IN THE COMPETITION APPEAL TRIBUNAL

Case No:1339/7/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 16th November 2022

Before:
Sir Marcus Smith
(President)
Eamonn Doran
Bridget Lucas KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

MARK McLAREN CLASS REPRESENTATIVE LIMITED
Applicant / Class Representative

v

(1) MOL (EUROPE AFRICA) LTD
(2) MITSUI O.S.K. LINES LIMITED
(3) NISSAN MOTOR CAR CARRIER CO. LTD
(5) NIPPON YUSEN KABUSHIKI KAISHA
(6) WALLENIUS WILHEMSEN OCEAN AS
(7) EUKOR CAR CARRIERS INC
(8) WALLENIUS LOGISTICS AB
(9) WILHELMSEN SHIPS HOLDING MALTA LIMITED
(10) WALLENIUS LINES AB
(11) WALLENIUS WILHELMSEN ASA
(12) COMPANIA SUDAMERICANA DE VAPORES S.A.
Respondents / Relevant Defendants

A P P E A R AN C E S

Sarah Ford KC and Emma Mockford (instructed by Scott+Scott UK LLP appeared on behalf of the Class Representative)

Daniel Piccinin (instructed by Arnold & Porter Kaye Scholer (UK) LLP, Steptoe & Johnson UK LLP, Baker Botts (UK) LLP and Wilmer Cutler Pickering Hale and Dorr LLP appeared on behalf of the First to Third, Fifth, Sixth to Eleventh and Twelfth Defendants)

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Wednesday, 16 November 2022

(2.00 pm)

Housekeeping

THE PRESIDENT: Good afternoon, Ms Ford. Before you begin, a few housekeeping matters.

First of all, we have the live stream operating in this courtroom, so I'd better start with the usual warning, which is: although an official recording is being made, and an authorised transcript will be produced of these proceedings, that is to be the only recording of what is going on here, and no other recording, whether audio or visual, nor should photographs be taken of proceedings. That will be a contempt punishable in another court, so please don't do it.

More helpfully, can I thank the parties for their written submissions, which we've read. We each have two bundles, one authorities, one bundle of materials, which we have read.

We have paid considerable attention to the bundle that is not the authorities; the authorities we've skimmed through.

I'd like to say a couple of words about the constitution of the Tribunal, and one longish word on how we see the case, which may assist the parties in how they structure their submissions.

First, the Tribunal constitution. This is not, as the parties will appreciate, the usual constitution of this Tribunal. Because of the potential wider significance of the Application, I replaced Mr Bishop on the Tribunal and he is not present today. The elevation of Mrs Justice Falk to the Court of Appeal has required a further adjustment. Ms Lucas, to my right, will be taking over as Chair for the future, hence her presence in the place of Lady Justice Falk. Mr Bishop will be returning in the

future.

I will be retiring after a solo guest star performance. So that's the reason for the unusual constitution today.

Moving on to our sense of what the battle lines are between the parties, we think it's common ground there are some communications between defendants to a class action and the members of that class that the parties agree should not take place and are improper. The question, where the common ground ceases, is: what communications should not take place, and what communications are proper?

It is there that we have a divergence in the parties' submissions.

Now, the Applicant draws the prohibition extremely widely. I think we can see that from the bundle, tab 24, page 86, where there is a direction sought by the Applicant: "…the Defendants shall henceforth not communicate directly with actual or potential members of the class."

Now, that is a very widely drawn prohibition and reflects the width of Ms Ford's submissions.

For our part, we would provisionally say it seems to us that is a little too wide. What, one might ask, about the inadvertent communication between a defendant and a potential class member? Because we bear in mind that the definition of a potential class member may be extremely wide, certainly where the application for certification has yet to be granted -- I appreciate that's not this case -- or where the time for opting out has not yet come. Those are both factors which might lead to a rather wide drawing of persons with whom one cannot communicate on this test.

So, considering this, we were trying to work out what might be an appropriate way of framing the test that fell short of defining the test by reference to wrongdoing, or something that is naughty. Of course, we appreciate that you can frame it that way,

but we're not sure that it is the best way of doing so.

So, provisionally, we wondered whether a prohibition on communication could be articulated along the lines of the professional obligation that subsists between the solicitors of two parties to a private dispute -- so both who have instructed solicitors -- where it is quite understandably regarded as improper for one solicitor to write to the lay client on the other side, rather than to the solicitor instructed by that lay client.

Now, the first thing to say is that can't be regarded as an analogy or a parallel; it's simply a rule that we would be drawing on to inform our thinking.

Our provisional thinking is, applying this by analogy, there should be no communication by a defendant, or potential defendant, to a class member or potential class member, regarding proceedings that have either been certified by the Tribunal or which are the subject of an application to certify. In such cases, we're thinking, the general rule ought to be that communications are to the PCR or to the CR, depending on the state of the application, exceptionally -- because general rules are always quite dangerous -- a defendant could write to the Tribunal in advance for permission to write directly to the class or member regarding the proceedings. Even more exceptionally, a defendant could write directly and seek retrospective validation of that course from the Tribunal, to carve out a series of exceptions to the general rule.

Now, this is very much blue sky thinking on our part and of course would be subject to agreement between the PCRs' or CRs' legal representatives and any proposed or actual defendants as to communicating with the class. If there was agreement, it seems to us different rules would apply. It's not as if the parties are not likely to be before the court on multiple occasions where the questions of communication can't

be aired with the Tribunal, so the Tribunal can give a steer as to what is and what is not permitted.

So these very much are provisional thoughts, but we thought it helpful to set them out for the parties to consider in their submissions.

We raise it now because it does very much affect how we approach matters if the prohibition is narrower and more wrongdoing focused.

So, to assist you, Ms Ford, you may or may not wish to push back on our formulation as we have set it out. If there's no push back, then we would be grateful if you could keep your submissions on the test short.

However, we do think that it would be helpful if you could set out what your submissions on the facts are, assuming that we are persuaded that actually the test needs to be done on a narrower basis, a more wrongdoing focused approach.

Now, that will give Mr Piccinin the chance to push back both on our general formulation and on the related questions of what, if there should be a narrower test, it is; and why, if the narrower test is adopted, it's not satisfied in this case. Then, Ms Ford, you, of course, will have a right to reply to that.

So that's how we -- subject to the parties' views -- would want to structure matters.

The only other thing that I want to raise is the question of consequentials, which I would be grateful if the parties could think about in their submissions.

If the Application succeeds -- and of course that's the 'if' we're discussing -- is it common ground that the communications from the class to the Defendants should be disclosed to the Class Representative?

And relatedly: how urgent are other consequential matters? For instance, if the Application were to succeed, does the window for opting back in need to be reconsidered, so that someone who has opted out is given the chance to revisit that

question, given the communications, on this assumption, shouldn't have been written?

That begs the question of how the outcome of this Application, if it goes one way, ought to be communicated to the persons in receipt of communications from the Defendants.

So we raise that now because it's likely that we're going to be reserving judgment, but we would not want to have a further hearing to deal with consequentials in person, because diaries are difficult and we would not want this to be left unresolved in any way.

So I apologise for going on for so long.

I'll leave it to the parties to push back on that. If you want time to take instructions, of course, either of you will have it.

MR PICCININ: Could I just ask a quick point of clarification?

THE PRESIDENT: Yes, of course.

MR PICCININ: I wasn't sure -- the point about disclosure -- what you had in mind, Sir. If the Application succeeds, should the Defendants disclose --

THE PRESIDENT: Sorry, if the Application succeeds, there's a -- well, if you go to page 86 again, what it says in 2(2):

"…the First to Third, and Fifth to Twelfth defendants shall provide to the Class Representative any and all communications with actual or potential members of the class, including any responses to their letters..."

MR PICCININ: That has all been superseded, Sir.

THE PRESIDENT: Oh, sorry.

MR PICCININ: They're not seeking any of that relief in that form anymore. In their Reply, there's a draft order that seeks different relief because we actually gave them

all that by --

THE PRESIDENT: Okay, I'm sorry. That's my error.

MS FORD: Sir, the order that we attached to our Reply is behind tab 31 in the bundle.

THE PRESIDENT: I'm grateful. Yes.

MS FORD: It might assist to pick up -- I'm grateful, Sir, for your provisional indication -- the points you make about how one defines the breadth of the prohibition.

The way in which we see it is that what is prohibited is communications with class members in their capacity as class members. So what we have done in this order is to seek to accommodate some of the objections that were raised by the Relevant Defendants to our original order. But it's essentially for the avoidance of doubt, because the exceptions that are recorded here are essentially communications with class members in some other capacity.

So if, for example, they are a potential witness to the proceedings, whether a witness of fact or an expert witness, then any communication in that context is not in their capacity as a class member. It's in a different capacity, and so it falls outside.

Similarly, paragraph 2, it doesn't prevent the Defendants from communicating with actual or potential members of the class in the ordinary course of their business operations, again for the same reason: it's in a different capacity.

In our submission, the various examples that are raised in the Relevant Defendants' skeleton are also disposed of in the same way. So, for example, they said: well, what if a member of the court staff had happened to fall within the class because they had purchased a vehicle during the relevant period? Communications with that person in their capacity as a member of the court staff would not be in their capacity

as a class member, so they would not be precluded.

Equally, insofar as a class member happens to be selling brochures on eBay, liaising with them in that context is not precluded because it's not the relevant capacity. So the way we saw the limitation is the prohibition is on communicating in a capacity as a class member.

THE PRESIDENT: I think, Miss Ford, you are buying into the analogy of communications between two parties to private litigation who have each instructed a lawyer to act for them. There probably are cases where there are communications, one can imagine a dispute between neighbours, where they are arguing about the boundary between their two properties. They're litigating about it. That doesn't stop them talking about the football, or seeking to borrow the hose pipe from next door. But what they can't do is deal with the nuts and bolts of the litigation without making that position clear to their professional advisers.

So I think you're broadly happy with the analogy that we articulated?

MS FORD: Sir, yes, I think the way the Tribunal is perceiving it is very much consistent with the way that we perceive it.

THE PRESIDENT: Thank you. In that case our indication stands. We wouldn't want to cut you out for responding, but we wouldn't want you to be saying things where, at the moment, we're broadly seeing things the same way as you are.

MS FORD: I'm grateful. In that case I'm happy to start with the content and the timing of the relevant communication in this case.

Submissions by MS FORD

MS FORD: The Tribunal will see, if you look at the index to the application bundle, right at the front of the bundle, tabs 3 to 23 are the letters which are in issue. The

Tribunal can see the nature of the entities who were the recipients of this letter. The last one is over the page, tab 23.

That just gives the Tribunal the idea of the sort of entities that have been the recipient of this letter.

The letters in question are broadly in the same terms. So we can look at the first one in the bundle, behind tab 3.

It starts with a heading:

"Urgent, for the attention of the Chief Executive Officer and Head of Legal" of this particular recipient.

The Tribunal will be aware that matters concerned with disclosure are not normally treated as urgent. Of course, insofar as there is any urgency, it is of the Defendants' own making, because they chose the timing of their letters.

We then have a heading in bold type, and contained in a box for emphasis, and that says:

"This letter is not a circular. It relates to an important legal development with consequences for [the recipient]. We recommend that you provide it to your legal advisers immediately."

Again, the impression being given here is one of seriousness and one of urgency.

If we look at the first paragraph of the letter, you see the recipient being informed that the CAT has recently ordered that certain categories of companies will automatically become claimants in the litigation described below, unless they take steps to opt out by 12 August 2022.

Two points about that. First, the CPO that has been made is not focused on or limited to certain categories of companies. It is a defined class which comprises both consumers and companies. What the letters don't do is to set out the class

definition. That would be the most objective and accurate way to enable the recipients to tell whether they are in the class or not.

Secondly, it is incorrect to suggest that class members become claimants. To be clear, in our submission, this is not an inconsequential error or a permissible shorthand. By using the term "claimant" in this letter, it makes it more plausible that there might be attendant obligations coming with that status, such as disclosure or costs exposure.

Then at the end of this paragraph we see the first of many mentions of the possibility of opting out of the litigation by 12 August 2022.

Paragraph 2 then makes an oblique reference to applications which the Defendants are likely to make in relation to the recipient, again, if the recipient remains in the litigation. So another reference to the possibility of opting out.

Paragraph 4, we see a further reference to UK companies. It does say "amongst others", in this context. But, again, there's no reference to the actual class definition to enable the recipient to tell whether they're in the class or not. This paragraph purports to list the most common excluded brands, but it provides inaccurate information, because it's failed to identify four of the top ten excluded brands.

Turning over the page, paragraphs 5 to 8 are purporting to provide further information about the claim, but they omit to mention key details. They omit to mention that this is a follow-on claim, so the Defendants' liability for participation in a cartel is already established.

They fail to provide any information about the collective proceedings regime itself, such as, for example, the fact the Tribunal has already scrutinised these proceedings and concluded the Class Representative should be authorised to act and that the claims are eligible for inclusion in the proceedings.

These paragraphs do not explain the potential upside of being included within the class, namely that the recipient might be entitled to a share of the aggregate damages awarded. Lest it be said that it's not the Defendants' obligation to explain those matters, there is no reference to the CPO Notice, which is the document that this Tribunal scrutinised and approved for the purpose of giving potential class members a fair and objective explanation of the proceedings.

In fact the Tribunal did take great care in that process. It requested amendments to the Notice in order to ensure that it was satisfied that it was worded correctly.

So we say the description of the claims in those paragraphs is manifestly lacking.

We then come to paragraphs 9 to 11. They are headed:

"[The recipient's] involvement in the Claim."

But, actually, each of paragraphs 9 to 11 is about the possibility of the recipient opting out of the claim. So paragraph 9, it says:

"The CAT has ordered that UK companies which purchased relevant vehicles in the UK between 2006 and 2015 will automatically become class members on 13 August 2022, unless they avail themselves of the right to opt out."

So the 13 August date is given, and a reference is made to the possibility of opting out.

We then get paragraph 10, which is concerned with the way in which a company may opt out. It includes, in bold, that to be effective the opt-out instruction must be received on or before 12 August 2022. So a yet further reiteration of the key date, and bold type to give the impression of urgency and importance.

There is, in this paragraph, a cryptic reference to the benefits or burdens from participating in the claim, but there is no explanation of what those might be. In particular, there's no mention of a potential recovery in damages.

What you do see is a reference to the recipient being entitled, or may be entitled, to bring separate proceedings in its own name, rather than part of the class. The use of the reference to "entitled" gives the impression that this is a positive benefit that is obtained from opting out, rather than a difficult and time-consuming exercise which would not be necessary if the recipient remains party to the collective proceedings.

Paragraph 11, we then see:

"We understand that [the recipient] was a purchaser of new vehicles in the UK during the relevant period."

And:

"Accordingly, unless all the purchases were of Excluded Brands of vehicle it will by default become a class member on 13 August 2022 …"

So the date is given yet again:

"… if it does not exercise its right to opt out before then."

So each of these paragraphs makes the same point: it's the possibility of opting out; it gives the relevant date. It's made three times in a row.

Only then, at paragraph 12, do we come to a heading:

"Potential disclosure obligations."

So for a letter which is claimed to be all about likely disclosure, it takes a very long time to get to the point, and it only does so after heavy repetition of the possibility of opting out.

Paragraph 12 says that it is likely that the Defendants will seek disclosure of documents from class members who are large business purchasers of new cars and do not opt out. So, once again, the message being telegraphed is: the way to avoid this is to opt out.

What follows in the subsequent paragraphs is an attempt to make the potential

disclosure sound onerous. So, for example, we see the businesses in question could be ordered to carry out a careful search. That's paragraph 12.

If we go over the page, we can see the description of the example categories of document, and the description that's given is extensive. It references contracts and/or invoices which show the prices paid for all vehicles and/or the approach taken to pricing negotiations during the relevant period, 2006 to 2015. So it's all vehicles over a lengthy period of time.

Paragraph 13 then tells the recipient that disclosure might also be sought in relation to the question of whether class members passed on to their customers any overcharge.

I'm going to come back to the relevance of paragraph 14.

If we go on to paragraph 15, we see the recipient being told: this could involve a commitment of time, effort and cost on the part of the companies in question, although efforts would be made to minimise the extent of the burden where possible.

Then paragraph 16 warns them this obligation isn't limited to documents in the public domain; it would extend to disclosing confidential documents.

All this, in my submission, is clearly intended to convey the impression of disclosure obligations which would be time consuming, costly and intrusive.

Paragraph 14 includes a large chunk from the Tribunal's judgment in these proceedings. Buried in this chunk are some important observations that were made by the Tribunal. The first of those is in paragraph 169, where the Tribunal says:

"It may well be that disclosure would not ordinarily be ordered for members of an opt out class, but nothing precludes it."

The second is also in 169, and it is where the Tribunal indicates that it might well try to put in place safeguards to ensure the fair disposal of proceedings, and it gives

examples. Some form of cost protection, so the burden is not shouldered unfairly between class members or potentially giving the relevant class members the option of being excluded from the claim by removing them under Rule 85(3), if not Rule 82(2), if the opportunity to opt out would have otherwise expired.

Then paragraph 170, you see the Tribunal observing that the "…disclosure from certain Large Business Purchasers may be of limited relevance. " If the Tribunal reads on we can see the reasoning in relation to that. It said:

"Whilst it could assist as to levels of discount that they were able to negotiate and potentially in relation to pass on by certain types of businesses to their customers, it would not obviously assist in determining the levels of discount obtained by other purchasers, or, for example, and if relevant, the approach to setting vehicle list prices."

So the concern was that might not be representative of other purchases.

So there is important information contained in this chunk, but the letter does not present the Tribunal's judgment in such a way as to convey that information.

First of all, it's all buried in this text, and attention isn't drawn to it. But, instead, if we look at the beginning of paragraph 14, the way in which this chunk is presented to the recipient, what it says is:

"The CAT is aware that, in due course, the Defendants may seek such disclosure from such large business purchasers."

So if anything, in my submission, informing the recipient that the CAT is aware of this possibility gives the impression that it's all the more likely to happen.

Turning over to paragraph 17, it mentions again the possibility for the recipient to opt out of the claim, and it advises the recipient to take legal advice as to its duties to preserve relevant documents and to exclude them from routine document

destruction processes.

In our submission, this is a further problematic paragraph. It is carefully couched in terms of the need to take legal advice, but the clear impression it gives is that the recipients have duties to preserve relevant documents. That, in our submission, is incorrect. Class members are not parties to the proceedings, and they don't have document retention obligations.

The recommendation to take legal advice and the potential impact on routine document destruction processes all suggests the adverse consequences of remaining part of this litigation will start now, they begin immediately. They're not something that might happen at a later date when a disclosure application is, in due course, made. The point that's being conveyed here is: the pain begins now.

Paragraphs 18 to 21 are headed "Concluding comments", and they then repeat the key points.

Paragraph 18, the possibility of automatically becoming a class member; paragraph 19, the possibility of being the recipient of a disclosure application; paragraph 20, the need to take legal advice regarding its duties in relation to document preservation; paragraph 21 reiterates the obligation to take legal advice, or the advice to take legal advice, and finishes off:

"So that it can make an informed decision as to how to proceed in connection with this matter, including whether to join the class by default or to opt out of the class by 12 August 2022."

So the parting shot, the final thought that the recipient is left with is the deadline for opting out of the proceedings.

In my submission, the transparent purpose of these letters was to encourage the recipients to opt out of the class. Failing which, they would be best advised to take

legal advice immediately and be potentially exposed to time consuming, costly and intrusive disclosure obligations.

As the Tribunal will be aware, during the course of the CPO hearing, the Defendants tried to persuade the Tribunal to exclude large business purchasers from the scope of the class altogether.

They were unsuccessful in that argument. But they then took it upon themselves to write unilaterally to those parties, the large business purchasers, and they waited to do so until roughly two weeks before the opt out window closed, and they marked their letters urgent.

In our submission, there is no coincidence about the timing of those letters. We invite the Tribunal to infer, from the timing and the content of the communications, that their purpose was to seek to persuade large business purchasers to opt out of the claim.

In fact, unsurprisingly, the letters did cause alarm and confusion amongst their recipients. Ms Hollway has produced two witness statements which tell the Tribunal what occurred. The first is behind tab 25. Can I ask the Tribunal to review paragraphs 22 to 26 of this statement? They start at page 107.

(Pause)

THE PRESIDENT: Yes.

MS FORD: Two points to draw out from these paragraphs. The first is that both of the recipients that are dealt with here were under the impression that the letter they had received was from the Class Representative.

Secondly, the first recipient was indicating its intention to opt out as a direct consequence of having received that letter. Ms Hollway's third statement updates the Tribunal as to what occurred since the Application was lodged. That's tab 28.

Can I ask the Tribunal to look at paragraphs 6 to 9, starting at page 121?

(Pause)

THE PRESIDENT: Yes.

MS FORD: The upshot was that two recipients did opt out. One indicated the intention to opt out, but decided not to after speaking to the Class Representative's solicitors, and four sought further information from the Class Representative's solicitors.

So, in our submission, it is clear these communications have caused harm, and they would have caused more harm had it not been for the efforts that have since been made to correct the impression they gave.

The Defendants say all they were doing is giving notice of their intention to seek disclosure and advising these recipients to seek legal advice about their document retention obligations.

Leaving aside that, that is patently not what the letters were doing when one actually reads them, we make two further points in response to that.

The first is we say the assertion that it's likely that the Defendants will be seeking disclosure from these recipients is not consistent with the likely approach to disclosure in collective proceedings.

The second is, we say, in any event that doesn't in any way explain the actual timing of these communications.

THE PRESIDENT: Ms Ford, is there a more fundamental point?

Let's take a proposed class action, where -- in many class actions disclosure is unlikely to be a major feature because you're talking in general terms, rather than in the specific. It's the nature of class actions.

But let's suppose there is a class action where there is going to be a body of

documentation that is case critical held by the proposed class members and certification sought on an opt out basis. The Defendants are seriously concerned, and rightly concerned, that these documents will protect their position and enable them to advance the defence, and they want them preserved.

Presumably, the best way to ensure that the rights of the defence are respected is for that matter to be raised with the Tribunal and with the proposed class representative, to say, "Look, if you want certification, then you are going to have to have in place some means of ensuring that our position is protected, such that important documents are preserved and that then forms part of the notice that goes out to explain the implications of signing up". In other words, is one of the problems of this regime that it creates a shadow jurisdiction which is sending a rather different message to the message that is put before the court and approved in the form of the notice?

MS FORD: Sir, I certainly see the point that you're making. I think we might put it slightly differently.

We would say the error in the approach that the Relevant Defendants take is to assume that if disclosure is to be sought, then they should go about it unilaterally rather than allowing the Tribunal to exercise case management scrutiny over the exercise.

In our submission, it's inappropriate for them to take unilateral steps to seek disclosure. It's evident, even at this early stage, that is not the way in which these things are likely to be managed.

The Relevant Defendants have taken issue with that in their skeleton argument. It's their paragraph 52. They claim it would be unfair on them to hamper their defence by saying that they have to liaise with the Class Representative, or draw these

matters to the attention of the Tribunal, rather than going off and dealing with them unilaterally. But, in our submission, it is the Class Representative who has been authorised to act on behalf of the class members. That is a fundamental element of this new regime, and there's nothing unfair whatsoever about requiring the Defendants to liaise with the representative that has been authorised by the Tribunal to act on behalf of the class members.

It's also, in my submission, fundamentally necessary as a matter of practicality, because if the Defendants take it upon themselves to go off and start making large numbers of disclosure applications directly to class members, without reference or notice to a Class Representative or to the Tribunal, matters are very quickly going to become chaotic.

So large numbers of persons would feel the need to appear before the Tribunal to be heard in relation to the application that's made or threatened against them, and class members would be obliged to incur significant time and costs on dealing with issues with which they're not familiar because, of course, class members don't necessarily know what the issues in the case are; they don't necessarily know what the experts might require in terms of the data that they need for their analysis, and they don't necessarily know how the documents they hold fit into those matters.

So, in my submission, what we can see is that it's fundamental that the Tribunal would need to carefully manage any application for disclosure from the class. So it would not be appropriate for the Defendants to take things up individually and unilaterally with members of the class.

THE PRESIDENT: Let's take the private litigation analogy, and let's imagine a group litigation order. So you have 5,000 claimants, they have all signed up to a set of proceedings which are being conducted by a single solicitor, and there are various

defendants who naturally want to defend themselves. It wouldn't be suggested -- we'll see if it is -- that it would be appropriate for the defendants to write to each of the 5,000 claimants in person, saying, "You'd better ensure that you don't destroy your documents because there are disclosure obligations", and here there would be disclosure obligations.

The appropriate course would be to do precisely what is said shouldn't be done in 52, which is to liaise directly with the claimants' solicitors and say: make sure you don't destroy the documents.

MS FORD: Sir, indeed.

THE PRESIDENT: So the question, isn't it, is: what is the best way of translating this proper conduct in the more unusual case, where there isn't a group litigation order, there aren't parties signed up?

Because by definition that's not how the process works. One uses the hearing before the Tribunal, dealing with certification and notice, to ensure that concerns about disclosure are appropriately protected.

If one of the concerns -- let's assume it is -- is that documents need to be preserved for the rights of defence, then surely that is something that needs to be flagged front and centre for the Tribunal, for the Tribunal to work out what can be done to ensure that the defendant's position is protected. It may be that involves something being said in the notice, that you should know: if you sign in, or if you choose to sign out, you should know that there are these obligations.

Now, that would be framed by the Tribunal with all interested parties before it as a proxy for what would normally happen in my group litigation example. But that's what I meant by "not wanting a shadow regime".

I take your point that you say they're not parties, but the point is actually a little bit

more fundamental than that, in that even if they were parties, the proper approach is to go through the representative.

MS FORD: Sir, absolutely. That is, in our submission, very much the correct way to go about these matters. Indeed, to some extent that occurred in this case.

I've shown the Tribunal the excerpt from the judgment that was included in the letters. That was the part of the judgment where the Tribunal was considering what had been canvassed with it about the extent to which it might be necessary to get disclosure from these parties, from these large business purchasers. So it was a matter that was discussed at the CPO hearing.

The Tribunal indicated, in its view, it was unlikely to be particularly helpful, which is quite telling. But, certainly, I very much agree the appropriate way to do this is to enable the Tribunal to exercise case management scrutiny over it, potentially at the CPO stage and potentially on an ongoing basis.

THE PRESIDENT: Yes, thank you.

MS FORD: I think the Tribunal has my point that the claim that the letters were necessary to ensure document preservation equally doesn't stand up because there were no such obligations.

It is said in my learned friend's skeleton that it would be extraordinary if documents were destroyed after receipt of their letters, and if that occurred then adverse inferences could be drawn.

In our submission, one couldn't possibly draw adverse inferences in those circumstances. The appropriate means to ensure that the parties recognised the importance of retaining relevant documents would be, as you have suggested, to put something in the formal notice, with the imprimatur of the Tribunal on it, to say: this is what would be required.

The second point that I flagged up was that the Defendants' explanation isn't consistent with the timing of their letters.

In their submission, if the intention is to make an application for disclosure from class members, then surely what one does is to wait to see which members are within the class. That way you know the entities to whom your application should be directed. If you're concerned that the class members might opt out in order to avoid a disclosure application, then surely the last thing you do is to write to them and encourage them repeatedly to opt out, thereby reducing the likelihood that you will be able to get the disclosure you claim you're seeking.

The Defendants also say they're concerned that large business purchasers would say they had insufficient notice of the likelihood that they might make this application. If that were a genuine concern, then one might expect that they would not leave it two weeks before the deadline for opting out before sending a letter marked "urgent". They could have written the letter at any point after the CPO was made on 20 May 2022.

There's no explanation for why it was necessary to leave it until the end of July.

But, in any event, that point, that concern is already met, because the Tribunal has already said in its judgment, in this case, that if a class member does not wish to be involved in the light of a disclosure application that is made in due course, then it might well permit them to opt out at that stage.

The Defendants are claiming to be addressing a problem the Tribunal has already suggested a solution to.

So, in our submission, the explanation the Defendants were lining up a disclosure application is a fig leaf, and it's a fig leaf for a transparent attempt to undermine the viability of these proceedings by urging the large business purchasers to opt out in

order to avoid onerous disclosure obligations.

I'm moving on to deal with the statutory regime. It may be, in the light of the indications you've given, that I can take it relatively rapidly.

THE PRESIDENT: Yes, I think you can, subject always to having to expand in your reply in light of points made by Mr Piccinin.

MS FORD: I'm grateful.

The Tribunal is familiar with the authorisation condition. It's in the authorities bundle, tab 1, page 4. The Tribunal may only make a collective proceedings order if it considers that the person who brought the proceedings is a person who if the order were made the Tribunal could authorise to act as the representative in those proceedings in accordance with subsection 8 of the Act.

Then subsection 8 says:

"The Tribunal may authorise a person to act as the representative in collective proceedings … if the Tribunal considers it is just and reasonable for that person to act as a representative in those proceedings."

So, from the outset, it's a fundamental element of this regime, set in the statute itself, that the Tribunal exercises a gatekeeper function and scrutinises the propriety of the class representative.

Rule 78(2) tells us what the Tribunal has to consider in performing that function. That's in the bundle, tab 17, page 356.

THE PRESIDENT: Yes.

MS FORD: It imposes a duty on the Tribunal, indicated by the word "shall", to consider the factors in determining whether it's just and reasonable for a person to act as a class representative.

The key factors, for our purposes, are the ones in subparagraph 2(a):

"would fairly and adequately act in the interests of the class members",

and 2(b):

"does not have in relation to the common issues for the class members a material interest that is in conflict with the interests of class members."

Then, under (3):

When considering "whether the proposed class representative would act fairly and adequately in the interests of the class members for the purposes of paragraph (2)(a), the Tribunal shall take into account all the circumstances including ... "

at (c)(i):

"Whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings."

Those, in our submission, are the key relevant provisions that show that when the Tribunal is considering whether to authorise a class representative, these factors are the very factors which mean that it is the class representative which is best placed to communicate with the class.

The class representative must act fairly and adequately in the interests of class members. The defendants have no such obligation. There's been an attempt to suggest, in my learned friend's skeleton, that you get an equivalent effect from Rule 4(2)(d) and 4(7), those are, essentially, the procedural obligations to cooperate, ensuring the case is dealt with expeditiously and fairly.

But a procedural duty of cooperation doesn't come close to the class representative's role in acting in the interests of class members.

The class representative obviously may not have a material interest which is in

conflict with class members. That is in stark contrast to the defendants, whose interests are clearly in conflict with those of the class. The regime specifically contemplates that communication with the class is part of the class representative's function. So it has to satisfy the Tribunal that it has an appropriate means in place to do so, to perform that function.

THE PRESIDENT: Ms Ford, I understand why you're placing reliance on, effectively, Rule 78, the authorisation condition. I notice you don't have Rule 79, the eligibility condition, in the bundle.

But how far is the eligibility condition itself material to these questions?

Let me unpack why I say that. One of many factors that need to be considered there is whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues.

Now, one of the things that will crop up is the extent to which individuated disclosure from the class may or may not arise. If you are going to have individuated disclosure it's going to be a factor that first of all will tell against the eligibility of the claims forming a part of collective proceedings. I'm not saying it's fatal, but it's obviously a factor that would come into account. It's independent of the standing of the proposed class representative.

Now, it's at this stage that one might expect issues with disclosure and the importance of it to be drawn to the attention of the Tribunal. Because if you say, "Well, yes, there are these individuated documents in the hands of the putative class that will need to be disclosed, and therefore you shouldn't certify the action as a class", well, if that's a debate, then one would expect either it would be telling against certification at all, or it would affect the basis upon which certification occurs.

So conditions could be laid down as to what the proposed class representative, if

becoming a class representative, must do with regard to that corpus of documents. Ought we, therefore, be having regard to the other criteria, broad criteria, for certification, authorisation, Rule 78, and eligibility, Rule 79?

MS FORD: Sir, I certainly see the force of the point that you make. Once the Tribunal has certified something as being eligible for inclusion in collective proceedings that will have consequences for the way in which the Tribunal can necessarily go about determining the matters in issue in those proceedings, so that will have consequences for the way in which one goes about disclosure. As you say, that would suggest these matters ought to be aired, at the latest, at the CPO stage.

THE PRESIDENT: One has, of course, a time in which to consider everything, and disclosure normally follows on from certification and is dealt with separately, quite understandably. But my point is really if there is such a concern about disclosure and the protection of documents that it shouldn't be certified at all, for example, then that is something which one would embed as a solution to protect the putative defendants from the very beginning. You might very well have a further disclosure hearing to work out what should be disclosed and what shouldn't, but document protection, it seems to me, is something that would then, if certification is granted, would be covered in imposing additional burdens on the PCR. Of course, the PCR would then take a view as to whether those burdens were so burdensome that it didn't want to assume the duties of a class representative, that would be a matter for it.

MS FORD: Sir, it certainly must be right that is the time at which such obligations ought to have been raised. Of course, the ship has somewhat sailed in these proceedings --

THE PRESIDENT: Ms Ford, I'm speaking entirely hypothetically. I wasn't present at

the hearing, and disclosure will have been discussed to the extent it was.

But I'm making a rather more general point. I'm sure Mr Piccinin is listening to the answer, because what we need to articulate here is not simply a resolution for this case; we do need to, I think, set out a fairly clear steer for future cases as to what sort of communications are, and what sort of communications are not, appropriate in these relatively unusual types of proceedings.

MS FORD: Sir, absolutely. I don't disagree with what you say. It actually dovetails with the test for an adequate methodology in the *Microsoft Pro-Sys* case.

Obviously, the Tribunal there has to turn its mind to the availability of data, and the class representative has to satisfy the Tribunal that there's sufficient data for the methodology to operate. So, once again, there's an opportunity to scrutinise where the material is going to come from.

THE PRESIDENT: Yes, normally it is the other way round. Normally you are talking about what the economists can deliver in terms of theories of harm and data, and what material does the defendant have to produce to make good the claim.

So, somewhat unusually, I'm hypothesising something where the critical documents are on the other side of the line, where it's something the defendant would want to have to exercise the rights of the defence. But it's nonetheless as important as the ability of the class representative to make good the claim that it wants to run with.

MS FORD: Indeed, absolutely, and the time to make that point would be at the CPO stage. Of course, the Tribunal did consider the scope of disclosure in these proceedings, so in some respects that has played out in the way you, Sir, envisage.

I was going to come on to emphasise two further points from the statutory regime.

The first is that it is striking that the Rules only contemplate communications between the class representative and the class. There is no example where the

Rules envisage that the defendants will communicate with the class.

The second --

THE PRESIDENT: Well, that's not prohibition. That is a point that's made against you. We have to, as it were, read into the Rules some form of qualification.

MS FORD: Absolutely. I'm going to come on to explain why I say that's an obvious and necessary inference from the way the Rules are structured.

But certainly there is no positive example given of circumstance where the Rules do contemplate that the defendant will communicate with the class.

The second is that the Rules contemplate an important role for the Tribunal in scrutinising the content of communications that are made to the class, and we see that repeatedly. If we just run through the examples, starting at page 357, Rule 81(1):

"The class representative shall give notice of the collective proceedings ... in a form and manner approved by the Tribunal."

So the communication is by the class representative, the Tribunal scrutinises the contents of it.

Rule 87(2), over the page, this is an application for withdrawal by the class representative:

"The Tribunal may only give permission for the withdrawal under paragraph (1) ... if it is satisfied that the class representative has given notice of the application to withdraw to represented persons in a form and manner approved by the Tribunal."

Rule 88(2), on the same page, this is the Tribunal's power to give directions that it thinks appropriate for case management of collective proceedings:

"Without limitation …, such directions may order that ..."

Then (d):

"the class representative give notice in such manner as the Tribunal directs to represented persons of any step taken by the class representative."

So, again, the communication is by the class representative; the scrutiny of the terms is by the Tribunal in such a manner as the Tribunal directs.

Then subparagraph (3):

"If the Tribunal directs that the participation of any represented persons is necessary in order to determine individual issues, the class representative shall give notice of the further hearings to those persons in a form and manner approved by the Tribunal."

Now, that paragraph is contemplating a scenario where a particular class member is individually concerned with matters that are going to be decided. The Rules contemplate that the class representative will then give them notice in a form approved by the Tribunal to attend a particular hearing. That's concerned, we can see from the definition of individual issues -- we can see that's concerned with substantive individual issues. But, in my submission, there is an analogy here with a situation where an individual class member might be impacted by an obligation to give disclosure. So it might well be envisaged that they might wish to attend and be heard on questions, for example, on the time, cost, and proportionality of any disclosure obligations. In that case, by analogy, one would envisage that the communication would come from the class representative.

Rule 91(2), over the page:

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

Rule 92(3), this is concerned with assessment of damages:

"The class representative shall give notice to represented persons in such a manner

as the Tribunal directs of any hearing to determine what directions should be given in accordance with paragraph (1), and any represented person may apply to the Tribunal to make submissions either in writing or orally at that hearing."

This is another scenario where what's contemplated is that the represented persons might be individually impacted, because what's being debated is the way you split up the pot once an award of aggregate damages has been made. The represented persons may well have an individual interest in that.

Then the notice of the right to attend and to participate at that stage is given by the class representative.

Rule 94(2), over the page, in the context of collective settlements:

"Any offer to settle by a defendant in the collective proceedings shall be made to the class representative."

You can see over the page, subparagraph 4(f):

Any application for a collective settlement has to "set out the form and manner by which the class representative ... give notice of the application to — (i) represented persons … or (ii) class members …"

MR PICCININ: Sir, I do hesitate to interrupt, but I am a little bit concerned about the time.

THE PRESIDENT: I was looking at the time myself. You will obviously not be cut short.

Ms Ford, the point I think you need to address us on is the implication point.

But if I can summarise what I think you're saying, in brief, what I think you're going to be saying is: given one has communications between the class representative and the represented class being quite closely policed by the Tribunal, presumably for a good and sensible reason, it would be slightly strange for that regime to be cut

across by an uncontrolled communication regime between persons anti-pathetic to the claimants, the representative of the class's interests, which one might expect would be subject to even greater, rather than lesser, control than the class representative.

MS FORD: Sir, you very much have the point.

In circumstances where the regime envisages the class representative is carefully vetted for their propriety and their suitability to communicate with the class, they are accorded the role of communicating with the class, both because they have to show their ability to do it and because all the examples envisage that is what they do, and the Tribunal exercises its oversight of those communications. If you permitted the defendants to communicate freely with class members, then you cut across all those provisions. You simply undermine the entire structure of the regime. That's why, in our submission, this is the obvious and necessary implication of the Rules.

If one simply takes the present example, these are communications in the opt out window. So it's a particularly sensitive time for class members. They're making significant decisions about their legal rights. The Tribunal has scrutinised, corrected, and approved the contents of the CPO notice, which it considers to be the document to tell the class members about the proceedings and how to opt in or out as appropriate. In those circumstances, the Defendants then communicate directly with the class members in terms which are not scrutinised, which make no claim to neutrality whatsoever, and in key respects are positively misleading. It cannot be the legislative intention that would be permitted. We do say it's a necessary and obvious inference.

I addressed the Tribunal about the carve-outs that are in the order at the outset of my submission, so I don't need to come back to those.

We do put forward an alternative case, but I can address that should the need arise.

We do finally say that even if the Tribunal were not to be with us on the issue of construction, we do ask the Tribunal to grant declaratory relief in respect of the content of these particular communications. Because, as the Tribunal pointed out at the outset, the Defendants themselves accept they mustn't communicate in terms which give rise to unfairness, for example because the communication is misleading or coercive. That's an extremely low bar and it's not, in our submission, the correct test at all.

But, in any event, we say that threshold has been crossed for the reasons I have already made submissions. So we ask that if the Tribunal is with us on that, we seek declaratory relief that the letter should not have been sent in those terms.

THE PRESIDENT: I'm very grateful, Ms Ford.

Mr Piccinin, don't worry about the time, we'll sit as late as necessary. It may be that we'll need to rise.

Is this being transcribed? It is. We'll take a break, in any event, for the shorthand writer.

MR PICCININ: You'd like to do that now?

THE PRESIDENT: Have a run at it. I just wanted to make clear that one of the preconditions of sitting late is that one of my colleagues needs to make a phone call to ensure that we can do so. So, in your own time and when you feel that an appropriate point has been reached, we'll rise for five or ten minutes.

MR PICCININ: I'm very grateful.

I'd like to start just by clarifying, in case it's not clear to anyone, which parties I'm here on behalf of.

I'm here on behalf of all the Defendants, except for the Fourth Defendant. I'll refer to

the Relevant Defendants, most of the time. But if I ever slip and just say "defendants", I'm sure everyone will understand who I mean.

THE PRESIDENT: Well, let's use the word "defendants", but we will carve out the Fourth Defendant from that. That's probably easiest.

Submissions by MR PICCININ

MR PICCININ: I'm grateful.

Before giving you a road map of my submission, I'd just like to start with three preliminary observations about the position we find ourselves in, in this hearing right now, where we are.

The first one is I'm in some difficulties because of the way this has developed, because I've now been faced with, by my count, four different versions of the rule that is said to have been violated in this case, and at each stage of the proceedings -- first in the response, then the skeleton argument, then in the oral submissions that I've prepared today, and now in the oral submissions that I'm actually going to give to the Tribunal -- I'm meeting four quite radically different sets of targets.

I'm not saying I can't do that, or I won't do that -- of course I will, a barrister must always be prepared -- but it is difficult because what we're trying to do here is something very nuanced, which is to craft a set of rules to govern something that is by its nature quite amorphous and multifaceted, which is communication between people. It's also something that's quite important, because of course the right to free expression, to communicate, is a fundamental right, not just under the ECHR, but common law. I think that is common ground.

So this is a delicate subject, it's a nuanced one, and yet I'm facing four different

targets as to what it is I'm supposed to be meeting. But I will try to focus only on the things that are actually relevant now, and those are two, which is the one that is advanced by my learned friend today, and the other is the one that was canvassed at the outset of today's proceedings by the Tribunal.

THE PRESIDENT: Yes, Mr Piccinin, I think it's really two models. One is that using the party and party, solicitor and solicitor analogy, communications should in general, subject to very narrow carve-outs, only be between the defendants or proposed defendants, and the class representative or proposed class representative, which is the model that I think is advocated by Ms Ford and put provisionally by the Tribunal to both parties.

The alternative -- which I think is what you are articulating -- is: no, communication is a fundamental right and should not be abrogated, even in these circumstances, except where certain conditions pertain.

So, in a sense, you need to push back in general terms on the model that is saying "don't communicate", but the area which I think we'll be most assisted by -- and I don't want to cut you back -- is your alternative frame of saying: no, generally speaking you can do what you like, subject to limitations.

That's the difficulty, I think, in defining the limitations to make the regime workable on your basis.

MR PICCININ: I understand that, and I'm going to do that, but I'm afraid the details of the formulation that -- you say that your formulation was the same as Ms Ford's formulation. The details of that formulation matter quite a lot for the practical consequences. If we could just look at Ms Ford's formulation, the one from before today --

THE PRESIDENT: Yes, of course.

MR PICCININ: -- which is at tab 31, page 163. I think this is not the version of the relief that you had looked at when you were preparing for the hearing. Understandably, it's kind of buried.

THE PRESIDENT: I was looking at the Application rather than the --

MR PICCININ: Yes, which has been fully abandoned. Every word of it abandoned. So, in terms of the Reply, which is really now the application, so what we're looking at here, what was sought is an order:

"The Defendants shall henceforth not communicate directly with actual or potential members of the Class in relation to these collective proceedings save insofar as the person is, or may be, a witness … and such communication is made exclusively for that purpose."

Then there's a carve-out for ordinary course of business in the next paragraph.

Then there's also an alternative case -- which I wasn't even counting in the four that I'm trying to meet -- set out below, which is basically the same thing, except that we have to give notice before we engage in any of those communications.

Now, that's been modified today, Sir, in a way that is potentially significant, because my learned friend now wants to add the words, somewhere in paragraph 1, "in their capacity as class members". That wasn't there before, and that wasn't what I was meeting before, but I will come on to meet it later.

The point I'm making is that those kind of qualifications are potentially very significant for what the practical implications are. We're at risk, here, of getting things badly wrong if we constantly adjust on the hoof like this, and then potential consequences are missed.

The second thing that has been unclear throughout this process is: what is the nature of the task that I'm trying to meet here, this rule?

Is this a pre-existing rule that can actually be found somewhere in the rules, which is between the lines rather than in any numbered paragraph?

In that case, it is said that we're in breach of an existing rule. Or, is there no existing rule, but instead there is a power that the Tribunal has to make an order in these terms in a particular case where it is appropriate to do so? In which case, the question is: should the Tribunal in its discretion exercise that power?

Those are two entirely different legal exercises. One is an exercise in discretion; the other is an exercise in statutory construction. But my learned friend just skates across them freely, as though there were no difference between those two tasks. So I'm going to try to distinguish between them as I go through.

THE PRESIDENT: That's very helpful, thank you. For our part, I think we are going to be more assisted by the former exercise --

MR PICCININ: The statutory construction.

THE PRESIDENT: -- what the rules imply, rather than the latter.

We quite understand there's a degree of connection. You're absolutely right, the room for manoeuvre in terms of a discretionary order is rather different to what one derives from the rules as they stand.

MR PICCININ: Yes.

THE PRESIDENT: Of course, there's a significant difference in terms of how the letters written are to be coloured, if the rules say something which precluded this conduct. Whereas if it's an Application brought after the event to control something that has happened, which shouldn't happen for the future, well, that makes a big difference as well. So you can take it that we're aware of that, but it's the construction of matters, I think.

MR PICCININ: I'm very grateful for that indication.

That was my first preliminary observation.

My second preliminary observation is that I'm afraid that the analogy the Tribunal has in mind in the proposal that it has made provisionally is based on a false premise as to what the current SRA rules are.

Again, it's not surprising that should have arisen, because although in the back history of this Application there was a lengthy debate about what the rules were and aspersions were cast about the breach of those rules. The Tribunal helpfully directed that we shouldn't address them for this hearing, and so we didn't. So that's why there's nothing in front of you about that in our skeleton arguments. I'm afraid the rules don't say what I think, Sir, you suggested they say. If we can just look at it in the authorities bundle.

THE PRESIDENT: Of course.

MR PICCININ: It's authorities tab 16, and it starts at page 350.

Can I just say: these are the current rules. Way back in the day, from memory it's, like, 15 to 20 years ago, there was a rule of the kind that you described, Sir, but there isn't anymore.

Now what we have in the Code of Conduct -- you can see at the bottom of the page -- is a rule that begins with "maintaining trust and acting fairly". Then we have a series of particular rules. Over the page, if you just look at paragraph 1.2, I think this is the relevant one, which is:

"You do not abuse your position by taking unfair advantage of clients or others."

So that includes parties that you may be in litigation with, that also just includes general members of the public, anyone.

THE PRESIDENT: Yes.

MR PICCININ: It is no longer the case that there is any rule that says that a solicitor

cannot write to the opposing lay party.

Of course, doing so in some circumstances, depending on what's said in the letter, depending on the context, may or may not be a violation of this general rule, but there is a requirement to show that there has been some unfairness.

I'm not going to go through it all, because you asked us not to and it's not relevant, but just to give you the reference for it, if later on you go and look at tab 29, which is our response to the Application, pages 130 to 134, you will see we tracked through the history of the rule and see how developed, how it shifted from something that was a black and white rule to something that is actually about outcomes rather than process, if I can put it that way.

So there's no rule saying you can't send this kind of letter or that kind of letter; there's a rule against treating people unfairly, and that needs to be assessed on a case by case basis.

We say that is actually relevant when you come to consider what we should do in this context, because that's very much the approach we urge on the Tribunal.

THE PRESIDENT: What, so you're saying that each and every time a solicitor is writing a letter, they'll apply their mind to the interlocutor?

MR PICCININ: Sir, in almost all cases, when you're in simple party-party litigation and both parties are represented, just as matter of course you're going to write solicitor to solicitor. That's what almost always happens.

But if there were circumstances where for some reason you needed to write to the actual claimant, or if you were the claimant's solicitor and you wanted to write to the actual defendant, there's no express prohibition of that. Instead, what there is, is an assessment of whether the particular letter that you wrote was fair or unfair. That's the test, and it all depends on context, as in so many things.

The second point I make about these rules is: obviously, they only apply to solicitors. I don't mean as opposed to barristers. What I mean is that in party-party litigation, it is, of course, and has always been the case, that the parties can talk to each other and communicate with each other directly. That's never been prohibited, and it isn't prohibited now, and it happens very often.

Just to give you one example, it's very common to have principal to principal settlement negotiations take place with no lawyers involved. That's to be encouraged, far from there being a rule against it.

So that was my second preliminary observation.

My third one, which really ties all this together, is there's a serious risk that the way in which this Application has been prosecuted is going to result in the creation of a rule that is inappropriate going forward, for these proceedings and other proceedings generally.

The reason why I say that is it has actually turned into an application that is a bit academic, because the Application is not really based on -- it arises out of the letters, it was prompted by the letters, but is not really based on any analysis of them. I say that for two reasons. One is the relief is not targeted towards the letters or to other correspondence like them. No relief has been sought in relation to the opt out decision that has been made or to the provision of corrected information, or anything like that. The relief that has been sought is entirely forward looking. It is not even possible that letters of the kind sent before could arise again in this litigation.

So there is a mismatch between what is the subject matter of the Application and the relief that is being sought and the reasons for that relief.

The risk that gives rise to is that this is really a debate about future letters, future correspondence, future activities, but those events are not before the Tribunal. So

we're really having a hypothetical debate about what the Defendants might do in the future, and what they should be permitted to do or not do. That's a dangerous thing to do. It's not the way we normally about go about making orders in civil litigation.

THE PRESIDENT: Presumably, this is something we may need to know because it affects the timing of any ruling we make, but there's no immediate intention on the part of your clients to write any further letters to the class?

MR PICCININ: No, Sir, but I'm going to come on to -- when I get to my main submissions and the practical consequences of this rule -- the many ways it is inevitable --

THE PRESIDENT: No, I understand that. I just wouldn't want there to be a gap between this Application being heard and our ruling, for there to be the potential for communications to make matters worse rather than better. I'd rather, in other words, your clients held off if they were planning to write something.

MR PICCININ: We've already said we weren't going to until this Application is resolved.

MS LUCAS: Could I just raise a point?

THE PRESIDENT: Yes.

MS LUCAS: It's probably more a question for Ms Ford, actually. But she mentioned declaratory relief, I just wondered can you enlighten me as to what your understanding of that is?

MR PICCININ: Well, Madam, this Tribunal does not have power to issue declaratory relief. That's really what I say about that. Ms Ford is seeking relief that this Tribunal has no jurisdiction to grant.

But, in any event, it was entirely backward looking. It was about letters that have been sent and can't be sent again. It's also not in their draft order. So those are my

submissions on the declaratory relief.

MS LUCAS: Thank you.

MR PICCININ: If I could now just provide the road map for my substantive submissions. I am going to start by showing you, if I may, by showing you how this issue is dealt with in other jurisdictions. I'm going to do that all from one judgment, so you mustn't worry about me dragging you through --

THE PRESIDENT: No, of course.

MR PICCININ: I'm going to do that for two reasons. One is it's very helpful to frame the analysis, because I can entirely understand why the Tribunal is approaching this issue in the way that it has. It seems odd that you might have the defendants write to class members. But, in framing the analysis, we don't need to start from a blank page here. In Canada, they have been thinking about this issue for decades, so we can benefit from the learning in that jurisdiction. That jurisdiction shares all the features that my learned friend relies on as giving rise to a necessary implication of a prohibition that doesn't exist in that jurisdiction, or in the others that are referred to in the authorities.

So that's one reason.

The second reason -- which is related -- is those jurisdictions really provide an answer to the question of statutory interpretation that we're dealing with here today. Because prohibition of this kind -- it is accepted by my learned friend -- if it's not express, could only arise by necessary implication. If the same features of the regime that are said to give rise to that necessary implication here exist in multiple other jurisdictions where no such implication has been found, then that does make you wonder: how is it really a necessary implication as opposed to a rule that might be good from a policy perspective?

That's the first topic.

The second topic is about the practicalities in this jurisdiction of the rule that has been proposed. Thirdly, there is the exercise of statutory construction, which I'll go through briefly. Finally, there is the timing and content of the letters, notwithstanding, as I say, that is somewhat academic.

If I may start on the first topic, then. The one authority that I'd like to go to is the Ontario authority of the *ALS Society of Essex County*, which is in tab 6 of the authorities bundle, and page 82.

There are actually two cases, two class actions, alleging that two councils had charged illegal bingo licence fees.

What happened was that in that case, on the same day as the certification notices were published, and so Ontario is, as I'm sure the Tribunal knows, also has a certification process. At the end of that certification process formal notices that are approved by the Tribunal go out.

On that very same day, the defendants instituted a multimedia opt out campaign. You can see how that's described at paragraph 2. They expressly requested that class members opt out. They also actively encouraged people who saw these multimedia materials who weren't class members to get in touch with anyone else they knew who happened to be a class member and encourage them to opt out.

The argument that was being deployed was that these class actions were going to result in taxes having to be increased, as you can see at the end of paragraph 2.

You can see, in paragraph 3, that the multimedia campaign involved a website, a media release, a Twitter hash tag, a Facebook page, direct mailing, the whole works.

In paragraph 7, over the page, you can see the physical form of the multimedia campaign included a full page colour opt out ad placed in the same local newspaper

as the official notice was contained in. It was significantly larger and more apparent than that notice.

Now, the analysis begins at paragraph 8, where the court says:

"Nothing in the *Class Proceedings Act* prevents the defendants from communicating with class members. They have a constitutional right to do so as long as they do not engage in conduct or communication that is inaccurate, intimidating or coercive or made for some other improper purpose aimed at undermining the process of the court."

We would endorse that.

At paragraph 10, the judge cites the previous decision in *Money Mart* in which the principles had been summarised.

The first one was that there is no absolute prohibition on communication by the defendants to class members during the opt-out period, and there's no requirement for prior court approval for every communication.

The second one is that an order limiting communication is extraordinary. Sir, that is right, because it is an interference with a fundamental right, both in Canada and here.

The third one is that if communication by a defendant is inaccurate, intimidating or coercive, et cetera, the court has the power to intervene. Of course, that's a very broad word. You could intervene in all sorts of different ways to remedy the unfairness and prevent it from arising in the future, depending on exactly what the circumstances were.

Then, in paragraph 4, there's a specific type of intervention that is canvassed. That's the type of intervention that we're talking about today. Although it's said today that this is a blanket intervention that already exists there in the rules.

An order of the kind that's being sought today, limiting communication, should only be granted:

"If it is necessary to prevent a real and substantial risk to the fair determination of a class proceeding and because reasonably available alternative measures will not prevent that risk."

Again, that just follows immediately from the fact that what you're talking about here is a restriction of fundamental rights.

There's an example given in paragraph 12 of the type of conduct that might infringe those principles.

What happened in that case was that the defendant, you can see there, threatened to raise the rent if a potential claimant did not opt out. That was found to be destructive of the class member's free will, and it was therefore improper and intimidating. That's why, in that case, the court intervened.

If we just go over the page, to 86, and look at paragraph 17, you can see reference is made there to the position in the United States. There's a reference to the governing authority in the United States, which is the Supreme Court's decision in *Gulf Oil*. I only refer to that to say that it's not just Ontario here that's being funny; this is the position in the US, as well.

The Class Representative is quite wrong to have suggested in its skeleton argument that the position is different in the US. It isn't.

I think the Class Representative has made the error of confusing the professional ethics rules, which are different in the United States, from the rules about communications between defendants and class members.

THE PRESIDENT: Is there any law that considers the extent to which communication is inhibited if it can be made, or the communication can be made,

through an agent rather than a principle?

MR PICCININ: Sorry, Sir, I'm not sure I follow.

THE PRESIDENT: Let's take a situation where you have A wanting to communicate with B, and B has appointed Z as its agent to communicate. If A then communicates with B and is met with a response saying, "Look, I'd rather you went through Z"; is the right to communicate freely inhibited by that process, by having an agent to receive the communication?

MR PICCININ: I think it might be or might not be, Sir. It depends on the circumstances.

But if we're talking about litigation, to make it a bit more real, I think if someone wrote back to you and said: please don't write to me again. Please write to the class representative instead.

I would have thought any sensible litigant, bearing in mind their duties, would comply with that request, unless there was a very good reason why not to.

THE PRESIDENT: On your case, it would be unless it's unfair or oppressive.

MR PICCININ: I can see there would be a good argument that it would be unfair or oppressive. If someone says: please don't write to me again, please write to my solicitor. Then, in the face of that request, you continue to harass them with further correspondence, I can see that might be said to be unfair. That's not this case, but it might be said to be unfair.

THE PRESIDENT: You have a basic right to communicate, you're saying.

MR PICCININ: Yes, but it's one that obviously can be restricted, Sir. It is restricted in lots of different ways. I'm not suggesting that the constitutional right or the fundamental right to communicate can't be fettered. Of course it can. But when we fetter it, we fetter it as little as possible; that's what the Canadian authority is telling

us.

The US position is exactly the same. I keep saying "Canadian", this is strictly speaking an Ontario decision.

But if you look at paragraph 20, there's a reference to a Québécois decision. You can see what happened in that case. That was another claim against a municipality. The court actually permitted an extended opt out period of six months, expressly for the purpose of enabling the municipality to communicate with class members about the financial consequences for the municipality of the class members participating in the class action.

So that wasn't just something that was not unlawful; it was something that the court went out of its way to facilitate in that case.

Then if we could just skip on to page 88, we can see how the judge dealt with the multimedia campaign in this case, because it was on the wrong side of the line.

MR DORAN: Sorry, on that particular case, Mr Piccinin, presumably that's via the court?

It wasn't, if you like, just a communication to class members direct from the defendant, but the defence went to the court and said, "Can we write in these terms?"

MR PICCININ: It doesn't say that, Sir. What it says is --

MR DORAN: It was an order. Sorry, I'm only picking up that it says -- are we not saying this arose from the process?

MR PICCININ: That's right. It's true that the court in that case -- there be must have been some discussion in the process of setting the opt out period, about the fact municipality wanted to do this. But there's no suggestion the terms upon which the municipality then did that had to be pre-checked, pre-authorised, by the court. Not

as far as I'm aware anyway, Sir.

If we could just look at paragraph 37 to see how the court dealt with -- the particular reasons why what happened in this case was on the wrong side of the line. The court says:

"I accept the submission from counsel for the Town and the City that their intent was to inform potential claimants so that they would know the consequences of a large award potentially being made in favour of the plaintiffs with the ensuing consequences to the municipality. I must balance that intent ..."

Sorry, just pausing there, that seems to be a legitimate thing for the defendants to want to do, to have the plaintiffs understand the adverse impact of the class action on the municipality, but he has to balance that, the judge, with:

"… what appears to have been an aggressive multimedia opt out campaign that in effect pitted one taxpayer against another, or one organisation against another, in order for them not to pursue a valid claim. I understand the City and the Town's submission that the consequences of a large award of damages against them will have consequences to taxpayers …, but they went too far and created 'undue influence'."

Again, that's the test that's being applied. But he goes on, and says:

"I am also of the opinion that the plaintiffs have also gone too far in their request ... I consider this in light of the defendants' legal right to communicate with potential claimants and the potential consequences of a successful action against them. I conclude that any potential claimants who opted out should have an opportunity to reconsider their position at the end of the opt-out period …"

That's what I meant before: if there was some concern about the effect of particular communications, like the letters, that someone had made an opt-out decision they

might have regretted, one thing the Tribunal could do about it is give them an opportunity to reconsider. That's what the court did here, rather than to try to restrict the defendant's power to communicate.

We take three points from that.

The first is that the Class Representative here is really out on a limb in advocating for a blanket prohibition, or even a blanket requirement that you can't communicate with class members without first coming to the Tribunal or going through the class representative.

We've just seen here, in this one judgment, three jurisdictions, Ontario, Quebec, and the United States, in which there is no such blanket ban.

I haven't done an exhaustive search, but I can say I'm not aware of any jurisdiction in the world where there is a blanket ban. The Class Representative has not identified any jurisdiction in the world where there is one.

So the course that is being proposed today is seriously radical. The United Kingdom is late to the party on class actions. Other jurisdictions have thought long and hard about this, and nobody else has arrived at this conclusion, let alone arrived at it by a process of necessary implication, which I'm going to come back to.

THE PRESIDENT: Just so that I understand the context, understandably Mr Justice Patterson hasn't set out the controls that exist in any detail regarding the communications that the class representative may undertake. Do I infer from what you've said that the controls are similar, or identical, in Canada to here?

MR PICCININ: That is my understanding. There is another case, which is at tab 9 of the authorities bundle, which makes reference to there being official notices. It's page 223.

THE PRESIDENT: I certainly see the reference to the notice. What I'm really asking

is: is it implicit in your submissions arising out of the Canadian authorities that there is a parity of arms between the class representative and the defendants to the proceedings, in that they can all take out advertisements saying opt in, opt out? Is that your position?

Do by all means show me the case, if that assists.

MR PICCININ: I'll just show you this paragraph. It's on page 223, and paragraph 31. You can see what's said there is that under the Ontario Act there are several official notices that are specified and regulated by the statute.

THE PRESIDENT: Yes.

MR PICCININ: And it says what they are.

Then paragraph 32 goes on to say the particular issue in that case did not concern any of those official notices. Of course, the same is true here.

So my submission to you, Sir, is that in both cases there are official notices that are regulated --

THE PRESIDENT: Just pausing there and unpacking that. The official notices in 31 are all notices originating from the class representative.

MR PICCININ: Yes.

THE PRESIDENT: Does the case at bar in this case involve a notice, not official, emanating from the class representative?

MR PICCININ: In this case?

THE PRESIDENT: No, in the case you're citing to me at tab 9.

MR PICCININ: No, the case involves a communication by the defendant.

THE PRESIDENT: Right. So my question remains, then: are you saying, in the Canadian jurisdiction, there is a parity of arms between the class representative and the defendants, so that they can each pull the gloves off and advertise as they

please?

MR PICCININ: Sir, I would say that is actually the position here. The way that the rules --

THE PRESIDENT: It may be the position here.

MR PICCININ: As I understand, I'm not aware -- let put it this way: I'm not aware of any restrictions --

THE PRESIDENT: Let's start with the Canadian jurisdictions.

MR PICCININ: I'm not aware of any restrictions --

THE PRESIDENT: Okay.

MR PICCININ: -- on the ability of either party to the proceedings, either the class representative or the defendant, to communicate with class members.

THE PRESIDENT: So you would say -- and again I'm stressing the Canadian jurisdiction, not the present, which we'll come to -- that the notices are, as it were, obligatory, in the sense that certain notices have to be sent, but all they're doing is specifying the minimum, and much more can be said and written by the class representative?

MR PICCININ: Yes, that's my understanding.

THE PRESIDENT: Okay.

MR PICCININ: As I say, if I can just now come to the United Kingdom for a moment --

THE PRESIDENT: No, I want to be clear about Canada first. You're placing a good deal of reliance on these cases and, of course, you'll come to the UK separately, where the understanding, at least on this side of the bench, is a little greater.

MR PICCININ: Yes.

We do say that unless the Class Representative can identify something that's

different about our regime from the way things operate in other jurisdictions, it's quite difficult to see how it can be said to follow by necessary implication from our express rules that there should be a radically different result here that's hard to follow. It's a different question whether you should create a rule.

The second point I take from these cases, as we've seen, is the defendant's right to communicate their views with class members is an important one. It's capable of being overridden, but the starting point is a person is free to communicate with other person, and a gagging order preventing people from doing that is a serious thing. That's consistent, we say, with the basic principles of English law and the way English law treats free expression. It can be regulated, of course. But where you do so you regulate it with clear rules, usually express ones and, also, you do the minimum necessary to facilitate whatever the objective of that is. If there's another way to do it that still allows the class proceedings to proceed fairly, then you should do it that other way, instead of restricting communications.

So it's a very high bar the Class Representative needs to meet here.

The third point I make is that there is general consensus across these other jurisdictions on what the limits ought to be. You've seen the words: misleading; intimidating; coercive; undermining the court process.

Those are the kind things we're looking for. Those have been found to be administrable concepts in these other jurisdictions. There's no suggestion that it's been difficult to apply.

That concludes my first topic, which is the other jurisdictions. I don't know if now's a convenient moment?

THE PRESIDENT: Yes, that is a convenient moment. It's 3.40. We'll resume at 3.50, and we'll ensure that we can sit for as long as is necessary to have this matter

dealt with. Thank you both very much.

(3.40 pm)

(A short break)

(3.52 pm)

THE PRESIDENT: Mr Piccinin.

MR PICCININ: Moving on to the next topic, which is: the ways in which the parties, not just the defendants, but also the class representative, need to communicate with class members outside the specified statutory notices in proceedings in this jurisdiction, like this one.

It's very important as a contextual point that we look at this, because that provides important background to the exercise of statutory construction that we then come to.

Just on the class representative first, to complete the discussion we were having about Canada before, it's been pointed out to me, by those behind me, that the answer to your question, Sir, was in paragraph 39. It is *Del Giudice*, tab 9, page 224. What the court says is that:

"Not every communication to members of the class needs to receive court approval. The parties [so that's both sides] are free to communicate to the public about a class proceeding, and a press release that provides information to the media that does not evade or undermine the formal notice requirements is not a notice that is regulated by the … Act."

Although obviously, as we've seen in the Canadian cases, if something strays and is intimidating or coercive, or whatever, the court has the power to intervene and correct the problem.

We say that, starting with the class representative, the position is exactly the same here.

Ms Ford took you through a number of particular Rules that provide for particular notices and communications to be made by the class representative to members of the class, or represented persons, and some, but not all those, also need to be in an approved form by the Tribunal.

But it's common ground that is very, very, very far from being the only communications that happen between the class representative and members of the class. There are lots of communications between the class representative and members of the class about the litigation, and they never see the light of day. Or some of them are public. An example of that would be the class representative's website, which could be thought of as a multimedia campaign to encourage opting in, if you like, and that has all sorts of claims in it that are not scrutinised by the Tribunal through the certification process.

THE PRESIDENT: Well, that's, I think, the question that I have for you and Ms Ford, when she comes to reply.

Let's move away from an opt-out regime. Canada, of course, is opt out generally, and we have choice.

But where it's an opt out regime, the pressure to communicate, to drag people in, doesn't arise on the class representative. One can see why the communications need to come in order to constrain the class, principally from the defendants.

But let's take an opt in certification, where the class representative needs to get a certain volume of claimants in, in order to make the class, the action, financially viable.

Your position is, subject to the statutory communications and a rule not undermining them, you can do what you like when it comes to advertising, mailshotting, putting on a website, in order to drag people in?

MR PICCININ: Yes, Sir, subject to one point, which is that all those things that we've talked about, undermining the process and being intimidating and coercive --

THE PRESIDENT: No --

MR PICCININ: The point I was going to make about them is they're context specific. One important piece of context is: with whom are you communicating? If you're communicating with the chief executive, or the head of legal of a PLC, or a billion pound limited company, that's a very different thing from communicating with, I don't know, vulnerable persons with learning difficulties. What would be regarded as fair or unfair and legitimate or illegitimate can vary accordingly to the manner of the communication, and the recipients of the communication, and the purpose of the communication.

So that would be my submission, Sir.

Also, it needs to be said, I think: insofar as the communication was purporting to usurp the function of the notice -- so to do exactly the same thing as the notice, just in a different, unapproved form of words -- that's another thing that might be quite different from what we're doing in this case.

I'm wary of trying to say whether one communication or another communication would be within or outside the rule I'm proposing, because that's just a dangerous thing to do in general and we should really focus on the case at hand.

So we do say that the class representative is free to communicate with class members, and that goes beyond public communications.

We've seen in Ms Hollway's statement that she had verbal communications with class members. Those will never see the light of day at all. I don't know whether notes were taken, I've not asked to see them. But, obviously, we don't know what was said. So, on that side of the fence, it's clear that the Class Representative can

communicate with class members, and we say -- and this is what I'm now coming on to -- there are also important reasons why the Defendants need to be able to communicate with class members.

THE PRESIDENT: Yes.

MR PICCININ: So this case, although we must think of it overall, we must think of all cases.

But to start with this case, the class that we have here is massive. It runs into the millions. The Class Representative says that it doesn't even know how many millions, but we are told that there were roughly 18 million vehicles purchased during the relevant period that fall within the class definition. So there's a lot.

It's quite difficult to tell just from looking at someone whether they're inside the class or outside the class.

That's one feature of this case.

The second feature of this case is that it's an indirect purchaser claim. It's actually a multiple indirect purchaser claim, but the cartel was in shipping. The shipping services are provided to vehicle manufacturers. Vehicle manufacturers pass the cars down to their usually intra-group national sales companies. They sell them to independent third-party retailers. Those independent third-party retailers sell them to class members.

So someone in the position of my clients, the shipper based in Japan -- some of them -- is going to know very little about quite a lot of that causal chain that connects between the top and the bottom. So you know an awful lot about the ways in which we can measure and try to prove market-wide harm in different contexts.

This is a case where the approach the Class Representative has taken is to track through that causal chain and make factual assertions about the way in which it

works, all the way down to the class member. So what they're looking for -- we spent a lot of time last week arguing about this in the Court of Appeal, as to whether this is arguable -- but they're trying to track through the delivery charge line item that appears in an invoice at the end of the day when a class member buys a vehicle.

The debate we had in the Court of Appeal last week, all about causation and measures of loss, raised all sorts of interesting questions about how vehicle manufacturers and how retailers set their overall price for the car, about how negotiations take place between the retailers and the class members when purchasing a car.

These are all central issues in the case that go to a binary yes/no question as to whether there's a claim there at all. So they're very important issues in the case, and we don't know anything about them. The only way we're going to learn anything about them is by talking to people, and communicating to people who were involved in one stage or another, and probably more than one stage, of those supply chains.

So we say that just at a minimum, in order to conduct the defence here, we're going to need to not just gather witness statements, which it's now accepted we can do by the Class Representative, although it wasn't accepted in the Application. But, more generally than that, we're going to have to take soundings from people who are involved in the supply chain, which will include class members.

My learned friend has today for the first time, on her feet, tried to deal with that, without providing any advance notice before the hearing, by inserting into her draft order the words "in their capacity as class members". But that is a very, very slippery concept, Sir. It's straightforward to think about capacity when you're talking about formal decisions that a person makes. When this Tribunal, or a member of it, issues an order, we can ask: well, what capacity was that made in? Was that

a High Court Judge, or was it the Tribunal, or what?

Likewise, when an agent makes an agreement on behalf of the principle, we can say you're making it as an agent, or an executor transfers some property on behalf of an estate or in a personal capacity, those all make sense. But if you want to start asking the question: in what capacity are two people having a conversation?

That's a very difficult thing to answer. If that's the scope of the rule, then we say it's very unclear.

If I can just give an illustration of the way that might develop. Suppose we find someone who is or isn't a class member, we don't know in advance, but they work in retail and we want to talk to them about the way the negotiations work, and perhaps we want to compensate them for their time, offer to pay them £50 for an hour to talk to us about the way the process works. As we start talking about the case, they say, "Oh, I see, I'm actually a class member, isn't that a bit funny, that I'm helping to you defeat the case against me?" and we say, "Well, don't worry too much about that, because the Class Representative's own case is that for your type of car you bought, let's say it was a Ford, the whole of your claim is worth like 3p. So, with the £50 that we're paying you to you talk to us, you're quids in".

In that conversation have we spoken to that person in his or her capacity as a class member?

THE PRESIDENT: Mr Piccinin, you're raising a very interesting point, which is how far the collective process, the notices and certification controls that exist bleed into the court's control of, let us say, disclosure.

What you've just been saying is ringing bells in my mind about the way in which the Tribunal is going about controlling process in the retail interchange fee cases. We've had a lot of debate, not about certification. None of these are class actions before

us, they may be joined by some class actions, but they're not at the moment class actions.

MR PICCININ: Yes.

THE PRESIDENT: But the question has arisen: to what extent can the defendant, Mastercard and Visa, approach witnesses of fact on the other side of the fence in the group of persons explicitly represented by various solicitors for the claimants?

What we've said -- it's in a ruling, so I'm not making a new point -- is that Mastercard may not approach the factual witnesses, because we don't regard that evidence as liable to be probative in the facts of that case.

MR PICCININ: Yes.

THE PRESIDENT: We've kept the door open because we want to see disclosure as being a matter that we will articulate as everyone learns more about the process.

But what you're talking about here, surely it shouldn't be a free for all? And it ought to be, particularly when one's moving into the question of how a party defends itself, one should be proceeding in a manner that is actually under the pretty close supervision of the Tribunal, at the very least to ensure that one doesn't waste disproportionate efforts chasing rabbits down holes.

So what I'm really putting to you is: you may very well say, "We want to make this point in a singularly complex factual environment," and you can take it that I entirely accept that pass on, whether it is immediately indirect or indirect for several layers, is enormously difficult for all parties to get a grip on.

But the idea that should proceed in a manner of not referring to the Tribunal how the defence is going to be articulated, that seems to be rather inimical to the way that we do things in this Tribunal generally, not relating to certification at all.

MR PICCININ: It may be that I wasn't sufficiently clear in what I was talking about,

because I absolutely agree with everything you've just said to me about the case management techniques that the Tribunal needs to use in those and lots of other cases to control the evidence that is actually deployed at a trial, to make it manageable.

Sir, you don't see it, but in these interchange hearings that you're talking about, in the background, before, we've all spent years trying to get our own understanding in our heads of the facts of the case and how these things work, before you go anywhere near thinking about, "What witness evidence do I want to deploy at a trial?" you need to understand how these supply chains actually work. It's that most basic prior stage.

Of course, in *Interchange*, which is concerned with transactions, a lot of the issues about exemptions in that case, for example, are concerned with transactions that happened at the till. We all know about that; right? We all know what happens in a shop when you try to buy something, so those difficulties don't arise. Of course, Visa and Mastercard know a lot about the other areas of the payment system.

But, in this case, the difficulty we have is we need to know what happens inside the room, where the car is bought. To have a proper understanding of that, that's one of the issues in the case, we need to go out and talk to people. Not to get witness statements, although that's now conceded that we can do that, on the other side --

THE PRESIDENT: I'm not sure that we're --

MR PICCININ: That's fine, Sir. We're not anywhere near there.

THE PRESIDENT: No.

MR PICCININ: But before we can even express to the Tribunal and articulate to the Tribunal a methodology for trying the case, and what the evidence might be and what might or might not be relevant, we need to understand the basics of how these

things work.

Let me give you another example, Sir. One of the really odd things about this case is that the Class Representative's case on the extent of pass on to the class turns on, critically, the question of whether delivery charges that are published in brochures by various vehicle brands increased at a particular times during the claim period, and when -- Mr Doran will remember this -- the Application came on for certification, the Class Representative led evidence of just four examples that they'd collected.

This is referred to in my skeleton. We have since gone out, on our side, and we've bought on eBay a whole bunch of these brochures from a whole further set of brands which casts light on a critical issue in the case. You could imagine we could go out and get yet further ones from yet further brands by talking to people who have them, some of whom will be people who have bought cars in the relevant period. That's why we're interested in talking to them, because they hold those brochures.

It would be seriously unfair if that investigative stage had to happen with our cards face up on the table, while my learned friend is free to conduct investigations of those kinds, talking to class members, taking soundings, as they propose to do, with cards down. Then only revealing their hand as they choose to in the course of the litigation.

At the Court of Appeal last week, my learned friend stood up and said: we want to do all these things. We want to conduct surveys, talk to class members, even mentioned disclosure as a possibility.

Of course, some of that will be controlled by the Tribunal, but before it gets anywhere near the Tribunal enormous amount of work have to be done in the background for parties to be able to talk about the case.

MS LUCAS: When you're talking to someone because they have brochures, and you've bought them, when you're transacting with them; are you transacting with them as a class member?

MR PICCININ: The actual transaction is one I think we can answer that question for. So the actual sale of goods that takes place, I think it's right we can say: this person is selling me a brochure in their capacity as the owner of this brochure.

But then you start to ask yourself -- well, if it it's on eBay, that's fine, that's easy enough, but what if it was a different kind of transaction, talking to a person who had one and trying to buy it from them, and then we find ourselves in the example I gave before. They say: why do you want this? A litigation, is it? Oh, I'm a class member. That's why I have this brochure, right? Because I'm a class member. Because I bought a car that was advertised in one of these brochures.

And then they say: should I be selling it to you? Is that helpful or unhelpful for me in the case?

Again, we say to them: why are you worried about that? I'm buying it for whatever. Your claim, according to the Class Representative, is 5p, you're quids in. Is that communication?

THE PRESIDENT: So it's the subsequent communication, as opposed to the actual transaction of going out and purchasing brochures and gathering information?

MR PICCININ: Well, it's both, because you may not be able to buy the thing from the person without talking to them first.

On eBay you can. But there will be other communications where you try to get something from someone, and they start to ask that question. If we were to ask the retailers, who are also class members, insofar as they were first registered keepers of any vehicles that they used for their business purposes, right? The same thing

then.

This "'capacity " wording is very unsafe ground to rest on if you're trying to apply it to communications. That's the point that I was trying to make earlier.

THE PRESIDENT: Indeed. But moving on from capacity into simply in a party neutral way, in other words in a manner that is maintaining a level playing field between the Class Representative and the Defendants, for certification, what's wrong with a discussion with the Tribunal involved as to what each side is minded to do before they do it?

Now, it may be in very general terms. If you're saying, "Look, we need to investigate, to look for the brochures", or whatever it is that one is doing. "We're not targeting class members, we are simply trying to work out whether we have a case and what that case is, we need to do certain investigations which may involve persons who happen to be within the class. Well, that's one thing.

On the other hand, if you're saying, "We're actually going to write to specific members of the class doing whatever", well, isn't that something the Tribunal ought at least to have an understanding of?

Just to take a point against Ms Ford and in your favour, let's suppose the Class Representative is saying: because you've ordered opt-in, we're proposing to spend millions on an advertising campaign that will be extremely intrusive to the class. We're going to mailshot everyone and tell them why it's so important they sign in. Here's what we're going to spend.

Shouldn't that be before the Tribunal? Well, actually it would be, because it would be in the budget. But why shouldn't there be a regime which is part of the certification process by way of which these points are addressed in a manner that ensures that you don't have the disbenefits -- I can see benefits, but the disbenefits of

a free-for-all.

MR PICCININ: The problem is, Sir, that it's impossible to craft a rule like that, that is fair between the parties and doesn't put the Defendants in a straitjacket. Because the Class Representative can't do its job without communicating with class members.

THE PRESIDENT: No, I think you're misunderstanding the nature of the rule that we're talking about here.

MR PICCININ: I apologise.

THE PRESIDENT: No, not at all. These are difficult things.

But if we say that one has my resort to the old solicitor's rule, that you communicate lawyer to lawyer when you are dealing with matters to do with the litigation, as a general rule, you don't communicate with the "client", and I know that the class is not a client in that sense.

But, nevertheless, if you have that as a general rule, if you then say, "Look, we need to communicate in the following ways: we want, for instance, to do broad investigation. We don't say what they are. We just need to investigate matters. We're not targeting members of the class, we're just targeting information", well, why shouldn't you raise that and get the Tribunal's imprimatur?

MR PICCININ: It would be very difficult to have to conduct those preliminary investigations in a way where we reveal what they are, or that we're doing them, before we know what the answer is. That's just not the way that civil litigation is conducted. That's not a constraint that would apply to the Class Representative.

I don't know whether the Class Representative has already been conducting factual investigations about these subject matters. As I said, we have, in particular ways that I've referred to, I'm not purporting to say what one client or another has done beyond that, but it would just be unworkable to conduct litigation in a way, for either

side, in which they were unable to talk to people who were members of the class without first telling the Tribunal that they were proposing to do so.

I'm still not clear on exactly what the form of words is, because even the analogy that you've just put to me is: well, you write lawyer to lawyer.

How does that apply to the Class Representative? Who is the Class Representative supposed to be writing to? Or is the point that they are not subject to this rule because they're in some sense, inaccurate sense, a lawyer for the class?

I don't understand what the proposal is.

THE PRESIDENT: I think you're operating at a plane of specificity that I'm not.

MR PICCININ: That's very significant, Sir. Because the point that I'm putting to the Tribunal is that it is really difficult to regulate something like communications in a way that you don't end up prohibiting something that you don't want to prohibit, that you shouldn't prohibit, that it would be wrong and unfair to prohibit. Until you have wording on the table, I'm just shooting at a --

THE PRESIDENT: Well, Mr Piccinin, you're assuming a vacuum, aren't you? You're assuming that there isn't any face time between the parties and the Tribunal?

MR PICCININ: No, Sir --

THE PRESIDENT: I can quite understand if you had a position where it was simply a situation where you couldn't raise these matters with the Tribunal, then you would have to have a rule that was definitive to guide matters. But what we have here is a situation where the entire shape of the claim, and the entire identity of the class representative, is gone through in enormous detail in order to work out whether certification should occur or not.

Now, all I'm putting to you is that when the class representative is saying, "This is how we're going to prove our case, this is what we need to do," the rights of the

defence need to be taken into account as part of that process. Where you say, "Look, if we are to defend ourselves, we need to do the following things," and broadly speaking, investigation fine, targeted letters to the class, to take an example, not fine.

So if you were, for instance, saying: we absolutely need to send a questionnaire to each member of a class, the questionnaire will be as follows. It will ask the following questions.

I really think that's something that ought to be coming to the Tribunal for investigation.

MR PICCININ: Those communications would ordinarily be subject to litigation privilege. So if a party to litigation communicates to a third party to try to understand the facts of the case, that is privileged.

THE PRESIDENT: Well, yes, but you can articulate what you're doing in general terms, can't you?

MR PICCININ: Well, Sir, I can't. I think that's very difficult.

Another point I'd like to make about this -- perhaps it's lost on the Tribunal -- but we already have witness evidence in this case. It's not uncommon for that to happen, for expert reports and factual evidence, in the course of resisting a CPO. So it's now not clear to me whether, in the short number of weeks between when a CMC takes place, the first CMC takes place, in the collective proceedings -- we have one of these next week -- do I need to be saying, as a defendant at a first CMC, "Here's an outline of the investigations that I'm going to carry out for the purposes of resisting the CPO application. Some of these might involve talking to my customers who might be, or are, class members in some cases"?

What if a customer wants to talk to the defendant? There's a direct client

relationship already – customer relationship with the defendant – about the position the defendant is taking in the litigation? Is that something the defendant can't do? That would seem to me to fall within the capacity wording that Ms Ford proposes, but it would seem to be seriously unfair to prevent a defendant from doing that.

It seems to me unworkable to expect defendants and not class representatives, for really either of them, from outlining exactly what it is they are proposing to do in advance without giving the game away for matters that should be privileged, which is another fundamental right.

So, Sir, those are my submissions on the practicalities.

THE PRESIDENT: I'm very grateful.

MR PICCININ: In terms of the rules, I think I can be very brief. I don't think I need to go back over them again, because you've seen them.

We say the test has to be that it is already clear when you read the rules what the prohibition is, and that it exists.

So it needs to arise by necessary implication in that sense. It has to be impossible, illogical, for the rules to operate without having this particular rule that has been formulated in four different ways now by the people in this room, other than me.

That's what arises from -- I think it's now three sets of rules; two came from the Class Representative and one came from the Tribunal.

One is the appointment of a class representative. But we say there is a clear rationale for the Tribunal scrutinising the appointment of the class representative, because the class representative, unlike the defendants, is in a position where class members are liable to trust them, and trust what they say, because they're purporting to act on behalf of the class. They're also conducting the litigation in a way that is going to result in a judgment that is binding on members of the class, whether they

like it or not, whether they know about it or not. So it's obviously incredibly important that the Tribunal should scrutinise who it is that's going to carry that heavy burden. But that doesn't, on its own, imply that defendants or anyone else should be prohibited from talking to class members. That necessary implication just doesn't follow.

Secondly, the scrutiny of the limited number of official communications.

Those communications all serve a purpose which makes it obvious why the Tribunal needs to scrutinise them before they go out. Notifying people what the class is, of their right to opt out, the terms of any settlement, all those kind of things, you can well understand why the Tribunal needs to make sure that at least that information gets into the hands of the class in a way that the Tribunal is satisfied is fair.

But that, too, doesn't necessarily imply that no-one else is to have any other communications with the class.

As I said, it seems to be common ground that it doesn't imply the class representative is to have no other communications with the class; it's only said that it follows that the defendants can have no other communications with the class.

Indeed, that it's not just the defendants' rights that are being infringed. It's just been pointed out to me. It's also the rights of the class members, who may want to communicate with the defendants in this and other cases, and their rights, too, are being trammelled by this necessary implication.

We just say it's impossible to see how any one of these four versions can be said to be already clear from reading the rules, and the situation in Canada illustrates that.

The final topic, I hope I can do reasonably briefly --

THE PRESIDENT: Don't worry about time, Mr Piccinin.

MR PICCININ: I'm grateful. I just want to run through the letters, because although,

as I say, it's somewhat academic, because none of the criticisms of the letters actually bear on the issues that we've been grappling with here, which is about whether we should be free to take soundings from class members about what happens in the room. But the letter has been criticised, so I do need to answer the criticisms.

THE PRESIDENT: Well, I think you do, because it may be that you have persuaded us that the manner in which the rule is to be formulated is not on the basis that we've been discussing, but on the basis that certain communications of a particular type, or with a particular purpose, are prohibited.

I think it's been made quite squarely the case that these communications are, because of their nature, not communications that should have been made.

MR PICCININ: Yes, and I'm going to address those. But the reason --

THE PRESIDENT: I don't want you to take it quickly. That's my point, Mr Piccinin.

MR PICCININ: I'm grateful for that.

But the reason why I still say this is somewhat academic is that this is not a case in which the Class Representative says anything needs to be done about it.

The Class Representative doesn't say that the one person who opted out needs to be given a second chance. One can identify why that is, because Ms Hollway has already spoken to that person and is under no illusions about that person's reasons for doing it. I don't know what they are.

If it had been said they should be given another chance -- I would need to take instructions -- I'm not sure whether I would oppose that.

But there's no relief that is being sought that is about these letters at all. That's my point. Other than relief which the Tribunal has no power to give, which is declaratory.

THE PRESIDENT: Again, Mr Piccinin, I don't want you to be under any illusion, but we don't regard ourselves as fettered by what the Class Representative is seeking and not seeking. So the reason I'm pressing you on this is because we regard ourselves as in overall charge of the shape of these proceedings, and we are, as both sides have said, somewhat feeling our way in the collective proceedings regime because it is a new regime which we need to make work.

So there are wider issues in play, and that's why I'm so keen you take your time. Don't rush over these points.

MR PICCININ: Yes, that's a very helpful indication. It's understood.

If we could just turn to the first letter in the bundle. I just want to go through them. I'm just picking it because it's first.

My first point is actually about the top-left corner of it, which is the addressee, and this may be a particularly bad example for me because it's a relatively small one. It's not a PLC, it's just little old AA Limited, whose revenue in 2020 was almost a billion pounds, and it has 7,500 employees.

So the first point I make is: this is not a case like the ones you have seen in cases in Canada and the United States, where criticism has been made that communications are happening with small businesses or with individuals, just -- natural persons, just individuals. These are communications that are being made with very, very large businesses indeed, and they have been selected for that purpose.

If you cast your eye down the index of the bundle, you'll see most of them are PLCs, and some are truly epic in scale, like Lloyds, for example.

You can also see as well, just underneath the address, that these are for the attention of the CEO and the Head of Legal. That's a very important contextual point for considering all the criticisms that are made of the letter, because these are going

to very legally sophisticated and commercially sophisticated people, the CEO and the head of legal, for very, very large businesses.

You can also see, Sir, in the box, right up front, although it happens repeatedly, there is a recommendation that the letter be provided to the legal advisers of the recipient. Again, it would beggar belief that any of these recipients would not have external legal advisers on hand as well, ready to advise on day-to-day matters. So we say that, too, is very important context, because when you're assessing any communication for its fairness, or whether it's misleading, whether it's coercive, whether it's intimidatory, you need to look at who the recipient is, because the same words may or may not be those things when spoken to somebody else in a different context.

THE PRESIDENT: The recipient is altogether unarticulated, isn't it?

What it says is: we're writing to AA Limited, so it will go to the post room.

What you're saying is: please pass this up to the CEO and head of legal.

MR PICCININ: Yes, that's right.

THE PRESIDENT: Yes, okay.

MR PICCININ: That's whom it should be read by.

THE PRESIDENT: You couldn't find the actual address of the --

MR PICCININ: It may be that someone will provide me with the answer to that question, Sir. I don't know the answer.

But we say that is a relevant factor.

Then I'd just like to look at the first two paragraphs, because they're important.

The first paragraph tells the recipients that they will automatically become claimants if they don't opt out by the deadline. There's been some criticism of the choice of words there, "claimants", rather than -- I think it's technically it's not class members.

It should have been "represented persons". But we say nothing turns on that in the context of the letter. It's a perfectly serviceable shorthand and it's a shorthand that is used by the Class Representative itself, on its own website, informally. There's nothing to criticise in that.

But the importance of it, for my purposes, is it sets up a contradistinction with the next paragraph. So we've just talked about claimants, the next paragraph says:

"We are writing on behalf of the Defendants …"

So it immediately becomes clear, from the first two paragraphs, the person who is writing to them is adverse to their interests. That is transparent. So we say that is another factor that is very important when you're trying to figure out whether the communication is misleading or unfair. Because the recipient is going to be reading it thinking: this isn't someone who's on my side.

The other point that's important about the second paragraph is that it says what the purpose of the letters is.

Ms Ford, I think she said we didn't get on to disclosure until about paragraph 12, but that's just not right. We say it in the second paragraph: the reason we're writing is to inform you about applications which the Defendants are likely to make if they remain in the litigation.

Then it goes on to explain why we're doing that. It says: the purpose is to ensure that they are not taken by surprise.

THE PRESIDENT: Do I take it from this that there's no question of the Defendants seeking disclosure from any other persons?

MR PICCININ: No. It may be helpful if I just articulate in a bit more detail what we meant by this purpose, what the function of it was.

It was canvassed at the CPO hearing. One of the arguments that was made was:

we're going to need to get disclosure from large business purchasers. It would be helpful if they were opt-in rather than opt-out, so we would know exactly who they are.

That's why there's a section in the judgment on this.

One of the things that's said in the judgment -- if we flick over the page, we'll come back in a moment, but it's paragraph 169 in the judgment. On page 3, you can see the quotation, and around the middle it says:

"If an order for disclosure against certain class members was determined to be necessarily reasonable and proportionate ... or potentially giving the relevant class members the option of being excluded from the claim by removing them after the end of the opt out period if the disclosure would otherwise be ordered."

So the context here is that we're faced with a situation where if we just wait and do nothing, and then apply for disclosure against these people down the road, then, firstly, they're liable to make some of the sorts of arguments that have been made by the Class Representative already, about disclosure being inappropriate in collective proceedings.

Secondly, they're likely to be able to bolster that by saying: we know we're here, we know we're represented persons, but we knew nothing about this. No-one ever told us about the action at all, let alone about the possibility that there might be a disclosure application, so that's a reason why we should be left well alone.

Then the third thing they may say, they may leap on this and say: okay, well, if the Tribunal is otherwise minded to order disclosure against us, then we opt out.

Then that puts us in the position, on my side of the fence, where we have to play whack-a-mole because just when you have persuaded the Tribunal to order disclosure from someone, they opt out and we need to start again with someone

else.

So, no, Sir, it's not the case that I'm saying we're definitely not going to seek disclosure against anyone other than these people, but we had already determined, at the stage of the CPO hearing, that there was a likelihood that we were going to be seeking disclosure from people like this.

We then spent some time going through who they should be, because we didn't want to write to all the large business purchasers in the claim, and trouble them all. So we wrote to what I believe are the largest of them.

That's not to exclude the possibility that we might one day seek disclosure from someone else, but these are the people who are likely to find themselves on the receiving end of a disclosure application.

The benefit we obtain from this is that when they find themselves on the receiving end of a disclosure application in due course, if the Tribunal was otherwise minded to make it -- it may or may not -- they will not be able to say this is something they didn't know about when they decided not to opt out. It's a decision they made in full knowledge of what was coming.

THE PRESIDENT: So everyone else who you haven't written to will be able to make those points?

MR PICCININ: If we were to seek disclosure from somebody else, they would be able to make those points, and we would have to meet those points in argument. I'm not saying those points would be a complete answer to a disclosure application. But it's an argument that would be made, I would imagine: hang on a second, we didn't opt out. You have at least to give us a chance to opt out now, now that we know.

I should clarify, Sir, that is an explanation for what the letters were about, what they were for.

I don't make the submission that they were necessary letters to send, in the sense that it would have been completely impossible for us to pursue a disclosure application for us to conduct this application without sending these letters, that's not the burden of my submission. I'm just trying to explain to you what they were for, which was a legitimate purpose --

THE PRESIDENT: I think what you're saying is that you wanted each of these addressees to consider their position in light of the costs that they might incur in response to an application that you would probably be making?

MR PICCININ: Yes. So that we're not then met with the argument which I've just canvassed, which would a frustrating argument to be met with.

The point I'm making, Sir, is: I'm not trying to persuade you that it was essential for these letters to be sent. That is not the test that applies to communications with class members, as I have articulated. The test is whether it's coercive or intimidatory, or misleading, or any of those things. It's none of those things, and it's not made for an improper purpose either. Even if the Tribunal or the Class Representative considers it unnecessary, it's not improper, that objective.

Continuing with the letter, there is then a short section -- just back on pages 1 and 2, section A -- that provides background. It's a short section, and we're criticised for its brevity, but the reason it's short is we are not, in this letter, trying to usurp the function of the notice. We're not trying to usurp the function of the Class Representative in explaining to the recipients what the claims are about. If we had, in our own words, tried to explain how it all works, no doubt the Class Representative wouldn't have liked the particular ways in which we put it.

Instead what we did -- and you can see this in paragraphs 6 and 7 -- is that we gave them a link to the Class Representative's own website, where there's lots of

information about what the proceedings are about, and then we also gave them a link to the Tribunal's website, and to the particular page on the Tribunal's website that we then say includes an Order made by the Tribunal which sets out the precise scope of the claim, including the full list of excluded brands.

So we're referring the recipients of these letters to people who are either neutral -- that's you -- or partisan, but in the other direction -- that's the Class Representative -- in order for them to obtain information about what the proceedings are about from those sources, rather than from us.

We say that's not something to criticise us for, that's entirely proper. We've not done the things that people have done in the other cases, where they've been criticised, where they try to take on that mantel and compete with it. We're not doing that at all.

I should say the Notice, I believe, is available on McLaren's website. That's referred to there, so they can see it at source.

In section B, we explain the recipient's involvement in the claim, and we're criticised for saying there that they have a right to opt out. But they do have a right to opt out. That is a right and opportunity that every person has. The reason there is an opt-out right is it would be quite wrong for someone to carry out litigation on someone else's behalf without them having an opportunity to say "not me". So there's nothing inaccurate about that. It's indisputably true.

So that's really the introduction section to the letter.

The meat of it, which is foreshadowed in paragraph 2, is section C, which is about the potential disclosure obligations.

So that's where we say we are likely to seek disclosure. That's in paragraph 12.

Ms Ford criticises that. She seems to say that's untrue, that we're unlikely to seek disclosure, because, she says, in this type of proceeding there wouldn't normally be

disclosure.

Well, the Class Representative may be right or wrong about that, but we are likely to seek it. We're the ones in control of whether we seek it, and the Tribunal may reject it, if the Tribunal doesn't like the application. But it's true that we are likely to seek it. So that's not misleading.

We say what we're likely to be seeking disclosure of, in paragraphs 12 and 13.

We're criticised for saying that it would involve a careful search. It's true that it would involve a careful search if it were ordered, and that's all we say. In addition to being true, it's important that we say that so that they understand, and so they can't turn up at the hearing and say, "We didn't know the scope of what you would be seeking".

The next thing we do -- again, this is conspicuously fair -- we say this is something the Tribunal is aware of and the Tribunal has commented on, and then we set out verbatim, in just three paragraphs -- it's not a lengthy set of text -- everything the Tribunal has said about this issue, including the bits that you might think were adverse to us. Like the bits in paragraph 170, the possibility that disclosure may be of limited relevance.

We're criticised for not drawing attention to that. But, Sir, again, we're caught between the horns of a dilemma here. Either you paraphrase, in which case it's very short and people say, "We don't like your paraphrasing," or we set it out in full and they say it it's too long. In this case we say the second of those is unsustainable. Again, bearing in mind this is going to Head of Legal, they ought to be able to read three paragraphs and make of it what they will.

So, again, we say that was actually conspicuously fair.

Again, on that question of whether it was buried -- which I think is what Ms Ford says -- it's buried in a document that's only four pages long. It's an absurd criticism.

At paragraph 15, we then go on and say there will be time and effort involved if the CAT were to order disclosure. Again it's expressly conditional in that way. The function of that is obvious once you understand what the purpose of the document was, which was to prevent them from saying they were surprised and they didn't know.

Then, at paragraph 17, we suggest they take legal advice as to their duties to preserve documents. We're criticised for saying that as well, on the basis that the Class Representative's submission, without reference to authority, is that there are no duties at all on a person who receives a letter like this.

Now, we haven't purported in this letter to state a view on what the law is in that regard, because again we're being conspicuously fair. We're trying not to put ourselves in the position of the people who are giving them substantive advice on their rights and obligations, given that we're adverse to them. It would be strange to take advice from a person who's adverse to you, and we're not purporting to give it.

But we do say that it is quite wrong, and it would be extraordinary if one received this letter and then went away and destroyed the documents. It may even be a criminal offence depending on how they went about doing it.

THE PRESIDENT: Well, Mr Piccinin, you are giving legal advice though.

MR PICCININ: Sir, I'm not sure I understand that.

THE PRESIDENT: Well, you're giving legal advice to get legal advice.

MR PICCININ: We're making a suggestion they should take legal advice, yes. This is going to the Head of Legal.

That's why I said we're not giving legal advice on their substantive rights and obligations; all we're saying is: there's a question here that you ought to go away and consider with your lawyers.

That's the full extent of it.

THE PRESIDENT: I'm not sure it is. Let me explain why I say that. The whole point of a collective regime is that the sum of the individual claims are greater than the costs of prosecuting those individual claims, because the costs are saved by a single party bringing the claims. That's the whole point of collective proceedings, whether they are opt in or opt out.

Surely the suggestion that any member of the class, whether they are opting in or opting out, needs to retain their own lawyer to give advice about how to treat documents is undermining of that process?

MR PICCININ: Sir, once again, it's relevant who these recipients are. These are not small businesses who may have one vehicle that is the subject of the claim that's worth a few pence or a few pounds. These are the very largest purchasers that we were able to find.

I don't know if someone can draw my attention to the figures for their claims. I think it was discussed in the judgment.

But these are people who have a much larger stake in the litigation, and so I certainly wouldn't be saying that everybody who is a class member has a freestanding obligation to retain documents. But our position is that if you're one of the very largest ones, and someone writes to you and says, "You're holding documents that are very important to our case, we're likely to apply for disclosure for them", all I'm saying is, in those circumstances, there are limits to what they could properly do.

We're not saying what those limits are here, but there must be limits on what they could do. If they went away and selectively destroyed documents that were relevant to this issue, my submission would be that would be inconsistent with their duties

under the criminal law.

THE PRESIDENT: Mr Piccinin, the reason I'm asking you this is: why was this not raised before Mrs Justice Falk?

If it's so important -- and I do understand why it is -- that documents are retained by those who are remaining in the class because they're not opting out; why isn't this something that you ensure prospectively is engaged?

MR PICCININ: Yes, Sir, as I said at the outset of my submissions on this topic, I'm not saying that this was the only way we could have done it, or that we had to do it this way. I think it's probably right that it's something we could have raised at the CPO hearing. If we'd done that for this particular case, that might have avoided the difficulties that we're in here.

But that's why I said, at the outset of all my submissions, that it's quite a dangerous thing to craft a general rule from this particular case, particularly in circumstances where, as it happens, no harm was done. Nobody has made an opt out decision that they've regretted on consideration.

But the test can't be, Sir, that you can only send a letter if it was impossible for you to carry out the litigation function that you're trying to achieve in that letter without sending it unilaterally. That can't be the test; that's not the way that any civil litigation works.

While I accept the point that you're putting to me, Sir, which is that we could have, and maybe it would have been better if we had, it's not the case and it can't be right that we be required by law to do that.

THE PRESIDENT: I'm certainly not putting that to you.

The reason I'm raising this is because an alternative construction of these letters -- and I think it's appropriate that I put it to you, so that you can refute it -- it is

something which a reader of these letters might think was their purpose.

The reason you've written to the largest members who are automatically in, unless they choose to exit, was because you wanted to shape the nature of the class, and you were, therefore, raising concerns that might undermine the opt-out order that Mrs Justice Falk made.

In other words, you're not raising it because you're concerned about disclosure; you're raising it because you have a fighting chance of sculpting the class in the manner which you contended for before Mrs Justice Falk, but failed.

MR PICCININ: Yes. Sir, I think I have three answers to that point.

The first one is the subjective intention in sending the letters is really not the issue, which is why it's not been addressed with witness evidence, delving into matters that are privileged.

The second point is: no, there is an objective reason for choosing the largest business purchasers to write to, because it's most proportionate to put the burden of disclosure on those who stand to benefit the most from the claim.

You can well see why it might be disproportionate, unless there were a really good reason to do it, like a substantive reason in the case why it was important to explore the documents of some other party.

But the size of a party, and the size of their stake in the claim, has to be a factor that militates in favour of disclosure obligations being made against them.

Then the third point, my Lord --

THE PRESIDENT: Just pausing there, I could understand a distinction being drawn between individuals and corporates, but why are you drawing a distinction between corporates and corporates?

MR PICCININ: Because some corporations, Sir, are single person vehicles.

THE PRESIDENT: Right. Is that why you drew the line there? You have no evidence, you can't tell me why --

MR PICCININ: Sorry, Sir, I don't understand the question.

THE PRESIDENT: Okay. Have you only addressed those corporations who are so big that you can expect a meaningful response, or have you just gone for the biggest?

Why have you drawn a distinction between one corporate and another? You have not just excluded one-man bands.

MR PICCININ: No, I think what we've done is chosen the ones that have the biggest claims. So those are the ones who have the most to gain from the litigation. So it seems reasonable to impose the costs of the litigation, the cost of this little part of it, on them. That's the logical reason why we've done it.

Of course, they're also the ones who are most likely to be holding the most relevant data. The people who have bought lots of vehicles are likely to have lots of experience of purchasing them and lots of purchase prices that they've paid that can then be the subject of analysis. Whereas someone who has a much smaller claim will have less relevant information.

That's why we made the selection we did. Again, the reason why we made a selection at all. We could have written to everyone, but that would have been disproportionate. We didn't want to do that.

The third and final point I want to make on this topic, Sir, is the fact that Lloyds Bank, or the Ministry of Defence, or even the AA Limited, is going to be bullied into exercising a right to opt out because of the pretty neutral formulation of words that you find in these letters is fanciful.

It's just not realistic that the CEO of a billion-pound organisation is going to be bullied

like that. This theory that's being advanced by the Class Representative as to what we were really trying to do in these letters is absurd.

This is quite different from what you see in the cases, the ones that I've shown you, and also the American case that my learned friends cite, where that's what coercion looks like; right? Where people try to apply pressure from their relationship with the class members, which may be franchiser or franchisee, or may be municipality and taxpayer, to bully them into opting out.

This is completely different. I can't conceive of letters sent to a class member that are less likely to be intimidatory than this kind of letter sent to this type of recipient.

So, Sir, we say that would be an irrational inference to draw about what these letters are for. It may be they could have been put differently, it may be things would have been better if it had been canvassed beforehand, or with the Tribunal, sure. But none of that goes to show that they were sent for an improper and entirely unsuccessful purpose of undermining the process by forcing someone to opt out where they would otherwise have intended to stay in.

MS LUCAS: You say that, Mr Piccinin, but have you look at page 123 of the bundle?

It's Ms Hollway's third witness statement. As I read it, recipient G opted out and then, once they discussed it with the Class Representative, wanted to opt back in again.

MR PICCININ: That's right, and they have opted back in.

Sorry, that was the last point that I wanted to make about this letter, and about the purpose of it, is: we copied it to the Class Representative. That's how we ended up here. This wasn't something we did in an underhand way, whereby they wouldn't know about it.

If we go back to the letter, you can see it's clear on the face of the document that it is copied to the Class Representative.

That is important for two reasons. It's important because the recipient knows who the Class Representative is and who to contact if they want to talk to the Class Representative. It's also important that we've copied it to them because the Class Representative can see exactly what address we sent these communications to.

So if the Class Representative doesn't like something that we've said in here, or thinks it's inaccurate or misleading or coercive or intimidatory, there are only, I think, 21 of them, the Class Representative could have sent 21 corrections. That was something that was possible because of this step we took to be conspicuously fair. It's not something we say we had an obligation to do, but the fact that we did it is really quite inconsistent with the idea that this was intended to bully people into doing something they didn't want to.

Some of the recipients of these letters seem to be in a bit of a muddle. One of them, it's said, somehow, despite the fact that we say more than once that we're the Defendants, thought we were the Class Representative. I can't account for that.

One of them decided that they -- I think it's only one, I'll be corrected -- decided they wanted to opt out and then changed their mind.

MS LUCAS: If you're in another form of litigation, the normal course would be, wouldn't it, to write to the solicitors on the other side and say: please remind your clients of the obligation to preserve documents.

MR PICCININ: Yes.

MS LUCAS: So it was open to you to ask the Class Representative's solicitors to write to these people or not?

MR PICCININ: We certainly could have asked them to, yes.

But the situation that these letters are aimed at is not one that arises in normal civil litigation. In normal civil litigation, the parties are already the parties.

The issue, as I tried to explain earlier, that we were trying to deal with here, is that these people were in the process of choosing whether to opt out or not. Then it was likely that a disclosure application was going to follow. The main thing we wanted to achieve by the letter, the main objective purpose of them, was to ensure they weren't surprised by that application and they couldn't say they were surprised as a response to it.

MR DORAN: But if the disclosure of these documents is critical, as you suggest, then will you be seeking it anyway, whether or not they're a proposed class member?

MR PICCININ: Yes, I'm glad that you've raise that point, because it's a point that my learned friend makes. Again, there seems to be some confusion.

It is likely to be critical that we have some evidence about what's happening in these causal chains. It's obviously not critical that we have every piece of evidence that exists, or evidence from every class member, or even from all the largest class members.

So the situation in which someone says, you know, I don't know, say five of them opted out, and then we get it from the other 15, that will do. 16. That'll do. It's not being said here, and we've never said, that it is essential that we get disclosure from all these people. All we're saying is that we're likely to be making an application.

Does that answer your question?

MS LUCAS: Does that mean that some of the recipients to the letter may not be on the receiving end of an application for disclosure?

MR PICCININ: The only thing we say in the letters is that we're likely to be making an application. So we didn't say in the letters that we were certain to make

an application, and you can imagine there would be lots of situations in which we might not. For example, if the Tribunal says that such an application is hopeless, or if the case settles, or if it's struck out by the Court of Appeal following the hearing last week.

MS LUCAS: It just is quite difficult to read the letter without putting together the suggestion that there may be, if they don't opt out, there is likely to be a very expensive process lying in store for them.

MR PICCININ: It doesn't say that.

What it says is that we're likely to make an application, and what it goes on to say is: if the application were successful vis-à-vis them, then they would need to carry out a careful search.

That's all true.

We also then drew their attention to the comments the Tribunal made about either why that might not happen, because it might not be required, or there would be protections put in place to cover their costs. So we tell them that, too.

MS LUCAS: I just notice that whenever we raise this point, you don't refer to the fact the letter refers directly to the cost that is likely to be visited as a result of the exercise.

MR PICCININ: Yes, it's important that we do refer to that, so they know it. That's the thing we want them to be aware of, so they can't say they're surprised by it.

MS LUCAS: Thank you.

MR PICCININ: So we say, just summarising what I have to say about the letters, there was nothing wrong with any of that, certainly nothing that meets the standard that's set down in the Canadian and American jurisprudence.

These were very, very sophisticated recipients. This wasn't a situation like in those

cases, where you have a huge number of blanket public communications. It was copied to the Class Representative, which is a mad thing to do if you're trying to coerce or bully or mislead people. So it would have been straightforward to fix if there was anything that went wrong.

It doesn't say anywhere the recipients should opt out. It doesn't purport to tell them whether the claim is worth more or less to them. We don't refer to the fact that these claims are worth pennies per vehicle in many cases. That's not a point we make.

Again, unlike what was done in some of those other cases, where sometimes points were made about the merits of the claim.

THE PRESIDENT: Just so I understand your submission: there would have been nothing wrong in doing that to these sophisticated clients?

MR PICCININ: My submission is that there's nothing, in principle, wrong with communicating class members about the merits of the proceedings, but it's obviously something you need to be very careful about doing, particularly if you're writing to lay people.

THE PRESIDENT: No, let's take these as examples --

MR PICCININ: Even then, even if you were going to stray into the merits, which is not something we did, in my submission you would want to be very careful that you were not being misleading, for example.

Because I accept some of the points that my learned friend makes about the situation that these are class members, not parties to the litigation. So you don't want to say something that misleads them. I think it's unlikely that someone like Lloyds Bank would be misled in the end, because they could take their own advice. But if you were straying into the merits, I would think you would want to be careful.

THE PRESIDENT: Supposing you had said we are on the other side, as you have

done, you have made clear you're defendants, they are claimants. Now, the label may not be quite right, but you've put in place the opposing positions of writer and addressee; why couldn't you say, "This is going to cost you far more than you will gain, because the costs of disclosure are really very high and the costs for you, in terms of internal administration, are so great that any damages you get are going to be dwarfed by the costs of a large organisation putting in place a document preservation process"? Why can't you say that?

MR PICCININ: Putting it in just those terms, it's difficult, Sir, because you're putting hypotheticals to me.

But I would want to be careful about saying that because there are a number of uncertainties in there. One is whether the Tribunal is going to make that disclosure order. Another is whether the Tribunal is going to put in place a costs sharing mechanism that protects the recipients from the costs of the disclosure exercise, or compensates them in some ways, as the Tribunal adverted to in paragraph 169 of the judgment, in the paragraph we quoted in these letters. Again, not something we would have done if we were trying to bully these people or mislead them.

The letter that you, Sir, have just drafted for me now is straying into making assessments of how likely those things are. I think you would want to be careful, if you were doing that, that you were not misleading them about those matters, because obviously we know more about the litigation than they do, so it would have been a risky letter.

I still think I probably would be surprised if it was found to fall foul of the standard that's set down in the Canadian cases.

I'm trying to be helpful to you, Sir, but that's not this case.

THE PRESIDENT: Well, it might be said that paragraph 15 of the letter is actually

a more carefully crafted and drafted version of what I have put to you.

MR PICCININ: No, Sir, because it follows immediately on from a quotation of what the Tribunal said.

THE PRESIDENT: Yes, I see the "if" at the beginning --

MR PICCININ: It begins with the word "if", and it then includes the word "could". This is being read by legally sophisticated people.

So I really do struggle with the idea that someone that is -- it is certainly not the same as you put to me, Sir, because it doesn't express a view on either of those two "if"s or "could"s. The contrary view to them is already expressed in the very paragraph before it. On both of them, there's a doubt as to necessity, and then there's also the expression of confidence on the part of the Tribunal that some form of costs protection could be put in place to deal with the costs. All that is set out for them.

It would be perverse in the face of that, and all the points I've made, to find that these letters were sent for an improper purpose.

Just dealing with the timing, that's, I think, the final point that I need to make.

Once it was understood what the purpose was, which was to put them on notice so they couldn't be surprised by the effect of a decision not to opt out, it follows that it had to be sent during the opt out period.

I don't know whether Ms Ford is intending to suggest that we sat on it and deliberately waited until there were only two weeks left in order to send the letters. If that is a suggestion, it's not one that I had appreciated had been made before. But there's no basis for it.

Obviously, it would have been better from everyone's perspective if the letters had been sent earlier, including from the perspective of the argument that we want to

make from the perspective of the disclosure application. We could have said they had a longer period to consider it. But it takes time to come up with the lists of the recipients and to coordinate between the various Defendants.

THE PRESIDENT: Mr Piccinin, I had understood Ms Ford to be making that point. I see she's nodding.

I entirely accept your point that we have to be quite careful here, because we only have the face of the letters, and we don't have any evidence as to the thinking behind them. The thinking behind them would almost certainly be privileged anyway. So you can take it that we'll tread quite carefully.

But I think the point is being made that there's something to be read into the timing.

MR PICCININ: It's been made today. Maybe Ms Ford can direct me to where a square allegation was made that we deliberately delayed. But that is the kind of allegation that should be made very squarely indeed, if it is to be made at all. It may be that I missed --

THE PRESIDENT: I confess I think it has been made. It's paragraph 21 and following from the submissions that Ms Ford put in, (iii), the timing of the letters. So the point is there.

MR PICCININ: Paragraph 21 of the skeleton?

THE PRESIDENT: Of Ms Ford's skeleton. Paragraphs 21 and following, under the heading, "The timing of the letters".

MR PICCININ: I'm sorry, which sentence says that we deliberately delayed?

THE PRESIDENT: No, I'm simply saying that --

MR PICCININ: I thought the point being made was that we sent these letters during the opt-out period. Whereas they say, in paragraph 26, that what it would have made sense for us to do was to send the letters after the opt out period.

That's not right. That's inconsistent with the purpose that we were trying to achieve. But I don't think I've seen -- again, I apologise if I've missed it -- any allegation that we deliberately delayed. That's a serious allegation to make.

MS FORD: Sir, there is the point, at 24, the Class Representative's submission that timing is highly significant, both in terms of intention behind the letters and the potential effect of the letters. The emphasis has been made in earlier paragraphs that the letters emphasise the urgency of the situation which is obviously a situation of the Defendant's own making.

We say in 25,:

"As to the intention in sending the letters, the Tribunal is invited to infer, not only from their content … but also their timing, that the letters were sent with a view to inducing class members to opt out. It is clearly no coincidence the letters were sent roughly two weeks before the opt out deadline and emphasise the need for urgency."

MR PICCININ: And then they go on in the next paragraph and said had the purpose genuinely been to obtain disclosure, then the timing makes no sense because they should have been made afterwards.

I absolutely accept that it's been squarely put that the purpose of the letters was to induce people to opt out, but I hadn't appreciated that it was put that we had them ready on the stocks and we sat there for months waiting until the very end of the opt-out period. If that's put, it's not true.

THE PRESIDENT: We've already indicated that we consider the point is live, but we do have to tread very carefully in what we read into simply letters, where we see only the letters and nothing more, so you can take it that is something which will be very much in our minds when considering purpose.

MR PICCININ: Yes.

THE PRESIDENT: Which is why, to go back to the discussion we had earlier, there may be some importance in your point that even if the purpose was simply to dissuade by whatever means the class members to opt out, that was absolutely fine, subject to the restrictions which you say do not pertain here.

MR PICCININ: Yes.

THE PRESIDENT: Of bullying and intimidation and misleading.

MR PICCININ: Yes, Sir. I'm just checking whether I have any final points.

THE PRESIDENT: No, of course.

MR PICCININ: Sir, that's all I wanted to say about the letters. They had a clear rationale, it's possible to disagree about whether it was necessary to send them, or whether the same rationale could have been achieved in another way that would have been better, but that's not the legal question that we're answering here. The legal question that we're answering here is: does it necessarily follow from the express rules that can be found in the statutory instrument that we're construing here that these letters were prohibited? That's the question, and we say that the answer to that is a very clear no.

Unless the Tribunal has any questions, those are my submission, and I'm very grateful for the time.

THE PRESIDENT: Thank you very much, we're very grateful to you.

Ms Ford, again, don't feel constrained about time.

Reply submissions by MS FORD

MS FORD: I'm grateful, Sir. Can I start by briefly clearing away some of the preliminary points that were made? There were in particular some disparaging remarks about the suggestion that our initial Application has been abandoned. To

be clear, it hasn't been abandoned. What has happened is that we sought to accommodate points that were raised in response by the Relevant Defendants, and one's not normally criticised for seeking to be constructive in that way.

It's also been suggested that our Application is somehow academic. In my submission these letters show exactly why it is not academic, it is necessary to be clear what can and cannot be done by parties to collective proceedings, and there is very clearly a fundamental difference between the parties as to what is permissible, because the Relevant Defendants continue to maintain that what they have done is entirely permissible. So it is far from academic.

The test that is being advocated by the Relevant Defendants is essentially a test of a free for all, subject to an overriding requirement of fairness. In our submission that test is not consistent with the statutory regime; it's not consistent with the careful process for appointment and scrutiny of the class representative; it's not consistent with the Tribunal's role in scrutinising the content of communications; and it is not consistent with the Tribunal's case management role in seeking to manage these types of proceedings. We say it's simply irreconcilable with the structure of the statutory regime.

There was a point made about the extent of the current position on the solicitor's conduct rules, and we have indicated our understanding of that in our Reply, which is at tab 30, page 151, paragraph 17. This is in response to the points the Defendants raised addressing the extent of the professional rules that related to solicitors. We summarise our understanding of the position as being that until 2019, solicitors were generally expected to refrain from communicating with another party that has retained a lawyer in a matter as a means of ensuring compliance with the mandatory provision of taking unfair advantage of third parties.

Secondly, there remains under the current Code of Conduct an absolute prohibition of taking advantage of clients or others, which will require a solicitor to be careful when writing to a third party to ensure they act fairly and do not mislead or coerce the recipient by virtue of the contents of their letter.

So the underlying rationale, the obligation not to take unfair advantage, remains, and that was obviously what the absolute bar on communication was seeking to achieve.

Of course, nobody sought to suggest that actually there's been a massive sea change in the practice and it's now generally accepted there's no problem at all with communicating with persons who have a lawyer appointed by them, and the reason is presumably because it generally will fall foul of the underlying prohibition on taking advantage or acting unfairly.

THE PRESIDENT: Yes, Ms Ford, what we're talking about here is the difficulty of drafting rules, and what the SRA seem to have done is they seem to have gone for brevity, with a reassuring dose of uncertainty as to what the rule means. Looking at the White Book, I'm reminded about the rule regarding communications with the court, which says in 39.8(1):

"Any communication between a party to proceedings and the court must be disclosed to, and if in writing (whether in paper or electronic format), copied to the other party or parties or their representatives."

Now that's delightfully specific. Unfortunately it goes too far, because you would scarcely expect the applicant for a freezing order or a search and seizure order to copy in the other party when they're going ex parte. So of course you do get the carve-out in (3):

"A party is not required under paragraph (1) to disclose or copy a communication if there is a compelling reason for not doing so …"

So, we have a carve-out which is itself somewhat vague, with a primary rule which is specific. One of the problems that we're clearly going to have is the articulation of what actually the regime means and what it does not mean, and there will be a drafting problem, but that's inherent in all rules. You can draft something vague and woolly and have lots of applications, or you can draft something which is attempting to have these issues raised at the appropriate time so that the individual case can be discussed between the parties, who are sophisticated and well represented, so that a broad direction of travel can be laid down.

MS FORD: Sir, yes. I don't think we disagree with any of that.

There was some reliance placed on foreign authorities. We do say that is of limited assistance when the exercise is to construe our regime, but having said that, we do draw attention to two informative authorities. The first one is authorities bundle tab 13, page 334. This is an excerpt from an American practitioner's text, Newberg and Rubenstein on Class Actions, paragraph 9.9, "Defendant post-certification communications with absent class members." What it tells you, starting from the word "however", is that:

"… the certification decision radically restricts the defendant's opportunities to communicate for a simple reason: following certification, class counsel and absent class members have a formal, if unique, attorney-client relationship. Absent class members are therefore 'represented parties' and ethics rules prohibit opposing counsel from contacting them directly. Defence counsel must therefore communicate with the opposing class members through class counsel after this point. To be sure, the restriction applies only to the subject of the litigation and excludes other non-litigation-related communications."

Mr Piccinin makes the point that in the particular context of the US, this is put in the

form of an ethics rule, but of course the key point is that the outcome is essentially the same, communications are intended to be via the class representative following certification. In our submission it's really immaterial that the actual mechanism by which that's achieved in the US happens to be an ethics rule as opposed to some other means.

The other authority, and this is one that Mr Piccinin did refer to, is the authority behind tab 9 in the bundle. This is the Ontario authority. If the Tribunal turns to page 226, there is a section headed "Postface". This is this judge's recommendation as to how in his opinion communications with class members might be handled in the future in order to avoid what happened before him in this case. He says:

"… I suggest that once a class action has commenced: if the defendant wishes to communicate with class members and the communication is (a) out of the normal course of the defendant's business or affairs; and (b) on a topic that is substantively significant to the class action, then – not as a matter of courtesy – but as a means to avoid problems and objections, the defendant's lawyer should ask class counsel if there are any problems or objections to the notice. Class Counsel should respond with its objections, if any. Class Counsel should appreciate that for unofficial notices from the defendant, the court has a high threshold for exercising its jurisdiction to supervise the communication. (c) If Class Counsel has comments, the defendant should consider Class Counsel's comments and objections seriously."

And it goes on. The Tribunal can cast your eyes over the suggestions that are being made. In essence, this essentially reflects the alternative way we've put it in our draft order, which is that there is at least prior notice to the Class Representative before a communication is made, and that facilitates both the Class Representative and the Tribunal in exercising that scrutiny that the Rules contemplate will take

place.

Sir, you raised the question about how does this work in the case of an opt-in certification, where the class representative might have a different incentive to try and achieve a certain volume of claims. It's of course the case that many of the provisions that we have referred to and which we rely on, concerning the appointment of the class representative, the origin of the notices, the origin of the communications and the scrutiny by the Tribunal remain the same, so in that respect there is no difference.

Insofar as the concern is that in that scenario it's the class representative rather than the defendant who might have incentives which cause them to be for example a bit overoptimistic, then that is equally something that the Tribunal can scrutinise, it's even handed in that respect, but it is worth recalling that the class representative is still in a different position to the defendants in the sense that there is no clear conflict of interest as between them and the class, and they have been selected and authorised on the basis that it's satisfied that they are able to act fairly and adequately.

The Tribunal will be aware that there is some authority from this Tribunal about what's meant by that. It's the *Boyle v Govia Thameslink* authority which we have in the bundle at tab 11, page 271, paragraph 15 subparagraph (3)(ii), which indicates that acting fairly and adequately imports notions of using good judgment and good sense, and that's obviously something which can apply to the class representative in an opt in claim so as to enable their conduct to be scrutinised appropriately as well.

THE PRESIDENT: Clearly you're right, there's a difference between class representative and defendant, the difference is in the name, representative versus defendant, so there's an oppositional interest, and therefore in terms of

communicating for example prospects, or settlement, that sort of thing, there will be both a need for communication and an attachment of privilege, which would not arise in defendant communications. So clearly there's a difference.

What I was getting at was in terms of not communications between representative and class member to do with the prospects of success or the quantum of the action, but what are, let us say, plugs for or against the merits of joining, to what extent would you agree that the same sort of rules about communications ought to apply to both the defendant group and the class representative?

MS FORD: Well, I do say that it is material that the entire regime contemplates the class representative being appointed with a role to communicate with the class and essentially having been scrutinised to be appropriate to conduct that role, and for that reason I do say there's a relevant distinction between them, such that one doesn't strive for absolute even handedness as between the class representative and the defendants.

Where I think it becomes particularly relevant is a process of evidence gathering, which is obviously a point upon which Mr Piccinin made some quite lengthy submissions, because both parties will be seeking to gather evidence in support of their case. Certainly, for our part, we are not suggesting that there is any barrier to engaging in evidence gathering.

Take for example the point that he made about this case, involving a chain of supply with various levels. Nobody's stopping any approaches at any of the supply chains that don't involve the class at all, that's all perfectly fine. Nobody's stopping any approach insofar as you're investigating consumers generally and their conduct, because that's not an approach to a class member as such, that's essentially an investigation of the way in which consumers might conduct themselves.

Where you draw the line -- and this comes back to the point that I made about in what capacity are you communicating to this person -- where you draw the line in my submission is where you're communicating to a particular individual because of their status as a class member, and that's when the Tribunal will be able to exercise its supervision as to the extent to which that's appropriate.

So if it's being suggested that a general survey of consumers is going to be conducted, of course it's possible that a general survey of consumers might include within it somebody who happens to be within the class, but that's not the target, and so that is not a problem. If it's being suggested that disclosure be obtained from the class, or a survey be conducted of the class, because they are class members, that in my submission does fall within the area where the Tribunal should be exercising a greater scrutiny.

THE PRESIDENT: What about something which goes beyond a questionnaire, but say is targeting sampled witness statements from class members? That's something where one would tread quite carefully if one was in ordinary litigation where both sides are represented, but not the case here, it's a different relationship. Is that something which the Tribunal ought to be interested in controlling, whether it's part of the general management of the trial or part of the basis upon which certification is granted, or is it something where one should have, as I suggested to Mr Piccinin, a free for all?

MS FORD: In my submission it does fall within the rule that the Tribunal would wish to have an oversight, because it is a measure which is targeted at class members because that's their status, that is the reason why they're being targeted, and so that is something which the Tribunal ought to be scrutinising and managing. Of course there is then a separate question and the Tribunal would have to be satisfied as to

the utility and relevance of that exercise, and as you raised, that was something that was doubted in the context of the interchange fee proceedings, for good reason.

It might well be that those were some of the thoughts behind the Tribunal in this case saying that they didn't think that targeted disclosure from the large purchasers might be representative, and so they were sceptical as to the utility of that. It does raise questions as to whether or not that really is going to be a productive way forward, but insofar as the Tribunal felt that it was, in my submission that falls clearly within a sphere where the Tribunal should be exercising appropriate case management over it, because it is communicating with those class members in their capacity as such.

I'd like to address the complaint that's been made that my reference to capacity is somehow new. It's made in response to the points which were made in my learned friend's skeleton for the first time, coming up with all sorts of scenarios where it's said, well it might be necessary to communicate with class members on eBay or because they're court staff, or various other scenarios which have been raised. Those were raised for the first time in that context and we received it on Friday, so I am entitled to respond to that.

In many respects, in my submission it's an absolutely obvious line to draw, and it's consistent with the carve-out that we've liaised with the Defendants on and we've agreed to, because we've said yes, if you're liaising with potential witnesses, we're not seeking to stop you doing that, if you're liaising in the course of your business, we're not seeking to stop you doing that. In my submission it is really quite an obvious point, so it's not something that's been new and been sprung only today.

The Tribunal will appreciate that we strongly resist the suggestion that no harm has been done by the letters in issue in these proceedings. It's caused us considerable costs to correct the misunderstandings that were generated by these letters. We

don't know what else might have been sent or said if we hadn't made this Application and sought directions in respect of it.

It's been said, "Oh, well, we copied it to the Class Representative." There is evidence in the bundle about exactly what happened there, because although it says on the documents these were copied to us, in fact they were only received by us some time later. There's certainly a significant delay. It's tab 25, page 102. It's worth checking what the dates were of the relevant letters. You can see from the index they're dated 26 July, and then the latest one is 27 July. Paragraph 5 says:

"On 29 July … SSUK received a hard copy letter … which informed us that Steptoe and Baker Botts had on behalf of the Defendants other than the Fourth Defendant, written to certain entities which may have been large business purchasers during the Cartel Period" and provided the enclosures.

Which were the relevant letters. Then at 7:

"The First Steptoe Letter stated that Steptoe 'had previously attempted to send this letter and attachment to you [SSUK] by post, but the delivery failed and we are therefore providing hard copies'."

We make the point that our offices were manned. There's also a reference to an attempt to send it by email, but it bounced back. The bottom line is that there was a considerable gap between these letters being sent and us actually seeing them.

Sir, there was a final point about the extent to which this Tribunal can give declaratory relief. This is a point we've raised in our Reply, tab 30, page 160, paragraph 35. We've invited the Tribunal to give declaratory relief indicating that the letters ought not to have been sent in the terms that they were. For the first time today, we've heard the suggestion that there is no jurisdiction to do that. It's of course the case that in terms of the substantive claim, a substantive claim under

collective proceedings, one can't seek declaratory relief, but the Tribunal does have in a procedural context a very broad power under Rule 53, this is tab 17 of the authorities bundle, page 353, under the heading, "Case management directions":

"The Tribunal may at any time, on the request of a party or of its own initiative at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) or such other directions as it thinks fit to secure that proceedings are dealt with justly and at proportionate cost."

In our submission, that is perfectly wide enough to include a direction that the Relevant Defendants should not send communications in the form and in the terms and of the nature that they have done. It may be that the use of the words "declaratory relief" has caused some confusion because that's normally substantive relief rather than a procedural direction, but in my submission it's perfectly open to this Tribunal to indicate, should it wish to do so, that shouldn't have been done.

THE PRESIDENT: I don't think it's a declaration, Ms Ford, is the short answer. I think if you look at Zamir & Woolf, they have a very particular understanding of what a declaration is, which is for instance what a contract means or whether there has been an infringement of a contract provision, and that jurisdiction we do not have.

On the other hand, we won't be making a declaration, we'll be saying that something is or is not consistent with the rules as we find them to be, and it seems to me, speaking entirely for myself, that the real substance of what we're talking about is, is this an unclear case which we are making clear, in which case we will make it clear, but it may have an effect on a costs order we make, or is this a case where there has been a very clear breach of something, which we are as it were making clear should not have happened, and it is not debatable it should have happened, in which case it will not be a question of declaration, it will be a question of costs consequences of

this matter having to be raised with the Tribunal in this way. That's something we can't obviously reach a view on today, but I think that's how it probably sounds.

MS FORD: That's fully understood. The Tribunal will obviously be well aware that our submission is that this is very much in the second category, that this should not have happened.

THE PRESIDENT: That's why your Application is for indemnity costs, yes, I have that.

MS FORD: Unless I can assist further, Sir, those are my reply submissions.

THE PRESIDENT: That's very helpful. Both of you have mentioned the mismatch between the parties in relation to which letters were written and the parties in relation to which the argument was that they should be subject to an opt in rather than opt out regime. It would be helpful just to have a list of parties to whom letters were sent and a list to whom letters could have been sent on the basis of that opt in/opt out distinction. I'm sure we can piece it together, but it would be helpful.

MR PICCININ: There's an impossibility.

THE PRESIDENT: Why is that?

MR PICCININ: Because we don't know who purchased vehicles during the period 2006 to 2015. That's one of the points I've been making to you, Sir, that we don't know who's in the class and who's not. We've never known who the large business purchasers were, other than what we've been able to piece together with the investigations that took a lengthy period that led to the sending of these letters. We've been able to deduce that these people fall into that category, but we don't have a list of every person who is a large business purchaser.

THE PRESIDENT: So is your position that you've written to everyone that you can identify?

MR PICCININ: No, not that either, Sir.

THE PRESIDENT: There is an element of selection which I would like to get a handle on.

MR PICCININ: Yes. Would you like an account of how we chose these people?

THE PRESIDENT: I certainly don't want to augment the witness evidence, but there was obviously a debate about opt out versus opt in, you were accepting, not arguing against, an opt out order in respect of a class, and you were contending for an opt in process in respect of another class.

MR PICCININ: Yes.

THE PRESIDENT: And what I'm trying to get a feel for is whether the persons that you've written to in relation to that second class are all of those people that you understood to be in that class, or a selection of those people that you understood to be in that class.

MR PICCININ: I think I understand.

THE PRESIDENT: I think what you're saying is it's a selection, but you didn't know the identity of any of the other people to write to, you wrote to the ones you knew.

MR PICCININ: I've understood the question now. Perhaps the best thing is for us to come back in writing.

THE PRESIDENT: I don't want anyone to spend too much time on this, it's a minor point. If you're going to be churning away into the small hours to produce the answer then please don't to it.

MR PICCININ: We'll provide a short explanation.

THE PRESIDENT: That would be helpful.

MR PICCININ: I'm grateful.

MS FORD: Sir, insofar as we're able to assist at this stage, there was data which

was placed before the Tribunal by the Defendants deriving from Fleet News, and that enabled them to identify a top 20 of large business purchasers. Our understanding is that the recipients of the letters were not the top 20 on the list, that doesn't seem to have been the way in which it was done.

THE PRESIDENT: Okay. It may be rather less certain that one would like, which makes the division between opt in and opt out being rejected slightly more understandable, since you don't know.

MS FORD: Sir, if anything, I think the discrepancy between the top 20 as identified for the purposes of that and the fact that there was then a degree of selection does rather suggest that something else was going on, in my submission.

THE PRESIDENT: Yes. Well do what you can in relation to my request, but don't spend too much time on it.

MS FORD: I'm grateful.

THE PRESIDENT: Thank you all very much. We will reserve our judgment, unsurprisingly, given the time and the very helpful submissions we have had today. We have discussed on a number of occasions in the course of this afternoon what we would like not to happen regarding communications. I want to be absolutely clear, Mr Piccinin, investigations absolutely fine, but I would rather that there were no communications as between the Defendants and the members of the class so identified until we have clarified the position in a ruling.

MR PICCININ: We've already said --

THE PRESIDENT: No, indeed, you made the point that you might be inhibited in what was being done in relation to other matters that you were working on in connection with this case. I'm raising this because I want to make clear I don't want that inhibition to exist, but purely because we haven't been able, as I at one time

hoped, unfortunately we couldn't start until 2 o'clock, to make things clear today, we can't, and I don't want the position arguably to be made worse while we're making up our minds, that's all I'm saying.

MR PICCININ: Yes, I understand.

THE PRESIDENT: I'm grateful.

Thank you all very much. I'm sorry we've kept you so late, but we are very much obliged to you all for your help. Thank you very much.

(5.45 pm)

(The hearing concluded)