IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1339/7/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 29 November 2021

Before:
The Honourable Mrs Justice Falk
Dr William Bishop
Eamonn Doran
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Mark McLaren Class Representative Limited

Applicant/Proposed Class Representative

-v-

MOL (Europe Africa) Ltd and Others

Respondents/Proposed Defendants

A P P E A R AN C E S

Sarah Ford QC and Emma Mockford (On behalf of Mark McClaren Class Representative Limited)
Mark Hoskins QC and David Bailey (On behalf of MOL)
Marie Demetriou QC and Daniel Piccinin (On behalf of NYKK)
Josh Holmes QC and Michael Armitage (On behalf of WWL)
Tony Singla QC and Anneliese Blackwood (On behalf of Kawasaki Kisen Kaisha Ltd)

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Monday, 29 November 2021

(10.30 am)

THE CHAIRWOMAN: Good morning, everyone. These proceedings are being livestreamed 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 the proceedings and breach of that provision is punishable as a contempt of court.

Thank you.

Application by MS FORD

MS FORD: Madam Chair, members of the Tribunal, I appear with Ms Mockford for the proposed class representative. Mr Hoskins QC is with Mr Bailey for the first to third respondents, MOL; Ms Demetriou QC appears with Mr Piccinin for the fifth respondent, NYKK; Mr Holmes QC and Mr Armitage are here for the sixth to eleventh respondents, WWL; and Mr Singla QC and Ms Blackwood are here for the fourth respondent, KK; and the twelfth respondent, CSAV, has indicated in

correspondence that it is neutral about this application.

THE CHAIRWOMAN: Yes.

MS FORD: This is my application for a collective proceedings order. In terms of the structure of my submissions, I am going to start by making some submissions on the legal test for certification. Secondly, I am going to show the Tribunal the relevant passages from the Commission decision, finding an infringement on which this claim is based, and thirdly I am going to make my submissions in support of the application for a CPO, focusing in particular on the objections that have been raised by the respondents.

THE CHAIRWOMAN: Thank you. Before we start, can we just talk a little bit about timetable because we indicated, I think a week ago, that we would not be requiring any opportunity to ask questions of the experts. Have you had a discussion about whether that has any effect on the timetable, in particular do we actually need the full three days?

MS FORD: We have not discussed that directly. For my part, I would hope that I should be done by close of play today, so I would hope that we could accommodate it comfortably within the three days.

THE CHAIRWOMAN: Yes, I am hoping we can go down to about

two and a half, given that half a day was set aside.

MS FORD: Madam, certainly. I think that should be doable.

THE CHAIRWOMAN: If that, having heard what you have just said. Thank you.

MS FORD: Starting with the *Competition Act 1998*, if we can go, please, to authorities bundle, tab 1, page 2, {AUTH/1/2}. I think that is the advocates bundle. The authorities bundle is the first one that appears at the top of the list of bundles.

If we can go down to 47A, towards the bottom of this page, this is the provision which provides that claims for damages for breach of competition law can be made in proceedings before the Tribunal.

If we go over the page to page 3, {AUTH/1/3}, the Tribunal will see at the bottom there, section 47B, which is the section governing "Collective proceedings before the Tribunal", subsection (1) provides that:

"... proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies."

"Those proceedings must be commenced by a person who proposes to be the representative in those proceedings."

That is subsection (2).

If we go over the page again to page 4, please, {AUTH/1/4}:

"Collective proceedings may be continued only if the Tribunal makes a collective proceedings order."

That is subsection (4).

Subsection (5) then sets out the two requirements for the Tribunal to make a collective proceedings order. The first one is the authorisation requirement, so the Tribunal must consider:

"... that the person who brought the proceedings is a person who, if the order were made, the Tribunal could authorise to act as the representative in those proceedings in accordance with subsection (8) ..."

The second is the eligibility requirement, and that is the requirement that the claims are eligible for inclusion in collective proceedings.

What is meant by "claims eligible for inclusion in collective proceedings" is then defined in subsection (6) and it contains two limbs. There is what is termed the "commonality requirement", which is that "the Tribunal considers that [the proceedings] raise the same, similar or related issues of fact or law", and then there is the suitability requirement which is that the claims "are suitable to be brought in collective proceedings".

Subsection (7) then explains the matters that the order must include: authorisation of the representative,

description of a class and the specification of the proceedings as opt-in or opt-out. Those are concepts which are defined then as subsections (10) and (11) of this provision.

Subsection (8) then continues with the authorisation requirement and it provides that:

"The Tribunal may [only] authorise a person to act as the [class] representative [if] ..."

Then at subsection (b):

"... if [it] considers that it is just and reasonable for that person to act as a representative in those proceedings."

Then the Tribunal will see the definition there of "Opt-in collective proceedings", subparagraph (10), and "Opt-out collective proceedings", subsection (11).

Go over the page to page 5, please, {AUTH/1/5}. This is section 47C and this is the provision which concerns the award of damages in collective proceedings. Subsection (2) provides that:

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

That is the concept of an aggregate award of damages and an aggregate award of damages is sought in these

proceedings.

Moving on to the *Competition Appeal Tribunal Rules*, can we turn up {AUTH/2/45} please? The Tribunal will see there Rule 77, which is "Determination of the application for a collective proceedings order". That provides that:

"The Tribunal may make a collective proceedings order, after hearing the parties, only ..."

Then the two relevant provisions: provision (a), if the authorisation requirement is satisfied, and provision (b) concerns if the eligibility requirement is satisfied.

Rule 78 is the Rule that governs the authorisation requirement and, consistent with the terms of the Act, Rule 78(1)(b) provides that "the Tribunal may authorise an applicant to act as the class representative ... only if the Tribunal considers that it is just and reasonable ..."

Subparagraph (2) then identifies the factors that the Tribunal must take into account in determining whether it is just and reasonable. The particular ones which are engaged for the purposes of these proceedings are subparagraph (a), whether the person would act fairly and adequately "in the interests of the class members", subparagraph (b), whether the person has

"a material interest that is in conflict with the interests of the class members", and (d), whether the person "will be able to pay the defendant's recoverable costs if ordered to do so".

Subparagraph (3) then provides that:

"In determining whether the proposed class representative would act fairly and adequately in the interests of the class members for the purposes of paragraph 2(a), the Tribunal [must] take into account all the circumstances, including ..."

Relevantly for these purposes, under (b):

"if the proposed class representative is not a member of the class, whether it is a pre-existing body and the nature and functions of that body;

"[and] whether the proposed class representative has ... a plan for the collective proceedings ..."

Turning on to page 46, please, {AUTH/2/46}, Rule 79 of the tribunal's rules is the Rule governing the eligibility requirement. The Tribunal will see that there are three requirements under 79(a) -- sorry, under 79(1). First, the claims sought to be included in the collective proceedings must be brought on behalf of an identifiable class of persons; secondly, they must raise common issues; and, thirdly, they are to be suitable to be brought in collective proceedings.

Subparagraph (2) is then dealing with suitability and it provides that the Tribunal may take into account such matters as it thinks fit, including various listed factors, and the particular factor which is in issue for the purposes of this application is the factor in (b), "The costs and the benefits of continuing the collective proceedings".

Subparagraph (3) in this Rule 79 then concerns whether the claim should be certified as opt-in or opt-out. It provides that "the Tribunal may take into account all matters it thinks fit", including an additional two factors: firstly, the strength of the claims and then, secondly, whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of the damages the individual class members may recover.

Moving on to the Tribunal's Guide to Proceedings, if we can look, please, at {AUTH/3/84}, the Tribunal will be aware that section (6) of the Guide overall deals with collective proceedings and paragraph 6.29 to 6.36 are all concerned with the authorisation requirement.

If we can go on to 6.37, {AUTH/3/84}, 6.37 is the provision that concerns the eligibility requirement, and the first bullet is addressing the requirement that you

need an identifiable class of persons. It explains:

"It must be possible to say for any particular person, using an objective definition of the class, whether that persons falls within the class."

If we can go over the page, {AUTH/3/85}:

"The need for an identifiable class of persons serves several purposes. It sets the parameters of the claim by clearly delineating who is within the class and who is not, thus determining who will be bound by any resulting judgment. It affects the scope of the common issues raised by the collective proceedings."

Then if we go to the second chunk of text, you can see that the Guide tells us:

"... class definitions based on subjective or merits-based criteria (for example 'persons having suffered loss as a result of the defendant's conduct') should be avoided.

The second bullet on this page is concerned with the requirement that there must be common issues and it explains that:

"Common issues are defined in Rule 73(2) as the same, similar or related issues of fact or law ..."

Then the third bullet, towards the bottom of the page, concerns the requirement that claims must be suitable to be brought in collective proceedings and it

explains there that the Tribunal will take into account all matters it thinks fit and it gives a particular example of costs and benefits. So it says:

"By way of illustration, the Tribunal may consider the costs and benefits of continuing the collective proceedings in various ways ... having regard to the likely loss incurred, any potential damages award and the financial cost of continuing proceedings collectively. Where the estimated legal fees and expenses appear disproportionate compared to the likely damages award, the costs of pursuing collective proceedings may outweigh the benefits. The Tribunal may also consider whether collective proceedings should be preferred, in the circumstances, to ordinary individual proceedings, or other ways of resolving the dispute."

If we turn on to page 86, please, {AUTH/3/86}, paragraphs 6.38 and 6.39 are giving guidance about the question of whether proceedings should be opt-in or opt-out. You see there the two criteria identified that were in the Rules, the strength of the claims and the practicability requirement. As to the strength of the claims, the guidance says that follow-on claims "will generally be of sufficient strength for the purpose of this criterion". That is towards the bottom of the first bullet point.

Then if we can scroll down a little bit further, on whether it is practicable for proceedings to be brought as opt-in, the guidance says:

"The Tribunal will consider all the circumstances, including the estimated amount of damages that individual class members may recover in determining whether it is practicable for the proceedings to be certified as opt-in. There is a general preference for proceedings to be opt-in where practicable. Indicators that an opt-in approach could be both workable and in the interests of justice might include the fact that the class is small but the loss suffered by each class member is high, or the fact that it is straightforward to identify and contact the class members."

So those are the relevant provisions of the tribunal's Guide. I am moving on to look at the tribunal's case law on certification. As the Tribunal will be aware, the leading case is *Merricks* in the Supreme Court. That is in the authorities bundle at tab 25, please, {AUTH/25/1}.

This is essentially the leading case on the legal requirements for certification and it is a follow-on claim brought on an opt-out basis. The majority judgment is given by Lord Briggs. If we start, please, at paragraph 30, which is on page 13, {AUTH/25/13}, the

Supreme Court is here explaining the two grounds on which the Tribunal originally refused a CPO and they concerned the eligibility requirement.

If we go on to page 14 for the rest of paragraph 30, {AUTH/25/14}, you can see that the Tribunal explains that this was not because it "failed to raise the same, similar or related issues".

Opposite B:

"Rather, the refusal of a CPO was because the claims were not suitable to be brought in collective proceedings. The first reason was that the claims were not suitable for an aggregate award of damages, within Rule 79(2)(f). This was sufficient on its own to require refusal of a CPO. The second reason was that Mr Merricks' proposals for distribution of any aggregate award did not respond in any way to the compensatory principle which the CAT regarded, on common law principles, as an essential requirement of any distributive scheme."

So those were the two grounds on which the CAT originally refused a CPO.

If you look down to paragraph 32, you can see that the Supreme Court elaborates on these two reasons. On the points that the claims were not suitable for an aggregate award of damages, the Supreme Court explains

at 32 that the tribunal's concern was that there might not be sufficient data for the methodology that was being proposed to assess merchant pass-on, so pass-on of an overcharge by merchants to the class, and they were concerned that the absence of data meant that the methodology could not be applied on a reliable basis.

Then as regards the concern that Mr Merricks' proposals for distribution of the award did not comply with the compensatory principle, the Supreme Court explains in 33 that the particular concern was that there would be wide divergences in the impact of the overcharge on individual consumers. You can see that just at the end of this page and it goes on to the other page.

It is highlighting the point that "wide divergences in the impact of any overcharge upon each one of them, viewed individually, even if all of them will probably have suffered some loss ..."

So that is the context of the Supreme Court's consideration. Those are the two reasons that the CAT considered it was not suitable for a CPO. The Supreme Court's analysis of that then begins at paragraph 45 on page 18, {AUTH/25/18}. This paragraph is commenting on the purpose of the collective proceedings regime. It explains between F and G:

"Collective proceedings are a special form of civil procedure for the vindication of private rights, designed to provide access to justice for that purpose where the ordinary forms of individual civil claim have proved inadequate for the purpose. The claims, which are enabled to be pursued collectively, could all, at least in theory, be individually pursued by ordinary claim, in England and Wales under the CPR, under the protection of the overriding objective."

It says importantly:

"It follows that it should not lightly be assumed that the collective process imposes restrictions upon claimants as a class which the law and rules of procedure for individual claims would not impose."

Moving on to paragraph 46, just before the end of the page, you see the Supreme Court commenting that this is a follow-on claim, and it says:

"... Mr Merricks [and if we can go over the page] and the class he seeks to represent already have a finding of breach of statutory duty in their favour."

Just pausing there, that is obviously the case in this claim as well and the Supreme Court makes the point, {AUTH/25/19}:

"All they would need as individual claims to establish a cause of action would be to prove that the

breach caused them some more than purely nominal loss. In order to be entitled to a trial of that claim they would (again individually) need only to be able to pass the strike-out and (if necessary) summary judgment test: i.e. to show that the claim as pleaded raises a triable issue that they have suffered some loss from the breach of duty."

It goes on in 47:

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

Then it goes on to point out that:

"There are cases where the court has to do the best it can upon the basis of exiguous evidence. There are cases, such as general damages for pain and suffering in personal injury claims, where quantification defies scientific analysis, where the court has to apply general tariffs developed over many years by the common law ..."

"In many cases", says the Supreme Court, "the court unashamedly resorts to an element of guesswork ..."

It cites *McGregor* on Damages.

If we go on to paragraph 51 on page 20, {AUTH/25/20}, having pointed out what the position is in non-collective proceedings, regular proceedings, the Supreme Court says:

"In relation to damages, this fundamental requirement of justice that the court must do its best on the evidence available is often labelled the 'broad axe' or 'broad brush' principle ..."

It explains "It is fully applicable in competition cases".

Moving down to 54,{AUTH/25/21}:

"There is nothing in the statutory scheme for collective proceedings which suggests, expressly or by implication, that this principle of justice, that claimants who have suffered more than nominal loss by reason of the defendants' breach should have their damages quantified by the court doing the best it can on the available evidence, is in any way watered down in collective proceedings. Nor that the gatekeeping function of the CAT at the certification stage should be an occasion when a case which has not failed the strike out or summary judgment tests should nonetheless not go

to trial because of difficulties in the quantification of damages. On the contrary, as the Court of Appeal observed at [paragraph] 59, a refusal of certification of a case like the present is likely to make it certain that the rights of consumers arising out of a proven infringement will never be vindicated, because individual claims are likely to be a practical impossibility. The evident purpose of the statutory scheme was to facilitate rather than to impede the vindication of those rights."

In our submission, those are important principles that underlie the collective proceedings regime.

The Supreme Court then goes on to express its view as to the meaning of the word "suitable" in the regime, and that is at paragraph 56, {AUTH/25/22}, further down the page.

What it explains is that the concept of suitability means "suitable" in the relative sense, i.e. suitable to be brought in collective proceedings rather than individual proceedings. It explains at 57 that:

"The same analysis leads to the same conclusion about the meaning of 'suitable for an award of aggregate damages' ..."

If we go on to 58, {AUTH/25/23}, the Supreme Court refers to the fact that:

"Another basic feature of the law and procedure for the determination of civil claims for damages is of course the compensatory principle, as the CAT recognised. It is another important element of the background against which the statutory scheme for collective proceedings and aggregate awards of damages has to be understood. But in sharp contrast with the principle that justice requires the court to do what it can with the evidence when quantifying damages, which is unaffected by the new structure, [the Supreme Court says] the compensatory principle is expressly, and radically, modified. Where aggregate damages are to be awarded, section 47C of the Act removes the ordinary requirement for the separate assessment of each claimant's loss in the plainest terms. Nothing in the provision of the Act or the Rules in relation to the distribution of a collective award among the class puts it back again. The only requirement, implied because distribution is judicially supervised, is that it should be just, in the sense of being fair and reasonable."

So that is another principle to which we will come back to, that in collective proceedings the compensation principle has been expressly and radically modified.

Paragraph 59, the Supreme Court states "that the certification process is not about, and does not

involve, a merits test". It identifies two exceptions to that statement. The first is where you have a strike-out or summary judgment application and the second, in paragraph 60, is the Rule in 79(3)(a), which "makes express reference to the strength of the claims, but only in the context of the choice between opt-in and opt-out proceedings. It does so in terms which, by use of the words 'the following matters additional to the matters set out in paragraph (2)', confirm that the factors relevant to whether the claims are suitable to be brought in collective proceedings do not include a review of the merits".

So the basic Rule is that certification is not about a merits test, subject to those two exceptions.

We then go on to 63 to 64 on page 24, {AUTH/25/24}. The Supreme Court is here only to consider whether the CAT's decision to refuse a CPO was vitiated by errors of law and it concludes that it was. It summarises the relevant errors that it has identified in paragraph 64 of its judgment and it then goes on to address them in greater detail.

If we go to page 25, {AUTH/25/25}, paragraph 66, the Supreme Court is here recording that there has been no appeal against the finding of the Court of Appeal that pass-on is a common issue. It says that it should have

been weighed in the balance, in the balancing exercise, when the CAT was considering suitability. So it says:

"Had the CAT concluded (as the Court of Appeal held and which is not appealed) that the merchant pass-on issue was a common issue ... this would ... have been a powerful factor in favour of certification ..."

Go on then to 67 to 69, {AUTH/25/26}. In these paragraphs the Supreme Court is identifying a further error in treating the question of suitability of an award of aggregate damages as a hurdle rather than simply as a factor that should be weighed up in the balancing exercise.

Then, at 70 to 71, the Supreme Court identifies a further error in that the CAT did not consider relative suitability.

Paragraph 72, at the bottom of the page, {AUTH/25/26}, concerns the proposed approach to determining whether merchants passed on an overcharge to the class. What was proposed, if we go over the page {AUTH/25/27} -- what was proposed by Mr Merricks' expert team was to divide the retail market into a number of sectors. There were concerns about the reliability of and the availability of data for the purposes of that exercise, but what the Supreme Court said about that, starting at C, is:

"... the CAT's assessment fell well short of suggesting that Mr Merricks would be unable at trial to deploy data sufficient to have a reasonable prospect of showing that the represented class had suffered any significant loss."

It goes on to say at 73:

"The fact that data is likely to turn out to be incomplete and difficult to interpret, and that its assembly may involve burdensome and expensive processes of disclosure are not good reasons for a court or Tribunal refusing a trial to an individual or to a large class who have a reasonable prospect of showing they have suffered some loss from an already established breach of statutory duty. In the context of suitable for collective proceedings or aggregate damages, it is no answer to say that members of the class can bring individual claims. They would face the same forensic difficulties in establishing merchant pass-on, and insuperable funding obstacles on their own, litigating for small sums for which the cost of recovery would be disproportionately large."

It goes on in 74:

"The incompleteness of data and the difficulties of interpreting what survives are frequent problems with which the civil courts and tribunals wrestle on a daily

basis. The likely cost and burden of disclosure may well require skilled case management. But neither justifies the denial of practical access to justice to a litigant or class of litigants who have a triable cause of action, merely because it will make quantification of their loss very difficult and expensive."

So there, in my submission, you have the Supreme Court emphasising the importance of not refusing a trial to a class who have a reasonable prospect of establishing that they have suffered some loss from an already established breach of statutory duty.

Just looking quickly at 76 to 77 on page 28, {AUTH/25/28}, here you have the Supreme Court reiterating that "Section 47C ... radically alters the common law compensatory principle" and that means that adherence to the compensatory principle is not essential in the distribution of an aggregate award of damages.

It says at the end of paragraph 77:

"In many cases, the selection of the fairest method will best be left until the size of the class and the amount of the aggregate damages are known."

Those, in my submission, are the important principles that can be derived from the *Merricks* case in the Supreme Court. Once the Supreme Court had clarified

the relevant approach in *Merricks*, there have been three collective proceedings orders certified and the Tribunal has not refused to certify any proceedings. So the first one in time was *Merricks* itself, which was certified on remittal, and I am going to come back to that in the context of compound interest and deceased persons, so I do not propose to look at the judgment for that now.

The second in time was the *BT case* and that is in authorities bundle tab 29, please. This is a judgment in which the Tribunal certified an application for a collective proceedings order against BT and the claims which were certified were stand-alone claims rather than follow-on claims and the allegations were abuse of a dominant position by means of excessive pricing.

BT sought summary judgment or strike-out of the claims and they also challenged the certification of the claims on an opt-out basis. Neither of those objections were successful. We start at page 12, please, {AUTH/29/12}. Paragraph 25, the Tribunal is summarising the familiar principles on strike-out and summary judgment and you see there that "the claim must have a real prospect of success. It must not be merely 'fanciful'. The Tribunal ... should not seek to conduct a 'mini-trial'". Those are familiar principles.

In our submission this case is particularly instructive because of the way the Tribunal grappled with the approach to expert evidence at the CPO stage when faced with an application for strike-out summary judgment. If we look at paragraphs 35 to 47, they are a fairly extensive summary of the contents of the class representative's expert reports in that case.

Then at paragraph 47 on page 20, {AUTH/29/20}, the tribunal's conclusion is that what it summarised, the reports that it summarised, support at least a prima facie case of abuse.

Now, obviously, this was a stand-alone claim and so the applicant in that case faced an additional hurdle that we do not face here, which is that they had to establish that there was an infringement in the first place, but, in our submission, it is the right approach for the Tribunal to say: is there a prima facie case here? The Tribunal then goes on to consider the various criticisms that were advanced of the expert evidence in that case. If we look, for example, at paragraph 64 on page 25 --

THE CHAIRWOMAN: Just pausing there, at this stage, are they considering the summary judgment?

MS FORD: They are, yes. The first half of the judgment is considering the summary judgment application. The

second half comes on to deal with the opt-in and opt-out.

So if we could go to page 25, please, {AUTH/29/25}, you can see paragraph 64 in the context of the Tribunal considering all the criticisms that were advanced. They say:

"The real question is whether, taken in the round, there was any part of his analysis that was so wanting that it was fatal to any realistic conclusion that there was abuse."

Again, in our submission, that is the correct way to approach it.

Looking at paragraph 82 on page 30, please, {AUTH/29/30}, they are expressing their conclusions on what they describe as "Objection 3". They say:

"... we fail to see that Mr Parker's analysis is seriously defective because it has not engaged with BT's points on Wider Competitive Dynamics. And to the extent that there is something in some or all of those points, they do not at this stage render his evidence on abuse effectively worthless."

Similarly, if we look at page 31, {AUTH/29/31}, paragraph 88, the Tribunal is there recognising that the sorts of objections that have been raised raise questions for trial, but they say:

"... it does not render the PCR's present analysis merely fanciful."

Then page 35, {AUTH/29/35}, paragraph 100, you see a similar approach:

"Yet again, some or all of these points may be debated at trial. But they do not, either individually or collectively, dispose of the claim in respect of SPCs at this stage."

Then finally, to similar effect is paragraph 105 on page 36, {AUTH/29/36}. You see -- partway through this paragraph you see them expressing the view:

"... this point of distinction ... [does not] mean that BT is bound to win on this point so that SPCs will not recover any damages."

In our submission these are the sorts of enquiries that the Tribunal should be making at this stage when it is faced with objections on the part of the respondents about the effect of expert evidence.

THE CHAIRWOMAN: Well, certainly should be making if there is a summary judgment application.

MS FORD: My Lady, yes. We obviously have made the point that there is a purported summary judgment application in that the procedural niceties do not appear to have been followed. In our submission, similar points do arise insofar as you are facing an objection that there

is a methodological problem for the purposes of --

THE CHAIRWOMAN: Yes. Going back to Lord Briggs' judgment in *Merricks*, he says at one point that there is no merits test unless there is a summary judgment application, but you have also taken us to parts of his judgment that indicate something that looks a bit like that sort of test when considering methodology; is that your point?

MS FORD: My Lady, I am going to come on to the *Trains* judgment, which was considering the commonality requirement, and that sets out very clearly what the test is when you are considering methodology.

THE CHAIRWOMAN: Well, yes, I know we will get on to the Microsoft debate, but I am on a slightly narrower point here, which is on this particular judgment, the paragraphs you are showing us now are consistent with considering the normal summary judgment --

MS FORD: My Lady, that is entirely correct. We say, insofar as there is a summary judgment strike-out application, this is the correct approach to it.

The Tribunal will see at 109 on page 37, {AUTH/29/37}, the tribunal's conclusion in that claim. This is how they dispose of the summary judgment strike-out on that basis. They say:

"... there is a real prospect of success for this

claim and the cross-application must be dismissed."

They go on to consider the opt-in/opt-out question.

If we look at paragraph 110 at the bottom there, you can see that the Tribunal says in this case, {AUTH/29/38}:

"We agree that the fact that the PCR does not seek an opt-in basis as an alternative does not absolve it from demonstrating, and the Tribunal from being satisfied, that the opt-out basis is more appropriate."

The Tribunal will have seen from our skeleton argument that we do respectfully differ from the Tribunal in respect of that reasoning.

THE CHAIRWOMAN: Sorry, I think we need to go on to the next page.

MS FORD: I am sorry.

I am referring to the last three lines:

"We agree that the fact that the PCR does not seek an opt-in basis as an alternative does not absolve it from demonstrating, and the Tribunal from being satisfied, that the opt out basis is more appropriate."

So it is essentially saying, even when you have a PCR that is not offering opt-in as an alternative -- it is saying, "I am applying to bring an opt-out claim, nevertheless the Tribunal must consider whether opt-in is appropriate".

We have put down a marker in our skeleton that we do respectfully disagree with that reasoning and we say, in particular, that it is not consistent with the Supreme Court's reasoning in *Merricks* because, Madam, as you have just indicated, in *Merricks* the standard Rule is that certification does not involve a merits test. If, even when the PCR is not trying to bring an opt-in claim by way of alternative, the Tribunal still has to consider whether or not opt-in is practicable and consider the merits element of an opt-in application, then you essentially undermine the Supreme Court's indication that *Merricks* should only be an exception rather than the Rule.

But, as I will come on to submit, in our submission the Tribunal does not actually have to decide that point in these proceedings because these proceedings raise a very particular issue, which is that the respondents suggest that you should bifurcate a class which is otherwise suitable for opt-out proceedings. My submission in due course will be that there is no support for that approach in the Act or the rules or the Guide and so actually it does not become necessary to decide the separate point that the Tribunal expresses a view on here in paragraph 110.

You can see from paragraph 111 that the *BT case* was

exceptional because, unlike this case, the Tribunal had found that it was possible to identify and contact members of the class because it happened that they were all either BT's customers or ex-BT customers, and so exceptionally they could be identified and contacted. That is one of the criteria that I showed the Tribunal, that was identified in the Guide as reason why an opt-in proceeding might well be appropriate and viable. Nevertheless, the Tribunal then goes on to express a view about there being a distinction between opting in at the outset of proceedings and distribution. So you can see at paragraph 112 this is actually citing the PCR's submission:

"The PCR's core response is that there is a real difference between the option to join a legal action at the outset and claiming a damages entitlement later on once the case has been won."

If we go on to 114 on page 39, {AUTH/29/39}, you see at the bottom of paragraph 114 the Tribunal accepts the PCR's submission on that point. It says:

"... the position at this stage is not at all the same as at the distribution stage, for the reasons already given."

I will show the Tribunal later that we agree with that and Ms Hollway's evidence in her witness statement

is that there is a very real difference between inviting a class to opt in at the outset and inviting them to collect their share of a damages pot at the distribution stage.

MR HOSKINS: Can I just ask you to read the rest of that paragraph at this stage?

THE CHAIRWOMAN: 114?

MR HOSKINS: 114.

(Pause)

THE CHAIRWOMAN: Thank you.

MS FORD: Just to see how the Tribunal resolved the objection to an opt-out application in this case, can we go to paragraph 125 on page 41, {AUTH/29/41}? You can see that, notwithstanding that this was a relatively exceptional case in the sense that the clients were both identifiable and contactable, the Tribunal nevertheless certifies it on an opt-out basis. So that is the *BT case*.

Then moving on to the other CPO which has been certified since *Merricks*, that is the *Trains* case and it is at authorities bundle tab 30, {AUTH/30/1}. This is a judgment where the Tribunal had before it two applications for a collective proceedings order and the underlying claims were alleging that the train-operating companies had abused their dominant position by failing

to make boundary fares sufficiently available or prominent for consumers. This was a stand-alone claim rather than a follow-on claim and they were certified on an opt-out basis.

Again, in this case, the defendants sought summary judgment or strike-out of the claims and they also sought to argue that the claims in this case did not satisfy the eligibility requirement. They were unsuccessful on each of those objections.

If we look at paragraph 52 on page 21, {AUTH/30/21}, the Tribunal is there citing the test for summary judgment and strike-out. It is saying that it is the same under the CAT rules as under the CPR. It is citing the familiar test from *Easy Air v Opal*. You see, as in the *BT case*, there must be a realistic as opposed to fanciful prospect of success.

If we go over to 22, {AUTH/30/22}, you see that the Tribunal -- the court must not conduct a mini trial.

If we look at page 23, {AUTH/30/23}, paragraph 54 is summarising the objections that were raised in that case on abuse. What was said was that the objections -- the allegations went well beyond existing law and were unsustainable. Again, the Tribunal will have the point that this is a case where there was no pre-existing finding of liability in contrast with the present case,

where we have the benefit of a binding finding.

But the Tribunal was not persuaded that that was insufficient, and if you see at paragraph 75 on page 32, {AUTH/30/32}, their conclusion is:

"the Applicant's case on abuse is reasonably arguable. It cannot be dismissed summarily at this stage or be struck out."

So having dealt with the strike-out summary judgment application, they then move on to consider the eligibility requirement. The argument that was advanced there, if we look at paragraph 77 -- I think it is on page -- it should be at the bottom of this page {AUTH/30/32} -- yes, they say:

"... the eligibility condition is not satisfied in these cases."

They make two points. First they say:

"There are no, or at most very limited, common issues ..."

And over the page, {AUTH/30/33}, they say:

"The need for individual factual assessment to establish whether any claim was valid meant that the claims are not suitable for collective proceedings."

If you look at paragraph 78, about eight lines down, in particular you see that what was argued here was that some class members might not have suffered any loss at

all. So you see:

"... the Respondents submitted that this is clearly unsustainable. On the contrary, some class members will have suffered no loss at all, and the situation of the class members generally is hugely diverse and cannot be bundled into collective proceedings. Therefore, the claims of all members of the class, as defined, do not enable the establishment of liability and loss on a collective basis; or alternatively the class definition is over-inclusive."

So that is the submission that the Tribunal was faced with.

Beginning at paragraph 81, the Tribunal then went into an extensive consideration of Canadian authority and the conclusions it draws from it are then summarised at paragraph 107, so this is page 45, {AUTH/30/45}. You can see there:

"... the Canadian Supreme Court has set out the following principles which we think can appropriately be applied under the UK regime."

The principles that we place particular emphasis on are, first of all, subparagraph (3), which tells us:

"A common issue does not require that all members of the class have the same interest in its resolution. The commonality refers to the question not the answer, and

there can be a significant level of difference between [if we can go over to the next page] the position of class members. Therefore the question may receive varied and nuanced answers depending on the situation of different class members, so long as the issue advances the litigation as a whole ..."

The second point we place emphasis on is subparagraph (4), and this is articulating the test for the purposes of the commonality requirement. This is the point, Madam, that you were referring to earlier I believe. It is referred to in this judgment as the "*Microsoft test*" and I think KK refers to it in its skeleton as the "*Pro-Sys test*", but this is the --

THE CHAIRWOMAN: The same case.

MS FORD: The same case, exactly. The way the Tribunal summarises it is, {AUTH/30/46}:

"The standard to be applied in assessing expert evidence designed to show a common issue is that it must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement and that it is not purely theoretical but grounded in the facts of the particular case in question, with some evidence of the availability of the data to which the methodology is to be applied ..."

The Tribunal emphasises, referring to *Merricks*, that

"this is not an onerous evidential test".

If we go on to 114 to 115, page 50, {AUTH/30/50}, what the Tribunal is doing here is comparing the claims that were in the Canadian authorities, that it was referred to, to those advanced in this case. What it is emphasising is that the present claims are advanced on the basis of a systemic failure by the respondents.

"The claims focus on the manner and extent of the availability of Boundary Fares, both as regards outlets from which and types of fare ... for which they were not available at all, and the lack of information for customers where they were available. The basic contention of the Applicant is that the overwhelming majority of passengers who were entitled to purchase a Boundary Fare ... would not knowingly pay more for their journey than necessary. We do not regard that as a far-fetched or implausible contention and whether that is accepted in whole or in part does not depend on individualised consideration of every customer."

You also see a reference to the concept of a "systemic breach" towards the bottom of 115 as well. So they are grappling with the fact that there might be differences as between customers but they are saying that what you are enquiring about here is the effect of a systemic breach.

We can see that the Tribunal is now moving to apply what it said by way of the test to the common issues that are in this case. Moving on to page 55, {AUTH/30/55}, paragraph 126, you can see that in the context of debating causation, the respondents in that case advanced various factual scenarios where they said a passenger might have been aware of the possibility of a boundary fare but might not have purchased one or might not have suffered any loss.

What we see in this judgment is that the Tribunal rejects the submission that any factual scenarios of that nature or any degree of variation undermines the commonality requirement. If we look in particular at paragraph 129 on page 56, {AUTH/30/56}, it is commenting on -- this is the fifth example that was advanced, but there are various of them. It says:

"... subject only to (iii) [which is the circumstances of point-to-point fares, in specific circumstances, they say] we consider that the various examples do not preclude the issues we have identified from being common issues as the term is explained above. Almost any class action will include some claimants who suffered no loss ..."

It cross-refers to *Merricks*.

"We think it would create an unfortunate obstacle to

an effective regime for collective proceedings if potential defendants could sustain objections to the eligibility condition based on speculative examples. Where appropriate, the interests of the defendant can be protected by making some reduction in the aggregate damages award, based on reasonable estimation or assumption."

So that is how the Tribunal has dealt with what it describes as speculative examples of circumstances where one class member or another might not have suffered loss.

Paragraph 135 on page 58, {AUTH/30/58}, this is the tribunal's conclusion on what are common issues in that case. What we see is that it has identified the sort of headline questions of dominance and abuse but also issues which might be thought to be more individualised, such as causation and mitigation. So even issues where there might be considered to be a degree of variation in the circumstances of particular class members, they still satisfy the test for common issues.

Paragraphs 136 to 138, probably on the next page, {AUTH/30/59}, they are setting out their reasoning in respect of the submission that some class members may be in a different position or may find they have suffered no loss. They say:

"We recognise, as is indeed obvious, that these issues do not arise equally in the claims of all class members and they indeed may not arise in the same way as regards every purchase of an in-scope journey ticket by the same class member."

They go on to give examples.

"But in our judgment, the way these questions arise for each class member are sufficiently similar or related to constitute common issues, like the questions of merchant pass-through for very different sectors in *Merricks*."

Just looking at the conclusion in 138:

"In our judgment, if there is a realistic and plausible method of estimating aggregate damages, that overcomes the individual aspects of causation and the claims are suitable to be brought together by way of collective proceedings. For the same reason, we do not see that the claims by way of collective proceedings can be struck out or that the Respondents are now entitled to summary judgment."

So what they have essentially said is the fact that you can point to elements of variation or difference as between class members does not torpedo the commonality requirement.

Starting at paragraph 140, they are then coming on

to consider the methodology in that case for the calculation of aggregate damages. You can see in 140 -- I think it might have been the previous page {AUTH/30/59} -- they are again applying the *Microsoft test*. They say that the test is "a workable or credible methodology for calculating damages with a realistic chance of being applied".

Paragraph 141, {AUTH/30/60}, they remind themselves that:

"It is fundamental to competition damages cases that a precise quantification of loss is not required."

They refer to the "broad axe" principle.

Then they go on to look at the various specific criticisms that were advanced in that case.

Paragraph 155 on page 64, {AUTH/30/64}, you can see that in grappling with the particular criticisms that were advanced, they say:

"We should emphasise that a CPO application is not an occasion for a full evaluation of the merit and robustness of an expert methodology."

Then, similarly, at paragraph 162 on page 67, {AUTH/30/67}, you see partway down that paragraph the Tribunal saying:

"Expert evidence at this stage should explain the methodology proposed and indicate the available sources

of data to which it will be applied, but it does not have to provide detailed elaboration of the way the analysis or analyses will be conducted."

If we look at 164, {AUTH/30/68}, you can see their conclusion in that case. They were satisfied that the expert in that case had put forward a plausible and credible method of calculating aggregate damages. Again, in our submission, that is the correct approach to assessing the expert evidence at this stage.

Paragraphs 165 to 178 then went on to a different issue, which was the "Cost Benefit Assessment" in these proceedings. If we look at paragraph 168, {AUTH/30/69}, you can see that there was a particular concern in this case:

"The Respondents argued that it was highly unlikely that many people would have such documentation, going back what could well be as much as eight years. Mr Ward pointed out that copy bank statements alone would not suffice since they would not show the kind of tickets purchased or Travelcard held. Moreover, the Respondents submitted that it was very doubtful that many individuals would be incentivised to gather all the information required given the small amount they would recover."

So there was a particular concern in the context of

a claim which is about train fares of how were the members of the class going to find the relevant paperwork to demonstrate -- evidence their claim as and when they come to try and claim their entitlement.

That, in my submission, is quite an important element which weighed on the tribunal's mind when it was considering the cost benefit analysis of these particular proceedings. The Tribunal then concluded at 178, {AUTH/30/72}, in their view, in that case:

"... the cost-benefit analysis comes out slightly against the grant of a CPO."

We can see at paragraphs 179 to 181 that what the Tribunal then has to go on to do, is to weigh up the various factors that feed into a suitability analysis and, notwithstanding that they found that one particular factor weighed against the grant of a CPO, they conclude that overall the suitability requirement in that case was satisfied. You can see that, I think, from 181 on the next page, {AUTH/30/74}. Yes:

"Accordingly, taking account of all the various factors set out above and the significant number of common issues, we consider that the balance comes down clearly in favour of a finding of suitability."

So having decided that suitability was satisfied, they then go on to consider opt-in/opt-out. Their

consideration there is relatively brief. What you do see in paragraph 183 is that they say:

"We have no doubt that it is not practicable for opt-in proceedings to be brought here. The small amount of estimated individual recovery means that very few persons would seek to opt-in, and the large size of the class in each action would make opt-in proceedings very difficult to manage."

They go on to say:

"We should add that we were not impressed by the Respondents' argument that if few class members would choose to opt-in that demonstrates that few would submit a claim after an award of aggregate damages. Participating in potentially lengthy and uncertain litigation from the outset is a very different proposition from claiming even a modest payment, for which the claimant is eligible to apply, from an existing fund."

So there you have the Tribunal expressing the same view as was expressed by the Tribunal in *BT*, that there is a real difference between asking somebody to opt in at the outset and applying to collect their share of the damages at the end. Again I will come on to show you Ms Hollway's evidence that we agree that that is a relevant distinction.

Finally, paragraph 185 on page 75, {AUTH/30/75}, you can see the tribunal's conclusion that the requirements for certification were satisfied in that case.

So, in our submission, what the Tribunal's judgments in *BT* and *Trains* demonstrate is that the threshold for certification of collective proceedings is not an onerous one and the Tribunal must be astute to ensure that it does not attempt to determine at this stage matters that ought properly to go to trial.

Now, I have picked up the test for summary judgment insofar as it has been pursued, as we have been through, but there is one particular authority I would draw attention to in addition. It is very much consistent with the points that have gone before, but what it does emphasise is that disputed elements of fact are not suitable for summary determination, and that is the *Optaglio* case. It is authorities bundle, tab 15 at page 7, {AUTH/15/7}. We rely on paragraphs 31 and 32. You see this reference to the fact that:

"... an application for summary judgment should not be allowed to develop into a mini-trial of disputed issues of fact."

Then at 32 you see:

"Given the nature of the summary judgment test, the court can only dispose of factual issues in this way

when there is no real prospect of the evidence of one side on that issue being accepted."

Madam, I am conscious that the transcribers might need a break.

THE CHAIRWOMAN: Yes. We can break now if it is convenient.

MS FORD: It is, yes.

THE CHAIRWOMAN: We will regroup at quarter-to, please.

(11.37 am)

(A short break)

(11.47 am)

MS FORD: Madam, I am coming on to deal with the Commission decision on which these claims are based and it is in bundle A, tab 5, please, starting at page 1.

We can then go within the decision to page 7, please, {A/5/7}. Recital 1 in the decision gives the summary of the infringement that has been found by the Commission and it says:

"This Decision concerns a single and continuous infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement. The single and continuous infringement, in which the addressees of this Decision participated, consisted in the coordination of prices and the allocation of customers with regard to the provision of deep sea carriage services for new motor vehicles, cars, trucks and high and heavy vehicles on

various routes at least to and from the European Economic Area ... The infringement lasted from 18 October 2006 to 6 September 2012."

Then recital (2) sets out the various addressees of the decision, and they are the proposed defendants to this application.

If we go on to page 12, please, {A/5/12}, there is a heading towards the bottom of this page, "Description of the Conduct", "Nature and scope of the infringement". The Commission finds at (29):

"With regard to deep sea shipments to and from the EEA, the parties were involved to varying degrees in conduct that sought to ... coordinate the prices of certain tenders ... allocate the business of certain customers and ... reduce capacity by coordinating the scrapping of vessels.

Going over the page, please, {A/5/13}, recital (30) explains that:

"The conduct followed the ... 'rule of respect'. According to [which] shipments of new motor vehicles related to already existing businesses on certain routes for certain customers would continue to be carried by the [incumbent] undertaking ..."

Recital (32) explains that the Rule of respect was the guiding principle for the parties' practices and it

says that when a carrier was considered an incumbent, "the carriers would respect the business of the incumbent carrier by either providing a quote above [their quote] or refraining from quoting".

It says:

"The conduct also covered ... Requests for Quotations ... by certain vehicle manufacturers."

Going down to recital (34)(a), you can see that the parties:

"coordinated rates for certain routes and for certain customers, except for CSAV that was engaged in this type of conduct only [from] June 2011 onwards. In addition, other participants than CSAV were engaged in coordination concerning the BAF (Bunker Adjustment Factor) and CAF (Currency Adjustment Factor) for certain routes and for certain customers."

Subparagraph (b) explains they:

"... allocated various RFQs, and the business of certain customers (including agreements on which party should win the RFQ or business or a certain share thereof and the details of the offers) as well as replies submitted in the framework of contract renewals and annual price negotiations."

Go over the page, please, {A/5/14}, subparagraph (c):

"[They] discussed and coordinated capacity reductions through scrapping of vessels, except for CSAV ..."

And subparagraph (d):

"[They] exchanged commercially sensitive information as a means to support the conduct described in points (a), (b) and (c) above."

So that is the nature of the conduct which the parties were found to engage in.

Recitals 35 to 40 then summarise the various contacts that took place between the parties and they explain that there were four carrier meetings, trilateral meetings and bilateral meetings.

If we go on to page 15, {A/5/15}, the Commission finds under recital (41):

"The geographic scope of the conduct ... covered at least shipments into and from the EEA ..."

Then recital (42), the Commission explains that it only has jurisdiction in respect of this conduct from 18 October 2006 and so that is deemed to be the starting point of the conduct.

Then recital (43) it says:

"The end date of the conduct ... is set at 6 September 2012 ..."

We then go on to page 17, {A/5/17}. The commission

is now setting out its legal assessment of the conduct in question and in recital (50) it finds that the parties in question "were involved in horizontal anticompetitive arrangements which formed part of an overall scheme pursuing a single anti-competitive object and single anti-competitive aim of restricting price competition. Within that overall scheme, the parties aimed at coordinating their pricing behaviour through various forms of conduct".

And recital (51) elaborates on that and says:

"Through a combination of multi-lateral and bi-lateral contacts, structured around the 'rule of respect', [the addressees] engaged with varying intensity, in market sharing, price fixing, customer allocation and capacity reduction, concerning deep sea car carrier services. The parties engaged in such practices with the aim of restricting competition on the market and maintaining the status quo, that is to say, ensuring that the car carriers would keep their respective businesses for certain customers and/or certain routes. They also claimed to preserve their position in the market and to maintain or increase prices, including by resisting requests for price reduction from certain customers."

If we go on to page 18, please, {A/5/18}, recital

(56) finds that the conduct was in pursuit of an identical object, and that is to avoid price decline and to maintain the existing balance of business between carriers.

Then recital (57) explains that:

"The conduct was an ongoing process and did not consist of isolated or sporadic occurrences. The contacts ... were of a continuous nature, with numerous and regular contacts."

Then, finally, if we go on, please, to page 32, {A/5/32}, this is the operative part of the decision and Article 1 sets out the binding finding of infringement on which we base these proposed claims. So you have the finding that:

"The following undertakings infringed Article 101 of the Treaty and Article 53 of the EEA agreement by participating, for the periods indicated, in a single and continuous infringement consisting of the coordination of prices and the allocation of customers with regard to the provision of deep sea car carriage of new motor vehicles ... on various routes to and from the European Economic Area."

Then they set out the addressees. So that is the infringement on which we rely.

I am turning to address the requirements for

certification. The Tribunal will have seen that in our skeleton we have worked through each of the requirements in order and in some detail to explain how we say they are satisfied.

In my oral submissions, I propose to focus on the objections that have been raised by the respondents and I am going to start with the objections which are claimed to justify refusing to grant a CPO altogether. In that respect, the respondents focus their fire on our methodology and, in particular, the methodology for demonstrating that any overcharge was passed down the supply chain to the affected class. My submission will be that none of the objections that are raised provide any basis for refusing certification and they are all, in essence, issues for trial in due course.

Secondly, I am going to address the suggestion that the claims of what are described as "large business purchasers" should be brought on an opt-in basis rather than an opt-out basis. Thirdly, I am going to address the various other objections which have been raised to different aspects of the application and in that head I am covering the position of deceased persons and defunct companies, compound interest and the points that have been taken about the proposed representative's relationship with Mr McLaren and the litigation funder.

So starting with the pass-on to the proposed class members. As the Tribunal will have seen, the respondents do not take issue with our methodology for determining whether the infringement actually resulted in an overcharge of the prices for deep sea shipping, nor, as we understand it from their skeletons, do they now take any issue on the proposed approach for determining the extent of any pass-on from the class insofar as the class are business purchasers.

So we understand that the scope of the objections that are being taken are relatively narrow and they relate to the methodology for ascertaining whether the overcharge in deep sea shipping is passed down the supply chain to the proposed class.

THE CHAIRWOMAN: Sorry, can I just clarify that because I have not picked up one of those points properly. You think there is no significant issue being raised about downstream pass-on?

MS FORD: Madam, yes. The reason I say that is the paragraph of the joint skeleton for the MNW respondents, where they say -- paragraph 8, they say:

"In the MNW Response, the MNW Respondents also pointed out that the PCR had not put forward a methodology for assessing pass-on by the PCMs at all. It has now done so in Reply. While this is also flawed

(not least for the same reason that it focusses only on the effects of delivery charges and not vehicle prices)..."

Just pausing there, of course, that is a point that I am going to come on to deal with because it is a point they take in relation --

THE CHAIRWOMAN: Sorry, you are at paragraph where?

MS FORD: I am sorry, paragraph 8 of the skeleton for the MMW respondents.

MS DEMETRIOU: Madam, in case it helps, I can confirm that we are not taking a point on downstream pass-on, for the purposes of this hearing.

THE CHAIRWOMAN: That is a really helpful clarification, thank you, so ...

MS FORD: For the tribunal's reference, it is advocates bundle tab 2 and then it's paragraph 8 within the skeleton, {AB/2/3}.

THE CHAIRWOMAN: Okay. So the focus is on the upstream element of the pass-on entirely. I thought there might still be an issue on downstream, but we will come back to --

MS FORD: Not that we are aware of.

THE CHAIRWOMAN: Thank you.

MS FORD: So in relation to upstream pass-on, we rely on two types of evidence. We rely on the evidence of

Mr Robinson of BDO, who is an expert economist, but we also rely on the evidence of the industry experts, Mr Goss and Mr Whitehorn, as to how in fact the costs of deep sea shipping services incurred by OEMs were then recouped down the supply chain.

Mr Robinson has been very clear in his report that his quantitative methodology that he has proposed for estimating the extent of any pass-on relies on the qualitative evidence of the industry experts as to what in practice happened in the automotive industry. In taking this approach, so in crafting our economic evidence based on the industry expert evidence, in our submission we have taken an entirely conventional approach and we have taken, we would say, an optimal approach and we rely on a number of authorities to just make good that proposition. The first one is the European Commission's Guidelines on Passing On. This is back in the authorities bundle at tab 37, please. If we go to page 11 within this document, {AUTH/37/11}, can we possibly zoom in a bit on (37) and (38), please?

These are the European Commission's guidelines on how you go about demonstrating passing-on. They say:

"The type of evidence necessary to show and quantify passing-on will depend on which of the economic methods, described in sections 5 and 6 below, is used. Evidence

may be categorised in different ways but it is typically divided into qualitative and quantitative evidence. The Damages Directive itself makes clear that 'evidence' means all types of means of proof admissible before the national court. This could include the following:"

And one possibility is:

"qualitative evidence to understand a firm's business behaviour or pricing strategies comprising [for example] contracts ... internal documents ... financial and accounting reports ... witness statements ... expert opinions as well as ... industry reports and market studies ..."

Then by contrast to that you can then have:

"quantitative evidence relating particularly to data for the use of econometric techniques, such as ... sales prices, retail and end consumer prices of the product or service in question, and of comparable products or services ... financial reports ... expert opinions ...", et cetera, et cetera.

Then if we go on to (38), {AUTH/37/12}:

"As explained more generally in the Practical Guide, normally, the specificities of the case at hand and the evidence provided are the starting point for establishing if the infringement has in fact harmed the claimant, and if this is the case, for determining the

quantum of that harm. The relevant evidence may include direct evidence which, at least in the context of passing-on, can be understood as covering documents produced by the direct or indirect purchaser as well as witness statements on whether the overcharge has been passed on. The availability of such evidence may play an important role when a court decides whether any, and if so which, of the methods described below can be used by a party to meet the required standard of proof under the applicable law."

So the European Commission is saying, "When you are trying to establish pass-on, you can use both qualitative evidence and quantitative evidence", and that is what we have done. We have advanced the qualitative evidence of the industry experts and the quantitative evidence of Mr Robinson from BDO.

The reason we say that that is an optimal approach is because there are cases where the courts or this Tribunal have commented unfavourably on practices which seek to focus exclusively on econometric evidence or economist evidence to the exclusion of the evidence of industry experts.

Just to give a couple of examples of that, *Chester City Council*, which is a case in authorities bundle tab 9, {AUTH/9}, starting at page 46,

{AUTH/9/46}. The court in this case -- if we can look at paragraph 142, please, the court in this case was faced with a submission that evidence should be left to economists. It records it as saying:

"... Mr Sharpe said that Mr Foster is not eligible as an expert on the competition issues relevant in this case (in particular the relevant product market, the geographic market and questions of abuse) because he is not a trained economist. The submission was that economists have a monopoly of the training and expertise necessary to assist the court on such issues and no one else can match them. Mr Foster's disqualifying misfortune is that he does not have an economics degree and is not an economist. His degree, from Aston University, is in transport operations, planning and management, and even though his course included transport economics, that was not good enough. In addition, he has not published anything by way of a contribution to the learning in the sphere about which he purports to speak."

It goes on to list the many other terrible disadvantages under which Mr Foster is labouring.

The short point is if we go to 147 -- it is page 48, {AUTH/9/48} -- the Tribunal was not persuaded that these matters disqualified Mr Foster from expressing an

opinion.

It said:

"TAS is a specialist public transport consultancy, of which there are only a few. It is obvious that Mr Foster has a wide understanding of the bus industry and how it operates as well as a wealth of experience of that industry. Whilst the concepts required to be investigated in a competition law case are no doubt most easily grasped, explained and opined upon by trained economists, they are concepts drawn from and related to the operations of the market in the real world; and I regard it as unreal the thought that it is only trained economists with a list of learned articles to their name who have the expertise necessary to understand them and to help the court on their application to a particular case."

So this court clearly saw the benefit of having industry expert evidence as well as economist evidence. The same came from the Tribunal at first instance in *Sainsbury's*. That is the authorities bundle, tab 17, page 39, please, {AUTH/17/39}. The Tribunal will see the heading "Weight to be Attached to the Economists' Evidence". There the difficulty was:

"... Mr von Hinten-Reed and Dr Niels were, as we have said, expert economists. Neither of them is an

expert in the field of payment systems, whether generally or specifically in relation to the MasterCard Scheme. Inevitably, they were very dependent upon an accurate account of the factual basis and context within which these complex sophisticated systems operate."

"In other words, in contrast with the position normally encountered by an expert witness, their expertise was engaged at one remove: it could only be deployed in relation to substantial and complex factual material about which they were not expert."

The Tribunal went on to observe:

"In these circumstances, it was incumbent upon the parties to ensure that the experts gave their opinions based on a common -- and if possible, agreed -- factual base."

So what the Tribunal was really emphasising is that the economists were, in that case, dependent upon the factual expertise of others in order to express their opinions.

DR BISHOP: What case was that?

MS FORD: This is *Sainsbury's*, the first instance judgment of the Tribunal.

Finally, we have referred to an article which was written extrajudicially by Mr Justice Marcus Smith, who is obviously the newly appointed president of the

Tribunal. That is at authorities bundle tab 38, {AUTH/38}, and he is --

THE CHAIRWOMAN: This is the "Venus and Mars", is it not?

MS FORD: This is the one, yes. He is commenting on the fallacy of seeing expert economic evidence as the answer to everything. If we can just look at his conclusion at page 6, {AUTH/38/6}. He says -- in the second column, partway down the sort of first paragraph, he says:

> "It is a mistake to see economic evidence as containing 'The Answer' to, for example, a legal question of causation. Rather, it is evidence -- granted of a somewhat idiosyncratic nature, at least to the lawyer -- that goes into the pot with all the other evidence, on which the parties make their submissions and which the judge has to weigh."

That is the basis on which we have proceeded. We have founded our economics evidence on the evidence of the industry experts.

It is also worth emphasising at this stage that, as the Tribunal will of course appreciate, the expert reports are not in the form that you would expect them to be once this matter goes to trial. Of course this is an early stage of proceedings, there has not yet been disclosure, the data has not yet been obtained, so what an expert report contains at this stage is essentially

a plan. It is a plan about how this Tribunal can adjudicate these matters when they go to trial.

Starting with our qualitative evidence, the evidence of the industry experts is that shipping costs were routinely passed through the supply chain to the proposed class members. If we can look at their report -- it is bundle B, tab 1, page 17, {B/1/17} -- the Tribunal will see at paragraph 3.3 that there is a diagram which is setting out the components of a vehicle's delivery charge.

It starts on the left with the OEM's costs. If you look at the costs that are split out, they include shipping costs and an OEM margin. Those costs are then passed to the national sales company and then the national sales company's costs are split out, and they include the OEM's costs, which we have already seen include the shipping costs. The national sales company's costs are passed to the retailer and the retailer's costs include the national sales company's costs plus a margin. That is what ultimately comprises the delivery charge.

The industry experts explain at 3.4:

"Delivery charges reflect the actual cost of delivery of a new vehicle, in the process summarised at paragraph 3.3 above. While the process may vary

slightly by OEM (for example, the exact point of distribution at which ownership of the vehicle passes from OEM to NSC to retailer; or whether the OEM or NSC pays the initial cost of transporting a vehicle from the incoming dock to the central compound for national distribution) the underlying principles of how the delivery charge is arrived at is the same."

What the industry experts then do is they then address what happens at each of the stages of the distribution chain. So if we go over the page, {B/1/18}, we can see that the first stage is the "OEMs' costs", and that is dealt with at paragraph 3.5 to 3.7. You can see the OEM will typically bear the following costs listed out at 3.5. At 3.6:

"OEMs charge the [national sales companies] a price which includes the cost of the vehicle, insurance and freight ..."

That is the part with -- the freight is the part we are concerned about because of the costs of transporting the vehicle from the factory to the local market plus a margin.

Then they say:

"The delivery cost of the vehicle is itemised separately."

They explain that:

"The cost will often vary by model. Where the same model is manufactured in more than one location ... the OEM will charge the NSC appear single, blended cost for that model, rather than charging the NSC separate amounts depending on where the individual vehicle was manufactured."

So that is what happens at the OEM stage.

We then have the "NSCs' costs", starting at 3.8, and they bear at (a):

"the charge imposed on them by the OEM to get the car to the NSC's country, as described as 3.6 above."

If we go on to 3.10 to 3.11, on the next page, {B/1/19}, this is how the national sales companies then set their delivery charges. Could we have the top of the page as well, please? What it explains is:

"When setting the delivery charges, the NSCs will generally..."

"calculate their total projected logistics costs -- both the costs incurred and recharged by the OEMs (plus the OEM margin if applicable), and the NSCs' own costs of onward distribution."

They then "divide the total projected logistics costs by the total projected unit sales, to calculate the average cost of delivery per vehicle".

And then at (d) they "add their own margin, plus

what they consider to be a reasonable margin for the retailers to make on the cost of delivery per vehicle."

They:

"consider delivery charges charged by equivalent brands and consider whether it should adjust its delivery charge as a result ..."

They "add VAT and round the delivery charge up".

They make the points in 3.11:

"In our experience, recommended delivery charges are generally the same across all models of a particular brand. This is in line with customer expectations since if a customer purchases a brand of vehicle associated with a certain location of production, the customer would not expect there to be a cost of delivering a vehicle from a different geographic location."

They go on to give an example of that.

If we go on to the next page, {B/1/20}, we see they are making the point that they would generally take a broad brush approach with the main objective being to ensure that the input costs of delivery are recovered in full.

Then at the end of 3.13 they explain:

"... the NSCs' operations teams will monitor costs on an ongoing basis."

3.14:

"Where it looks like recommended delivery charges are no longer sufficient in light of the level of costs that need to be covered, delivery charges will be adjusted upwards accordingly by the NSCs. If an NSC's costs fall, delivery charges will generally remain static."

That piece of evidence is an important piece of evidence which drives the methodology that Mr Robinson then applies because he explains that the NSCs monitor their costs and if it looks like the costs are not going to be recovered, they increase their delivery charge.

3.16:

"Delivery charges are often separately itemised on sales literature and/or on the customer invoice. Where the delivery charge forms part of the total on the road price (rather than being separately itemised), the process is generally similar, but with additional on the road costs (such as VED) being added to the average cost of delivery per car, before margins are applied and the prices are rounded as necessary."

3.17 is another important piece of evidence. They say:

"In our experience, it is highly unlikely that OEMs and NSCs would not recover, at a minimum, their delivery costs in full. The automotive market is very

competitive and margins are extremely tight, so it would be unfeasible for OEM and NSCs not to recover the actual costs they incur. As it is accepted as industry standard, there is no need or incentive for NSCs (or by extension, retailers) to absorb these costs or offer any discounting."

3.18 makes the point that delivery charges set by the NSCs are only to be recommended as an NSC cannot dictate what a retailer will charge. They then go on to confirm:

"In our experience, it would be rare for a retailer to discount the delivery charge, as there is no customer expectation to do so, and margins are such that it would not be commercially viable."

3.19, you see:

"NSCs at a minimum seek to maintain a fixed profit margin in respect of delivery costs in line with their business planning and budget assumptions. This will generally be a monetary amount rather than a percentage of total costs."

Finally if we go on to page {B/1/22}, please, paragraph 3.24 explains:

"In all the purchasing and financing scenarios we have discussed above, delivery charges are borne entirely by the end customer who is purchasing or

financing the new vehicle in question."

They go on to identify various different scenarios but their evidence is very clearly that the delivery charges are borne by the end customer.

Then at 3.25, in the particular context of outright purchases, they say:

"When a customer purchases a new vehicle, they will often seek to negotiate on the list price or certain optional extras, but it is generally recognised across the industry that the final delivery charge will always be applied. This is primarily because delivery charges are a separate line item applied to the invoice at the point of sale. It is therefore generally treated as an additional fixed cost in the same way as VED or number plates ..."

So there, in my submission, you have very clear evidence that shipping costs are a component of the delivery charge and that it is accepted that it is industry standard that those shipping costs are passed on down the chain to the end customer. That is the industry expert evidence on which Mr Robinson then based his quantitative methodology.

If we turn to his report. It is bundle B, tab 5, page 54, {B/5/54}, please. Actually can we go on to 5.23 on 55, {B/5/55}? This is where he describes his

methodology for calculating pass-on to the class. First of all at 5.23 he explained:

"When estimating the damages to the end customer it is the difference between the total Delivery Charge in the But-For and Actual Scenarios that needs to be considered."

So the But-For scenario being there was no cartel and the actual scenario being that there was a cartel.

That, in my submission, is important because the respondents claim in their criticisms that actually he is not doing that exercise, he is not comparing But-For and actual, but, in my submission, it is very clear that that is what he has in mind.

He then explains in 5.26 that the practical difficulty he faces is that the various different components of the delivery charges, so the breakdown of the shipping costs, the other costs, the margins, they are not going to be observable by him. The reason is because that information is not publicly available. He says it is not going to be held by the proposed defendants either because they will only have information about their shipping costs.

So he has identified that there is essentially a data question there, and what he then proposes to do to address it is, first of all, under (a), "measure the

total shipping cost overcharge per brand as set out in Section 4". He then divides it by the total number of registered vehicles per brand, which gives him an overcharge per vehicle. Then under (c) he says:

"observe the next increase in the total Delivery Charge per vehicle levied by the [National Sales Company] ..."

Then at (d) he says:

"[I am going to take the smallest of two figures, the amount of the overcharge to the OEMs and] ... the increase in the total Delivery Charge per vehicle."

If we go on to 5.27, he explains why that is important because he says that by taking the smallest of the two figures, the overcharge or the increase in the delivery charge, he is never going to attribute an increase in the delivery charge to a cartel where it in fact might be caused by an increase in unrelated costs instead.

So Mr Robinson has explained how his methodology works by setting out various scenarios in his report and they start at page 48, {B/5/48}. What he does is he looks at various possible combinations of what might happen with shipping costs and what might happen with other unrelated costs and then he looks at whether that means that the overcharge is passed on or not. So the

first scenario at paragraph 5.18, this is a scenario where he is assuming that the cartel causes an overcharge by increasing shipping costs. You see that in each case he is comparing the But-For position, which is the first column, where there is no cartel, with the actual position where there is a cartel.

In period 1, the position is the same in the factual and the counterfactual. So in both the factual and the counterfactual you have got shipping costs of 200, which are the blue ones, you have got other costs of 200, which are the orange ones, and then you have got a margin of 100. So the position is the same in the factual and the counterfactual.

If we go over the page, {B/5/49}, in period 2 he assumes that shipping costs increase by 50 to 250 in the actual scenario, and that is due to the effects of the cartel. The consequence of that is that the NSC's margin, the grey, is reduced from 100 to 50. But in the But-For scenario there is no cartel and so the position remains the same. You have only got shipping costs of 200 and you have got a margin of 100.

In period 3 the NSC increases its delivery charge to 550 in order to maintain its margin of 100. So realising that its margin has been reduced from 100 to 50, it increases its delivery charge to secure its

margin. That is based on the industry expert evidence that I have shown you, that the OEMs will seek to maintain their margins. As a consequence there is now a difference in the delivery charge in the actual compared with the But-For, as a consequence of the cartel overcharge, and so the outcome is that the overcharge is passed on in full to the end consumer.

That is the first possible scenario.

The second scenario he identifies, scenario 2, starting at 5.19, the difference here is that he is assuming that, instead of actually causing an increase in shipping costs, the cartel might have caused an overcharge by maintaining shipping costs at an artificially high level when they might otherwise have fallen. In this scenario the overcharge is passed on in full from the point where other costs increase and cause the NSC's margin to be eroded.

If we look over the page at period 1, {B/5/50}, it is the same as before, it is exactly the same in the But-For and the actual.

In period 2, in the But-For scenario, shipping costs decrease by 25 to 175. In the actual scenario they remain the same because the effect of the cartel is that it is causing shipping costs to be maintained at an artificially high level. But, importantly, in this

scenario, the delivery charge remains the same even though shipping costs have reduced. The reason for that is the industry experts' evidence that, if costs fall, delivery charges remain static. That was their evidence.

So the consequence in the But-For, when costs fall, is that the NSC makes more margin, so instead of a margin of 100, it now enjoys a margin of 125.

In period 3, there is an increase in the other costs, so in both the actual and the counterfactual other costs increase from 200 to 250. What that means is that the NSC's margin is eroded in both the factual and the counterfactual. In the actual it decreases to 50 and in the counterfactual it decreases to 75.

It is important to note that in this example that Mr Robinson is considering, he is assuming that there is an increase in costs which is higher than the amount of the cartel overcharge. He is assuming an increase in costs of 50 in circumstances where the cartel overcharge is 25.

In period 4, over the page, {B/5/51}, what happens is that the NSC then increases its delivery charge to restore its margin to 100, but that means there is a difference in the delivery charge between the But-For and the actual scenarios because we know that the cartel

and the actual maintained -- the maintained cartel-related costs are at an artificially high price, whereas it did not in the counterfactual, and so you end up with a difference of 25, which means that the shipping overcharge of 25 has been passed on in full to the NSC.

The reason I emphasise that it is important to realise he has assumed an increase in other costs which is higher than the counterfactual is because this shows that the methodology has not attributed the entirety of that 50 increase in other costs to the cartel. It has not said, "The costs have increased by 50 so you have an overcharge of 50". It still comes out with the right answer. It has recognised that only 25 is to be attributed to the overcharge itself.

Scenario 3 is another scenario where he is assuming that the cartel maintains shipping costs artificially high rather than actually increasing them, but, in this scenario, he illustrates that there might only be partial pass-on. Just to explain how that comes about, in period 1 you have got the same in the But-For and the actual, as we have seen in the previous examples. In period 2, over the page, {B/5/52}, you see shipping costs decrease by 25 to 175 in the But-For, absent the cartel, and, as was the case in scenario 2, we see that

in the actual they remain the same because the cartel is causing them to be maintained artificially high. Once again, the delivery charge remains at 500 and so, in the But-For, the NSC is enjoying a larger margin. It is getting 125 rather than 100. Again, that is based on the industry experts' evidence that, even where costs fall, the delivery charge would not reduce.

In period 3 you get an increase in the other costs, but it is only an increase in 10, so the other costs go up from 200 to 210 in both the factual and the counterfactual and that causes the NSC's margins to be decreased and they reduce to 90 in the actual and 115 in the counterfactual.

In period 4 you can see that the But-For scenario does not change, and the reason is that the margin is already 115 in the But-For scenario, which the NSC considers to be satisfactory so it does not increase its delivery charges. In the actual scenario, where you have got the cartel maintaining costs artificially high, the NSC increases its charges to 510 in order to restore its margin of 100. So in this scenario, where you have got costs increasing but a lesser amount, you do not get the full pass-on of the overcharge, you do not get the full 25 overcharge passed on to the class; you get 10 passed on. The reason for that is that part of the

overcharge is absorbed by the NSC in the form of a lower margin than it would have in the actual compared to the counterfactual. So you can see there that the NSC has a margin of 100 in the actual whereas it would have had a margin of 115 in the counterfactual, but part of the charge is passed on to the consumer in the form of an increase in the delivery charge to 110. So this is a scenario where you end up with a partial pass-on.

The final scenario, scenario 4, is a scenario where the cartel causes an overcharge by maintaining costs artificially high but, because other costs unrelated to the cartel actually decrease, you do not get the overcharge passed on to the consumer at all. So in period 1 we have got this situation where the position is the same in the actual and the But-For; in period 2, the actual scenario remains the same because the cartel is maintaining prices. The But-For scenario, the shipping costs decrease because there is no cartel maintaining them at higher level, so the same as the previous two scenarios; but in period 3, instead of other costs increasing, they actually decrease, and that means that the NSC's margins increase from 100 to 175 in the But-For and 150 in the actual, and because the NSC is happy with the margins it is earning, it does not increase its delivery charge. The delivery charge

remains static. There is no difference between the position in the But-For and the actual and no costs are passed on to consumers.

So what Mr Robinson is illustrating in that circumstance is a situation where no harm is actually suffered by the end consumer because the effect of the cartel is eclipsed by falls in other costs. Mr Robinson has investigated whether that scenario, that there is no harm at all, is actually going to -- is likely, and he has concluded that it is unlikely. If we look at his 5.24 on page 55, {B/5/55}, he said:

"While Illustrative Scenario 4 indicates that there could be circumstances in which no damage would be suffered by the end customer, my view is that such a scenario would be unlikely."

"This is based on my review of a small sample of price lists published by NSCs over the court of the Relevant Period ..."

And he has looked at four possible brands in appendix 8. He says that all those brands show price increases and, because there have been price increases, at least a proportion of the overcharge will have been passed on to the proposed class. So his initial investigation suggests it is highly unlikely that you are going to get a scenario where there is no harm at

all suffered by the class.

Importantly, as I have emphasised, the amount of the damage to the class is always the smaller of two measures, the overcharge and the increase in the delivery charge, so it is entirely conceivable, as he has illustrated, that the increases in the delivery charge might be greater if they are driven by increases in other costs, but by taking the smaller of the amount of the overcharge and the increase in the delivery charge, he ensures that he only attributes to the cartel those increases which are actually caused by the cartel.

So that is the summary of our proposed methodology and, in our submission, it is a workable and sound means of quantifying pass-on to the proposed class.

I am turning to deal with the criticisms that the respondents have advanced to it. We say that there are two answers to all the various points that the respondents have advanced under this head. The first answer is that, as I have shown you, the proposed class representative is entitled to advance its claim based on a combination of qualitative and quantitative evidence, so we rely on both the evidence of the industry experts and the evidence of Mr Robinson.

The respondents' criticisms arise because they focus solely on the evidence of Mr Robinson and they seek to

disregard the evidence of the industry experts, but, in our submission, the industry experts' evidence tells you how this industry works in practice and that is the answer to all the supposed methodological objections that the respondents are raising. That is the first answer.

The second answer is that, although they are dressed up as challenges to our proposed methodology, in our submission they are in reality disputes about the factual and expert evidence and those sorts of disputes are wholly inappropriate to be resolved at the certification stage. They are clearly matters for trial. So I am going to start by addressing the points that feature in both sets of responses and then I will address the additional points that are made in the KK skeleton.

The first criticism that is advanced is that it is said our methodology is deficient because it only analyses delivery charges and it is said that it should focus instead on the overall price paid by the class member for their vehicle.

In our submission, in the light of the industry expert evidence that I have shown you, focusing on the delivery charge is sensible and logical. This is a claim for damages suffered as a consequence of

a cartel in deep sea shipping services. The evidence of our experts is that the costs of those services form one component of the delivery charge, so our methodology proposes to identify the overcharge in those services and identify the extent to which that overcharge has been passed down the supply chain to the class. When your evidence is that the overcharge is in the delivery charge, then it is self-evident that you focus on the delivery charge when you are seeking to assess the extent of the loss.

Now, the respondents obviously intend to argue at trial that, even if the delivery charge was inflated by reason of the cartel, then the overall price of the car might have been lower and so there would be no difference with the counterfactual. That is obviously what they are intending to argue. That might be because the proposed class member managed to negotiate down the overall price of the car in bilateral negotiations -- that is the way that the KK respondents put it in their skeleton -- or, alternatively, we are told that it might be because the price of the vehicle has to compete with the price of comparable vehicles and so -- and that is how the MNW respondents refer to it. They say it is all about competition.

Either way, in my submission, the case that is being

advanced here is that there is some extraneous benefit which offset the loss that is caused by the passing-on of the overcharge down the chain. Ultimately it would be a matter for them to plead and prove that at trial, but it does not render our methodology unsound.

We have cited an authority for the proposition that, if you are trying to rely on such an extraneous benefit, offsetting loss, it can only be taken into account to the extent it is causally related to the breach. So if you are saying, "This loss has been offset by a countervailing benefit", you have to show that there is a causal relationship between the benefit and the breach. The authority we have cited for that is *Fulton Shipping*. It is authorities bundle, tab 20, page 15, {AUTH/20/15}.

This is actually a contractual claim where there was a breach of a charterparty by charterers and it was argued that, in quantifying the loss that had been suffered as a consequence of the breach, the owners of the vessel had to give credit for the fact that they had been able to sell the vessel earlier and at a higher price than they would have done had they actually -- had the charterparty been performed and they had to sell it two years later. So it said, "You have got to take into account the fact that you got a better price when you

sold the vessel".

The Supreme Court declined to take that factor into account in reducing loss and its reasoning is in paragraphs 29 and 30. You can see here:

"Viewed as a question of principle, most damages issues arise from the default rules which the law devises to give effect to the principle of compensation, while recognising that there may be special facts which show that the default rules will not have that effect in particular cases. On the facts here the fall in value of the vessel was in my opinion irrelevant because the owners' interest in the capital value of the vessel had nothing to do with the interest injured by the charterers' repudiation of the charterparty.

"This was not because the benefit must be of the same kind as the loss caused by the wrongdoer."

He says:

"The essential question is whether there is a sufficiently close link between the two and not whether they are similar in nature. The relevant link is causation. The benefit to be brought into account must have been caused either by the breach of the charterparty or by a successful act of mitigation."

So essentially what is being said is that, if it is your case that some loss that has been suffered has been

offset or improved by reference to a countervailing benefit, you have to show that there is a causal relationship between the loss and the benefit. On the evidence as it stands, in our submission, there is no causal link between an overcharge in deep sea shipping and any reduction in an overall price of the car. The reason we say that is set out in Mr Robinson's second report, bundle {B/110/32}. What he explains, starting at paragraph 4.47, is that:

"... the negotiating characteristics of the parties [so the purchaser's bargaining power, for example, are going to] ... be the same in the But-For and and Actual Scenarios."

So the question you have to ask is: to what extent would the behaviour of the purchaser and the behaviour of the seller differ just because of the existence of an overcharge in deep sea shipping? Would it differ because of an overcharge so that you actually end up with a reduction in the price of your car overall? Is there a causal relationship between them? He goes on to consider that both from the perspective of the seller and from the perspective of the purchaser.

Paragraphs 4.48 and 4.49 is where he looks at this from the perspective of the seller. He explains that their motivations to recover their costs, that we have

already seen in the industry experts' reports, they would be the same in the But-For and the actual scenarios. He is quoting -- if we look at 4.49, {B/110/33}, he quotes the relevant industry expert's evidence:

"At all levels of the automotive supply chain, margins are extremely tight and subject to huge scrutiny. If an OEM, NSC or retailer was to absorb even a small amount such as £10 or £20 per vehicle, this would add up to a large amount taking volumes into account ... delivery is, in our experience, a line item that is not negotiated."

He also cites a further passage:

"In our experience NSCs would not absorb any increase in delivery costs. There is no expectation they would do so and they operate on such tight margins that costs must be passed on to ensure the ongoing viability of the business."

Looking at it from the perspective of the seller, nothing about that is going to change in the counterfactual, absent an overcharge.

He then looks at it from the perspective of the purchaser of the car, the buyer of the car, and that is paragraphs 4.50 to 4.53. What he explains is that, from the perspective of the purchaser, what we are talking

about is a really small price differential: the price differential that is reflected by the overcharge on the delivery charge; and it is going to be even smaller if the car is bought on finance. He says it is unlikely that that small price differential is going to cause the buyer to adjust their negotiating position in the factual, compared with the counterfactual, world.

THE CHAIRWOMAN: So in the example of an overcharge -- the example of a discounted price, it is "I get £2,000 off" rather than X per cent, which would give you slightly different results?

MS FORD: There is no reason to suspect you would get any different amount off in the factual than the counterfactual, essentially is what he is saying.

DR BISHOP: Ms Ford, can I ask how far this argument goes? I will make sure I have understood it first. The argument is that many things happen after an illegal charge, some connected to it, some not. You are saying that there is authority that says principles of causation, remoteness, whatever they are called, still apply and that some of the things that happen should be excluded, should not be taken into account.

Now, I am wondering what the implications of that are. The respondents in this case have pointed to econometric exercises that look at the final price to

the final consumer and Dr Majumdar fairly explicitly says that is what should be done and the skeletons say the same thing. Would you go so far as to say that such a method actually is legally suspect? Because, looking at the final price, it will bundle in all kinds of effects, some of which are too remote or are not causative and should not be taken into account.

MS FORD: I think for the purposes of this application, I do not need to go that far because my submission is they are perfectly entitled to do those exercises at trial. We will levy appropriate criticisms against those exercises at trial and I may well want to make the points that you make, but I do not need to make those now. They are free at trial to advance the methodology that they want to advance and we will meet it as appropriate. What they cannot do is say that, because they want to advance that methodology, that somehow impugns our methodology and renders it inadequate. In my submission, it clearly does not.

THE CHAIRWOMAN: So another way of putting that is to say you do not have to show, certainly at this stage, that your methodology is the best methodology, only that it is a workable one?

MS FORD: I have to satisfy the Microsoft test.

THE CHAIRWOMAN: Yes, I do not want to summarise that test

now but you say that is enough? There is nothing further than that, in particular, you do not need to show that what you are proposing is better than starting with the overall price?

MS FORD: Madam, I do say that as a matter of the test. That is absolutely the correct test. However, I do say that, based on the industry expert evidence, our submission would be that this is the better methodology because the industry expert evidence is that the overcharge is in the delivery charge and so our methodology focuses on the delivery charge. It is a separate step in the chain and a separate causal analysis to say, "Ah, well, even if you have suffered an overcharge by virtue of passing-on of an overcharge down the chain, nevertheless that might be set off by some other negotiated or consequential changes in the overall price of the car".

THE CHAIRWOMAN: That is a sort of mitigation point.

MS FORD: It is a sort of mitigation point. It is a causal argument. They are saying, "Well, nevertheless, notwithstanding that you have suffered loss, the Tribunal must take into account other factors which might have meant that overall you are no worse off". I have explained to you under *Fulton Shipping* that you do not necessarily automatically take those factors into

account. You have to make an enquiry as to whether they are causally related and, in our submission, on the evidence, there is no reason to think that they are, because there is no reason to think that the extent of the overcharge would change the dynamics of negotiation or the motivations of either the seller to recover their costs or the buyer in the way in which they negotiate for the car.

THE CHAIRWOMAN: But your starting point and the foundation of your case is that the shipping charges are always incorporated in the delivery charges and that they are passed on because delivery charges are always added on?

MS FORD: That is the industry experts' evidence on which we rely, yes. That is why we say you look at the delivery charge and that is why we say that is, even putting it at its lowest, a workable and viable methodology, but we say a methodology which is strongly supported by the industry experts' evidence as to what happens in real life.

THE CHAIRWOMAN: So compared to, for example, some other widgets that might go into a car or some other elements that go into a car, you say the delivery charges are in a rather unusual position, I think, because of the way that the evidence is that they are passed on.

MS FORD: I hesitate to speculate because obviously we do

not have evidence about the other --

THE CHAIRWOMAN: Yes. Well --

MS FORD: But what I do say is what we do have is evidence about how this charge is dealt with in reality.

THE CHAIRWOMAN: I see.

MS FORD: The evidence is that it is industry standard practice that this charge is passed down the chain to the consumer class.

Madam, I was making my submissions about the fact that it is highly unlikely that you are going to get this causal relationship between the existence of an overcharge in the factual and some corresponding reduction in the overall price of the car.

Mr Robinson's analysis is that you are not going to see a causal relationship between those two things.

The only scenario where you might conceivably end up with a different discount in the factual versus the counterfactual is if you were specifically focusing on removing the delivery charge rather than obtaining some sort of general overall discount on the price of the vehicle. I have shown you the evidence of the industry experts that delivery charges are often separately itemised on sales literature and on their customer invoices and that there is no customer expectation that that separately itemised charge would be discounted.

They also elaborated on that in their second report, if we look at bundle {B/109/18} please.

THE CHAIRWOMAN: This is the second industry expert report, is it?

MS FORD: Yes, it is.

THE CHAIRWOMAN: B/109?

MS FORD: B/109, yes.

THE CHAIRWOMAN: Page?

MS FORD: It is page 18, please.

What they explain there is that:

"The margins are percentages of the basic price of a vehicle, to which [on the road] costs such as taxes and delivery are then added. This means that, even if a retailer was willing to give up all of its margin in order to agree a sale, the delivery charge would still be added on and would not be subject to any discount."

They say:

"As described above, in our experience, a retailer would not discount or absorb the delivery charge, as this would be a hard cost to the retailer, not an erosion of the retailer's margin."

So their evidence is that this is an actual cost to them. They have incurred this cost and so it is not up for grabs, it is not up for negotiation. It is not equivalent to a margin where they have added on

a percentage on their costs.

THE CHAIRWOMAN: Yes. There is a slightly oddity there because when we saw earlier that the delivery charge I think includes an allowance for margin for the retailer --

MS FORD: They maintain their margin, yes, which is how --

THE CHAIRWOMAN: No, there is an element of the -- in the build-up of the delivery charge, I think we saw that the national sales company includes something for a margin for the retailer.

MS FORD: It does, yes.

THE CHAIRWOMAN: Which is not necessarily reflected here.

MS FORD: They seek to maintain their margin and we saw that their desire to maintain their margin drives them when they increase their delivery costs. But they are saying there that, in their experience, there is a relevant distinction and that a retailer would not discount or absorb the delivery charge. That is actually consistent with Mr Dent's evidence for KK, if we look at bundle {C/13/6}, we can go to paragraph 26 and 27 on this page.

This is his evidence:

"Customers often question the delivery charge and ask for it to be discounted. In these discussions, I would generally advise them that the charge is

intended to represent the cost of transporting the vehicle from the factory to the dealership."

Then at paragraph 27:

"I do not believe that customers were prejudiced by the fact that the delivery charge may not have reflected the actual transportation costs, because ultimately the customer could negotiate discounts far in excess of the delivery charge. I tell customers that the delivery charge is included in the advertised price and cannot be discounted. However, on a number of occasions (four to six times a year on average) [so very limited circumstances], I have had customers who have specifically focused on that cost and said that they would not buy the car if they had to pay the delivery charge."

He then goes on to say:

"Although the system does not allow me to change the 'delivery' charge from ... 825 to zero, I could achieve the same effect by putting an additional amount of ... 825 in the 'special Allowance' section of the invoice. It makes no difference to a dealer where the discount is applied; it is, however, physically impossible to change certain line items."

In our submission, that is evidence which is entirely consistent with our position that this is

treated differently. He tells customers that it is not up for negotiation. In very limited circumstances, a customer might specifically focus on delivery charge. But in the absence of that, in our submission, there is no reason to suppose that you would have some sort of reduction in the price of a car in the actual which is causally related to the existence of an overcharge so that it ought to be taken into account.

Having said all of that, in any event, this is clearly a matter for trial. We do not have to show now that there is no prospect of there being such a causal relationship because, in my submission, the Tribunal simply cannot adjudicate that question at this stage. This is very clearly a matter for trial and so it is not a basis on which certification can be resisted.

I am moving on to deal with the second criticism that is advanced of our methodology and that is that it is suggested that Mr Robinson's methodology measures changes to delivery charges over time rather than estimating the difference between the delivery charges in the real world and in the counterfactual. It is argued that there is no logical connection between changes to delivery charges over time and the extent of class members' loss.

I have shown you Mr Robinson's various scenarios

where, very clearly, he had very much in mind the need to compare the situation, the factual and the counterfactual, and that is exactly what he is doing. I have also shown you what the connection is between what happens to delivery charges over time and the extent of the loss to the class, and the connection is the evidence of the industry experts.

The connection is their evidence that, if costs rise, then the OEMs and the NSCs will seek to maintain their margins and, if costs fall, then delivery costs will remain static. What that means is if you see delivery costs increasing over time, the reason for that will be because costs have risen. We know that Mr Robinson takes the smaller of the overcharge and the increase in the delivery charge and, by doing that, he makes sure that he only identifies costs which are attributable to the cartel and not ones which are attributable to increases in other costs.

I am coming on to deal with the various hypothetical examples that the respondents had advanced as to why they say that Mr Robinson's methodology might not work, but I am in the tribunal's hands as to whether you want me to start on that process or --

THE CHAIRWOMAN: Let us carry on for the moment.

MS FORD: So it is bundle A, tab 14, starting on page 12,

{A/14/12}. Possibly it is -- can we go down to the bottom of the page, please? Yes, so if you see at paragraph 39, you see they are advancing their submission in 38 that there is no logical connection between changes in actual price levels over time during the cartel period and differences between price levels in the real world and in the counterfactual. They say:

"This point can be illustrated by the following scenario of a cartel imposing an overcharge on its customers, who are then said to have passed on that overcharge to end-users in the form of higher retail prices."

The criticism they are advancing is:

"The cartel overcharge may be passed on in full, despite the fact that there are no changes in either the cartel price or retail prices at all [if we go over the page] during the claim period. That situation may arise, for example, if the cartelists' prices would have fallen in the absence of the cartel."

So what they are trying to advance are scenarios where they say there would be an overcharge and it would be passed on, but, because there are no changes in delivery charges, you do not register the fact of that pass-on to the class.

Subparagraphs (a), (b) and (c) are each talking

about a scenario where the cartel prevented prices from falling over time or reduced the extent to which they fell rather than causing them to increase over time. In that case it is said, "Ah, well, in that case there would be no increase in the cartelists' prices in the real world over time and yet, nevertheless, your methodology ought to be registering pass-on or overcharge to the class". But I have shown you that each of Mr Robinson's scenarios 2, 3 and 4 were concerned with a cartel which prevents prices from falling rather than causing it to rise over time and so he has clearly considered that scenario.

What he showed was that, because the industry experts' evidence is that they would seek to maintain their margins, that overcharge can be passed on in that scenario. He distinguished between scenario 2, scenario 3 and scenario 4. Scenario 2 was the scenario where the overcharge would be passed on in full, to the extent that there are increases in other costs. So that was the scenario where the increases in other costs corresponded to the extent with the overcharge.

THE CHAIRWOMAN: Or at least corresponded.

MS FORD: At least corresponded. Madam, you are quite right.

Scenario 3 was partial pass-on, and that was the

scenario where the increases in the other costs were less than the amount of the overcharge. Then scenario 4 was the possibility that you might have no pass-on at all if other costs fell --

THE CHAIRWOMAN: Or presumably no change in other costs because, if there has been no change in other costs, then there is no pass-on.

MS FORD: That must be right. But he showed that that was an unlikely scenario on the facts because he sampled delivery charges of four brands and he showed that there actually had been increases so there was at least some pass-on to the class. So he has actually considered these issues and grappled with them and shown that his methodology will assess the extent of pass-on in those circumstances.

Might that be a convenient moment?

THE CHAIRWOMAN: Yes. So 2 o'clock, please.

(1.02 pm)

(The short adjournment)

(2.00 pm)

MS FORD: Madam, we were looking at the respondents' various examples of situations in which they said delivery charges might not change but the methodology should be picking up pass-on. They are at bundle {A/14/13}.

We dealt with (a), (b) and (c), which were all the

ones making the point that the cartel might not have made prices increase, it might have maintained prices, and I have shown you that Mr Robinson gave that very careful consideration in his scenarios 2, 3 and 4.

Moving on to subparagraph (d), the scenario the respondents are dealing with here is the possibility that the cartel overcharge might be fully incorporated into retail prices before the start of the claim period. The reason that might be is, for example, if the cartel operated for a substantial period before the finding of infringement of the Commission decision, and the point is made, well, in those circumstances, there will be full pass-on although you would see retail prices remaining constant.

First of all, as I flagged up, Mr Robinson has identified price increases over the period so there is no factual basis for suggesting that prices remained constant, but, secondly, the industry experts' evidence is that delivery charges will remain static even if costs go down. What that means is that, if there was an overcharge incorporated at day one, delivery charges will remain constant in both the factual and the counterfactual because they would not reduce, so in that circumstance the class is no worse off in the factual than the counterfactual and so they have not suffered

a loss. So, again, the methodology gets the right result in that circumstance.

It does mean, of course, that if at trial, on the facts, the Tribunal were to conclude that actually prices would have fallen in the counterfactual, then the actual loss to the class in those circumstances would be even higher because you would then have a difference between the scenarios in the factual and the counterfactual. But what is important, in my submission, for this stage is that Mr Robinson's model correctly reflects the evidence of the industry experts as it is at this stage and so there is no basis for criticism of his model for it failing to give the right answer.

THE CHAIRWOMAN: Sorry, are you saying that the model could accommodate that if it were shown at trial?

MS FORD: Well, he has certainly based his model on the basis of the experts' evidence that prices would not have fallen in the counterfactual, and so if he were instructed to assume something factually different, the model, I anticipate, would be able to accommodate that. But the point I make for these purposes is, at the CPO stage, he cannot be criticised for having produced a model which reflects the industry experts' evidence.

THE CHAIRWOMAN: I see.

MS FORD: The fifth example that is given, subparagraph (e), is in some ways the opposite scenario because what is being suggested there is that delivery charges increase throughout the claim period but it is argued that the overcharge has not been passed on and it is said that, in that case, Mr Robinson's scenarios or his model overestimates pass-on. That is the allegation that is being made in subparagraph (e). But I have explained that if delivery charges increase for reasons other than the cartel, then that would occur equally in the factual and the counterfactual. So based on the industry experts' evidence, the OEMs and the NSCs will increase their margins, both in the factual and in the counterfactual, and increase their delivery charges.

If and to the extent that the effect of the increases are that prices are being maintained in the real world at a level which is higher than the counterfactual, because of the effect of the cartel, then the delivery charges in the real world would increase more than they would do in the counterfactual and then the effect of the model would be to quantify the extent of pass-on. As I have explained, because it takes the lesser of the two numbers, he excludes anything which is not referable to the overcharge in the factual world. That is what we saw happening in

scenarios 2 and 3 in his model.

So, in my submission, what the respondents' scenarios actually illustrate is that their objections are boiling down to factual disputes, disputes with what the industry experts are saying about how the industry operates in practice. They would not get anywhere if one proceeds on the basis that the evidence of the industry experts is correct.

The respondents have advanced three responses to this in their skeleton. First, they complain that this analysis rests on an extreme and unrealistic interpretation of the evidence of Mr Goss and Mr Whitehorn. That is their skeleton, paragraphs 34 to 35 and also 37 and also 43, where the same sort of formulation appears. Needless to say we do not agree with that. We say that it rests on a straightforward application of their evidence, but, in any event, disputes about the meaning, interpretation and effect of evidence are self-evidently matters for trial. They cannot prevent certification at this stage.

The second response is they complain that Mr Robinson's methodology measures the timing and extent of changes in delivery charges without shedding any light at all on the causes of those changes. That is their skeleton, paragraph 36, and you see a similar

complaint being made by KK. In my submission, that complaint is being made because the respondents persist in looking at Mr Robinson's evidence in isolation from the evidence of the industry experts because it is the industry experts' evidence that the NSCs will seek to retain their margins that means that any increase in the delivery charge will have been caused either by the cartel or by increases in other costs and they can then be separated out by taking the smaller of the two numbers.

So you only get a complaint about a lack of a causation indicator if you choose to close your eyes to what is being said by the industry experts, but then it is said, "Oh, well, Mr Robinson's methodology sheds no light on whether the industry experts' evidence or the PCR's interpretation of that evidence is correct", and it is said that the PCR has no means of addressing at trial the MNW respondents' case that competition between OEMs and NSCs' retailers would have limited or prevented their ability to pass on any cartel overcharge. So it is said, "Well, Mr Robinson's methodology is inadequate because it does not show whether or not the industry experts' evidence is correct".

In our submission, the PCR can at trial meet the

respondents' case in any way it chooses and so it is entitled to rely on qualitative evidence as well as quantitative evidence to meet that case. It is for the Tribunal to decide at trial whether to accept that evidence or not. It is not a legitimate criticism of Mr Robinson's methodology that it does not perform that particular function, the function of verifying whether or not the industry experts' evidence is correct or not, when we are entitled to advance our case by reference to their qualitative evidence.

In our submission it is important to remember that Mr Robinson's approach has been constructed specifically with questions of availability of data in mind, so he particularly explained that information as to all of the components of the delivery charge is unlikely to be observable by him. We know from *Merricks* that it is important that the court does the best it can with the evidence available. So the fact that he has done that, in my submission, is no basis for criticism. It would be inconsistent with the approach directed by the Supreme Court in *Merricks* if he were to be criticised for not doing something that cannot be done on the available data.

The third response in the skeleton is a series of what are supposed to be examples. If we can turn up the

MNW respondents' skeleton. It is advocates bundle tab 2, page 12, {AB/2/12}, and this is paragraph 39. It says:

"It is helpful here to make the abstract scenarios concrete by considering the data on delivery charges that appear at Robinson 1 Appendix 8 and the overcharge per vehicle for private customers that appear at Robinson 1 Appendix 4."

Just pausing there, there are a number of reasons why we say that this is not particularly an either fair or helpful comparison to be drawing.

You can see there that one of the inputs into this exercise is Mr Robinson's appendix 4 of his report, and what that is is an illustrative estimate of damages. It is important to emphasise that it is necessarily an illustrative calculation so it makes assumptions and it makes simplifications for the purposes of illustration because that is the stage of proceedings that we are at. But what is being done is then to compare this illustrative calculation with something very different, which is appendix 8 in Mr Robinson's report, which is information that he has extracted from price lists for sample brands. This is the data he referred to when he said, "I have looked to see whether or not there were price increases and I have satisfied myself that there

were and so that means that there was obviously at least some pass-on to the class". So he looked at a limited number of sample brands and checked whether or not there were price increases or not.

So what is going on in this paragraph of the respondents' skeleton is they are comparing a simplified illustrative calculation with actual factual evidence of price list with all the attendant complexities and, unsurprisingly, because they are not comparing like with like, the outcome is not particularly informative.

So, to give an example, the assumption that was made for the purposes of the illustrative calculation was that loss commences on day one of the claim period. One of the points that the respondents are trying to draw out with their examples is that there might be a lengthy period from day one of the claim period to the point at which there is first an increase in the delivery charge, and it is said, "Well, you have to assume that that means that they absorbed the entirety of the overcharge for that period and then only passed it on once there is an increase in the delivery charge".

But the difficulty is that we presently do not know at what point the companies entered into contracts that were affected by the cartel and so it might not have been at the start of the infringement period; it might

have been later. Insofar as it was later, then there might not have been such a long period during which the overcharge is absorbed before it is passed on at the point of the first delivery charge increase. We simply do not know at this stage. So we say making that comparison is just not really helpful to illustrate anything at all.

It is also important to realise that some of the figures, for example, those for BMW and Honda, are currently incomplete and so complete information is not available about the timing of any delivery charge increases. So once that information becomes available, then it will be possible to look and see whether or not there were delivery charges that increased in the earlier period as well and whether there is or is not a period of delay before potential pass-on takes place.

So, in our submission, there are various problems with the exercise that has been done in this paragraph, but what it really illustrates is the need to go to trial to ascertain the actual factual basis of these points, whether there is any force in them or not.

The final point that the respondents make is that they seek to challenge whether the increases in the delivery charge can be said to be triggered by a change in the cartel overcharge or by some unrelated change in

other costs, so they raise the question whether other costs increases satisfy the legal test for causation. We do not agree with the suggestion that these other unrelated costs are the cause of the margin increases because the cause, based on the industry experts' evidence, is the automotive industry's practice of seeking to maintain their margins. That is a practice which takes into account all costs, not just costs that happen to go up at a particular point in time, and any other costs that are going up can be assumed to go up both in the factual and in the counterfactual.

So what is driving the difference between the factual and the counterfactual, what is driving the level of loss that is passed on to the class, is the cartel overcharge, not the increases in other costs. The increases in other costs are consistent in the factual and in the counterfactual. So, in our submission, there is a clear causal relationship here.

In any event, again, these are simply not matters that the Tribunal can determine in the defendants' favour at the CPO stage. Questions about causation are axiomatically something that must be determined in the light of all the evidence at trial, so we say this just does not provide any basis to impugn the methodology that has been put forward.

THE CHAIRWOMAN: Can I try and make sure I have understood your position on that? I think it may be illustrated by scenario 2 or 3 that we looked at earlier, where the cartel has not increased -- has not had the effect of increasing costs, so -- I may need correcting if I have got this wrong -- what is the immediate cause of an increase in the delivery charge, maybe an increase in other costs? That is what the proposed defendants are getting at, are they not?

MS FORD: That is the point that is being put against us.

THE CHAIRWOMAN: So look at what has put the prices up; it is some other increase in the components of the delivery charge.

MS FORD: That is absolutely the point that is put against us, and we make two points in response. The first is we do not accept that that is the correct characterisation in circumstances where what is driving the increase in the delivery charge is the practice of maintaining margins, which must take into account all the costs in the stack, not just the most recent increases, but, secondly, whether the causal relationship -- the legal requirement of causation is satisfied or not. In our submission it is clearly heavily fact-sensitive and so this Tribunal is not in a position to conclude now that it is not satisfied.

THE CHAIRWOMAN: But on the first of those points, that what really drives the increase or the level of the loss is the need to maintain margin, the thing that is made -- it is another way of saying this. You come back to saying the same thing. The trigger, the immediate trigger or the apparent trigger, for the increase in the delivery charge is some other increase in costs.

MS FORD: That is the point that they are making against us. My submission is --

THE CHAIRWOMAN: Yes, and I just want to understand a bit better your first answer to that of your two answers.

MS FORD: I fear I might also fall into the trap of saying the same thing in a different way.

THE CHAIRWOMAN: Yes, maybe.

MS FORD: The reason that the delivery charge goes up in such a scenario is because, according to the industry experts, the relevant car companies will look at the entirety of their costs and will increase their delivery charge so as to ensure that their margin is maintained. So that is an exercise that is looking at the entire stack of costs rather than the most recent increase.

When you -- Mr Robinson's methodology is comparing the factual and the counterfactual and the increase in the other costs occurs equally in both the factual and the counterfactual. That means that, insofar as there

is a difference which is said to be causally attributed to the cartel, that difference must be driven by the overcharge and it is not causally attributed to the other costs because they are consistent in both the factual and the counterfactual.

THE CHAIRWOMAN: Yes. So you say it is wrong to focus on that trigger, if you like. You say, "No, you have got to at all times compare the factual and the counterfactual"?

MS FORD: We do say that and, indeed, somewhat artificially that was the criticism that was advanced against us. It was suggested that Mr Robinson was not doing that. In my submission, I have shown you in his report that he very clearly is. But what drives the difference is always the cartel overcharge. But the Tribunal will of course have very clearly in mind my second answer to the point as well, which is that, in any event, assessments of causation are not appropriate at the CPO stage. That has to be something that the Tribunal engages in in the light of all the evidence at trial.

Of course, what we have been focusing on is, as you, Madam, indicated, the sort of scenario -- 2/3 scenario in Mr Robinson's possible menu of occurrences, and that is the circumstance where the cartel maintains prices rather than increases them. But his scenario 1, which

he considered first, is in some ways more straightforward, which is that you have got increases in prices and then you have an even more immediate causal relationship between the increase in price and --

THE CHAIRWOMAN: We are not having this discussion about scenario 1, are we, not in the same way?

MS FORD: Madam, you are quite correct, but, of course, looking at what *Merricks* says, insofar as you have got anything other than nominal loss to the class, then you should allow matters to go forward to trial so it can be -- access to justice can be ensured. Even if there are concerns about the scenario 2/3 scenario, we know that those concerns do not arise in relation to a scenario 1 scenario and that ought to be enough for this to get certified, leaving aside anything else. There is a more straightforward scenario that he has modelled which satisfies --

THE CHAIRWOMAN: Okay. I had not quite picked that up. Are you saying that, even if we did not really believe or believe that the analysis in relation to scenarios 2 and 3 was credible, we could say, "Well, if we think it is credible for scenario 1, that is good enough"?

MS FORD: I do make that submission because you have seen what the Supreme Court said in *Merricks*, that when you have got a class with a pre-existing finding of

infringement, insofar as there is anything beyond nominal loss to that class, access to justice requires that they be permitted to take their claim to trial. Now we know that there is a straightforward causal relationship on the assumption that the cartel overcharge caused increases in prices. We have seen references to that possibility in the Commission decision. No challenge is made to the methodology which is proposed to assess the extent of the overcharge and so the Tribunal, in my submission, cannot proceed on the assumption that that possibility is not a viable one.

THE CHAIRWOMAN: So in that scenario, if it was established at trial that delivery charges on the whole went up, in other words it was not scenario 4 -- delivery charges either remain static or went up -- and you could also establish that shipping charges went up, you would succeed?

MS FORD: We would say that his methodology takes the lesser of those two and that is the amount of pass-on to the class, yes.

THE CHAIRWOMAN: Yes, okay.

MS FORD: I am turning to deal with the additional objections which are raised by KK in its skeleton, but not -- also in the MNW skeleton. In our submission, what is going on here is that, under the guise of

identifying methodological flaws, what KK is trying to do is advance a factual attack on the underpinnings of the methodology and to claim that that means it does not satisfy the *Pro-Sys* test. In our submission, those are points that clearly ought to go to trial and are not appropriate for this stage.

The first point they seek to make is that they challenge the industry experts' expertise to give evidence concerning the practice in the automotive industry. The essence of the point, as we understand it, is to say, "Well, they have not worked for every single automotive company so how do they know?" Mr Goss and Mr Whitehorn have specifically addressed that concern in their second report. It is bundle {B/109/6}.

The Tribunal will see the heading, "Our Experience and Expertise". They have cross-referred to their CVs. They note -- cross-referred to paragraph 2.1 above, where they say:

"We are aware that the Respondents have challenged our expertise ..."

They say:

"... we provide further information and clarification as set out below."

They say, 2.4:

"We both are deeply experienced in the automotive

sector, having worked in the industry for over 40 ... and 30 years ... respectively. We have both held very senior positions for multiple brands and manufacturers. In particular:

"Mr Goss has worked in management roles, as well as private and fleet sales for Jaguar Land Rover, Porsche (part of the VW group), Toyota, Lexus, Nissan, Citroen and Austin Rover; and

"Mr Whitehorn has worked in management roles, private and fleet sales for Hyundai (which owns a significant share of the Kia Corporation), Toyota and Renault."

Importantly:

"These are not inward-looking roles, but require an in depth knowledge and understanding of the industry as a whole, including of related companies, direct competitors and other vehicle brands."

They go on to say:

The automotive industry is extremely competitive and operates on very tight margins, meaning such knowledge and understanding is essential to ensure that the businesses are successful, and maintain or increase market share."

If we can just scroll up a bit -- sorry, I should probably say "scroll down". They are emphasising:

"The roles we have held have enabled us to gain a significant and broad knowledge of the industry, and a deep understanding of the distribution value chain."

If we can go over the page, {B/109/7}:

"In reality, there are very limited variations in terms of operations across different automotive brands, which is why the First Industry Expert Report relates to the entire industry and is not limited to any particular brand ..."

They note that that is consistent with Mr Dent's evidence. They say:

"We both have first-hand experience working at all relevant levels of the supply chain including OEMs, NSCs and retailers, as well as finance companies. These levels do not operate in isolation but are very much interlinked: OEMs and NSCs are part of the same corporate group, EOMs recover their costs from NSCs, and NSCs determine pricing strategy, set the recommended retail price for retailers and are in constant dialogue with both OEMs and retailers."

They go on to emphasise at 2.9 that they are members of the Society of Motor Manufacturers and Traders' Car Section Committee. They explain that that is:

"... the trade association for the UK's automotive industry and represents more than 800 automotive

companies in the UK ... [it] provides industry perspective from leaders of NSCs and OEMs, using committee members as 'sounding boards' on policy decision and government action."

Finally, 2.10:

"... from our industry knowledge and experience, there have been no significant changes to the processes and practices that we described ... during the Relevant Period, or since. We note that this is consistent with Mr Dent's experience ..."

So, in my submission, they have quite comprehensively addressed the concern that has raised by KK that they can only speak for the particular brands that they worked for and they explain why, on the contrary, they do have a very strong basis to speak to practices in the industry as a whole.

Can I ask the Tribunal very briefly just to read paragraphs 2.11 to 2.17, which then goes on to talk about the individual positions that the two experts have held? (Pause)

In light of all that, we say any challenge to the ability of these experts to speak in a practical way to what goes on in the automotive industry as a whole is, in my submission, completely ill-conceived and we say it is all the more ill-founded at this early stage of the

proceedings. There is simply no basis whatsoever at this stage that the Tribunal could legitimately discount this evidence.

Moving on to KK's second point, they point to the fact that the industry experts have, quite fairly, accepted that it is not possible for them to state with absolute certainty what occurs in every transaction or every circumstance. KK seeks to contend that that is somehow fundamentally problematic as a matter of methodology. I think first of all can we look at what the industry experts actually do say? This is in the same report, page 15, {B/109/15}. You see at 4.1:

"We are aware from Scott + Scott that the Respondents have criticised the First Industry Expert Report for the use of terms such as 'generally', 'typically' and 'often'."

"When we use such terms, we are referring to what we regard as industry norms based on our respective experience of 40 and 30 years in the industry. It is of course not possible for us to state with absolute certainty what happens in every transaction or in every circumstance, as there will inevitably be exceptions. However, to the extent that there are any such exceptions they would not in our view materially impact upon the matters we have set out both in the First

Industry Expert Report and this report. Such exceptions might:

"(a) be slight variations in practices but to achieve the same end result; or

"(b) take place in such limited circumstances that they would affect only a tiny fraction of the market (for example, for specialist brands); or

"(c) be theoretically possible so we cannot Rule them out but, in our experience, would not happen in reality."

So that is how they have responded to the criticism of them using these sorts of terms. Then they go on in their report to address three particular examples that were raised in the KK response and they explain why that does not undermine the value of their evidence. But, in my submission, what is said there is a perfectly respectable factual foundation for the methodology. Even if there is a degree of variation, it is now well established that that possibility does not undermine the commonality threshold. So I showed the Tribunal when I was working through the authorities, you have got the Supreme Court in *Merricks* and the Tribunal in *Trains* envisaging that there might well be wide divergences in the circumstances of the class in those respective cases, and that was clearly not a problem for the

purposes of commonality.

The Tribunal in *Trains* also made very clear that advancing speculative scenarios that posit that certain class members might not have suffered loss in certain circumstances simply does not assist. It is not a legitimate basis on which to resist a CPO application in my submission.

The third submission that is made by KK is it is said that the industry experts' evidence contradicts one of the key factual assumptions underpinning Mr Robinson's methodology. What they point to in particular is where the industry experts say that if a NSC's input costs do not increase but its competitors increase their charges, then the NSC will consider whether it also wishes to increase its delivery charge. KK says, well, the fact that NSCs might increase their delivery charge opportunistically in that way is somehow fatal to our methodology. In my submission, it clearly does not cause an issue because, as I have already explained, Mr Robinson's methodology takes the smaller of the overcharge or the increase in the delivery charge. So if the NSCs opportunistically increase their delivery charge in such a way that it is not related to an overcharge, it will not be attributed to the cartel by Mr Robinson's methodology.

So, in short, we say that these objections fall well short of undermining the credibility of the industry expert evidence and they are clearly matters that the Tribunal should determine at trial. We say that the flaw in KK's position is particularly evident from paragraph 33 of its skeleton argument. If we can just turn that up, it is advocates bundle {AB/3/12}. KK starts by saying -- sorry, 33, please -- paragraph 33:

"It is important to emphasise that KK's opposition to certification does not require the Tribunal to make any findings as to the facts or to reject the evidence of the Industry Witnesses. As explained above, the fundamental problem for the PCR is that it has not put forward any methodology in the event that any of the factual assertions made by the Industry Witnesses are proven at trial to be incorrect."

Then further down it says:

"What this means is that if any of those factual assertions are proven at trial to be wrong ... then the methodology collapses and the case fails."

And KK says for that reason the *Pro-Sys test* is not satisfied.

Now, it is of course the case that, if we are ultimately unsuccessful in making out our case at trial, then we will lose, but that does not mean that there is

any flaw in our methodology being advanced now. Nothing in the rules requires the PCR to advance a methodology which is demonstrably infallible. What the rules do say is that the time to test those factual assertions is at trial and not at certification.

THE CHAIRWOMAN: You would also say it would be up to the claimants whether they had any alternative methodologies or fall-backs that could be used in the event that any of those underlying planks -- I was going to say "factual" but the expert industry evidence is opinion as well, of course -- well, to some extent opinion, not all perhaps -- it would be on the claimants' shoulders to have any fall-back that they thought they needed to have?

MS FORD: Madam, absolutely. Of course by the time we get to trial, there might well be such fall-backs. One does not know. But of course we are at the CPO stage and it is not a flaw in our methodology at this stage.

THE CHAIRWOMAN: Another way of putting that is: to what extent is the methodology set in stone? I mean, under the case law test you have got to have a methodology that is -- I am going to incorrectly summarise it again -- let us say capable of working or not obviously flawed or -- but to -- I suppose I am really testing how far that goes in terms of any obligation to put forward

alternatives.

MS FORD: Well, the case law certainly very much recognises that the methodology that is being put forward at this stage is necessarily provisional and it has to be because it is prior to disclosure and it is prior to all the other stages that have to take place and so it must necessarily be a provisional one. So what the case law asks is that you demonstrate that the methodology you are presently envisaging using satisfies the test.

THE CHAIRWOMAN: Putting it another way, let us say you get closer to trial and following disclosure or whatever -- let us say you get that far and you have got disclosure and then you want radically to modify your methodology, even though the Tribunal has approved the collective proceedings on the basis of a different methodology, is there any clarity as to what happens then?

MS FORD: Well, presumably, if the respondents felt that what was being advanced moved materially away from that which had been certified, then they could say to the Tribunal, "We are concerned that what is now being advanced is a very different claim" --

THE CHAIRWOMAN: Yes.

MS FORD: -- so it would have to take the steps it thought appropriate at that stage. But I would emphasise that I am not trying to satisfy the test of certification by

reserving the possibility of amending everything at a later stage. We say that what we have now is manifestly enough.

THE CHAIRWOMAN: So putting it another way, you say you need to meet the test on the basis of what we know now --

MS FORD: Necessarily, Madam, yes.

THE CHAIRWOMAN: -- and on the basis of the industry expert evidence on which you rely?

MS FORD: Yes. We have to demonstrate that what we have now essentially satisfies the test and, in my submission, it clearly does.

The Tribunal will have seen that KK also seek to rely on the same points as going to the suitability requirement as well as the commonality requirement. Insofar as those points rest on their contention that the methodology is flawed, in our submission, they fail for exactly the same reasons. But KK also does seek to take a separate point about the costs outweighing the benefits of the proceedings under Rule 79(2)(b), and the Tribunal will recall that that is one of the factors that it is entitled to weigh up in determining the question of suitability for collective proceedings.

On that there is no doubt that the cost of these proceedings like any other proceedings are likely to be significant. The PCR has obtained funding for

14.85 million to litigate these matters for trial and Woodsford have undertaken to pay the proposed defendants' costs up to a maximum aggregate amount of 15 million, in the event that the claims are unsuccessful. But that is, in my submission, then to be set against a very substantial potential benefit and you can see that from the illustrative calculations that Mr Robinson has put in his report.

If we look at {B/5/72}, the Tribunal has there a table 11, "Summary of estimated loss based on assumed 10% overcharge ...", and the total there is some 57 million on the assumption that there is a 10% overcharge.

If we go over the page to 73, {B/5/73}, on the assumption of a 15% overcharge you then have 86 million. Then over again to page 74, {B/5/74}, on the basis of an assumption of a 20% overcharge you have got just under 15 million.

Then once you add in simple interest, if we go over to page 75, {B/5/75}, you have then got -- on the various assumptions of overcharge, you have the figures of 71 million, 107 million, 143 million respectively. Those are the sort of sums we are looking at.

If you look at {B/9/10}, it does require squinting but what this actually shows --

THE CHAIRWOMAN: Yes, if you show us which bit to focus on?

MS FORD: Well, I simply draw attention to the fact that what this is showing is the provisional summary of the overcharge per vehicle split by brand. So the brand is down the left-hand side and --

THE CHAIRWOMAN: Yes.

MS FORD: -- then you see the figures in years. Over to the right of this table, the figures at the right are an overcharge expressed per vehicle per brand. The Tribunal will have seen that KK, in their skeleton, have essentially cherry-picked a handful of examples of brands where the overcharge per vehicle is likely to be low, and the reason for that is that those are going to be vehicles where the proportion of those that were actually shipped and so potentially subject to an overcharge, versus those that were transported by other methods, were relatively low and so you get a small overcharge by brand.

But, of course, as is always the way, there are other examples of much higher figures and you can see in this table there are examples of figures in the 40s and 50s of pounds per vehicle per brand. We know from *Merricks* that distribution need not be on a compensatory basis so it is not being contemplated that you would distribute in relation to some of these low figures per

brand.

THE CHAIRWOMAN: Sorry, so you are taking that to mean that if there were a brand where it was a very, very small amount, you might not even distribute?

MS FORD: There is no obligation under the regime to distribute on a compensatory basis. We know that from *Merricks*. I am not at this stage advancing any submission as to the way in which distribution would take place, and we also know from *Merricks* -- and I drew your attention to the relevant part, where they said you might well want to wait until you see the size of the class and the size of the overcharge before you make that decision, it is not for now. But I do make the submission that it is not a requirement of the regime that you distribute on a compensatory basis.

KK have cited a Federal Trade Commission report which suggests low uptake figures in US class actions. In my submission, if that sort of general information is the basis on which to impugn the cost benefit of collective proceedings, then no collective proceedings are going to be likely to be deemed worthwhile because that applies across the board. They also refer to the position in *Trains*, where, as I have shown you, the Tribunal in that case considered that the cost benefit analysis narrowly militated against certification.

In my submission, that was because of the particular circumstances of that case, where there was the concern that people would not recall what train journeys they had taken and they might not have the tickets and they might not retain the paperwork and they might not be willing to do the exercise of establishing their own loss in order to make a claim. In my submission, the same does not apply in a claim in respect of the purchase of a new car.

THE CHAIRWOMAN: You mean you might remember what cars you bought?

MS FORD: One would expect you to remember if you bought a new car, indeed, and the chances are you would have kept your paperwork. So, in our submission, this is just not a similar scenario.

Of course, even in *Trains*, where they found that it militated against a CPO, when they weighed up all the other factors, they found naturally, nevertheless, the eligibility criterion was satisfied. So even if the Tribunal takes a view that actually that criterion weighs against, certainly in *Trains* that did not outweigh the benefits of pursuing justice for the class. But we say this is simply not a comparable scenario. In our submission, the cost benefit analysis in this case clearly favours a CPO, as do the other factors, and for

the reasons we have explained in detail in our skeleton, we say the suitability requirement is clearly satisfied in this case.

The final point that KK takes is the suggestion that there is a mismatch between the proposed methodology and the class definition. The reason this comes up is because the loss to the end consumer only arises once the OEM has entered into a contract which is affected by the cartel and then they have to pass any overcharge on to the NSC, which increases its delivery charge and then it is passed on to the consumer class. So the point is taken, well, the class is defined as "all persons who purchase or finance the vehicle from a non-excluded brand during the relevant period", but it is said "Your class will include some people that actually have not suffered loss at the beginning of the period because the loss has not actually arisen yet". That is the point, as we understand it, that is being taken against us.

THE CHAIRWOMAN: These are people who bought before the relevant shipping contract was entered into?

MS FORD: That is the assumption that is made, exactly. It is within the defined infringement period and it is within the defined class, but as and when these matters are investigated, it is suggested, well, there will be people at the beginning, before the relevant effective

contract incepts, that have not actually suffered loss.

THE CHAIRWOMAN: You say you do not know who is in that category at the moment presumably because you have not had disclosure?

MS FORD: Exactly. We say that we cannot know. We have not had the relevant disclosure or the witness evidence so it is not actually possible for us to draw a class definition narrower at this stage.

I have shown the Tribunal the guidance on the way in which you go about determining your class definition and what is important, what is emphasised, is that you need an objective means of knowing who is within the class and who is outside. It makes clear that you cannot go about defining your class on subjective or merits-based tests, such as, "If you have suffered loss, then you are within the class". That is not permissible. The Guide tells you that that is not an appropriate way of going about it.

So you have to identify an objective basis of identifying your class and the fact that that may mean that some individuals' claims are ultimately not made out is, in our submission, an unavoidable feature of the statutory scheme. It cannot be the basis for criticism of the class definition.

THE CHAIRWOMAN: Just talk us through what you say happens

in that event. Let us say there is disclosure and let us say the first set of contracts entered into after the relevant date in 2006, they were all entered into a year later so there is a year's worth, keeping it very simple, of purchasers who may not, on your methodology, have suffered loss, what is then done at trial? What do you say then happens at trial? In practice, just an adjustment to the overall award?

MS FORD: The aggregate damages would be produced in order to reflect the fact that a certain proportion of the class have not suffered loss.

THE CHAIRWOMAN: There would be a calculation, rough or otherwise, of the number of purchases or acquisitions that fell into that period?

MS FORD: Yes, there would be a calculation based on the optimal information that is available at that time.

The other point that we have made in our reply is that, as I showed you in the Commission decision, there are other factors which the Commission identified which are driving loss. One of them was the bunker adjustment factor and the currency adjustment factor. Again we are in this position where we do not actually know whether that element of the collusion, that element of the infringement, is going to drive loss which might incept earlier. Again it is something that we need disclosure

to know.

THE CHAIRWOMAN: So are you saying the same point applies? You would just find a means at trial if you got that far to make adjustments for those things?

MS FORD: Yes.

THE CHAIRWOMAN: I cannot remember what the bunker adjustment is. I am sure I read it, but currently --

MS FORD: I am not sure I am going to be in a position to enlighten you what it is!

THE CHAIRWOMAN: I will go back and read it again. Hopefully I will remember it.

MS FORD: It is conduct which the Commission identified as being an example of their collusion.

THE CHAIRWOMAN: Yes.

MS FORD: But, in any event, we would say what is clear from the authorities that I have shown you, in particular *Trains*, is that, as the Tribunal said there, almost any class is going to include some claimants who have not suffered loss and it is not a bar to certification.

THE CHAIRWOMAN: It is a little bit different, is it not, because in -- you could, I suppose, in theory at least, write down objectively a slightly narrower class definition in our case that did not cover anyone who acquired a vehicle before the revised contract was entered into, but it would be --

MS FORD: Madam, in my submission, that falls foul of the desire that is set out in the Guide to have a clear class definition with objective criteria.

THE CHAIRWOMAN: You mean you say it should be clear from the outside who is -- now and before disclosure, who is actually in the class or outside it?

MS FORD: It must be because, of course, if you are thinking from the perspective of a class member who must decide whether they opt out for class or not --

THE CHAIRWOMAN: I see, yes.

MS FORD: -- they need to know now whether they are actually in the class or not in the class and it will not assist them to know that they need to wait until there is disclosure to find out whether or not the particular car they bought relates to a period of time which is covered by an affected contract or is not.

That brings me to the end of the objections on the question of upstream pass-on and our overall submission is that none of them are capable of preventing certification of these proposed claims. I am moving on to deal with the question of opt-in and opt-out. I have shown you Tribunal Rule 73, which is the one which identifies two additional factors that need to be taken into account in answering the question of whether you certify on an opt-in or opt-out basis, and that is the

strength of the claims and whether it is practicable for proceedings to be brought as opt in.

In our submission, both those factors clearly point to certification on an opt-out basis. On the strength of the claims, I showed you the tribunal's Guide, which tells you that follow-on claims will generally be of sufficient strength for the purposes of certification. This is, of course, a follow-on claim and, in my submission, the sorts of challenges that have been mounted by the respondents in these proceedings are not -- they have been cast as supposedly methodological issues, but they are not any suggestion that the claims themselves are inherently unmeritorious. They are challenges to a methodology rather than anything else. So, in my submission, there is nothing there that would suggest that you do not achieve the relevant threshold for the purposes of the merits to justify an opt-out claim.

On the practicability of an opt-in claim, this is a very large proposed class. It comprises all persons who purchased or financed a new vehicle over a period of approximately nine years and the loss suffered by each member of the class is, as we have seen, potentially modest. So that is, in my submission, a classic example of a case where an opt-out class is appropriate and an

opt-in claim would be manifestly impracticable. Actually, the proposed defendants have not taken issue with that in relation to the vast majority of the class, so they do not seek to suggest that an opt-in claim would be feasible in respect of the vast majority of this class, who are individual consumers, who purchased or financed new vehicles over the relevant period, and nor do they suggest it would be viable for small or medium-sized businesses in the class who fall within the scope, so they are not claiming that any of that could conceivably be operated on an opt-in basis.

What they do suggest -- and we say it is an extraordinary suggestion -- they say that even though an opt-out class is necessary for the vast majority of this class, they say the Tribunal should skim off the top subset of the proposed class, those which they describe as "large business purchasers", and they should direct that those class members be required to opt into the claim instead, merely because of their size.

In our submission there is no support for that approach anywhere, not in the Act, not in the rules or in the Guide. There is simply nothing to suggest that the Tribunal should take what is clearly a properly brought opt-out claim and require the largest members of the class to opt in instead.

Actually, as we have seen, the rules consider practicability and opt-out on a unitary basis for the class as a whole. There is no suggestion there that you should salami-slice it and divide the class. So, in our submission, what the respondents are suggesting is simply wrong in principle and that ought to be the end of the matter.

We have also, however, put in evidence to explain why we say that this suggestion is impracticable in reality, and that is the evidence of Ms Hollway. It is in bundle {C/15}. Ms Hollway is a partner at Scott + Scott UK and her evidence addresses four key points on the basis of her experience of litigating competition claims in England for nearly 15 years and including six years at Scott + Scott, which is a specialist claimant law firm.

THE CHAIRWOMAN: Is this evidence of fact?

MS FORD: My Lady, it is in the sense that it is evidence based on Ms Hollway's experience of trying to recruit people and to run claimant ... you can assess it as we go through, but it is -- I would suggest, yes, it is evidence of fact and it is evidence of the sort which has also been put in in other CP --

THE CHAIRWOMAN: I am sure that is the case.

MS FORD: So if we look at page 6, {C/15/6}, the first point

that she makes -- and this is paragraphs 17 to 20 of her statement -- is that it is not straightforward to identify and contact large business purchasers. The Tribunal will recall that in the Guide it talks about the ability to identify and contact potential class members as relevant. Her evidence is it is not straightforward to identify and contact large business purchasers. She points out that, of the 13 collective actions that have been filed with the Tribunal, only one had been proposed to be brought on an opt-in basis and that was by an industry association that had well-established lines of communication with the potential victims. She makes the point that there is no industry or representative body for these large industry purchasers or large business purchasers that would enable them to be identified and contacted cost-effectively.

So that means that, right from the outset, the proposed class representative would have to dedicate considerable time and resources to identifying businesses that might qualify as large business purchasers and contacting each one of them individually.

If we then move on to page 7, {C/15/7}, the next point she makes concerns whether large business purchasers would be incentivised to opt in, even if

identified and contacted. The point we emphasise here is that the proposed respondents' case about this is speculative. They rely on the evidence of Dr Tosini, but all that evidence goes to is the number of business purchasers and the potential value of their claims. It does not then cover the next step or bridge the gap and establish that it would be practicable to expect those purchasers to opt in. What Ms Hollway's evidence does is identify various reasons why, in our submission, it would not be practicable.

If we look first at 24, page 8, please, {C/15/8}, Ms Hollway agrees with the distinction that has been drawn by this Tribunal both in *BT* and *Trains* -- and I showed the Tribunal as we went through -- that there is a difference between encouraging class members to come forward and collect their share of damages that are already on the table and persuading class members to join an opt-in claim form from the outset, and so she says:

"... this submission [she is referring to the respondents' submission] conflates encouraging class members to come forward to collect their share of a damages pot that is already on the table with persuading class members to join an opt-in claim from the outset. In reality, the two are very different.

The former is a 'sure thing'; the latter is considerably more speculative. When deciding whether to participate in the claim, a Large Business Purchaser will likely need to: familiarise itself with the claim and the people running it to reassure itself that it wishes to be associated with the claim; consider the likely amount of work involved and over what timeframe; consider the likely recovery (at a very early stage where there is little certainty around this); weigh that recovery against the financial and time costs of participating; assess and potentially negotiate the funding package and the payment(s) it will be committed to making pursuant to that package; and consider any anticipated reputational impact in becoming involved in such a claim. Even the preliminary work involved in deciding whether or not to opt in is therefore not inconsiderable and the MNW Respondents have provided no evidence that a significant number of Large Business Purchasers would be willing to do so for the sums potentially involved."

That is the headline point that she is making and she then goes on to address various of those points in greater detail.

She says, first of all -- if we go on to 26, what is said there is that "potential opt-in class members ... would need to put resources in to assessing the merits

of the claim".

Paragraph 27, she makes the point that very few of these are going to have in-house competition expertise. At paragraph 28 she makes the point that these are indirect purchasers so they are also unlikely to have expertise in either shipping or automotive industries. At paragraph 29 she makes the point that they will have to gather and analyse data to try and ascertain their own claim value.

In paragraphs 30 to 31 she makes the point that the MNW defendants appear to envisage that opt-in claimants will have to give disclosure on things like prices of new vehicles, resale prices and their own pricing practices, and she makes the point that being ordered to provide wide-ranging, costly and time-consuming disclosure is likely to be a significant disincentive to opting in to an opt-in claim.

34 and 35, she makes a point about the lack of control over the conduct of the litigation, concerns about confidentiality and concerns about reputation, all of which might disincentivise opting in.

At 37 to 41, she comments on the value of claims and she makes the point that, according to the Tosini report, large business purchasers would have a maximum claim value of 1.9 million. She refers to a submission

that was made on behalf of the MNW respondents. They referred to Royal Mail, which was the largest fleet purchaser in 2019, and what they sought to imply is that, because Royal Mail are a claimant in the Trucks litigation, then they would be likely to opt in. But Ms Hollway makes the point that in the Trucks litigation, their claim, according to publicly available records, is some 270 million, which is obviously a bit different than the 1.9 million that is being canvassed here. It also relates to a fraction of the number of vehicles and so one can infer that the disclosure burdens would be less as well.

Of course that is Royal Mail, which was the largest fleet purchaser in 2019. Some of the business purchasers' claims would be much lower, so they would be for 93,000 or less. So none of that provides any convincing evidence that these large business purchasers would be persuaded to opt in.

Then, at 42 to 43, she makes a point that opt-in claimants have to agree to pay a share of their recovery to a litigation funder and she makes the point that that makes it even less attractive.

So those are the factors that go to persuading large business purchasers to opt in. Ms Hollway then proceeds to consider the matter from the perspective of the

proposed class representative and to what extent is that practicable. Paragraphs 44 to 48, she makes the point that book-building for an opt-in claim is much more burdensome and time-consuming than publicising the existence of an opt-out case and the right to take a share of damages. She makes the point that the PCR has budgeted for raising awareness of an opt-out case but it certainly has not made allowances for extensive book-building that will be required for an opt-in case.

Paragraphs 49 to 51, they are addressing the costs of an opt-in claim and, in particular, they make the point that the costs of providing disclosure for many large businesses would significantly exceed what is presently budgeted for.

Then paragraphs 52 to 53 deal with the difficulties that the defendants' proposals would cause in funding the claim. She makes the point that funding has been obtained on the basis of the present estimated claim values and the proposed defendants now suggest that stripping out between 23 million and 46 million and shifting it to a speculative opt-in claim would be viable. In fact, in our submission, it is a transparent attempt to undermine the viability of the funding of this claim in totality and to render the opt-out proportion of the claim economically unviable.

Finally, Ms Hollway makes the point that the defendants have not actually identified any concrete benefit to class members of proceeding in the way that they suggest and, if anything, it would be disadvantageous for all concerned. So, for example, paragraphs 54 to 56, she makes the point that the defendants have not actually grappled with how in practice this would work. She points to the fact that large business purchasers are put to greater effort, expense and risk than other class members and the fact that the proposal risks are undermining the economic viability of the claim which is being brought on behalf of consumers and small businesses. So, in our submission, it is overwhelmingly clear that the attempted bifurcation of this claim is impracticable. We would invite the Tribunal to reject it.

THE CHAIRWOMAN: You only touched on disclosure there, but it is a possible reason the proposed defendants put forward, is it not, as to --

MS FORD: They have certainly advanced it as a possibility. Yes, their response, paragraphs 80 to 82, {A/14/27}.

In our submission -- and the Tribunal already has my submission -- the prospect of being ordered to provide disclosure is likely to be a disincentive to large business purchasers and, of course, it is important to

recognise that what is being proposed is that it is important for determining the issues of pass-on of the alleged overcharge to large business purchasers and pass-on by them to their own respective customers.

We have addressed in our submission a perfectly viable methodology for dealing with pass-on to the class and no point is now taken on the methodology we propose for pass-on from the class.

MR HOSKINS: Just to be clear, that is for the certification purposes but not at trial. We will be running pass-on -- downstream pass-on arguments at trial.

MS FORD: We certainly anticipated that.

THE CHAIRWOMAN: I think that is why I was pausing a bit.

MS FORD: I am sorry, that is quite right. I am not suggesting that it has in any way been waived for going forward.

THE CHAIRWOMAN: Does it follow from having an opt-in claim that disclosure would be ordered?

MS FORD: No. In my submission it certainly does not. In my submission, it is also --

THE CHAIRWOMAN: Nonetheless you say it could be a disincentive, the prospect or possibility of it?

MS FORD: Yes, that is what -- Ms Hollway has specifically made this point. If we can look to {C/15/10}, she does, I think, make the point in one of these paragraphs that

we do not necessarily accept that they will --

THE CHAIRWOMAN: I was looking at 31, {C/15/10}.

MS FORD: Yes, so 31:

"... it is unclear why or on what basis the Proposed Defendants believe that Large Business Purchasers who opt-in to the proceedings would be required to give disclosure ..."

So the Tribunal will note, for the avoidance of doubt, the proposed representative fully reserves its position on the disclosure, if any, that any member of the class should be required to give.

So we certainly do not accept that it follows. What we do say is that, insofar as the MNW defendants appear to envisage that such a disclosure will take place, then it is a potential disincentive.

THE CHAIRWOMAN: There is an underlying assumption in that that you are more likely to have to make disclosure if you are opt-in -- that an opt-in claimant could very well be exposed to an order for some sort of disclosure.

MS FORD: Certainly that is the premise that underlies the MNW respondents' response because they are advancing it as a purported advantage. Of course we would say that what the Tribunal is assessing for the purposes of opt-in/opt-out is practicability and practicability requires you to recognise that even the potential for

disclosure is a further disincentive to these parties potentially opting in.

THE CHAIRWOMAN: Yes. I see what you say. We should take a transcribers' break. Is now a good time?

MS FORD: Now is a good time.

THE CHAIRWOMAN: So just coming up to 20 past, please.

(3.10 pm)

(A short break)

(3.22 pm)

MS FORD: Madam, I have addressed the objections that seek to resist certification at all or on an opt-out basis, so the points that I am coming on to address are, in our submission, somewhat at the margins in the sense that, even if the respondents were right about them, they do not provide any basis to resist certification.

Starting with the deceased persons and defunct companies. In relation to defunct companies, we have clarified that we do not propose to include the claims of defunct companies within the collective proceedings and annex A to our skeleton provided a proposed amendment to the class to address that. If I can just show you. It is advocates bundle {AB/1/43}.

It is the wording in red. This is the category of excluded persons and we have added an additional category of excluded person at (e), which is:

"Any legal person that is recorded as dissolved on the register of companies kept by Companies House."

Mr Robinson has, in his supplementary report, explained how in practice he envisages removing these claims from the proposed class. So, just for the tribunal's note, it is in his supplementary report, paragraphs 6.3 to 6.8.

That is the defunct companies.

On the question of deceased persons, the extent to which deceased persons can be included in a class was considered by the Tribunal in *Merricks* on remittal, and that is authorities bundle {AUTH/28/13}. In *Merricks*, the proposed class representative had consciously excluded from his class definition the estates of individuals who met the class definition but who had passed away before the domicile date, so you can see there is a quote here from his claim form and then under (d) you see:

"The proposed class representative is aware that this class definition excludes some individuals who might have good claims, in particular ... (iii) the estates of individuals who meet the proposed class definition but who passed away before the domicile date."

THE CHAIRWOMAN: That was on the claim form?

MS FORD: That is the claim form, yes, under the heading "Description of the class".

THE CHAIRWOMAN: So you are saying it excluded estates on the face of the form?

MS FORD: It consciously excluded claims by estates.

Then if we go on to page 14, {AUTH/28/14}, paragraph 35, the experts' report filed as part of the CPO application had made deductions to exclude deceased persons.

Then, in paragraph 36, you see the Tribunal expressing the view that it would be clear to anyone reading the CPO claim form and the CPO application that Mr Merricks intended to exclude people who were no longer alive and the Tribunal then also refers to what was said in the notice about the proceedings as well. That is also 36.

If we go on to page 15, {AUTH/28/15}, paragraph 39, what we see is that on remittal, Mr Merricks then said that he wished to include deceased persons within the class for the first time on remittal.

And paragraph 40, counsel for *Merricks* sought to argue that the claims by deceased persons could be included on the basis of the class definition in the existing claim form. You can see at paragraph 41, that the Tribunal considered that to be untenable. It said

that the claim form defined the class on the express basis that deceased persons are excluded.

At 42 you see them making the points that there was nothing in the notice on the website to indicate that the application was for a class that included deceased persons. There was then -- as the Tribunal points out in 43, there was then an application to amend the claim form and the Tribunal will see the form of the amendment that was sought on page 16, {AUTH/28/16}.

Under 23(b)(i), the underlined passage sought to include "persons who have since died". If we look at paragraphs 45 to 46 on this page, we can see that the submission was made to the Tribunal that as a matter of policy it should be possible to include deceased persons in collective proceedings. That is right at the bottom of the page, paragraph 45.

If we go over the page to 46, {AUTH/28/16}, the Tribunal says:

"We agree. However, the normal way of bringing proceedings where loss has been suffered by a person who has died by the time the proceedings are started is for the claim to be brought by his or her estate through those authorised to represent the estate. We see no difficulty in principle in having a class definition that includes the estates of deceased persons."

They make the point:

"That is not, however, the position taken in the draft amendment which simply treats deceased persons as individuals within the class."

So there were essentially two problems with Mr Merricks' application. The first one, which gets elaborated upon in paragraphs 48 to 54, is that the claim in the name of a deceased person is a nullity, and that is the amended class definition that Mr Merricks was seeking. If we look at paragraph 55 on page 19, {AUTH/28/19}:

"A claim could be made on behalf of the estates of deceased persons by their personal representatives, but that is explicitly not the form of amended class definition which Mr Merricks seeks."

Then 56 to 60, there was an additional concern that deceased persons cannot be said to be domiciled for the purposes of the rules. So the conclusion at paragraph 60 on page 21, {AUTH/28/21}, right at the end of this paragraph:

"... although a class can include the representatives of the estates of deceased persons, it cannot simply include persons who are no longer alive."

Paragraphs 62 to 69, the Tribunal then considers the rules which govern the amendment of claims after the

expiration of a limitation period. The relevant rules are set out in paragraph 63 and there was a difference of opinion about whether the application to amend that was being made by Mr Merricks was governed by Rule 32(2) or Rule 38(6) to (8), both of which are set out in the judgment. The Tribunal can see that the Rule 32(2)(b) permits amendments to correct a mistake as to the name of the party, {AUTH/28/22}, "but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question ..."

Then if we scroll down to 38(6), you have got the requirement that additional substitution must be necessary. Then if we go over the page, {AUTH/28/23}, 38(7):

"The addition or substitution of a new party, as the case may be, is necessary ... only if the Tribunal is satisfied that ..."

Then one possibility is (c):

"the original party has died or had a bankruptcy order made against it and its interests or liability has passed to the new party."

So those were the rules being debated in that case.

In the case of *Merricks*, if we look at page 24, paragraph 69, {AUTH/28/24}, the Tribunal said:

"... an amendment to add new members to the class

after a limitation period has expired is to be regarded as involving the addition of new parties and so is governed by Rule 38."

Then it concludes, page 25, paragraph 72, {AUTH/28/25}. It says an amendment to add persons "who were deceased before the claim form was issued cannot be allowed as it does not come within any of the categories in Rule 38(7)". So that is how the matter was dealt with in *Merricks*.

In our submission there is an important difference between the circumstances in *Merricks* and the circumstances of the present case, and that is that the proposed class definition in our case was always intended to capture claims that vest in the estates of deceased persons. So unlike in *Merricks*, there was no express exclusion and, on the contrary, those claims are encompassed within the class definition that has been advanced. So it is all persons who, during the period, either purchased or financed in the United Kingdom a new vehicle or a new leased vehicle. At the time, a person who is now deceased purchased or financed a new vehicle or a new leased vehicle, they were obviously a person and they were within the class, and if --

THE CHAIRWOMAN: But are you not describing a category of people -- well, this is the question: are you there

describing a category of people who are bringing the claim?

MS FORD: Well, we are defining the class and we are defining claims, and our point essentially is that, unlike *Merricks*, we have not expressly excluded claims on behalf of estates. We simply, if necessary, would need to clarify that those claims are brought by the estates rather than the individuals, but, in our submission, that is really an unnecessary clarification. It was always intended that these claims would be within the class.

THE CHAIRWOMAN: Well, does that beg the question that what it shows you was always intended?

MS FORD: Well, first of all, Madam, is the fact that on that definition the person who is now deceased, at the point when they purchased or financed the new vehicle within the claim period, they were a person, they were within the class. Unlike in *Merricks*, the estimates that have been given by the proposed representative of the size of the class and the quantum of the recovery are calculated on the basis of including rather than excluding deceased persons.

THE CHAIRWOMAN: You say it is just a backward-looking definition identifying people who did buy?

MS FORD: Yes.

THE CHAIRWOMAN: That is the end of it?

MS FORD: I can bring up the class definition. It is {A/1/14}:

> "All Persons (other than Excluded Persons) who during the period 18 October 2006 to 6 September 2015 either Purchased or Financed, in the United Kingdom, a New Vehicle or a New Lease Vehicle ..."
>
> So the claims which now vest in the estates of deceased persons are within that definition, in my submission. Unlike in *Merricks* again, there have been no relevant communications with the proposed class which seek to exclude deceased persons so our submission is that it has always been sufficiently clear that the claims that vest in the estates of deceased persons are within the scope of the class. Now, we would say on that basis there is simply no need to amend the claim form at all.
>
> We have indicated that to the extent that the Tribunal thinks it is insufficiently clear on the face of the class definition, then we would be content to amend for the purposes of removing any ambiguity and we have provided a draft amendment. It is in the advocates bundle {AB/1/41}. This is now the green text. The Tribunal will note that the proposed amendment does not run into the difficulties that arose in *Merricks* because

it refers to the estates of deceased persons rather than the deceased persons themselves, so it does not run into that problem and it is not seeking to add new class members to the claim. We say that these claims were always within the class. It is not --

THE CHAIRWOMAN: Well, yes, but if you -- "clarificatory" can mean adding and, if you are, does that not breach the rules against adding after the limitation period?

MS FORD: Well, our primary position is that it does not run into that problem because on the basis of the definition and the quantification and indeed the publicity, all of it, they were already there, so you are not adding new claims. They were there already and so you do not run into that difficulty of amending after the end of the limitation period.

So if you are simply clarifying to explain the basis on which these claims that were always in there are brought, that is not something that engages either Rule 32 or Rule 38. It is just a clarification.

THE CHAIRWOMAN: Yes, but to add that text, are you agreeing that you have to first decide that it is purely clarificatory and it does not actually expand the class?

MS FORD: No. We say in the alternative that we can take the benefit of either Rule 32 or Rule 38 in circumstances where the claim is already included. It

is just a basis of clarifying the basis on which the claim is brought. But our first step is to say, since these claims are already there and this is a purely clarificatory exercise, you do not need to use either of those rules. But then we say, even if the Tribunal thinks actually you do need to deploy those rules, because in contrast to *Merricks* this is not adding new claims, then it is permissible in a way that was not in *Merricks*.

THE CHAIRWOMAN: Just explain to me -- I think I am being really slow -- if you are wrong that it is purely clarificatory, why would we not be adding new claims?

MS FORD: Because it essentially resides on the same point that we say these are claims that were always within the class. That is the distinction we draw and we say that whether it is purely clarificatory or whether the Tribunal feels that it needs to rely on these Rule 32 or Rule 38 powers, the key distinction is these claims were always there; you are not adding anything.

Madam, those were my submissions on the question of deceased persons.

Compound interest. The claim includes a claim for compound interest and in *Merricks* remittal judgment, as well as dealing with deceased persons, it also dealt with what is required for the purposes of bringing

a claim for compound interest. We rely in particular on what is said at paragraph 84 of the judgment. This is {AUTH/28/29}.

We have identified this because it essentially encapsulates what we understand to be the tribunal's consideration of the *Sempra Metals* line of case law and the circumstances in which you can or cannot claim compound interest. The Tribunal will see that there has been some working through of the case law on compound interest. But what it says at 84 is that:

"... it is not sufficient for a claim to compound interest to show that an individual had borrowing and/or savings. It is necessary to show, on the balance of probabilities, how they funded the additional expense or what they would have done with the additional money if there had been no Overcharge."

So that is what you have to be able to show in the context of the claim for compound interest.

So in this case what we have proposed is to narrow down our claim to compound interest to those members of the class who purchased a new vehicle on finance. For those members of the class, we do know how they funded the additional expense because we know that they funded it via financing and that they would have incurred compound interest in doing so.

So we say that, for that group of the class that financed their new vehicle, that satisfies the test for compound interest. Mr Robinson has advanced a methodology in which he explains how the losses suffered by that proportion of the class could be calculated and it is in his second report, {B/110/45}. It is paragraphs 6.9 to 6.12.

Basically what he proposes to do is to use publicly available data to find out what proportion of cars are bought on finance and then to apply the average new vehicle finance rates to that proportion for the average period of new vehicle financing. That enables him to quantify these losses, in our submission, with reasonable accuracy.

The sorts of objections that have been raised to this approach are things like: well, there would be a disparity in interest rates or there would be a disparity in the arrangements for financing or disparity in the arrangements for capital payments and the like. In my submission, in light of the approach that is indicated in *Merricks* and *Trains*, disparities do not undermine the methodology. The fact that there is variation in circumstances does not render the methodology unviable. In our submission, for that proportion of the class that bought a new vehicle on

finance, there is a claim to compound interest which is suitable to be heard in these collective proceedings.

I am moving on to the final points which are raised, which are the points on authorisation which have been taken by the MNW respondents. It is in their response and then they cross-refer to it in their skeleton.

THE CHAIRWOMAN: Yes.

MS FORD: They have identified two purported defects in the arrangements between Mr McLaren and the proposed class representative, being the incorporated vehicle. The first supposed defect is that they say there is no service contract between Mr McLaren, the person, and the PCR, the special purpose vehicle. The concern is said to be that there is no guarantee that Mr McLaren will continue to be involved in the proceedings and no provision for what will happen if he becomes unable or unwilling to act as the PCR sole director and shareholder. We make three points in response to that.

First, we say that what should happen if Mr McLaren becomes unable or unwilling to act is already specified in the articles of association of the PCR, so it makes a provision for the appointment of additional directors; it makes a provision for the appointment of alternate directors. Importantly, that provides considerably more clarity than you would get if it was the case that

Mr McLaren was applying to be, in his individual capacity, a proposed class representative, so actually the position, having articles of association, is actually more informative than it would be if it was Mr McLaren acting individually.

Secondly, we make the point that the Tribunal, of course, has the power to revoke or vary a CPO if it takes the view that the class representative no longer meets the criteria for authorisation. We have confirmed in writing that we will notify the Tribunal if Mr McLaren were to indicate that he wanted to step down from his role as sole director or if he became unable to act, so the Tribunal would be able to take steps in that circumstance.

Thirdly, what is being suggested is some sort of service contract between Mr McLaren, the individual, and the proposed class representative, the specially incorporated vehicle. In our submission, that would be completely artificial because the signatories would be Mr McLaren in his personal capacity and Mr McLaren in his capacity as sole director of the PCR. We just find it difficult to see what actual utility that sort of exercise would serve. In our submission, there is nothing in that objection.

Then the second supposed defect is it is said that

the effect of the deed of adherence between Mr McLaren and Woodsford, the litigation funder, means that Mr McLaren has insufficient control over these proceedings. If I can just show the Tribunal the relevant provision of the deed of adherence. It is {E/2/2}. The relevant provision is 3.3.

What it sets out is matters that Mr McLaren is not entitled to do without the approval of Woodsford. The Tribunal will see that these matters do not go to the conduct of the litigation at all. They go to the constitution and governance of the PCR itself. In our submission, there is nothing improper about that at all and it actually makes sense for the funder, who is providing significant sums of money to the PCR, the entity, without collateral, that they would want to retain a degree of control over the constitutional arrangements and the governance arrangements of that entity, but it does not in any way go to Mr McLaren's conduct of the litigation.

So, in our submission, there is simply nothing in these objections which would preclude the authorisation of the PCR as a class representative.

Unless I can assist the Tribunal further, those are my submissions.

THE CHAIRWOMAN: Thank you.

Submissions by MS DEMETRIOU

MS DEMETRIOU: May it please the Tribunal, I am going to be addressing you on methodology together with Mr Piccinin. We have divided the submissions between us and Mr Singla will make additional submissions on methodology on behalf of the KK defendant. Then Mr Hoskins will address you on opt-in/opt-out and then Mr Holmes is going to be addressing you on deceased persons and compound interest. There may be something I have forgotten, but I think that is broadly it by way of roadmap.

THE CHAIRWOMAN: We will try and keep up.

MS DEMETRIOU: Madam, members of the Tribunal, you will have heard that we say there are two key defects in the methodology that has been advanced by the PCR. The first is that the PCR's methodology measures delivery charges when it should measure, we say, the overall charges for cars. That is the point that I am going to address you on.

The second is that the methodology measures changes in the delivery charge over time rather than measuring differences between the claim period and a clean period untainted by the cartel. That is the point that Mr Piccinin is going to address you on. But, to be clear at the outset, we say that these are two

self-standing defects, so if we are right on either one of them, then we say that the claim should not be certified.

Now, by way of underlying principles, it does appear to be common ground that the PCR must put forward a plausible methodology in order to meet the commonality requirement for certification. At times Ms Ford seemed to be making a rather extreme submission on *Merricks*. So she said a couple of times, I think, that as long as you can show some basis that the class might have suffered some nominal loss, then principles of access to justice mean that it has to be certified for trial, but I do not think she was intending by that submission, which we dispute, that that is an accurate reflection of *Merricks*. I do not think she was intending to sweep aside the plausibility requirement because it is plain from what she said earlier in the day and also from their written submissions that the PCR does accept that the methodology needs to be plausible in order for the claim to be certified.

Now, in *Merricks* itself, so in the part of *Merricks* that went to the Supreme Court, it was common ground that there was a plausible methodology for calculating pass-through to consumers of the inflated element of the interchange fee. The main dispute that reached the

Supreme Court was whether it was realistic for Mr Merricks to obtain sufficient data to enable that methodology to be applied and, of course, the Tribunal will know that the Supreme Court answered that question in Mr Merricks' favour, so difficulty in proving a claim because of challenges in obtaining data was not a reason not to certify the claim in circumstances where an individual claim would have met the same sorts of challenges. The Supreme Court said, in those circumstances, that the trial court or Tribunal must do the best it can with the data available -- that is available to the parties.

So the objection raised by Mastercard and considered by the Supreme Court was different to the objection that we raise in these proceedings because the objection we raise in these proceedings does not go to availability of data, but goes to the plausibility of the methodology itself; simply is it capable of measuring the loss claimed? We say it is not for the reasons we are going to elaborate in our oral submissions.

Now, that species of objection was raised in *Merricks* after the Supreme Court judgment, when the question of certification of the claim was remitted to the Tribunal and, in particular, Mastercard argued that the claim advanced by Mr Merricks for part of its

damages claim should not be certified because there was no plausible methodology to establish it. That part of the damages claim, that particular part of the damages claim at issue, was the claim for losses in respect of the time value of money; in other words, the claim for compound interest.

Mastercard's argument in that respect was of course accepted by the Tribunal, which did not certify -- which refused to certify -- that part of the claim. I think it would be helpful to go to the *Merricks* CPO judgment, which is in authorities bundle {AUTH/28}. If we perhaps go to page 4 first of all, {AUTH/28/4}, we see at paragraph 8 -- at the bottom of the page, we can see there the issues, the issues on the remittal, so:

"Some further issues have arisen regarding the authorisation of Mr Merricks ..."

Then we see that the first of the issues relates to deceased persons. If we go over the page, {AUTH/28/5}, (b) is whether these collective proceedings can include a claim for compound interest, the compound interest issue.

Then if we go to page 26, please, {AUTH/28/26}, we can see there that the claim for compound interest was put forward, as those claims are, as a damages claim. We see that from paragraphs 74 through to 76, so

paragraph 75:

"The claim form proceeds to state that the claim for compound interest is advanced on an aggregate basis, as with the other damages claimed, and that it is being put forward as a damages claim following *Sempra Metals* ..."

Then we see -- if we go to page 27, {AUTH/28/27}, we see that the compound interest claim, first of all, at the top of the page, makes a very substantial difference to the total sum claimed. We can see further in that paragraph:

"... the claim for compound interest alone adds some £2.2 billion to the total award sought in these proceedings."

So it was a substantial part of the damages claim.

Then if we go to paragraph 78:

"... Mr Hoskins opposed the inclusion of claims for compound interest on the basis that this was not a common issue across the class and that no plausible or credible method had been put forward for calculating the loss suffered."

So you can see that the argument that was being made there, which was accepted by the Tribunal, was that there was no plausible methodology for calculating that part of the damages claim which comprised the claim for compound interest. If we go to page 31, please, in the

report, {AUTH/28/31}, and paragraph 87, so you can see my submission being rejected. So I said that compound interest is parasitic on primary loss. That was rejected by the Tribunal, which said that:

"... compound interest constitutes a distinct head of loss ..."

And so there needed to be a plausible methodology for that distinct head of loss.

If we then look down, we see the heading "Plausible or credible method of calculating the loss" and a reference to *Pro-Sys* and to *Merricks* in the Supreme Court.

If we go over the page, please, {AUTH/28/32} to paragraph 91, you can see there that two alternative approaches to estimating the compound interest claim were advanced by Mr Merricks before the Tribunal. We do not need to go into the detail of the approaches but they are both described and summarised in this paragraph.

Then at paragraph 92, if we can go down the page -- or the next page, I think it is, {AUTH/28/33}, so again:

"The problem with both approaches is not any limitation on the data that might be available."

So, again, by contrast with the issue that was before the Supreme Court.

"As the SC Judgment made clear, that is not a basis for denying certification: the Tribunal has to do its best with the data that is available. But the first approach is based on the assumption that anyone who was a saver or a borrower would have used the small amount by which each of their purchases would have been cheaper ... to reduce their borrowings ... The second approach rests on the same assumption ... However, as Ms Demetriou recognised in her oral submissions, the relevant question is: 'if [the class members] hadn't suffered the overcharge, what would they have done with the additional money ... Both the above approaches assume the answer to this question and fail to take account of the need to show, as a matter of probability, that the money would not have been used simply for a little extra expenditure."

So the vice that is being identified is that the methodology itself is not capable of estimating the loss that is being claimed.

We see at paragraph 96 on page 35, {AUTH/28/35}, that the fact that what was being sought was an aggregate award of damages does not assist, the Tribunal says there, where the basic methodology is flawed. Then you have the conclusion at paragraph 97, and the conclusion was that that part of the -- that aspect of

the damages claim was not certified. Certification was refused on the basis that the methodology was not plausible. Really it is the same species of argument that we are advancing before this Tribunal.

This claim, of course, seeks to establish that members of the proposed class suffered a loss as a result of the RoRo cartel when they purchased cars in the UK and, as with every cartel damages claim, this entails comparing what the class members paid in the real world with what they would have paid in a counterfactual world in which there was no cartel. It is the difference between those two things that constitutes the loss caused by the cartel. We say that the methodology of the PCR has to be capable of assessing that difference, has to be capable of establishing that difference.

Now, of course, purchasers, so members of the proposed class, did not buy anything at all from the cartelists. What they bought was cars. They did not buy delivery services and they did not buy anything from the cartelists at all. They bought cars which were already in the UK at the time they bought them and a small proportion of those cars were shipped over the deep seas by the members of the cartel and so this is, as you have seen, an indirect purchaser claim. So, as

with any indirect purchaser claim, there have to be two stages to the analysis.

The first stage is that there has to be -- the first stage has to measure the extent to which, if at all, the cartel led to higher shipping charges and that is the overcharge analysis. As you have heard, we are not taking any point on the overcharge analysis for the purposes of certification. But assuming that there was an overcharge, then, as I have said, that overcharge was not paid by the class members because they did not ship cars from outside the EEA to the UK. Any overcharge was paid by the manufacturers of the cars, the OEMs. So the second step for the PCR is that it needs to demonstrate that the overcharge, or part of it that was paid by the OEMs, by the car manufacturers, in turn caused consumers to pay more for their cars than they would have done in the counterfactual. It is that methodology, it is the methodology in respect of this second step that we say is defective in this case.

In order to understand why it is defective, we say that it is helpful to have in mind, indeed necessary to have in mind, the issues that the Tribunal would need to be grappling with at trial in order to determine whether there is or whether there was any pass-through of the overcharge or any element of the overcharge. Because,

of course, overcharges are not always passed down through a supply chain. The Tribunal will have seen that, in this case, the overcharge element is likely to be a very small fraction of a small upstream cost. Here, the upstream cost -- shipping -- of course only affects a small proportion of the cars. So the overcharge, if there was one, may have been passed on or it may have been absorbed or the answer may be somewhere in the middle. In other words, part of it may have been passed on. The answer, which of those is it, will depend on the nature of competition in the market.

If we could turn up, please, the Commission guidelines, so Ms Ford took you to part of the Commission guidelines, I just want to take you back to them, please. They are in authorities {AUTH/37/1}. You can see here what the communication is. It is headed "Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser". Just pausing, this document is really concerned with the very question that needs to be grappled with in this case. So this case is an indirect purchaser case and what we are trying to think about is how or what the PCR needs to do is to establish that the overcharge or any overcharge was passed through to the indirect purchaser.

If we can go to page 5, please, in the document {AUTH/37/5}, we see at paragraph (8) and in the diagram a basic illustration of how pass-on of an overcharge works at different levels of a supply chain. So box 1 gives an example of a copper cartel and so a wire harness manufacturer might pass on some of the copper cartel overcharge into the price of wire harnesses sold to a car manufacturer. So we see those arrows leading down to the car manufacturer which in this case is an indirect purchaser because in the middle you have the wire harness supplier which is the direct purchaser.

If we go on to page 6 {AUTH/37/6} at paragraph (11), the Commission here continues the example so that the car manufacturer then passes on the inflated cost of wire harnesses in inflated prices for the car. The car retailer does the same when selling the car to the consumer. So in each case there might be pass-on in the price of the wire harness and then in the price of the car.

Then if we turn to page 37 {AUTH/37/13}, paragraph (46) at the bottom of the page, please, what is being said here is that it is necessary to understand the impact of cost increases on the direct purchaser's prices and the value of lost sales. So these are key things that need to be understood in order to work out

whether pass-through down that sort of supply chain is going to happen.

We see that, at paragraph (47), what is being said by the Commission here is that economic theory provides a framework for assessing whether the standard of proof, whether showing, establishing pass-through, whether the standard of proof is met. The guidelines then examine the key factors affecting pass-on.

If we could go on to page 15, paragraph (54) {AUTH/37/15}, you see there that what is being said is that the nature and intensity of the competitive interaction between the firms on the market on which the direct purchasers are active also affects the level of passing on.

"It is important to keep in mind that the effect that increased competition can have on the degree of passing-on depends on whether the initial overcharge affects only the direct customer (i.e. firm-specific overcharge) or also the competitors of the direct customer (i.e. industry-wide overcharge). If the overcharge affects only one direct purchaser, fiercely competing with other direct purchasers, passing-on is less likely compared to a situation where the only affected direct purchaser faces weak competition. However, if there is an industry-wide overcharge,

a large number of fiercely competing direct purchasers will generally favour a higher passing-on of that overcharge compared to a situation where there is weaker competition among these direct purchasers."

What is being said is that pass-on is less likely where the overcharge does not affect all industry participants so, in other words, in circumstances where it affects only one or perhaps some of industry participants which are fiercely competing with other industry participants which do not have to bear the overcharge. So in those circumstances, because there is fierce competition in the market and other direct purchasers are not facing that cost, then it is less likely that the overcharge will be passed on because, if it is passed on, then the direct purchaser will be less competitive, will be charging higher prices to end consumers than their competitors and therefore losing sales.

If we go to page 16, please {AUTH/37/16}, paragraph (61), here we have an example which we have also set out in our skeleton argument. It is an example really of the point that the Commission was making that I just described. So assume that:

"There are 10 producers of apple juice in the same relevant market. One of the producers sources apples

from a supplier involved in a ... cartel. This apple juice producer claims damages as compensation for an overcharge. However, the defendant (the supplier of apples) raises the passing-on defence and argues that the apple juice producer has passed on the entire overcharge to the indirect purchasers."

Then you see:

"Analysis: the apple juice producer facing the overcharge is in strong competition with nine other companies for the production and supply of apple juice. All products sold by the ten companies are rather homogenous to consumers. Insofar as the other producers do not obtain apples from the cartel members, but are able to buy them at a lower price elsewhere, the producer having to buy from the cartel is placed at a competitive disadvantage vis-a-vis its competitors. The apple juice producer's ability to pass on the cost increase would hence be constrained due to the fact that it would lose sale (and profit) to its competitors to a very large extent if it passed on the overcharge, even only partially. The stronger the competition between the 10 apple juice producers, the greater the constraint on the ability to pass on the cost increase. Hence, in this scenario, the direct customer will normally not be able to pass on the increase in cost (the overcharge)."

Why am I taking the Tribunal to this? Well, because we say it is of obvious relevance in the present case, because we know from the evidence submitted in this case by the PCR that only 13% of vehicles registered in the UK during the relevant period were manufactured outside the UK and Europe, so that is the maximum proportion of vehicles that could have been shipped using RoRo services and could have incurred an overcharge at the OEM level.

Just for your note, we do not need to turn it up because this is all taken from the PCR's evidence, we see that in Mr Robinson's first report at paragraph 7.18(b) which is {B/5/69}. So what that means is that at least 87% of cars in the UK incur no overcharge -- no overcharge -- and several major brands sold in the UK were not shipped intercontinentally into the EEA at all. So for those brands there were no overcharges at all. We can see this if we go to the amended claim form, so if we go to bundle {A/1/17}, at the bottom of the page under subparagraph (2), it is paragraph 44(2):

"Excluded Brands. The Proposed Representative has formulated a list of 'Excluded Brands'. These vehicle brands are excluded from the Proposed Class because the Proposed Representative understands that the vehicles

produced under these brand names were never shipped intercontinentally into the EEA during the Relevant Period... Accordingly, UK purchasers of new vehicles manufactured by these brands would not have paid a delivery charge that included those shipping costs impacted by the infringement..."

We can see the list of excluded brands at page 15 so two pages previously {A/1/15}. It is in the middle of the page and we can see that there are some major brands such as Audi and Fiat, and Jaguar, Seat, Volvo, you can see them all listed there, Skoda.

Now, Mr Goss and Mr Whitehorn say, and Ms Ford stressed this today, they say that the automotive market is extremely competitive. And so, against that background, it is important, in our submission, to understand what the respondents' case would be at trial. The starting point is that what each member of the proposed class paid for was a car. It was not a delivery service. The car was already in the United Kingdom when the class member took ownership of it and what they did was they agreed, and they paid, a single overall price for the vehicle. So they did not contract to purchase a Mazda in Japan and then enter into a contract to have it shipped to some dealer in London for collection, that simply does not reflect the

factual reality of the situation.

So we say that, in order for a class member to have suffered loss, they must therefore have paid more for their car than they would have paid in the counterfactual world of no cartel. That is the only transaction on which they could have suffered loss because it is the only transaction that they made. That is what they did. They bought a car, they paid a single price for a car. If a class member paid the same price for the car in the real world as they would have done in the counterfactual, they suffered no loss. We say it is basic tort law.

Now, the respondents' case at trial will be that it is unlikely that any overcharge on RoRo services could have caused the price paid by consumers for their cars to have been higher than it would have been in the counterfactual. So the respondents' case at trial will be that pass-on, in other words, of any overcharge on RoRo services was unlikely. That is because the OEMs and the NSCs and the retailers need to set the prices for the 13% of cars that need RoRo services at a level that is competitive with the 87% of cars that are manufactured within the EEA and do not require RoRo services.

So even if, as Messrs Goss and Whitehorn say, even

if the NSCs and the retailers set delivery charges that are averaged across all models for brands that use at least some RoRo services, those cars still need to compete with the cars produced by manufacturers such as Fiat and Volvo which do not use RoRo services at all, and also cars from brands that make heavy use of RoRo services, such as Mazda, need to compete with brands that make very little use of RoRo services, such as Mercedes.

Now, in our skeleton argument we gave the hypothetical example to illustrate this of competition to supply the BMW X5 which is a high-end SUV which is manufactured in just one factory in the world, which happens to be in South Carolina. We said in our skeleton argument, well, no doubt BMW had very good reasons to choose South Carolina. We do not know what those are but they could have received subsidies. Anyway, they no doubt thought that was a good place to base their factory and that manufacturing decision will have led to higher average delivery costs for BMW for the X5 in the UK than BMW would have incurred if the X5 had been manufactured in Europe.

Now, when BMW retailers in the UK market for the X5, what they do is they have got to set or negotiate total on-the-road prices that are competitive with similar

vehicles produced by other manufacturers. So, for example, the Audi Q8 or the Land Rover Discovery or the Porsche Cayenne or the Range Rover Sport, and the manufacturers of those cars, Audi, Jaguar, Land Rover and Porsche, they are excluded brands. They did not incur any intercontinental shipping costs on their vehicles in the UK at all. But to sell X5s in the UK, someone in the BMW supply chain, so either BMW, in other words the OEM itself, or the NSC or the retailer, must set the list price or negotiate discounts on some element of the total price paid by consumers to ensure that that car is competitive with those other vehicles.

So RoRo costs may rise or fall but if X5s sold in the UK, which those cars require RoRo services, if those cars must be sold in competition with Audi Q8s which do not require RoRo services, then those changes in RoRo costs are not likely to affect the prices paid by end purchasers for X5s.

Now, this is going to be a key issue at trial and if this gets to trial -- of course we say it should not -- the Tribunal will need to determine this issue; so the Tribunal would need to decide whether any overcharge on RoRo services affected the price paid by consumers for their cars or whether the overcharge did not result in an increase in prices for cars relative to the

counterfactual because of competition in the market from other vehicles which are not subject to that cost. In other words, the Tribunal will need to grapple with the apple juice point which is explained in the Commission guidelines.

The flaw that I am addressing in the PCR's methodology is that it does not, simply does not permit this question to be examined at all. What it does on the contrary is it simply ducks it, it seeks to avoid it. Now, the Tribunal has seen how the proposed methodology works and the PCR's starting point, as Ms Ford explained earlier, is the evidence of their industry experts: Mr Goss and Mr Whitehorn, and they say -- and you have seen this -- they say that the OEMs and the NSCs tend to recover their delivery costs in full, that NSCs increase recommended delivery charges when they are not sufficient to cover costs but tend not to reduce them when costs fall, and they say it would be rare for a retailer to discount the delivery charge.

What they are saying in effect, and this is what the PCR relies on, is that OEMs seek to recover their shipping costs, including any cartel overcharge, from NSCs and retailers, and retailers seek to recover delivery costs from consumers, and that some retailers, though by no means all, have a line item on the invoice

which is headed "Delivery charge". They say that this specific line item is rarely discounted in negotiations with the consumer. The PCR says, "Well, that is pass-on".

Mr Robinson says that he will therefore seek to quantify the amount of the overcharge that is passed on and he proposes to do that by looking at changes in the delivery charge line item over time and will seek to establish the extent to which the cartel caused that charge to be inflated. Now, Mr Robinson does not propose to look at the actual prices paid by class members for their cars at all. His analysis is confined to the delivery charge. But this means -- Madam, I am just pausing; I am assuming that the Tribunal is going to sit until 4.30 but I did not want to assume that without checking.

THE CHAIRWOMAN: No, that is fine.

MS DEMETRIOU: That is very helpful. Thank you.

We say the failure to look at prices paid for cars as opposed to the line item on the invoice that says -- that is headed "Delivery charge", means that the approach fails completely to grapple with the fundamental issue raised by the respondents which I have been describing, because there may well be a line item on the invoice labelled "Delivery charge", but the RoRo

overcharge, any RoRo overcharge will not have been passed on to the consumer unless the consumer pays a higher price for their vehicle than they would have paid in the counterfactual world of no RoRo cartel. If they have paid the same price as they would have done in the counterfactual, they have not suffered any loss. How could they have suffered any loss if the price that they have paid is exactly the same?

Now, the PCR purports to address our argument at paragraphs 69 to 70 of its own skeleton argument. Somebody will give me the reference to that. I think it is in the advocates bundle {AB/1}.

THE CHAIRWOMAN: Try page 26.

MS DEMETRIOU: Thank you {AB/1/26}.

Yes, so paragraph 69. What is being said there is they are saying that what the MNW respondents are in effect suggesting is that to the extent that a PCM managed to negotiate a good price on the overall vehicle, that is a benefit which needs to be taken into account when assessing whether they have suffered any loss. So that is how they characterise our argument.

Then we see at paragraph 70 they say:

"On the evidence as it currently stands, there is simply no reason to think that any such causal connection exists..."

Now, Mr Robinson points out in his second report that in both the real world and counterfactual world the negotiating characteristics of the end customer and retailer would be the same. I will come back to that point but let us look at the first sentence. So, on the evidence as it currently stands, there is simply no reason to think that any such causal connection exists, so no causal connection, no causal connection between the overcharge, the tortious conduct of the respondents and the overall price which a proposed class member paid for their vehicle.

Now, we say that things have gone very badly wrong here because, if there is no causal connection between the tortious conduct and the price paid by a class member for their vehicle, which is the only transaction they are engaging in, then there is simply no loss. There is no claim. It is as simple as that.

But the PCR raises what they say -- they raise essentially a point of law. So they say that, if the cartel inflated the delivery charge line item in the invoice, then that is a class member suffering loss even if the class member actually paid the same amount for the car as it would have done in the absence of the cartel. They say that our case seeks to rely on actual loss on the delivery charge line item, having been

cancelled out by a separate benefit conferred on the consumer. But that is not a proper characterisation of our argument and it is certainly not a proper characterisation of the transaction that class members made.

As I have already said, our point is that even if there is a delivery charge line item that is higher in the real world than in the counterfactual world, the consumer pays a single price for the car and that single price could still have been the same in the real world as in the counterfactual.

Can I show, just before we stop, the Tribunal how that might work? If we turn up bundle {B/79/3}, so this is an extract from a BMW price list. If we look at the first line, let us just take the first row which is a model 318i ES. What you have is you have in bold the on-the-road price of £22,695. If we scroll down, please, to the bottom of the page, we can see on the bottom right-hand side, on-the-road price:

"The recommended on the road price includes:

"Delivery and BMW Emergency Service £700."

So that is the line item they rely on as incorporating in some way the overcharge of the shipping cost.

Now, suppose that the delivery charge in the absence

of the cartel would have been £695 instead of £700. Our point is that, if we can go back to the top of the page, the on-the-road price may still have been £22,695 because that figure in the real world was set in order to compete with other vehicles, such as Mercedes and Volvo and so on. Or, equally, if the advertised on-the-road price in the counterfactual had instead been £22,690, so let us say it had been £5 less, reflecting the absence of the £5 overcharge, the bargaining process that everyone agrees most consumers engage in might have settled down at the same round number of £22,000 in the real world and in the counterfactual.

So, in other words, had that line item been £22,690, the consumer may still have come in and said, "Well, I want this car for £22,000". They may have done that in the counterfactual and in the real world, instead of settling on the rather unlikely looking figure of £21,995. So if you negotiate and you end up at the same round figure in the real world as you would have done in the counterfactual world, despite the fact that the base price would have been £5 lower, then the cartel has caused that consumer absolutely no loss at all.

So if that is right, then it simply does not matter that the retailer seeks to recover its delivery costs as the industry experts say -- and let me be clear, we are

not, for the purposes of this hearing, disputing anything that the industry experts say. So Ms Ford said, well, we are raising disputes of fact; we are not raising any disputes of fact at all. We are prepared, for the purposes of this hearing, to take at face value what the industry experts say. But if the examples that I have just given to you are correct, so if in the counterfactual world the delivery charge would have been £695, as I say, one possibility is that the on-the-road price would have been exactly the same anyway; but even if it were reduced by £5, another very real possibility is that the way the negotiations took place would have ended up at exactly the same round number. If that is right or if that is a possibility, then it simply does not matter that the retailer seeks to recover its delivery costs, as the industry experts say, and it simply does not matter that the sheet of paper that some retailers give the customer says "Delivery charge £700" whereas it would have said "Delivery charge £695" in the counterfactual, because on both of the scenarios I have just been describing, the overcharge has not caused the customer to pay any different price at all. It has simply not caused any loss.

THE CHAIRWOMAN: Yes. Well, you are postulating in that situation that, in the actual, the retailer is prepared

to take a bit more of a hit on their margin, overall margin, than in the counterfactual.

MS DEMETRIOU: Yes, Madam, because --

THE CHAIRWOMAN: Rather than maintaining their margin.

MS DEMETRIOU: Yes. So, because the retailer is competing with other manufacturers, some of which may not be having to bear any RoRo charges at all, including any overcharge, then this manufacturer -- so this manufacturer is competing, we know, with Audi and with Volvo, so there are competing models of cars --

THE CHAIRWOMAN: Well, indeed, but it is not the same as apple juice, is it? Brands of cars and models of cars have got greater differences than different --

MS DEMETRIOU: Madam, that is a fair point so it is not as homogenous as -- there will be some quality differences, but this is still a highly competitive market, as the PCR and as the PCR's industry experts say. Because it is a highly competitive market and because even though there are some quality differences between brands, so they are not completely homogenous, that is correct, it is not exactly the same, the same economic incentive -- similar economic incentives are at play. Our point is that this is a point which we will be arguing at trial and it is a point that would need to be explored by the Tribunal, but on the methodology of the PCR, it is

simply not a point that is grappled with at all.

So they say, "Well, as long as we can show that the £700 is £700 instead of £695, that is all we need to show". We say that is divorced from the facts of this claim and the facts of this claim are that purchasers do not purchase a delivery service; they purchase a car and they pay an on-the-road price for a car. Of course we do not know at this stage what the pass-on rate was and it may be that because it is not exactly the same as apple juice, that in the apple juice situation there would be no pass-on and here there is some pass-on, all of those points we say are for trial but they are for trial on the basis of a methodology that can explore them and this is not such a methodology. It simply ignores the point.

THE CHAIRWOMAN: We must pause there for today. We will no doubt continue with this point tomorrow. Thank you. So 10.30 tomorrow.

(4.31 pm)

(The hearing adjourned until
Tuesday, 30 November 2021 at 10.30 am)

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