS: But absolutely, it's not an absolute notion.

Now, while we're with Lord Briggs, you were taken to paragraph 58 and the sentence -- it's dealing with the -- if you look about halfway down, you'll see the sentence begins, "But in sharp contrast with the principle that justice requires the court to do what it can with the evidence when quantifying damages, which is unaffected by the new structure, the compensatory principle is expressly and radically modified. Where aggregate damages are to be awarded, section 47C of the Act removes the ordinary requirement for the separate assessment of each claimant's loss in the plainest terms." Now I'll

come onto section 47C in a moment, but my submission is that what Lord Briggs is referring there to, I'll make it good when we go to Section 47C is quantum, the assessment of loss. He is not dealing with causation.

Indeed, insofar as one is looking at pass on, pass on is a species of mitigation, which is a different concept. What Lord Briggs is referring to there was the assessment of loss, i.e. quantum. Now, in relation --

JUDGE ROTH: Well, it's species of mitigation for the retailer, it's not for these claimants, not for Mr Merricks' class, it's not mitigation, it's causation of loss, isn't it? It's a (inaudible).

MR HOSKINS: I'll come -- I'll make specific submissions on what I say is causation, quantification and mitigation in the context of this case.

JUDGE ROTH: I can see that pass on is causation, I don't -- but it's sometimes mitigation when it's used as a defence. But seems to me here it's straight causation or ... But I take your point, you're saying Lord Briggs isn't talking about causation, he's talking about quantification.

MR HOSKINS: That's right. That's right. So this is -- and I will come on and I'm sure you'll have questions for me about what the difference is between causation and pass on in this case. I'll come onto that in a minute. Just to make it clear, I'd say that there is a difference in this case, the elision made by Ms Demetriou was not appropriate. I'll come to this whole point. I'm foreshadowing it.

So let me just before we leave then Lord Briggs say that whilst the Supreme Court was therefore looking at the extent of merchant pass-on to consumers, and was looking at the question of quantum, we're looking at compound interest. And in relation to compound interest, again, do the exercise. Imagine a series of individual claims, because that's what one must do to decide on

commonality. Each compound-interest claim would be entirely individual to each claimant, reflecting their unique position in respect of savings, borrowings and/or spendings.

And in pursuing that individual claim, the individual claimant would not have to address or take account of the position of other individuals' compound-interest losses. The individual would only require proof of his or her own actual losses. They would not have to enter any form of proof of what anyone else's compound-interest losses were. That's the difference between our case, what we're looking at now, and the merchant pass-on issue that we were just looking at paragraph 55 of Lord Briggs.

Now, moving on to the point I kept saying I'd come to shortly, which is the sort of causation notion.

On behalf of Mr Merricks, it's been submitted that compound interest is parasitic on loss, and that members of the class, the rights of members of the class to claim compound interest will depend on their individual loss to be established by means of aggregate damages, ie you can't unpack the two.

In our submissions, that's not correct. If this action goes ahead on a collective basis in relation to the primary loss, that will determine the rate of overcharge. What was the difference between the amount that consumers actually paid, in terms of the goods and services they purchased, and what they would have paid if a lawful rate of overcharging had been applied? That's what the primary loss is.

The question for compound interest is different, as Ms Demetriou herself made clear. The question for compound interest is what would each member of the class have done if the overcharge had been at a lawful as opposed to an unlawful level? It's a different question. So it's not correct to say that compound

interest is parasitic on loss. They are different heads of loss and the means of assessment is different for each of them.

So to put it another way, in terms of the primary loss, what the Supreme Court held in the Mastercard case -- the *Sainsbury v Mastercard* case -- was that the primary loss, ie that suffered by the retailers, was the loss suffered through paying an elevated level of overcharge. I can get that put in the bundle and give you the reference tomorrow. It was something that came up in response to the submissions made.

That's the analysis of the primary loss by the Supreme Court in the *Sainsbury* case, whereas in relation to compound interest, the loss is that suffered due to not having the money in one's pocket due to the overcharge. So the primary loss is paying more, and the compound interest is having less to spend or to reduce borrowing. They're actually distinct and different types of loss, heads of loss, and they are not parasitic on each other.

MR JUSTICE ROTH: I mean, you'd say the quantum of compound interest is parasitic, because obviously it's interest, so you need the primary loss figure to calculate it, but the liability for compound interest you say is not parasitic. Would that be a fair analysis?

MR HOSKINS: What you need to know for compound interest is not the total amount of primary loss. That would work for simple interest. What you need to know for compound interest is how much less did the individual have in their pocket and, as a result of that, how much more would they have saved or how much less would they have borrowed? The crucial thing you need to know is the level of the overcharge, not the total aggregate amount of loss suffered. So for both, you need to know what the overcharge is, absolutely. In order to establish compound interest, you do not need to know what the

total aggregate primary loss of the class is. That's not how you calculate it. Not compound interest.

Let me move on. I'm still in this notion of causation. Let's go to section 47C of the 1998 Act, so authorities 1, tab 7, if you still authorities 1 open. It begins at the middle of page 31. So section 47C(2).

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

The language of section 47C is limited to the amount of damages, ie the quantum of damages. Section 47C says nothing about causation. And causation is an essential and distinct ingredient of the cause of action for breach of statutory duty. You must show there has been an infringement; you must show it has caused loss; and then you must then quantify the loss. The language of section 47C is in terms of the amount of a quantum of damages and says nothing about causation. Therefore in our submission, the power to award aggregate damages is therefore limited to the amount or quantum of loss and it does not sweep away the requirement that in order to be recoverable, any losses must be shown to have been caused by the relevant infringement. It would be extraordinary if when one moves to a collective action, suddenly the question of causation is dispensed with, and that clearly cannot be correct.

As I've submitted, the issue of causation of alleged compound-interest losses in the present case will be unique to the circumstance of each class member. If they had had more money in their pocket, what would they have done with it? Would they have saved more? Would they have lowered their borrowings? Would they have bought extra beer in the pub on a Friday night? The paradigm of an uncommon issue, if I use that ugly phrase.

Now, in relation to that, it was submitted on behalf of Mr Merricks is that all that needs to be shown in relation to each individual class members is that they have each suffered some loss at some point, ie that they were a borrower or a saver, or both. Now, with all due respect, that simply side steps but does not address the issue of causation. In an individual action, the claimant would have to show that the infringement caused all his or her compound-interest losses.

So if I say, "Well, as a result of paying the overcharge, I actually saved less", I'd need to show that. If I also wanted to say, "And actually in a different period of time, I would have borrowed less", I'd need to show that. It would not be possible for an individual claimant to show, for example, that they had an overdraft for a 12-month period and then claim compound interest for the duration of the 16-year infringement, and they wouldn't be able to claim for the duration of the 16-year infringement on the basis of whether they saved or borrowed. The mere fact you suffered some compound-interest loss at some period doesn't again suddenly remove the need to show that you were actually caused loss at different times and in different ways, if that's the way you wish to claim. The case, the argument put on behalf of the applicant, simply proves too much. It explodes the requirement of causation.

So in terms of causation, in relation to primary loss, one asks, did the infringement cause an overcharge? As I've said, *Sainsbury* found that that is the level of primary loss; how much excess overcharge did one pay over what would have been the lawful amount? In relation to compound interest, the causation question is, did the infringement cause the individual to borrow more; and/or did it cause the individual to save less; and/or did it cause the individual to spend less, ie if they'd had the extra money, would they have simply have

spent more? Of course that head is not recoverable as compound interest. But, again the questions that one has to ask in relation to causation are different when one is looking at primary loss, as opposed to compound interest.

The applicant relies on the minority judgment of the Supreme Court in this case, the judgment of Lords Sales and Leggatt, and if we can go back to those paragraphs. That's authorities 1, tab 28.1, and it's page 24 of the bundle. It's paragraphs 95 to 97. I'm sorry, I may have given you the wrong page reference. Yes, I've given you the wrong page reference.

MR JUSTICE ROTH: Yes. Page 568.42.

MR HOSKINS: Thank you. You were shown these by Ms Demetriou. "95. A provision for aggregate damages may, however, go further and serve an additional purpose. It may also permit liability to be established on a class-wide basis without the need for individual members of the class to prove that they have suffered loss, even though this would otherwise be an essential element of their claim." Then a reference to the Professor Mulheron article, and then picking it up at the bottom. "An aggregate damages provision may dispense with this requirement by permitting liability towards all the members of a class to be established by proof that the class as a whole has suffered loss without the need to show that any individual member of the class has done so." Then over the page at 96. "The Canadian legislation referred to by Lord Briggs has not been interpreted as allowing liability, as well as the quantum of loss, to be established on a class-wide basis." There's a reference to The British Columbia Class Proceedings Act 1996 and then a reference to Pro-Sys. “In Pro-Sys […] the Supreme Court of Canada held that this provision could not be used to establish proof of loss where this is an

essential element of proving liability. Mr Justice Rothstein said: 'The [British Columbia legislation] was not intended to allow a group to prove a claim that no individual could. Rather, an important objective of the [legislation] is to allow individuals who have provable individual claims to band together to make it more feasible to pursue their claims.'" Then the minority opinion. "The UK legislation is not limited in this way. Section 47C(2) […] contains no wording comparable to that of the British Columbia Act […]. Section 47C(2) is phrased in broad terms and is properly read as dispensing with the requirement to undertake 'an assessment of the amount of damages recoverable in respect of the claim of each represented person' for all purposes antecedent to an award of damages, including proof of liability as well as the quantification of loss. Such an interpretation better accords both with the language used […] with the statutory objective of facilitating the recovery of loss caused to consumers by anti-competitive behaviour."

I make the following submissions in relation to that part of the minority judgment.

First of all, that part of the minority judgment was not adopted by the majority, and, in our submission, the basic premise upon which the majority judgment is based actually contradicts the minority view on this point. I submit that because Lord Briggs's analysis was based on equating collective and individual proceedings, not differentiating them, ie he said that when you're looking at individual and collective proceedings, you're looking at the same constituent parts and you are comparing them. It's not that one is different from the other. Let me show you what I mean by that. If you go to page 568.24, paragraph 45 -- I'm not going to take you to all the relevant paragraphs, because you'll all have read this; you'll be aware of what the point is -- the final sentence: "It follows that it should not likely be assumed that the collective process

imposes restrictions upon claimants as a whole for which the law and rules of procedure for individual claims would not impose."

Then at 47: "Where in ordinary civil proceedings a claimant establishes an entitlement to trial in that sense, the court does not then deprive the claimant of a trial merely because of forensic difficulties in quantifying damages, once there is a sufficient basis to demonstrate a triable issue whether some more than nominal loss has been suffered. Once that hurdle is passed, the claimant is entitled to have the court quantify their loss, almost ex *debito justitiae*."

So the whole point that Lord Briggs was making, we're not starting from the premise there is a distinction between individual claims and collective claims, in terms of the ingredients of the cause of action. He starts from the premise they are the same, and then he argues from the basis of what the ingredients of an individual claim are to justify his conclusion in relation to the collective claim.

The second point is that this particular issue -- ie do all members of the class have to have suffered loss? -- wasn't actually argued before the Supreme Court, so it was dealt with by Lord Sales and Leggatt, but it wasn't an issue -- certainly to the best of my recollection -- on which specific submissions were made by either side.

The third point is that the position in Canadian law does not support the minority's position, and that's expressly reflected in the minority judgment at paragraph 96. It's the section for process I showed you.

MR JUSTICE ROTH: Yes.

MR HOSKINS: Lord Briggs did, in referring to the Canadian legislation say it was of persuasive value but that he was going to adopt an approach to the interpretation of the domestic legislation. But he did recognise at paragraph 42 of his judgment that "Canadian jurisprudence [is] persuasive in the United

Kingdom".

The fourth point is -- and it echoes something I've already said -- it would be extraordinary if the Legislature had intended simply to sweep aside causation in all cases where a methodology for aggregate damages could be proposed. In our submission, such a radical alteration of the ingredients of the cause of action for a breach of statutory duty, one of the fundamental ingredients would have to be expressly stated, and we've seen the language of section 47C. It says nothing about causation.

And the fifth and final point is that sweeping away the requirement to establish causation in any case where an aggregate damages methodology could be employed to assess quantum, would be illogical. Because if it were not necessary to establish that an infringement had caused a particular head of loss or a particular type of loss within that head, then what losses would one be assessing by way of aggregate damages?

On that basis damages would simply be at large, regardless of how they were caused. If not causation, what's the limiting factor?

MR JUSTICE ROTH: But wouldn't you be assessing the total damage estimated to have been suffered by the class? That's what you'd be assessing. You would still look at causation but you'd do it on a class basis without regard to which individuals within the class might have had that loss.

That's what you're doing.

MR HOSKINS QC: And sir, that brings me back to where I started the submission which is one of the essential ingredients is not just suitability which of course in this terms is what the Supreme Court was looking at.

It's commonality. So my submission is that for commonality you must, by definition, it's common as between the individual cases.

And therefore when one looks at causation as between the individual cases, they are not common.

And in my submission what one cannot do is go to the aggregate loss approach and say that that allows us to side step commonality as a statutory ingredient.

MR JUSTICE ROTH: So you say in sum that Lord Sales and Leggatt are wrong?

MR HOSKINS QC: I have to say that and that's why I put five points.

MR JUSTICE ROTH: Yes, I understand.

MR HOSKINS QC: I am going to move to a slightly different issue that reflects the point you just put to me, sir.

It is suggested that compound interest will be assessed on an aggregate basis. But the applicant has not been able to propose, even on a tentative basis, a methodology to calculate compound interest across the whole of the proposed class.

If we go back to the remittal submission, that's bundle A tab 10, page 104.

MR JUSTICE ROTH: Sorry, this is --?

MR HOSKINS QC: It's the applicant's remittal submission, the ones that were made in March this year.

MR JUSTICE ROTH: I think you mean bundle C, don't you?

MR HOSKINS QC: I'm so sorry, it's a bad reference in my notes, it's bundle C. Thanks.

MR JUSTICE ROTH: Yes.

MR HOSKINS QC: And if you can go to page 104. At paragraph 44 is what's described as the first approach, and this is, the first approach is an attempt to establish compound interest on an aggregate basis. That's what the first approach is.

And you have the point, because Ms Demetriou showed it to you, paragraph 46, sub

C. The applicant has not been able to identify any data source which would allow them to address the overlap. And therefore on the evidence before you no methodology has in fact been put forward for assessing compound interest on aggregate basis.

MR JUSTICE ROTH: I think Professor Waterson suggested that actually there might be a data source.

MR HOSKINS QC: There might be and we haven't -- it's not before the Tribunal and none of us have had a chance to digest whether that would be the magic bullet that the applicant needs.

MR JUSTICE ROTH: Well, it won't. I mean all these things as you put it would be extraordinary if there were no surveys of how households dealt with their finances at various times. There may be other sources.

But this will look at savings, borrowings and spending patterns probably.

MR HOSKINS QC: Sir, possibly. The point I make is that whilst one might think that relevant material is available and might well be available, in this case in which I think it's fair to say, and this is intended as a compliment, no stone has been left unturned by the applicant and his team.

They have made a very frank admission, they have not been able to identify what they need. Now I think it's fair to assume that they will have looked long and hard for it before they make the admission that they do in section 46(c).

And I say you should proceed on the basis of what is in front of you rather than speculation as to what there might be. Particularly in circumstances where the onus is on the applicant to satisfy the Tribunal in relation to commonality.

Again the issue of commonality is not at large, it is for the applicant to satisfy you all in relation to commonality.

And the second methodology point, this is the one at paragraph 47, it's called the

second approach, which is, "To limit compound interest to the sub class of borrowers". And that's said to be, you will see in the second sentence there, "on the assumption that the money lost by the sub class members would have been used to reduce debt rather than build up savings".

You'll see the reference to the assumption in the middle of the paragraph.

Now this wasn't put forward with any great enthusiasm on behalf of the applicant. In our estimation that's because it is patently unworkable. And sir, you teased out some of the problems with it in your dialogue with Ms Demetriou.

But for example there is no identifiable sub class of "borrowers". As we have seen, consumers may be savers, borrowers and spenders at the same time. And as you pointed out to Ms Demetriou, their behaviour may change over time. So the idea that you can come up with a sub class to deal with this issue, is we say, simply unrealistic.

And equally the assumption that an individual would reduce debt rather than increase savings or spending, is neither justified nor supported by any evidence.

But it is in our submission quite clear that in response to an over charge or indeed the lack of an over charge, because that's what we're considering, rather than for example paying off debt, some class members may simply have spent more.

It's the £2.00 extra in your pocket at the end of the month. Do you rush to the building society to put it in your loan account or do you spend it in the pub? Some would, some wouldn't. But you can't assume, as a class, that everyone will be fiscally prudent in this way. That again, without any evidence, is just not realistic.

And sir, unless you or the other members have any questions, that's what I want to

submit in relation to compound interest on behalf of Mastercard.

MR JUSTICE ROTH: If it's not a common issue, not all issues have to be common issues, do they, in collective proceedings?

MR HOSKINS QC: They do not, sir, as you correctly said in your initial judgment in this case.

MR JUSTICE ROTH: So does that prevent it from being included?

MR HOSKINS QC: Do you mean in the action or in the action as a collective issue?

MR JUSTICE ROTH: In the action as -- no, not as a collective issue. In the collective proceedings.

MR HOSKINS QC: It can be in a collective proceedings but not itself certified as a collective issue. And I took you to the rule, rule 74 sub 6.

MR JUSTICE ROTH: That says that, let me just turn it up, that it may be limited to some issues. That's a slightly different question. Yes, it may be limited to only some parts of the claim. My question is can it include parts of the claim that are not common issues? Or do you say if it's not a common issue, then it must be excluded?

MR HOSKINS QC: I don't say the latter. It reflects the slightly tentative debate you and I had with each other at the outsets of my submissions.

And it's my fault rather than yours, sir, I certainly reached the landing that you could have this collective action going forward with certain issues being certified. But what you don't have to do in the order is then exclude, for example, compound interest.

So what that would mean is that at the end of the action for example if individual claimants did want to come forward in this action, and try to obtain compound interest on individual basis, they could do so.

That was my understanding, but I apologise, as I demonstrated, I didn’t quite have

the --

MR JUSTICE ROTH: Yes, because what we have to decide in our order which I think it's common ground that we're going to make a collective proceedings order, the question is, what's its scope?

Subject to the point about Mr Merricks and the issues on the funding agreement. So there's that on the authorisation.

But as far as the claims, that we make the order, we don't certify all the claims, do we? Or every issue in the claim?

MR HOSKINS QC: No. In reaching the -- there's not a requirement to state in the CPO what all the common issues are, that's an exercise you will go through in deciding whether to make a CPO. But from recollection I don't believe -- it's rule 80.

MR JUSTICE ROTH: Thank you.

MR HOSKINS QC: Sets out what you -- the collective proceedings order must contain.

MR JUSTICE ROTH: No, it does say, d, on d, "The claims certified for conclusion, class representatives", but I think that means what the nature of the claims are.

MR HOSKINS QC: That's right.

MR JUSTICE ROTH: It's not, it's sort of issue by issue within the claim. So in this case it's a claim for breach of competition or by the unlawful MIF.

MR HOSKINS QC: And sir, that's why I think we're both right, that if you don't certify compound interest as a collective -- or you find it, sorry.

If you find that compound interest is not a common issue and the action proceeds and you come to a conclusion on the primary loss and you make an award on an aggregate basis, that will then not prevent members of the class coming

forward in the context of these proceedings to claim compound interest on an individual basis.

MR JUSTICE ROTH: What I'm wondering is, not that I'm seeking to duck it, but if it goes forward whether it's not then a matter for the trial stage to decide whether it's possible to calculate, not just to calculate, but to establish therefore causation and quantum compound interest for the class or not. And that they will, the Tribunal, will consider that when it deals with the action. And it's not something that we necessarily need to determine at this stage. That's the question I'm raising really.

MR HOSKINS QC: I understand. Sir, I can see you have to address the question of is it a common issue. And that may or may not, as we discussed and have agreed, if it's not a common issue, that in itself doesn't prevent certification.

Having decided what is and is not a common issue, there is then a case management power on the part of the Tribunal to decide how the matter should be determined at trial. And in my submission as a matter of case management you would be entitled say, "I've found. I've heard detailed arguments, I found that compound interest isn't a common issue and I'm not going to permit it to be pursued as such at trial".

MR JUSTICE ROTH: Yes, but we could deal with that or it could be left to the trial Tribunal possibly after more investigation of how it might or might not be established.

MR HOSKINS QC: Well, then I think what we'd have today is a finding by the Tribunal of whether this is or is not a common issue.

And then the question of what should flow from that, I can see you can decide either for this Tribunal or for the trial Tribunal, how that should be case managed.

But I think having heard argument on whether this is a common issue, clearly it

would be desirable for a determination on that issue to be reached.

MR JUSTICE ROTH: Yes. Because I think in the Guide we say somewhere, speaking from memory, that --

MR HOSKINS QC: You wrote it a long time ago, sir.

MR JUSTICE ROTH: It is a long time ago and no doubt some of it needs revision in the light of Merricks, but not I think, this point.

But I can't now put my -- it is a contrast, as I recall, with the US requirement where you also have the concept of common issues, maybe slightly differently defined. But the US certification requires the court to be satisfied that the common issues predominate over the individual issues.

And that's not a requirement in UK statute. And I think that point is made somewhere but right now I'm not sure where that is.

MR HOSKINS QC: I am just wondering whether it's even in the rules.

MR JUSTICE ROTH: I doubt it because it's a comment on the difference with the US regime.

In any event I mean that's certainly the position and it was a legislative choice. And my attention is being drawn to it helpfully by one of the other members.

Yes, it's just above para 6.38. But I think that supports your point, the first complete paragraph on the page, “Where only certain issues in the claims constitute common issues, there is no requirement that those must predominate over the remaining individual issues in order for it to be suitable for the part of the claim covering the common issues to be brought in the collective proceedings". Yes.

That's the passage I was thinking of, yes.

MR HOSKINS QC: And I just wanted to say, to add, that in a case in which, I'm sorry this is going to be a bit abstract because I'm just thinking on my feet. But

in a case in which you have seven potential issues, and one or two of them are common, but they're important issues, so you've got two important issues that are clearly collective. And it's clearly desirable that they should be dealt with on a collective basis.

Yes, it might be a liability …. and then you've got five other issues that might be quantum issues that are clearly not common. It can't be the case that in order to have collective proceedings, for example on the liability issue, the Tribunal has to say okay we'll have everything collectively. That would clearly be undesirable.

MR JUSTICE ROTH: Yes.

MR HOSKINS: But, equally, that can't mean that, where the liability is collective and you have a collective proceeding to determine liability, when the individual claimants then come on the back of the liability judgment and say, "We would now like damages" it can't be the case that the defendant can say, "Ha ha you're time barred".

MR JUSTICE ROTH: No. No. That seems …

MR HOSKINS: The ability to do so must be preserved within these proceedings otherwise that clearly would be unfair. And that's our submission.

MR JUSTICE ROTH: Yes. It's within the proceedings, yes.

MR HOSKINS: Yes.

MR JUSTICE ROTH: And that I think is also mentioned somewhere else. Yes. Yes. Yes, thank you.

MR HOSKINS: Thank you. Now there's 15 minutes that may be -- I hope I'm not alarming him too much, whether Mr Cook is ready to deal with the undertaking issue. He might have been expecting to deal with it tomorrow. If you do I hope you'll give him some leeway. But …

MR JUSTICE ROTH: Well, as things stand, you've got time tomorrow obviously to deal with the deceased persons issue and on the timetable you've got two and a half hours for that which I expect you're not going to need, are you, the full two and a half hours?

MR HOSKINS: Not on my usual form, no, sir.

MR JUSTICE ROTH: So it may be that it's more satisfactory to hear Mr Cook in the morning and that shouldn't prevent you concluding by lunchtime, should it?

MR HOSKINS: I wouldn't have thought so, no.

MS DEMETRIOU: At what?

MR HOSKINS: At the undertaking. (inaudible) your arguments, to be precise.

MR JUSTICE ROTH: Sorry.

MS DEMETRIOU: So sorry.

MR JUSTICE ROTH: Did you want to address us?

MS DEMETRIOU: I did actually but I was not addressing you in that moment. I'm sorry.

MR JUSTICE ROTH: Right. Well what I was proposing, Ms Demetriou, is that we should rise now and hear about the undertaking in the morning.

MS DEMETRIOU: Yes, I'm happy with that. I did actually want to briefly update you in relation to the funders point.

MR JUSTICE ROTH: Yes. If you are able to do that, yes.

MS DEMETRIOU: Yes. We will send you later the text but essentially the funders have agreed to adopt the wording in the old funding agreement which you took us to and insert it in this funding agreement. But we'll send you the revised text later but I wanted to update the Tribunal on that.

MR JUSTICE ROTH: Yes, that's very helpful. Thank you.

MR HOSKINS: Sir, sorry, just one more point. Sorry to outstay my welcome. But

someone has very helpfully pointed out paragraph 6.4 of the Tribunal guide which is at 6.187 of the purple book.

MR JUSTICE ROTH: 6.4.

MR HOSKINS: Of the guide.

MR JUSTICE ROTH: Yes.

MR HOSKINS: "Collective proceedings are governed by rule 75 93. They have four main stages: making a CPO, trial of the common issues, determination of any individual issues."

MR JUSTICE ROTH: Yes. Yes, that is helpful. Thank you.

MR HOSKINS: "and distribution of any damages."

MS DEMETRIOU: Sir, can I raise one further point which relates to the undertaking? I'm not at all trying to force Mr Cook to make his submissions early and I appreciate what you say on that but our difficulty in relation to the undertaking is that we've never been told the basis or the reason for it. And it would really be helpful so that we can take instructions overnight if Mr Cook could at least give us the punchline of his submissions, or at least indicate why, the basis on which they say it's appropriate in this case. We have attempted to elicit that in correspondence but we've never been told. And that's really why things have not moved forward. And so if we could be told, if Mr Cook could tell us the basis on which he says it's appropriate, even if he's not developing those submissions, it may enable us to move things forward.

MR JUSTICE ROTH: Well if it will have that desirable effect, that would be helpful. So I don't know, Mr Cook, if you're in a -- we can't see you at the moment but no doubt you'll join us, if you're in a position to give us, as it were, the headlines and with main text to follow. Mr Cook, are you there? It may be he, Mr Cook, took my earlier observations as a good reason to go off and do

something more productive.

MS DEMETRIOU: (inaudible)

MR COOK: There.

MR JUSTICE ROTH: Mr Cook, hello.

MR COOK: No, no. I was online, sir, but just struggling to bring my camera back online.

MR JUSTICE ROTH: Well I think you heard what Ms Demetriou said and if you're able to just outline the headlines of where you want to go and I think my understanding is then she'll consider that, rather her clients will consider that, with the funder.

MR COOK: Yes. I'm slightly surprised by Ms Demetriou's continuous repetition of the fact that she doesn't think we set out our position on the basis it has been something that we've repeatedly set out in both correspondence and indeed our skeleton argument.

Our position on sort of the broad lines of this are essentially that this is a case which involves in damages, in cost terms, given the complexity and sums in dispute, very substantial amounts of money, with the funder providing potential exposure for, or potential consideration for, up to £15 million of Mastercard costs so it's a very substantial sum indeed. And in circumstances in which we are essentially going to be left immediately, or initially at least, with a claim against Mr Merricks who, as far as we're aware, simply has nothing like that amount of money personally. And then a situation in which Mr Merricks will make a claim against the funder under the funding agreement and, in due course, money they put up will come to us. And we would simply like to be in the position where we can short circuit, or ensure, that we have direct rights against the funder where the funder is accepting a responsibility to essentially

make that payment in respect of Mastercard's costs.

Now our sort of starting position to some extent is it must be an understandable commercial concern on Mastercard's part that it should have the ability to recover such substantial sums. We are surprised that this is something that the applicant and the funder have been so entirely resistant to and without ever setting out any form of reason why this creates any form of commercial difficulty or problem particularly in circumstances where exactly the same proposal in the rail tickets collective proceedings was, as far as we can see, immediately accepted by the funder in that case as being a perfectly understandable request and agreed to.

So essentially as soon as we made what seems to us to be a sensible suggestion and it's met with a blank refusal without any justification that raises its own concerns in that regard. So it's the size of the amounts in dispute, the desirability of having direct ability to enforce and we also pray in aid what you get from analogous case law in circumstances in which it's often common to make security for costs orders against funders in, for example, high court action. And we've referred to the RBS rights issue litigation specifically for this reason because ultimately in these kind of cases and the RBS rights issue litigation was it's a group litigation order so what you have is a very large number of individual claimants who are strictly severally liable for costs but individually may not be worth it or certainly not cost effective to pursue. And Mr Merricks is in the same consideration in the sense personally he is not worth the money. That simply imposing a right of direct enforcement is an effective form of security.

So those are the concerns and the considerations just in summary and I'll develop them in a little bit more detail tomorrow. And to some extent we're surprised

that there's been a blanket refusal to engage with the proposal or give us any justification for why it's unacceptable or problematic.

MR JUSTICE ROTH: Did this Tribunal say something on analogous lines in the, I'm sure you've looked at it, the judgment on dealing with funding arrangements in the *Trucks* litigation I have a vague memory. Often my memory plays tricks on me but I do recall certain issues about rights against the funder in that case. You might want to look at that overnight.

MR COOK: That's very helpful and we will look at it again.

MR JUSTICE ROTH: Which went to the Court of Appeal but not on this point.

So, Ms Demetriou, I think you've got the headlines and I suppose what it comes down to that it's no in any way disrespect to Mr Merricks to say that with that sort of money involved they're concerned that, as it were, they're dependent on, apart from anything else, on the solvency, continuing solvency, of an individual and having to go through someone rather than directly. I think that's what it comes down to.

MS DEMETRIOU: Okay. If that's what it comes down to I'll address that tomorrow and we'll take instructions overnight.

MR JUSTICE ROTH: Yes. Very well. So we'll say 10.30am tomorrow and we'll start, I don't know if we start tomorrow, with the undertaking. Perhaps we start with the deceased persons.

MR HOSKINS: I think I'd prefer to do that, sir, because obviously that's the one that should take more time.

MR JUSTICE ROTH: Yes. And you will be getting your draft amendment by 6.00 pm. 10.30 am tomorrow. Thank you very much.

MR HOSKINS: Thank you.

(Adjourned until 10.30 am, Friday, 26 March 2021)