**IN THE COMPETITION APPEAL TRIBUNAL**

Case No.: 1381/7/7/21

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

Tuesday 19 October 2021

Before:
The Honourable Mr Justice Waksman
Eamonn Doran
Derek Ridyard
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Justin Le Patourel

**Class Representative**

-v-

(1) BT Group PLC
(2) British Telecommunications PLC

**Defendants**

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# A P P E A R AN C E S

Ronit Kreisberger QC, Nicholas Bacon QC, Nikolaus Grubeck and Jack Williams (instructed by Mishcon de Reya LLP) appeared on behalf of the Class Representative
Sarah Ford QC and Sarah Love (instructed by Simmons & Simmons LLP) appeared on behalf of the Defendants

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**Tuesday, 19th October 2021**

**(10.30 am)**

**CONSEQUENTIAL MATTERS**

**MR JUSTICE WAKSMAN:** Good morning, everyone. The usual important introductory remarks. These proceedings are being live streamed and of course many are joining on the Microsoft Teams platform. I must start therefore with the customary warning. These are proceedings in open court, as much as if they were being heard before the Tribunal physically in Salisbury Square House. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual of these proceedings, and breach of that provision is punishable as a contempt of court.

Good morning in particular, Ms Kreisberger and Ms Ford. The order in which we would propose to deal with consequential matters today is as follows.

First of all, the substantive order.

Secondly, the question of costs.

Thirdly, the question of permission to appeal.

On the question of the substantive order can I first, please, go to Ms Kreisberger, in relation to the matters which we raised in the letter last week and which you have responded to through your solicitors yesterday about changes to the litigation funding agreement, which is essentially between you and the class members.

Can you just give us a progress report on that, please?

**MS KREISBERGER:** Sir, I am going to hand over to Mr Bacon for that one.

**MR JUSTICE WAKSMAN:** All right. Thank you, Mr Bacon.

**MR BACON:** A very good morning to you. I hope you can hear me okay.

**MR JUSTICE WAKSMAN:** Yes.

**MR BACON:** We have received confirmation from Harbour. They have considered the recommendations and there is no difficulty with those recommendations. I have actually seen over the last couple of days some drafts and I am confident that the Tribunal's observations will be met entirely in respect of amendments to the LFA, in both areas, both as to settlement and as to the mechanism for resolving disputes about settlement.

**MR JUSTICE WAKSMAN:** Thank you. Can I therefore suggest the following. First of all, I will include within the order an undertaking on the part of the PCR to -- I am reading here from your letter -- to agree to amend the litigation funding agreement in line with the Tribunal's -- amend those two paragraphs, 8.3 and 9.1, in line with the Tribunal's comments in *Merricks*.

Then we need to have a date by which the amended agreement can be produced. That can be part of the undertaking as well. How long is it likely to take do you think?

**MR BACON:** Well, it is agreed, like all these things, sir, the recommendations have been made. They have been agreed in principle. The question is ensuring that the directors, at a doubtlessly specially convened meeting, approve it. If you could give me a moment, I can probably make some enquiries direct with Harbour, if I can be given that.

**MR JUSTICE WAKSMAN:** I would have thought first off we would be content with something like seven days.

**MR BACON:** Yes.

**MR JUSTICE WAKSMAN:** But it is something that needs to be sorted out fairly quickly and it should be capable of doing that.

**MR BACON:** Leave it with me and certainly by the conclusion of these proceedings we will have a timetable.

**MR JUSTICE WAKSMAN:** Thank you very much.

Then we turn to the substance of the order insofar as there are issues between the Claimant and the Defendants.

Ms Kreisberger, I think the first issue, if it is still an issue, is the question of the format of the Particulars of Claim. I see that you agree with the Defendants to the extent of bits that you say don't need to be pleaded to, but there's still a question, I think, as to whether it should be repleaded. What do you want to say about that issue, first?

**MS KREISBERGER:** Thank you, sir, I am grateful. That's quite right. I am in the Tribunal's hands on this one. We raised the issue. We agree that there's clearly no point -- it would be wasteful to plead to parts of the Claim Form that go to certification. That has now been decided. It seems to us that repleading the Claim Form is just an unnecessary and wasteful step, and it's just a way to inject further delay and cost. So we say, as far as there are parts that go to certification, those have been identified and they are the subject of agreement between the parties and they are set out in paragraph 13 of the draft order. That's at tab 4, page 132 of the bundle.

**MR JUSTICE WAKSMAN:** Right. Just one moment. I see. So the way you are doing it is they simply don't need to address those paragraphs at all?

**MS KREISBERGER:** Precisely, sir.

**MR JUSTICE WAKSMAN:** Yes.

**MS KREISBERGER:** It seems to us that would do the trick.

**MR JUSTICE WAKSMAN:** Yes.

**MS KREISBERGER:** Those are agreed. So that's not in dispute. BT, and Ms Ford

will need to address you on this, but I think I can pre-empt it, BT objects to two other aspects of the Claim Form. The first is the Ofcom summaries. Sir, I can take you to that part of the Claim Form, if helpful, but you may recall the Claim Form summarises the Ofcom review and the various documents generated.

**MR JUSTICE WAKSMAN:** Yes.

**MS KREISBERGER:** As the Tribunal found in its judgment, the Class Representative is perfectly entitled to rely on the Ofcom review. We don't say it is binding, but we rely on it. The fact that it is not binding is neither here nor there, for these purposes. So those sections which summarise the Ofcom review remain part of the particular claim of the Class Representative. So no need for anything further on that front.

BT's other complaint is that there are references to the Parker report. You will recall the Claim Form was served with the Parker report, as is usual in these proceedings.

**MR JUSTICE WAKSMAN:** Yes.

**MS KREISBERGER:** My submission, and I can take you to one of those references if it is at all helpful, but I am sure you don't want to go through each one of them. The position is that the allegation in the Claim Form in each instance is clear, and the fact that there is also a reference to the Parker report doesn't cause BT any prejudice. The allegations are clear. BT can plead to the allegation. In time-honoured fashion, BT can always say "paragraph X is noted" - so this is there. The Claim Form (inaudible). It would just be contrived, but also unnecessary to airbrush those references out at this stage. So that's my submission on the Parker report references.

**MR JUSTICE WAKSMAN:** Right.

**MS KREISBERGER:** I should perhaps say BT also made a veiled reference to "in

the style of a pleading". I am not quite sure what they are getting at, but when this Claim Form was prepared, it was very much in the Class Representative's mind that this would be a pleading that carries forward beyond certification. So they are Particulars of Claim in the traditional way.

**MR JUSTICE WAKSMAN:** Thank you. Yes, Ms Ford.

**MS FORD:** Sir, as the Tribunal will be aware, the purpose of an exchange of pleadings is for the parties and the Tribunal to identify the matters that are between them and that require to be resolved in the proceedings, and the matters that are not, and then future case management decisions, such as disclosure, evidence, expert evidence and such like will then be taken on the basis of those pleadings.

In our submission, the Claim Form, in its current form, was produced for a different purpose, which was an application for certification, and it is not in a form which makes it efficient or conducive to plead to it as a matter of a pleading exercise.

We simply say, rather than approach this by deleting a paragraph here and a paragraph there, it would be more appropriate for the Claim Form to be put in a post certification format. If I can just show the Tribunal the sort of thing we mean.

**MR JUSTICE WAKSMAN:** Yes.

**MS FORD:** The Claim Form is behind tab 3 in the bundle.

**MR JUSTICE WAKSMAN:** Right. Yes.

**MS FORD:** If we start from paragraph 1, it says:

"This is an application for a collective proceedings order."

Obviously, it no longer is. You then see:

"The Applicant makes this application for a CPO permitting him to act as the class

representative."

Well, that's no longer the case.

**MR JUSTICE WAKSMAN:** You have agreed about that. I thought you have already agreed that you don't need to plead to those things, or is it not --

**MS FORD:** We have agreed certain paragraphs be excised as illustrative -- in fact this is not one of them. This is really illustrative of a broader problem, which is it is a Claim Form which was produced for a particular purpose. We simply say it would be better if it were adapted to be appropriate post certification.

If you turn for example to paragraph 5, you see references to the proposed class and the proposed sub-classes, and those references throughout the Claim Form. They are no longer appropriate in the light of the Tribunal's decision to certify.

Paragraph 7 sets out the structure of the Claim Form, in the light of the Tribunal's rules and guide for an application for certification.

Paragraph 8 then says:

"Accompanying this Claim Form are the following documents in support of the application for a CPO and the Claims."

It sets out the various documents. What we see is a document which is structured and set out for the purposes of certification, and we say much more appropriate if it was simply turned into a form which is more appropriate to plead to.

If we go on in the document, you can see, for example, some of the references to the expert's report that we say you would not normally see in a pleading.

If you look at paragraph 22, you see the statement:

"On the basis of his own analysis of the publicly available data, arising out of the 2017 Review, the Parker Report has concluded that, during the applicable Claim Period, BT holds/held a dominant position on the relevant markets and

that it abused its position in those markets."

Now, one would not normally see and be required to plead to statements about what has been concluded in an expert report. One would normally see the propositions pleaded on the basis of which it is contended that BT is dominant and on the basis of which it is contended that BT abused its dominant position, not the facts of an opinion.

If the Tribunal looks at paragraph 23, you see a plea as to the Proposed Class Representative's belief that the prices for standalone residential landlines which form the subject matter of the claims infringe the Chapter II prohibition, and so on.

Again, in my submission, statements about the Proposed Class Representative's belief are not relevant to the claim as such and are not the sort of form that one would normally plead to. You would expect to see the propositions of fact set out to which BT should be required to plead back.

Paragraphs 24 to 73 then contain a summary of Ofcom's findings. That runs to some 19 pages. We fully accept that the Class Representative is entitled to set out propositions from Ofcom's findings on which it purports to rely, but in our submission, in circumstances where what has now been certified is a standalone claim, and these findings are not binding and required to be proven, it is not efficient to require BT to plead back to 19 pages worth of summary of what Ofcom says. In our submission, the Tribunal is unlikely to be assisted by such a lengthy engagement with what Ofcom has said.

If you then turn to paragraphs 75 to 81 you have a description of the proposed class.

Then 92 to 101 are paragraphs which it has been agreed are examples which do not need to be pleaded to.

**MR JUSTICE WAKSMAN:** Yes.

**MS FORD:** Paragraphs 103 to 140 are other examples where propositions are pleaded by reference to the Parker report. Again, one would not normally see at a pleading stage cross-references to expert evidence. One would normally plead the propositions and the expert evidence then follows from that.

Paragraphs 107 to 119 contain contentions of law. The Tribunal will see the heading "Contentions of Law" above those paragraphs.

Again, those are required by virtue of the rule for the purposes of certification, but one would not normally be required to plead to a series of propositions of law in response to a Claim Form.

You then see at paragraph 125 a further reference to the Parker report.

We simply submit that the Tribunal might be best assisted by a set of pleadings which is directed at the claims which the Tribunal has now certified and not an application for certification.

**MR JUSTICE WAKSMAN:** Just one moment. I understand what you are saying about the extensive references to Ofcom, but the guts of it, as far as the actual contentions are concerned, really start at 106. One doesn't have to plead or usually plead contentions of law, although I don't think that it's necessarily unhelpful here, because there are differences as to what the legal position is and, in any event, let's take dominance at paragraph 111. They would be entitled to contend that that's the dominant position as they contend that it is.

Similarly, in 112, they would be entitled to plead that it's in excess of 50%. Then they are entitled to contend what they say abusive pricing is.

You may want to say in your defence: "Well, we don't agree that's what abusive pricing consists of" or "We don't agree with the *United Brands* test, if it is a test in the way that it is formulated".

I think, and I am sure I speak for the other members of the Tribunal, that that sort of issue we would be helped to see on the pleadings, because we know we had extensive discussion about it at the hearing, although ultimately it didn't matter too much.

Then there are the particulars of infringement, which are given below. They say in paragraph 124 what they say the relevant markets are, and we know there is an issue about that, and they give their alternative contentions. Then, so far as dominance is concerned, they set out the particulars of dominance and then they set out the particulars of excessive pricing.

So I can see your point, Ms Ford, that, as it were, the core of what you are going to have to plead back to is from 107 onwards, but I don't think you are suggesting that you can't plead back to it. The only question is what to do with what goes before. If that's right, is there really a problem?

**MS FORD:** Sir, I am certainly not suggesting we can't plead back to it, although normally one wouldn't plead to the propositions of law in the form of a skeleton quite in that way. We simply make the point that in terms of efficiency, one would not normally have to plead back to a document which is targeted at a different thing.

Sir, insofar as you make the point that the core of the claim is here, one would think that it is not a difficult exercise for the Class Representative to express the core of his claim in a way which is more conducive to being pleaded back to rather than in a way which is essentially an application for certification.

**MR JUSTICE WAKSMAN:**

**Ruling on claim form**

(For Ruling, see [2021] CAT 32)

Ms Kreisberger, is it then the case that the next question is time for service of defence?

**MS KREISBERGER:** That's right, sir. Just turning back to the CPO at tab 4.

**MR JUSTICE WAKSMAN:** Yes.

**MS KREISBERGER:** You will see our proposal there. So we propose 16th November for service of the Defence. That's 28 days from today.

**MR JUSTICE WAKSMAN:** Yes.

**MS KREISBERGER:** That's the usual period under CAT rule 35. Section 47A, monetary claims. Of course, sir, you will have the point that this would be ten months on from service of the Claim Form, which was on 18th January. On any view, this is a generous allowance for BT. Ms Ford is asking for three months from today, as I understand it. The Class Representative just wants to get on with this. Again, sir, we are in your hands, but 28 days would seem more than average, given where we are.

**MR JUSTICE WAKSMAN:** Right. Let me hear from Ms Ford then, please.

**MS FORD:** Sir, we do seek three months. We say that it is not appropriate to direct BT to provide a Defence within 28 days of this hearing. That would be the period of time that's appropriate in the circumstances of a single claim and, of course, in the Commercial Court even that period, a period of 28 days, it would be possible to agree a 28 day extension to that.

In our submission, these are complex standalone excessive pricing claims. They also raise complex issues of causation of loss, pass-on, mitigation. So in my submission it is not appropriate to direct the absolute minimum period of time for a provision of a Defence to a complex class action of this nature.

I note the point that Ms Kreisberger makes, that this is ten months from the service of the Claim Form. In my submission, there can be no criticism for BT having

not progressed its Defence to date. It was reasonable, in my submission, for BT not to have done so, given, first of all, the Class Representative's position that the claim might not proceed at all, if it was certified as an opt-in rather than an opt-out.

As the Tribunal is aware, we are also seeking a stay of proceedings pending an appeal, and in those circumstances it wouldn't have been appropriate for us to incur costs proceeding with the Defence until now.

I also make the point that if the Tribunal looks at the directions that are being sought, which is tab 4, page 132, there is a proposal that there should be a second CMC -- this is paragraph 15 -- in Michaelmas term 2022. So that is really the next procedural step that's being proposed. In circumstances where the next CMC is going to be essentially in a year's time, in my submission, there is no great urgency, no real good reason why BT should not be permitted a period of three months in which to produce a proper Defence to the claims.

**MR JUSTICE WAKSMAN:** Can I just ask you this, please, Ms Ford? I think we saw a reference to it, but you have your expert already instructed. Is that right?

**MS FORD:** May I take instructions for one second?

**MR JUSTICE WAKSMAN:** Yes, of course.

**MS KREISBERGER:** Sir, is it just helpful to correct -- there is some debate about whether Michaelmas is the right term.

**MR JUSTICE WAKSMAN:** I think you mean Hilary.

**MS KREISBERGER:** January, February 2022.

**MR JUSTICE WAKSMAN:** Yes, yes.

**MS FORD:** Sir, I am not sure what source you are referring to in terms of BT having instructed an expert. We have spoken to experts in the context of the application for certification proceedings.

**MR JUSTICE WAKSMAN:** Yes.

**MS FORD:** We have not yet formally proceeded to instruct experts for the purposes of the certified proceedings.

**MR JUSTICE WAKSMAN:** That's all right. It is not part of your application for a three month period to say: "We won't be able to take guidance from an expert, insofar as we need to, for the pleading". That was the only point that I was trying to address. That doesn't seem to be part of your time point. You are just saying it is a big case and it is complicated.

**MS FORD:** Sir, I don't take the specific point that it is necessary to take instructions from a particular expert, but I do say, in circumstances where a single standalone claim would normally be given the period of 28 days, a complex collective action such as this, in my submission, merits considerably longer.

**MR JUSTICE WAKSMAN:** Thank you. Anything you want to say in reply, Ms Kreisberger?

**MS KREISBERGER:** Thank you, sir. I have made the point.

**MR JUSTICE WAKSMAN:** Yes.

**MS KREISBERGER:** As I say, I apologise for the error. The intention is for a CMC in early 2022, but BT have had the judgment since September and are well versed in the issues. I understand the same experts -- well, they have had experts instructed for the Ofcom review as well. So maybe they have experts well versed in these matters too.

**MR JUSTICE WAKSMAN:** Yes.

**MS KREISBERGER:** Sir, those are our submissions. Just to point out on that, you, sir, you have on this timetable that our Reply would be served before Christmas, by 14th December. That's paragraph 14.

**MR JUSTICE WAKSMAN:** Well, just a moment. You are saying that they should

serve it by -- when were you saying -- a month from today or something?

**MS KREISBERGER:** Yes. That's 16th November.

**MR JUSTICE WAKSMAN:** 28 days from today?

**MS KREISBERGER:** 28 days from today.

**MR JUSTICE WAKSMAN:** 28 days from today. That's on the basis then that you are going to have your Reply, which is --

**MS KREISBERGER:** 28 days from the --

**MR JUSTICE WAKSMAN:** That's 28 days from the Defence. Right.

**MS KREISBERGER:** The intention is to allow a CMC early in the New Year.

**MR JUSTICE WAKSMAN:** Yes. All right. Well, we have had an opportunity to think about this. We are prepared to give a little bit more time than a month. We don't think that you can have downed tools entirely on the basis that there might be a stay hereafter, or on the basis that the collective proceedings order application, as it were, might fail, and more importantly, of course, both sides have been up hill and down dale on the very question of merits, which is what the Defendants are now going to have to deal with in their Defence in some considerable detail, as our judgment shows. So we don't think that we need anything like three weeks (sic). What we propose -- what we will order is that the Defence be served by Friday 3rd December. We think it particularly important that it is done before Christmas.

Ms Kreisberger, I appreciate that means that your Reply might go on the other side of the Christmas break, but I don't think that is unduly going to affect the timing of the CMC, say, in February of next year.

**MS KREISBERGER:** I am grateful, sir. Of course, we will accommodate that. Could I come back to you on the timing of the Reply, if I might just take instructions on that?

**MR JUSTICE WAKSMAN:** For my part, but I would hear Ms Ford on it, there is the Christmas break. By the same token, you have an idea of what they are likely to say in their Defence. If you had 28 days, then that would take you through to 31st December. I think one has to give a bit of leeway on that. I would be content with 7th January. Do you have any observations on that, Ms Ford?

**MS FORD:** Sir, we don't have any objection to that.

**MR JUSTICE WAKSMAN:** No. Thank you. Right.

**MS KREISBERGER:** Sir, if I might just take instruction. Holiday absences do tend to stretch into that week. That's generally holiday, and with school holidays and so on, I think that if the following week didn't do any damage to the timetable for a February CMC, that may be better.

**MR JUSTICE WAKSMAN:** Yes. I think the Tribunal is of the view this matter needs to be progressed as speedily as is fair and is possible. We have given you another week there. Not everybody stops work entirely for the week before Christmas and after Christmas, even into the first week in January.

Secondly, if one wants to have a CMC in January or even in February, there's got to be a decent amount of time for the Defendants to review the Reply before then dealing with the rest of the action. So I think we are going to leave it at 7th January.

**MS KREISBERGER:** I am grateful, sir. Thank you.

**MR JUSTICE WAKSMAN:** Thank you. I think that then deals with the substantive elements of the order, unless there's anything I have missed.

**MS KREISBERGER:** No, sir, you haven't. I am assuming that you are happy with those parts which aren't in contention, domicile date, opt-out date and so on. They are provided for at paragraphs 9, which is the domicile date, and paragraph 10 is the opt-out date. These are matters which don't concern BT.

They concern the --

**MR JUSTICE WAKSMAN:** No, but can I just check, just for the sake of completeness, we are going to add a recital, which didn't appear formally in the judgment but it should appear here, simply to say that we are satisfied that Mr Le Patourel, is indeed -- it is just and reasonable that he acts as the authorised class representative. We will add that in the order.

Secondly, CMC. You are going to have to -- can we be a bit more specific? Can we say February 2022?

**MS KREISBERGER:** Yes. Thank you, sir.

**MR JUSTICE WAKSMAN:** Then it will be a matter of, in the usual way, counsel approaching the CAT to sort out a date. Just give me one moment, please. I have just been alerted to one particular point. Just give me one second, please.

Thank you very much, everyone. I hope you can hear me. Ms Kreisberger, can you hear me?

**MS KREISBERGER:** I can. Thank you, sir.

**MR JUSTICE WAKSMAN:** We are back. We have just helpfully had our attention drawn to paragraph 6.7 of the guide. I don't think you need to turn it up, but it deals with the position, if at some point prior to trial, a collective settlement agreement emerges and the Tribunal then has to approve it. If the Tribunal does approve it, that's fine. If it doesn't, there is then a problem about that Tribunal being the Tribunal for trial, because they will have seen effectively without prejudice correspondence.

We have looked at this. It seems to us that that is not a matter which affects the case management of the case going forwards at the moment. If that situation arises later on, then at an appropriate stage we can take further directions,

but we think it is probably in the interest of everyone, since we have a reasonable grip of the case, to deal with case management for the time being.

It was rightly pointed out that I should just look at that, because, of course, paragraph 15 of the order in relation to the case management conference identifies us as being those who are case managing. So unless anyone wants to say anything more about it, we will leave things as they are.

**MS KREISBERGER:** I am very grateful for that indication.

**MR JUSTICE WAKSMAN:** Yes. Could we then -- I think if that's right, then we go to the question of costs.

**MS KREISBERGER:** In which case, sir, I will ask Mr Bacon to take over from me.

**MR JUSTICE WAKSMAN:** Thank you. Yes, Mr Bacon.

**MR BACON:** Very good morning to you, sir. Tab 4 of the bundle contains the order. Paragraphs 16, 17, 18 and 19 deal with costs. That is probably the appropriate place to start. They help explain vividly our position.

The first paragraph, 16, we seek an order that the Defendants should pay the Class Representative his costs of and occasioned by the strike-out application, on the standard basis.

I should just preamble this. You will know, from your own experience, there is an obligation within funding agreements, and I have checked this one, Class Representatives are usually under an obligation. They give an undertaking or comply with warranties and conditions that they should seek their costs in appropriate circumstances, so that if it were ever said that there was an opportunity at an appropriate moment to seek cost, this would be it. He has succeeded in defending the strike-out application, and I can't see any principle basis on which there couldn't be an order for that.

In respect of the CPR obligation itself --

**MR JUSTICE WAKSMAN:** Hang on. What I would like to do, Mr Bacon, because there appear to be differing issues between the parties, is do this bit by bit.

**MR BACON:** Yes.

**MR JUSTICE WAKSMAN:** I would first of all like to see whether there is, in fact, any opposition to paragraph 16 dealing with the strike-out application in the form in which it is drafted. Ms Ford?

**MS FORD:** Sir, we don't resist that order.

**MR JUSTICE WAKSMAN:** Thank you. Right, Mr Bacon. Now you can go on to 17.

**MR BACON:** Yes. Now, 17 reflects our position that obviously outside of the strike-out application there were costs of and occasioned by the CPO application itself, and more particularly the resistance to the CPO application, which were not otherwise bundled into the strike-out. It is always difficult to separate vividly the distinction between costs of a summary judgment application or strike-out application and the costs of objections based on other grounds, but they are and they do feature here.

What I have sought to do is identify a date, namely 30th April, which was the date when the Response objecting to the CPO application was filed. It is from that date, it seems to us, that the Tribunal can be confident that any issues of debate, as regards whether or not there should be a CPO flow on any view from that date. They were unsuccessful in respect of the Response document. I have been through it and your judgment is clear. The appropriate order, therefore, is not some sort of muddled, confused order that says "Thou shalt have the costs of and occasioned by the CPO applications to which the response dated "blank" dealt with", because it would be really muddled and confused to try and apportion costs between CPO costs and

Response costs.

Picking the date seems to us to be the most sensible thing. Otherwise you will have a percentage order or a costs judge down the line, reflecting on the same rule, "who on earth agreed to this?" Dates are better, from experience. We all know that. It seems to us 30th April is the right moment at which to flip the costs from costs in case to the Defendants paying the costs.

So that would mean BT would pay, on the standard basis, the Class Representative's costs from 30th April, reflecting their opposition to the CPO, as articulated in the Response. It is that that generated the hearing.

I mean, I have seen the recent correspondence. You will have seen it too. There has been a little bit of correspondence. We will be guided by the Tribunal, but it seems to us the idea that there would have been a two-day hearing, with the requirement for experts' reports and the pleadings and the Reply that went to the Response, had BT simply said "We have no objection to this CPO" is extraordinary, because it is being suggested that all this work would have been necessary anyway. That simply can't be right.

We have floated the idea. It has not happened yet, because the scheme, as you know, is so embryonic. Conceivably, it could have been something that could have been dealt with on paper probably. Your colleagues and yourself would have looked at the application, probably identified any issues you might have had yourselves, and we could have responded to it, but we certainly wouldn't have had the outing that the parties had in this case.

Reflecting as broadly as one can -- one can't be scientific -- the just and appropriate order to make is the order that I have articulated in 17 (a) and (b), picking up costs in case for the CPO costs, save for those that were incurred after 30th April.

**MR JUSTICE WAKSMAN:** Yes. Right. Thank you. Ms Ford?

**MS FORD:** Sir, as you might anticipate, there is disagreement between us on this point.

**MR JUSTICE WAKSMAN:** Yes.

**MS FORD:** We are in agreement that the Class Representative costs of and occasioned by the CPO application up to 30th April should be costs in the case. Where we disagree is the provision in 17 (b) that we should pay the entirety of the Class Representative's costs of the proceedings from the date of our Response up to and including the CPO hearing. We say that that is clearly not a fair reflection of the position. It assumes that if BT had not opposed the CPO, then the collective proceedings could have been certified with no hearing and no further costs incurred and, in our submission, that is obviously incorrect. The Tribunal is required to satisfy itself that it is just and reasonable for the Class Representative to act in the proceedings, and that the claims are eligible to be included in collective proceedings.

As has been found in the Tribunal's judgment, where the Class Representative seeks approval to bring opt-out proceedings, the Class Representative is obliged to make submissions as to why that form of proceedings is more appropriate than opt-in proceedings. That includes, on the face of the rules, a consideration of the merits, because that's one of the factors that the Tribunal is entitled to take into account in determining whether or not proceedings should be opt-in or opt-out.

In our submission, a CPO hearing would have been necessary in any event, and the Class Representative would have had to have made submissions about the appropriateness of bringing proceedings as opt-out.

So it's not appropriate, in my submission, for those costs to be said to be in some

way attributable solely to BT's opposition to the CPO being made on an opt-out basis.

We also say that there were significant costs incurred as a consequence of the Class Representative's conduct in the run-up to the CPO hearing, which should not be borne by BT. We say that merely excluding the costs of and occasioned by amendments which were subsequently made to the Claim Form falls a long way short of actually encapsulating those costs.

We advance two particular examples. First, the Class Representative incorrectly sought to include all deceased persons in the class definition, and opposed BT's suggestions as to corrections to that class definition, up until the second day of the hearing. The parties exchanged lengthy correspondence on this topic throughout June in the run-up to the hearing. Had the Class Representative not opposed BT's position on this until the second day of the hearing, in our submission, a substantial proportion of the costs that were incurred in the lead-up to the hearing could have been avoided.

In addition, there was extensive correspondence about the Class Representative's ATE position in the run-up to the hearing. Eventually the Class Representative conceded immediately prior to the CPO hearing, and provided an undertaking which was intended to address the position in terms requested by BT. Again, that caused costs to be run up in the approach to the hearing.

We were told in the most recent correspondence that was received last night that actually the costs schedule that has been provided does not include costs referrable to the ATE insurance debate which took place, but, if so, we are unclear for what purpose Mr Bacon's attendance at the hearing is included in this costs schedule, because our understanding is that that's the issue for which he was responsible at the CPO hearing.

For those reasons, we say that the post April 2021 costs should also be costs in the case.

**MR JUSTICE WAKSMAN:** Thank you. Mr Bacon, anything you would like to say by way of reply?

**MR BACON:** Yes, I would, if I may.

First of all, Ms Ford does not actually say what the order should be. It sounds as though it should be something like --

**MR JUSTICE WAKSMAN:** I think the high point of her position would be that all the costs, whether before or after 30th April, should be costs in the case. I assume that's your high point. Is that right, Ms Ford?

**MS FORD:** Sir, that's right, yes.

**MR JUSTICE WAKSMAN:** There is a bit of room in between. Right.

**MR BACON:** Well, I suspect it is the bit of room in between that we need to address, because it cannot on any basis follow that having successfully responded to the Response, the costs should be in the case. That would require some explanation in your ruling, sir, plainly.

**MR JUSTICE WAKSMAN:** Yes.

**MR BACON:** There is no disagreement between us that it should be costs in case up to 30th April.

**MR JUSTICE WAKSMAN:** Yes.

**MR BACON:** After 30th April, my learned friend seems to want an order that says something like: "Well, the claimant should have its" -- apart from costs in the case, that there should be some order to reflect the fact that the Claimant should only have those costs that wouldn't have been otherwise incurred.

**MR JUSTICE WAKSMAN:** Just pause there, if you don't mind, Mr Bacon, for a minute, because I think what's being said here, reading to some extent

between the lines, is that it would be wrong to say that all of your costs from 30th April in truth were incurred only because of the position they took on the Response. There would have been costs that had to be incurred in any event because of the oversight of the Tribunal.

Ms Ford's high point might be that applies to all of them. I suspect I am being invited, and she will correct me if I am wrong, that in the alternative I should say that only a percentage of your costs from 30th April they should pay for and the rest would be in case.

**MR BACON:** Yes. As you have seen from our skeleton, we are very much in the Tribunal's hands in respect of that.

**MR JUSTICE WAKSMAN:** Yes.

**MR BACON:** As a matter of principle, I can see that from a principled approach, if the Tribunal was going to require costs to be incurred in any event, without any role on the part of the Defendants, then there would be a principle basis on which to say you shouldn't get these. I can see that.

The fact remains that we would say that here the Defendants took on, effectively, the role that the Tribunal would have otherwise exercised itself. I can't think of -- Ms Ford has not identified I think anything in particular that stands out, under which in her Response she had not raised that the Tribunal itself might have raised. The fact that you might, as a Tribunal, have raised it is not a reason to then deprive the Claimant of the costs, because we were incurring the costs in response to the Defendants' objections and not the Tribunal's inquisitorial exercise.

So that's an important caveat, but it gets very complicated. Unless the Tribunal is clear in its approach that there was inevitably a percentage of the costs that were incurred that wouldn't have been incurred despite the Response of the

Defendants, then I would submit it would be treading on difficult areas then to come up with a percentage.

There has to be some clear marker. To date, in my experience of these cases, successful oppositions in *Merricks* to the CPO didn't result in some sort of quasi order that reflected the fact that the claimant or the defendant wouldn't have had to incur any costs, because there would have been a need for the Tribunal to interrogate the application. This would I think be the first occasion in which the court would be venturing down that route. I question whether it is justified.

**MR JUSTICE WAKSMAN:** Are you saying -- because, of course, the only other one we are talking about at the moment is *Merricks*?

**MR BACON: …**Is *Merricks*.

**MR JUSTICE WAKSMAN:** Are you saying the costs order there -- of course I don't know what arguments were raised in that case.

**MR BACON:** The defendant got its costs, and got a payment on account.

**MR JUSTICE WAKSMAN:** The defendant got its costs. Do you mean the first time round?

**MR BACON:** They got costs because they successfully opposed, but there was not an argument that the defendant should not get all of its costs because the Tribunal might itself have raised objection. That is my point.

**MR JUSTICE WAKSMAN:** Yes. Okay.

**MR BACON:** As with all these cases, we are venturing down new little channels. Unless there is an obvious category of costs that wouldn't have been incurred but for the Response, then the Tribunal shouldn't venture down that route. Bearing in mind the Response in this case was a formidable document, if the Tribunal are satisfied that nothing that was said in that Response left anything

open for the Tribunal itself to be concerned about, then the normal rules should follow. The Respondents should pay the costs of the Class Representative responding to that Response. I mean, that's how we see it.

**MR JUSTICE WAKSMAN:** All right. Well, I think we are just going to take a few moments to confer on that.

**MR BACON:** Thank you.

(Pause.)

**MR JUSTICE WAKSMAN:** We have considered this matter. We don't accept that the Defendants' argument can be side-stepped entirely by saying that points which the Tribunal could legitimately have raised in its own inquisitorial role, as it were, the fact that the Defendants raised them and they have been answered in response to the Defendants' response, that doesn't really avoid the issue, because the question here is whether, in relation to costs which are sought against these Defendants, there are costs which the Claimant would have to have incurred in any event, never mind who raised the point.

We do take the view that in order properly to discharge its functions, so as to be satisfied that Mr Le Patourel should be authorised to conduct this litigation on an opt-out basis, this would involve certainly something more than a mere paper exercise, and would probably have involved a hearing, which may not be very lengthy, but would certainly enable the Tribunal to ask questions of its own right, and questions such as "What happens with deceased persons?" and the ATE insurance position, albeit that have been raised by the Defendants here, would be things which would have come to the Tribunal's attention.

Having said all that, this was a Response which in the event took a number of points on the CPO application, albeit that some of them, apart from the opt-in/opt-out

question, were then abandoned before the hearing, in a way which led to a very significant and intensive two-day hearing.

In our judgment, the right way to take account of the fact that there were some costs post 30th April, which would have been incurred in any event, the obvious and non-complex way of dealing with it is to make some sort of percentage reduction from the costs of the CPO application which the Claimant is entitled to from the Defendants in any event at this stage. The deduction we make is 20%.

So the order will be revised to say that:

"The Defendants shall pay the Class Representative's costs and occasioned -- 80% of the costs of and occasioned by the CPO application from 30th April onwards", with all the rest there. The balance of the 20% will be costs in the case.

**MR BACON:** Thank you, sir.

**MR JUSTICE WAKSMAN:** All right. So that's that one.

**MR BACON:** That's that one. Paragraph 18 is just the costs of today. They will be costs in the case in the usual way.

**MR JUSTICE WAKSMAN:** Yes.

**MR BACON:** Then 19 is a request for payment on account of the costs.

**MR JUSTICE WAKSMAN:** Yes.

**MR BACON:** A schedule has been prepared setting out the costs as though it were a summary assessment. Of course, it is not a summary assessment.

**MR JUSTICE WAKSMAN:** No.

**MR BACON:** Sometimes one gets information far less detailed than this document, but we thought it might be helpful to set it out.

**MR JUSTICE WAKSMAN:** Yes.

**MR BACON:** The total costs are about £1 million. Obviously, there will be a reduction to that reflecting your 20% order, and a reasonable payment on account is sought.

I don't think the principle of a payment on account is objected to. At least I have not seen anything in the skeleton. In fairness to my learned friend, she did reserve her right to make further oral submissions. Perhaps I could just pass that.

**MR JUSTICE WAKSMAN:** Let's go straight to Ms Ford. Indeed.

**MS FORD:** Sir, we don't object to the principle. We do have submissions to make as to the proportionality of the sums which have been incurred.

**MR JUSTICE WAKSMAN:** Certainly. Why don't you do that now.

**MS FORD:** Sir, we have indicated our position in correspondence in our letter of 17th October 2021. We are extremely concerned at what in our submission is a manifestly disproportionate approach to the costs incurred in the run-up to the CPO hearing. As Mr Bacon has just submitted, the Class Representative has claimed approximately £1 million of costs in respect of a period of less than two months, for the purposes of a two-day hearing. In our submission, that is both extraordinary and unreasonable.

The Class Representative's (inaudible) budget anticipated that total fees incurred between the CMC and the CPO hearing would be approximately £818,000, sorry (inaudible) pounds with a further £248,000 plus VAT incurred for the CPO hearing itself. It is said on behalf of the Class Representative that they have essentially come in broadly on budget. In my submission, the budget was based on certain important assumptions which didn't actually occur in fact. In particular, the budget was based on an assumption of a five day hearing rather than a two day hearing that eventually took place. It assumed

that there would be a necessity to review expert evidence served on behalf of the Defendants, when in fact none was filed, and it assumed a time between BT's Response and the CPO hearing of 7 to 8 months, when, in fact, as a consequence of the way in which the matter was listed, there was only a two month period.

In my submission, one would expect those important differences, in particular the reduction from a five day hearing to a two day hearing, to result in a significant reduction in fees. Even if the same work is compressed into a shorter time, which in my submission is by no means (inaudible) because it is well known that work expands to fill the time available to do it, there is no reason why a much shorter hearing with less in dispute should not have led to a materially lower amount of costs. In fact, the Class Representative appears to have run up costs to the level of the budget without in our submission any justification.

If we can look at the statement that has been provided, it is behind tab 6 in the bundle. If we start with Counsel Fees.

**MR JUSTICE WAKSMAN:** I just want to check one thing before we do anything else. Yes. So this is an amalgamated statement, which is all costs from 30th April, bearing in mind, as Mr Bacon says, that there is now going to have to be a dampening by 20% of some of those costs, the CPO related costs. Right. Yes. I have got the statement. Thank you, Ms Ford.

**MS FORD:** Sir, it is pertinent that you query which costs are included, because, of course, we don't have any sort of narrative explanation of what has been included and what hasn't and why. We did receive a letter, around about 5.00 pm yesterday, providing some further clarification, which essentially, in my submission, didn't really clarify matters at all, as to the basis on which these costs have been claimed and some have been included and some have been

excluded.

To put a bit of meat on the bones, can we start by looking at the position for Counsel Fees. The court will see this is on page 150. The court will see if we look at total brief fees charged by Counsel, the Class Representative appears to have incurred fees amounting to 96 and a half days of work between the date of BT filing its Response on 30th April and the first day of the CPO hearing on 21st June. These are the figures we set out in correspondence.

Just to explain where we get them from, if one assumes that the refresher rate constitutes a day rate for Counsel, then Ms Kreisberger's brief fee of £180,000 for a two day hearing is equivalent to 31 days of preparation for that two day hearing.

Similarly, Mr Grubeck appears to have charged the equivalent of 28 days, at a cost of £80,000, and Mr Williams has charged the equivalent of a further 37.5 days of preparation for two days of hearing, at a cost of £75,000. There were in fact only 33 working days between the date of BT's Response to the CPO application and the CPO hearing. So the Class Representative's Counsel team have charged for the equivalent of working to prepare for the hearing full-time, essentially virtually every single day from receiving BT's Response up to the hearing.

The Class Representative's budget assumes that refreshers will be incurred on the basis of a ten hour working day. On the basis of that, on our calculation, the competition Counsel team charged the equivalent of nearly 1,000 hours in less than a two month period and for the purposes of a two day hearing. In our submission, that's a very long way from either being proportionate or reasonable.

**MR JUSTICE WAKSMAN:** Yes. Just as a matter of interest, by way of comparison,

what was BT's costs from the date of its Response up to and including the hearing?

**MS FORD:** BT's competition Counsel incurred a total of £110,453.30 during the same period. So it is roughly a third of the fees that were charged. A point has been taken in correspondence about that, because it doesn't include Mr Richardson of Serle Court's fees, but his involvement was in order to deal with the Class Representative's mistaken stance on deceased persons. In our submission, that clearly shouldn't be included in the amount.

**MR JUSTICE WAKSMAN:** No. So what was BT's total costs for the same period, that is from your Response up to and including the hearing?

**MS FORD:** I may have to ask for some assistance on that figure. I think it may be in correspondence.

**MR BACON:** Unfortunately, it is not. Ms Ford, as you know, we have asked on more than one occasion for you to make a sensible comparison. As I understood it, deliberate or otherwise, you have failed to do so. If I might just add, it is misleading to suggest --

**MR JUSTICE WAKSMAN:** Hang on one second. I am still with Ms Ford. I am not sure she has finished.

**MR BACON:** I understand.

**MR JUSTICE WAKSMAN:** There must be someone who can provide Ms Ford immediately with a figure. Let's just wait for that.

**MS FORD:** I am grateful. The relevant correspondence is behind tab 19 of the bundle.

**MR JUSTICE WAKSMAN:** Yes.

**MS FORD:** Page 187. There is a heading "Conclusion".

**MR JUSTICE WAKSMAN:** Yes. I know. I can see that. That's what Counsel's

costs are. I am asking for its total costs. Oh, I see. So that's its total costs, is it, £294,719.50?

**MS FORD:** Those are its total cost for the same period, sir, excluding probate Counsel.

**MR JUSTICE WAKSMAN:** I see. That was the bit I didn't follow, because you laid emphasis on competition Counsel, so I was not sure why that was. So it is about a third. Thank you.

Now, Ms Ford, you were just talking about Counsels' Fees, or was there something else you wanted to talk about?

**MS FORD:** Sir, there is something else. I should clarify that since we set out the position concerning hours in correspondence, we then received a letter last night which suggested that there should then be a reduction of 10% in the Counsel Fees claimed. We remain unclear on what basis that 10% has now been proposed. In our submission, it doesn't begin to grapple with the difficulty of proportionality in the amount of the Counsel Fees charged.

It also raises a concern concerning the reliability of the costs that are now being advanced, and on the basis of which a significant interim payment is sought, because we are told at the last minute, the day before, the figures that we were told are appropriate should now be reduced by 10%, on a basis that remains somewhat unclear to us.

In our submission, to be clear, the proposed reduction of 10% has been made but we remain unclear why, and we say it simply doesn't even approach addressing the concerns of proportionality that arise from these figures.

Turning then to the Solicitors' Fees, there are some £359,342.10 of Solicitors' Fees run up in the same two month period. That's the total fees charged, less the fees for the October hearing, which it is common ground should be costs in

the case.

**MR JUSTICE WAKSMAN:** Sorry. You mean today's hearing?

**MS FORD:** Today's hearing, sir.

**MR JUSTICE WAKSMAN:** Yes.

**MS FORD:** The total fees charged for Solicitors in the order behind tab 6 -- sorry -- the statement of cost behind tab 6, less the sums charged for the October hearing come to some £359,000.

**MR JUSTICE WAKSMAN:** Right.

**MS FORD:** In our submission, those figures too are clearly excessive given that what actually occurred during this period was the service of a Reply, the service of a six page procedural witness statement and the service of a straightforward witness statement from the Class Representative.

We have identified particular heads of costs which we say appear to be unjustifiable, although we do make the point in relation to the global figure as well.

First of all, there appear to have been 381 hours, at a cost of £150,000, working on documents by Managing Associates. The Tribunal can see that if we look, starting at page 153, Fee Earner fees. So line 3 in the table and line 9. These are hours incurred by Managing Associates. Then there's sort of a general description of what's said to have incurred all these costs.

Starting in line 3, there are references to drafting and amending the Claim Form and application notices. We make the simple point that drafting the Claim Form and the application notices are steps which should have been undertaken before proceedings were issued and which can't, on any basis, be said to be attributable to BT.

**MR JUSTICE WAKSMAN:** Yes.

**MS FORD:** We are told in correspondence that actually, although there is

a reference to drafting and amending, that actually these costs are referable to amendments as a result of the deceased customers issue.

In my submission, that was an issue that was ultimately conceded by the Class Representative, and so those are costs that shouldn't be borne by BT.

We then have a reference to drafting the litigation plan, draft and amend the litigation plan. We make again the same point that insofar as it is drafting, that is a requirement for the Class Representative to issue proceedings in the first place, and shouldn't be being charged for now.

Again, comments have been made about this in correspondence, and we are told that this relates first to amendments to the litigation timetable, as a result of the expedited pace of the proceedings. In my submission, again that is not a cost that BT should be being asked to bear. That's costs that are not necessary for pursuit of a CPO.

We are also told that included various planned notices to cover the inclusion of personal representatives. Again, in our submission, that is as a consequence of the concession that was made and shouldn't be borne by BT.

I wonder if the Tribunal would indulge me for one moment while I take instructions.

**MR JUSTICE WAKSMAN:** Yes.

**MS FORD:** I am grateful, sir. I will carry on with these points.

**MR JUSTICE WAKSMAN:** Yes.

**MS FORD:** There is a reference to reviewing BT's data and data from Ofcom drafting table of references. The Tribunal will recall that the data in question was requested by the Class Representative as part of its CPO application. The Class Representative asked BT to provide this relevant data. In our submission, that is not a cost which is incurred which is referable to BT's Response to the application.

We are told that it was relied on by the Class Representative in its Reply and its submissions at the CPO, but that, in my submission, doesn't mean that it wouldn't have been relied on in any event in support of a CPO application. So again, we say these aren't costs that BT should be responsible for.

Over the page, there is a reference to draft letters of instruction for experts, review experts, comments and reports, plural, and then consider the Parker report and supplemental report, raise issues, comments thereon.

The Tribunal will appreciate that the Parker reports -- it says "reports" plural -- as distinct from the supplemental report was one that was served with the application for a collective proceedings order. So it is difficult to understand on what basis costs should be claimed in respect of that. I understand it is now said that this is only referring to the supplemental report but, of course, what's said here refers to reports, plural, and specifically the Parker report as the initial report.

If the Tribunal looks at page 148, there are a series of costs claimed in respect of attendances on various parties, attendances on clients, attendance on experts. There is a total of 102 hours claimed in respect of attendances on unspecified others, which amounts to some £41,437. We are told now that this head of expense includes updating class members and journalists about the process of the CPO. In my submission, that is another head of costs that would have been incurred irrespective of any opposition by BT, and shouldn't be forming any part of any claim against BT.

There are then further heads of costs which, in our submission, aren't properly incurred in the context of these proceedings at all, and for which BT should not be liable.

If the Tribunal looks at page 150, there are a series of experts' fees claimed. First of

all, there are costs incurred by the Class Representative's public relations firm, Media Zoo. They are distinct from separate heads of costs which are claimed in respect of Case Pilot, which is the litigation support, and they amount to some £18,475.

On this, in correspondence, the Class Representative has explained that Media Zoo were engaged during the period after receiving the Response and during the CPO to help give notice to class members on the status of the Class Representative's CPO application.

Again, in my submission, that makes an assumption that if BT had not opposed certification, then there would be no CPO process and no need to update class members on the status of the application. In my submission, that's an incorrect assumption. In our submission, these are not sums which ought to be claimed against BT.

The Tribunal will then see a claim for costs incurred by Canadian counsel of £9,143.77. As the Tribunal is aware, there are no issues of Canadian law in dispute in the present proceedings. In our submission, these are clearly not costs that ought to be claimed against BT.

We are told, again in correspondence, that the Class Representative sought Canadian law advice in relation to how the Canadian collective proceedings regime treats the issue of deceased class members. In my submission, that is a further example of the cost which has been incurred in relation to the Class Representative's mistaken position on deceased class members and should not come to fall at BT's feet.

In summary, in our submission, these costs are very clearly in no way reasonable or proportionate, and in our submission they cannot be adopted as a starting point for the assessment of any interim payment. The Tribunal has already

seen the comparison with the relative costs that have been incurred by BT.

**MR JUSTICE WAKSMAN:** Yes. Thank you. Right. Mr Bacon, what would you like to say in reply?

**MR BACON:** Yes. Thank you, sir. Just very quickly, addressing the points in probably the same sort of order. Budgets, first of all. The budgets are in the bundle. They are almost indecipherable, because they are too small to read. They are at tabs 7.1 and 7.2. What I can tell you is that, yes, it wasn't a five day hearing. It was a two day hearing. But if you apportion the hearing costs for column 5, which is purely the attendance for five days, and reduce it to two, the total figures are still in line with the budget. In my submission, that's a positive, not a negative.

Budgeting these cases is not straightforward, and the case has obviously been budgeted on the basis that it would be opposed in very much the way it was. I mean, this was a heavy opposition. It didn't last as long as five days, but certainly we would submit that there is nothing to be taken from a comparison with the budget.

What I do have a concern about really are two things. My learned friend's submissions appear to be based upon, one, an analysis of the Counsels' Fees and Barristers' Brief Fees, and some sort of mathematical assumption that they were bionic, in the sense that there were 33 days, working days, and in that period they couldn't possibly -- the flaw in the submission, for your note is my learned friend is relying upon the refreshers as being indicative of the setting of the brief fee so she takes the refreshers, divides it by ten and arrives at an hourly rate, and then divides that hourly rate into the briefing. That's not, sir, as you know from your own experience, how brief fees are set and agreed. It is a flawed exercise. Place, I would submit, little reliance on

that.

More fundamentally, my learned friend took you to the comparison figure, which she said we should all have regard to, and I probably rudely interrupted. She referred to the correspondence and to the letter in which she refers to two figures, the figures for her own counsel in respect of the matter and figures for the total of the solicitors' fees.

Now, the value of £294,000 is given for the date of 30th April to 24th June, combined figure. The obvious flaw in that, for present purposes, sir, is this. In comparing the costs that the Class Representative has incurred in responding to the Response, you have to take into account what the Defendants spent in preparing the Response. What they have done is they have excluded entirely all of the work that they had to do in preparing the Response that we had to respond to, and then say "Look, compare the two". I hope that's pretty clear as to why that isn't a helpful approach for the Tribunal. I had no idea what the costs would have been in preparing it, but they would have been huge. They would have been enormous. But we are not told what that figure is either from the Barristers' costs or the Solicitors' fees. That is my point there. Without that figure, on any view, you shouldn't be comparing our costs to £294,000.

The rest of the submissions my learned friend makes have been dealt with in correspondence, but listening to them as I was tentatively, they all broadly speaking boil down to these were costs which would have been incurred in any event under the CPO. There is potentially the media bit, there's a bit of the experts' costs. That has been dealt with by the deduction that you already made.

**MR JUSTICE WAKSMAN:** Yes.

**MR BACON:** If one takes account of the deduction of 20%, that's £200,000 off the budget. I went through -- I was doing it quickly -- going through each of the points --

**MR JUSTICE WAKSMAN:** Sorry. Is that how you are proposing to deal with it?

**MR BACON:** For the purpose of argument --

**MR JUSTICE WAKSMAN:** For the purpose of argument in other words, the starting point is now not one million, it is 800,000?

**MR BACON:** For the purpose of argument, otherwise we will be here --

**MR JUSTICE WAKSMAN:** Yes. Right.

**MR BACON:** Just looking at that figure, that figure exceeds by quite some margin the discrete point that my learned friend was taking on our schedule. I am not sure it is helpful to go through it, because all I will be saying is you have already accounted for that.

**MR JUSTICE WAKSMAN:** I can understand it, insofar as her points are related to "This is something that they would have had to incur in relation to the CPO application in any event". I have got that point.

**MR BACON:** Most of them were. In our letter which we sent yesterday -- at page 191.

**MR JUSTICE WAKSMAN:** Yes.

**MR BACON:** There are a couple of points. My learned friend said she was unclear about the 10%. There is nothing unclear about the final paragraph on page 191, with due respect to her. Nothing at all.

**MR JUSTICE WAKSMAN:** Just a second. I've got to just make sure it is here. Ah, yes. Right.

**MR BACON:** We served a revised schedule reflecting the fact that the barristers' clerks had corrected the fee notes to reflect the fact that 10% of the fees were

incurred before the 30th. That's all that was. There is nothing unclear about that. It wasn't dealing with proportionality or reasonableness, as my learned friend sought to suggest.

The comparison point that I have mentioned is dealt with on page 192, right in the middle. You are being disingenuous in trying to compare 200 and our figure of 110, barrister --

**MR JUSTICE WAKSMAN:** Well, that's a point you have made. Yes.

**MR BACON:** I have made that point. The rest of the paragraph -- from page 192 over, we have dealt with each of the discrete points that my learned friend has raised this morning in respect of the schedule.

The big point I get from this, if I may say so, is that in the correspondence my learned friend's solicitors, or those who drafted the letter, were pretty cute in summarising -- put it this way -- what we had said in the schedule, by making it look as though these were costs that would have been incurred in any event, but, in fact, much of the work is relating to amending documents post the April date, and that we therefore corrected in this letter. Insofar as it wasn't, in other words, they are costs that would have been incurred anyway, they have already been dealt with by the deduction that the Tribunal has already made.

So far as other costs are concerned, yes, there is some relatively de minimis points on Media Zoo and Canadian counsel. I did take instructions on the Canadian counsel. You see our response at the top of page 194. The team -- obviously they say that they did have regard to the judgment in *Merricks* and the relevance of Canadian jurisprudence to this still embryonic jurisdiction. It is a matter for the Tribunal. One can understand that and one can have some sympathy for that argument, but they are relatively small players in the big

picture.

This is at the end of the day a request for payment on account. We are not inviting the court to summarily assess them. There are going to be no findings here -- I accept the court will take a general view and a broad view. The authorities, we are not in dispute about. There is a very reduced or minimum test now. It is broadly what do you think would be recoverable, less discount, to reflect there is going to be an argument on detailed assessment.

**MR JUSTICE WAKSMAN:** Yes. So your position now is the starting point is 800,000 and you are seeking a payment on account of 70%?

**MR BACON:** Indeed, correct. If it helps, sir -- sorry to interrupt you -- if it helps, in *Merricks*, 80% was allowed. I went back to the judgment. What happened there, there was a claim for £1.2 million. There was a total Defendants' costs of £1.2 million for the CPO hearing. For your reference, it is page 80 of the authorities bundle. The Defendants did not seek all those costs. They simply sought their Counsels' Fees, which I think were about £600,000-odd in the end. The Tribunal allowed a figure of -- I think they only sought actually the Counsels' Fees for the actual hearing, from memory.

**MR JUSTICE WAKSMAN:** All right. Yes.

**MR BACON:** You will see that the appropriate order was 80% of the total that was sought. I think it is paragraph 32. Whether it is 70 or 80, we are seeking 70 --

**MR JUSTICE WAKSMAN:** Yes.

**MR BACON:** -- of what is now a reduced schedule in order to (inaudible).

**MR JUSTICE WAKSMAN:** We have to consider that against Ms Brown's position, which I think is she says that's far too high a starting point, and she doesn't necessarily agree with 70%, if I have summarised those two points correctly. We will take a break. I think you've got a transcriber, haven't you, somebody

transcribing this today. We will take a break anyway for about ten minutes -- we will say to 12.15 -- during which we will deliberate on this aspect and then come back with our decision. Right.

**MR BACON:** Thank you, Sir.

**(Short break)**

**MR JUSTICE WAKSMAN:**

**Ruling on costs**

(For Ruling, see [2021] CAT 32)

Ms Ford, the usual order is of course 14 days. Is there any objection to that?

**MS FORD:** Sir, I am very briefly taking instructions on that.

**MR BACON:** Whilst instructions are being taken, can I perhaps deal with the Harbour matter. I am grateful to Harbour actually. They have assisted this morning. We can go with the 7 days that you suggested, sir, but could I just have a caveat, given that it is an undertaking, that with liberty to request an extension from the Tribunal, in writing, with good reason, should the need arise? I have been advised that it is most unlikely that the need will arise, but we wouldn't want to put anybody in breach of an order unnecessarily.

**MR JUSTICE WAKSMAN:** No. Well, put in "with permission to apply in writing for an extension".

**MR BACON:** Thank you very much indeed.

**MR JUSTICE WAKSMAN:** Which must be made at least 24 hours before the time would otherwise elapse. Ms Ford?

**MS FORD:** Sir, we have no objection to 14 days.

**MR JUSTICE WAKSMAN:** In which case I think then that leaves the final matter which is permission to appeal.

I am very grateful for the proposed grounds of appeal which have been set out in

some detail in writing on the permission application. Of course, we have had the benefit of reading BT's response. So we have got all those points in mind. Is there anything you want to add or to highlight, Ms Ford?

**MS FORD:** Sir, yes, very briefly.

**MR JUSTICE WAKSMAN:** Yes.

**MS FORD:** We do say that these grounds of appeal have a real prospect of success. They concern the approach in law to certified proceedings on an opt-out rather than an opt-in basis, and the Tribunal's jurisdiction to direct relief by way of account credit. We also do say that there is another compelling reason why we would invite the Tribunal to grant permission to appeal. As has even been canvassed during the course of this hearing, the collective proceedings regime is a new and nascent regime. There has been no appeal to date and no Court of Appeal guidance on the question whether proceedings should be certified on an opt-in or opt-out basis. So, in our submission, this is an important opportunity for the Tribunal to have the chance to clarify those matters.

As you have indicated, sir, you have seen our written application. I do have some brief observations on what has been said in response to that by the Class Representative.

In relation, first of all, to ground 1, which is that the Tribunal, in our submission, misdirected itself in law as to the correct interpretation of rule 79(3) of the CAT rules. We do resist the suggestion that's made in the Class Representative's --

**MS KREISBERGER:** Sorry, I hesitate to interrupt. Ms Ford is cutting out, unfortunately. I don't know if anyone else is experiencing that.

**MR JUSTICE WAKSMAN:** We were all right I think. Just give us one second,

please.

It doesn't sound like that's because someone else has got their microphone on, but do you want to continue, Ms Ford. Ms Kreisberger, let us know straightaway if you can't hear.

**MS FORD:** I was referring to ground 1 of the grounds of appeal. In our submission, it is an error of interpretation, in particular in relation to what's meant by whether it is practicable in the relevant CAT rules, in circumstances where the Tribunal has made a finding at paragraph 111 of its judgment, that exceptionally in this case it is straightforward to identify and contact the class members, and in our submission the Class Representative's own evidence show that there was little, if any, difference between the participatory steps required at the opt-in stage and the distribution stage.

In our submission, the Class Representative is wrong to try and characterise this ground of appeal as simply being about the weight to be accorded to different factors, and so not disclosing an error of law. In our submission, it does raise an important question of construction of rule 79(3) of the CAT rules, read in particular in the light of what's said in the Tribunal's guide, which itself has the force of a practice direction.

That this is arguably an error of law, suitable for appeal, is evident from the Class Representative's submissions themselves. Paragraph 6 of those submission tries to draw a parallel between what the Supreme Court said in *Merricks* about rule 79(2), and the true construction of rule 79(3) which has affected this ground of appeal. *Merricks* makes clear, if there was any doubt, that the correct construction of one of the Tribunal's rules, the question of law suitable for appeal, and indeed one that went not just to the Court of Appeal but to the Supreme Court.

It is misconceived, in my submission, to suggest that what the Supreme Court said about rule 79(2), which concerns whether proceedings are suitable to be brought in collective proceedings, could be dispositive as to the separate question as to the construction of the reference to practicability in rule 79(3). That reference does not even appear in rule 79(2).

So we do say that this is very clearly an error of law which is suitable for appeal.

Just addressing briefly what the Class Representative has said in support of the Tribunal's reasoning, first, at paragraph 8(a) of their submissions, the Class Representative has sought to play down the relevance of the Tribunal's conclusion that damages could be distributed without relevant customers' active participation, and the Tribunal will be aware that that was addressed in paragraphs 112 and 117-118 of the judgment.

The Class Representative now tries to say that that was only one factor of many, and a matter that need not be conclusively determined now.

In my submission, that does not properly reflect the weight that was put on this point, both by the Class Representative themselves in the hearing before this Tribunal and in due course by the Tribunal in its judgment.

The Class Representative relied on this point positively to explain why, on its case, even if class members were not prepared to opt in to collective proceedings at the outset, they could nevertheless be relied upon to join at the distribution stage. The answer the class representative gave to the Tribunal about that conundrum was: "Don't worry. Distribution can be achieved without any active participation". That's recorded at paragraph 112 of the Tribunal's judgment.

The Tribunal then placed reliance on that reasoning in paragraph 119 of its judgment. In our submission, that does disclose what is at least arguably

an error of law.

We also, as the Tribunal has seen, seek to challenge the Tribunal's approach to the evidence on the basis of the distinction between the opt-in stage and the distribution stage, and we say there is an important point of principle about the relevance of a preference on the part of a funder for opt-out rather than opt-in proceedings.

In our submission, those points potentially undermine the correct construction of rule 79(3). So in our submission there are important points of principle being raised here under the first ground of appeal.

I am turning to address the second ground of appeal. The Tribunal will appreciate that they are interlinked, because the second ground of appeal concerns the Tribunal's jurisdiction, whether it has jurisdiction to enable damages to be credited directly to customers. So there is obviously a degree of overlap in the sense that part of the Tribunal's reasoning relied on that in relation to ground 1.

In my submission, there can be no doubt that this is a point of law. It turns on the meaning of various statutory provisions and it's notable that the vast majority of those statutory provisions have not been grappled with by the Class Representative in the written observations that were provided to the Tribunal on this ground of appeal.

We refer to sections 47(a)(iii) and 47(b)(i) of the Competition Act. Those are the relevant provisions that define the Tribunal's jurisdiction to hear a claim, and they permit claims for damages or for a sum of money.

In our submission, an account credit is neither damages nor a sum money, less fungible than a sum of money, because it can't be used for anything in the way that a sum of money can. It can only be applied against charges for

telephony services on a particular account. It is clearly of no utility at all to somebody who doesn't have a BT account any longer or somebody who is deceased.

The starting point, in our submission, is the relevant sections of the Competition Act itself. We also rely on section 47(c)(v) of the Competition Act. We point to the fact that it makes provision in mandatory terms that any unclaimed damages must be paid to a prescribed charity, and the relevant rules that implement that, which are rule 93(4) to (6), which say that the Tribunal shall order those matters.

In our submission, an award of account credit is inconsistent with the notion, first of all, that the damages actually have to be positively claimed, and equally inconsistent with the notion that the payment to charity of unclaimed sums, or indeed the ability of the Class Representative's litigation funder, to recover their costs and expenses from unclaimed sums.

We have also pointed to rules 93(1) and (3)(a) and (b). Those are the rules which envisage a payment to be made on behalf of representative persons, not directly to them, and which envisage that representative persons shall claim their entitlement. Those were rules that the Tribunal did address in its judgment.

We have now drawn the Tribunal's attention as well to the relevant paragraphs of the guide, which make clear that those parts of the rules are not discretionary but mandatory, in the context of opt-out proceedings. So they make an express provision that in opt-in proceedings, the Tribunal may order that damages be paid directly to the represented persons, but it doesn't make that provision in relation to opt-out proceedings.

In our submission, it is very telling that, given the detailed reference to statutory

material and rules in our application for permission, that the Class Representative has not grappled with those provisions properly. Instead, they have sought to distance themselves from this argument by seeking to contend that the Tribunal did not, in fact, reach a conclusion on it at all and need not do so.

In my submission, that is not a fair reading of the Tribunal's judgment. The Tribunal will be familiar with, in particular, paragraph 118 of the judgment, in which the Tribunal did grapple with this question of construction. So in my submission it is not right to say that this is not something that has actually been decided.

In any event, I would respectfully submit that the fact that the Class Representative now seems to be moving away from this argument is an indication that it is at least arguably incorrect, and so ought to go in support of an application for permission to appeal.

Sir, finally, on ground 3, ground 3 concerns paragraph 124 of the judgment and the role of the strength of the claims. Our ground of appeal is essentially that paragraph 124 of the Tribunal's judgment has applied a de facto threshold test. So it's held that the merits could only assist BT if it could persuade us that this is a very weak claim.

The short point we make there is that, in our submission, there is no basis in either the rules or the guide to impose that test. In our submission, each of those grounds is well arguable and, in any event, given the nature of this regime and the important principles involved, there is some other reason why, in any event, permission to appeal should be granted.

I am in the Tribunal's hand as to whether you would like me to go on to deal with our stay application now.

**MR JUSTICE WAKSMAN:** No. Let's pause there and see if Ms Kreisberger wants

to say anything in response?

**MS KREISBERGER:** Thank you, sir. I am grateful. It does seem that the Wi-Fi is struggling a little at our end. So do let me know if you have any difficulty hearing me. We've done everything we can to make sure it is not a problem.

Sir, I will confine myself to some brief observations. Jumping straight into each of the grounds, ground 1, the first point is that the Tribunal's decision to endorse opt-out proceedings here is a procedural decision about how to manage the case in the best interests of the class.

Contrary to Ms Ford's submission, that this is all very new, we have the benefit of the Supreme Court's ruling on essentially the same exercise under rule 79(2). You have our written submissions on *Merricks*. The Supreme Court said that the Tribunal has a wide discretionary power to consider all matters it thinks fit -- that's the rubric -- and then arrive at a value judgment here as to whether opt-out should be made available. That's my first point.

My second point is that the principal basis for the Tribunal's conclusion that opt-out is available was the Tribunal's assessment that there was little prospect that a sufficient number of BT customers would opt in, given the demographic. That's at 114 and 115. That, sir, was your value judgment based on the evidence and the facts as to what could be expected from class members.

Sir, you will recall Mr Le Patourel put in evidence on that on the demographic, and it is covered by Ofcom.

BT's only rebuttal point, and that's at 111, paragraph 111 of the judgment, was that existing customers could be contacted. That's accepted, and we say it will be a great help for distribution, but it doesn't negate the relevant finding that whether or not they can be contacted, they wouldn't opt in in sufficient numbers. That's the value judgment. So there's no discernible error of law

there.

Turning to the specific points made by BT, just very briefly, the main line of attack seems to be that there was no discussion or analysis. It is not clear what BT had in mind, but the reason for your finding, sir, was the nature of the demographic; a large number of elderly and vulnerable customers. That's at paragraphs 11 to 13 of the judgment. It is made very clearly, sir.

I would also just observe the framing of BT's challenge is to (inaudible) that customers were less likely to opt in than at the distribution stage. Relative questions aren't essential. The Tribunal correctly addressed the question of whether a sufficient number of customers would opt in at the opt-in stage, finding that take-up rates would be too low, and questions of distribution come later.

So it is curious to see BT hang its hat on the guide, paragraph 6.39. You have our submissions that that's just guidance. But apart from that, that is consistent, sir, with your finding that opt-in wouldn't be practicable, because take-up rates would be too low.

That was all I was going to say on ground 1, apart from the question of funding, which is clearly irrelevant.

Ground 2, we say no discernible error of law.

Now, Ms Ford has placed much emphasis on us moving away from arguments. None of that is the case. Very shortly, BT aims fire at a passage, paragraph 117, where all the Tribunal did, sir, as you know, was to express some scepticism about BT's claim that the rules would be a total bar to using some form of direct credit mechanism, at least for existing customers. That's a rather far-fetched claim. But the Tribunal didn't make a finding about the jurisdiction to award damages. That's not there. It didn't need to make that

finding, because, as *Merricks* tells us, the Supreme Court made clear, questions of distribution engage the interests of the class, not the interests of the defendant. So they are generally premature at certification. So that's for another day. That's paragraph 80 of the Supreme Court ruling in *Merricks*.

Sir, I am assuming you don't want me to address you on rule 93(1), but I am very happy to, if it is of any assistance.

**MR JUSTICE WAKSMAN:** Just one moment. No.

**MS KREISBERGER:** I am grateful, sir.

Last point, ground 3. Somewhat baffling. The Tribunal didn't, in my reading of the judgment, apply any specific test or threshold. If one looks at what BT's argument was, and this is in our written submissions, the allegation was that there were fundamental deficiencies under the opt-out heading, fundamental deficiencies in the Class Representative's case. That's just another way of saying the case is very weak. The judgment rejects that allegation. It says the Class Representative's case was not very weak. That's obviously in line with the finding by the Tribunal on strike-out.

There's no sense in which the Tribunal lays down some generalised threshold of unification. It just rejects the allegation before it from BT, which the Tribunal was entitled to do.

Sir, unless I can help further on that.

**MR JUSTICE WAKSMAN:** Thank you. No. That's fine. We will just briefly confer.

(Pause).

**MR JUSTICE WAKSMAN:** Ms Brown, can you hear me?

**MS FORD:** Sir, it is Ms Ford, but I can.

**MR JUSTICE WAKSMAN:** I think I did that before. Probably too many cases. Sorry about that, Ms Ford.

**Ruling on permission to appeal**

(For Ruling, see [2021] CAT 32)

That I then think, Ms Ford, leaves just your application for a stay.

**MS FORD:** Sir, yes.

**MR JUSTICE WAKSMAN:** Again, you have articulated this in some detail in writing.

**MS FORD:** Sir, I have. In the light of the Tribunal's indication for permission, we would ask the Tribunal to stay, pending determination by the Court of Appeal for renewed permission to appeal and if permission were to be granted by the Court of Appeal, then pending its substantive determination of the appeal.

The Tribunal's power to order a stay is Rule 85(1). It is in the authorities bundle, tab 4, page 20, which provides:

"The Tribunal may at any time, either of its own initiative or on the application of the class representative, a represented person or a defendant, make an order for the variation or revocation of the collective proceedings order, or for the stay or sist of collective proceedings."

That's the relevant power. The test, in our submission, is the one set out by the Court of Appeal in *Hammond Suddard*. That's in the authorities bundle at tab 6. If the Tribunal looks at page 41, paragraph 22, you see we are drawing here an analogy in the CPR. It says:

"By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether

there is a risk of injustice to one or other or both parties if it grants or refuses a stay."

We have also referred to *Leicester Circuits*, which is in tab 7, paragraph 13 of that judgment. The Court of Appeal again saying:

"The proper approach is to make the order which best accords with the interests of justice."

Finally, we have referred to *City of Westminster v Davenport*, which is in tab 9:

"Weighing up the interests of justice, it is permissible to take into account broader public interest."

The Tribunal can see that from paragraph 30 in the judgment on page 69.

In that case it wasn't persuaded that there were solid grounds for departure from the normal rule against the grant of a stay, but what you see in that paragraph is the Court of Appeal taking into account risk of damage to the public interest in reaching its conclusions.

In the present case, in our submission, there is a clear risk of injustice and a risk of harm to the public interest if the CPO were to proceed on a basis which, if BT's appeal were to be upheld, turns out to be misconceived. The reason we say that, if I can ask the Tribunal to turn up the collective proceedings order, it is in tab 4 of the bundle.

**MR JUSTICE WAKSMAN:** Yes.

**MS FORD:** Paragraph 8 of that order is envisaging that:

"The Class Representative shall publish a Notice of the Collective Proceedings in the form appended to this Order, in accordance with Rule 81 of the Tribunal's Rules."

If the Tribunal then looks at tab 5 in the bundle, you see the Notice that is going to be published.

**MR JUSTICE WAKSMAN:** Yes.

**MS FORD:** What the Tribunal will see is that the Notice, understandably and to be expected, informs the relevant class all about their rights and obligations on the basis that this is going to be an opt-out proceedings.

If we start at page 134, you see a summary of notice. In the first column of the paragraph, it tells those reading it:

"If you are one of these people or the personal representative of their estate, and you were domiciled in the UK on 27 September 2021, then you are a class member and will be bound by the Tribunal's judgment deciding the outcome of the case, unless you opt out."

Then, at the top of the next column, right-hand column:

"Unless you opt out, if the Tribunal makes a judgment on these issues, you will be bound by it and the amount of compensation that you are entitled to will be limited to what the Tribunal decides, and no more. If the Tribunal decides that class members are not entitled to any compensation, if you have not chosen to opt out, then you will not be able to seek compensation from BT by any other route. Therefore, you may want to opt out if you would prefer to bring a separate claim against BT to seek compensation for the overcharges."

Then there's information about personal representatives and the circumstances in which they might opt out.

Over the following page, you see a summary of your rights and choices. It quite rightly emphasises:

"Please read this notice carefully. Your legal rights may be affected, whether you act or you don't act."

It is informing the relevant class:

"You do not need to do anything if you were living in the UK on 27 September 2021."

Then you satisfy various criteria. Further down, under the two bullet points, you see:

"By doing nothing at this time, you will be included in the collective action and may benefit from any eventual money/compensation which results from the collective action."

Over the page, there is similar information about opting out.

So the information that is going to be provided to the class at this time is all on the premise that they must exercise their rights and obligations in relation to an opt-out regime, and that would clearly be incorrect if in due course BT were to succeed in its appeal.

There are then paragraphs in the relevant order which also concern opting out, so paragraphs 9 to 11 in the order behind tab 4. You have the heading "Opting-out". Then it says:

"Every class member who is domiciled in the United Kingdom on 27 September shall be included in these collective proceedings, subject to paragraph 10 below."

Paragraph 10 is the possibility of opting out.

Paragraph 11 concerns notices, how they should be served.

So you have specific provisions on the basis of an opt-out regime.

Then, as the Tribunal is aware, paragraphs 13 to 15 that the Tribunal has already looked at today, there is provision for substantive pleadings and a further CMC.

In our submission, it is clearly inappropriate for procedural steps of this nature to be taken and for notices and information to be provided to class members and for class members to be asked to make important decisions about their rights and obligations on the premise that the proceedings are certified on an opt-out basis, if that basis may change following appeal.

In my submission, to do that would be prejudicial to BT, because it renders BT's

appeal nugatory, and it is prejudicial to the class members themselves, because they are making important decisions about their rights and obligations on a basis which may transpire to be incorrect in due course.

It hardly need be emphasised that it also involves considerable wasted time and wasted costs if these proceedings are then certified on an opt-in basis. It may be that steps have to be either reversed or repeated. In fact, it is the Class Representative's own evidence, as recorded by the Tribunal in paragraph 115 of its judgment, that it might not bring proceedings at all if it were only available on an opt-in basis, in which case all of these steps would have been completely redundant.

For those reasons, in our submission, the balance of justice dictates that the Tribunal should stay these proceedings, pending the application for permission to the Court of Appeal.

**MR JUSTICE WAKSMAN:** Thank you very much, Ms Ford. Ms Kreisberger?

**MS KREISBERGER:** Thank you, sir. Sir, just really for completeness, on the approach to a stay, it is in our written submissions. There is also paragraph 8.29 of the guide, which provide the usual rule by reference to what is now CPR rule 52.16:

"An appeal shall not operate as a stay of any order or decision of the Tribunal, unless ordered otherwise."

So a stay is the exception, not the rule.

BT says that if a stay is not granted, their appeal will be rendered nugatory, but the key reason articulated by Ms Ford is not a matter of prejudice to BT at all. It is concern for the class, they say.

Now, there is no reason, as far as the class is concerned, why proceedings shouldn't progress while the appeal is pending. I mean, let's be clear. The interest of

the class is in proceeding as quickly as possible to a determination of their rights, particularly given the demographic.

So the whole thrust of the collective regime is to ensure timely vindication of rights that have been infringed, particularly consumers' rights, and of all cases here we have a class where at least some people in the class could suffer real prejudice; in other words, actually seeing compensation in their lifetime. So when we are applying the *Hammond Suddard* test, it points in one direction alone. That's my main submission.

The other point I just want to draw to your attention, Ms Ford made a lot about matters being confusing for the class. If I could just refer you, sir, to rule 91(2) in the rules. For your note, that's at tab 4, page 21 of the authorities bundle. That rule provides that:

"The class representative shall give notice ..."

Sorry, sir. I will let you turn that up.

**MR JUSTICE WAKSMAN:** Yes, please. Yes.

**MS KREISBERGER:** 91(2):

"The class representative shall give notice of any judgment or order to all represented persons in a form and manner approved by the Tribunal."

**MR JUSTICE WAKSMAN:** Yes.

**MS KREISBERGER:** Then we have guide paragraph 6.55, which explains how this should be handled. 6.55 makes clear that the rules require the Class Representative to give members information about proceedings at certain stages, which include any orders.

**MR JUSTICE WAKSMAN:** I follow that. That's on the basis the proceedings are going ahead. I am a little concerned, just as far as the class is concerned, even if it is not a point that directly affects BT, if you don't say anything and

you give the class members the opportunity to opt out but they have got to do so by April 2022, appreciating that we don't think there's anything in an appeal, but if the Court of Appeal took a different view, that's going to be somewhat confusing, isn't it? I mean, what are you going to do with the class members or are you going to adjust the present notice already to make a reference to an appeal?

**MS KREISBERGER:** That is precisely the point in drawing rule 91(2) to your attention. What rule 91(2) contemplates is that you keep the class informed of developments as they happen.

**MR JUSTICE WAKSMAN:** I know that. I follow that. But this is more than keeping them informed, because suppose the Court of Appeal gives permission in February, or something like that. At that point, of course, if the Court of Appeal gave permission, it would actually be for the Court of Appeal to decide any question of a stay. But it would throw everything into disarray, wouldn't it, at that point, if you had already told the members that they have to make their decision by April 2022?

**MS KREISBERGER:** Let me take that in two stages.

**MR JUSTICE WAKSMAN:** Yes, yes.

**MS KREISBERGER:** First of all, as you say, these are points down the line. Today they don't really impact your decision on a stay. But having the thought experiment that an appeal is allowed, the Class Representative would inform the class of that development, but there is no reason in principle why that should affect the opting out procedure. I mean, being in the class is no guarantee of success. These are the vicissitudes of litigation. The litigation might not be successful. The Class Representative hopes that it will. There is no reason why opting out should be in any way, in any way impacted by

an appeal. Class members should opt out -- the purpose of the opt out date -- we have given a very long period, six months from today, so class members have sufficient time to consider whether they want to be in, and they can opt out. If, as a result of an appeal, it turns out that this litigation can't progress in the way that it is formulated, that's a loss. There's no reason why it should stop people carrying on as if we are progressing ahead. We see absolutely no reason why it does any damage whatsoever to opting out.

If the Court of Appeal were to disagree with us, then we'll deal with it at that stage, if there's to be an extension to the opting out period. As I say, my primary submission is that I can't see any reason why there should be such an extension, but if there is, that can be ordered, and that will be explained to the class. As with any other development in this litigation, the class needs to be kept apprised, but we can't see any reason why opt-out can't carry on, and the proceedings progress in the normal way as one would in the absence of a stay. We follow the directions which you have laid down, sir.

**MR JUSTICE WAKSMAN:** I just wanted to ask on that point, would you say anything about -- of course, the step that would have been relevant particularly might have been if we had granted permission. We haven't granted permission. Are you intending to make any reference to that in the notice or is it your case that really the next time something might happen might be if and when the Court of Appeal grants permission, if it does so.

**MS KREISBERGER:** My understanding is the latter is correct to put it, sir. I should just double check.

**MR JUSTICE WAKSMAN:** Yes.

**MS KREISBERGER:** That has been confirmed. As any development arises.

**MR JUSTICE WAKSMAN:** Yes. Thank you. Yes.

**MS KREISBERGER:** Sir, those are my submissions on the stay, unless I can be of any further assistance.

**MR JUSTICE WAKSMAN:** No. Ms Ford, do you want to come back on anything?

**MS FORD:** Sir, two brief points. First, the suggestion that there is no prejudice to BT in this scenario. There is a very clear prejudice to BT in allowing the CPO proceedings to proceed on a basis which, if its appeal were to succeed, is an incorrect one. That is a very obvious prejudice to BT. So I do resist this suggestion that it is all about the class members.

Nevertheless, it is an important factor that the Tribunal must also take into account. The class members will be told something which will become incorrect in the event that the appeal succeeds. In my submission, it is no answer to say that their decision will not be impacted by an appeal, because the advice that will be given to them and the explanation that is being given about the way in which they must participate in these proceedings will be essentially reversed. Insofar as they want to proceed, it will be reversed.

We have heard much in these proceedings about the nature of the class, much emphasis put by the Class Representative on the nature of the class. In those circumstances, to provide mixed messages by telling them one thing pending an appeal and potentially another thing if an appeal were granted, or if permission were granted, in my submission, is very problematic.

**MR JUSTICE WAKSMAN:** Thank you very much. We'll just confer briefly.

**(Pause.)**

**Ruling on application for a stay**

(For Ruling, see [2021] CAT 32)

Can I ask counsel to do the necessary drafting as far as that's concerned? All right?

**MS FORD:** Sir, can I just clarify which paragraph the Tribunal's direction for a stay relates to? You have mentioned the notification, which is paragraph 8 on page 131.

**MR JUSTICE WAKSMAN:** Yes.

**MS FORD:** I would assume it also would encompass 9 to 11, which is the mechanism by which the class members would or wouldn't opt in, because obviously that's what they are being notified about and that's the mechanism that they are being invited to operate. So we would assume that that is also to be stayed.

**MR JUSTICE WAKSMAN:** Does it affect paragraph 9, in fact?

**MS KREISBERGER:** No, sir, it doesn't.

**MR JUSTICE WAKSMAN:** It will be a longer contemplation period, as it were, in the sense that it will be more than six months, but it seems to me that the qualification date should remain as it is, and I think it is really 10 and 11.

**MS FORD:** Sir, you are quite right. 9 isn't -- although it is under the heading "Opting out", is not, in fact, concerned with opting out. The mechanism it would seem --

**MR JUSTICE WAKSMAN:** Yes.

**MS KREISBERGER:** I am grateful. This is probably one for me. Our submission is it's just 8 and 10. 9, domicile date, as you say, sir, is fine as it is.

**MR JUSTICE WAKSMAN:** Yes. I mean, 11 is really your sort of service provision.

**MS KREISBERGER:** That's right.

**MR JUSTICE WAKSMAN:** So that was only going to kick in when 10 kicks in. So if 10 is stayed, 11 -- nothing happens. That is just about form. I think that must be right.

**MS KREISBERGER:** So it can stay as is. So, yes, it is 8 and 10.

**MR JUSTICE WAKSMAN:** Right. Ms Kreisberger, is there anything further that you wish to raise in relation to this hearing?

**MS KREISBERGER:** Sir, if I could just check with those behind me.

**MR JUSTICE WAKSMAN:** Thank you. Ms Ford?

**MS KREISBERGER:** I am grateful, sir.

**MR JUSTICE WAKSMAN:** Thank you very much both for your helpful oral and written submissions and this hearing is terminated now.

**(1.23 pm)**

**(Hearing concluded)**

**Key to punctuation used in transcript**

| | |
|---|---|
| -- | Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking |
| … | Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence. |
| - xx xx xx - | A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption. |
| - | Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there? |