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IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1339/7/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 1 December 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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1 Wednesday, 1 December 2021
2 (10.30 am)
3 THE CHAIRWOMAN: Good morning.
4 I should just read out the normal livestream
5 warning. These proceedings are being livestreamed and
6 many may be joining on the Microsoft Teams platform.
7 I must start again, therefore, with the customary
8 warning. These proceedings are in open court as much as
9 if they were being heard before the Tribunal physically
10 in Salisbury Square House. An official recording is
11 being made and an authorised transcript will be
12 produced, but it is strictly prohibited for anyone else
13 to make an unauthorised recording, whether audio or
14 visual of the proceedings, and breach of that provision
15 is punishable as a contempt of court.
16 Thank you. Good morning.
17 Submissions by MR HOSKINS
18 MR HOSKINS: Good morning. I am going to address you on the
19 opt-in/opt-out point which arises in the following way:
20 if the Tribunal is against the respondents on the
21 primary submission that no collective proceedings should
22 be certified, then in the alternative we submit that any
23 collective claim by "large business purchasers" -- and
24 I will come to the definition of that -- should only be
25 permitted on an opt-in basis.

1 There are two legal issues that this raises. The
2 first is this one: where a PCR brings an application
3 solely for permission to bring opt-out proceedings, is
4 the Tribunal precluded as a matter of law from
5 considering whether opt-in proceedings would be more
6 appropriate? In other words, can the Tribunal make
7 a straight choice between opt-out and opt-in for all
8 class members? That is the first issue.
9 The second issue, which is related, is this: where
10 a PCR brings an application solely for permission to
11 bring opt-out proceedings, is the Tribunal precluded as
12 a matter of law from considering whether opt-in
13 proceedings would be more appropriate for some of the
14 proposed class members? In other words, can the
15 Tribunal make a choice between opt-out for some class
16 members and opt-in for other class members?
17 Those are the two legal issues. Before I make my
18 submissions in relation to them, let us revisit the
19 legal provisions. You have seen some of them so we will
20 be able to take them pretty quickly. First of all, can
21 we please go to authorities {AUTH/1/4}, which is the
22 Competition Act. It is section 47B(7)(c).
23 THE CHAIRWOMAN: Sorry, for some reason, I am not --
24 MR HOSKINS: You are not plugged in again?
25 THE CHAIRWOMAN: I am still not plugged in. I do not know

1 what has happened here. Please bear with me. (Pause)
2 Thank you.
3 MR HOSKINS: So section 47B(7)(c) provides:
4 "A collective proceedings order must include the
5 following matters ...
6 "(c) specification of the proceedings as
7 opt-in collective proceedings or opt-out collective
8 proceedings ..."
9 Then if we can go down to (12) on the same page:
10 "Where the Tribunal gives a judgment or makes an
11 order in collective proceedings, the judgment or order
12 is binding on all represented persons, except as
13 otherwise specified."
14 In other words, all class members who have not opted
15 in -- sorry, who have not opted out in opt-out
16 proceedings will be bound by the judgment.
17 Can we go to the Tribunal rules, so that is
18 {AUTH/2/1}. Can we go to page 46, {AUTH/2/46}? You
19 have seen these before. You see the heading,
20 "Certification of the claims as eligible for inclusion
21 in collective proceedings". Sub (2) deals with the
22 issue of whether claims are suitable to be brought in
23 collective proceedings and you will see there is
24 a non-exhaustive list of matters for the Tribunal to
25 consider, but the overarching requirement is:

1 "... the Tribunal shall take into account all
2 matters it thinks fit ..."
3 Then there is a separate -- a discrete rule, sub(3),
4 which deals with the choice between opt-in and opt-out
5 proceedings. It says:
6 "In determining whether collective proceedings
7 should be opt-in or opt-out proceedings, the Tribunal
8 may take into account all matters it thinks fit,
9 including [all the items in sub] (2) ..."
10 But in addition:
11 "the strength of the claims;" and
12 "(b) whether it is practicable for the proceedings
13 to be brought as opt-in collective proceedings, having
14 regard to all the circumstances, including the estimated
15 amount of damages that individual class members may
16 recover."
17 So you will see that whilst "all matters [the
18 Tribunal] thinks fit", there is a specific reference to
19 the estimated amount of damages for individual class
20 members as a factor relevant to opt-in versus opt-out.
21 Then just to tie off a query from the bench
22 yesterday, page 65 of this tab, {AUTH/2/65},
23 Rule 115(3), the heading is "General power of the
24 Tribunal". Sub (3):
25 "The President may issue practice directions in

1 relation to the procedures provided for by these Rules."
2 We then go to the guide, which is such a practice
3 direction. If we go to tab 3 of authorities, {AUTH/3},
4 if we can go to page 11, {AUTH/3/11}, you will see the
5 explanation there that the guide was made pursuant to
6 Rule 115(3) and is a practice direction.
7 THE CHAIRWOMAN: Thank you.
8 MR HOSKINS: Can we please go to 86 in this tab,
9 {AUTH/3/86}? You have seen these before, 6.38 and 6.39,
10 but I am going to go through them in some detail so
11 I would invite you briefly to refresh your memory on
12 what 6.38 and 6.39 say. (Pause)
13 THE CHAIRWOMAN: Do you want us to read the -- can you
14 scroll down, please, if you want us to read the rest, to
15 the bottom of the page? Thank you.
16 Yes.
17 MR HOSKINS: In our submission, there are eight points that
18 one can draw from this. The first one, if you take the
19 words -- opening words to 6.38:
20 "... a judgment in opt-out proceedings binds all
21 persons within the class ..."
22 I have shown you that in the Act, we looked at sub
23 (12). Opt-out proceedings binds all persons in the
24 class whereas opt-in proceedings bind only those class
25 members who have opted into the proceedings. Therefore

1 the binding nature of opt-out proceedings is very
2 far-reaching and there is a description of that in the
3 *Merricks* judgment in the Supreme Court.
4 If we can go to authorities, tab 25 -- I just need
5 to get the page for you. Sorry. It is paragraph 92,
6 which is on page 32, {AUTH/25/32}. This is the
7 dissenting judgment of Lords Sales and Leggatt, but
8 there is no dispute about the general nature of opt-out
9 proceedings and this is, as you will see, simply
10 a description of the general nature of opt-out
11 proceedings. Can I ask you, please, to read
12 paragraph 92?
13 THE CHAIRWOMAN: Yes.
14 MR HOSKINS: So you will see from the opening sentence that:
15 "Generally, legal proceedings may only be brought
16 with the authority of the persons whose rights are ...
17 to be enforced."
18 But, in relation to opt-out proceedings "a person
19 may become a claimant in collective proceedings without
20 taking any affirmative step and, potentially, without
21 even knowing of the existence of the proceedings"
22 brought in his or her name.
23 As we have seen from the Act, that person will be
24 bound by the judgment that is delivered at the end of
25 the opt-out proceedings. That is the first point

1 I wanted to highlight arising from the guide. If we can
2 go back to the guide, please, so {AUTH/3/86}, the second
3 point is this: if you see 6.39, the heading "Strength of
4 the claims ...", and the end of the first sentence, the
5 guide says:
6 "... in the latter case [i.e. in an opt-in case],
7 the class members have chosen to be part of the
8 proceedings and may be presumed to have conducted their
9 own assessment of the strength of their claim."
10 So that is an important difference between opt-out
11 and opt-in. In opt-in claims, the class members choose
12 to be part of the proceedings and it is to be assumed
13 that they direct their mind, therefore, and make
14 a positive decision to opt in because they wish to be
15 part of those proceedings.
16 The third point, again under the heading "Strength
17 of the claims ...", you will see the words:
18 "Given the greater complexity, cost and risks of
19 opt-out proceedings ..."
20 So, according to the guide, opt-out proceedings are
21 more complex, costly and riskier than opt-in
22 proceedings, and that is understandable because opt-out
23 claims will almost invariably be brought on behalf of
24 larger classes than opt-in claims.
25 There will, as in this case -- we will come to it --

1 be more evidential gaps because of the detachment of the
2 class members from the claim. There will be a whole
3 other industry following judgment in terms of
4 distribution and you will see that a specialist body has
5 been retained to deal with distribution, but there are
6 questions of, once the criteria have been set for
7 distribution, what proof do claimants have to provide,
8 who processes that proof, who checks what they are to
9 receive. So it is not surprising that the guide takes
10 the view that opt-out will be more complex, costly and
11 riskier than opt-in.
12 The fourth point under the heading, "Whether it is
13 practicable ...", you will see in the second sentence,
14 given the different characteristics of opt-out and
15 opt-in claims, "There is a general preference for
16 proceedings to be opt-in where practicable". It is not
17 a straight choice between opt-in and opt-out. The
18 starting point is there is a general preference for
19 opt-in.
20 The fifth point -- and one sees it in the last
21 sentence of paragraph 6.38, if we can shuffle up again,
22 please:
23 "Where the class representative seeks approval to
24 bring opt-out proceedings, it will need to make
25 submissions as to why that form of proceedings is more

1 appropriate than opt-in proceedings."
2 Two points flow from that. First of all, the guide
3 indicates that a PCR must make submissions on why
4 opt-out is more appropriate than opt-in in all cases
5 where it seeks approval to bring opt-out proceedings.
6 There is no restriction on that requirement in the
7 guide. It is generally applicable.
8 The second and very important point is that the
9 burden is on the PCR to satisfy the Tribunal that
10 opt-out proceedings are more appropriate than opt-in
11 proceedings. It is not on the respondents to satisfy
12 the Tribunal that the opposite is the case. The PCR
13 must satisfy you.
14 The sixth point -- it is the opening sentence under
15 the heading "Whether it is practicable for the
16 proceedings to be brought ...", so we need to shuffle
17 down again a little. This reflects rule 79(3) of the
18 Tribunal rules, "the estimated amount of damages that
19 individual class members may recover" is identified as
20 a specific factor for the Tribunal to take into account
21 "in determining whether it is practicable for the
22 proceedings to be certified as opt-in".
23 The seventh point -- it is the final sentence under
24 the heading "Whether it is practicable ..." -- factors
25 in favour of an opt-in approach include, one, "the fact

1 that the class is small but the loss suffered by each
2 class member is high", and two, "the fact that it is
3 straightforward to identify and contact the class
4 members".
5 The final point in relation to the "Strength of the
6 claims", the guide states that the Tribunal will usually
7 expect the strength of the claims to be more immediately
8 perceptible in an opt-out than an opt-in case, no doubt
9 because of the greater cost, complexity and risk.
10 Secondly, the reference to the strength of the claims in
11 Rule 79(3) does not require the Tribunal to conduct
12 a full merits assessment. Thirdly, the Tribunal will
13 form a high-level view of the strength of the claims
14 based on the collective proceedings claim form. So you
15 are looking at what the PCR has put forward in the claim
16 form and forming a view on the strength at a high level.
17 Finally, where the claimants seek damages for the
18 consequence of an infringement found by a competition
19 authority, i.e. in a follow-on claim, they will
20 generally -- and I add the words "but therefore not
21 always" -- be of sufficient strength for the purposes of
22 this criterion. There is an indication of what the
23 general position will be, but it clearly permits for
24 there to be exceptions.
25 There is one other aspect of the regime I would like

1 to flag up, and that is the commercial aspect of
2 collective actions. Collective actions, collective
3 proceedings, are not just claims brought by concerned
4 persons on behalf of consumers -- although they are
5 that -- but they are also significant commercial
6 projects put together by well-resourced solicitors and
7 funders with a view to making significant profits.
8 Now, there is absolutely nothing wrong about that.
9 That is the way the legislation is intended to work.
10 Solicitors and funders work together to put together
11 commercial projects that will benefit consumers, but, in
12 our submission, that is one of the reasons why the
13 Tribunal must consider whether opt-in proceedings would
14 be more appropriate than opt-out proceedings.
15 If we can go back to *Merricks* in the Supreme Court,
16 {AUTH/25/33}, again from the judgment of Lords Sales and
17 Leggatt, and paragraph 98 -- can I ask you please to
18 read paragraph 98? (Pause)
19 In our submission, what this means is that
20 solicitors and funders cannot dictate whether
21 proceedings should be opt-in or opt-out based on their
22 views of what would be most profitable for them. It
23 must be, and it is, for the Tribunal to decide what most
24 accords with the interests of justice, taking account of
25 the interests of consumers and defendants and the need

1 to conduct proceedings fairly and efficiently.
2 So having made those comments about the nature of
3 the legislation and the differences between opt-out and
4 opt-in, let me turn to the first legal issue. I just
5 remind you, the first legal issue is: can the Tribunal
6 make a straight choice between opt-out and opt-in for
7 all class members where the PCR makes an application
8 solely on an opt-out basis?
9 Now, in our submission, it is already established
10 that a PCR who has only applied for certification for
11 opt-out proceedings must satisfy the Tribunal that that
12 is more appropriate than opt-in proceedings.
13 Furthermore, the burden in that regard is on the PCR,
14 not the respondents. We see that in the rail fares
15 case -- sorry, in the *BT* case, *Le Patourel*, {AUTH/29}.
16 If we go to page 3 {AUTH/29/3}, you will see at
17 paragraph 4, the final sentence:
18 "... the PCR is seeking a CPO on a 'opt-out' basis
19 exclusively ..."
20 Then to page 37, {AUTH/29/37}, paragraph 110, you
21 were shown this by Ms Ford and the crucial finding is
22 the penultimate sentence over the page, {AUTH/29/38}:
23 "We agree that the fact that the PCR does not seek
24 an opt-in basis as an alternative does not absolve it
25 from demonstrating, and the Tribunal from being

1 satisfied, that the opt-out basis is more appropriate."
2 So two factors: the PCR must show that opt-out is
3 preferable to opt-in and the burden is on the PCR. That
4 position is reflected in the *Gutmann* case. That is
5 tab 30. If we go to page 4, {AUTH/30/4}, the first
6 sentence of paragraph 5 tells us:
7 "The Applicant seeks to bring the proceedings on an
8 opt-out basis ..."
9 Then page 21, {AUTH/30/21}, paragraph 51, it is
10 about eight lines down:
11 "We think Ms Abram is probably correct in her
12 submission that this consideration applies even when no
13 opt-in alternative is put forward by the Applicant,
14 since it is for the Tribunal to decide whether a CPO on
15 an opt-out basis is justified. That accords with the
16 view expressed in the Guide at para 6.39."
17 That is put in the terms "We think it is probably
18 correct", but we find a more definitive adoption of the
19 *Le Patourel* approach, page 74, paragraph 182, under the
20 heading "Opt-out proceedings":
21 "Since the Applicant seeks to bring opt-out
22 proceedings, Rule 79(3) is engaged and it is for the
23 Tribunal to consider whether instead opt-in proceedings
24 should be ordered."
25 So you have definitive statements in both

1 *Le Patourel* and in *Gutmann* that, where the PCR brings an
2 application on an opt-out-only basis, it has a burden to
3 satisfy the Tribunal that that is preferable to opt-in.
4 It is not entirely clear what the PCR's position on this
5 is, but I think it is putting down a marker on this
6 point, but it is sort of willing to wound but afraid to
7 strike, but let me take this head-on.
8 In their skeleton at paragraph 92 {AB/1/37}, they
9 argue that this approach, i.e. the approach that I am
10 advocating and that the Tribunal has hereto adopted, has
11 the result that:
12 "... in any case where an opt-out claim is proposed,
13 the 'exception' formulated by Lord Briggs to the general
14 rule that certification is not about a merits test would
15 in fact be the norm."
16 So that is the argument they would make if they were
17 willing to strike, but the argument is misguided in any
18 event.
19 If we can go to *Merricks*, so that is authorities at
20 tab 25. I will just get the page number for you,
21 {AUTH/25/23}. Again, you were shown these by Ms Ford on
22 the first day. It is paragraphs 59 and 60. In 59:
23 "... the Act and Rules make it clear that, subject
24 to two exceptions, the certification process is not
25 about, and does not involve, a merits test."

1 The first exception is strike-out, summary judgment,
2 and then at paragraph 60:
3 "The second exception is that Rule 79(3)(a) makes
4 express reference to the strength of the claims, but
5 only in the context of the choice between opt-in and
6 opt-out proceedings."
7 In our submission, the approach adopted by the
8 Tribunal in *Le Patourel* and *Gutmann* is the correct one
9 and the argument put against that by the PCR is a bad
10 one for the following reasons: *Merricks* did not actually
11 raise this issue, i.e. the one we are looking at now, at
12 all. This is simply reasoning of Lord Briggs on the way
13 to his conclusion on the issues that were in that case.
14 But the issue of whether the Tribunal -- sorry, whether
15 the PCR has to justify an opt-out approach even where it
16 brings an opt-out only application simply was not raised
17 in *Merricks*. It was not an issue.
18 But clearly on its face, secondly, *Merricks* did not
19 decide that consideration of the merits could never play
20 any role as part of the certification proceedings.
21 Lord Briggs expressly found the exception or one of the
22 exceptions was where there is a choice or a need to make
23 a choice between opt-in and opt-out. That is expressly
24 provided for by Rule 79(3)(a).
25 The third point is that there is a substantive

1 difference between the potential role of the merits in
2 relation to suitability and opt-in versus opt-out. In
3 relation to suitability, if merits were relevant and the
4 test were failed, no certification could be ordered at
5 all. It would be an absolute barrier. But that is not
6 the case in relation to opt-in versus opt-out. The
7 consideration of merits in that context is relevant to
8 the tribunal's decision as to what type of collective
9 proceedings should be permitted, not whether there
10 should be collective proceedings at all.
11 THE CHAIRWOMAN: That is subject to one point which you will
12 need to address us on, which is what the Tribunal is to
13 do if the only application in fact before it is for
14 opt-out. Let us just say the Tribunal accepted your
15 legal argument and then went away and thought about it
16 and thought, "Actually, for some members of the class,
17 opt-in would be better" -- let us say we reached that
18 conclusion -- we cannot force that on the proposed class
19 representative so what do you say happens?
20 MR HOSKINS: The proposed -- I was going to deal with it as
21 my last point, but, rather --
22 THE CHAIRWOMAN: Deal with it in that order, but it is
23 a question that needs --
24 MR HOSKINS: I will foreshadow: it is for the PCR to decide.
25 If they bring an application to the Tribunal and the

1 Tribunal forms the view that, in fact, opt-in for part
2 of the class is preferable to opt-out, then as a matter
3 of law the Tribunal should state that. In this case
4 what I am going to suggest is that the application would
5 be adjourned and the PCR would have the opportunity to
6 consider whether it wished to make such an application.
7 It could decide just to carry on with the opt-out part
8 of the claim or it could decide that in fact it wished
9 to make the application. Having had the indication that
10 it can have opt-in for large business purchasers, it
11 would say, "Yes, thank you very much, we will do that",
12 and come back to the Tribunal with an amended
13 application and take the advantage of that. But it is
14 not for the Tribunal to dictate what should happen. The
15 Tribunal can only say, "In our view, as a matter of law,
16 this is what we think should happen", and then it is
17 free choice for the PCR, for the funder, for the
18 solicitors, whether they --
19 THE CHAIRWOMAN: I thought you would say that, but I thought
20 I would clarify.
21 MR HOSKINS: The final point on this merits issue is I have
22 described the difference between merits that might play
23 a part in suitability and merits that might play a part
24 in opt-in versus opt-out. Of course that is reflected
25 in the rules themselves because one has Rule 79(2) on

1 suitability and we have the *Merricks* judgment. Merits
2 still play a part in that as a matter of certification.
3 Then you have Rule 79(3) separately saying merits do
4 play a part in opt-in versus opt-out, so the rules
5 themselves make it quite clear the different concepts
6 and that merits are relevant.
7 So to finish on the first legal issue, in our
8 submission, as a matter of law, it cannot be correct
9 that a PCR can prevent the Tribunal from considering
10 whether opt-in proceedings would be more appropriate for
11 a particular set of claims by the simple expedience of
12 only making an application for opt-out proceedings.
13 That is particularly so given the commercial interests
14 of both solicitors and funders to bring opt-out rather
15 than opt-in proceedings in order to maximise their own
16 returns.
17 Under the legislation, in our submission, it is
18 quite clear that it is for the Tribunal to decide
19 between opt-out and opt-in, not for the PCR to decide
20 and to take that decision as a matter of law out of the
21 tribunal's hands.
22 It brings me to the second issue, which is, where
23 the PCR has made an opt-out only application, can the
24 Tribunal make a choice between opt-out for some class
25 members and opt-in for other class members? There is

1 obviously a degree of overlap between the first issue
2 and the second issue. First of all, just as it is
3 important for the Tribunal to have control over whether
4 proceedings should be opt-in or opt-out rather than
5 leaving the choice entirely to the PCR, it is important
6 that the Tribunal should be able to consider the nature
7 of the package of claims put together by the PCR to
8 determine whether that package is appropriate or not.
9 Indeed, if that were not the case, it could
10 facilitate manipulation in certain cases. I am not
11 suggesting manipulation in this case. I am simply
12 pointing out the possibility if the law were as the PCR
13 suggests. Imagine a group of claims which would, most
14 appropriately, be brought on an opt-in rather than an
15 opt-out basis. If the PCR's submissions were correct,
16 the PCR could prevent the Tribunal as a matter of law
17 from even considering the correct position simply by
18 bundling those claims with some others and making the
19 application on an opt-out basis. That cannot be the
20 law.
21 Secondly, the respondents' argument, i.e. our
22 argument, is consistent with the Act and the rules. Can
23 we go back to the Act, {AUTH/1/3}? It is important to
24 understand what the nature of collective proceedings
25 actually is. Section 47B(1) provides that collective

1 proceedings are a collection of individual claims or of
2 claims that would be capable of being brought
3 individually. They are a collection of individual
4 claims. If we can go to the rules, tab 2 in this
5 bundle --
6 THE CHAIRWOMAN: Sorry, you were looking at 47B(1), there?
7 MR HOSKINS: Yes 47B(1):
8 "... proceedings may be brought before the Tribunal
9 combining two or more claims to which section 47A
10 applies ..."
11 47A, if you want to look at it on page 2, sets out
12 when an individual claim can be brought before the
13 Tribunal for damages.
14 THE CHAIRWOMAN: Thank you.
15 MR HOSKINS: I was going to the rules, {AUTH/2/46}.
16 Rule 80(1)(d) -- so if we look at 80(1) first:
17 "A collective proceedings order shall authorise the
18 class representative to act as such ... and shall ..."
19 Then there is a list of things it must do. Top of20
page 47, {AUTH/2/47}:
21 "(d) [it must] describe or otherwise identify the
22 claims certified for inclusion in the collective
23 proceedings."
24 I.e. the individual claims certified for inclusion
25 in collective proceedings.

1 Then (f):
2 "State whether the collective proceedings are opt-in
3 or opt-out collective proceedings."
4 So, in our submission, given that the fundamental
5 issue is whether individual claims should be grouped
6 together on a collective basis, it follows that the
7 Tribunal should be, and we say is, entitled to consider
8 whether groups of individual claims within a single
9 application should be grouped together on an opt-in or
10 an opt-out basis.
11 In response to a solely opt-out application, the
12 Tribunal has power under Rule 80(1)(f) to make a CPO or
13 CPOs certifying some claims to proceed on an opt-out
14 basis and others to proceed on an opt-in basis, but you
15 are required to consider the best way that individual
16 claims should be brought collectively.
17 The third point is that the PCR complains that
18 a finding that opt-in would be more appropriate for
19 large business purchasers would be commercially
20 advantageous for the respondents in this case, but, with
21 respect, that argument cannot carry any weight. In
22 commercial disputes, all parties put forward arguments
23 that are helpful rather than detrimental to their
24 position. It would be an act of self-harm if it were
25 otherwise the case.

1 THE CHAIRWOMAN: So you say "So what?" on that point?
2 MR HOSKINS: Exactly. The fact that an argument is helpful
3 practically to a particular party does not go to the
4 proper interpretation of the law. It cannot do so and
5 we are looking here at a purely legal question --
6 THE CHAIRWOMAN: Well, it does not go to the proper
7 interpretation of the law.
8 MR HOSKINS: It might come into the facts, absolutely --
9 THE CHAIRWOMAN: It might come into the facts.
10 MR HOSKINS: -- but it cannot be relevant as a matter of
11 law.
12 Finally, I make the point that this issue, this
13 opt-out only application, should there be opt-in for
14 part of them, is unlikely to arise in many cases. It is
15 particularly apposite here because of the disparate
16 nature of the class -- we will come on to that in
17 a minute -- where you have purchasers of thousands of
18 cars down to people who bought one car in the period.
19 It is only because of that top end of the class that
20 includes purchasers of thousands of vehicles that this
21 issue arises, but this is not an issue that will arise
22 in every case.
23 That is all I want to say on the law, so I want now
24 to turn to the facts of this case. But before getting
25 to the nitty-gritty, I would like to emphasise two

1 important general points. First of all, as we have
2 seen, there is a general preference for claims to be
3 brought on an opt-in rather than an opt-out basis. In
4 our submission, what that means is that when you are
5 considering the PCR's arguments, it is therefore
6 important to distinguish between characteristics of
7 opt-in proceedings generally and those that are specific
8 to the facts of this case because attempts to say that
9 general characteristics of opt-in proceedings are
10 undesirable should be given little weight in light of
11 the general preference for opt-in over opt-out.
12 The president, in making the practice direction, has
13 already formed a view of the merits and demerits of
14 opt-in over opt-out and has said there should be
15 a general preference, so a mere description in
16 first Hollway of general aspects of opt-in cannot weigh
17 heavily in the balance and we will see some specific
18 examples of that when I go to the weeds.
19 The second point is one I have made before. I make
20 no apologies for emphasising it again. It is for the
21 PCR to satisfy the Tribunal that bringing all the
22 individual claims in its proposed class on an opt-out
23 rather than an opt-in basis is preferable. The onus is
24 on the PCR, not on the respondents.
25 Let me deal first with the issue of practicability,

1 which is one of the two specific factors that Rule 79(3)
2 says the Tribunal should have regard to. Let me take it
3 under a number of different headings. Let me begin,
4 first of all, with the evidence on the value of the
5 claims that has been put forward in the claim form
6 because that is what we are required to look at.
7 What we have done is to put forward the expert
8 report of Dr Nicola Tosini, an economist, to provide
9 estimates of the value of the claims put forward by the
10 PCR that relate to large business purchasers; i.e., what
11 he does is he takes the claims as set out in the claim
12 form and strips them out into large business purchasers
13 and the rest and I will show you what he concludes on
14 that. But the PCR has not challenged that exercise. It
15 has not put in its own expert report, saying, "No, no,
16 no, Dr Tosini has this absolutely wrong". So, in our
17 submission, the Tribunal can and should form a view
18 based on Dr Tosini's estimates. They are not in dispute
19 for the purposes of this hearing.
20 If we can go to, first of all, the appendix to
21 Dr Tosini's report, {B2/108/1} -- sorry, it may not have
22 the "2" in the electronic bundle. {B/108}, that is it.
23 Thank you. It is not quite as cloudy, I hope, as the
24 one we were looking at yesterday.
25 THE CHAIRWOMAN: Just for the benefit of the panel members,

1 it is not in the core bundle.
2 MR HOSKINS: It is in the hard copy B bundle but not in the
3 core bundle.
4 THE CHAIRWOMAN: Yes, not in our core bundle.
5 MR HOSKINS: So this provides estimates of damages for
6 different definitions, for different thresholds of large
7 business purchasers. The estimates are based on the
8 PCR's own proposed damages estimates. It simply takes
9 what the PCR has done and splits them out into different
10 categories of class members. The first column are just
11 the different overcharge percentages that have been put
12 forward by the PCR, 10%, 15%, 20%. The second column,
13 under the heading "Threshold Registrant", are the
14 different possible or potential thresholds for the
15 definition of "large business purchasers"; i.e., someone
16 who bought 4,000 vehicles, someone who bought 5,000
17 vehicles, et cetera.
18 THE CHAIRWOMAN: Over the entire period?
19 MR HOSKINS: That is right.
20 The fifth column -- so you will see the heading
21 "Overcharge for the Threshold Registrant", then in the
22 fifth column "Total Overcharge Simple Interest". The
23 one we are particularly interested in -- our proposed
24 threshold, as you know, is 20,000, and what the fifth
25 column tells us is that a business that purchased 20,000

1 vehicles over the claim period would have an
2 individual claim of £59,349. But, obviously, it is
3 a matter of judgment. If you think there is merit in
4 this submission, you might say, "Yes, I think there
5 should be ..." -- sorry.
6 DR BISHOP: Sorry. You say the fifth column shows -- 20%
7 interest shows 59,000 --
8 THE CHAIRWOMAN: No 20,000 vehicles.
9 MR HOSKINS: So the second column -- we are looking in --
10 assumed overcharge is 10%.
11 DR BISHOP: Oh, 10%.
12 MR HOSKINS: Yes, we are in the 10% column. Then we are
13 looking at, assuming that the threshold to be a large
14 business purchaser is 20,000 vehicles or more --
15 DR BISHOP: I understand.
16 MR HOSKINS: -- then the individual claim, including simple
17 interest, would be the 59,000.
18 It is important to note that that is the minimum
19 value of the individual claim because there will be
20 members of that class, the definition of "large business
21 purchasers", who bought more than 20,000 vehicles. You
22 see that in the sixth column. So if the threshold is
23 20,000, there would be 45 members potentially of that
24 class, but if you move up to the 45,000 vehicles, there
25 would be 29 members of that class. So 20,000 is the

1 minimum and there are, in that estimate, people who will
2 have bought more. That is a minimum.
3 Then carrying through on the 20,000 threshold, if
4 you go to the final column, you get the aggregate value
5 that the claim would have of all those large business
6 purchasers and you see that the aggregate claim would be
7 29,577,687. You can do the same for the 20% overcharge
8 simply by going down, 20%, 20,000 threshold, the
9 individual claim is 118,699, the total is 59,155,353.
10 Again you can do the same for a threshold of 45,000
11 vehicles. So at 10% the individual claim would be worth
12 118,699, the total would be 28,158,468, and at 20% the
13 individual claim would be 237,397 and the total claim
14 would be 56 million-odd. So this is us trying to give
15 you the toolkit -- if you think there is merit in this
16 argument but you think 20,000 does not sound right, you
17 have the figures for other levels. So that is the raw
18 material.
19 Rule 79(3) expressly refers to the estimated amount
20 of damages that individual class members may recover as
21 being a factor relevant to opt-in versus opt-out. As
22 I have just shown you, if one adopts a threshold of
23 20,000 or more vehicles for large business purchasers,
24 the minimum individual value of claims would be between
25 £59,349 -- that is the 10% overcharge -- and £118,699 --

1 that is the 20% overcharge -- including simple interest.
2 Our submission is that that level of potential recovery
3 would be sufficient to incentivise large business
4 purchasers, LBPs, to opt in. If you disagree, you could
5 look at the 45,000 figures and you will see there is
6 quite a material increase in the individual value of the
7 claim.
8 Now, the PCR makes a number of arguments in response
9 to this. If we can go to first Hollway, so that is core
10 bundle, tab 18 at page 8.
11 THE CHAIRWOMAN: I think it may be C15.
12 MR HOSKINS: Sorry, it is also C15, page 8. Would you
13 prefer core bundle references?
14 THE CHAIRWOMAN: Sorry, my mistake.
15 MR HOSKINS: No, that is fine. I am happy to give both if
16 it helps as well. {C/15/8}.
17 Sorry, is the core bundle not available
18 electronically?
19 THE CHAIRWOMAN: It is up there. I just thought the
20 operator was finding it difficult and I had the hard
21 copy.
22 MR HOSKINS: I will do whatever is most helpful.
23 Paragraph 24 you were shown yesterday. Can I just ask
24 you to remind yourself what is said five lines down:
25 "When deciding whether to participate in the claim

1 ..."
2 If you could read that string of points, please,
3 down to the reputational impact point. So a list of
4 things that a large business purchaser would likely need
5 to do in deciding whether to opt in or not.
6 Then a similar point at paragraph 26 on the same
7 page, the final sentence:
8 "... a potential opt-in class members ... would need
9 to put resources in to assessing the merits of the
10 claim."
11 This is said to be a disadvantage. It is a bad
12 thing according to the PCR.
13 Then on page 9, {C/15/9}, paragraph 29:
14 "As far as the claim value is concerned, the Large
15 Business Purchaser may have to gather data and provide
16 it to the solicitors and experts to be analysed to make
17 an informed decision about whether or not to opt-in."
18 Again this is presented as a bad thing, a factor
19 against opt-in.
20 But, with respect, this argument is misguided
21 because, as I have already explained, one of the major
22 differences between opt-in and opt-out is that, under
23 the opt-in method, those who opt in have chosen to be
24 part of the proceedings and may be presumed to have
25 conducted their own assessment of the strength of their

1 claim. You see from the guide and you see from the
2 *Merricks* judgments of Lord Sales and Lord Leggatt that
3 that is a good thing, not a bad thing. That is one of
4 the advantages of opt-in. That is why it is preferred.
5 In contrast, a person may become a claimant in
6 opt-out proceedings without taking any affirmative step
7 and potentially without even knowing that a claim is
8 being brought in their name. It is that distinction
9 that is one of the reasons for there being a preference
10 for opt-in over opt-out. So the fact that certifying
11 opt-in proceedings for LBPs would require potential
12 class members actively to consider whether to
13 participate in the proceedings is actually an argument
14 in favour of opt-in proceedings, not against.
15 Remember the opt-in indicators in paragraph 6.39
16 {AUTH/3/86} of the Tribunal Guide. I will just remind
17 you. I am reading from the guide:
18 "Indicators that an opt-in approach could be both
19 workable and in the interests of justice might include
20 the fact that the class is small but the loss suffered
21 by each class member is high, or the fact that it is
22 straightforward to identify and contact the class
23 members."
24 In fact, both these indicators, we submit, are
25 present in the present case in relation to large

1 business purchasers. Let us take the first indicator,
2 the size of the class, the value of the claims. As we
3 have already seen, 45 -- the estimate is that
4 45 businesses bought more than 20,000 vehicles in the
5 claim period and each of those businesses has an
6 estimated minimum claim of between around £60,000 and
7 £120,000; in other words, the class is small, about 45,
8 and the individual losses are high, 60,000 to 120,000.
9 I just pause here to say we are a world away from the
10 2.3 million largely domestic customers in *Le Patourel*.
11 You remember when Ms Ford took you to the
12 *Le Patourel* judgment on the first day and I asked you to
13 read the extra bit of the paragraph, paragraph 114,
14 because there is no comparison. She sought to make
15 a comparison but it was unfounded because of the nature
16 of the potential class we are looking at.
17 The second indicator, "straightforward to identify
18 and contact the class members", in our submission, it is
19 straightforward to do both. In relation to identifying
20 class members, the identities of the largest vehicle
21 rental companies and company fleets are readily and
22 publicly available.
23 Can we go to bundle {B/107/3}, paragraph 13? This
24 is in first Tosini. You will see he explains:
25 "I received from Arnold & Porter data on the fleet

1 size of the 50 largest rental companies in the period
2 2012 to 2015 and the 100 largest company fleets in 2019
3 ... both relating to the UK. The Rental Fleet Data
4 [over the page please] come from the FN50 and the
5 Company Fleet Data from the Fleet200 listings, both of
6 which are collected and published by Fleet News."
7 Then if we can go to {B/108/2}, which is appendix B
8 to first Tosini, and you will see the nature of the
9 information that has been drawn from that, the names of
10 the purchasers, the fleet size. You will see the detail
11 that Dr Tosini has been able to lift from those
12 documents.
13 I should say that information from Fleet News has
14 been relied on by the PCR's own expert. I will not turn
15 it up. I will just give you the references. It is
16 second Robinson which is at {B/110}. It is
17 paragraphs 5.20, 6.3(a), 6.4(a) and 6.7. So Fleet News
18 is used by both sets of experts. So identification is
19 not difficult --
20 THE CHAIRWOMAN: Sorry, is this - it is not just identifying
21 rental companies, is it, or isn't it?
22 MR HOSKINS: So this is looking at vehicle rental companies
23 and company fleets, so this would actually --
24 THE CHAIRWOMAN: You would say it would cover the range?
25 MR HOSKINS: Well, I would say this actually underestimates

1 the number of large business purchasers because, insofar
2 as there are large business purchasers who are not
3 vehicle rental companies or company fleets, they will
4 not be covered by Dr Tosini's estimates, so Dr Tosini's
5 estimates of numbers of LBPs are a minimum.
6 How do we find out who the extras are? That is the
7 next question. That comes to contacting class members.
8 Can we go to --
9 DR BISHOP: I am just a little bit puzzled by this list.
10 Some of them look like corporate entities that are
11 really financing a purchase or use by someone. VT
12 Fleet, I understand, whatever that is, or British Gas or
13 whatever. Société Générale, ALD Automotive, what is
14 this? Is it really a business user or is it a --
15 MR HOSKINS: Sir, that is possible. That is why I come to
16 the next two points, which is identifying class
17 members -- sorry, contacting class members and
18 book-building, because you are absolutely right, just
19 having a list from Fleet News does not tell you
20 everything you need to know. So I accept there is a bit
21 more to be done and the two things are contacting and
22 book-building, but it is an absolutely fair point.
23 Can we go to first McLaren, paragraphs 39 to 40.
24 I have that in core bundle, tab 15 at page 18, so
25 I think we may need to go to bundle {C/1/18}.

1 Paragraphs 39 and 40, the PCR has engaged Case Pilots
2 Limited, which is a claims administrator, and you will
3 see at 40 its "extensive experience" and expertise is
4 described. Case Pilots has produced a proposed notice
5 and distribution plan. That is at {C/6/2}.
6 If we can go to page 14, {C/6/14}, paragraph 26,
7 now, this plan has been put forward for the purposes of
8 the current application, but our submission is that it
9 is quite obvious that the methods which are suggested in
10 this plan could be used very straightforwardly to
11 identify -- to contact large business purchasers. So,
12 first of all, at paragraph 26 on page 14:
13 "A four-part Notice Plan will be undertaken ... in
14 order to disseminate the Collective Proceedings Order
15 Notice, relevant Tribunal judgments ... and to publicise
16 any damages quantification hearing."
17 There will be a litigation website, there will be
18 contact via social media channels and social media
19 advertising, advertising through national newspapers,
20 earned media coverage in print and online and a PR
21 campaign to heighten media interest.
22 Over the page at 29, {C/6/15}:
23 "A campaign incorporating social, digital and
24 print media will be used to maximise outreach to class
25 members ...", et cetera.

1 Page 30, {C/6/30}, paragraph 29 [sic]:
2 "A press release will be drafted ... to draw
3 attention to the filing of the application ... This will
4 be circulated to key media identified ..." --
5 THE CHAIRWOMAN: Sorry --
6 MR HOSKINS: Sorry, I am going too fast. I am on page 30.
7 THE CHAIRWOMAN: I think you meant page 30, paragraph 92
8 perhaps.
9 MR HOSKINS: I did indeed mean that. Sorry if I misspoke.
10 "A press release will be drafted by the proposed
11 class representative's advisers to draw attention to the
12 filing of the application ... This will be circulated to
13 key media identified as ..."
14 You will see the second bullet:
15 "Those whose readership will include UK businesses
16 who may have purchased fleet vehicles during the
17 relevant period ..."
18 Then page 31, {C/6/31}, paragraph 96:
19 "Dedicated pages will be created on Facebook,
20 LinkedIn and Twitter."
21 Then over the page at page 32, {C/6/32}, 101:
22 "LinkedIn is a social media channel primarily used
23 for work and recruitment purposes."
24 Then the final sentence:
25 "It is also visited regularly by business owners and

1 managers, who may have bought new vehicles in the UK
2 during the relevant period for employee use."
3 So it is quite clear that it is well within the
4 capability and expertise of Case Pilots to communicate
5 with potential large business purchasers. They have the
6 wherewithal and the nous to do so.
7 The next aspect of this is book-building, as I just
8 indicated. Can we go to first Hollway? So the core
9 bundle reference is CB/18, page 13, which is
10 bundle {C/15/13}. You will see the heading at the
11 bottom of the page, "Book-build". If we can turn over
12 the page, please, you will see the last sentence of
13 paragraph 44, {C/15/14}: The PCR complains that:
14 "... identifying a meaningful number of Large
15 Business Purchasers and persuading them to opt in to the
16 claim would require a very significant commitment of
17 resources by the Proposed Representative."
18 Again this is said to be a bad thing. There are two
19 answers to this: first of all, the act of explaining the
20 nature of the claim to potential class members in order
21 to allow them to make an informed decision whether to
22 opt in or opt out is an advantage, not a disadvantage of
23 opt-in proceedings.
24 Secondly, the fact that a solicitor who wishes to
25 put together a commercial package to bring collective

1 proceedings must invest some time and resources in doing
2 so is part and parcel of every opt-in application and
3 yet there is a general preference for opt-in
4 proceedings. This is simply the way the legislation
5 works in practice. Solicitor firms are encouraged by
6 the legislation, by the promise of the returns, to
7 invest time and resources in seeking to put together
8 such packages.
9 It is inherent in the scheme that solicitors must
10 speculate to accumulate, they must book-build, but that
11 is also a means of ensuring that solicitors do not bring
12 frivolous applications for CPOs before tribunals. They
13 have to have faith in it as a business model. But
14 book-building is a good thing, not a bad thing.
15 The next heading I want to deal with, why opt-in is
16 practicable, is disclosure. Now, you have heard
17 detailed submissions on the methodology proposed by the
18 PCR to calculate damages. Whatever decision you reach
19 on the viability of that methodology at this stage for
20 the purposes of certification, what is undeniable is
21 that an important cause of the potential difficulties
22 with the proposed methodology is the lack of disclosure
23 from class members in opt-out proceedings. One sees
24 that from first Robinson itself. If we can go to
25 {B/5/55}, paragraph 5.26, he says:

1 "In practical terms, it is unlikely that the
2 composition of the total Delivery Charge (i.e. the
3 breakdown of shipping costs, 'other costs' and margin)
4 is going to be observable by me, as such information is
5 not publicly available and disclosure from the Proposed
6 Defendants would only provide information relating to
7 shipping costs."
8 That is what we have been debating for the last two
9 days. That is the problem with this approach, is if you
10 do not have disclosure from the people that purchased
11 the vehicles --
12 THE CHAIRWOMAN: Hang on. Why would disclosure --
13 am I missing something? Why would disclosure from the
14 proposed class members give you a breakdown of the
15 composition of the delivery charge?
16 MR HOSKINS: What it will give you is information on
17 upstream pass-on, i.e. how much of any overcharge was
18 passed on in the purchase price paid for vehicles by
19 class members.
20 THE CHAIRWOMAN: It will give you or could give you the
21 price paid and the invoice.
22 MR HOSKINS: Exactly that. You could get the invoice, you
23 could get other documents that relate to it, you could
24 get evidence potentially of the negotiations that took
25 place. Particularly we are talking about large business

1 purchasers here, not individuals. We are talking about
2 companies and how they bought vehicles --
3 THE CHAIRWOMAN: So you are not just talking about
4 disclosure; you are talking about witness evidence?
5 MR HOSKINS: I am simply pointing out the possibility that
6 exists for further evidence in opt-in proceedings versus
7 the accepted lack of any evidence at the purchaser level
8 on the opt-out basis, which is the whole basis upon
9 which Mr Robinson proceeds.
10 THE CHAIRWOMAN: It may be obvious, but can you explain why
11 that is going to be so much easier with opt-in?
12 MR HOSKINS: In opt-in?
13 THE CHAIRWOMAN: Yes.
14 MR HOSKINS: Absolutely because -- let me just finish.
15 THE CHAIRWOMAN: Yes.
16 MR HOSKINS: I am about to answer your question. One thing
17 you would get is information on upstream pass-on to the
18 purchaser, which would clearly be highly relevant.
19 Another thing you would potentially get is downstream
20 pass-on to the large business purchasers' own customers,
21 which is also highly relevant. We know that from
22 *Sainsbury's* in the Supreme Court. Those are the two
23 things that you might potentially get with the
24 involvement of large business purchasers.
25 Now, in opt-in proceedings it is absolutely correct,

1 there would be no automatic disclosure from the class
2 members. The Tribunal has a broad discretion under
3 Rule 89(1)(c) of its rules to order disclosure by any
4 represented person on the terms it thinks fit.
5 THE CHAIRWOMAN: So, in theory, that covers opt-out --
6 MR HOSKINS: It does.
7 THE CHAIRWOMAN: -- representatives. So in theory the
8 Tribunal could say, "We need to know what Mrs Jones paid
9 for her car and ..." --
10 MR HOSKINS: Indeed. You will see my next submission.
11 I think if we can use telepathy at this stage!
12 It is also highly unlikely that any disclosure
13 ordered would be from all class members on a standard
14 basis because the practice of the Tribunal, consistent
15 practice, is not to order blanket standard disclosure
16 from all parties but, rather, to adopt a targeted
17 proportionate approach.
18 Now to answer your question, a significant advantage
19 of opt-in proceedings for large business purchasers
20 would be that the parties and the Tribunal would have
21 the potential of active participation from sizeable
22 class members who have consciously decided to
23 participate in the proceedings when seeking to determine
24 the appropriate scope of disclosure and also the terms
25 upon which it was to be given; for example, as to

1 confidentiality; for example, as to who is to pay the
2 costs for the disclosure exercise. But contrast that
3 with the rather desperate reliance on the broad axe
4 approach to quantifying damages on behalf of an
5 amorphous and largely oblivious opt-out class and really
6 the cry of despair at paragraph 5.26 of first Robinson,
7 "If I do not have any disclosure, this is what I have to
8 do". With all due respect, whatever view you take on
9 the merits for certification of the methodology, it is
10 sometimes verging more into magic wand than broad axe
11 because there is an awful lot of information that, on
12 the approach that is suggested, is never going to come
13 before this Tribunal.
14 THE CHAIRWOMAN: The sorts of information you are talking
15 about would be relevant to -- let us take the car rental
16 company -- its particular position, maybe how it
17 negotiated, what sort of levels of discount it managed
18 to achieve and its own pass-on, are unlikely to be
19 relevant to other members of the class.
20 MR HOSKINS: Sorry "are unlikely" or "likely"?
21 THE CHAIRWOMAN: -- are unlikely to be relevant to other
22 members of the class or at least other members not in
23 the same category.
24 MR HOSKINS: But it will not be exactly the same. If you
25 were seeking perfection, I absolutely accept you would

1 not say, "In this line of business, this is the degree
2 of upstream and downstream pass-on and we take it
3 across". But look at what the options are that are put
4 before the Tribunal. We have opt-out with no
5 information from purchasers or you have opt-in with
6 a possibility to seek some disclosure.
7 Ask yourself, is it better -- when wielding the
8 broad axe, when waving the magic wand, is it better to
9 have some information at the purchaser level of upstream
10 and downstream pass-on or, I ask rhetorically, is it
11 better to have none at all? Clearly the answer is some
12 in this context is potentially much more valuable than
13 none. This is a question of fairness to the defendants
14 as well because the broad axe is incredibly blunt, the
15 one that is being suggested. What we are proposing is
16 that there is some rigour put in at the level of large
17 business purchasers to make the position better than
18 simply having nothing. But that is the choice.
19 The next point I want to point out, practicability
20 is the aggregate value of the claims. On the basis of
21 a threshold of 20,000 or more vehicles, as we have seen,
22 the total claim value including simple interest would be
23 between 29.6 million and 59.2 million. Our submission
24 is that the aggregate value of the claims of those large
25 business purchasers would be sufficiently high compared

1 to the projected costs for that opt-in to be
2 commercially viable.
3 The funder has budgeted 14.85 million to cover its
4 own cost, the PCR's costs. As we have seen,
5 paragraph 6.39 of the tribunal's guide suggests that
6 opt-out proceedings will generally be more complex and
7 costlier than opt-in proceedings. Therefore, in our
8 submission, the cost of opt-in proceedings for large
9 business purchasers can therefore be assumed on the
10 basis of the guide to be materially less than
11 £14.85 million. That is estimated costs of the PCR
12 bringing proceedings, 14.85 million, potential recovery
13 between 29.6 million and 59.2 million.
14 THE CHAIRWOMAN: Does that not ignore that what you are
15 proposing is two classes, one opt-in and one opt-out,
16 and you still have the --
17 MR HOSKINS: I am coming to that, absolutely. I am looking
18 now at, from the PCR's perspective, would it be
19 attractive to them to bring this opt-in large business
20 claim? The answer is obviously "Yes" because the costs
21 are less than 14.85 million; the potential pot of gold
22 is somewhere between 29.6 million and 59.2 million.
23 But of course you are absolutely right that then one
24 has to look at the broader aspect of, well, this assumes
25 an opt-out claim and opt-in claim carrying on at the

1 same time, and what does that do to costs? Well, we do
2 not know. If you add them together, you would expect
3 the opt-out proceedings to be less because you have
4 taken out some of the claimants there -- and very
5 significant claimants -- and you would expect, as I say,
6 the opt-in total costs to be less because the guide
7 tells us so. If you add them together, you may get
8 a total that is less than 14.85 million, you may get one
9 that is more.
10 THE CHAIRWOMAN: I think I know what the answer would be.
11 I mean --
12 MR HOSKINS: Fine, let us assume --
13 THE CHAIRWOMAN: -- realistically -- it must be difficult
14 for you to escape this -- that you are talking about --
15 you must be talking about some additional cost because
16 of the contact in the book-build.
17 MR HOSKINS: Let us assume for the purposes of argument --
18 THE CHAIRWOMAN: Maybe I am missing something, but I cannot
19 easily see costs coming out on the opt-out side.
20 MR HOSKINS: Well, in relation to the opt-out, there are
21 costs, for example, in relation to distribution, which
22 when you are dealing with claims for thousands of
23 vehicles --
24 THE CHAIRWOMAN: But you have taken out 45 --
25 MR HOSKINS: You have taken out hundreds of thousands of

1 vehicles because it depends what the distribution system
2 looks like, but you have taken out hundreds of thousands
3 of vehicles and you have simplified --
4 THE CHAIRWOMAN: Well, okay, that depends on --
5 MR HOSKINS: Madam, I do not need to go to the wall on this.
6 Let us assume, because you have very kindly given me the
7 indication -- let us assume that the total cost of
8 opt-in plus opt-out would exceed the costs of opt-out.
9 That is what you are putting to me. Now, in our
10 submission that would be a price worth paying for two
11 reasons. First of all, some of the advantages of the
12 opt-in proceedings, particularly in relation to
13 disclosure, would feed across into the opt-out
14 proceedings because, if one has these two sets, everyone
15 would be saying to you, "Please case-manage them
16 together". So the information that is gained, purchaser
17 information, will be useful in the opt-out/the opt-in,
18 so you will have the benefit of getting closer to
19 a broad axe than magic wand in the opt-out as well.
20 Secondly, any extra costs on the part of the PCR
21 bringing the claim will be borne by the respondents
22 almost certainly if the claim is successful. I am not
23 giving up our right to argue about costs at the end of
24 the day, but given that costs follow the event, if at
25 the end of the day both claims prevail, they are not

1 going to be paying the costs; we are. What we are
2 actually asking is for you to allow us to take that risk
3 of bearing the costs so that we can have a fairer
4 hearing and so the Tribunal can be better informed.
5 That is really what that boils down to, that point.
6 I am aware of the time and I am almost finished.
7 The next heading is "viability of remaining opt-out
8 claims" because what happens if the Tribunal says yes
9 for opt-in for LBPs? What happens to the opt-out for
10 everyone else? In our submission, it is clear that it
11 would remain practicable for opt-out proceedings to be
12 brought in respect of all purchasers other than large
13 business purchasers. Can we go to the PCR's litigation
14 plan?
15 THE CHAIRWOMAN: Yes, are you taking account that we need
16 a transcribers' break?
17 MR HOSKINS: I am and Mr Holmes wants about an hour and
18 I will land pretty much, I think, there.
19 THE CHAIRWOMAN: Okay.
20 MR HOSKINS: Bundle C, tab 5, page 2, {C/5/2}. You see this
21 is the litigation plan that has been produced. If we
22 can go to page 8, {C/5/8}, paragraph 15, if I could ask
23 you to refresh your memory on paragraph 15, please.
24 (Pause)
25 THE CHAIRWOMAN: Yes.

1 MR HOSKINS: So Mr Robinson breaks down his damages
2 estimates between private and business members
3 separately, and these estimates are excluding interest,
4 so you would have to add on simple interest. The claims
5 of private purchasers on their own are estimated to fall
6 within the range of 31.1 million -- that is 10%
7 overcharge -- and 62.1 million, 20% overcharge.
8 THE CHAIRWOMAN: Sorry, where are you reading from?
9 MR HOSKINS: I am reading that from the penultimate
10 sentence:
11 "Of these vehicles, approximately 10.9 million ..."
12 I am sorry. I need to take you to another table.
13 I have jumped ahead. Can we go to page 63? Sorry.
14 Again I have the core bundle reference. Let me catch
15 up. You safely had, I hope, 728 and 730 with the
16 reference I gave; is that correct? No, I will
17 double-check.
18 THE CHAIRWOMAN: No.
19 MR HOSKINS: Sorry, I thought the core bundle was going to
20 be on the --
21 THE CHAIRWOMAN: I do not think it has the litigation plan
22 in it.
23 MR HOSKINS: So {B/5/71}, "Summary of loss":
24 "Appendix 4 sets out my detailed calculation of the
25 estimated loss ..."

1 THE CHAIRWOMAN: Sorry, which paragraph?
2 MR HOSKINS: You need to scroll up the page, and again,
3 please.
4 THE CHAIRWOMAN: Down, I think.
5 MR HOSKINS: Yes, I am looking for the bottom of the page,
6 the bottom of page 71. So you see the heading "Summary
7 of loss".
8 THE CHAIRWOMAN: Yes.
9 MR HOSKINS: "Appendix 4 sets out my detailed calculation of
10 the estimated loss, which is summarised in the table
11 below."
12 "I have split my analysis between 'Private' and
13 'Business' customers ..."
14 Then over the page, please, {B/5/72}, you will see
15 a series of tables. The first one is on the basis of
16 the 10% overcharge. You will see he splits the claim.
17 We can look at the totals at the bottom of that table.
18 For private, the estimate is 31 million-odd; business,
19 the estimate is 26 million at 10% overcharge.
20 At the 20% overcharge -- that is on page 74,
21 {B/5/74} -- the total private estimate is 62 million and
22 the business estimate is 52 million-odd. Sorry, that is
23 where I get my figures when I say Mr Robinson suggests
24 that the claims of private purchasers alone, i.e.
25 without any business purchasers, are between

1 31.1 million, 10% overcharge, and 62.1 million with
2 20% overcharge.
3 Now, bear in mind that a proportion of his estimates
4 for business purchasers would remain in the opt-out
5 class because this covers both large business purchasers
6 and let us just call them "small business purchasers"
7 for contradistinction. So it is apparent from the PCR's
8 own estimates of loss that opt-out proceedings that
9 exclude large business purchasers would be economically
10 viable because the total potential pot would be in
11 excess of £31 million at their lowest level and the
12 estimated costs they have at the moment is
13 14.85 million, and that is good money on anyone's basis.
14 It is telling, in our submission, that first Hollway
15 does not categorically state anywhere that if the
16 Tribunal were to decide that the claims of large
17 business purchasers should be brought on an opt-in basis
18 rather than an opt-out basis, the PCR would be unable or
19 unwilling to bring such a claim. It is remarkably coy
20 about that.
21 The closest it gets, to be fair -- first Hollway,
22 paragraph 57: "There is a very real prospect that the
23 bifurcation of the claim would undermine the economic
24 viability of the claim." But there is no trenchant
25 statement that we would not go back and have no doubt

1 further discussions with the funders and see whether we
2 fancied a crack at that pot of gold or not.
3 That is all I want to say on practicability.
4 On strength of the claims, it is a very short point.
5 You have had the submissions. Even if you find that the
6 methodology survives the certification for the purposes
7 of suitability, of course we have seen the separate
8 consideration then comes in, opt-in versus opt-out, and
9 you would be entitled to conclude that the proposed
10 methodology, whilst surviving certification as a whole,
11 nonetheless you have doubts and you can put that into
12 your basket when you are weighing up whether opt-in is
13 preferable to opt-out.
14 What do we suggest should happen if you are with us?
15 Can we go to our CPO response? Again I have got a core
16 bundle reference. Bear with me. Bundle {A/14/29},
17 paragraph 85. You will have seen that we suggest, if
18 you are certifying the opt-out proceedings for the rest,
19 this is how the class should be defined in order to
20 include large business purchasers. Of course if you
21 were to take the view that 20,000 was not the
22 appropriate threshold, you would amend that accordingly.
23 What, as I have indicated in response to your
24 earlier question, we suggest should happen is the
25 Tribunal could then adjourn the CPO application so as to

1 permit the PCR to decide whether it wishes also to bring
2 an opt-out claim in respect of large business purchasers
3 and, if so, to put forward an appropriately amended
4 application in that regard. Just for a degree of
5 comfort, it was not exactly the same point but a similar
6 approach was adopted by the Tribunal in the very first
7 collective proceedings claim in *Dorothy Gibson*. That is
8 authorities, tab 18. It is paragraph 146 at page 42,
9 {AUTH/18/42}. There the Tribunal was not satisfied with
10 the methodology and said, "Well, we are not satisfied
11 but we are going to give you a chance to improve it".
12 They adjourned the application and gave the PCR a chance
13 to come back with an amended application.
14 THE CHAIRWOMAN: Okay. I am really conscious of the time.
15 MR HOSKINS: I am finishing in one minute.
16 THE CHAIRWOMAN: Yes, but I am afraid I have to ask you
17 a question.
18 MR HOSKINS: I see. Sorry.
19 THE CHAIRWOMAN: You carry on.
20 MR HOSKINS: Let me finish, then we will do the questions.
21 We put forward this adjournment proposal because --
22 I want to make it absolutely clear we are not trying to
23 steal a fast one on limitation because this means that
24 there is no limitation issue arising. It is not that
25 the PCR will come back with a new application and we

1 say, "Ha ha, limitation has expired". If you adjourn
2 this --
3 THE CHAIRWOMAN: No, I appreciate -- yes.
4 MR HOSKINS: -- it preserves their position so we are trying
5 to be fair to them.
6 Then, looking forward, if you were to certify
7 opt-out proceedings and if you were to certify opt-in
8 proceedings, we submit it would then be for the Tribunal
9 to determine the most appropriate and efficient
10 procedure for dealing with both those proceedings before
11 it. There is no off-the-shelf answer, but what
12 certainly could and should be achievable is that it
13 should be possible to obtain some cost savings between
14 them. So insofar as one is looking at total cost, it is
15 not simply "Here is opt-out and here is opt-in".
16 Clearly a degree of saving would be obtained by
17 case-managing them together, but also, and importantly,
18 the Tribunal could ensure a read-across of the benefits
19 that I have described of opt-in into the opt-out
20 proceedings in terms of further information at the
21 purchaser level.
22 THE CHAIRWOMAN: Okay. My question is this: you have
23 suggested, if we are with you on these points, 20,000
24 vehicles and then you say you could choose other
25 numbers, any number that you choose is going to produce

1 odd cliff-edge results. You know, the buyer of
2 19,900 vehicles might get a cheque at the end of the day
3 for no effort; the buyer of 20,000 vehicles either gets
4 nothing or has taken greater risks perhaps in relation
5 to costs, depending on the particular arrangements, has
6 certainly had to get engaged for all the reasons that
7 you give and may be more likely to give disclosure.
8 I mean, your underlying point, apart from buying in, if
9 you like, you know -- it being a good thing, as you say,
10 for businesses to reach their own assessment, the key
11 thing you want is disclosure.
12 MR HOSKINS: It is not the only thing, but it is certainly
13 one of the jewels in the crown, I would say, of our
14 argument, yes.
15 THE CHAIRWOMAN: There may be ways, as you suggest, of
16 ensuring that disclosure happens without taking this
17 step if disclosure is appropriate.
18 MR HOSKINS: There may be, but if -- I go to the point, if
19 one has an opt-out claim where the claim has not been
20 brought with any buy-in on the part of any claimant and
21 then applications for disclosure are made, it is a very
22 different scenario from an application in which
23 disclosure is being sought from large companies, with
24 a lot of skin in the game, having made an informed
25 decision to participate. The ability and the

1 willingness of the Tribunal to order disclosure, in my
2 submission, will be far more fertile in the latter case
3 than the former because you can quite imagine someone
4 in --
5 THE CHAIRWOMAN: Yes, okay. I do not want to extend this
6 conversation at this stage, but it strikes me that there
7 may be more than one way of approaching that that does
8 not involve necessarily opt-in.
9 MR HOSKINS: I accept that in argument, but you can imagine
10 the reaction of a class member who does not even know
11 potentially that this claim has been brought on their
12 behalf and suddenly they are told, "By the way, you are
13 in the Tribunal next week" or "In the Tribunal next week
14 there is an application for disclosure against you".
15 THE CHAIRWOMAN: Okay. We must take a break there.
16 MR HOSKINS: Of course. I am sorry to overstay my welcome.
17 THE CHAIRWOMAN: We will come back at five past.
18 (11.56 am)
19 (A short break)
20 (12.12 pm)
21 Submissions by MR HOLMES
22 MR HOLMES: Good afternoon, Madam, members of the Tribunal.
23 My topics are deceased persons and compound interest.
24 These are challenges to two specific aspects of the
25 application and they are advanced in the alternative to

1 the root and branch objections that you heard yesterday,
2 if you are not with us on those.
3 The issue on deceased persons is whether the PCR can
4 pursue claims on behalf of persons who died before the
5 proceedings began or of their estates. My submission is
6 that it cannot. I have five points. I will give you
7 them first in outline and then develop them. I am sure
8 you have them already, but just to recap.
9 THE CHAIRWOMAN: Can I be clear what class of persons we are
10 talking about? Are we talking about people who died
11 before the claim was brought or does it go beyond that?
12 MR HOLMES: My challenge is to the application insofar as it
13 extends to persons who died before proceedings
14 commenced.
15 THE CHAIRWOMAN: Yes.
16 MR HOLMES: Point number one, under English law deceased
17 persons cannot bring legal claims themselves. If
18 someone tries to claim in the name of a dead person,
19 that claim is a nullity and claims for loss caused to
20 deceased persons must instead be brought by the legal
21 representatives of their estates.
22 Point number two, the position is the same for
23 collective proceedings under section 47B. Such
24 proceedings cannot include claims by deceased persons
25 and the class whose claims are covered by the

1 proceedings cannot be defined to include deceased
2 persons. If a PCR wishes to include claims for loss or
3 damage caused to deceased persons, the class should
4 instead be defined to include the representatives of
5 their estates who are the persons entitled to bring such
6 claims. So that is the second point.
7 The third point concerns the current McLaren class
8 definition. As it currently stands, we say that
9 definition does not include the representatives of the
10 estates of deceased persons who made relevant purchases.
11 Instead, it simply identifies persons who made purchases
12 or financed vehicles within the relevant period without
13 distinguishing between persons alive and dead and
14 personal representatives are not persons who purchased
15 or financed a vehicle. So as it currently stands, we
16 say the proposed McLaren claim does not include any
17 valid claims in respect of vehicles purchased or
18 financed by deceased persons.
19 My fourth point is about the amendment sought by the
20 PCR which would bring personal representatives within
21 the class, and it is this: the amendment, we say,
22 involves the addition of new parties to the claim; that
23 is to say the representatives of the estates of deceased
24 persons who made relevant purchases. That is not just
25 a clarificatory amendment, as Ms Ford submitted. The

1 current definition does not contain legal
2 representatives of estates. The amended definition does
3 and we say that it must satisfy the requirements under
4 the tribunal's rules governing the removal, addition or
5 substitution of parties.
6 The fifth and final point is that the amendment is
7 sought after the limitation period for the claim has
8 expired and, in consequence, the amendment will only be
9 permitted if it falls within the CAT Tribunal
10 Rules 38(7). But it is clearly outside that paragraph
11 and permission to amend should therefore be refused as
12 respects purchasers who were already deceased by the
13 time the claim was brought.
14 That in a nutshell is our case on deceased persons.
15 I will develop those points by reference --
16 THE CHAIRWOMAN: Just to be absolutely clear, those who die
17 after the claim is brought, the claim would continue to
18 vest in their estate?
19 MR HOLMES: The amendment is not prone to the vice that
20 I will identify --
21 THE CHAIRWOMAN: Yes. So the amendment -- well, whether it
22 is amended or not, in principle the claim could continue
23 to vest in their estate?
24 MR HOLMES: In respect of those who died after the
25 commencement of the claim.

1 THE CHAIRWOMAN: Yes, thank you.
2 MR HOLMES: I will develop those points by reference to the
3 tribunal's judgment on the *Merricks* remittal in relation
4 to which substantially the same issues arose.
5 THE CHAIRWOMAN: Yes.
6 MR HOLMES: Ms Ford took you through the relevant parts
7 briefly, but there are some further passages I would
8 like to show you. If we could turn it up, please. It
9 is in authorities bundle, tab 28, and the relevant
10 discussion begins on page 12, {AUTH/28/12}. You see at
11 the foot of the page, at paragraph 33, the Tribunal
12 identifies the requirement under Rule 75 that:
13 "An application to commence collective proceedings
14 ... [must contain] ..."
15 Then over the page, {AUTH/28/13}:
16 "... a description of the proposed class."
17 At the risk of stating the obvious, the class is the
18 category of persons with individual claims that the PCR
19 proposes to combine. It is quite abbreviated there, but
20 just to illustrate that point it is perhaps worth taking
21 a quick detour to section 47B.
22 If we could go to authorities bundle, tab 1, page 4,
23 {AUTH/1/4}, we are in the Competition Act here in
24 section 47B. If you look at subsection (7), you see the
25 matters which a collective order must include. So these

1 are what you, as the Tribunal, must include in your
2 order if you certify. If you look at (b), you see
3 there:
4 "[a] description of a class of persons whose claims
5 are eligible for inclusion in the proceedings ..."
6 So the class is a class of persons with eligible
7 individual claims.
8 If we return to the *Merricks* remittal judgment, so
9 back to authorities bundle, tab 28, and pick it up at
10 page 14, {AUTH/28/14}, Ms Ford showed you the tribunal's
11 finding at paragraph 36, that:
12 "... it would be clear to anyone reading the CPO
13 claim form [and associated documents] ... that
14 Mr Merricks intended to exclude people who were no
15 longer alive."
16 That is in the original claim form.
17 Turning on to page 15, {AUTH/28/15}, you see at
18 paragraph 39 that by the time of remittal Mr Merricks
19 wished to include deceased persons within the class.
20 At paragraph 40, the PCR sought to argue that this
21 could be done on the basis of the existing class
22 definition. At paragraph 41, the Tribunal rejects that
23 argument as untenable for two reasons. Ms Ford showed
24 you the first of those. It is in the final sentence of
25 the paragraph, namely that the claim form and associated

1 documents in fact expressly excluded deceased persons,
2 the point we have just seen.
3 But the tribunal's second reason, at paragraph 42,
4 is, in my submission, also relevant. The Tribunal
5 states that:
6 "... it is important that the claim form in
7 collective proceedings is clear ..."
8 It is one of "the documents made available to
9 potential class members", and this is in order for
10 them -- "to enable them to decide whether to opt-out or
11 opt-in ..." Do you see that?
12 So the class definition must specify the membership
13 of the class in clear-cut terms. They need to be able
14 to see if their individual claims are in or out so that
15 they can exercise their rights under the statute and
16 there is no room for ambiguity.
17 At paragraph 43 you see that the Tribunal gave
18 a strong steer or indication on the first day of the
19 hearing that the claim form did not cover deceased
20 persons. Turning over the page, {AUTH/28/16}, you see
21 at the top that Mr Merricks' response was to bring
22 forward an amendment, a draft amended claim form, and
23 apply for permission to amend.
24 The amendments are then set out in the middle of the
25 page. If you look at (i), you see that the members must

1 be individuals, including persons who have since died.
2 "The intention ... is to capture those individuals
3 who purchased goods or services in their capacity as
4 individual consumers ..."
5 So the proposal was to amend the class to include
6 persons who made relevant purchases whether they
7 remained alive or had since died. But Mr Merricks did
8 not include the representatives of the estates of
9 deceased persons within the class definition and, as we
10 will see, that explains why the amendment was rejected.
11 Just to anticipate my submission on this, we say
12 that the McLaren PCR's current class definition is
13 analogous to Mr Merricks' amended class definition,
14 which was rejected. It identifies persons who made
15 relevant purchases and it says that this is intended to
16 include persons alive and persons dead at the time that
17 proceedings began, but it does not identify the personal
18 representatives of the estates of deceased persons.
19 THE CHAIRWOMAN: Yes. You accept that the current
20 description of the class which just looks at people who
21 bought in a certain period is apt, taken as such, to
22 include people who have since died?
23 MR HOLMES: Well, we say that it is not completely clear.
24 It is not made express, but we do not need to worry
25 about that for the purposes of my submission.

1 THE CHAIRWOMAN: Right. Okay.
2 MR HOLMES: Looking down at paragraph 44, the Tribunal there
3 sets out the well-established principles governing
4 amendment of a claim form:
5 "Permission ... should not be granted if a plea in
6 [the] form could be struck out and is subject to special
7 rules if ... limitation ... has expired."
8 As Ms Ford showed you, paragraph 45 records the
9 submission by the PCR's counsel that it should, as
10 a matter of policy, be possible to include deceased
11 persons in collective proceedings.
12 On the next page, {AUTH/28/17}, at paragraph 46, the
13 Tribunal agrees, but it says that the normal way of
14 bringing proceedings, where loss has been suffered by
15 a person who has died, is through those authorised to
16 represent the estate.
17 "We see no difficulty in principle in having a class
18 definition that includes the estates of deceased
19 persons. The rights to opt-out or opt-in can then be
20 exercised by the representatives of those estates."
21 That is not the position taken in Mr Merricks' draft
22 amendment, which simply treats deceased persons
23 themselves as individuals within the class.
24 So the answer in the tribunal's view is that
25 a collective action can include the claims vested in the

1 estates of deceased persons, to use the language that
2 Ms Ford employed on Monday, but the way that is done is
3 by including the personal representatives within the
4 class definition in the same way that such
5 representatives would bring individual proceedings.
6 Those are the eligible individual claimants and they
7 need to be specified as such in the class definition so
8 that they can exercise their rights to opt in or opt out
9 on behalf of the estate.
10 The class cannot simply include persons who suffered
11 loss, whether alive or dead and the problem for
12 Mr Merricks' proposed amended class definition was that
13 it did not include personal representatives. Of course
14 we say that the current McLaren definition has the same
15 problem.
16 At paragraph 47, the Tribunal identifies the two
17 distinct objections advanced by the respondent to the
18 amendments: first, that deceased persons cannot be class
19 members and, secondly, limitation. Those are then
20 considered in turn. Starting with the former objection,
21 paragraph 48 notes that, on the death of a person, any
22 cause of action vested in him survives for the benefit
23 of his estate. Paragraph 49 identifies the
24 well-established principle that a claim cannot be
25 brought in the name of a deceased individual.

1 As authority for that proposition, the Tribunal
2 cites the *Kimathi* case, the conclusion of which is set
3 out at the top of page 18, over the page, {AUTH/28/18}:
4 "Since the claim had been brought in the name of the
5 deceased individual personally and not in the name of
6 his personal representative, [it] was a nullity."
7 So that is authority for my first point.
8 The Tribunal then considers the implications of this
9 principle for collective proceedings under section 47B.
10 You see at paragraph 50 the submission of the PCR's
11 counsel that section 47B was different from other types
12 of claim. Under that provision, collective proceedings
13 are brought by the class representative and so it was
14 said that the class could contain deceased persons.
15 At paragraph 51, the Tribunal rejected that
16 submission and it states there that:
17 "In our view, the structure of the statutory
18 provisions is clear. Proceedings under [section] 47B
19 constitute a collection of claims which could be brought
20 under [section] 47A ... They are a bundle of claims
21 brought collectively by one representative and they
22 retain their identity as distinct claims."
23 The point is then developed by reference to various
24 provisions of section 47B and 47C, all of which are
25 premised on the collective proceedings constituting

1 a bundle of separate and individual claims.
2 At paragraph 53, {AUTH/28/19}, you see the Tribunal
3 notes that Lord Briggs accordingly referred to claims in
4 collective proceedings as ones which could, at least in
5 theory, be individually pursued by ordinary claim.
6 The upshot at paragraph 54 is that if an individual
7 claim in the name of a deceased person is a nullity, it
8 cannot be included in collective proceedings.
9 At paragraph 55, the Tribunal notes that the claim
10 could be made on behalf of the estates of deceased
11 persons by their personal representatives, but this was
12 not the form of amended class definition sought by
13 Mr Merricks. So, again, the Tribunal very clearly
14 regarded it as necessary to include the personal
15 representatives within the class definition. They are
16 the claimants for the bundle of claims being included.
17 They would exercise the statutory rights and they must
18 therefore be in the class definition.
19 At paragraphs 56 to 58, the Tribunal bolstered its
20 conclusion with a further point of construction. Very
21 briefly, class members must be domiciled and therefore
22 resident in the UK and a person that is dead cannot be
23 said to be resident in the UK. At the end of
24 paragraph 60, {AUTH/28/21}, the Tribunal gives its
25 overall conclusion on the question of whether the class

1 definition can include the deceased:

2 "We therefore conclude that although a class can
3 include the representatives of the estates of deceased
4 persons, it cannot simply include persons who are no
5 longer alive."

6 So, pausing there, this is obviously the basis for
7 my second point: collective proceedings cannot be
8 brought on behalf of deceased persons as individuals
9 within the class. Instead, it is absolutely clear
10 beyond doubt, on the basis of the tribunal's reasoning
11 in Merricks, that in order to cover the losses incurred
12 by such persons, the class must be defined to include
13 representatives of the estates.

14 The Tribunal held so in terms in the final sentence
15 of paragraph 60. The *Merricks* judgment is also, I say,
16 support for my third point. The current McLaren class
17 definition refers to persons who made relevant purchases
18 without distinction between the living and the dead and
19 it does not include personal representatives and it is
20 therefore deficient for the same reason as the *Merricks*
21 amended definition.

22 Ms Ford submitted to you that although the
23 definition does not include personal representatives, it
24 was nonetheless intended to capture the claims that vest
25 in the estates of deceased persons. She said that the

1 current McLaren class definition encompasses all persons
2 who made relevant purchases during the relevant period
3 and there is no exclusion for deceased persons. She
4 said that this distinguishes the present case from
5 *Merricks*, where the claim form originally excluded
6 deceased persons. But this is, with respect, the wrong
7 comparison.
8 As we have seen, the Tribunal in *Merricks* was not
9 focusing upon the original class definition that
10 Mr Merricks put forward. It was considering the
11 proposed amended definition, which included all persons
12 who had made relevant purchases, including those who had
13 died. The Tribunal found that this amended class
14 definition was not adequate to capture claims by the
15 estates of deceased persons. The class definition
16 identified the deceased persons themselves as class
17 members; it did not include the personal
18 representatives. Exactly the same is true of the PCR's
19 current class definition in this case.
20 Indeed, as *Merricks* shows us, even express reference
21 to deceased persons does not help, but the position is
22 a fortiori, whereas here the class definition refers to
23 persons who made relevant purchases without referring to
24 deceased persons at all.
25 The *Merricks* judgment also underlines the importance

1 of a class definition that is clear-cut. Claimants need
2 to know whether they are in or out so that they can
3 exercise their rights of opt-in or opt-out as required.
4 The claimants in respect of the estates of deceased
5 persons are personal representatives, not the deceased
6 persons themselves. If the PCR wished to claim in
7 respect of the estates of deceased persons, it needed to
8 identify them as part of the class but they are absent
9 from the current definition. No doubt in recognition of
10 this difficulty, the McLaren PCR has brought forward
11 a proposed amendment and that would include personal
12 representatives. I do not think we need to go to it.
13 You have seen what it does.
14 THE CHAIRWOMAN: Yes.
15 MR HOLMES: In our submission, the amendment is
16 impermissible for the reasons covered by my fourth and
17 fifth points. The fourth point is that this is an
18 amendment to add parties and the fifth point is that the
19 amendment is made after expiry of limitation and does
20 not fall within the permitted circumstances.
21 Again, it is helpful to see how those points are
22 addressed in *Merricks*, if you will permit me to go there
23 again. You will recall that the respondent raised two
24 objections to the proposed amendment in *Merricks*. The
25 first was the objection which we have just seen

1 concerning the inclusion of claims by deceased persons
2 and the second was an objection that the amendment
3 should be refused under the rules given that limitation
4 had expired. Although the tribunal's conclusion on the
5 first objection was sufficient to dispose of the
6 application to amend, it nonetheless considered the
7 latter objection, given that it had been fully argued.
8 So this is strictly speaking obiter but we still say
9 that the Tribunal should follow it.
10 If we could go to authorities bundle, tab 28 -- we
11 are there already -- and pick it up at page 22,
12 {AUTH/28/22}. In paragraph 62, the Tribunal notes that
13 limitation for claims based on the Commission's
14 *Mastercard* decision had long since expired by the time
15 of the application to amend and in the present case, it
16 is common ground that limitation has expired so the
17 following paragraphs are of direct relevance.
18 Paragraph 63 sets out Rules 32 and 38 of the
19 tribunal's Rules of Procedure. We say that Rule 38 is
20 the applicable Rule. It concerns additional parties and
21 you have seen how it works. Just to recap, at 38(1),
22 the Tribunal has a discretion to permit removal,
23 addition or substitution of parties.
24 Rule 38(6) provides that, after the expiry of the
25 relevant limitation period, parties may be added or

1 substituted only if two conditions are met. First, the
2 limitation period was current when the proceedings were
3 started -- there is no difficulty with that condition --
4 and, secondly, that the addition or substitution is
5 necessary.
6 Turning over the page, {AUTH/28/23}, you see that
7 Rule 38(7) defines exhaustively the circumstances in
8 which an addition or substitution will be necessary.
9 Three are identified and, as we understand it, Ms Ford
10 only relies on the third of those:
11 "... the original party has died or had a bankruptcy
12 order made against it and its interest or liability has
13 passed to the new party."
14 At paragraph 64 the Tribunal notes that Rule 38
15 applies to collective proceedings by virtue of Rule 74.
16 Paragraph 66, over the page, {AUTH/28/23}, explains that
17 there was a dispute between the parties as to whether
18 the proposed amendments fell under Rule 32 or Rule 38
19 concerning additional parties. The point is addressed
20 by the Tribunal in paragraph 67:
21 "In our judgment, the amendment sought ... cannot
22 come within Rule 32."
23 It seeks to add a large number of parties to the
24 class.
25 The Tribunal notes that Rules 32 and 38 mirror the

1 Civil Procedure Rules and that CPR 19.5, which is the
2 equivalent of Rule 38, carries into effect statutory
3 provisions as to limitation.
4 Over the page, {AUTH/28/24}, you see the point that,
5 under the CPR, "it is well-established that for an
6 amendment seeking to add a new party after the expiry of
7 a limitation period", the specific provisions of
8 Rule 19.5 trump 17.2 [sic].
9 Then the CAT's conclusion:
10 "We consider that the same approach must apply to
11 the CAT Rules. If it were otherwise, the restriction in
12 Rule 38(6) could be circumvented by reliance on
13 Rule 32."
14 At paragraph 69, the Tribunal applies this
15 conclusion in the specific context of the collective
16 proceedings regime:
17 "When applied to collective proceedings, we consider
18 that an amendment to add new members to the class after
19 a limitation period has expired is to be regarded as
20 involving the addition of new parties and so is governed
21 by Rule 38. This follows from the fact that each
22 represented person is regarded as having his or her own
23 claim, and that it is those claims which are being
24 pursued on a collective basis ..."
25 This is the point I have already rehearsed with you.

1 Turning on again to page 25 at paragraph 72,
2 {AUTH/28/25}, the Tribunal concludes that:
3 "Even if it were possible, contrary to our holding
4 above, to have claims by deceased persons included in
5 collective proceedings, the application to amend is made
6 after the limitation period ... and an amendment ... to
7 add persons who were deceased before the claim form was
8 issued cannot be allowed as it does not come within any
9 of the categories in Rule 38(7)."
10 THE CHAIRWOMAN: It is implicit within that, I take it, that
11 the claim form could be amended to cover -- to include
12 the estates of those who died after the claim was made?
13 MR HOLMES: Yes, Madam, yes. I think that is set out in the
14 next paragraph of the judgment, paragraph 73, where you
15 see as a coda that the Tribunal makes clear that it is
16 not dealing with the issue of persons who were alive
17 when the claim form was issued and have since died. So
18 that was why I made the qualification that I did in
19 response to your question, Madam.
20 THE CHAIRWOMAN: Yes, thank you.
21 MR HOLMES: So that was how the matter was dealt with in
22 *Merricks*.
23 Turning to the present case, we see that, as in
24 *Merricks*, the present proposal would also involve adding
25 a number of additional persons to the class, namely the

1 personal representatives of deceased persons. The PCR
2 argues that the amendment would not have the effect of
3 adding new class members to the claim because it has
4 always been clear that the PCR is seeking to pursue the
5 claims of persons who made relevant purchases but have
6 since died. As such, the PCR contends that Rule 38 is
7 not engaged.
8 Now, with respect, we say that objection really
9 cannot be right. Whatever may be said about the
10 original class definition, it clearly does not include
11 the personal representatives of deceased persons'
12 estates and that is because representatives of deceased
13 persons' estates are not themselves persons who, during
14 the relevant period, purchased or financed a new vehicle
15 or new lease vehicle other than an excluded vehicle.
16 Now, obviously, a personal representative might fall
17 within the class by happenstance --
18 THE CHAIRWOMAN: But that is in a different capacity.
19 MR HOLMES: In a different capacity, you have my point, yes.
20 In this respect we say that the PCR's proposed
21 amendment is therefore analogous to the attempt to add
22 deceased persons to the class in *Merricks*. It is an
23 attempt to add what are potentially a considerable
24 number of new parties and so the application falls to be
25 considered under Rule 38 and not Rule 32.

1 But even if that is wrong and putting the PCR's
2 argument at its highest, what the PCR is saying is that
3 it has always been clear that deceased persons' claims
4 were included in the class definition and that is an
5 argument at best that its proposed amendments involve
6 the substitution of new parties; that is to say
7 substituting personal representatives for the deceased
8 persons whose claims are a nullity.
9 We have seen from Rule 38 that the addition and
10 substitution of new parties are subject to precisely the
11 same requirements in Rule 38, so, in my submission,
12 Rule 38 is on any view the governing Rule, as the
13 Tribunal held in *Merricks*.
14 My fifth and final point concerns the application of
15 that Rule. It is common ground that limitation has
16 expired, as was the case also in *Merricks*. The
17 applicable rules in this case are therefore Rules 38(6)
18 and 38(7). We have seen that 38(6) requires that the
19 addition of a new party is necessary, and "necessary" is
20 defined exhaustively. The only requirement which is
21 raised by the PCR is that the original party has died
22 and its interest or liability has passed on to a new
23 party. But we say that here the PCR's argument trades
24 on a fallacy. The fallacy is to postulate the existence
25 of an original party who has died, but the only

1 conceivable candidate for such a party is the person who
2 made a relevant purchase but then died before the
3 collective proceedings were commenced.
4 As we saw from the *Merricks* judgment in reliance on
5 *Kimathi*, a claim in the name of a deceased person is
6 a nullity. A nullity means that the claim in the name
7 of a deceased person simply never existed. Just to
8 illustrate that point, could we very briefly turn up
9 a case you have not yet been shown? It is the case of
10 In *re Workvale* and the reference is authorities bundle,
11 tab 5.1, {AUTH/5.1/1}.
12 You see from the first page that it is a Court of
13 Appeal authority and this is a claim against a dissolved
14 company. It concerns an employee who had suffered
15 injuries at work and sought to sue the company that
16 employed him. Lord Justice Scott gave the main judgment
17 and he sets out the facts.
18 If we turn to page 3 of the bundle numbering,
19 {AUTH/5.1/3}, 418 of the report, Lord Scott explains at
20 D that the defendant company had become dissolved --
21 became dissolved. Then you see, at F, the writ was
22 issued subsequently, so proceedings began after
23 dissolution of the company.
24 At F, you see the consequence: the writ was
25 therefore a nullity as the named defendant did not

1 exist. It is the same principle applied to defunct
2 companies as also applies to deceased persons.
3 Now, the point that arose on the appeal is not
4 material. It was about whether the company could be
5 restored to the register for the purposes of the claim,
6 but the concurring judgment of Lord Justice Stocker
7 contains a helpful short explanation of what is meant
8 for an action to be a nullity.
9 If you turn to page 11 of the bundle,
10 {AUTH/5.1/11} -- that is 426 of the report -- you find
11 his judgment at A and B. He says:
12 "... the only action that has been brought by the
13 plaintiff was a nullity from the start [you see that in
14 the fourth line]. He purported to sue a non-existent
15 company. Therefore [this is the passage we rely upon]
16 there never was an action in existence, and the
17 reasoning of their Lordships in [another case] ... does
18 not arise in this case."
19 So we say that the same conclusion applies in this
20 case. As I think the PCR must accept, a claim by
21 a deceased person is also a nullity and just as with
22 a claim against a defunct company, such a claim was
23 never in existence.
24 It follows that a person who died before the
25 collective proceedings were launched cannot be an

1 original party under Rule 38(7)(c) because there can
2 never have been any claim by such a person. So we say
3 Rule 38(7)(c) does not apply and what the Rule in fact
4 covers is a different situation in which a person dies
5 after proceedings are brought and in such a case the
6 deceased person was an original party to a valid claim
7 and the representative of the deceased person's estate
8 may be added by application of the Rule, and so we
9 accept that the amendment --
10 THE CHAIRWOMAN: And/or was substituted presumably.
11 MR HOLMES: And/or -- or equally substituted, yes. But that
12 is not the case where the person is already deceased by
13 the time the proceedings were commenced.
14 I do not think I need to address you on 38(7)(a) and
15 (b) because neither of those is relied upon, but we say
16 they are equally inapplicable.
17 So, in conclusion on the first topic, we say that
18 the current class definition cannot cover claims on
19 behalf of persons deceased when the claim form was
20 issued and the amendment to allow the claims of personal
21 representatives to be included is not permissible under
22 the rules.
23 Now, if the Tribunal agrees with those submissions,
24 there is then a methodological gap in the current claim
25 form because there is no methodology to explain how

1 purchases by deceased persons are to be removed from the
2 aggregate damages calculation. We propose that the
3 steps needed to address that lacuna should be considered
4 as a consequential matter if the Tribunal rules in our
5 favour on the issue.
6 So that brings me to the second topic: compound
7 interest. I can be very brief about this. The issue
8 here is whether the PCR's claim for compound interest
9 damages on behalf of a subset of the class should be
10 certified as a common issue. You have seen the way in
11 which the issue crystallised. In both the original and
12 amended claim forms the PCR included issues relating to
13 compound interest in its list of common issues, but, by
14 its own admission, the expert report accompanying the
15 claim form of Mr Robinson did not include any
16 methodology for addressing compound interest.
17 The view of the PCR was that this was premature
18 before the issues of primary loss are resolved.
19 Instead, Mr Robinson simply provided a worked example by
20 way of illustration. All that the PCR said in the reply
21 was that compound interest may well be capable of
22 resolution in due course on a common basis across the
23 class or at least by way of sub-classes. For your note,
24 you see that in the original claim form and the amended
25 claim form at page 32, paragraph 59.5, but I do not

1 propose to go there.
2 Now, in the reply, the PCR finessed its position on
3 compound interest in view of the responses, which said
4 that this just did not wash, and the tribunal's judgment
5 on the compound issue in the *Merricks* remittal judgment.
6 If we could quickly look at the reply, please -- it
7 is bundle {A/17} -- and turn to page 66, {A/17/66}. If
8 you look at paragraph 161, you see that the PCR signals
9 its intention to narrow its claim for compound interest
10 to those who actually purchased on finance or through --
11 either through a PCP or a hire purchase arrangement.
12 Reference is made to the supplementary industry
13 report which is said to set out a methodology. You see
14 at the end of the paragraph that it is said that this
15 will allow interest to be determined -- sorry, at the
16 end of 162, "with reasonable accuracy". As you will
17 have seen from our skeleton argument, the respondents'
18 position is that Mr Robinson's proposed methodology does
19 not meet the *Pro-Sys* standard, it is not plausible and
20 it is not credible.
21 I do not think that I need to take you to how the
22 matter was dealt with in *Merricks*. I am sure you are
23 well familiar, Madam, with *Sempra Metals* and the need
24 for an individualised assessment based on evidence.
25 THE CHAIRWOMAN: Yes, nevertheless, can I just clarify?

1 MR HOLMES: Yes.

2 THE CHAIRWOMAN: Your criticism is of the methodology as not
3 meeting the *Pro-Sys* standard --

4 MR HOLMES: Yes.

5 THE CHAIRWOMAN: -- not as to -- maybe it is -- as to
6 whether it is a common or capable of being a common
7 issue as such. You criticise the way the methodology is
8 proposed, for example, not taking account of capital
9 repayments.

10 MR HOLMES: Yes. So just as in *Merricks*, the methodology
11 was found to be flawed and not to meet the *Pro-Sys*
12 standard and, for that reason, the Tribunal certified
13 the claim form -- the claims in the claim form as
14 eligible for inclusion in collective proceedings
15 excluding the claim for compound interest. So also we
16 say that the compound interest methodology here does not
17 meet the *Pro-Sys* standard and so the claims for compound
18 interest should similarly be excluded from the
19 certification of the claims in the claim form as
20 eligible for inclusion.

21 THE CHAIRWOMAN: It is quite different on the facts, though,
22 because the complaint in *Merricks* was that you really
23 could not tell whether someone had borrowed the relevant
24 amount or reduced borrowings or whatever it was, whereas
25 here, the proposed restriction is to those who took out

1 financing and probably did incur compound interest, so
2 your objections are a lot more detailed, if I may put it
3 that way.
4 MR HOLMES: I fully accept that. The objection that we take
5 is not the same objection to *Merricks* although the legal
6 analysis which underpins it is the same. It is an
7 application of the *Pro-Sys* standard as a basis for
8 challenging the methodology. There was a methodology
9 advanced in *Merricks* but that was found to be wanting
10 for the reason that you have identified. We have
11 identified other reasons why the -- if one can call it
12 that -- the methodology advanced by Mr Robinson does not
13 pass muster here.
14 If I could just briefly, in the few remaining
15 moments I have, explain the objections that we take to
16 the methodology. It is useful I think just briefly to
17 remind ourselves of what Mr Robinson refers to as his
18 methodology. It is at bundle B, tab 110, beginning at
19 page 45, {B/110/45}. At paragraph 6.9 you see
20 Mr Robinson refers to the methodology he has been
21 instructed to set out. At 6.10 he refers to the data
22 that would need to be gathered:
23 "The proportion of vehicles which were purchased
24 using finance ..."
25 He identifies a source for that.

1 Secondly:
2 "The average period over which a customer held the
3 vehicle under a financing arrangement, such as a PCP."
4 He refers to the PCR's industry experts, saying it
5 is "typically between three and five years". Then "the
6 average rate of interest applied for new car finance".
7 The proposed approach for working out compound
8 interest for the subset of class members who purchased
9 vehicles on finance is then described in very brief
10 terms at 6.11 and it involves using an "average rate of
11 interest for new vehicle finance, for a period
12 commensurate with the average length of a car finance
13 arrangement", {B/110/46}. We say that this is a very
14 crude approach indeed and, in our submission, it is just
15 too crude.
16 THE CHAIRWOMAN: Sorry. I think you may need to go to the
17 next page.
18 MR HOLMES: Sorry, did I give you a wrong reference?
19 THE CHAIRWOMAN: No, it is all right. We just needed to
20 scroll on.
21 MR HOLMES: Is that the top of the page?
22 THE CHAIRWOMAN: Top of page 46, {B/110/46}.
23 MR HOLMES: Yes, so you see:
24 "Calculate compound interest using the average rate
25 of interest for new vehicle finance, for a period

1 commensurate with the average length of a car finance
2 arrangement ..."
3 The reason why we say that is too crude is on the
4 basis of three specific objections. For your note,
5 those are set out in paragraphs 90 to 93 of the
6 skeleton. The first of these is that Mr Robinson states
7 that he will deploy an average rate of interest applied
8 for new car finance and apply this figure reflecting the
9 average duration of a financing agreement. It goes
10 without saying that an approach to estimate compound
11 interest damages that relies on average interest rate
12 and average duration will only result in a realistic
13 estimate of aggregate damages if the figures for the
14 average interest rate and for the duration are
15 themselves credible, but one looks in vain in the
16 supplementary report for any indication of how these
17 average figures will be estimated, let alone accurately
18 so, nor is this addressed anywhere in the supplementary
19 industry experts' report.
20 As we note in paragraph 90 of our skeleton, class
21 members will have financed their cars on very different
22 terms, including different and indeed variable interest
23 rates, and the available terms will depend in the normal
24 way on a variety of personal circumstances, including
25 income, credit history, credit rating, other debts,

1 mortgages. We refer in paragraph 90 to some online
2 materials indicating that the APRs can vary from as
3 little as 3.2% to as high as 12.1%.
4 THE CHAIRWOMAN: Yes. I mean, to some extent you might say
5 this is a lack of detail, for example, of whether the
6 average is some sort of, you know, weighted average.
7 There is --
8 MR HOLMES: We simply do not know because there is no
9 description at all as to how the average would be
10 calculated or what sources of information would be used
11 to compile it or whether they exist. That is in
12 striking contrast, of course, to those areas where
13 information is specifically identified.
14 There is a vague reference in the reply to using
15 direct evidence from the industry experts and
16 documentary evidence such as sample financing terms, but
17 the industry experts say nothing about it and they have
18 given evidence in a supplemental report and there is no
19 indication of where the documentary evidence is to be
20 found or how it will be obtained. We say that this is
21 just not adequate.
22 THE CHAIRWOMAN: Okay. So you say there is not enough
23 information about what the data source is --
24 MR HOLMES: Yes, the Tribunal --
25 THE CHAIRWOMAN: -- for the methodology?

1 MR HOLMES: Indeed, Madam. The Tribunal is entitled to
2 a credible and plausible methodology to be put forward
3 at this stage which explains how the aggregate amount of
4 compound interest will be established. You will recall
5 the passage from the *Merricks* remittal judgment that
6 Mr Singla took you to yesterday, which made the point
7 that it is at the CPO stage that one needs to assess
8 methodology and it is not enough to say that something
9 may come up.
10 Secondly, the proposed methodology applies the same
11 approach to purchases made by way of personal contract
12 purchase and hire purchase arrangements. The PCR's
13 industry expert evidence explains that these are the two
14 separate ways in which finance is ordinarily provided on
15 car purchases. Now, the difference between those -- you
16 may well be familiar with this already, Madam -- but in
17 hire purchase arrangements, the way it works is there is
18 an upfront deposit and then a series of monthly payments
19 over an agreed term, with the payments covering the
20 price of the vehicle and the interest by the end of the
21 term. The vehicle is then fully paid off.
22 With PCP, the difference is you start with an
23 upfront payment typically, you then pay instalments, but
24 at the end of the term you have the chance either to
25 return the vehicle or to make a further payment,

1 sometimes known as a "balloon payment", to purchase the
2 vehicle outright. What this means is that the amount of
3 any compound interest actually paid by someone who
4 purchases a vehicle on finance will depend on the
5 particular financing arrangements selected because
6 obviously they will pay off on quite different
7 schedules.
8 Mr Robinson's proposed approach of simply looking at
9 the average interest rate and the average length of
10 a car finance arrangement simply does not grapple with
11 that distinction, which is set out in the PCR's own
12 evidence, although it will affect the amount of interest
13 payable over the life of the arrangement.
14 So we say, again, that the methodology simply does
15 not include any way of approximating the amount of
16 compound interest actually paid by the subset of class
17 members that are now subject to the claim.
18 THE CHAIRWOMAN: If your criticisms were found to have
19 merit, do you say that the only thing we can do is cut
20 out this bit of the claim because the proposed class
21 representative has not produced the methodology, rather
22 than saying, "Well, as long as the methodology did the
23 following, then ..."? You are really saying we cannot
24 do the second of those?
25 MR HOLMES: I think my submission is that it is for the PCR,

1 which is advancing the claim, to bring forward and
2 explain the methodology that it proposes to use.
3 The third issue we have identified is that capital
4 will be repaid throughout the lifetime of a PCP such
5 that the monthly interest payments will decrease.
6 THE CHAIRWOMAN: Does that not depend on whether --
7 I thought that was the point you were actually making
8 about hire purchase versus PCP, those profiles change.
9 MR HOLMES: But I think the calculation will reflect the
10 fact that the capital -- so it will be calculated at the
11 outset, but reflect the diminishing --
12 THE CHAIRWOMAN: Yes, I'm not sure it is a separate point.
13 In HP you are paying up capital and interest as you go
14 along, to be clear, are you not?
15 MR HOLMES: Yes.
16 THE CHAIRWOMAN: PCP, you are paying more to rent the car?
17 MR HOLMES: Yes, indeed. I think it is a different way of
18 putting the same point and, for the same reason, it
19 means that, as I have said, the amount of interest
20 actually paid will not be reflected by the methodology.
21 We entirely accept, of course, that this is
22 a context in which the use of a broad axe is
23 appropriate. Lord Briggs noted in the *Merricks*
24 Supreme Court judgment at paragraph 48 that resort to
25 informed guesswork may be appropriate in this context.

1 But we say the problem with Mr Robinson's proposed
2 methodology is that he has not provided the Tribunal
3 with any confidence that it will result in an estimate
4 of the aggregate compound interest damages that is
5 informed at all. All he has said is that he will apply
6 an average compound interest rate to the average
7 duration of a financing agreement but without any
8 explanation of how he will arrive at a reasonably
9 accurate estimate. Without that explanation, we say the
10 methodology cannot be said to be credible or plausible.
11 On that basis, we would invite the Tribunal not to
12 certify the claim for compound interest damages as
13 eligible for inclusion in the same way that was done in
14 *Merricks*.
15 Subject to any questions, I have one final point on
16 something else.
17 DR BISHOP: I have one question.
18 MR HOLMES: Yes, of course.
19 DR BISHOP: Mr Robinson, in preparing his report, may not
20 even have adverted to the difference between hire
21 purchase on one hand and PCP on the other, but there is
22 nothing to prevent the point being raised if proceedings
23 were to go forward and by fairly simple means, looking
24 at the difference in amounts paid by these two classes
25 of people and coming up with some approximation.

1 I mean, this is a -- the document is an illustration of
2 how they would go about it. It is not a final
3 determination.
4 MR HOLMES: If the gating function of this Tribunal is to
5 mean something, in my submission it must mean that
6 a methodology is brought forward by the PCR that enables
7 one to understand not merely that a methodology might be
8 provided at a future stage in a particular form but what
9 methodology is specifically proposed. We say that this
10 really does not pass muster. It is not a credible or
11 plausible methodology. I think it is ground that was
12 traversed yesterday.
13 The final point is simply in relation to the
14 procedural objection which was taken by the PCR's
15 counsel.
16 THE CHAIRWOMAN: Yes.
17 MR HOLMES: Now, you have our submission that that was
18 a purely formal matter, but simply to clear the point
19 off the table, we do have today --
20 THE CHAIRWOMAN: I thought a piece of paper might emerge.
21 MR HOLMES: Yes -- a draft order and a statement of belief
22 signed by the representatives of all of the respondents
23 here present. So, if I may, I will hand that up and
24 I think a copy is also available to be distributed to
25 others in the room.

1 THE CHAIRWOMAN: Okay. Well, those can be passed on to us
2 when we retire for the short adjournment. So 2 o'clock.
3 MR HOLMES: I am grateful.
4 (1.06 pm)
5 (The short adjournment)
6 (2.00 pm)
7 Reply submissions by MS FORD
8 MS FORD: Madam Chair, members of the Tribunal, if the
9 Tribunal casts its mind back to Monday evening,
10 Ms Demetriou dealt with the question of whether the
11 methodology should focus on the delivery charge or the
12 overall price of the car. She first made the submission
13 that economic theory suggests that pass-on is likely
14 where the overcharge affects all industry participants
15 but is unlikely where the overcharge does not affect all
16 industry participants.
17 She pointed to the fact that in this case only 13%
18 of vehicles registered in the UK during the relevant
19 period were manufactured outside the UK and Europe and
20 so she made the submission that 87% of cars in the UK
21 incurred no shipping overcharge and that that made
22 pass-on unlikely.
23 The reference she gave you for those statistics was
24 in Mr Robinson's first report, paragraph 7.18(b), and it
25 is {B/5/68}, please.

1 The paragraph in Mr Robinson's report that
2 Ms Demetriou was referring to was 7.18(b). It says:
3 "38 brands are included in my damages calculation
4 (i.e. at least some of their vehicles were manufactured
5 outside of the UK or Europe during the Relevant
6 Period)."
7 Then going over the page, {B/5/69}:
8 "In total, 13% of all vehicles registered in the UK
9 during the Relevant Period were manufactured outside of
10 the UK and Europe [that is the statistic that
11 Ms Demetriou relies on, but then he goes on to say], but
12 this had an impact on the Delivery Charge of 81.4% of
13 all vehicles registered in the UK during the Relevant
14 Period ..."
15 The reason for that, as he explains, is that:
16 "... NSCs which ship at least some of their vehicles
17 spread shipping costs across all vehicles sold as part
18 of a homogenous Delivery Charge."
19 That is based on the industry experts' evidence.
20 Ms Demetriou also showed you the list of excluded
21 brands that never actually shipped continentally and she
22 made the submission that that list included some major
23 brands, but we can see from Mr Robinson's figures that
24 the excluded brands only accounted for 18.6% of
25 registered vehicles.

1 So, in reality, we have an overcharge which covered
2 81.4% of the market and Ms Demetriou's economic theory
3 suggests that pass-on is likely in that scenario. In
4 our submission, that is entirely consistent with the
5 evidence of the industry experts that pass-on to the
6 class is standard in the industry.
7 Ms Demetriou then made the submission that there is
8 a fundamental flaw in our methodology, that it focuses
9 on delivery charges rather than on the price of the car
10 as a whole, and it is not obvious to us the basis on
11 which that submission is made. There is certainly no
12 factual evidence in support of it and there is no expert
13 evidence to that effect and nor was there any legal
14 authority in support of that proposition.
15 As we understand the submission that is being made,
16 it is said that it must be the case because the customer
17 bought the car, not the delivery charge in isolation,
18 so, because the customer bought the car, the analysis
19 has to focus on the price of the car and not on the
20 delivery charge. But, in our submission, it is
21 certainly not self-evident that that would follow.
22 Just to give an example, let us assume that you go
23 to a shop and you buy some lunch, and you buy
24 a sandwich, a bag of crisps and a banana, and each item
25 that you buy is separately itemised on your receipt,

1 just in the way that a delivery charge is often
2 separately itemised on the evidence of the industry
3 experts. Assume that there is a cartel in bananas and
4 the economist is saying, "How do I go about calculating
5 the overcharge on a banana?", does it means that the
6 economist has to analyse the total price of your lunch
7 in order to determine how much of an overcharge there
8 was on the banana? In my submission, self-evidently
9 not.
10 THE CHAIRWOMAN: Well, that is different from a car, where
11 you are buying a single car.
12 MS FORD: My Lady, absolutely. It is clear --
13 THE CHAIRWOMAN: I am not buying the seats separately.
14 MS FORD: I fully accept that this is not a perfect analogy,
15 not least because you can buy a banana on its own but
16 you do not buy a delivery charge on its own.
17 MR HOSKINS: It might be a meal deal!
18 MS FORD: We will come on to deal with meal deals!
19 THE CHAIRWOMAN: I think you are being too (inaudible),
20 Mr Hoskins.
21 MS FORD: The fact, Madam, that you make this point, "Well,
22 there is a factual difference there", you say, "because
23 you do not buy them separately in the same way", that,
24 in my submission, is illustrative of an important point,
25 which is when you are deciding do I look at the whole

1 that the customer bought or do I look at a sub-item,
2 a sub-category, something which is separately itemised,
3 it is an inherently fact-sensitive enquiry. You have to
4 ask yourself: well, how are these products sold and how
5 does the consumer buy them?
6 There will be a spectrum of scenarios and so the
7 lunch example, which is a series of severable items that
8 you can buy separately or together, that is at one end
9 of the spectrum, and then you might have a single
10 product such as, say, a laptop at the other end, where
11 clearly you would not separately buy one of the chips in
12 the laptop. In our submission, the situation of a car
13 when you have a separate delivery charge which is
14 separately itemised falls at a certain point between
15 those two on the spectrum but it is certainly not to be
16 presumed that you automatically look at the price of the
17 car and not the price of the separately itemised
18 delivery charge.
19 Now, I pointed out that Ms Demetriou did not advance
20 any legal authority in support of her case that what you
21 have to look at is the car, but, in fact, one of the
22 cases that Ms Demetriou drew your attention to
23 yesterday, the *Sainsbury's* Supreme Court case, is
24 actually supportive of our position on this point. It
25 is in authorities bundle, tab 24, starting at page 53,

1 please, {AUTH/24/53}. If we start looking at
2 paragraph 192, which I think is at the bottom, you can
3 see there the Supreme Court say:
4 "The merchants' claims are for the added costs which
5 they have incurred as a result of the MSC [merchant
6 service charge], which the acquiring banks have charged
7 them, being larger than it would have been if there had
8 been no breach of competition law."
9 If we go on to 193 on the following page,10
{AUTH/24/54}:
11 "In each case the merchants' primary claim of
12 damages is for the pecuniary loss which has resulted
13 directly from the breach of competition law by the
14 operators of the schemes. That direct loss is
15 prima facie measured by the extent of the overcharge
16 in the MSC."
17 Just pausing there, we would say similarly, if you
18 ask "What is the direct loss in this case?", it is
19 prima facie measured by the extent of the overcharge in
20 the delivery charge.
21 But there was in *Sainsbury's* then a debate --
22 THE CHAIRWOMAN: Sorry, but in *Sainsbury's* there was no
23 dispute that that overcharge was passed to *Sainsbury's*,
24 as I understand it.
25 MS FORD: Madam, I do not know whether that is right or not,

1 but it does not matter for my purposes. What I was
2 going to come on to say is there was a debate about
3 whether you focus on the merchant service charge as the
4 direct loss or whether you have to look wider.
5 THE CHAIRWOMAN: Well, that was a downstream argument, was
6 it not?
7 MS FORD: Yes. So paragraph 198 -- I think it is on the
8 same page -- you see there:
9 "The question then arises as to whether the
10 merchants are entitled to claim as the prima facie
11 measure of their loss the overcharge in the MSC which
12 results from the MIF. The merchants say that they are
13 so entitled because they have had to pay out more than
14 they would have But-For the anti-competitive practices
15 of the schemes and so have suffered pecuniary loss. On
16 the other hand, Visa [argued that it is a claim] ... for
17 pure economic loss and must be claims for the loss of
18 the profit which they would have enjoyed But-For the
19 alleged wrongful act of the defendants."
20 So, in my submission, Visa's argument there is very
21 similar to the sort of argument which is being run here
22 because they are saying, "Yes, we see that you have
23 suffered a prima facie overcharge, but you cannot just
24 point to that overcharge as a measure of your loss. You
25 have to show that you were less profitable overall and

1 you might have been equally profitable in the
2 counterfactual".
3 The Supreme Court dismissed that argument. If we
4 look at 199, {AUTH/24/55}, they say:
5 "We are satisfied that the merchants are correct in
6 their submissions that they are entitled to plead as the
7 prima facie measure of their loss the pecuniary loss
8 measured by the overcharge in the MSC and that they do
9 not have to plead and prove a consequential loss of
10 profit. There are many circumstances, which are not
11 confined to damage to property, in which the law allows
12 the recovery of damages without regard to the claimant's
13 profitability."
14 So pausing there, they are saying you do not -- you
15 identify the direct loss, you do not have to look at
16 a wider question of whether you were profitable or not
17 profitable.
18 If we look at the authorities that the Supreme Court
19 then goes on to cite in support of that, one of them is
20 the *Fulton Shipping* case, which we have been looking at
21 in these proceedings. So it is paragraph 202:
22 "Where charterers of a vessel redelivered the vessel
23 two years before the contractual date on which the
24 charterparty ended, the court accepted the owner's claim
25 for loss of profits from that charterparty during the

1 remaining two years of the charterparty without having
2 regard to the overall profitability of the claimant ..."
3 We have looked repeatedly at *Fulton Shipping*. The
4 Supreme Court is citing that for the proposition that
5 you look at the direct cause of the damage and you do
6 not have to look at overall profitability.
7 THE CHAIRWOMAN: Yes, but it is -- the facts in *Sainsbury's*,
8 I repeat, were very different. As I understand it,
9 there was not really -- or this debate, at least, does
10 not relate to the overcharge being passed to
11 Sainsbury's; rather, the argument being made by Visa was
12 that Sainsbury's had to effectively show it had an
13 impact on profits because it did not pass it on or deal
14 with it in some other way, like squeezing another
15 supplier.
16 MS FORD: That is entirely fair. That is exactly what the
17 debate is. It is analogous in my submission because you
18 have a prima facie measure of loss and then you have an
19 enquiry about whether or not your overall profitability
20 has to be set off against that loss.
21 THE CHAIRWOMAN: But it is different in the sense that
22 Ms Demetriou points out, that the car buyer ultimately
23 enters into one contract. They buy the car with an
24 invoice with some items on it, possibly. That is
25 different to this, which is looking at Sainsbury's wider

1 position. *Fulton*, equally, is about what the court
2 found to be an independent transaction which had the
3 effect of reducing loss. It was whether that could be
4 taken into account.
5 MS FORD: Madam, that is all entirely correct. What it
6 demonstrates, in my submission, is that it is
7 a fact-sensitive exercise to determine in any particular
8 case what is the prima facie measure of the loss. It
9 cannot be a decision that is made in isolation.
10 Just to complete the treatment of this case, the
11 Supreme Court goes on then to say at paragraph 206,
12 {AUTH/24/56}, that once you have suffered a prima facie
13 overcharge, if you then take steps to reduce your loss,
14 that is considered by way of a question of mitigation.
15 In that context, if we go on down to 213 on page 57,
16 {AUTH/24/57}, once again you have the citation of
17 *Fulton Shipping* for that proposition and the context of
18 a sort of downstream enquiry, as to whether, having
19 suffered an overcharge, there is any causal connection
20 between some steps you might have taken which might
21 mitigate your loss. That is consistent, Madam, with the
22 point you put to me when I was opening, that it is
23 actually analogous to a question of mitigation.
24 So, in my submission, *Sainsbury's* is helpful to us
25 in the sense that it identifies a prima facie loss in

1 a particular charge and then it says that you then have
2 an enquiry about whether surrounding circumstances can
3 or cannot be taken into account to set off, mitigate,
4 minimise that loss. The governing principle, we can see
5 here from 213, is whether there is a causal link between
6 the things which are said to then mitigate or set off or
7 ameliorate the loss.
8 Where does that leave the Tribunal for the purposes
9 of this application? In my submission, the Tribunal is
10 presented with two competing methodologies. The
11 Tribunal has the PCR's methodology and it is based on
12 the industry experts and it focuses on the delivery
13 charge. It has also been told by the respondents that
14 there is an alternative methodology --
15 THE CHAIRWOMAN: Well, I do not know if they go that far or
16 need to go that far, but what do you say they say?
17 MS FORD: In my submission, they say that there is an
18 alternative methodology which focuses on the price of
19 the car. I was going to go on to make the point that
20 that methodology is not presently based on any evidence.
21 It is advanced on the basis of submission only. I say
22 that the question for the Tribunal under the *Pro-Sys*
23 test is whether our methodology, the methodology we are
24 seeking to advance, establishes some basis in fact for
25 the commonality requirement that is not purely

1 theoretical but grounded in the facts of the particular
2 case in question. I have taken the wording from the way
3 in which it was expressed in *Trains* and obviously also
4 in the *Pro-Sys* case itself.
5 THE CHAIRWOMAN: In *Pro-Sys*, yes.
6 MS FORD: I make the submission that clearly our methodology
7 does have some basis in fact. It is firmly based on the
8 industry experts' evidence. I say in that circumstance
9 is it appropriate for the Tribunal to determine now
10 which of two competing methodologies is preferable?
11 Is it appropriate for the Tribunal to say that the PCR's
12 methodology is wrong and the methodology which has only
13 so far even been advanced by way of submission is
14 correct?
15 MR SINGLA: Madam, I hesitate to interrupt, but she has now
16 said this twice. I showed you the RBB report yesterday
17 so we have put in evidence before the Tribunal as to how
18 this exercise should properly be carried out.
19 MS FORD: My Lady, that was not a matter that Ms Demetriou
20 relied on in support of her submission that the correct
21 approach is to focus on the car.
22 MS DEMETRIOU: Well, Madam, we have not put in evidence but
23 I am not submitting that there is -- I do not have to
24 submit that there is some other methodology that is more
25 appropriate and I hope that was clear from my

1 submissions.
2 THE CHAIRWOMAN: No, no, I think I have clarified that.
3 Just for my benefit, the RBB evidence was put in on
4 behalf of your clients --
5 MR SINGLA: It was put in on behalf of KK. We agree with
6 Ms Demetriou, it is not for us to say "This is how you
7 should do it". The RBB report, however, was evidence
8 from an expert in terms of an approach or the factors
9 that need to be investigated by any methodology.
10 THE CHAIRWOMAN: Thank you.
11 Yes, it cannot be that controversial that we need to
12 determine whether your -- everyone accepts that the
13 *Pro-Sys* test applies, so we need to apply that test to
14 the methodology that the PCR is actually putting
15 forward.
16 MS FORD: Madam, I am glad to hear it is not controversial
17 because my understanding is that the supposedly
18 hard-edged point of law that Ms Demetriou is advocating
19 is to say our approach is definitively wrong --
20 THE CHAIRWOMAN: Yes, yes, exactly. So you do need to
21 answer the point that she says is a point of law. She
22 says that *Fulton* is irrelevant, and I have to say I can
23 see why she says it, for the reasons I referred to
24 earlier, including the way it is referred to in
25 *Sainsbury's*, so you need to answer that point and

1 explain to us why that is not fatal to certification.
2 MS FORD: My Lady, the answer is that we do not accept that
3 it is a hard-edged question of law. In my submission,
4 the question of whether you should look at the price of
5 the car or the delivery charge is highly fact-sensitive
6 and it involves an enquiry about how cars are sold and
7 an enquiry about how consumers buy them. It would be,
8 in my submission, clearly inappropriate for the Tribunal
9 to determine at this stage, for the purposes of
10 certification, that the focus must be on the price of
11 the car and the focus cannot be on the delivery charge.
12 THE CHAIRWOMAN: Can I make sure that we have really
13 understood that because, you know, the starting point is
14 you have bought the car. Are you making a point by
15 reference to the particular way in which delivery
16 charges are dealt with as you say your industry experts
17 say is the case, in other words -- and summarising,
18 probably getting it wrong -- but essentially delivery
19 charges are in essence separated out and passed down the
20 chain in a way that the copper wiring is not. Is that
21 the nub of the point?
22 MS FORD: Madam, that is it. We have industry expert
23 evidence that these are a separately identifiable charge
24 to which an overcharge has been applied. In those
25 circumstances, in our submission, it is not possible for

1 the Tribunal to dismiss that evidence and find against
2 us that actually you had to look at the price of
3 the car.
4 THE CHAIRWOMAN: There are two specific angles -- apologies.
5 You are probably coming on to this -- but Ms Demetriou
6 looked at two different points, although they come back
7 to much the same thing. One is the level of discount
8 that the buyer might in fact negotiate and whether it is
9 right or wrong that that is always on other bits of the
10 invoice, if you like, rather than the delivery charge.
11 The other, which I think she was saying your evidence
12 does not address, is whether the OEMs or NSCs are
13 setting list -- I suppose it is the NSCs -- are setting
14 list prices in a way that would take account of high
15 delivery charges because of it being such a fiercely
16 competitive market.
17 Now, she was making both of those points, as
18 I understand it, in the context of the "it is a single
19 price, this is a hard-edged point of law", so we
20 definitely want to understand what you say to both of
21 those slightly different points.
22 MS FORD: My Lady, she does make both of those points. Both
23 of them occur, if one can say downstream, at the stage
24 of the -- once you have already have an overcharge
25 which, on the basis of our industry evidence, is then

1 passed down the chain. They then focus on the point at
2 which the car is bought, and so, in my submission, both
3 of the points essentially assume the issue which is now
4 claimed to be a hard-edged point of law because they
5 assume that what you have to look at is profitability at
6 the point when the car is bought and not whether the
7 overcharge is passed down in the form of delivery
8 charge. That is the case for both of those points.
9 So just to make that point good, one of the ways in
10 which Ms Demetriou elaborated on her point was to say,
11 "Well, at trial -- our case at trial is going to be that
12 cars are sold in competition with other cars and that
13 that is likely to affect the overall price that is paid
14 for the car". That is going to be their case at trial.
15 Then she said, "Well, the flaw in the PCR's methodology
16 is that it does not permit that question to be
17 examined". That was her submission.
18 We do not accept that that is a flaw in our
19 methodology. We say the defendants can advance whatever
20 case they choose, including some kind of regression
21 analysis focusing on the overall price paid for the car,
22 and it is absolutely commonplace that at trial the
23 Tribunal might be faced with competing methodologies and
24 they might take different approaches.
25 THE CHAIRWOMAN: So you are suggesting that the defendants

1 could say, "Well, actually, we have done our regression
2 analysis by reference to the overall price. That is
3 a better analysis -- I mean, you should dismiss the
4 claim altogether but it is a better analysis if you are
5 going to allow the claim", and that is a perfectly
6 normal dispute, you say, at trial. Is another way of
7 putting it that we are not deciding now that the
8 methodology you propose is the best methodology?
9 MS FORD: That is exactly how I would put it. I would say
10 it is not a hypothetical example because it is exactly
11 what happened in the BritNed case, which is a case that
12 is in the bundle, if the Tribunal wants to look at it.
13 It is authorities bundle 21. I can just tell you there
14 were two competing methodologies in that case. This was
15 the case that prompted the president --
16 THE CHAIRWOMAN: This is BritNed, is it not?
17 MS FORD: BritNed, yes. It prompted the President to write
18 his article about lawyers are from Mars, economists are
19 from Venus --
20 THE CHAIRWOMAN: That one, yes.
21 MS FORD: -- because he was dealing with two competing
22 methodologies that approached things in very different
23 ways. What he had to do is hear the evidence and then
24 decide at trial which methodology was preferable.
25 So we say it is not a problem and it is certainly

1 not a criticism of our methodology that the respondents
2 want to advance a different methodology, and that is
3 perfectly fine. When it comes to trial, there will be
4 at least three ways in which we might want to address
5 their methodology.
6 So, first of all, we might want to adduce our own
7 factual evidence about how consumers go about buying
8 cars. That is one possible way we might engage with it.
9 Secondly, we might challenge the respondents' expert
10 evidence, whether by adducing our own responsive report
11 or by cross-examining their expert or both. Thirdly --
12 and this was a point that I believe Dr Bishop raised
13 when I was opening -- we can make the legal submission
14 that a countervailing benefit cannot be taken into
15 account unless it is causally related, and what the
16 respondents are seeking to focus on is properly
17 characterised as a countervailing benefit rather than
18 the actual measure of their loss. That will be a legal
19 submission that the Tribunal will then have to determine
20 one way or another.
21 THE CHAIRWOMAN: Just to make sure I have understood an
22 example of that countervailing benefit, are you talking
23 about, for example, a discount that would have been
24 negotiated anyway --
25 MS FORD: Exactly. I am going to come on to --

1 THE CHAIRWOMAN: -- not the round sum example that
2 Ms Demetriou -- let us say £500 off.
3 MS FORD: I am going to come on to deal with the examples
4 that were given, but that is exactly the sort of thing.
5 One possibility for us would be to make the legal
6 submission that actually these matters are not legally
7 to be taken into account. But there are many ways in
8 which we could meet their case at trial and it is
9 entirely up to us how we choose to do so. But the
10 important thing is it is not a flaw in our methodology
11 that it does not do what their methodology -- what they
12 say it ought to do. It cannot be the case, in my
13 submission, that a proposed class representative is
14 obliged to advance a methodology which is designed and
15 geared around the way in which the respondents see the
16 case. That cannot be an obligation on us.
17 First of all, we do not know what they are going to
18 say at the time when we formulate our methodology and,
19 secondly, we dispute central elements of the way in
20 which they advance their case, as is perfectly normal.
21 So it cannot be the case that the fact that we choose to
22 approach things in a different way is in any way
23 a source of criticism.
24 So coming on to the last point, about the discounts,
25 Ms Demetriou gave the example of a consumer negotiating

1 an on-the-road price at a round figure of £22,000 for
2 a car. That was the example that she was giving. The
3 submission that was made was the consumer paid the same
4 in the factual and the counterfactual, so, in her
5 submission, the consumer suffered no loss. The industry
6 experts' evidence on this point is that, if the retailer
7 is prepared to make that sort of deal, then they
8 discount their margin, they do not actually discount the
9 delivery charge. They have actually addressed that and
10 they say that the margin is a hard cost to them, so --
11 sorry, the delivery charge is a hard cost to them, so,
12 insofar as that were a negotiated deal, what they would
13 do is they would discount their margins. Madam, I think
14 that is the point that you put to Ms Demetriou when she
15 was advancing this possibility.
16 So the industry experts' evidence is that the
17 delivery charge will be preserved because it is
18 a concrete cost. But the legal point that we would then
19 make is that there is no causal relationship, which
20 means that the discount that has been negotiated has to
21 be taken into account in setting the overcharge. The
22 reason for that is that the consumer did not come in and
23 negotiate an on-the-road price because they perceived
24 that there was some sort of overcharge in the delivery
25 charge and they said, "Ah, well, I can see that that is

1 pretty pricey so I am going to negotiate around the
2 on-the-road price". There is no causal connection
3 between the fact of the overcharge and the way in which
4 they go about negotiating. They would do it in any
5 event. What that means, in my submission, is that there
6 is no benefit that is actually caused by the cartel.
7 THE CHAIRWOMAN: Well, on your view of life, the total
8 on-the-road price is £20, whatever it is, higher because
9 of the overcharge. To say that there is no causal
10 connection -- if someone is saying, "That is a bit
11 pricey, I want to get this down", they are looking at
12 what is on the estimate in front of them, are they not,
13 which includes that £20?
14 MS FORD: My Lady, in order for there to be the relevant
15 causal relationship, it has to be linked to the actual
16 overcharge as opposed to the general scenario, so there
17 might be such a causal relationship if you could say
18 that the specific overcharge on the delivery charge is
19 what has prompted somebody to try and negotiate down the
20 overall price of the car. But what our evidence has
21 shown -- I took you through Mr Robinson's evidence and
22 the industry experts' evidence -- is that the likely
23 amount of the overcharge just is not going to be enough
24 to change the parties' negotiating practices. It is not
25 going to change the practices of the sellers because

1 they are always keen to try and preserve the delivery
2 charge because it is a cost to them, and that is not
3 going to change, and it is not going to change the
4 approach of the buyer because it is just not enough to
5 change the negotiation that the buyer wants to engage
6 in.
7 THE CHAIRWOMAN: Is this Robinson 2?
8 MS FORD: My Lady, yes. I am sure we could find the
9 relevant --
10 THE CHAIRWOMAN: Yes, it is the discussion about elasticity,
11 is it not?
12 MS FORD: It is, Madam. That is exactly it. That is one of
13 the ways in which we envisaged that we would meet at
14 trial --
15 THE CHAIRWOMAN: I see. But you say -- I think you are
16 saying that we do not need to say that now, we do not
17 need -- that may be one of the things in our armoury
18 but, we, the panel, do not need to ...
19 MS FORD: Madam, I am very strongly saying that. I am
20 making the submission that it would not be appropriate
21 for the panel to try and determine now whether it is
22 right or whether it is wrong that you have to look at
23 the price of a car. In my submission, you just do not
24 have the material in front of you to make that decision.
25 In my submission, you do not have to do it because the

1 enquiry is whether our methodology has some basis in
2 fact and that test is passed.
3 THE CHAIRWOMAN: Okay. Thank you.
4 MS FORD: Madam, I am moving on to deal with changes in
5 delivery charges over time, and this is the point that
6 Mr Piccinin dealt with.
7 THE CHAIRWOMAN: Yes.
8 MS FORD: He made two submissions. First, that, in his
9 submission, the methodology was insufficient to show
10 factual or but for causation and, secondly, that it was
11 insufficient to show legal causation. On the factual
12 but for causation, Mr Piccinin's submissions were
13 structured around an example of a single brand,
14 Mercedes, and the point he made was that you could
15 speculate that the causes of the increases in the
16 delivery charge of that brand might be benchmarking
17 against competitors rather than actual increases in
18 costs.
19 THE CHAIRWOMAN: Or rounding up.
20 MS FORD: Or indeed rounding up. He was saying there was an
21 element of judgment and discretion involved here rather
22 than a pure mechanical costs ratchet.
23 THE CHAIRWOMAN: Yes.
24 MS FORD: So he made the submission based on that that we do
25 not know, based on the PCR's methodology, whether any

1 increase was actually caused by the cartel or not. That
2 is the criticism that is advanced against me.
3 In my submission, the error that is made here is
4 that it focuses solely on Mr Robinson's methodology as
5 the source of the PCR's primary case on causation. In
6 fact, our primary case on causation is to be found in
7 the industry experts' evidence that shipping charges are
8 passed down the chain routinely and as a matter of
9 practice. Yes, they say, as Mr Piccinin highlighted,
10 that price-setting might also entail benchmarking and
11 rounding-up, but the strong force of their evidence is
12 these charges are routinely passed on. That is the
13 basis of our factual case on causation.
14 Dr Bishop quite rightly made the point in argument
15 that, in the case of many cartels, there might well be
16 numerous components making up the final product and it
17 becomes very difficult to trace the components down the
18 chain and to discern factual causation in that way.
19 Here, in this case, exceptionally in our submission, you
20 can, and that is the effect of the industry experts'
21 evidence. They say you can trace the delivery charge
22 directly from the OEM to the NSC to the retailer to the
23 proposed class in the form of an itemised delivery
24 charge that is then often separately itemised on the
25 invoice which is then presented to the customer. So

1 that is the basis on which we say we have established
2 a but for case of causation.
3 We then say -- and it is repeated a point that
4 I made fairly frequently on Monday -- by taking the
5 lower of the two figures, the overcharge and the
6 increase in the delivery charge, even if there was
7 a degree of opportunism or judgment in the setting of
8 the delivery charge, you do not overcompensate because
9 you have taken the lower of the two figures.
10 THE CHAIRWOMAN: Yes. One of the points being made was
11 that -- most obviously seen I think possibly in
12 scenario 3, when we went back to the scenarios -- was
13 that the immediate trigger or the immediate reason for
14 that hike in the delivery charge might be something
15 different and the point being made -- well, a point
16 being made against you was that that was fatal because
17 you could not then say that it was, in legal terms, the
18 overcharge that caused the price hike.
19 MS FORD: My Lady, yes. That was Mr Piccinin's second
20 point, when he said, well, even if you have but for
21 causation, in his submission you cannot satisfy the
22 legal causation text. The Tribunal has my submission
23 that the proximate and operative cause is the NSC's
24 practice of margin maintenance and we know that other
25 costs will rise to the same extent in the factual and

1 the counterfactual, and so what specifically determines
2 how much the NSC's delivery charge will go up and what
3 determines how much it will go up and whether it will go
4 up more in the factual and the counterfactual is the
5 presence of the cartel overcharge. That is what makes
6 the difference and that is what drives the loss to the
7 class.
8 THE CHAIRWOMAN: Yes. You could describe that as a but for,
9 as in, in that scenario, the price would not have gone
10 up if it had not been for the overcharge, but the
11 immediate trigger for it is some other increase. So
12 I suppose what I am asking is for a bit more detail on
13 how you establish, in legal terms, the proximate or the
14 legal cause.
15 MS FORD: Madam, I think that is a very relevant question
16 because how you establish proximate or legal cause is
17 a fact-sensitive enquiry. We do not know, at the
18 moment, the amounts of the overcharge in any concrete
19 terms. The timing of the overcharge, we do not have
20 complete information about the timing of the delivery
21 charge increases and we do not know how proximate or
22 remote they are in time to each other. In my
23 submission, this is an assessment. In order for the
24 Tribunal to express any view about whether there is or
25 is not legal or proximate causation, you need to have

1 that factual background.
2 THE CHAIRWOMAN: So you mean we do not have the shipping
3 contracts, we do not have a complete set of delivery
4 charges, presumably -- we have some for some brands, if
5 I have understood correctly --
6 MS FORD: Four.
7 THE CHAIRWOMAN: -- so you have not yet had an exercise of
8 saying, "Ah, there was a new shipping contract at this
9 point and then there was a hike in a delivery charge
10 then"; is that the ...?
11 MS FORD: My Lady, yes. This exercise -- this judgment by
12 the Tribunal as to whether it satisfies the legal test
13 for causation or not cannot possibly be undertaken in
14 a factual vacuum and the information we have is
15 necessarily provisional at this stage. So my primary
16 submission is that, while this is no doubt a question
17 for trial, the Tribunal cannot resolve the points
18 against us at this stage because the information simply
19 is not available.
20 My Lady, Mr Piccinin also sought to submit that in
21 other cases, instead of approaching the matter in the
22 way that Mr Robinson has done, you might see some sort
23 of regression analysis and you would try to control for
24 other factors that might impact on delivery charges.
25 Mr Robinson has given evidence about exactly why he has

1 not taken that approach. That is {B/5/55}. This is his
2 evidence at 5.26, where he says:
3 "In practical terms, it is unlikely that the
4 composition of the total Delivery Charge (i.e. the
5 breakdown of shipping costs, 'other costs' and margin)
6 is going to be observable by me, as such information is
7 not publicly available and disclosure from the Proposed
8 Defendants would only provide information relating to
9 shipping costs."
10 What he has done is he has formulated a methodology
11 which addresses the data limitations that he perceives
12 exist and that is, in my submission, entirely in
13 accordance with the guidance of the Supreme Court in
14 *Merricks*, that you do the best you can with the data
15 that is available.
16 THE CHAIRWOMAN: Sorry, to make sure I have understood this,
17 I thought you were making a point about the submission
18 that Mr Piccinin had said you could do a regression
19 analysis comparing delivery charges in a clean period
20 with in a cartel period. Why is the answer -- just take
21 me through why the answer to that is here.
22 MS FORD: Madam, it is because if you were to do
23 a regression analysis, you would have to look at the
24 delivery charge and then look at all the other factors
25 which might affect the delivery charge and feed them all

1 into your regression model and --
2 THE CHAIRWOMAN: Oh, I see, because you are controlling for
3 the other elements and you say those are elements that
4 are not --
5 MS FORD: Mr Robinson is saying, "I do not have access to
6 those other elements, they are not -- the breakdown of
7 shipping costs, other costs and margin is not going to
8 be observable by me", so he is saying, "I have
9 formulated a methodology which addresses that lack of
10 data".
11 THE CHAIRWOMAN: Thank you.
12 DR BISHOP: It does address, in a certain way, that lack of
13 data. It does not, of course -- by its very nature it
14 cannot take into account the question that Ms Demetriou
15 kept hammering on about -- and others too -- that there
16 may be a discounted point of sale. In its nature it
17 cannot take that into account. You say that you will
18 run at trial, if things get there, an argument, a legal
19 argument, that says it would be irrelevant anyway, it
20 would be inappropriate.
21 Suppose you were to fail on that argument and the
22 Tribunal were to hold that this point had to be
23 addressed about discounts other than explicitly to do
24 with the delivery charge, what is your -- does
25 Mr Robinson's method and the other things you propose --

1 would that permit the Tribunal to address that issue?
2 It would, you say?
3 MS FORD: It absolutely would, Sir, and the reason I say
4 that is because my legal argument is only one of the
5 possible ways in which the PCR might choose to engage
6 with the defendants' case at trial. Other ways, as
7 I indicated, might include advancing our own factual
8 evidence about the way in which cars are sold, so
9 dealing with the downstream circumstances, the extent of
10 negotiations, the way in which consumers approach it,
11 the way in which dealers approach it, factual evidence.
12 Alternatively, we can engage with their expert evidence,
13 either by producing responsive reports or by
14 cross-examining their experts.
15 So, in my submission, it is absolutely not the case
16 that the Tribunal is going to be left unable to deal
17 with these matters at all, but it is important to
18 recognise that, because that is the way the respondents
19 perceive it, that does not mean that that drives the way
20 in which we choose to present our positive case.
21 THE CHAIRWOMAN: No, but it is of some relevance -- and I am
22 sure you are going to come back to this -- that in
23 establishing whether the methodology that you propose
24 meets the *Pro-Sys* test, presumably we need to have an
25 eye on whether it is sufficiently robust to be capable

1 of addressing some of these points, so, for example,
2 discounting. If the evidence was, well, in fact,
3 discounting does effectively extend to the delivery
4 charge, there needs to be some way of addressing that.
5 I am not sure that is entirely just a broad axe point.
6 MS FORD: Madam, I quite agree. We have made a start in the
7 sense that there is already Mr Robinson's expert
8 evidence as to the extent to which discounting might, on
9 the basis of economic theory, be expected to impact the
10 delivery charge. He has addressed that and, in doing
11 that, he draws on the industry experts' evidence about
12 the way in which things are done and also on the
13 evidence adduced by KK, by Mr Dent, about the way in
14 which these things are done in practice, so it is
15 absolutely not the case that we are unable to engage
16 with this element of the case.
17 THE CHAIRWOMAN: Yes, his supplemental report, you say,
18 engages with the discounting point?
19 MS FORD: He does, yes. I will come on to show you in
20 another context that what he expressly says in that
21 context is, "If further information will become
22 available to me, I will take it into account".
23 DR BISHOP: Yes, right, and you say then that the method
24 that you offer as the appropriate method here, which is
25 essentially evidence from experienced people in the

1 industry, as would happen in, say, a High Court case or
2 something of that sort, then processed by Mr Robinson,
3 but the real substance of your method is industry
4 evidence, and you say that that meets the test that you
5 have to have a method that is appropriate to -- I do not
6 want to -- I cannot quote the exact words, but it meets
7 the appropriate standard in the *Pro-Sys* test?
8 MS FORD: Very much so. It is a dual approach based, as
9 I submitted in opening, on quantitative evidence and
10 qualitative evidence. Mr Robinson's role is the
11 quantitative role and he takes the experience of the
12 industry experts as to what happens in real life and he
13 applies a methodology for quantifying what is going on.
14 In my submission, that very clearly does satisfy the
15 test.
16 THE CHAIRWOMAN: I think one point being made is: what do we
17 mean by "the methodology"? Is it Mr Robinson sitting
18 there with his calculator or is it something broader
19 than that?
20 MS FORD: Madam, yes, and I think that is illustrative of
21 the fact that, in my submission, some of the
22 respondents' submissions veered close to making the
23 mistake that I showed the Tribunal in one of the
24 High Court cases of having a really quite rigid
25 perception of what are the relative roles of experts and

1 saying "This is what an economist must do" and "This is
2 what other experts do". The Tribunal will recall the
3 unfortunate Mr Foster, who was labouring under the
4 disability that he was not an economist. The court
5 obviously gave short shrift to these concerns. In my
6 submission, in some respects, what the respondents are
7 saying really comes quite close to making the same
8 mistake.
9 But the test that this Tribunal applies does not ask
10 you to do that. It is not prescriptive at all in that
11 way about what an economist does and what somebody else
12 does, so --
13 THE CHAIRWOMAN: So you are saying *Pro-Sys*, the reference
14 there to "methodology" is not prescriptive as to what it
15 is?
16 MS FORD: It is not prescriptive at all and it makes sense
17 because it could not possibly be. The methodology has
18 to be tailored to the circumstances of whatever case is
19 being presented.
20 DR BISHOP: Yes. Your suggestion and Mr Robinson's
21 suggestion is that this is actually the best method that
22 could be deployed here because you and he are very
23 sceptical that, for example, a regression approach would
24 be able to be put into operation at all because of lack
25 of data and, second, maybe -- I am not sure whether you

1 do say this -- even if you could get data, it would be
2 hard to get a result out because so much would be -- it
3 would be so complicated and the charge -- the overcharge
4 so relatively small that it just would not work.
5 I think Mr Robinson suggests that.
6 MS FORD: I certainly see the force of that point that you,
7 Sir, are making to me. Mr Robinson's evidence I think
8 is best encapsulated in the paragraph I have shown you,
9 5.26, where he is expressing concerns about the data
10 availability. We do say that this takes you into
11 classic *Merricks* territory because *Merricks* says you
12 just have to do the best you can. Our case very much is
13 that this methodology that is being advanced is the best
14 that can be done in the circumstances.
15 DR BISHOP: Yes, okay. Good.
16 MS FORD: Finally, in response to both the submissions of
17 Ms Demetriou and Mr Piccinin, it is worth recalling that
18 these defendants who are submitting to the Tribunal that
19 the PCR has not raised a credible case of pass-on in
20 this case are the same defendants who, in proceedings in
21 the High Court, have positively pleaded that the car
22 companies passed on the shipping charges down the chain.
23 I would just show the Tribunal one example of that. It
24 is at bundle {A/10}.
25 THE CHAIRWOMAN: They might say, "Ah, but it stops at the

1 retailer".
2 MS FORD: They might well, Madam, but, in my submission, it
3 does not sit very comfortably in their mouths to be
4 coming before this Tribunal and saying that the PCR's
5 claim should not be permitted --
6 THE CHAIRWOMAN: I think we call this a jury point, do we
7 not, that you are going to show me --
8 MS FORD: It might have the flavour of a jury point, but if
9 I might be permitted, I will just show you the relevant
10 paragraph. So this is the defence of the
11 11th defendant, NYK Group Europe Limited, and this is
12 Ms Demetriou's and Mr Piccinin's client. It is the
13 defence to a claim by Daimler for damages caused by the
14 shipping cartel, and Daimler is the parent company of
15 Mercedes, which is, of course, the example that
16 Mr Piccinin was speaking to.
17 If we just look at page 9, {A/10/9}, paragraph 41,
18 you see the plea:
19 "... if Daimler and/or the other Daimler
20 Subsidiaries did suffer recoverable Overcharge Losses,
21 they passed those losses on to their customers in the
22 form of higher prices and must give credit for this pass
23 on."
24 In my submission, that does sit uncomfortably
25 with -- before this Tribunal, taking a position that

1 there is no viable case of upstream pass-on in this
2 claim.
3 I am turning to deal with the additional points
4 advanced by Mr Singla. He first made submissions as to
5 the content of the *Pro-Sys* test. We fully accept that
6 the requirement for a sufficiently credible or plausible
7 methodology is a separate and distinct test for
8 a strike-out and summary judgment test so we can clear
9 that away. We do not agree with Mr Singla's submissions
10 that the principles which are articulated by the court
11 in *Merricks* about the importance of vindicating private
12 rights and ensuring access to justice are to be read
13 very narrowly and are concerned solely with forensic
14 difficulties of quantification. I understand him to be
15 saying they had no application to questions of
16 methodology. We do not accept that that is a correct
17 reading of *Merricks*.
18 I do not propose to take the Tribunal through
19 *Merricks* for a third time, but, in our submission, what
20 is being said comes through particularly clearly first
21 of all from the discussion at paragraphs 45 to 55 of the
22 judgment, and that is where the Supreme Court is saying
23 that it should not be lightly assumed that the
24 collective process imposes restrictions on claimants as
25 a class which the law and rules of procedure for

1 individual claims would not impose. Then it goes on to
2 talk about the importance of doing the best you can with
3 the available evidence.
4 We fully accept that the particular context in
5 *Merricks* was forensic difficulties arising from data
6 availability, but, in our submission, there is no reason
7 why the Supreme Court would consider it legitimate to
8 start imposing additional burdens on claimants in
9 collective proceedings because those additional burdens
10 arise out of methodological issues in circumstances when
11 it has expressed such strong views about imposing
12 additional burdens arising out of data availability.
13 Then, similarly, paragraph 73 and 74, where the
14 Tribunal is emphasising the importance -- sorry, the
15 Supreme Court is emphasising the importance of not
16 refusing a trial to an individual or to a large class
17 who have a reasonable prospect of showing they have
18 suffered some loss from an already established breach.
19 They talk about the denial of access to justice to
20 a litigant or class of litigants who have a triable
21 cause of action. Again, in my submission, nothing about
22 the Supreme Court's reasoning suggests that denial of
23 access to justice will be perfectly fine provided that
24 it is on methodological grounds rather than in relation
25 to data. In my submission, clearly the points being

1 made by the Supreme Court have much broader application.
2 We do note that the Tribunal in *Trains* did not
3 perceive there to be any rigid distinction between the
4 observations of the Supreme Court being confined to data
5 availability and then questions of methodology. You can
6 see that they considered they were relevant to
7 methodology as well. Just to give an example,
8 authorities bundle 30, page 64, please, {AUTH/30/64},
9 paragraph 155.
10 You can see that the Tribunal is here considering
11 the PCR expert's methodology for estimating aggregate
12 damages.
13 THE CHAIRWOMAN: Yes.
14 MS FORD: They say there:
15 "We should emphasise that a CPO application is not
16 an occasion for a full evaluation of the merit and
17 robustness of an expert methodology."
18 They then cite *Microsoft*, which is obviously the
19 *Pro-Sys* test. They say it "rejected the defendant's
20 submission that the court should assess the expert
21 method by weighing the evidence of both parties at the
22 certification stage".
23 Then they go on in the same breath to cite *Merricks*
24 Supreme Court, Lord Briggs, and what he says about
25 sometimes you need to have recourse to guesswork. So

1 certainly they perceive what the Supreme Court is saying
2 in *Merricks* to be highly relevant to questions of
3 methodology and questions of satisfaction of the *Pro-Sys*
4 test.
5 If we just go on to page 65, the following page,
6 {AUTH/30/65}, paragraph 158. Here, the Tribunal is
7 specifically considering what was advanced as
8 a methodological objection specifically to the
9 applicant's case on causation. What is being argued,
10 what is being questioned, is whether the methodology was
11 capable of addressing causation. The submission that
12 was made was that:
13 "The Respondents' argument essentially concerns
14 causation. Mr Holt has approached quantification on the
15 basis that in the counterfactual, where Boundary Fares
16 were widely available and offered, passengers would have
17 bought them for eligible journeys. That is not a matter
18 for expert evidence, although Mr Holt's survey may
19 assist in testing it. It reflects the way the Applicant
20 puts forward his case, contending that the overwhelming
21 majority of passengers would not choose to pay more
22 for a train journey if offered the opportunity to buy
23 a cheaper ticket."
24 THE CHAIRWOMAN: You mean you do not need an expert to tell
25 you that?

1 MS FORD: You can certainly take that point from it, that
2 they are saying this may not be an expert point, but it
3 is certainly a causation point. It is a circumstance
4 where the respondents are saying that you cannot just
5 assume causation in this case and the Tribunal says,
6 "Well, you, the applicant, are perfectly entitled to put
7 forward the case", but they go on to say that, "The
8 respondents are of course free to contest that
9 assumption but we consider that the applicant is
10 entitled to advance it". Then again you get a reference
11 back to *Merricks* Supreme Court:
12 "... Lord Briggs' observation quoted above that
13 sometimes the court has to make an informed guess as to
14 what a claimant is likely to have done in the absence of
15 an infringement."
16 THE CHAIRWOMAN: So you say that paragraph, like the earlier
17 one you took us to, is all about criticisms of
18 methodology in that case?
19 MS FORD: It is, and the Tribunal is meeting them and
20 dealing with them by pointing to the principles that
21 come out of *Merricks*. So we say this rigid distinction
22 that is being advanced that *Merricks* is only about data
23 availability and you do not need to worry about it for
24 anything else, in our submission, is just not right.
25 We certainly do not agree with the way in which

1 Mr Singla sought to characterise the *Pro-Sys* test. We
2 do not agree that it requires us to advance
3 a methodology which is infallible at trial. In our
4 submission, there is no support whatsoever for that in
5 the authorities. We know from the wording of the test
6 that it needs to be sufficiently credible or plausible
7 and it needs to establish some basis in fact. We know
8 that the Supreme Court emphasised that that was a low
9 evidential hurdle. So, certainly in this jurisdiction,
10 there is no support whatsoever for the way in which
11 Mr Singla sought to characterise the *Pro-Sys* test.
12 He then sought to deploy a Canadian case, the *Jensen*
13 case, to say that a more rigorous approach was required.
14 That is in authorities bundle, tab 32 at page 28,
15 {AUTH/32/28}. We just invite the Tribunal to scrutinise
16 the terminology that you see the court using here. If
17 you look at paragraph 60, for example, you see that the
18 threshold is a low one. It says --
19 THE CHAIRWOMAN: Yes. I think we have been taken to this
20 so, unless you want to show us different paragraphs, we
21 can look at it in our own time.
22 MS FORD: I do not. I simply want to draw out the nature of
23 the terminology that is being used. It is about no
24 viable cause of action, it is about insufficient
25 evidentiary basis, it is about filtering out unfounded

1 and frivolous claims, it is about untenable claims,
2 groundless suits, minimum evidential foundation
3 required. That is the sort of terminology you get from
4 this judgment. So, in my submission, it certainly
5 provides no support for the notion that the *Pro-Sys* test
6 is requiring you to advance some sort of infallible case
7 at trial.
8 I am turning to deal with Mr Singla's second point
9 in his submissions, which was that the proposed
10 methodology is premised on the evidence of the industry
11 experts, and he says, "Well, what happens if that
12 evidence is not accepted?". His rhetorical question
13 was, "What happens at trial? What happens to your
14 methodology?". The Tribunal has my submission that that
15 in fact is not the legal test but I do intend to engage
16 with the submissions that were made under this heading
17 as well.
18 THE CHAIRWOMAN: When you say that it is not the legal test,
19 you mean you do not have to meet this submission or ...?
20 MS FORD: We do not have to show that at trial our test is
21 infallible, which is essentially what, in my
22 submission --
23 THE CHAIRWOMAN: Sorry, yes. I just wanted to clarify it is
24 a repeat of the point you just made, thank you.
25 MS FORD: The submission was made that our evidence relies

1 on extreme factual assumptions that are inherently
2 likely to topple over at trial and the reason it is said
3 that they are extreme is because they apply, on the
4 industry experts' evidence, to all OEMs, all NSCs, all
5 retailers across the entire claim period.
6 As it happens, the factual assumptions that we are
7 relying on are actually consistent with the story you
8 get from Mr Dent's evidence from KK. If we turn up
9 bundle C, tab 13, page 3, {C/13/3}, starting with
10 paragraph 6, he explains:
11 "... I have worked for most of the publicly listed
12 motor dealers in the UK."
13 If we go on to paragraph 9, he is dealing firstly
14 with BMW's practices and he says:
15 "There is ... an item called the 'delivery' charge
16 included in the [on-the-road] charges."
17 Paragraph 11, on the basis of his experience of the
18 motoring industry from 2004 to the present day:
19 "... I am not aware of any relevant changes to these
20 documents or, more specifically, the treatment of
21 delivery charges over the relevant time period."
22 So he is saying there is consistency over the
23 relevant time period.
24 If we go on to 12, {C/13/4}:
25 "To the best of my knowledge all vehicle brands have

1 similar documents to BMW, generated by similar software.
2 This was certainly the case for all the brands that
3 I have sold."
4 Then paragraph 15:
5 "To the best of my knowledge, the delivery charge
6 ... is set by BMW's national sales company ... in the UK
7 ..."
8 He says he cannot comment on other countries.
9 Then you have 16:
10 "... the same delivery charge ..."
11 Sorry.
12 "... the same delivery charge of GBP 825 appears on
13 the documents for all new BMW cars sold in the UK."
14 Then 27, probably a few pages on -- sorry --
15 {C/13/6}, he is commenting on whether the delivery
16 charge can be discounted, and he says:
17 "I tell customers that the delivery charge is
18 included in the advertised price and cannot be
19 discounted ... on a number of occasions (four to six
20 times a year on average), I have had customers who have
21 specifically focused on that cost ..."
22 He says:
23 "... the system does not allow me to change the
24 'delivery' charge from GBP 825 to zero [and he says]
25 I could achieve the same effect by putting an additional

1 amount ... in the 'Special Allowance' section of the
2 invoice."
3 But it is "physically impossible", he says at the
4 end of that paragraph, to change certain line items.
5 In my submission, the story that comes through from
6 Mr Dent on the basis of his experience over the claim
7 period, working for various car companies, is
8 essentially the same story that the industry witnesses
9 are telling, so we do say it is difficult to see why our
10 case that we are advancing is being characterised as
11 extreme. But, of course, in any event, saying our case
12 is extreme is, in reality, just seeking the Tribunal to
13 conduct a mini-trial and we say that is not legitimate
14 at this stage.
15 We are also a bit mystified about the submission
16 that was repeatedly made that, in order to succeed at
17 trial, the Tribunal must accept all our facts in their
18 entirety and that, if they do not, then our methodology
19 simply cannot cope and will fall over. It was suggested
20 repeatedly that our methodology cannot cope with any
21 difference in the facts.
22 First of all, Mr Robinson has made very clear that
23 his approach, unsurprisingly, is preliminary at this
24 stage. So if we look, for example, at bundle {B/5/10},
25 he explains:

1 "Any opinions or views expressed in this report are
2 subject to any further information which may be
3 available to me in due course. The focus of this report
4 is on setting out the methodology which I would propose
5 to use, in due course, to determine matters such as the
6 likely overcharge and the quantum of loss on the
7 Proposed Class, as well as the data I would need ... My
8 suggested methodology and conclusions are necessarily
9 preliminary given that I have not, at this stage, had
10 access to the underlying data which I would, in due
11 course, expect to receive."
12 In his second report, if we look at {B/110/22},
13 paragraph 4.25, he is actually commenting on this
14 paragraph that we saw earlier in his first report, where
15 he observes that the delivery charge is unlikely --
16 sorry, the composition of the delivery charge is
17 unlikely to be observable to him as such information is
18 not publicly available. He comments:
19 "Whilst it seems likely that the NSCs would hold
20 this data, I am instructed that it would be difficult
21 and costly to obtain, as it would have to be procured
22 via applications for third party disclosure."
23 That is of course the possibility that Mr Piccinin
24 was alluding to.
25 He goes on to say:

1 "Of course, if such data can be obtained in due
2 course I would consider it carefully and, if
3 appropriate, make use of it in my calculations."
4 THE CHAIRWOMAN: Can I just interrupt for a minute and make
5 sure I understand how this works procedurally because,
6 if we certify, we certify on the basis of the
7 methodology that has been put forward and let us say we
8 do satisfy ourselves that it meets the *Pro-Sys* test, to
9 the extent modifications are subsequently made or
10 desirable, how does that work procedurally? Is it some
11 form of amendment to the claim or is it just dealt with
12 in evidence because -- I mean, I have seen references to
13 provisional methodologies here, this is obviously not
14 the first case where there are references like that, but
15 I just do not have a clear idea of how it would work.
16 MS FORD: Madam, yes. I hesitate to express a definitive
17 view because, of course, none of the CPO claims have
18 actually got that far yet.
19 THE CHAIRWOMAN: Yes.
20 MS FORD: Certainly we envisage it would be the same as
21 a regular claim in the sense that if you were changing
22 the fundamental nature of the claim, you would have to
23 amend your claim.
24 THE CHAIRWOMAN: So amending the pleadings effectively?
25 MS FORD: If it were a fundamental change in the nature of

1 the claim -- of the nature that would require you to
2 change your pleaded case.
3 But, of course, in making this point I am actually
4 responding to a criticism which is made against me,
5 which is that, "What if the facts are different at
6 trial? How are you going to accommodate that?" That is
7 said supposedly to be a defect in our methodology. In
8 my submission, it is not, but I am saying that certainly
9 Mr Robinson is telling the Tribunal that he is perfectly
10 willing to look at new factual information and to
11 address it and so there is no difficulty in responding
12 to and accommodating further factual information as and
13 when it becomes available.
14 MR SINGLA: Madam, just on that procedural point, you will
15 of course have in mind the claim form which I took you
16 to yesterday, which is put in terms of, on the basis of
17 Mr Robinson's methodology, the shipping cost overcharge
18 was always passed on and entirely passed on. So I just
19 do put down that marker that this is not something where
20 the expert has free rein post certification.
21 THE CHAIRWOMAN: There are a number of different ways of
22 approaching that. If that was conventional pleadings,
23 you might ultimately say "You have not made out that bit
24 of the case", but it does not necessarily mean that the
25 whole case falls over.

1 MR SINGLA: Well, I reserve our position as to that, but at
2 the moment the only thing before the Tribunal is a 100%
3 pass-on case. That is clear. That is what you have to
4 assess.
5 MS FORD: My Lady, I do take issue with the characterisation
6 of our case as a 100% pass-on case for various reasons,
7 two of which are, if you look at Mr Robinson's
8 scenarios, he very expressly models a possibility of
9 less than 100% pass-on and indeed scenario 4 is no
10 pass-on at all, so it is not correct to claim a 100%
11 pass-on case.
12 MR SINGLA: Well, what else does "entirely passed on" in the
13 claim form mean then? We cannot have the PCR, in reply
14 submissions, trying to suggest that there is some
15 alternative, less extreme case open to it. The claim
16 form I took you to -- in fact Ms Ford did not take you
17 to those paragraphs, rather revealingly, we would say.
18 THE CHAIRWOMAN: Well, you have taken us to those paragraphs
19 and we have heard what you have got to say. I am just
20 going to hear Ms Ford in reply, thank you.
21 MS FORD: Madam, it is not uncommon for a claimant to
22 express their claim at its highest in the recognition
23 that it may not at trial actually reach that benchmark
24 but that does not mean that it falls over completely.
25 It is absolutely commonplace.

1 What I am showing the Tribunal now is that
2 Mr Robinson has expressly indicated in his report that
3 his methodology and approach is provisional and that he
4 is willing and open to consider additional factual
5 information and take it into account. In my submission,
6 the criticism that was advanced that suggested that it
7 is unable to do that and that it would fall over at
8 trial is baseless.
9 Just to return to, Madam, your question about how in
10 practice does it work, of course what is envisaged in
11 collective proceedings, as in any other, is that there
12 will be a process of disclosure followed, presumably, by
13 factual witness statements, followed by expert reports.
14 This is an expert report for the purposes of
15 certification but one would expect the usual process to
16 take place.
17 THE CHAIRWOMAN: Okay. So effectively you are saying it
18 would likely be refined through expert evidence, further
19 expert evidence --
20 MS FORD: That would certainly be the usual way in which
21 these things are done. I do want to make clear that
22 I am not seeking to overcome the bar to certification by
23 reserving the possibility of adding things on at a later
24 date.
25 THE CHAIRWOMAN: No. I was not asking a loaded question.

1 I was trying to understand.
2 MS FORD: I am grateful.
3 Just in terms of addressing whether it is
4 problematic from the view of the commonality requirement
5 that there might be developments in the understanding of
6 the facts, again the approach of the Tribunal in *Trains*
7 is informative on this. If we look at authorities
8 bundle 30, page 56, {AUTH/30/56} -- this is the
9 paragraph 107 -- sorry, I have possibly given you the
10 wrong reference there. I was looking for
11 paragraph 107(3). I can remind the Tribunal of what it
12 says. It is the paragraph which says that commonality
13 refers to the question, not the answer, that there can
14 be --
15 THE CHAIRWOMAN: Yes, we know that point.
16 MS FORD: I am grateful. It says specifically there can be
17 a significant level of difference between class members,
18 so the fact that you might envisage that variations come
19 out in the evidence is not a problem. Then, of course,
20 where appropriate you adapt, and so the Tribunal said --
21 and this is page 56, I think, paragraph 129 --
22 right at the end of 129, {AUTH/30/56}, if we can go over
23 the ... So:
24 "Where appropriate, the interests of the defendant
25 can be protected by making some reduction in the

1 aggregate damages award, based on reasonable estimation
2 or assumption."
3 So what the Tribunal is doing there is expressly
4 recognising that, if appropriate in the light of what is
5 in due course established, what you do is you adjust
6 your damages award.
7 THE CHAIRWOMAN: Yes. I think we had better have a break if
8 now is convenient.
9 MS FORD: It is.
10 THE CHAIRWOMAN: Ten minutes, please.
11 (3.15 pm)
12 (A short break)
13 (3.29 pm)
14 MS FORD: Madam, I indicated in response to a question from
15 Dr Bishop that I would show an example of where
16 Mr Robinson had proposed to accommodate changes in
17 evidence by making an adjustment. The example is in his
18 second report, paragraph 4.57, so it is {B/110/35}.
19 He is commenting on the evidence of Mr Cunningham
20 which was served by KK. This was in the particular
21 context of whether rental companies might, in the course
22 of negotiation, flatly refuse to pay the delivery
23 charge. He is indicating how he might address that. He
24 says:
25 "... I note that even if all car rental companies

1 were able to refuse to pay the Delivery Charge in its
2 entirety [and he comments] (which appears to go far
3 beyond what Mr Cunningham suggests and in support of
4 which there is no other evidence), this can be easily
5 identified and would not have a material reduction on
6 the estimated claim. By way of example, based
7 on a 10% overcharge, car rental companies only
8 account for £4.1 million (7%) of the total illustrative
9 £57.5 million loss figure estimated in My First Report."
10 He is responding to the evidence and saying that you
11 can make -- as indeed the Tribunal in *Trains*
12 contemplated -- if necessary you can make appropriate
13 adjustments.
14 I am turning to address Mr Singla's third point,
15 which was the costs benefit analysis in the context of
16 the suitability requirement. The Tribunal has my
17 primary submission on that from opening. In my
18 submission, the relevant comparison is between, on the
19 one hand, the costs of bringing the proceedings,
20 including potential exposure to adverse costs, as
21 against, on the other hand, the projected aggregate
22 recovery. In this case we know costs -- we have
23 14.85 million of funding to litigate the claim to trial.
24 There is also then cover of up to 15 million for adverse
25 costs, so on the costs side of the ledger it is roughly

1 30 million. But you can break that down further
2 because, of course, if the defendants are ultimately
3 successful, they accept we have adverse cost provision
4 and so the costs will not be borne by them as such.
5 Equally --
6 THE CHAIRWOMAN: Well, the majority will not be but
7 potentially some.
8 MS FORD: Well, indeed. I am certainly not foregoing any
9 points on that, but there is a sort of nuance behind the
10 30 million figure.
11 Of course, if we are successful and it transpires
12 that the claim is well brought, in those circumstances,
13 if the defendants have to bear their costs of attempting
14 to resist the claim, that can hardly be a factor which
15 ought to be weighing against the costs benefits of the
16 proceedings. But, in any event, if you work on the
17 basis of 30 million on the costs side of the ledger, on
18 the benefits side of the ledger, you have estimated
19 recoveries of between 71 and 143 million, including
20 single interest. So this is not, in my submission,
21 a marginal case. The potential aggregate benefits
22 clearly outweigh the costs.
23 The Tribunal will have in mind that Mr Singla's
24 submissions were not focused on the aggregate benefits
25 as such, presumably because they do clearly favour the

1 outcome of a CPO. What he did is he focused on certain
2 examples where the overcharge per vehicle per brand
3 might be low, and I explained to the Tribunal that the
4 reason for that is that some brands have a low
5 proportion of vehicles that are shipped versus those
6 that are transported by other means and so, when the
7 shipping costs are spread across the brands, you end up
8 with low overcharges per vehicles.
9 The Tribunal will appreciate those examples were
10 carefully selected and there are other examples which
11 show returns which are materially higher and, as we have
12 explained, it is not actually a relevant metric in
13 circumstances where there is no obligation to distribute
14 on a purely compensatory basis.
15 The Tribunal has my submission that, unlike in
16 *Trains*, where there was a real difficulty with the
17 members being asked to recall and evidence which train
18 journeys they took, the purchase of a car is going to be
19 a significant purchase and so, in my submission, there
20 is no reason to think that class members would not go to
21 the effort of digging out their paperwork in order to
22 seek to claim their entitlement.
23 Fundamentally, the fact that the sums in issue in
24 this case, the potential recoveries, are modest cannot
25 as a matter of principle, in my submission, be a bar to

1 a CPO because, of course, that is precisely the sort of
2 claim that would not be viable individually and so
3 precisely the sort of claim that the legislature was
4 seeking to facilitate by introducing this new regime.
5 It would undermine the regime altogether if defendants
6 could point to the fact that individual recoveries are
7 relatively modest and say that that means that you
8 should not direct a CPO at all.
9 Mr Singla also sought to bring the returns of the
10 funder into the equation. The Tribunal will recall, you
11 were invited to have a look at the confidential material
12 on funding. It is worth emphasising that this is
13 a claim that is worth potentially 143 million. It is
14 being funded by 15 million in litigation funding and by
15 solicitors and barristers working on partial
16 contingencies. In those circumstances, these claims are
17 only going to be viable with the aid of litigation
18 funding. They are inevitably going to be expensive and
19 funding is necessarily going to be a part of that
20 exercise and that is, in my submission, expressly
21 recognised by the legislature at various points in the
22 Guide, in the rules and indeed in the case law.
23 You see in *Merricks* at first instance there was
24 a recognition that the statute should accordingly be
25 given a purposive interpretation to encompass a funding

1 structure such as the present. In that regard we were
2 referred to a range of extrajudicial material which
3 recognised the importance of third party funding to
4 enabling access to justice.
5 So we do say that you have to be realistic in this
6 case that -- in this case and indeed any other
7 collective action regime that funding is necessarily
8 going to be an important part of making these claims
9 viable.
10 THE CHAIRWOMAN: Just for my benefit, the *Merricks* case you
11 have just referred to, is that on remittal or first
12 instance?
13 MS FORD: That is first instance. For your note, it is
14 paragraph 119, authorities bundle tab 19 at page 33.
15 THE CHAIRWOMAN: Thank you.
16 MS FORD: It might assist you to understand where funding
17 fits in, in terms of the order of things, because once
18 a claim results in a settlement or judgment, you then
19 have a pot of damages for class members and the class
20 representative then does its best to distribute that pot
21 to the class members. We have obviously, as has been
22 pointed out, retained Case Pilots in order to facilitate
23 that distribution. It is only once compensation has
24 been paid to all the class members who come forward that
25 the PCR then approaches the Tribunal in respect of the

1 unclaimed damages and the Tribunal then scrutinises the
2 process of paying the funders' return and can take into
3 account relevant factors in authorising that. Of
4 course, once the funder has been paid, any remaining
5 undistributed damages then go to the Access to Justice
6 Foundation.
7 THE CHAIRWOMAN: Yes, I thought the Tribunal has a role in
8 scrutinising the method of distribution to members of
9 the class as well, but you are saying there is a further
10 element that effectively provides for the Tribunal to
11 approve payment to the litigation funder?
12 MS FORD: Madam, yes, that is right. The point I make is
13 that this all happens at the end of the process, once
14 you have had a pot of aggregate damages and those class
15 members come forward and get their payment out of the
16 pot of aggregate damages, so the payment to the funder
17 really slots in at a later point in the process.
18 So, in our submission, the real weighing-up exercise
19 that the Tribunal does for the purposes of costs benefit
20 ought to be costs in terms of the 30 million that I have
21 identified on the one hand and the aggregate of recovery
22 on the other.
23 Our submission is that the costs benefit analysis
24 clearly favours a CPO in this case. Of course, even if
25 the Tribunal were not with us on that element of the

1 costs benefit analysis, nonetheless, in our submission,
2 the other factors that the Tribunal is invited to weigh
3 up by the rules in determining whether these proceedings
4 are suitable all point in favour of CPO, and so, in my
5 submission, the balance is clearly in favour of
6 certification.
7 Mr Singla's final point was to suggest that, in the
8 event that the claim is certified, the class definition
9 needs to be amended. The Tribunal will be familiar by
10 now with how that point arises. It is because the loss
11 to the class member only incepts as and when the
12 relevant OEM enters into an affected contract, and
13 Mr Singla pointed to relevant provisions in the Guide
14 which tell you that the class should be defined as
15 narrowly as possible.
16 The key words in our submission are "as possible"
17 because, as we have emphasised, we do not yet know which
18 claimants this affects, if any, and so for present
19 purposes it is not possible to define the class any
20 narrower.
21 THE CHAIRWOMAN: Can we ask a question about that which we
22 were discussing, which is there is a point about the way
23 in which the claim -- if we were to certify, the claim
24 then gets advertised and you have a limited amount of
25 time to opt out, if it is certified as an opt-out claim.

1 For the reasons you give, you may not -- you say you
2 cannot now determine how to narrow that class,
3 presumably because you have not got the shipping
4 contracts and you have not got the delivery charge
5 increases for a lot of the brands, although you might be
6 able to get the second of those in advance of
7 disclosure, I expect. Is there scope, if this were
8 thought to be a major point and it was thought
9 inappropriate to advertise to all BMW buyers in
10 2007/2008 if it ultimately becomes clear that they would
11 not be able to really form part of the class -- is it
12 appropriate to consider any form of structure which
13 provides for the class definition to be clarified at
14 a later point, post disclosure, in some way? For
15 example, by -- and delaying -- I suppose, most
16 relevantly, delaying advertising.
17 MS FORD: Madam, I very much hesitate with the delaying
18 advertising part because the normal approach to this is
19 that, once a CPO order is made, at that point the claim
20 is then advertised. It would be very unsatisfactory, in
21 my submission, to delay that process whereby people are
22 notified and the claim is publicised for essentially an
23 indefinite period because we cannot tell at the moment
24 at what point we will have the requisite clarity to be
25 able to say, "Well, for this period you BMW owners would

1 have a claim, but for this period you Volkswagen owners
2 will not". I do not think we are in any position at the
3 moment to have clarity about when that would happen and
4 I do query the practicality of a class definition which
5 takes that level of granularity.
6 We saw in the Guide that we are encouraged to try
7 and come up with something which is essentially simple
8 and workable. I do question the practicality of trying
9 to get that level of granular detail into a class
10 definition.
11 THE CHAIRWOMAN: Well, you would end up going down and
12 looking at each brand and setting a different date for
13 each brand, I think.
14 MS FORD: It would probably involve at least that level of
15 granularity. What of course possibly could be done is
16 to indicate in the material by which the claim is
17 publicised that recovery is not guaranteed because, for
18 example, it may transpire that certain people who are
19 within the claim period might be found in due course not
20 to have a claim so nobody is given an undue expectation.
21 Of course --
22 THE CHAIRWOMAN: Can I clarify how you see it working? You
23 see, everyone who has bought or acquired after the date
24 in 2006 would be in the class, but as disclosure
25 produces this additional information, that would

1 effectively scale down what you are claiming by way of
2 aggregate award, would it not?
3 MS FORD: It would.
4 THE CHAIRWOMAN: Then it would be a separate matter as to
5 whether Mrs Jones, who bought in the later part of 2006,
6 actually gets to share in that award?
7 MS FORD: Certainly insofar as there was sufficient clarity,
8 at a particular point in time, one could amend the class
9 definition to reflect that. It is of course subject to
10 the point that, Madam, you will be aware I take, that
11 there may be other sources of loss, the currency
12 adjustment factor and the bunker adjustment factor. So
13 this is why I hesitate to say, well, you might not even
14 have clarity in relation to the contract and the
15 delivery charge dates.
16 The reason why that is important, in my submission,
17 is that it would clearly be unsatisfactory to exclude at
18 this stage claimants who may transpire to have suffered
19 loss and this, of course, is a matter that is not within
20 the PCR's knowledge, it is within the defendants'
21 knowledge, because they know how the cartel operated,
22 they know how loss arose from that particular element of
23 collusion that the Commission identified in its
24 decision.
25 This is the classic situation where you have the

1 asymmetry of the information and the claimant is not in
2 a position to know how that might impact. It is [sic]
3 a matter within their knowledge and so it would be
4 unfortunate to exclude claimants who, it might
5 transpire, may actually have been the victims of the
6 cartel.
7 THE CHAIRWOMAN: Okay. Thank you.
8 MS FORD: Madam, I think that covers the question of class
9 definition.
10 I am moving on to deal with the opt-in/opt-out
11 question. In that context, Mr Hoskins identified two
12 questions of law, the first being whether the Tribunal
13 can, as a matter of law, consider an opt-in claim when
14 only faced with an opt-out claim. I do paraphrase
15 slightly, but that, as I understand it, was the first
16 legal issue he identified. Then, secondly, whether the
17 Tribunal can, as a matter of law, consider opt-in for
18 a part of the class, essentially to bifurcate the claim
19 in the way that the defendants are inviting the Tribunal
20 to do.
21 In relation to the first issue, he reminded you of
22 what was said by the Tribunal in *BT* at paragraph 29 and
23 in *Gutmann* at paragraph 51. We have expressly reserved
24 our position as to whether those paragraphs are correct
25 or not.

1 I should clarify, the reason we have reserved our
2 position is not because we are willing to wound but
3 afraid to strike but because we say that it may be that
4 the Tribunal does not actually need to decide one way or
5 another whether the Tribunal is right about that matter
6 because we say, on any view, in relation to the second
7 issue, whether on the law or indeed on the facts of this
8 case, it is clearly manifestly misconceived to suggest
9 the bifurcation of the class in the way that has been
10 suggested. So we say it may be that the Tribunal does
11 not need to decide the first issue.
12 But to just be clear about what our position is on
13 issue 1 that Mr Hoskins identified, we emphasise that
14 the test that the Tribunal is asked to consider, is
15 directed to consider by the rules and by the Guide, is
16 whether opt-in proceedings are practicable. The Guide
17 expresses a general preference for opt-in only where
18 practicable -- not a general preference overall, but
19 only where practicable. That is the touchstone. That
20 is always the test that the Tribunal has to apply.
21 The first simple point we make is, whether as
22 a matter of law or indeed simply as a matter of fact, it
23 cannot possibly be practicable for opt-in proceedings if
24 no opt-in proceedings are being offered. Any suggestion
25 in those circumstances that opt-in proceedings would be

1 practicable is necessarily completely speculative.
2 Secondly, we say it is contrary to *Merricks* to say
3 that the Tribunal must always consider opt-in,
4 notwithstanding that that circumstance -- that
5 possibility is not on the table. You have been shown
6 that *Merricks* tells you that certification does not
7 involve a merits test. The Supreme Court identified two
8 what it describes as exceptions to that Rule, one of
9 which is where you have to consider opt-in/opt-out. So
10 the normal position, the position where there is no
11 exception, is, according to the Supreme Court, that
12 certification does not involve a merits test. It does
13 not involve any merits test. It is not a different
14 merits test or a test directed at a different question
15 of suitability rather than opt-in or any of that nature.
16 Clearly what the Supreme Court is saying is, subject to
17 those two exceptions, the normal Rule is that there is
18 no merits test for certification.
19 So we say, if every time an application for a CPO is
20 made, the Tribunal necessarily considers is it
21 practicable to bring opt-in and what is the merits
22 position on opt-in, that does necessarily undermine what
23 the Supreme Court is telling you, that it does not, as
24 a Rule, involve a merits test.
25 Thirdly, in the context of this point, Mr Hoskins

1 made the submission that the preference of funders
2 cannot be determinative or should not be determinative
3 of this question. I would just draw the tribunal's
4 attention to the view of the Tribunal in *BT* on that
5 particular point. This is authorities
6 bundle {AUTH/29/39}, paragraph 115. The Tribunal say:
7 "... the PCR contends that if (as he predicts) too
8 few customers opt in, the required third-party funding
9 will not be attracted and in reality the claim would
10 never get off the ground. It is hard to see an answer
11 to this point, save the one which we have rejected which
12 is that in reality a large number of the relevant
13 customers would opt in."
14 So certainly the Tribunal in *BT* did see a lot of
15 force in the reality to the matter that these claims
16 require funding.
17 So that is our position on the first point of law
18 that Mr Hoskins identified.
19 I am moving on to the second point, which is: is it
20 open to the Tribunal to bifurcate the class? In
21 relation to that, our submission is that the legal
22 rules, so the Act, the rules and the Guide, when they
23 refer to this question, you do not see mention of
24 proceedings or any part of them and you do not see
25 a mention of the possibility of bifurcating the

1 proceedings. What you see is a -- what is envisaged is
2 a unitary consideration of whether the proceedings, as
3 a whole, should be opt-in or opt-out.
4 To make that good, if we start with the Act,
5 authorities bundle {AUTH/1/4}, section 47B(7)(c):
6 "A collective proceedings order must include the
7 following matters ...
8 "(c) specification of the proceedings as opt-in
9 collective proceedings or opt-out collective proceedings
10 ..."
11 So they are envisaging a fairly binary question.
12 Then if you go to tab 2, page 46, {AUTH/2/46},
13 Rule 79(3):
14 "In determining whether collective proceedings
15 should be opt-in or opt-out ... the Tribunal may take
16 into account all matters it thinks fit, including ...:
17 "(b) whether it is practicable for the proceedings
18 to be brought as opt-in collective proceedings ..."
19 Again, a binary question: which one?
20 Mr Hoskins took you to Rule 80, so this is on
21 page 47, {AUTH/2/47}, and he referred to 80(1)(d) and he
22 made the point that you have to describe or otherwise
23 identify --
24 THE CHAIRWOMAN: No, 80. Go back up to the top of the page,
25 please. Thank you.

1 MS FORD: He made the point that you "describe or otherwise
2 identify the claims certified for inclusion in the
3 collective proceedings".
4 He made the point it is "claims" plural, it is
5 a collection of claims, but of course the proceedings as
6 a whole are referred to in the singular, so "the claims
7 certified for inclusion in the collective proceedings".
8 If you look at subparagraph (f) in this Rule, you
9 see:
10 "state whether the collective proceedings [singular]
11 are opt-in or opt-out collective proceedings."
12 Again we would say that what is envisaged is
13 a relatively binary enquiry.
14 The same applies if you look at the Guide,
15 {AUTH/3/86}, 6.39. If we can go down to the second
16 bullet, please:
17 "Whether it is practicable for the proceedings to be
18 brought as opt-in proceedings ..."
19 You can see even in the text:
20 "... whether it is practicable for the proceedings
21 to be certified as opt-in. There is a general
22 preference for proceedings to be opt-in where
23 practicable."
24 So, in my submission, in each of the places where
25 the exercise that the Tribunal must engage in is

1 described, what they are envisaging is that you
2 determine one or the other. You say: is this going to
3 be opt-in or opt-out? They do not contemplate the
4 possibility that you might essentially chop off the head
5 of the class and determine that that should be opt-in
6 and then the remainder should be opt-out.
7 We do say that this is either a strict point of law
8 because, in our submission, it is very clear on the face
9 of the legislation that it is not contemplating doing
10 that at all -- so this is potentially a jurisdictional
11 question as to whether you have any power to do it at
12 all -- but, equally, in my submission, it is strongly
13 indicative -- even if you did have the power, it is not
14 contemplated and clearly not envisaged as a way forward
15 by the legislative regime.
16 We do place some reliance on the background to the
17 statutory regime in this context as well, and there is
18 a summary of that in *Merricks* at paragraph 20. It is
19 {AUTH/25/8}. This is Lord Briggs summarising how the
20 regime came into being:
21 "Although now forming part of the Competition Act
22 1998, the statutory part of the structure for collective
23 proceedings was introduced, by amendment, in two stages.
24 The first was in the Enterprise Act 2002, but it only
25 permitted opt-in proceedings and was unsuccessful. The

1 second was in the Consumer Rights Act 2015. This
2 followed a public consultation ... it was announced that
3 the Government wished to bring forward proposals to
4 improve the regime [improve a regime which previously
5 envisaged only opt-in] for bringing private actions for
6 redress for anti-competitive behaviour."
7 You see the aims there, {AUTH/25/9}:
8 "Under the heading 'Why is reform needed?' the paper
9 recognised ... the widespread view that private actions
10 were the least satisfactory aspect of the competition
11 regime, so that there was wide recognition of the need
12 to improve 'access to redress and dispute resolution'."
13 They point out:
14 "'Currently it is rare for consumers and SMEs to
15 obtain redress from those who have breached competition
16 law, and it can be difficult and expensive for them to
17 go to court to halt anti-competitive behaviour.'"
18 You see further down the page recognition of the
19 difficulty that they are addressing:
20 "'... competition cases may involve large sums but
21 be divided across many businesses or consumers, each of
22 whom has lost only a small amount. This means that a
23 major case, with aggregate losses in the millions or
24 tens of millions of pounds, can nevertheless lack any
25 one individual for whom pursuing costs makes economic

1 sense.'"

2 So this is the statutory background to the regime

3 and it arises in circumstances where there was solely an

4 opt-in proceeding available and it was, as the

5 Supreme Court said, unsuccessful. Only one case was

6 ever brought under it, by which -- which essentially

7 said, "We are not going to try to bring a case again

8 because the regime is unfit for purpose". That is the

9 background to a circumstance where the possibility of

10 bringing an opt-out action, in order to vindicate

11 claims, was introduced.

12 You can see again, if we just go to 54 in this --

13 sorry, page 22, paragraph 54, {AUTH/25/22}, you just see

14 below B:

15 "The evident purpose of the statutory scheme was to

16 facilitate rather than to impede the vindication of

17 those rights."

18 In our submission, that does provide a relevant

19 background to this question because the possibility of

20 an opt-in was considered to be unsatisfactory and the

21 reforms ought then to bring the possibility of opt-out

22 proceedings in order to facilitate the vindication of

23 rights.

24 I am moving on to Mr Hoskins' submission on the

25 facts of this case. He first made the submission that,

1 because there is a general preference for opt-in rather
2 than opt-out, any attempt to rely on generalities or
3 general aspects of opt-in cannot weigh heavily in the
4 balance. We take issue with that for two reasons. The
5 first is that the general preference, as I have said, is
6 for opt-in rather than opt-out where practicable and, as
7 a consequence, when the Tribunal is applying this test
8 of practicability, the general points are important.
9 So, inevitably, factors which make it impracticable
10 to pursue opt-in proceedings generally that appear in
11 multiple cases are going to be relevant to your enquiry
12 as to whether it is actually factually practicable and
13 you cannot just dismiss them by saying, "Well, they
14 arise in many cases". It is going to be relevant to
15 your assessment of the factual practicability of
16 bringing them in any one particular case.
17 Mr Hoskins took you to {B/108/1}. This is what he
18 described as a "toolkit" and so the respondents are
19 offering the Tribunal a toolkit whereby they can decide
20 what is the threshold for practicability and apply it to
21 their proposed bifurcation of the class. But the
22 question I pose is: well, how is the Tribunal supposed
23 to approach that? How is the Tribunal supposed to make
24 an informed assessment of what is practicable and at
25 what level? How does it pick? We have what I would

1 describe as "assertions" from the respondents as to what
2 is or is not practicable and that certain levels of
3 claim might incentivise opt-in and certain levels of
4 claim might not, but there is no evidence in support of
5 that. What the Tribunal does have is detailed evidence
6 from Ms Hollway, explaining exactly why it is not
7 practicable to pursue this plan. It really is not
8 a very straightforward exercise.
9 So if, for example, the Tribunal were to say, "Well,
10 we will pick a level of 20,000 vehicles and that gives
11 us, on this table, a claim value of some £59,000", first
12 of all you do not know whether those 20,000 vehicles are
13 excluded brands or not, so it is conceivable that you
14 could pick somebody who has purchased 20,000 vehicles
15 and find that actually they do not have the scale of
16 claim that is being assumed in this table or you could
17 find that this is 20,000 vehicles of the sort that were
18 only exposed to a lower overcharge, such as those
19 referred to by Mr Singla in his submissions, and so you
20 find that you have 20,000 vehicles with a very low
21 overcharge and the total overall value of your claim in
22 those circumstances is relatively low. So it is not
23 a straightforward and mechanical exercise to say, "Ah,
24 well, if you take a particular number of vehicles, then
25 you can assume that this is a practicable threshold,

1 opt-in will work".
2 I am coming on to address the very specific elements
3 which go into whether it is practicable or not, and one
4 of the points that was made by Mr Hoskins was -- it was
5 responding to Ms Hollway's evidence about data-gathering
6 and book-building. Ms Hollway -- I think I showed the
7 Tribunal the evidence in opening that Ms Hollway was
8 making the point that it becomes very impracticable
9 to -- first of all, for the relevant companies in
10 question to assemble the material they need to decide
11 whether to opt in or not and indeed for the relevant PCR
12 to seek to engage in the process of book-building.
13 Mr Hoskins' submission was that, well, that is
14 actually a good thing, data-gathering is a good thing,
15 book-building is a good thing, because the parties in
16 question are making an informed decision on whether to
17 participate in this claim or not.
18 My submission about that is that is applying the
19 wrong test because the test is not whether it is a good
20 thing; the test is whether or not it is practicable to
21 bring proceedings in this way, opt-in proceedings.
22 Is it practicable? Ms Hollway's evidence is very
23 clearly that these factors mean that it is not
24 practicable.
25 Mr Hoskins emphasised that the characteristic of an

1 opt-out proceeding is that you have members of a class
2 who are -- and the claims are brought on their behalf,
3 potentially without their knowledge or consent, and that
4 is the nature of an opt-out proceeding. But the regime
5 fully addresses that because the regime says, for
6 example, that one of the factors you, the Tribunal, must
7 take into account is the merits of the claims. You
8 would expect that a claim for opt-out proceedings would
9 have more obviously demonstrable merits -- I think the
10 merits must be more immediately perceptible for opt-out
11 precisely for the reason that Mr Hoskins has
12 indicated: because you are then authorising the PCR to
13 act on behalf of people who have not expressly opted in
14 and so the regime is specifically acknowledging and
15 providing for a threshold to address that matter. Of
16 course, if they decided that they did not want to be
17 party to the proceedings, they have the option to opt
18 out.
19 So, in my submission, it is not an answer to the
20 specific practicability concerns to say, "Ah, well, this
21 is because people will be party to a proceeding to which
22 they have not expressly given their consent".
23 Mr Hoskins then addressed the question of claim
24 value, which is obviously another indicator that the
25 Tribunal takes into account. He pointed out one of the

1 indicators is, if you have a small class and high value
2 claim, that might point to opt-in proceedings in the
3 Guide. He made the point that here the defendants'
4 proposal does give rise to a small class and a high
5 value claim and so, therefore, this all points to
6 opt-in. Of course the reason that it does is because
7 they have proposed chopping off the top of a very big
8 class and making a second opt-in small class, and so, by
9 definition, they have identified a small class. Equally
10 the reason that the claims in that class are in
11 relatively terms high value is because they have chosen
12 to chop off the highest value claims in the class. So,
13 in my submission, it is self-serving to say, "Aha,
14 therefore this satisfies the test for opt-in".
15 Mr Hoskins made submissions that it would be
16 straightforward to identify and contact members of the
17 class. Given the time available, I would simply draw
18 attention to the fact that the submissions that were
19 made do contradict directly the evidence before the
20 Tribunal of Ms Hollway, who explained why that was not
21 the case and, in particular, she addressed that at
22 paragraph 19, just for the tribunal's note, {C/15/6},
23 and also the reliance on Case Pilots, who have been
24 appointed to assist with publicising the claim, at 46 to
25 48, {C/15/14}.

1 There was a discussion of disclosure and disclosure
2 was at various points presented as some sort of
3 advantage that means that the Tribunal should direct
4 opt-in claims. As came out in the course of
5 submissions, of course, the disclosure that will come
6 out from a class would necessarily be at the purchaser
7 level and so it certainly does not assist to any great
8 degree with the problem that Mr Robinson identified,
9 that we have seen many times in his report, the upstream
10 pass-on question.
11 As, Madam, you indicated during the course of
12 argument, there are of course other ways of doing it if
13 and to the extent that disclosure or further information
14 might be considered desirable. In FX, the President was
15 suggesting that you could possibly sample the class in
16 order to obtain answers to questions and in *Trains* we
17 saw that there was talk of doing a survey to find
18 answers to questions, so there are other ways of
19 approaching this.
20 THE CHAIRWOMAN: Yes. Can we raise a specific point there?
21 To the extent that Mr Hoskins was saying, "Well,
22 essentially it is unfair not to allow us to get
23 disclosure from some of these big users because,
24 frankly, you are not going to order that in an opt-out
25 situation where you might order it in an opt-in

1 situation", I think I indicated that there might be
2 other ways of dealing with that. I think the point was
3 made that nothing legally precludes a disclosure order
4 against an opt-out participant.
5 MS FORD: Certainly the rules envisage that as
6 a possibility.
7 THE CHAIRWOMAN: If it was felt important for any reason to
8 obtain disclosure from, say, the largest car rental
9 companies, just to take an example, it is possible that
10 the Tribunal would feel -- might feel able to take that
11 approach if the relevant -- at least if the relevant
12 proposed claimant, class member, had an opportunity to
13 opt out in order to avoid going to the lengths that
14 would be required with a disclosure order. I just want
15 to put that point out there for consideration.
16 MS FORD: Yes, well, I envisage, insofar as that is a matter
17 that comes up during the course of case management, the
18 Tribunal will hear submissions on it and Mr Hoskins can
19 make his submission that it would be unfair if he was
20 not permitted to get disclosure and any submissions that
21 needed to be made to the contrary could at that point be
22 made.
23 THE CHAIRWOMAN: Yes, I am just conscious that if and when
24 you make a CPO, you put a time limit on opting out,
25 typically. I think you do put a time limit, as

1 I understand it --
2 MS FORD: You do.
3 THE CHAIRWOMAN: -- so I wanted to float that point because
4 it might be something where consideration would be
5 appropriate.
6 MS FORD: I am helpfully reminded from behind me that
7 Rule 82(2) says that a class member could apply to opt
8 out even after the opt-out date. I am grateful for
9 that.
10 MR HOSKINS: I think it is also necessary to look at sub (3)
11 to that Rule, which says:
12 "In considering whether to grant permission under
13 paragraph (2) the Tribunal shall consider all of the
14 circumstances including in particular whether the delay
15 was caused by the fault of that class member and (b)
16 whether the defendant would suffer substantial prejudice
17 if permission were granted [as read]."
18 So it is circumscribed in those two respects.
19 THE CHAIRWOMAN: Yes. I mean, there are different ways of
20 doing this. One might be via 82(2) but another might be
21 conceivably by the timetable, the general timetable, for
22 when opting out needs to occur.
23 MS FORD: Yes. I mean -- I can see there is some scribbling
24 going on to my left so I do not want to --
25 THE CHAIRWOMAN: I am not necessarily asking for answers

1 now. I am flagging the point as a possible point --
2 MR HOSKINS: Can I just echo -- I think there may be some
3 common ground between us. I echo Ms Ford's concern
4 that, if one looks at the rules, the Tribunal is
5 expected to specify a date by which those who wish to
6 opt out of opt-out proceedings should do so. It is
7 clearly not envisaged to be open-ended and certainly
8 I share Ms Ford's experience in the sense that it is
9 anticipated that the date for allowing people to opt out
10 of opt-out proceedings will be relatively short. It is
11 not, you know, a year down the line or 18 months down
12 the line. It is something that is to take place at the
13 start, if you like -- if certification is granted, it is
14 something that is to take place early after
15 certification.
16 THE CHAIRWOMAN: Yes, in my mind around six months, but
17 I may be wrong about that.
18 MR HOSKINS: There is no time specified, but my point is it
19 should not be too long and I think I echo Ms Ford's
20 submission on that.
21 THE CHAIRWOMAN: Thank you.
22 MS FORD: Madam, of course the Tribunal will hear
23 submissions as to all those matters in due course, in
24 the course of case management. The point I would make
25 is that the test that the Tribunal is asked to apply now

1 is the test of practicability and the evidence of
2 Ms Hollway, in 32 to 33 of her witness statement,
3 {C/15/10}, is that the risk of being exposed to costly
4 disclosure, if you were an opt-in member of the class,
5 would be a disincentive to opting in. That, in my
6 submission, is a very clear factor that needs to be
7 taken into account in weighing up the practicability of
8 the suggestion.
9 Mr Hoskins also made submissions on the aggregate
10 value of the claims, and his submission was that the
11 aggregate value of the case is clearly high enough, even
12 excluding large purchaser claims, to make this claim
13 economically viable. The figures he pointed to were
14 Mr Robinson's figures of 31.1 million as a projected
15 claim value for private claims only and the fact that
16 the envisaged costs of pursuing the proceedings is just
17 under 15 million, and the submission he made was, "Well,
18 that is good money".
19 Of course that does somewhat cut across the
20 submissions that were made by Mr Singla, who was
21 claiming that these proceedings, in their former value
22 of 143 million, were still not worth pursuing. But
23 focusing on how this fits into the question of
24 opt-in/opt-out, in my submission it is very obvious that
25 you have to factor in that if you have got two

1 duplicative claims running side by side, you are going
2 to end up with higher costs rather than lower costs.
3 That has to be factored in.
4 But, secondly, in my submission, it is speculative,
5 highly speculative, to suggest that you can get funding
6 for a claim of that value with those returns -- simply
7 to suggest, well, that is the relationship, therefore
8 you can get funding for it. There is no basis, in my
9 submission, to suggest that that is necessarily to be
10 assumed as an economically viable claim.
11 So, Madam, our submission on opt-in/opt-out is that
12 this is a case where it is clearly more appropriate to
13 certify opt-out, in our submission, whether as a matter
14 of pure law or whether as a matter of the facts of this
15 case. The proposal that the class should be bifurcated
16 and part of it proceed as opt-in is hugely impractical
17 and I would invite the Tribunal to reject it.
18 I am moving on to deceased persons and compound
19 interest. My notes are getting increasingly more
20 chaotic. But deceased persons, Mr Holmes set out five
21 propositions which he addressed in his submissions and
22 we do not take issue with the first two. So the first
23 two were under English law deceased persons cannot bring
24 claims themselves; claims must be brought by their
25 estate. We do not quibble with that. His submission

1 was that the same applies to collective proceedings
2 under point 2, and again we do not quibble with that.
3 Where we part company is in relation to his
4 proposition 3, which was that the current class
5 definition does not include claims on behalf of the
6 representatives of deceased persons. The Tribunal heard
7 my submissions in opening about how the class definition
8 in the claim form is to be read and understood but
9 I would just like to draw attention as well to how the
10 sums which make up the claim have been calculated and
11 how they demonstrate that claims on behalf of the estate
12 of deceased persons have always been included within the
13 class.
14 If we look at {C/5/8}, this is PCR's litigation
15 plan. If we look at paragraph 15, you can see this is
16 the paragraph which deals with the size of the class.
17 It makes the point that:
18 "... it is not possible to determine the number of
19 members of the Proposed Class with precision. However,
20 as is set out in Appendix 4.3 of the BDO Report,
21 approximately 22.0 million new vehicles were registered
22 in the UK during the Relevant Period ..."
23 So the starting point is all vehicles registered in
24 the UK.
25 "... of which approximately 4.2 million were

1 Excluded Brands."
2 So you take out those excluded brands.
3 Then:
4 "The remaining 17.8 million new vehicles were
5 purchased or financed by potential members of the
6 Proposed Class."
7 It goes on. So they are broken down by private
8 purchasers and business purchasers.
9 So in calculating the size of the class, you do not
10 see any exclusion of persons who bought a vehicle and
11 then died.
12 The same applies if you look at {B/5/23}. This is
13 Mr Robinson just explaining in greater detail the source
14 of the data that he used and he explains that he got it
15 from -- it shows the number of new vehicles registered
16 with the DVLA in the UK from the Society of Motor
17 Manufacturers and Traders. It is over the period 2006
18 to 2015 and that is the way the data is broken down.
19 But, again, the source data that is being used to make
20 these calculations does not make any reductions for
21 deceased persons.
22 So, in addition to the points that we make on the
23 reading of the class definition itself, we say that it
24 is clear that this was always a claim which included
25 claims which now vest in the representatives of deceased

1 persons. We say that that is the point -- that means
2 that we get different answers as well to issues 4 and 5
3 that Mr Holmes addressed because we say that means that
4 we are not trying to add or substitute -- neither of
5 those things -- new parties to the claim. We say these
6 claims were always there, there was simply an ambiguity
7 about the capacity in which they are being brought.
8 Insofar as the Tribunal considers that it would be
9 optimal to amend to address that ambiguity, we have
10 indicated we will do so, but we do not accept that it
11 takes us into the sort of field that was being dealt
12 with in *Merricks*, where you have to be fitting yourself
13 into either Rule 38 or Rule 32 because it is simply
14 a matter of clarifying the basis on which claims already
15 included are brought.
16 The submission was made -- the comparison we shall
17 be making when we are comparing ourselves to *Merricks*,
18 I understand the submission was made that we should be
19 comparing ourselves with the proposed amended Merricks
20 claim form rather than the initial Merricks claim form.
21 Mr Holmes made the submission that, if you look at the
22 amended Merricks claim form, ours is the same as that
23 because they had actually put in a reference to claims
24 on behalf of deceased persons. But, of course, the
25 amended Merricks claim form was itself on its face

1 defective precisely because they tried to claim on
2 behalf of the deceased persons themselves rather than
3 claims made by the estates, the representatives. So we
4 say that we are not in that position at all. Our claim
5 form is not on its face defective; it simply does not
6 expressly state the basis on which those elements of the
7 claims are brought.
8 So we do say that we do not even get into the
9 question of which Rule you proceed under. If you do
10 need to fit it in under a Rule, in our submission, the
11 fact that these claims were always in there essentially
12 means that multiple of the provisions either under
13 Rule 32 or Rule 38 would be amenable to the situation.
14 The oddity is, of course, that the way in which the
15 rules are expressed, they are talking about a party and
16 it is not really immediately transferable to the
17 situation of a class. But if we just look at 32(2) --
18 so this is {AUTH/2/22} -- in my submission there are
19 a lot of similarities in all three of the possibilities
20 under 32(2) so:
21 "To add or substitute a new claim, but only if the
22 new claim arises out of the same facts or substantially
23 the same facts as a claim in respect of which the party
24 applying for permission has already claimed a remedy in
25 the proceedings."

1 Well, here, of course, you already have a claim in
2 the proceedings. It is not really a new claim but it
3 certainly arises out of the same facts. You are simply
4 indicating, "Well, we are bringing these claims that
5 were already there on behalf of this person".
6 You then have (b):
7 "to correct a mistake as to the name of a party ..."
8 Of course it is not strictly a party because it is
9 a member of the class, but if it is a mistake as to the
10 name of the party, that is at least analogous to the
11 situation where you have not specifically clarified that
12 this claim is brought on behalf of the estate's
13 representatives rather than the deceased persons
14 themselves.
15 And then (c):
16 "to alter the capacity in which a party claims ..."
17 Well, again, I suppose you could say it is analogous
18 to that in the sense that you are altering your capacity
19 from the actual deceased person themselves to a claim by
20 the estate. It is all analogous rather than directly,
21 in my submission because, of course, it is not really
22 directly grappling with the situation of collective
23 proceedings.
24 The same applies to the various points under 38,
25 {AUTH/2/24}. I think if we go down to subparagraph (7):

1 "... the new party is to be substituted for a party
2 who was named in the claim form by mistake ..."
3 The Tribunal has my point that it is not really
4 a party and of course it is not really a substitution
5 because we say these were already there.
6 THE CHAIRWOMAN: You say a member of a class is not a party?
7 MS FORD: Well, it is not strictly a party in the sense that
8 the party is the PCR and the respondents, but I think
9 you must assume that this applies by analogy because it
10 is clearly the case that these rules are intended to
11 apply to collective proceedings.
12 So the point I make generally is that, in our
13 submission, the fact that these claims were always there
14 is a very important distinguishing factor as between us
15 and the situation on the *Merricks* remittal. We do not
16 think that we should actually have to cram our situation
17 into any of these parts of the rules, but, in any event,
18 we say that clearly the rules are contemplating that you
19 should be able to deal with a situation such as ours.
20 The claims are already there.
21 Madam, that deals with our position on deceased
22 persons.
23 I am just turning to deal with compound interest.
24 In relation to this, again, I rely primarily on the
25 submissions that I made in opening as to our position.

1 The submission that Mr Holmes made in response was that
2 the proposed methodology we have indicated does not meet
3 the *Pro-Sys* test. There were sort of two limbs to it.
4 On the one hand, it is suggested, "Well, it is a bit
5 broad brush". On the other hand, it is submitted,
6 "Well, it does not grapple in detail with various points
7 that the respondents have since identified". Insofar as
8 the complaint is, "Well, this is too broad brush", we
9 would draw attention to the position in *Merricks*, where
10 there was a methodology advanced to deal with pass-on
11 which, as Mr Singla emphasised, did satisfy the *Pro-Sys*
12 test, and that was extraordinarily broad brush because
13 it covered the entire economy and it split the economy
14 into various sectors and it came up with an average
15 pass-on rate across the sectors. That was over a period
16 of over a decade and that was sufficient for the
17 purposes of the *Pro-Sys* test.
18 So insofar as the complaint is, "Well, you have
19 taken too much of a broad brush approach", in our
20 submission that is not a viable complaint in the light
21 of *Merricks*. Insofar as the complaint is, "Well, there
22 is a lack of detail about how you envisage addressing
23 various complexities", we say that that is a point that
24 has already been addressed in *Trains*.
25 If we look at {AUTH/30/67}, paragraph 162, this is

1 the context of the paragraph where they are talking
2 about a possible survey. The Tribunal says:
3 "Expert evidence at this stage should explain the
4 methodology proposed and indicate the available sources
5 of data to which it will be applied, but it does not
6 have to provide detailed elaboration of the way the
7 analysis or analyses will be conducted."
8 In my submission, that really applies to the
9 circumstances of the present case because what are being
10 raised are increasingly points of detail about, "Well,
11 how do you propose to deal with this and how do you
12 propose to deal with that?". That, in my submission, is
13 not a legitimate basis for objecting to certification of
14 this issue altogether. I do not understand anyone to be
15 realistically suggesting that it cannot actually be
16 done. In that circumstance, in my submission, it is
17 appropriate to be certified.
18 THE CHAIRWOMAN: Are you suggesting, for example, that the
19 methodology proposed could be elaborated on to
20 distinguish between how hire purchase and PCP contracts
21 are dealt with, for example?
22 MS FORD: Well, I do not have instructions as to that
23 particular point, but --
24 THE CHAIRWOMAN: No, as a matter of principle.
25 MS FORD: Yes, as a matter of principle. Clearly the

1 Guideance that Mr Robinson has given in his report is
2 a relatively high-level approach. He is saying, "I am
3 going to take average finance rates, I am going to take
4 an average period of financing and I am going to work it
5 out". There is no doubt that it is a relatively
6 high-level approach and, in my submission, it should not
7 be criticised for that. There is an extent to which you
8 have to say, "Well, you need to stop going down into
9 further and further levels of detail at the
10 certification stage".
11 Of course, as and when we have relevant factual
12 evidence that tells us how do we go about this, what the
13 relevant proportions are, what the relevant rates are,
14 that sort of thing, that is the time at which it can be
15 done.
16 Madam, unless I can assist the Tribunal further,
17 those are my submissions.
18 THE CHAIRWOMAN: Thank you very much.
19 Thank you to all the advocates for your very clear
20 submissions. Judgment will follow in draft on
21 a confidential basis initially in due course. Thank
22 you.
23 (4.26 pm)
24 (The hearing concluded)
25

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