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IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1339/7/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 31st October 2023

Before:

Bridget Lucas KC
(Chair)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Mark McLaren Class Representative Limited

Class Representative

v

MOL (Europe Africa) Limited and Others

Defendants

A P P E A R AN C E S

Nicolas Gibson (On behalf of the Class Representative)

Daniel Piccinin KC (On behalf of the First to Third, Fifth and Sixth to Eleventh Defendants)

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Tuesday, 31 October 2023

(10.30 am)

MS LUCAS: Thank you. I'm afraid I do have to do the normal warning, which I'm sure some of you are now repeating in your sleep but as this is live streamed. Some of you are joining us live stream on the website, so I must start, therefore, with the customary warning. An official recording is being made and an authorised, not unauthorised, transcript will be produced but it is strictly prohibited for anybody else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court. Thank you.

Now, before you said anything, I was going to stay a few words. I want to thank the parties for attending. This is a hearing that was convened at my request. The purpose of the hearing is to consider the basis upon which communications should take place with third parties who are also class members.

Your skeletons were very helpful and thank you very much. If I can run through my understanding of where we currently are and how we got here, the present position is currently the subject of the McLaren communications ruling and my understanding is there's a pending judicial review in a few weeks about that.

Now, both parties, in their skeletons, have identified from that ruling that it's the Class Representative and the Defendants who are the parties and the class members aren't and the principle that was set out in that ruling, that the communications should be between the parties and not generally with the class members, unless the Tribunal and the parties otherwise agree. So the Tribunal are maintaining their supervisory jurisdiction.

The ruling identifies various purposes behind the rule.

If communications are directed at the class members, it's likely to result in costs being incurred by them which may, in the end, prove to be to no purpose and that would be

to the disbenefit of the regime as a whole. And the ruling also records that in general, there's no restriction in contacting non-parties to litigation, but this is a statutory regime, setting out procedures for collective proceedings and the general requirement should be that communication is with the Class Representative.

Then we got to the order of 20 December 2022, where there was a general prohibition on contacting class members, other than in the ordinary course of business. Then we get to the order of 6 April which provides the wording we're dealing with today and that is that the Defendants have permission to communicate with class members for the purposes of obtaining evidence or information relating to factual or expert issues, without being required to obtain permission from the Tribunal or notify the Class Representative but subject to a proviso, which is why we are here, which is that communications adverting to the possibility of a formal application being made, require the prior permission of the Tribunal.

So Mr Piccinin, your client's proposed letter falls into the latter category because there is a reference to a third party disclosure application being made.

MR PICCININ: Yes.

MS LUCAS: So the Class Representative doesn't have an issue with the letter being sent in principle, as I understand it.

MR GIBSON: That's correct, Madam.

MS LUCAS: And it's subject to certain proposed amendments and this is where the issue arose which caused this hearing to be called.

Your clients object to some of the proposed amendments and those objections highlighted some rather fundamental issues and in particular, on your client's approach, the Class Representative would be shut out from one half of the communications, potentially, with people that the Class Representative actually represents and so we've got the supervisory jurisdiction, which I'm here to exercise.

Now, the parties' disagreement as to whether or not the Class Representative should see the responses actually underpins the first issue that was raised in the correspondence, which was whether or not in fact, if the request is for data information, the Class Representative should be channelling those requests. And relatedly to that issue about whether the Class Representative should see the replies, that prompted, having read your skeletons, the query that was sent in correspondence yesterday about wanting some further explanation as to the basis upon which it's alleged that those representatives were subject to privilege.

Then the second group of questions that we raised, the second and third in the Tribunal's first letter, relate, effectively, to the potential burden on the third parties of complying with the requests. So that's why we asked whether the experts had previously liaised on the point and whether it's possible to refine the request further. So that's the background to the request we've made.

It's a rather long introduction, but I thought it might assist the parties to understand why we got here and I wonder if the best way to start is to deal with the first broad issue which encompasses the first question about whether the Class Representative should be channelling the communication --

MR PICCININ: Yes.

MS LUCAS: -- and the privilege question. And logically, Mr Piccinin, it should be you who starts and then we'll deal with the more practical issues as to whether the requests are broad and whether they can be refined further, as a separate point.

MR PICCININ: Yes. Madam, may I say that's been very helpful and that might help me speed along in some of my submissions. That was roughly the order I was going to deal with the points in, in any event.

MS LUCAS: Yes.

MR PICCININ: But it may be that it's helpful for me to make all of my submissions and

then for Mr Gibson to respond to them, but we can see how we go.

MS LUCAS: Yes.

Submissions by MR PICCININ

MR PICCININ: If I may just start by applying -- I'm sure this is obvious -- that firstly, I appear here today only for the first to third and the fifth to the 11th Defendants and not for any of the other Defendants who are not represented. Mr Gibson, of course, acts for the Class Representative.

I should clarify that all of my submissions today are made without prejudice to the judicial review that you mentioned.

MS LUCAS: Yes.

MR PICCININ: And so therefore I will be proceeding on the basis that the Tribunal's decision on the class communications issue was rightly made and also that the Tribunal's order of 6 April, to which you've also referred, was rightly made and is in the force. So if I might, I will start by giving you our case in a nutshell and the key point I'm going to be developing specifically in relation to the first issue, but it has implications for the others as well, is that we say that the Tribunal's function on an application of this kind, made under the 6 April order, is primarily to consider whether the way in which the proposed communication adverts to the possibility of an order being made would give rise to some kind of problem, most obviously unfairness, that the Tribunal needs to intervene to prevent. So in other words, it's not the Tribunal's function at this stage to adjudicate on competing drafts of the correspondence generally or to consider whether in some general sense, the scope of the request for voluntary disclosure should be altered or be better in some general sense, for it to be altered.

At this stage there's no application before the Tribunal for disclosure and so none of

the evidential materials that would usually accompany such an application, explaining why it's made and why it's needed and meets the test for disclosure, are before the Tribunal. The Tribunal's role, as I understand it, is to protect on a pre-emptive basis, that's what the order enables you to do, against the risk that a reference to the compulsory powers of the Tribunal would then give rise to some unfairness vis a vis the recipients, who are class members. Once that is understood, we say the answers to all the Tribunal's questions become clear. We should have permission to send the letters in the form that we have drafted them and then breaking that down by reference to your three very helpful questions. On the first question we say no, it is not appropriate for the Class Representative to send the letters instead of us, we should have the chance to engage in the evidence gathering correspondence ourselves, as the order enables us to do, that's what we want to do. The second question, no, there has been no joint discussion about the scope of the requests between the parties or their experts. In this particular case, there has been, I should stress, and I'll come back to this, there has been discussion between the parties' experts on other elements of the case, but on this particular one, it's largely because, as we already know, the Class Representative has no interest in gathering evidence of this kind and I believe that's Mr Gibson's position here today. So we anticipated that correctly.

MS LUCAS: Yes.

MR PICCININ: And then in relation to the third question, no, we do not see any scope for narrowing the request for voluntary disclosure at this stage and the specific proposal. The only specific proposal that has been made by the Class Representative, which is to strip out the excluded brands from the request, we say is inappropriate and unhelpful, once you understand how this all fits in.

So that's my position. In terms of the road map of my submissions, as I say, I was going to address the issues in the order in which you have just raised them. I would

like to start by looking at the order of 6 April. I don't think I need to go back to the class ruling, in light of what you've already said, the class communications ruling, and I'll explain what we say the effect of this order is in relation to our application today and at that point I will also address, by reference to our letter, what the position is in relation to privilege.

MS LUCAS: Hm-mm.

MR PICCININ: Then I'll address the question of co-operation between the parties, then I'll address the question of whether we could make the request more specifically and then finally, if I may, I will deal with the Class Representative's editorial suggestions.

MS LUCAS: Yes.

MR PICCININ: So the order of 6 April is in the bundles at tab 13 and if we can pick it up from page 254. And I should say that that order actually followed two CMCs, which I'm sure you'll recall, one just in our case, but the other one also involved the Volkswagen proceedings. And I'll like to start with paragraphs 1 and 2 which set out the approach to trial preparations that the Tribunal directed in this case and, in essence, what paragraph 1 does is it says that "each party is to file and serve their complete positive cases simultaneously." And "complete positive case" means their factual witness statements, the documents relied on, the expert reports and a wrapper for it all that explains our positions. And then a few months later, again, each party simultaneously sets out the negative cases.

One consequence of that -- this is not a criticism, it is just a consequence -- is that during this part of the process, where we are now, before the positive cases have been served, we know less about each other's approaches and the factual landscape than parties usually do when they get to the stage, certainly, of submitting expert reports. And just for example, each party's positive case and all of their expert reports are going

to have to be produced without having seen the factual evidence that's produced and relied on by the other side. So it's a slightly unusual situation, where experts will be giving their opinions on only an incomplete factual picture. There will be some material in common, essentially anything that's been given by way of disclosure, but there's been no order for standard disclosure and so any other material that each side is gathering or producing in the form of witness statements or industry expert statements, those will not be seen by the other side's experts, including their economic experts, at the times when they state their opinion on each party's primary cases.

The logic of that approach was explained in the Tribunal's ruling following those two CMCs, which is at tab 12 in the bundle and the key paragraph is on page 243. It's paragraph 11 in which the Tribunal said that at the CMC in February:

"The Tribunal directed a process whereby methodologies and cases would be articulated by the parties in parallel and not, as is usually the case, in sequence."

That course was adopted because the Tribunal concluded that the parties were not, in truth, advancing or intending to advance responsive cases at all, but were, at one and the same time, pressing their own case, whilst independently critiquing any opposing inconsistent case. Accordingly, the Tribunal articulated the broad directions that we've just seen in the order.

So the memorable phrase that the President used at that hearing was a "ships passing in the night" process --

MS LUCAS: Yes.

MR GIBSON: -- which I'm sure you'll remember, and I don't know whether that was intended as a pun, but the idea seems to us to have been that because the various positive cases that have already been set out in the pleadings to some extent, "pass in the night", they will be produced separately in this way, so they will indeed pass. And it's only once they've passed that you'll have engagement in the form of torpedoes

being fired at the passing ships. With that background, if we could return to the order and to paragraph 5 of the order, which is on page 255, and, as you said --

MS LUCAS: I'm just wondering, can we look at the provisions of paragraph 11 at page 243, going on to the subparagraphs. Just have a look at that.

MR PICCININ: Yes, of course.

MS LUCAS: And in particular, just looking at this, the disclosure process that was envisaged at subparagraph 2, "Permission to seek disclosure from any other party --"

MR PICCININ: Yes.

MS LUCAS: -- "and likely to be expert led." Yes.

MR PICCININ: Yes, that's right. And there has been some disclosure between the parties. So in particular, there's been disclosure of data on the shipping transactions and there's also been some disclosure of brochures showing delivery charges and that sort of thing.

MS LUCAS: Okay. Right.

MR PICCININ: So that has taken place. But just returning to the order and tab 13, page 255, paragraph 5, as you said in your opening remarks, this comes in two parts. The first sentence says that we:

" ... shall have permission to communicate with class members for the purpose of seeking to obtain evidence or information in relation to the factual and/or expert issues, without being required to obtain permission or notify the Class Representative."

And the second sentence then has the proviso that we're here before you today because of, which is, if we advert to the possibility of any formal application being made or an order being sought, then in order to do that, we shall require permission from the Tribunal.

So I should say that paragraph, that order that the Tribunal's made, was itself an exercise of the supervisory jurisdiction that you referred to in your opening remarks

as having been explained in the class communications ruling. So you're drawing a dividing line between communications that we can do, without even notifying the Class Representative before or after, and communications that we actually need to notify them and that, indeed, notifying them is not enough, we actually have to come before you and obtain your permission.

MS LUCAS: Now, just pausing there, I mean, if I had concerns about the amount that class members were being asked to do, for example, then are you suggesting I couldn't revise the first half of that order?

MR PICCININ: Sorry --

MS LUCAS: The first half of the paragraph?

MR PICCININ: Of the order?

MS LUCAS: Of the paragraph here, paragraph 5. Are you suggesting that if I'm unhappy about the amount class members are being asked to do on a voluntary basis, that I can't revisit that part of the order?

MR PICCININ: I suppose there are two answers to that. One is, insofar as you are talking about the order, of course the Tribunal can make a further order if it sees fit to do so, but it's not my submission that -- even under this order, it's not my submission that there is some kind of jurisdictional bar that prevents you from commenting on any part of the letter. So I would like to make clear what I say my submission is and why it follows from this order. I don't think there's any need to alter the order in order to do whatever it is you want to do. I do want to explain what the effect of it is, of the order that has been made and is the one we're working under today.

So the first point is that we are free to write to class members to ask for evidence or for information and, as I've said, we don't need to inform or copy the Class Representative or the Tribunal about that, unless we advert to the possibility of an order being made, in which case we need prior permission. And then it seems to

be implicit in that, that at least it's envisaged that if we get the prior permission of the Tribunal, then we can send the letter ourselves. That's what seems to be envisaged here, subject of course, to your supervisory jurisdiction and your ability to say: "no, we can't send the letter", there's nothing here that suggests that a letter of this kind should come from the Class Representative instead of from us.

MS LUCAS: Yes.

MR PICCININ: But we say that the framing of this order has some important implications for the scope of the Tribunal's role, when we send the letters that do advert to the possibility of an order being made. And I would like to illustrate that by reference to the letter that we actually want to send to make it concrete. And so that is at tab 29.1 of the bundle, which is at page 689 and at the moment, I don't want to go through all of it, but if you could just skim with me over the page. The point I want to make is that we could actually have sent the entirety of this letter, other than paragraph 18, without seeking permission from the Tribunal and without notifying or copying the Class Representative. So we haven't done that, but that is something that we could have done. It's only paragraph 18 that triggers the obligation to seek permission and if I can just labour that point slightly. We could have taken some different approaches to this correspondence. One thing that we could have done is we could have sent the whole letter without paragraph 18 and then only in the event of an adverse response or no response, we could at that stage have sought permission from you to follow up with a short letter, saying that: "by the way, if you don't engage with us, we're going to seek an application for disclosure from the Tribunal", and that follow up letter then would have required your permission in order to send it. Alternatively, we could have skipped that phase entirely. So we could have not adverted to the possibility of making an disclosure order at all. We could have just asked on a voluntarily basis and again, in the event of an unsatisfactory response, we could have proceeded straight to

making an application, which again would have required your permission to serve the application. But we could have skipped that stage of adverting to the possibility.

The reason that I'm somewhat labouring that point is that my submission is that the Tribunal ought to focus its enquiry on the aspects of the letter that triggered the need for permission in the first place and there are two reasons for that submission. The first is one of principle, which is that the purpose of the requirement for permission seems to be, to us, to prevent us from sending letters that cause some sort of problem -- if I can just use that term generally, to encompass all the potential problems it could cause -- by adverting to the possibility of an order being made. Presumably, what the Tribunal was worried about -- I should say by way of context that, going back to that paragraph 5, the first sentence was actually agreed between the parties when they sent it to the Tribunal and there was no second sentence in the draft that we sent to the Tribunal. But the Tribunal added it and didn't give a ruling on why and so I'm trying to guess -- not guess, I'm trying to analyse what those reasons might have been for drawing that distinction.

It seems fairly clear to me that the purpose for the distinction is to address the concern that the way in which we refer to the possibility of an order being made or the likelihood of an order being made, might have a coercive or misleading effect on class members that would bully them into providing the material voluntarily, because they're worried about having a contested hearing at which they're going to incur costs and lose and get an even worse outcome. So that, in my submission, is the kind of thing that this distinction is aimed at. And so, if that's right, if that's what the purpose of drawing that distinction was, then we say as a matter of principle, that should inform the nature of the Tribunal's inquiry.

The second point is one of practicality. It's not generally a good use of either public or private resources to get involved in wordsmithing parts of correspondence that could

have been sent without permission. And I would add to that, even if the Tribunal were minded to make a different order now that prohibits an even wider class of communications -- you know, some of the communications that have been permitted under paragraph 5 would be prohibited going forward -- in my submission, that would not be -- it's something you could do, it's not something you should do, because what it will lead to is hearings that cost large amounts of money, to debate lots of pieces of correspondence. I mean, we don't have cost schedules today but I don't think I can think of a time when I've attended in this Tribunal in which less than £100,000 has been incurred in aggregate for a hearing. So that's a lot of money to spend on every piece of correspondence.

MS LUCAS: Yes.

MR PICCININ: But taking paragraph 5 as it's currently written, the order as it stands, really, as I've said, there are three possibilities, if you take this approach that is urged upon you by the Class Representative of just reviewing the whole letter generally and wordsmithing it. One is that you'll end up with hearings like this one every time we send a letter like this, including -- I don't know whether you would envisage it would include, but it might do -- responses to these letters and then we reply to those and, what, we need a hearing again, three, four, five times?

The other is that you end up creating incentives for us to split the correspondence in the way that I outlined earlier or to skip the adverting to the possibility of an order stage and go straight from voluntary requests to a full blown application and neither of those is desirable, we say. All of those implications lead to inefficiency and we say it is actually in the interests of all parties, and not just the parties but also the recipients of these letters, that the recipients understand properly where this process could lead, because that's likely to -- not to coerce anyone to do anything, but it is likely to lead to them engaging more constructively.

So that is why we say that the Tribunal and, it follows from that, also the Class Representative, in their submissions, should focus on that question.

Now, as I've said, this is not my submission that there is some sort of jurisdictional bar that you can comment on paragraph 18 and no other paragraph of the letter.

MS LUCAS: Yes.

MR PICCININ: Obviously, you need to read the whole letter in order to understand the context. But the question, we say, is whether what we have said about the possibility of a formal application order being made, gives rise to some reason for the Tribunal to intervene. That's my submission.

MS LUCAS: Yes.

MR PICCININ: And so, to be clear, we have obviously no objection to the Class Representative making submissions on this application, as with any application, and that includes, in principle, commenting on the contents of the letter. But what we do object to is the Class Representative using this permission process as a general opportunity to make drafting edits to our letter that is a part of our exercise of our rights of defence, gathering evidence for our positive case or negative case.

I want to emphasise at this point that this is actually a very important part of the case. My learned friend, in his submissions, written submissions, refers to these LFOs as being a very narrow segment of the class.

MS LUCAS: Yes.

MR PICCININ: But it's also a very important segment. I've referred in my written submissions to the evidence of Dr Tosini, I don't know if you saw that, which shows that using a threshold of, say, 20,000 registrations, which is a lot, over the claim period, you would have just 45 firms meeting that threshold -- that's my learned friend's point, it's very narrow -- and yet they would account for 40 per cent of the size of the claim by value.

MS LUCAS: Yes.

MR PICCININ: So almost half the claim. The Class Representative's own evidence -- that's why it's important -- but why is it important for us to gather specific evidence on it? Well, the Class Representative's own evidence is that these very large organisations, or very large purchasers of vehicles, purchase vehicles quite differently from the way in which the Class Representative says that everyone else does.

If we could just look at that very briefly. In tab 36, this is the expert report of Messrs Goss and Whitehorn, if we look at page 1363 of the bundle --

MS LUCAS: Yes.

MR PICCININ: Yes. The top paragraph, 3.34:

"In circumstances where a business is purchasing an extremely large number of vehicles ..."

And if we just pause there and look at the footnote.

MR GIBSON: Sorry, I missed the reference.

MR PICCININ: It's page 1363 and it's paragraph 3.34.

MR GIBSON: Thank you.

MR PICCININ: You see the footnote, what Messrs Goss and Whitehorn have in mind by an extremely large number of vehicles, it's in excess of a thousand -- and bearing in mind the threshold I was talking about was 20,000 over the claim period:

" ... the customer may seek to negotiate on the basis of a single, all inclusive price."

And he says:

"The OEM would consider the total cost per unit of those vehicles which would include [but not separately] the delivery costs."

MS LUCAS: Yes.

MR PICCININ: Now, we find it very hard to understand how the Class Representative's theory of loss in this case, in which damage does not reside in the

overall price at all, it resides in a notional delivery charge, we find it hard to understand how that works at all in a situation where there's a negotiation of a single overall price. But we're not here today to have that argument. But we do say today, because of these differences, and also because of the size of this part of the class, it is very important that we have an opportunity to gather evidence and investigate it properly, with a view to preparing our case on this issue.

MS LUCAS: Yes.

MR PICCININ: Now, while we've been looking at the letter, unless you have any questions about that, I think now is a convenient moment for me to address your question about privilege and specifically, I think your question was whether the responses we received to this letter would be privileged and my short answer to that question is that it depends. But given the way that we've drafted the letter and the process that we're going through now, it seems quite unlikely that it will be privileged. But I do want to give you the longer version and if I may, I'll just hand up a short excerpt from Hollander on Documentary Evidence, which I've shared with my learned friend this morning and -- **(Handed).**

MS LUCAS: Thank you.

MR PICCININ: So just looking at the first half of the page, the learned author says that:

"The second category of legal professional privilege is wider than the first but arises only when litigation is in prospect or pending. From that moment on, any communications between the client and his solicitor or agent or between one of them and a third party, will be privileged if they come into existence for the sole or dominant purpose of either giving or getting legal advice with regard to the litigation or collecting evidence for use in the litigation.

"This is the basis for claiming privilege for a correspondence with witnesses of facts

or experts and proofs, reports or documents generated by them. The principle is that a party or potential party should be free to seek evidence without being obliged to disclose the result of his researches to the other side."

And then there's a quote from Lord Carswell in Three Rivers as well.

I should also highlight what Lord Justice James said in Anderson:

"As you may have no right to see your adversary's brief, you have no right to see that which comes into existence merely as materials for the brief."

But also just draw attention over the page to paragraph 1803, which concerns confidentiality.

MS LUCAS: Yes.

MR PICCININ: Mr Hollander says:

"It is always stated that confidentiality is one of the prerequisites for privilege and this requirement does not normally cause difficulty. However, as with legal advice privilege, the requirement of confidentiality may, in relation to the litigation privilege, on occasion involve something slightly different from the way the term is used in the law of confidence. Where a witness discusses evidence with a lawyer, the witness will usually be free to repeat the information to others and the witness will not be under an obligation of confidence. The test focuses on whether the information is confidential in the hands of the lawyer. Thus it has been suggested that in the context, confidentiality refers to the circumstances of retention rather than creation."

So just to give you what I take from that, if we did not have this whole regime, this whole class communications regime, and if we were free to write in whatever terms we pleased, subject to the usual professional and other duties, we could have written these letters without notifying or even copying the Class Representative.

MS LUCAS: Yes.

MR PICCININ: If the class member had then chosen to respond to us privately,

providing us with information for us to use in the litigation, then that would be privileged. For example, if we took a proof of evidence from them or they drafted a narrative statement explaining their purchasing practices and they gave that only to us, that would be privileged. But to be clear, I would not say the class member would inevitably respond in a way that attracted privilege. Obviously, they would be under no obligation to respond to us in that way. If they wanted to, they could ignore us and write to the Class Representative instead or they could write to us both jointly and in either of those cases, there would obviously be nothing in our hands that is privileged vis-a-vis the Class Representative, because the Class Representative already has it. It's also equally and obviously true that the mere fact that what we receive is privileged in our hands, does not prevent the class member from providing the same information to the Class Representative separately or at a later stage. There's no property in a witness.

All it means is that if the class member chooses not to provide the information to the Class Representative, then my clients are not under any obligation to provide it to the Class Representative ourselves, until we deploy it in a litigation.

MS LUCAS: Yes.

MR PICCININ: So in principle, a party who gathers evidence that they don't like does not have to deploy it in the litigation if they don't want to, and that's not just the principle that applies to my side, it applies equally to Mr Gibson's clients.

I should also clarify, just for the avoidance of doubt, that if the class member provides us with pre-existing documents that are not privileged, then obviously those documents don't become privileged just because they've been provided to us in this context.

So that is how it would work in the absence of this regime that the Tribunal has created. For example, that's also how it could have worked if we had not adverted to the

possibility of an order being sought or granted.

MS LUCAS: Is that strictly right in relation to the documents that are provided to you by a third party?

MR PICCININ: As I said, if they're pre-existing documents, then they're not privileged.

MS LUCAS: To bring it back to this example, if it's data and prices that have been paid in the past that had been maintained by them on a database --

MR PICCININ: That's what I was saying so if they provide to us pre-existing documents, those documents won't be privileged, but if, instead of doing that, they wrote back and said: "That's going to be difficult, you know, it's hard to get all the documents but what I can give you is an explanation of how I go about negotiating and what reference is made to delivery charges and all of that, you know, would you find that useful?" and we respond to that saying, "Yes, please", then all of that would be subject to litigation privilege in the ordinary course.

MS LUCAS: Yes.

MR PICCININ: But because we have to apply to the Tribunal for permission to send this letter, we have somewhat given the game away. We've had to. So we've had to tell you and we've had to tell the Class Representative to whom we are writing and what information we're seeking from them.

We've even drafted the letter on the basis that it should be copied to the Class Representative so that they can see that we're writing in accordance with the terms of the permission that you have given ex hypothesi.

MS LUCAS: Yes.

MR PICCININ: And so taking that approach reduces, in practice, the likelihood that we're going to receive a privileged response. It seems more likely that anyone who responds will copy the Class Representative and in those circumstances, the letter obviously won't be privileged. That's just the consequence of the regime that the

Tribunal has put in place, which we're not here to argue about.

That's a question for a different forum on a different day.

So those are my submissions on privilege.

If I can move now to co-operation.

MS LUCAS: Yes. So can we just deal with one point relating to that. Are you still maintaining your objection to anything being included in the letter that says replies should be copied to the Class Representative?

MR PICCININ: Yes, we say there's no need to put that in, because if the recipient wants to -- it's unlikely, I don't think in this particular case it's a very big deal -- but if the respondent wants to write that just to us, particularly in circumstances where we have copied the Class Representative and they have their details, I don't see why my clients should be forced to positively invite the Class Representative or instruct them to copy the Class Representative. I don't see how that fits into the jurisdiction that the Tribunal is exercising. I wouldn't have had to do that if I was just seeking information voluntarily. The Class Representative doesn't have to do that when the Class Representative goes out and seeks information.

MS LUCAS: But isn't the difference that you're under a statutory regime, where the Class Representative is representing the class members?

MR PICCININ: Well, they are representing the class members in a sense, in the sense that they're prosecuting their claims, the cause of action that belongs to the third parties. But they're not representing in the sense that, say, a solicitor represents a client. You know, there's no relationship of retainer between them or even consent between them.

MS LUCAS: So the difficulty I have, and I tried to articulate it at the beginning, it's the idea that you have a class representative representing class members. The defendants write to the class members, not making it clear that any reply could or

should be sent to the class representative, and so you've ended up with the defendants having information that the class representative doesn't have, even though the class representative has been appointed by this Tribunal to represent those members.

MR PICCININ: Yes, Madam. I think it's important though to think about the broader context. If you're contemplating a rule of general application, that any time a defendant communicates with a class member, that they need to copy the class representative, that has, potentially, very wide implications. In this case, where there are millions of class members, but also in other cases, where there are tens of millions of class members whose claims may be of little or no interest to them individually and to say that -- for example, someone we call as a witness in this case or someone that another defendant calls as a witness in another case, is not excluded from the class. And so what you would be saying is that you would have to take their proofs -- I mean, I don't know whether this is what you're saying, but it sounds like you're saying that the fact that you've contacted them and anything you receive from them, even your own drafts of their evidence in interview, would have to be shared with the other side. I mean, that's a remarkable --

MS LUCAS: Well, no, I mean, I think specific to what's happening here, I understand your point about points of principle and this case is, actually, to some extent, unusual in one sense because your Defendants are shippers and not involved in the car industry. So the factual scenario we're looking at this in is slightly different, and what I'm focused on and what you're seeking in this --

MR PICCININ: In this letter, yes.

MS LUCAS: And that is data and information about prices of cars. So I could see there could be scope for saying: "Well, there are certain communications and there is evidence that a class member may want to give us which we wouldn't want the Class Representative to see" but the information you're seeking here seems to be of a

different -- a particular type, if I can put it that way.

MR PICCININ: Of course, I understand it. Could I just have one moment, just to take instructions --

MS LUCAS: Yes.

MR PICCININ: It may be now is a good time for a shorthand break.

MS LUCAS: Yes, I'm happy to do that. Shall I rise for five minutes? I'll come in at 20 past.

MR PICCININ: I'm very grateful.

(11.12 am)

(A short break)

(11.28 am)

MS LUCAS: Thank you.

MR PICCININ: Yes. So the point we were just discussing was whether we have any objection in this specific case to the letter containing an additional sentence at the end or somewhere that says: please copy the Class Representative on any response. I think that was it, wasn't it?

MS LUCAS: Yes.

MR PICCININ: Yes, and I've got four responses to that.

MS LUCAS: Yes.

MR PICCININ: The first one is that we say that that's wrong in principle, for the reasons that I've given already. The second is that it's unnecessary, particularly in circumstances where we're already copying the Class Representative. And I said before that there's nothing to stop the Class Representative from communicating with anybody. Indeed, they can do it privately. Indeed, they could write to these same class members and say: please send your responses to us and not to the Defendant, if they wanted to do that, or they could say: please send your responses to both of us.

So we do say it's unnecessary that we positively be required to give the instruction that class members ought to do that.

But I don't want to waste too much time on this. You may have got the wrong impression, the wrong end of the stick from our submissions. That's not really the reason we're here, that one line. As I've already said, we've already been required by the regime, effectively, to give the game away. So if it's important to you that there be an additional sentence there, in this specific letter, then obviously that's a thing we can do and will do. But I should say, as I understand your question, it relates only to this specific letter and not to any follow-up correspondence, which might be different, for example, if someone responds and says they're happy to talk to us or to provide a witness statement or some kind of narrative. I don't understand you to be asking me about how we would deal with that.

MS LUCAS: It does rather raise an interesting question, doesn't it, and I think there's a distinction. You have written, and you say by virtue of our order and wrong in principle, but you have written and given the game away, you know what you're asking for.

MR PICCININ: Yes.

MS LUCAS: If the reply comes in, it seems to me that the status of that reply probably sits with the status of the letter that was written in the first place. If they wrote back to you and said -- and please push back on this if you don't accept it -- "Actually, that's an enormous task you've asked for. We don't have records for this period, we only have records for these two years, it's 20 million records, and we're sure there's something we can do but we're not going to do it all for you", I think you might say, your response to that really then drifts into the litigation privilege because you would be disclosing specifically what exactly you're after.

MR PICCININ: Yes.

MS LUCAS: But that's another step down the line.

MR PICCININ: Yes, and in that letter we may not be adverting to the possibility of a new order being made. So my submission would be that it doesn't fall within the second sentence and we wouldn't be required to do anything special, it would be governed by the second sentence of paragraph 5.

MS LUCAS: Yes, I see.

MR PICCININ: And certainly if we then took a statement from them. I keep saying that, it's not at all fanciful. It's something that happens in the cartel damages claims, is that sometimes, instead of or as well as providing some disclosure, you have narrative statements explaining the way things are done. Whether it's appropriate or not in a particular case depends. But that is a way in which evidence on these sorts of topics can be gathered. I don't know whether the Class Representative is presently engaged in that, but, if they are, they're not sharing it with us. So we do say that the order that the Tribunal has already made enables us to go out and do that and I think --

MS LUCAS: And you say if you don't deploy that in your positive case --

MR PICCININ: Then we don't deploy it, that's that and the same is true for the Class Representative.

MS LUCAS: And the Class Representative could always go and ask.

MR PICCININ: And also, they can choose not to deploy evidence they gather as well, in the same way, irrespective of who they gather it from.

Yes, and I'm asked to point out that our original request, as in this one, would also have been subject to litigation privilege in a counterfactual world in which we didn't have this regime.

MS LUCAS: I understand that point.

MR PICCININ: I think that was clear from my submissions.

MS LUCAS: Yes, thank you.

MR PICCININ: So if I could now address you briefly on the question of co-operation. I might shorten my submissions on this because I anticipate there's a degree of common ground between us, but I'll come back to it in reply if I need to.

The short point is that the parties have been co-operating on areas of the case where their ships are not entirely passing in the night for example, on overcharge, the question on whether the cartel has an effect on shipping prices. My learned friend has referred to that in his written submissions. It was actually one of my client's ideas. It was their proposal, the fifth Defendant, that there should be co-operation to produce a joint data set that all parties' experts can choose to use if they wish to or not, as the case may be, and that work is now underway in the same kind of way that you see it taking place in lots of cases.

But -- and indeed -- I don't want to get into a tit for tat argument about this, but there are other instances where we've invited the Class Representative to co-operate with us and provide us with advance sight of data sets and they've not been willing to do that, but again, we're not here to argue about any of that today.

The reason why -- at least one reason why there has not been expert or other co-operation on this particular request is that this request is for evidence of a kind that the Class Representative has no interest in gathering. Obviously, they want to receive anything that -- they've said they want to receive anything that comes our way, but they're not interested in proactively going out and getting this. I understand that's common ground, but just to give you a reference. In the reply which is at tab 7, page 126, paragraphs 13 to 14, the Class Representative's pleaded case is that if we're right that the measure of loss has to reside in the overall price that people actually paid for the only thing they bought, then in that circumstance, it would be disproportionate or impossible to investigate what the effect of the cartel was on what people paid. And so they say in paragraph 14 that even if we're right about the

measure of loss, their fallback position is just going to be the same as their primary position, which is that you still just use the effect of the cartel on the notional delivery charge as a proxy.

So in light of that, when we came to this request, we anticipated correctly, as I understand it, that the Class Representative was not interested in gathering this sort of data. So there was no risk, for example, of there being parallel letters going out, asking for overlapping sets of data or information from these class members, and I understand that to be the Class Representative's position today as well, so I don't think there's any dispute on that issue.

I think the Class Representative's objections in relation to co-operation are that we should have given them a prior opportunity to make drafting edits to our letter and you already have my submissions on why that's inappropriate in principle. But I'll come to the detail of them very shortly.

So that's the second question that you asked.

The third question that you asked was could we make the request more specific? And, as I flagged at the outset, I am afraid the answer at this stage is no. Obviously, if and when we come to make a disclosure application, we will have to do our best to make it as narrow as practicable, in accordance with the Tribunal's Rules. But a disclosure application is a different thing from a voluntary request for the provision of information and documents.

Equally obviously, if we receive a constructive response or many constructive responses to our letters, of the kind that you adverted to earlier, saying: "Oh well, our data is stored in such a way that I can give you the years 2009 to 2015 but I can't give you before 2009", or: "I can give you the overall transaction prices but I can't give you anything on negotiation documents." Or whatever it is, if we get responses like that, that will make it much easier for us to formulate our disclosure application in a way

that is narrower. But if that doesn't happen, we'll see where we get to. But it may be, often you see this in practice, that you start with a broad application and then it narrows as you get responses in, because people have to respond to a disclosure application when it's properly made.

As it is made --

MS LUCAS: You may actually have hit on one of the points that I've been a little bit concerned about in the proposed letter and it may be that, when we work through the specific provisions, we can deal with it.

MR PICCININ: Yes.

MS LUCAS: But it's the conjunction of -- we're asking for voluntary disclosure and I think you're upfront in your skeleton argument and you say that's exploratory in nature, we want to know what there is. The letter doesn't quite say that. That may just be a drafting issue. But then it says "and, if we don't get a satisfactory response, we will seek a third party disclosure order." So one of my concerns is that the order that would be sought is as broad as a category of voluntary disclosure that you're seeking.

MR PICCININ: Yes.

MS LUCAS: And it may be that there needs to be some clarity that it is by no means clear that you would get an order in very broad terms.

MR PICCININ: Yes.

MS LUCAS: Does that make sense?

MR PICCININ: I think I understand what you're saying which is what I've just said, there may be a difference --

MS LUCAS: The voluntary disclosure you're seeking and the disclosure that might get ordered.

MR PICCININ: Yes, because when we come to make that application, we will

obviously shape it in light of what we've had back from them. If we had nothing back from them, it might be difficult. I'm speculating at this point, but who knows what we'll be able to say. It's certainly much easier if we get a constructive response from them. Perhaps I can look at --

MS LUCAS: I don't want to take you out of order.

MR PICCININ: This is exactly where I was going. So it's at page 691 in the bundle and the request is paragraphs 13 and 14. My submission about them is that we are already being quite clear as to what it is we're asking for. So we're asking for transaction data showing the prices which were actually paid by the recipient for vehicles in the UK, which is clear enough, and the second thing we're asking for is documents showing how those prices and any delivery charge were negotiated with the relevant suppliers. That's obviously a bit broader and a bit less specific. That's just because at the moment, we don't know anything at all about the way that they make these purchases or negotiate them, which may also be different as between recipients of this letter. So I'm afraid, at the moment, it's not obvious to me how we could make this any clearer or more specific from them. You might say the time period, but that's answered by the following paragraph, where we say:

"Ideally, we would have data for the entire cartel period, which is defined above, but if that's not available, then what you've got that you can give us would be of assistance too."

So that's what we say and then we do say in paragraph 18, I think this might be what you had in mind, that:

"If you do not agree to provide the requested voluntary disclosure, the relevant defendants envisage seeking an order that such disclosure be provided."

And I think your point is that seems to be a statement that we will seek exactly the same disclosure.

MS LUCAS: Yes, which is very broad and you can see my overriding concern is that a class member who's received this letter will see the enormity of the task they're confronted with, without necessarily understanding that there may be ways to assist you that are not as daunting.

MR PICCININ: Yes. I see that, although I'm not sure how -- I mean, we need to bear in mind that these are very sophisticated organisations that we're dealing with here. You know, organisations like -- Lloyd's Bank was the example I gave the last time we were talking about class communications. We do have paragraph 14, where we say: "If documents and data are not available for the entirety of that period, then what you've got or even more recent material after that period would still be of assistance." And we also say in paragraph 20 over the page:

"If have you any questions, you may, if you wish, contact any of us, [not me, but any of my instructing solicitors] using the contact details provided."

And then we also make the point expressly that they are also free to contact the Class Representative. That was in our draft. So, I mean, I do think it would be obvious to any reader of this, that if they want to come back and suggest something less, if they write back and provide us with information that changes our mind, we'll make a different application. But the reason why it's important that paragraph 18 makes clear that we might seek the full thing is that we don't want to give them a misleading impression. We don't want to say: look, our disclosure application is actually only going to be narrower than this, and then it turns out it's not, because that would be unfair to them. But, I mean, if you had the suggested wording, I don't think there's been any suggested wording on this from the other side, but if you had suggested wording to (inaudible) that or expand on it, then I'm sure those instructing me would be happy to consider them.

MS LUCAS: No, thank you. I haven't got specific wording in mind at the moment, but

it was that sort of conjunction between those two phrases, "voluntary disclosure" and "such disclosure", in light of the broad categories at 13, that caused me a little bit of concern.

MR PICCININ: And, equally, if you want to send us away with that broad concern and ask us to come up with alternative wording that addresses it, I'm sure we can do that as well.

MS LUCAS: Yes.

MR PICCININ: Yes, I think on specificity, the only suggestion that my learned friend has made, and this wasn't made in the comments on our application, it's just made in submissions for this hearing, is that we should exclude the excluded brands. And just to remind you what those are, it's brands for which there are no deep sea shipping at all. So brands where all of the vehicles of that brand that are sold in the UK are manufactured in Europe and therefore permission to cross the short sea -- the shallow seas, if I can put it that way -- those ones are not in the claim because they are not affected by the cartel at all. And so they're saying: why don't we just exclude those? And the reason I said at the start that an unhelpful suggestion and not one we're not minded to take up, is there's no evidence or pleading in the case, including evidence from the Class Representative's industry expert, to suggest that there is any difference in the way that anyone purchases cars that are in the scope, from the way that they purchase vehicles that are not in scope. So it may well be that obtaining a bigger data set that includes both the excluded and included brands, leads to a more robust analysis than otherwise. It might also be that it's easier to produce, rather than more difficult to produce for the class member. We just don't know, you know, so they don't have to go filtering anything out. All of those are issues for later. Some of those are issues for trial, but we don't accept that sole suggestion that's been made about how we can make this narrower.

So my final topic, unless you have anything further on that, we're still going through on the letter, but my final topic was going to be on the editorial changes that might --

MS LUCAS: I fear I may start straying into editorial changes or ideas but the way the letter is formulated at the moment, your skeleton argument suggests that it's exploratory, you want to know what there is, what the volume of the documentation might be.

MR PICCININ: Yes.

MS LUCAS: That's almost the one thing this letter doesn't ask.

MR PICCININ: Does not say, yes. I think it's implicit in paragraph 14 and paragraph 17. Also paragraph 16, I've skipped over paragraph 16:

"We envisage there may be ways to minimise any burden of producing the data, for example by producing a representative sample, and we would like to discuss this with you, once you've had a chance to consider this request."

But, again, if you had something else that you wanted us to say, then I'm sure we could consider it. But nothing of that kind has been suggested by anyone and so I don't have any prepared wording on it or comments on the prepared wording for you today.

MS LUCAS: So what I'm envisaging is if a class member receives this letter, you're asking for a voluntary disclosure exercise that is quite expansive in scope.

MR PICCININ: Well, it may be or it may not be, depending on how their systems are set up.

MS LUCAS: Yes, it might be, and if a class member has received a letter which was broken down into a bit more bite size chunks which said something to the effect of: "This is what we're after. We don't know what you've got. If you're able to advise us what you've got, we'll be able to tailor our request." But in a way, I don't want to draft for you, but a class member receiving that, that's a bit more approachable.

MR PICCININ: That is what is meant by paragraph 16.

MS LUCAS: If it is, then it may be we need to clarify that a little further.

MR PICCININ: Sure, if you give that indication at the end of today, I'm sure we can take that away and respond accordingly.

MS LUCAS: Thank you.

MR PICCININ: But if we could turn to page 696. I should deal with the particular suggestions that have been made by the Class Representative.

So this is their mark-up. There's nothing substantive on the first page. They just suggested full stops and deletions of double spaces, but over the page in paragraph 4, they've inserted a sentence that requires us to state the basis for our understanding that the recipient has one of the UK's largest fleets of vehicles. And we do object to that. I mean, they're asking us to provide privileged information about the investigations that we conducted that led us to this place. And it's completely irrelevant and inappropriate. If the recipient thinks it's untrue, they can say so, but we do say that that is not the kind of suggestion that this regime is intended to produce. It just doesn't bear on the nature of the enquiry that the Tribunal ought to be engaged in here.

Paragraph 5, they have a somewhat convoluted suggestion. The first suggestion is that we delete the paragraphs for new recipients, meaning people we've not written to before, and that's not necessary because there aren't any. They then propose a completely unnecessary addition at the start of the paragraph about us seeking third party disclosure. That's unnecessary and it's also confusing because this Tribunal has separate rules on third party disclosure and disclosure from representative persons.

MS LUCAS: Yes.

MR PICCININ: So that would be an odd thing for us to say.

MS LUCAS: As I understand it, the distinction you've already underlined several times

to me, is that this is requesting voluntary disclosure. It's adverting to the possibility of an application.

MR PICCININ: That's right. So it would also be confusing for that reason.

Then at the end of the paragraph, including the footnote, they put into our mouths completely unnecessary words about alleged inaccuracies in our previous correspondence. That is not only inappropriate and unnecessary, it's also wrong, what they say in that footnote. So they first criticise us for referring to the recipients -- not in this letter but in the previous letter -- as claimants and I just point out that that's a shorthand that the Court of Appeal has used in this very case to talk about the same people. That's in paragraph 3 of the Court of Appeal's judgment. Just for your reference in the authorities bundle, tab 2, page 67. Now, it's right that in the class communications ruling, the Tribunal drew that correctly, drew the distinction between claimants and parties on the one hand and representative persons and class members on the other, and that's technically true. But we do say there's nothing wrong with a shorthand and the Court of Appeal doesn't seem to think so either.

The other point they make is that we were wrong to say that there was an obligation on the recipients to take legal advice about document retention or preserving documents and it's not true. We didn't say that. We never said that they had an obligation to do anything. So that is a further reason why this addition is unnecessary and it also, as with all of these, doesn't bear on the nature of the enquiry that we're supposed to be having here.

MS LUCAS: I do have concerns about that paragraph. Is there any particular reason you need to refer to the letter at all, because the ruling of this Tribunal was that that letter should not have been written and that it was not proper conduct, that's reflected in the order, and you're inviting these recipients to go back and look at that letter again, in effect. You're not expressly, but it is possible that they will go back and say: "Anyone

got a copy of that 26/27 July letter, what did it say?" Now, in light of the fact that this Tribunal ruled that it should not have been written, do you need to include that at all?

MR PICCININ: If you would like us to take it out, then again, I'm sure we can take it out. The rest of the letter will still function. It seems odd, having written to someone to tell them this is coming and then this comes and you don't make any reference to it. It seems a bit odd. That's why it's there. But if you want us to take it out, we'll take it out.

MS LUCAS: It is sort of a bit of a dilemma, isn't it? It's either you refer to it and refer to the effect of the ruling in relation to the fact it shouldn't have been written or you don't refer to it at all.

MR PICCININ: If that's where you come out, then we can take it out. The letter still works without it.

MS LUCAS: Thank you.

MR PICCININ: Paragraph 6, there's an addition there. We say it's pointless, but I don't have any submissions to make about it. It's true, but I don't know why they're making editorial suggestions that call for a hearing to deal with things of this kind.

Paragraph 7, again, they're putting unnecessary words into our mouths about their case and there are concepts in there with which we fundamentally disagree as concepts. Conceptually, when you talk about having actually paid a delivery charge which is a purely notional construct, that's not something that any of us have ever said and I don't know why they're putting that into our letter. It's also unnecessary because the Class Representative's position is already dealt with in paragraph 9, which we're coming to.

Paragraph 8, again, it's just unnecessary, but nothing much to say about it.

Paragraph 9, again, their wording, their description of their case is not a description that we recognise or agree with and, again, to the point where we say it's actually

nonsensical. It's nonsensical to talk about a negotiated discount to a total sum being applied to one part of that total sum and not the other. It's just legally and economically meaningless. So again, it's inappropriate that the Class Representative is seeking to require us to draft our correspondence in this way. Obviously, if they want to write separate letters that describe their case in whatever way they like, they can, but it's not a joint letter.

Paragraphs 12 to 13, not very important, but, again, unnecessary. Paragraph 17, I don't know whether this is maintained, but this one really is egregious. What we had said was that we would, in principle, be willing to pay expenses reasonably incurred and so we asked them to provide an indication of what costs they envisaged. Now, if they come back and say it's going to cost an absolute fortune, we can revisit that and say: "don't spend that money". They want us to write a blank cheque. That's very strange.

Paragraph 18 --

MS LUCAS: They might argue that it's qualified by the reasonably incurred, so --

MR PICCININ: Well, even so, they might be reasonably incurred costs of producing this disclosure, in the sense that there might be no other way to produce it. But we shouldn't have to sign a blank cheque without asking them, at least asking them to tell us what it's going to cost. Paragraph 18, I mean, it's unnecessary, but also unimportant. Paragraph 20 likewise and paragraph 21 is the one that we've already discussed.

MS LUCAS: Yes.

MR PICCININ: Of course, yes. There are several recipients. I think I've got the number 25, I think it's thereabouts. It might not be that much. But requiring us to sign 20-odd, if I can put it that way, blank cheques, is even worse than requiring us to sign one.

MS LUCAS: I met someone today and he still has a chequebook. Do you still have a chequebook? I get the point, but --

MR PICCININ: Yes, okay. Fair enough. Yes, make blank bank transfers, I should say. Doesn't have quite the same ring. Madam, unless you have any other questions, those are my submissions.

MS LUCAS: No, that's been very helpful. Thank you.

MR PICCININ: I'm very grateful.

Submissions by MR GIBSON

MR GIBSON: Madam, I propose to make my submissions under the following heads and I think they broadly do accord with what you intended. I've sort of approached the questions that have emerged from the party's letters and your questions separately, albeit that they accept they overlap. I did want to be sure we were thorough in covering all the bases. So obviously this hearing has been convened to decide an application for specific permission, pursuant to the second sentence of paragraph 5 of the April order and I'm going to make the submissions under the following headings. I'm going to touch on the factual context for the request, take us briefly through some of the background correspondence, because I think it's important to crystallise precisely what the parties' positions are, because I think it touches on what is reasonable or not in the circumstances.

MS LUCAS: Yes.

MR GIBSON: Two, I'm going to touch, again briefly, on the legal context, referring to some of the salient features of the collective proceedings regime. Obviously, Madam, you're very familiar with the application of the regime in this particular case, but I think it's worth just touching on some of the wider context points briefly. Three, I'm going to touch on the questions raised by the parties, there are three, and I'll touch on those

and then four, go to the questions that the Tribunal has asked, and then, five, just touch very briefly on some points by way of reply to my learned friend's submissions.

So in relation to the factual context, I'm going to talk first of all about the immediate correspondence, the correspondence that's led to this specific question, because I think it shows the scope of what the actual dispute is between the parties and you already neatly summarised your understanding which is accurate, so I think I can take this quite quickly. But I think it's important to look at documents at the same time. So on 23 September, this is when the fifth Defendant wrote to the CAT on behalf of all Defendants except the fourth Defendant and the 12th Defendant, referring to the President's order of 20 September and the President's further order of 6 April. And you've already touched on those, Madam, so I don't propose to go over them again. They enclose the proposed communication that we've just finished hearing about from my learned friend's submissions and, as he rightly notes, that was largely in the form of the voluntary request for disclosure and information. And it's common ground that, had he stopped there, of course, it would have fallen under the first sentence of the fifth paragraph of the April order and he would not have required permission from the CAT or to notify the Class Representative.

But the Defendant made a conscious choice to include specific reference to the possibility of seeking an order if the large fleet owner in question did not agree to provide it on a voluntary basis, it being disclosure, and accordingly, the Defendant has requested the CAT's permission pursuant to the second sentence of the April order.

On 25 September -- and I'm not taking you to documents, Madam, because you've already touched on them. I'll take you to as few as I can, because I don't want to trespass on your time too long, doing that. On 25 September, the Class Representative wrote to the CAT setting out its position on the request. I want to highlight four points that crystallise the points of consensus and dispute and from

which I say there are three questions that arise from the correspondence for the Tribunal to consider.

The first point is the Class Representative has no objection in principle to these letters being sent and that's paragraph 1.3 of the Class Representative's letter which appears at tab 30 at page 694 and following. I just say that for your note.

Secondly -- do you want to turn it up? I don't apprehend --

MS LUCAS: I have already.

MR GIBSON: Okay. Perfect. The second point -- and this is, if you like, the confusing point, it's the first of the three points of difference -- the Class Representative does suggest the CAT, in deciding whether to grant permission to what is in the application, should take into account the position, the submissions, the representations, of another party to the case, namely the Class Representative, to make a small number of edits to the draft letter and those are intended to be helpful and consistent with the points -- some of the points you have discussed today and you'll see them at 1.3. Now, these changes in particular arise from the Class Representative's concerns to ensure that the represented persons' interests are properly protected and that's what my solicitors said at paragraph 2.1. They refer expressly to the July 22 letters written by my learned friend's solicitors and, of course, you'll be very familiar with those, but they appear at the very back of tab 10, at pages 224 and following. Now, I don't propose to turn those up, because they've been ventilated sufficiently and I don't think it's helpful to start trying to characterise them. We don't accept my learned friend's submission that the letters were somehow neutral or benign or whatever. We do maintain our position they should not have been written and were highly inappropriate. Of course, you've already touched on the points that the CAT held in its judgment on November 22 in that respect. Paragraph 27 and 29.2 are particularly clear on the Tribunal's position on those points.

The third point I wanted to talk about, and it's the second point of difference, is that the Class Representative states that it should be copied to all subsequent correspondence between the Defendants and the LFOs, given their status as represented persons that relate to that initial request, i.e. the request which had adverted at paragraph 18 to the possibility of seeking an order compelling disclosure. And I'm going to come back and elaborate on this, Madam. But we don't accept that subsequent correspondence, just simply because it doesn't repeat that reference to the possibility of compulsion somehow then falls outside the sentence 2 regime, if I can call it that, with reference to paragraph 5 of the April order. We say that once you've triggered the need for the Class Representative to be involved, for reasons I'll come on to elaborate on, that protective obligation stands because of the origin of this chain of correspondence. And the fourth point of difference is the Class Representative also states that it should receive any documents and information received as a result of this request process from the LFOs. And those last two points appear at paragraph 2.5, (i), (ii) and (iii) of my solicitors' letter.

My learned friend has already touched on the fact that they responded on 26 September and they have made clear their objection to those last three points. So you see the crystallisation of the dispute. They dispute the fact we should make edits to the letter, they dispute the fact we should be copied into the correspondence and they dispute the fact we should receive any documents or information received. Why do they dispute that? They say it would be highly inappropriate and unfair for my solicitors to rewrite, as they describe it, the letter, which I think is an overstatement of what we've done and to interfere with their privilege over communications with third parties. And, obviously, we'll pick up on those points as we go through the remainder of the submissions. I'll return to those areas of dispute, as I say, and explain why we say our position is correct and, unsurprisingly, say their position is wrong, but before

doing so, I'm just going to touch also on earlier correspondence which we haven't looked at yet today, and I think it's important to look at that as well, because it illustrates the contours, if I can put it that way, of the Class Representative's position and contextualises the position we now take in relation to this application. There are effectively, if you like, and in a way I'll come on to explain, three types of approach that have been taken so far: the voluntary approach, the pure first sentence approach, the second sentence approach of aversion to the thing and then the stronger form of the second Defendant's approach, where you're making a formal application. We see that actually has happened over the summer months, with all three of those examples and I think it's helpful to look at them in that way. There are two broad strands of correspondence that happened over the summer. The first was the sixth to the 11th Defendants, representing Wallenius Wilhelmsen, were in contact with a number of car dealerships, including Lookers plc, and an example of one of those letters -- a number of identical letters, we haven't burdened you with all of them. There's one at tab 20, on page 670 and following.

MS LUCAS: Yes.

MR GIBSON: I don't want to go through blow by blow, because we probably don't have the time to do it but I'll just make some points and you'll obviously have an opportunity to look at it. If you have any questions, I can answer them.

MS LUCAS: I looked at it beforehand.

MR GIBSON: That's very help, thank you. So you'll be familiar. These are communications in which requests were made for voluntary disclosure. Unlike the fifth Defendant's letter we just looked at, they chose not to refer to a possible application for an order compelling disclosure and we say this is an example of how the letters, we say, don't create any difficulty for not having done so.

Consequently, all the communications in relation to this chain of correspondence

benefited from the general permission under the first sentence regime and, therefore, none of those Defendants are required to seek the CAT's permission prior to sending these communications and the communications, my learned friend rightly says, attract the normal process. We do cavil at the suggestion these were necessarily privileged but we say we don't have an automatic right to be copied with them and there's a distinction I'll come on to look at in a moment.

The second strand of correspondence was initiated by the first to third Defendants, MOL, Mitsui Defendants, who have been in contact with another car dealership, Vertu. There's a back story to this as well, where they initially contacted one of our experts who's a director, Mr Goss at Vertu, but we haven't got that in the bundle. There's just one letter which I perhaps might just mention but I don't imagine it's going to be controversial. But the correspondence here, in this bundle, starts at tab 17, when MOL initially sought voluntary disclosure and that's at page 665 and following, and again, that initial communication benefited from the general permission under first sentence, so no prior permission required. And you'll see that MOL had two attempts to persuade Vertu, one at tab 17, one at tab 21 and that's page 674 for the latter tab. On both occasions Vertu declined to provide the disclosure voluntarily because, as it explained, to do so would involve extensive and costly exercises; in fact, two extensive and costly exercises. First, one to determine whether the data requested could even be extracted, just to assess that possibility and the second then to generate that data. And you see that at tab 19 page 669 and on further request, they confirmed their position at tab 22, a very short email, page 676. Do let me know if you want me to slow my pace.

MS LUCAS: It's fine, I read all the correspondence.

MR GIBSON: Excellent. So I should highlight there, Vertu's response makes clear that it would not simply involve producing pre-existing documents, it would require

Vertu to generate, that's the word they use, generate, i.e., go to the time and trouble of creating new documents which synthesise other sources of data. And I flagged that just because I think it's important, thinking about what kind of applications are going to be made, and how it's all going to work. That's actually quite an important qualitative difference.

Anyway, consequently, having quite properly first sought the CAT's permission to serve a formal application for disclosure which they issued in a letter of 3 October -- and I think that's at the very back of tab 34. Tab 34 is quite a meaty tab. It's got the entirety of the exhibit for the application which runs to many hundreds of pages. If you dig right through to the back.

I wouldn't trouble yourself with most of it, I confess I didn't, but page 1335 -- just for your reference -- I couldn't think you need to turn it up, it's the letter by which they sought permission to serve the application they issued.

MS LUCAS: 135?

MR GIBSON: 1335, sorry, I got my 3s catching up on each other.

MS LUCAS: Yes. Yes.

MR GIBSON: So they made that request. They were given permission. There was no objection taken by the Class Representative and they then, on 9 October, serve this application, a formal application to third party disclosure and you see at tab 39 -- the wrong reference, I'm sorry. Tab 34, 1333, so that's three 3s, that's paragraph 1 of the draft order.

MS LUCAS: Yes.

MR GIBSON: And that makes clear that it's an order -- I think it says on its face "pursuant to Rule 63", I can't remember for certain but either in the evidence or on the order -- I may turn it up and just double check that. I believe they're clear they're making an application pursuant to Rule 63. That may be in the body of the witness

statement. In any event, what they asked for at paragraph 1 of the draft order is for a "spreadsheet extracted from Vertu's business records of Transaction Price data", i.e., there's an acceptance that this request does not involve production of pre-existing documents for the generation of new documents. I should say, to be fair in them, I think in the witness statement they frame this as what they would ideally like. So there could be some residual alternative there. I don't want to mislead you. I have a clear recollection they refer to Rule 63 but I can't immediately lay my hands on that. Perhaps those behind me can help me with that if they can find it. In any event, as to the Class Representative's position with respect to these developments, the Class Representative did not object to MOL making that Rule 63 application. This is without prejudice to the Class Representative's position on the substance of that application, when it comes to be determined in due course and that comes from the letter that's not in the bundle, a letter of May 2023. I don't think we need to turn it up, unless there's any dispute as to what has been said.

Would you like to see that letter?

MS LUCAS: Yes, if you just give me the reference. **(Pause). (Handed).** Thank you.

MR GIBSON: I'm just going to find the exact -- my solicitor is finding the exact reference, and I'll come back to that if I may.

MS LUCAS: Yes.

MR GIBSON: The Class Representative did not, the second point that I have to make clear about the position, the Class Representative did not and does not assert a right to receive copies of any Defendant's voluntary correspondence with represented persons. That's distinct from whether there's a bar to them receiving it as a matter of privilege, but they don't assert a right to receive copies automatically. Obviously, as my learned friend's explained, it will be open to them to go and send the letter to ask exactly the same question, although I would strongly question the efficiency of doing

so and the unnecessary burden that imposes on claimants. But in any event, there's no right to do that but the Class Representative was clear that it welcomed what MOL had done which was voluntarily to provide copies to the Class Representative which we considered to be consistent with the spirit of the order, the April order, paragraph 5, and indeed, with the requirements of Rule 4, subparagraph 7, for the parties to co-operate, wherever possible, to achieve the guiding principles, including the efficient management of proceedings.

MS LUCAS: Yes.

MR GIBSON: But I just want to be clear, we're not asserting a right to that, it's just simply a matter of pragmatism, we say it's not a bad idea. What we did assert a right to is a right to receive copies of any documents or information which the Defendants received from the car dealerships through these requests and that you see at paragraphs 1.3 to 1.4 of the letter at tab 23, page 678 to 679.

MS LUCAS: Yes.

MR PICCININ: Now the responses from the Defendants to this position taken by the Class Representative varied. In relation to the MOL, as I said, they provided the Class Representative with the communications and the responses. They did that by copying us on the list of people who received their 11 July letter. That's at tab 17, page 667.

MS LUCAS: Yes.

MR GIBSON: They also made a positive response to the request that my solicitors, Scott+Scott, asked at paragraph 1.2 of their letter, that's tab 23, page 678. The reply you find in Arnold & Porter's letter at paragraph 2, tab 24, page 680.

MS LUCAS: Yes.

MR GIBSON: They also confirmed that their clients would provide the Class Representative with any relevant third party data as soon as possible on receipt and that's at tab 24, page 680.

Now, I should just pause here briefly to make a point about the use of the word "relevant" there, because, for the avoidance of doubt, the Class Representative does not accept that it would be appropriate or efficient for the Defendants to purport to filter what they receive and I say that for two reasons. The first is it's unnecessary, since such disclosure is received from a third party and, therefore, provided precisely because it is relevant. We're working ex hypothesi on the basis that requests have been made because they were requests that were pointed at issues in the case and the documents produced pursuant to that request should therefore be relevant. Why else would a quote request be made? We also say it's inappropriate. The two points, essentially, are closely related. We say it's inappropriate since relevance is a filter that's applied during the disclosure process, by the parties themselves, in reviewing their own documents in a case, to decide whether the documents they always held, which quite probably will contain many, many documents that have nothing to do with the issues in dispute with a particular party they've dealt with, whether those documents should all be disclosed. And, obviously, you need to have a filter then, to avoid a ridiculous number of documents coming through and then, obviously, the courts have been astute to try and apply even more rigorous filters of late. But that's a fundamentally different position and situation from that in which a third party has provided documents specifically in response to a request for documents identified as being relevant. So we say that this relevance filter is only likely to add unnecessary time, cost and delay to the process. So we strongly resist that -- the single word carries quite a lot of importance.

That was the --

MS LUCAS: What's your position if there is an exchange of correspondence? It may be a hypothetical issue in this case, I don't know, but if the class members write back and say: your request is way too broad, we can't comply with that, but we have the

following categories of documents. What's your position in relation to that letter, which is not just saying: please find under cover the data you've requested, but actually is providing information over and above that. And then, as a second question, what would your stance be if the Defendants then say: ah, we're only interested in your categories B, C and D that you've identified, please send those?

MR GIBSON: Well, I think it was addressed by one, possibly two, of the points that I've made and the first is that we say that once they have chosen to write in a form that triggers the second sentence obligation, because they've intimated or adverted to an intention to compel a class representative -- and I will elaborate on the reason why we say this in a moment -- once they've triggered that, we say the rest of the correspondence is continued under that -- I won't use the word shadow, because that's pejorative, but it's done under the auspices of that original letter. And we say so, therefore, we should have oversight consistent with the protective obligation that we have as the Class Representative in respect of the people who have been corresponded with, namely members of the class represented persons, we say they should have visibility of that and I'll come on to explain why in a moment.

The second point is, to the extent they're providing information or indications of where they're going with information, we say they should see that, because it's information that's been provided by a member of our class. We're never for one moment suggesting that the same thing should apply in respect of their communications with third parties simpliciter, if I can put it that way, a pure third party. We need to keep in mind at all stages -- and I'll come on to explain the legal context, but it permeates everything that happens in this regime. And it's very easy to look -- and my learned friend, obviously, is always very attractive in his submissions and makes everything sound very reasonable, but that's because we need to keep in mind we're looking at the regime, not a simple situation of normal third party disclosure. I'm not suggesting

he's ignored that, but the emphasis we put on it is considerably stronger.

If that answers your question sufficiently for a moment. I'll come on to elaborate, as I said, the reasons for what we say about the protective power in the moment --

That was the way that MOL responded. The way that the fifth Defendant, my learned friend's clients responded, was they noted they were mindful of their continuing disclosure obligations but did not assume any duty to provide the Class Representative with documents which are "not discloseable", and you see that at tab 25, page 681. And all I would say to that is the not discloseable caveat seems to me equally dubious to the relevant qualification that MOL purported to make to their disclosure. The same points I just made about the lack of necessity and inappropriateness of that purported qualification stand equally here.

The remainder of the Defendants represented by Baker Botts in relation to the sixth to 11th Defendants and by Cleary Gottlieb in relation to the fourth, Kawasaki, both took a similar line in their responses and you see that at tab 27, page 684 and tab 28, page 686.

In relation to Baker Botts, they said they:

" ... do not consider the defendants are required either by the letter or the spirit of the fifth paragraph of the 6 April order to copy your firm on their communications with third parties."

I'll come back to that emphasis and the Cleary Gottlieb letter said "No obligation on defendants to copy your firm." They referred to the wording of the first sentence. They don't explicitly refer to it as the first sentence but they refer to the wording of the first sentence of the April order and they point out that that says precisely the opposite, i.e. there's no necessity to copy or seek or to give notice to Class Representative. But of course, we say yes, that's in relation to voluntary requests and we're not saying, we never said that they're required to provide communications with third parties generally

in relation to Baker Botts' objection or with class members or represented persons if they're purely voluntary requests. We say it would helpful to do so, it may be consistent with the regime to do so, but we don't say there's an obligation that arises as a result of anything we've looked at today.

As regard to possible third party application against Vertu, they noted that an application -- this is Baker Botts' letter at paragraph 2, tab 27, page 684. Baker Botts noted that:

"If that application happened, it would be made within these proceedings, such that your client would be fully apprised of it and would receive a copy of any disclosure provided as a result of it."

But they disputed the basis, and this is at paragraph 3 of Baker Botts' letter and similarly, 3 and 4 of Cleary Gottlieb's letter at page 686. Baker Botts' letter at paragraph 3 at page 685:

"They disputed the basis for our assertion that we had a right to receive the documents from a voluntary disclosure process ... "

So they contrast the position under the formal application with a voluntary disclosure process, noting they would only provide them to the extent "properly discloseable".

And again, the wording "properly discloseable", we say doesn't really add anything and is inappropriate and it's, again, purporting to add filters that are just going to wrack up legal cost, arguing about them in circumstances where it's pretty clear they're unnecessary and inappropriate.

But there is an unequivocal acceptance, rightly, that documents that they obtained as a result of compulsory disclosure, should be and would be provided to us.

And we say the logic behind that should apply equally if they obtained things in the voluntary disclosure, for reasons I'll elaborate on in a moment. To summarise the position between the parties, as I said, there's three different situations. The first

concerning voluntary requests by the Defendants to the represented parties to which our position is there's no obligation on the Defendants to seek the CAT's permission or our consent or to copy us but we do welcome the voluntary disclosure of that material by MOL. We say that's consistent with the party's duty to co-operative and very helpful. However, we do say even in this situation, that we should receive the documents, and I've already touched on why we disagree with the filters.

The second situation is requests adverting to possible compulsion by the Defendants, as to which our position is we have a right to comment on the request, that's what we're doing here today, not a right to comment before, although we submit that that would have been more efficient. Again, there's a contrast between what we say the parties should be doing voluntarily to try and serve the broader objectives of the rules and the duty to co-operate because much of the debate we've had today, and many of the concessions we've explored and what have you, could have been ventilated in correspondence, if it had been initiated before it came to the Tribunal. So that would have been a significant time saving. The situation we're here today of even having a hearing -- we understand why the Tribunal wanted one. We submit respectfully it was a good idea but it's the first time something has been done to thrash things out, think about the broader policy issues, as your questions have done. That's a sensible idea. The suggestion that we should do this on every occasion that this happens, we think is for the birds, with the greatest of respect. It would be completely disproportionate. As my learned friend quite rightly says, hundreds of thousands of pounds, or tens of thousands at least, would be expended, to no real purpose. So the parties should do what they generally do in proceedings before the Tribunal, talk among themselves and present the Tribunal with the points in dispute that are being narrowed through correspondence. And we say that, whilst there's no obligation on them to do that, we think it would have been helpful and we would encourage them to engage with us in

future on that front.

So that's the first thing we say in relation to the possibility of a compulsion, an adversion of compulsion, the second situation. No right to comment, but it would be helpful. So no right to comment before, but we do have a right to comment once the request has been made. The second point we say is we have a right to receive copies of subsequent correspondence regarding the request and we've already touched on that and I'll elaborate on that in a moment and the third thing is we have a right to receive the documents received. That's the common thread for all three of these situations. Thirdly, we've got the formal application, the one that's been made in respect of Vertu and it rightly appears to be common ground that we have a right to be served, unsurprisingly. The Guide, paragraph 5.90, is clear on that, but therefore, as a result of being served, we also have a right to comment on that too and, indeed, we intend to do so.

It's also expressly accepted by the Defendants who did address it that we have a right to receive the documents disclosed as a result of that formal application.

So it's helpful I think, I hope, to set that context because I think it allows points of comparison between the different regimes and we say much of what we say in relation to this second instance, the reasonableness of what we're saying can be seen by comparison with the other instances and the contours of where we've actually drawn the lines, we think on a principle basis, that I'll now come to explain, with great gratitude for your patience in allowing me to go through that.

MS LUCAS: That's very helpful. Thank you.

MR GIBSON: So briefly then on the legal context, I'm going to note key points regarding the collective proceedings regime specifically, the CAT's general case management powers, I know you'll be very familiar with them and I just want to touch on them briefly, and then including how they've been applied in this case. And that

third point I think I can take very quickly because your opening remarks covered most of that already.

First, the collective proceedings regime. It's well established and I don't think there's any scope for dispute, that the legislative intent of the statutory scheme is to enable whole classes of consumers to vindicate their rights to compensation and thus to facilitate access to justice. It's the classic statement in the Merricks Supreme Court judgment, in paragraph 2 of that judgment. We did put it in an authorities bundle. I don't think it was necessary. It's at page 4 of that bundle and similar statements have been made in numerous Court of Appeal judgments and I haven't burdened you with all of those, you'll be glad to hear. So that's the overarching intent of the scheme. An important feature, and I want to highlight two important features, no doubt there are more, but the two that are most relevant for today's purposes are first of all, the special role and responsibility entrusted in the class representative and you'll, of course, be very familiar with the way the class certification process works. It's onerous. There's been debate about exactly what test should apply, but regardless of the threshold you have to pass, it's still rigorous. The list of criteria is, rightly, very, very thorough and the class representatives are tested to check that they can assume the responsibility that is inherent in their role and rightly so. They need to be relied upon to act in the best interests of the class, and I emphasise that because that is critical. In the Boyle v Vermeer judgment, and again, we have copies, but I don't anticipate it's going to be necessary to turn them up. Boyle v Vermeer, that's 2022, CAT 35, paragraph 15(iii), it specifically highlighted -- do you want copies -- that the judgment and good sense to ensure what are usually complex and difficult claims are appropriately taken forward and resolved was emphasised, in, as it happens in that case, not authorising one of the two proposed class representatives because statements he made called into question his appropriateness for that purpose. I'm

happy to say there's never been any suggestion of that in relation to the excellent Class Representative we have and, indeed, he embodies, I would respectfully say precisely that good judgment and good sense.

He's probably blushing behind me now.

The other point that follows from that is the degree of responsibility and trust reposed in the class representative, such that they are in what's been described as a fiduciary relationship. It's a point that's been a particular point of concern in the most recent Court of Appeal judgment in the UKTC v Stellantis case, where the Court of Appeal was considering the conflicts within the class, and obviously, in the context of conflicts, fiduciary relationship becomes particularly important. There was never any question that it was appropriate to be considering conflicts in that way. The basic assumption that a fiduciary relationship was undisputed and rightly so. That's paragraph 91, for example, in that judgment.

An even more important feature, if I may say so, is the crucial supervisory role that the CAT plays. The appellate courts have consistently emphasised a number of points in that regard. I'll limit myself to three. The first is that the Tribunal plays a vitally important screening and gatekeeping role over the pursuit of collective proceedings and that is in the Merricks judgment, paragraph 4, and paragraph 105. So both the dissenting judges and the majority judges, majority of two obviously, for unfortunate, tragic reasons, both said that, pages 5 and 46 of the authorities bundle.

The second point, and they flow from one another, is that the need for the Tribunal to undertake intensive case management of collective proceedings, especially where they opt out, as here, is justified by the need to protect the interests of the class. And that we see in the Le Patourel judgment, paragraph 48 and, again, I have the judgments here, but the statements of principle I don't think are likely to be disputed. Unless my learned friend would like to take you to it for any other purpose. The third

point is the Tribunal's gatekeeper function is an active elucidatory role, it's proactive as well as reactive and it's a continuing one i.e., the making of a CPO is not the end of the gatekeeper role, as you'll be very familiar. This was guidance handed down in the McLaren Court of Appeal judgment. In this case, paragraph 45 to 46 and they also said it might well entail the Tribunal imposing substantial case management burdens on the parties at an early stage. And it's not directly analogous to here but it just emphasises the importance of what the Tribunal is doing. The reason for it being for protection and the fact it is an ongoing duty. The class regime is fundamental to all of that. That's what I wanted to say about the general statutory regime.

The second topic I wanted to touch on in terms of the legal context is the case management powers under the Rules. I've set out what I say are some of the most salient rules and paragraphs of the guidance in my skeleton. I apprehend you've looked at that, so I don't want to burden you particularly and it's clear, obviously: governing principles, everything should be done justly and at proportionate cost, expeditiously and fairly. The CAT's active case management is clear from that, including the encouraging of parties to co-operate and adopt fact finding procedures that are effective and appropriate. The parties themselves are under the obligation to co-operate and this is all at paragraph 5A to G of my skeleton and this includes the duty of giving effect to the aim of active case management. The Guide, paragraph 3.3, and 7.3, both emphasise that.

So that's how the CAT should approach its task and then the powers it has to do that are wide. Paragraph 53(i) is a very wide power:

"At any time, on the request of the party or on its own initiative, to give such directions as it thinks fit to secure the proceedings are dealt with justly and at a appropriate cost."

And the breadth of those case management powers in collective proceedings is confirmed at Rule 88.1 and also in the Guide at paragraph 6.68.

There's also specific provision for wide powers in relation to disclosure and including third party disclosure at Rule 63. My friend's question, I think at 63, would actually be the appropriate rule to rely on in this situation. We're also aware that there is Rule 89 and we say there's a question as to exactly how those two interact. We don't necessarily say that one displaces the other, we think it would require careful thought to think about how they interact and we don't make any positive submissions on that, we reserve our position as to how we might develop that in due course.

The Guide, of course, makes clear, and this is relevant to the point, you Madam chairman, made earlier, about the possibility of narrowing requests and making them more helpful. In respect of an application itself, and my learned friend obviously makes the distinction between a voluntary request and application, we don't say necessarily that follows from quite the way it's suggested. In relation to an application, it's quite clear the CAT was only likely to order disclosure of clearly defined documents or a very limited category of documents and, of course, the point I've already made, that it must be served on the other parties.

That's a very quick, whistle stop tour through some of the points in the Rules and in the Guide.

MS LUCAS: Thank you.

MR GIBSON: I won't detain us too long in relation to the approach to the Defendants' communications with third parties in these proceedings to date. We've touched on the fact that the reasoned ruling in November 2022 was a qualified restraint. I just emphasise that because sometimes that seems to be lost sight of, always subject to the opportunity to seek permission and the supervisory jurisdiction of the CAT. The possibility of the parties agreeing was also considered in that judgment.

The crucial point I would like to highlight is paragraph 28(2) of that judgment, and that's at tab 10, page 220, where, as you'll be very familiar, the Tribunal ruled that:

"To the extent that direct communication of class members is necessary and/or desirable to obtain evidence, that is a process that should be conducted under the overall supervision of the Tribunal and not as a litigation free for all. As to that, we do not rule out the possibility of the parties themselves coming to an agreed position on the content of communications with defendants to class members but that would depend on the particular facts of each case. In the end, it is the Tribunal which has the ultimate responsibility for supervising the conduct of collective proceedings and, in particular, the extent to which it is appropriate to involve class members."

And the main point I would flag there is the point about "not a litigation free for all", and the reason I flag that is because my learned friend rightly says one of the motivations for the communications, class communications ruling and the subsequent order of April, is a concern about what had happened in the July 2022 letters. That's pellucidly clear from the judgment, but what is also clear, and with respect, the Tribunal as a whole quite rightly highlighted there's a second purpose, closely allied to the first, but drawn from its active case management responsibilities and that's to avoid a litigation free for all. Even if you didn't have the concerns about how my learned friend's instructing solicitors conducted themselves in this particular case -- and I don't mean that to sound pejorative, I'm just echoing the points in the judgment -- even if they didn't have those concerns, there would still be a perfectly understandable concern but routed in the Tribunal's, as I've just outlined, actual case management powers, plus its supervisory responsibility in this particular regime, to avoid a litigation free for all. And that, I think, is what my learned friend's submissions were but, with respect, didn't focus on sufficiently.

At the February CMC -- and you see this at tab 16, page 579 to 580 which is in the transcript as page 29 to page 30; line 7 of page 29 through to line 9 of page 30.

MS LUCAS: Sorry, can I --

MR GIBSON: Sorry, that's tab 16, page 579 of the bundle.

MS LUCAS: Yes.

MR GIBSON: You can obviously read it for yourself, but you'll see that the President confirmed that the CAT:

" ... would welcome a co-operative approach between the parties and if and to the extent the class representative also wanted third party disclosure, ... "

It obviously made sense to hit the third parties once -- getting very militaristic in our analogies here, with torpedoes and hitting -- rather than several times:

"Accordingly, in such a situation, the first step is for the parties, without scaring the horses ... "

And that's a reference to what Mr Hoskins had mentioned earlier, troubling the third parties and getting them in a fuss about things before you get your ducks in a row, to use another animal analogy:

" ... to work out what it is, as a group, the parties would want to get from that as far as possible agreed between the parties."

So it's a continuation, if you like, of that no litigation free for all theme and I think it's an important one to highlight. And you've also touched already on the 6 April order which talks about the two different rules and we'll come on to explore that more in a moment.

So that's what I wanted to say on the legal context.

This brings us then to the question to be resolved and as I said in opening, there are three points that I say arise -- three disputes between the parties on the correspondence. First is whether the Class Representative should be permitted to comment on proposed communications, where those communications advert to the possibility of compulsory disclosure.

MS LUCAS: Yes.

MR GIBSON: So that's the second sentence regime.

The second question is whether the Class Representative should receive copies of any subsequent communications, following that initial communication. Obviously, we touched on that already.

The third question is whether the Class Representative should receive any documents or information received by Defendants from representative persons on a voluntary basis, following such a communication. As contrasted with the position in relation to a compulsory order, where I think it's undisputed that we should definitely get them. And you obviously have raised the additional four questions which, to some extent, will be answered in the course of that, but obviously should we ought to be communicating -- sorry, is it the Class Representative who ought to be communicating? Question 1. Question 2: have we considered a joint approach and if not, why not? Question 3: would it be possible to be more specific? And then Question 4: the question about litigation privilege.

So in the legal context I have just highlighted, namely the specific features of the regime for collective proceedings, the general case management powers and the observations of the President to date in this case and, indeed, in the Tribunal judgment more widely. It's our respectful submission that the answer to each of the three questions I outlined just a moment ago, arising from the correspondence, is a resounding yes. So whether the Class Representative should be permitted to comment on communications. By way of context -- obviously, I know this is worn to death, but we're dealing with the situation here, where the default position is they shouldn't be communicating with them at all. That's what the November ruling decided, the December order confirmed and my learned friend quite rightly makes clear that's not an issue for today. It will be debated in another context and another time. That's the default position at present at least. Now, where the Defendants are

required to apply to the CAT for permission under the second sentence regime, then the question arises whether we should be permitted to comment on that application for permission. We say yes, for the following reasons.

I group these reasons broadly under two heads. The first reasons derive, we say, from the features of the collective proceedings regime. We say that because the possibility that the Defendant may seek to compel disclosure from a represented person, requires the involvement -- because that policy has been flagged, this requires the involvement of the Class Representative, by virtue of its special fiduciary role, as the person specifically certified to protect the represented person's interests.

We say it's relevant to recall, I know we're very alive to it, the distinction between the first sentence regime and the second sentence regime. The first sentence is purely voluntary, the second sentence regime is even if there's a hint of compulsion.

So the trigger between the two, the trigger for us getting involved, if you like, the Class Representative getting involved, is -- the trigger is compulsion and the consequence of that trigger is that there's a requirement to seek prior permission of the CAT. That's all clear and I don't think in dispute. We say the corollary of that, of requiring the Defendant to apply for permission, is that the Class Representative, as the protector of representative person's best interests, should clearly be given an opportunity to make representations to the CAT, before the CAT decides on whether, and if so, on what terms, to permit the Defendant to send any such communications and for it to be an effective role, must include the possibility of making constructive and balanced, sensible suggestions, consistent with the good judgment the Class Representative has been chosen for and his responsibility about protecting the interests of class, to ensure that the correspondence is appropriately balanced.

MS LUCAS: Yes.

MR GIBSON: I'll address my learned friend's submissions about this at the end, just

to make sure I make my positive points first.

The second broad reason that we say that we should be allowed to play this role is because the conclusion I've just outlined, derived from the particular features of the collective procedures regime, is also consistent with the CAT's general principles and its active case management powers. It's consistent with the good sense of the President's observation at the February CMC which we've just looked at, and the Tribunal's earlier November 2022 Comms ruling, that where parties to collective proceedings are considering seeking disclosure and representative persons, it makes sense and it's welcomed they take a co-operative approach.

Indeed, we say the only way in which the parties could avoid the potential oppressive outcome of hitting represented persons several times rather than just once, is to discuss among themselves, proposed disclosure requests with each other before any of them approach the represented persons, in order that they can come to, and this is the wording from the February CMC, an agreed position on the content of communications from Defendants to class members or represented persons. And the possibility of the parties agreeing was expressly mentioned in paragraphs 14 and 28(2) of the communications ruling in November 2022.

We further say, and this is a third allied point, is that this desirability of such a joined up approach was specifically discussed and we understood apparently agreed, at least by counsel for MOL, Mr Hoskins, at the February CMC, in the passages we've taken you to. It wasn't explicit but certainly the tenor of what was discussed didn't seem to be controversial. And rightly so, we say, since this is the efficient and proportionate way to conduct litigation and particularly litigation on the scale and scope and involving the number of parties, albeit indirectly through the class system, as we have in the collective proceedings regime. Efficient and proportionate way to conduct litigation, one, under the overall supervision of the CAT, and that's envisaged in the Comms

ruling of 28(2). Two, in accordance with the CAT's general principles under Rule 4 and, indeed, repeated in the wording of 53(i) and three, in way which avoids a litigation free for all. Indeed, this is simply what, and this appears to be common ground, would be required at the point of making a formal application of the kind adverted to in the proposed communications with represented persons. So the application --

MS LUCAS: Can I just pause you there? Is your position that you should be notified -- this approach should apply to every request that's made by the Defendant? So assume for the sake of argument that the Defendant's expert comes up with a wizard wheeze and thinks: it would be really good to know the answer to this, but the answer could be shocking, we really wouldn't want anyone necessarily to know that, if there's a communication of that sort that is going to the class members, do you say the Class Representative should be copied into that or is that subject to litigation privilege?

MR GIBSON: There's a number of points I would like to make there. You haven't specified in your question whether this is a request that is purely voluntary. If it is purely voluntary, we say there's no obligation, the first sentence regime applies.

However, if there is a hint of compulsion or adverting to a possibility of an order et cetera, then they should copy us. So it's a matter for them to choose whether they want which regime. There's no obligation to go down the second sentence regime, and I would suggest in that particular situation, it would make perfect sense to go under the first sentence regime. If they're really concerned about the possibility they may not like the answer they get.

But the point about the privilege, I'm going to come on to. I don't necessarily say that's privileged. I just say the regime doesn't require us to obtain it, and even if it were privileged, my learned friend rightly concedes that if we asked the same person the same question, there's no bar to them telling us the answer that may be unhelpful to

them. That's clear from the passage my learned friend showed you in Hollander.

MS LUCAS: Yes.

MR GIBSON: So if there was a formal application, we'd have a right to be heard and we say that everything we've just suggested is consistent with the position under a formal application. We say, in truth, that's a better guide as to how you should proceed than my learned friend's suggestion that you should distinguish between the voluntary approach and a compulsive approach. Because if it's purely voluntary, that's one thing, but once you raise the spectre of compulsion, when you bear in mind the protective obligations, if I can put it that way, of the Class Representative, we say that constellation of factors is such that it's a weighty reason for allowing us to see what's going on. We're not purporting to rewrite their correspondence and we're not monitoring it in some sort of sinister sort of big brother way, we're purely fulfilling our statutory role, as confirmed by the CPO in each case. The Class Representative has a weighty responsibility and needs to be able to satisfy that.

In saying that, I should just reiterate once more, the Class Representative, it's not said it's a requirement it should be given an opportunity to comment even in the second scenario of a non-formal application but with the compulsion in the background. We don't say it's a requirement that we should be contacted before and discuss it, but I think that today's hearing does illustrate the good sense of just doing that anyway.

So that's the first question that's arisen in the correspondence.

The second question was should we receive copies of subsequent communications? And we've already touched on this, so I'll deal with it quite briefly. We say again, yes, for the following reason which flows from the points just made, it sort of builds on, if you like. Essentially because it accords with the special role entrusted to the Class Representative, that since the proposed communications falling under that second sentence regime are for disclosure requests made subject to the possibility of

compulsion, visibility of those subsequent communications is necessary for the Class Representative to be able to fulfil its fiduciary role in protecting represented persons' interests. And it goes without saying that what the represented person can't see, it can't check to ensure that those interests are protected.

Both of those points I think it's worth highlighting because I think it picks up the question you asked in my learned friend's submissions, effectively about there's an acceptance on our side that there is a line that's been drawn -- we say the line has been drawn on a line of compulsion, even if it's just adverted to. Inevitably, wherever in law you draw lines, there'll be cases you can come up which make you think maybe the line should be pushed one way, maybe it should be pushed the other way. The job of the courts, of course, is to decide on a line that's principled and overall, on balance, is the best line to draw. It may not be perfect, there may be examples which come up in both lines, but we say it's a good line, the possibility of compulsion, given the background of the obligation to protect the class interests. We say that that is a principle distinction and one that should be maintained, notwithstanding the fact that we can see that you can come up with examples that suggest that the line could have been drawn somewhere else, but we think it's a good line and one which should be supported.

The third question was whether we should receive any documents or information received by Defendants from third parties on a voluntary basis following such a communication. Once again we say yes, for the following reason. Again, it flows from the points originally made. I think, in fact, my learned friend very helpfully dealt with some of the points I'm about to make by way of concession and rightly so. Since the proposed requests we say are primarily for disclosure of documents, although, as I said, there's this question of exactly how a formal request would be formulated if they're going to seek data information, because, whilst they don't say it's not possible

to do that, it's a very different regime and, if you draw the analogy with seeking information by way of a witness summons, which is a possibility in both the CPR and under the CAT regime, it's well established that witness summons are very, very exacting and there's a particular framework you go through, there's all kinds of nasty -- that's not the regime that you use if you want to try and get wide data. In saying that I'm also conscious of the President's recent ruling in the Boyle case, where he said in respect of parties he specifically eschewed the possibility of weighty disclosure of documents because he said that's not going to help the situation. You want data.

So I understand the Tribunal's understandable desire to try and get to the point and get data out in relation to communications between the parties. I strongly question whether that translates, given the amount of work that involves, into the regime in relation to third parties, and that's not necessarily one for us to debate now but I think it's worth just putting down a marker and thinking about how this is actually going to work, how it's going to work, because I think it does colour what we're looking at, albeit that it's not directly on point.

MS LUCAS: I checked the rules before we started this morning and I have got the power to actually make an order for information to be provided by class members.

MR GIBSON: You do have very broad powers and indeed there's an order in relation to -- I mean, we can turn them up, but there's also a provision for requiring a witness to turn up and provide information. So there's sort of two routes to it.

I would say that to read the rules consistently with the good sense that's been established under the civil procedure regime, and I of course recognise that the Tribunal has latitude to do things differently from the High Court. Absolutely. But in this particular instance the good sense of the position that's been involved over decades and centuries in the civil procedure system of the High Court I think should

translate to here and that is a system which, where you're requiring information, does have a relatively narrowly circumscribed regime. So, for example, let's say if you're asking someone to produce information through a witness summons; and that's for the obvious reason that, whilst it may not require them to go and produce a whole new volume of documents which might seem more onerous, in fact the exercise of passing through all the documents themselves and effectively doing the job of the recipient for them can add significantly to the burden on them and you see that from Vertu's response to the request that was made of them and it will be interesting to see how it plays out in relation to the formal request, which is calibrated as being a question for data through a spreadsheet. As I said, that's a point for another day but I think it's potentially an extremely weighty request. Maybe appropriate, pursuant to the Boyle judgment, between the parties, questionably appropriately. Infeasible for third parties.

MS LUCAS: I only mention it, and it's possibly not a point for today, or an argument for today, but it seems to me that the existence of that specific rule -- I can't remember the number, I'm so sorry -- which refers to the Tribunal being able to ask for production of information from the class members probably recognises the fact that the Class Representative isn't necessarily the person who has the information that's necessary.

MR GIBSON: It's 89, in addition to the general powers -- this is at page 1506 in the bundle:

"In addition to the Tribunal's general powers under these rules to order disclosure, the Tribunal may order, on any terms it thinks fit, disclosure to be given by any represented person."

That's the provision directly relevant to the collective proceedings regime and that's couched in a language of disclosure. I think what you might have had in mind, I may be wrong, is the rules under the general regime under part 4 and, as I touched on,

Rule 56 deals with summoning or citing of witnesses and Rule 56(1)(b) allows the Tribunal at any time, at the request of any party, to issue a summons requiring any person, wherever that person may be the United Kingdom, to do one or both of the following: tender as a witness or answer any questions or produce any documents or other material. So there is a power there.

That's strongly analogous to the witness summons regime under CPR 34.2 and I think there's also provision under I think it's probably 53(3)(c). It's at page 1489. Is that what you're -- it's at 1489.

MS LUCAS: Is that in our bundle?

MR GIBSON: Yes, it should be. It's page 1489 of the bundle. The rules have been buried right at the very back, not given the prominence that I think they should have been given, but there we go.

MS LUCAS: I'm being incredibly unhelpful, because I seem to remember there was a specific one saying the Tribunal has the power to order the third parties to provide information.

MR GIBSON: This is the rule, I think.

MS LUCAS: Okay. Sorry.

MR GIBSON: Page 1489, Rule 53(3)(c), it says:

"The Tribunal may also, of it's own initiative, ask the parties or third parties for information or particulars."

MS LUCAS: Yes. I think that might be it. Thank you.

MR GIBSON: Now, the reason -- I haven't come here prepared to let you know whether there's any cases on that, but my submission -- free from authority, which is always dangerous -- is that that should be read in the light of the other powers in relation to it requiring parties to appear to give information.

MS LUCAS: Right.

MR GIBSON: And the good principles under the CPR about -- it's obviously potentially a particularly onerous power that needs to be exercised accordingly.

MS LUCAS: Yes. Sorry, I think I may have set a few red herrings and hares running --

MR GIBSON: No, no, red herrings and hares running, and all kinds of animals. We're doing well with analogies so far.

So we don't say that it's impossible. We say that perhaps the way it's been approached so far hasn't been done correctly, but, once you put it in that regime, then you have to comply with the strictures of that regime -- I mean, the third party disclosure regime is already relatively circumscribed and we say that this is even more circumscribed for good reason, because of the burden it puts on people.

I've kind of lost track of the point I was actually making and forgive me. I think I was talking about the second question. Yes? Thank you, Daniel -- which I think I've finished, whether the Class Representative should receive copies of subsequent communications.

We say yes, and I've already touched on the reasons for that, and in fact I've have even touched on the third question, whether we should receive any documents or information received, and that may be where this question came from.

MS LUCAS: Yes.

MR GIBSON: Once again we say yes. We say that, since the proposed requests are in a language they use, they're couched in a language of disclosure, we say disclosure is disclosure of -- I mean, it's a common place -- sorry, I'm conscious of the time -- disclosure obviously is normally talked about in terms of actually people confuse it with production. It's not. It's about telling you what documents you've got, pre-existing ones.

MS LUCAS: Yes.

MR GIBSON: So, by its definition, it's not about creating new documents. So if you

want to do that, it's a different regime, but there we go.

But insofar as they're asking for documents, those documents, if produced, my learned friend rightly -- we're in agreement, it's common ground, that they would be discloseable to us and we just don't take -- the filter that's purported to be applied, we don't accept. I've already made that point.

So what then of the Defendant's objections to our position, and I'll touch on here the objections that have been out put in correspondence. I'll come and touch on the ones that my learned friend elaborated on orally in a moment --

MS LUCAS: Can I just see -- you did refer to the time. I'm quite conscious of the time.

MR GIBSON: I'm sorry.

MS LUCAS: No. Please don't apologise. I think I just caused that last delay, for which I apologise.

MR GIBSON: No. It was an interesting diversion.

MS LUCAS: I'm not sure how you're placed, and I'm not sure how long you're going to be in reply, and one thing I don't want you to do is rush, because you will appreciate you're here because this is an issue that's frankly quite new to the Competition Appeal Tribunal and it's interesting to hear your submissions and it's very important that we do.

I don't know whether you'd rather me sit through lunch a bit so you can be done or whether you could vaguely contemplate coming back at two. But I very much will accommodate what's easier for you.

MR GIBSON: Can I just take instructions. For myself I'm more than happy to have the pleasure of your company in the afternoon as well but I'll just double check. (Pause).

For my part, the Class Representative, Mr Mark McLaren, he's here today, he may have to leave unfortunately but my solicitors and I will be able to continue this

afternoon, if that's the way that you prefer. I don't know whether my learned friend --

MS LUCAS: What would your preference be?

MR PICCININ: We're also available but at the moment my reply submissions are quite short. So if Mr Gibson is nearly done, then I suspect we could wrap it up in the next 20 minutes or so.

MS LUCAS: So over to you, Mr Gibson.

MR GIBSON: I know, the pressure is on.

MS LUCAS: I don't want you to feel rushed.

MR GIBSON: No, I think I might be rushed to do it in 20 minutes. I mean, we're dealing now with the important point about privilege, which obviously will cover off your fourth question. I just wanted to then touch very briefly on your first three questions, which I don't think will take any long, because essentially (a) there's no dispute I think between us at least on the first question, it's really a question of how we might respond to any residual or less residual concerns you may have on that point, and the second and third questions I think can be dealt with relatively briefly, just picking up on points I've made in the correspondence.

The only thing that might take a little while, I just wanted to go through some of the points my learned friend mentioned in his oral submissions. I think I probably would need more like half an hour to 45 minutes but I'm happy to press on or to pick up after lunch. I'm in your hands.

MS LUCAS: If we're talking half an hour or 45 minutes, I fear you may all have to come back at two.

MR GIBSON: I'm sorry if I'm the cause of that.

MS LUCAS: No, I certainly contributed. So no, shall we carry on for the next five minutes. The transcriber would also require a break, which adds to it, and that takes to us to 2 o'clock anyway. So let's crack on for another five minutes or so, until you

reach a good place for a break.

MR GIBSON: Okay. Well, I might deal with the first objection then in relation to the purported unfairness or inappropriateness of what we're proposing and then the second objection about privilege I think is one that we should take more slowly and probably after the short adjournment.

So as to the first objection, we say there's nothing unfair or inappropriate about the proposed approach that the Class Representative suggests for these matters. I've already touched on this really, but just to cash out the point that, as is, accepted there's two regimes under the April order, paragraph 5: the first sentence regime, whereby communications from Defendants to third parties -- to represented persons which simply seek voluntary disclosure, there's no permission or notice required and the second regime: communications in which the Defendants chose to include reference to possibility of compulsion for which prior permission is required and we say it's an unattractive submission, with respect, to say that, having been given a choice and made their election, that they then argue that it's somehow unfair or inappropriate that they should bear the consequences of that election.

I'm conscious that that didn't take five minutes, but the next point is about privilege and I think that is going to take me significantly longer.

MS LUCAS: Yes, well, let's rise. I am quite conscious that I'm eating into your afternoons. Do you have a preference for coming back at two or shortly before? Would you prefer to sit at ten to two or two o'clock.

MR PICCININ: Before would be better

MR GIBSON: Yes.

MR PICCININ: Bbut we are here.

MS LUCAS: Let's go for -- would we be ready by quarter to two?

MR PICCININ: That's fine.

MR GIBSON: Yes.

MS LUCAS: Quarter to two then.

(12.58 pm)

(The luncheon adjournment)

(13.45 pm)

MS LUCAS: Yes, Mr Gibson.

MR GIBSON: Thank you. Well, I feel restored after a good lunch, thank you very much and ready to deal with this as quickly as I may. So we're dealing with the second objection raised by the Class Representative's proposed approach which is in relation to the privilege and we say it's not inconsistent with privilege to do as we suggest. And we make three points in this regard. The first has been made already, just to repeat it. As to documents disclosed in this process, pre-existing documents we say don't attract privilege, so the point doesn't arise and I think that's common ground.

MS LUCAS: Yes.

MR GIBSON: Just while we're touching on that, given the reason for me saying that was because at least with the Vertu application, it's put within the context of a disclosure application. I couldn't find the reference. I now have the reference, it's at page 706. It's the 11 October letter by which they serve Vertu notice with the formal application. Page 706, paragraph 4:

"Accordingly, on 3 October, MOL filed with the CAT an application for third party disclosure pursuant to Rule 63 of the CAT Rules, seeking an order ... "

Et cetera et cetera.

MS LUCAS: Yes.

MR GIBSON: And I accept that my learned friend hasn't made a decision as to how he would proceed with an application, if indeed one is made. But at least in the Vertu context, that provides us with one answer to that point.

Secondly, as to communications between the Defendant and the representative persons during this process, the Class Representative does accept that generally, if one weren't looking at this through the prism of the Class Representative process and dealing with class members, a communication between a defendant and a third party simpliciter or purely, however one wants to distinguish them, for the dominant purpose of litigation, would attract privilege. And the extract from Hollander my learned friend very helpfully provides us that, to make good on that point. But the general proposition we say can't be relied upon in circumstances where one is dealing not with a third party, as generally understood, but with a represented person, whose interests are not simply related to those arising in the claim, they are the interests arising in the claim. It's their interests. So whilst it's, of course, true and it's being ventilated exhaustively, I think in this case, that represented persons are not parties, I'm not for one moment seeking to suggest that, they operate, if you like, as a hinterland. They're not a party but they're not a third party in the sense you would think of them as being a third party, completely unrelated to the proceedings. I'm not trying to develop a new class -- if you call them a third party, they're a third party with a certain hat on. Whichever way one wants to look at it, you can't ignore the quality of their character and their relationship with the underlying litigation.

MS LUCAS: So one way of looking at it is that the Class Representative is bringing the class members' claims. So it's the very claims that are the subject of the litigation that the Class Representative is actually bringing.

MR GIBSON: Yes, I think that is one way of looking at it. I'm conscious there's been a lot of discussion about exactly how the section 47B regime works in the context of limitation, so I don't want to say something that trespasses across the way it's been decided. But certainly that's the way that I look at it. The language tells you that. It's the represented person, they're not in the litigation, that's the whole point of it, but

nonetheless, it is their claims. Section 47B essentially is a wrapper that allows you to wrap up multiple claims and deal with them in a more litigation efficient way. Obviously, there's been different ways of doing it under CPR 19 and other forms of action. This way is innovative and new, in the way that the Merricks judgment in the Supreme Court highlights and indeed, the Lloyd judgment as well highlights. Lord Leggatt was very helpful in contrasting the way the different regimes work and highlighting the feature of this regime, the opt-out possibility and aggregate damages. In any event, all of these regimes are trying to deal with the need to deal with mass claims, in an era where you've got businesses that engage with masses of consumers and grappling with that has been a feature ever since the industrial revolution but with increasing force, now that we're dealing with modern forces of mass communication, and what have you.

MS LUCAS: In a normal situation, where a person is in litigation, the defendants, if you're the claimant, the defendants would liaise with the claimant's solicitors in relation to matters arising out of the claims. Now, in the collective proceedings regime, we've got a class representative who is managing the claims. But when a request for information comes relating to those claims, I mean, isn't there something to be said for that request should be channelled through the class representative because they are managing the claims and the question has arisen in relation to those claims? I appreciate this is actually a point on which you two have both agreed.

MR GIBSON: I'll come back to the litigation point. I'll skip ahead to that. I mean, our position, and my learned friend rightly represents, we don't disagree, in the circumstances of this case and the way that this application has arisen. In this circumstance, it wouldn't be appropriate for us to be the conduit for that information. Whilst I readily understand where you're coming from on that, the way it's evolved, partly as a result of the fact we weren't asked in the first place, partly because our

position, leaning on the point made at paragraph 170 of the certification judgment and that is where you might remember -- we can turn it up if it's helpful -- but paragraphs 151 to 170, the certification judgment, was where -- I believe it may even have been your good self -- I'm sorry, I wasn't involved in the case at that stage, I can't remember exactly who was featuring at which stage. It's been a little bit --

MS LUCAS: It wouldn't be me at the certification stage.

MR GIBSON: It was Lady Justice Falk. So there was discussion about the issue around disclosure and large business purchasers, as they were called, in the judgment.

MS LUCAS: Yes.

MR GIBSON: And in the context of that, there was a discussion about whether disclosure would be needed and that, my learned friend says in a different context, is the reason the whole letters came up and we're not going to get into that now. But in any event, in the context of discussing that, the Tribunal was clear that not only did they feel disclosure could be dealt with in much the way that it is now being dealt with, but also paragraph 170, and it may be helpful to turn it up -- I'll just remind myself of which bundle it's in. It's tab 8.

MS LUCAS: Is this an authorities bundle --

MR GIBSON: No, the authorities bundle is very Spartan. This is tab 18 of the main bundle.

MS LUCAS: Got it.

MR GIBSON: And 170 is page 192. That's where the Tribunal said:

"We would also observe that disclosure from certain large business purchasers may be of limited relevance ... "

And you can read the reasons they give for that there. I'll give you a chance to read it before I start talking again.

MS LUCAS: Yes. Yes, I've read that.

MR GIBSON: So I'm not overstating the point. I accept my learned friend takes a different view, but from our point of view, given, you know, the way we run litigation and mindful of that comment, we didn't think it necessary to approach people of this type to seek this formal disclosure. So this is very much --

MS LUCAS: So even if you transfer it to the class members, as the Defendants have requested.

MR GIBSON: I think there's a risk -- first, let me say that I don't exclude the possibility -- which is where I was trying to get to, I got distracted as I often do -- we don't exclude the possibility of that being appropriate in some cases. It may be that a conduit approach, if you want to put it that way, allied perhaps to a joined up approach, could be routed -- you get together, you think: we're going to need -- in a different case, we all accept that this group of representative persons are going to be helpful and we should think about what questions we want to ask of them.

MS LUCAS: And do it all at once.

MR GIBSON: Do it all at once, very much the way the President discussed at the February CMC and that may well be appropriate. Obviously, we see the good sense of that and I hope we've made that clear. We're just looking very much at the facts of this case, how this particular application has arisen and what we think we wouldn't want to have is a default assumption that it should always be the class representative to do that, in part, speaking frankly, because of the cost implications of that. You'll appreciate that any collective proceedings of any class action is generally -- I'm not aware of any that aren't funded and, obviously, funding is done on the basis of budgets and there's assumptions and all that kind of thing, and anything that deviates from those assumptions can cause problems. And even if there is now a new approach taken by the Tribunal so that people know in advance, that can be

built into the assumptions, it just increases the cost envelope and then you have the question of viability being an issue. And I'm not saying that's actually the primary issue here, but as a matter of principle, I can see why it would be something that the Tribunal should keep in mind in considering what's, overall, the best solution.

MS LUCAS: So if the Tribunal is asked to sign off a letter saying that these requests can be made, adverting to the possibility of a hearing, I mean, in the world that I was just putting to you, the Class Representative, we would see that beforehand and be able to assess whether or not the request was even reasonable or proportionate. And then what do you say about the possibility of there then being a hearing even before the class members are contacted at all about the scope of the disclosure that is going to be sought from them, if your class representative is looking after their interests. Is it appropriate?

MR GIBSON: Well, I say it's looked after in the following way. Firstly, one needs to draw a line somewhere in the interests of proportionality and my learned friend makes the point that you could have any number of communications voluntary with any number of people and whilst -- if money were no object and time were no object, you may say the class representative should be looking at all of them, that would be the purist way of actually protecting interests of the class. We say that wouldn't be practical or proportionate, so the line has to be drawn somewhere. The line has been drawn, as we put it, with the trigger being around the hint of compulsion and, as I said, we fully accept that any line that's drawn, you can find instances either way that that may not be precisely where would you have drawn it in this case. As a matter of principle, we say it's a good place to draw the line and one that works.

Consistent with that, we say that we should be allowed to comment on any application. We don't say that we're required to see the application in advance as a matter of requirement but, as a matter of pragmatic good sense, we say that -- we would

encourage the Tribunal to encourage the parties, as indeed the President did, we think very clearly in the February CMC, to endorse that encouragement, without requiring it of them to say: if you want to make an application directly to us, we'll hear it, but the discussion today -- when we come to look at the letter, I actually think that the scope of dispute in relation to the draft of the letter is quite slight now. My learned friend takes the principal position that we shouldn't comment on it at all. I accept that. We obviously disagree, but if you are going to look at the letter, which we say you should, then I think when I go through it, you'll see that we can narrow the disagreement quite quickly. And that could have been done regularly in correspondence and solicitors regularly debate things and narrow things. Most applications, when they come before a Tribunal, there's already been a sloughing off of some of the more extravagant positions both sides do. When people focus their minds on the possibility of trying to make their position out to a judge, it tends to be quite a sort of focusing exercise.

So in relation to if we're in a sentence two situation, so there's that penumbra of compulsion in the background, that triggers the need for us to be involved and that can be done in one of two ways. We say it's more efficient, not required, for us to comment in advance, but if that doesn't happen, then yes, an application can be made to the Tribunal. It doesn't need to be made in writing. Sorry, it doesn't need to be made by way of an oral hearing. As I said earlier, we fully understand why that's happened today and we support that. We welcome the opportunity to discuss this, thrash it out and a ruling on that basis is going to be more useful for other users of the Tribunal and its regime, so that's all to the good. But I think I heard my learned friend say that somehow, if you took the approach that we're advocating, we'd have endless hearings, with endless costs and I think I've touched on that already, but we don't accept that at all. We think it can be dealt with in a much more streamlined fashion. In most cases, there may not need to be a hearing at all, if the parties can come to a

sensible position. If the Tribunal says: "if the parties can agree, subject to the supervision", which would be: "here's an agreed proposal, here's a consent order". Obviously it's within the gift of the Tribunal to say: "Not happy with it" because you have an important supervisory role as well. We don't suggest that we can bind you on that. But in most cases, if both parties come up with a sensible position, the Tribunal can say: "Fine". Not minimal stamping, exercising their mind towards it but it's not going to take up a huge amount of time. In the cases where there is still a narrow scope of dispute, I would submit that it can normally be dealt with on the papers, as indeed many of this sort of process is done and in the extreme situation, the President has taken the approach in the Boyle case, for example, of saying he can make himself available to deal with disclosure things on an ad hoc basis in very short order, I assume half an hour/an hour before a normal sitting day, which is very generous of him, but he's obviously an absolute work horse when it comes to getting through material, so that's one option. We don't say we even would need to get to that. In most cases, either it would be agreed or could be dealt with on the papers and any hearing could be kept on a very narrow focus. So we think that this regime works very efficiently.

I'm conscious I've talked a lot, but have I answered the question you were asking?

MS LUCAS: I think you have. I'm wondering if there is scope at some stage in the procedure, and I accept we've got to the position that we have in the case that we have, for applying some consideration at an earlier stage in the proceedings as to what communications are likely to be required with class members and how they're likely to be best handled. That's an issue for another day.

MR GIBSON: It is an issue for another day, but if I may on that, I think the distinction between a joined up approach, which I think is absolutely sensible and should happen in all cases where it's possible to achieve it, particularly if it does turn out that both

sides want to send a letter to the same person, and an approach which requires the class representative to be the conduit. The former -- I'm dealing with the next question as well. We say in both cases we don't rule out the possibility of it being joined up or being a conduit. Albeit that in this case, neither actually is appropriate. But I think it's more likely that a joined up approach will be helpful or at least, I should say, a conversation about whether or not a joint approach is possible. And as I said earlier, in my earlier submissions, the only way you can find out whether you both want to write to someone is if you actually talk to each other about it and explain: "Well, we're going to do this." and, you know, that kind of conversation I think does need to happen. It could be that it becomes a feature of an early case management conference, people have to turn their mind to disclosure and that's, again, not an unusual feature of Tribunal procedure and that, we would say -- encourage the parties to talk about what they're going to do, think about what they want to approach by way of disclosure, get together. If one says: "I'm not interested in that but I would like to see a copy of the correspondence because I'm the class representative and it's coming from my class." then that's one thing. But I think that's probably -- I'm just going to check my submissions on questions 2 and 3, because I might have saved some time there.

In this particular case it was not jointly considered data, and my skeleton deals with this, but we see the obvious sense in what the President says, that "people should co-operate to work as agreed and as far as possible agreed." And that's the February CMC's transcript and the brief comments in the communications ruling which I won't go back to and in relation to whether it should be the conduit, as I say, we don't exclude the possibility of us acting as class representative in a different situation but generally acting as a conduit but we would caution against making it a default, or certainly not in all cases because of the potential cost implications. I think it would be appropriate particularly where, in the interests of the defendant, the defendant is the one that's

driving it, the defendant should make a decision about whether to do that. And I respectfully agree with my learned friend's submissions on the position in this case. I think we're ad idem on that. I'm not sure what my learned friend's position would be in another case but that doesn't really matter because we're not dealing with that now. So that's questions 1 and 2 of your questions.

I'll go back, if I may, to the privilege point.

MS LUCAS: Yes.

MR GIBSON: So I think where I was on the privilege point is to say the represented person is not a party but they're about as close as anyone who is not a party is going to get to being a party, if I can put it in that sort of contorted way. They stand behind, very close behind the Class Representative, in terms of their interest. They don't stand behind him literally, because the whole point is they're not supposed to be involved in the process and it's more efficient for them not to be. You can't ignore their interest in the claim and the outcome of any disclosure application. And I don't think anyone would sensibly seek to argue that an inter partes communication actually between a claimant and a defendant would attract privilege, even though it is a communication for the dominant purpose of litigation. My friend, I know you're not saying that, once you've realised that we're dealing with people whose interests are -- this is their claim. I think that one can see that to view privilege without looking at it through that prism, I think would be myopic perhaps.

There's also a question about confidentiality and my learned friend rightly points to the passage in Hollander about how to look at confidentiality in that slightly attenuated way that Mr Hollander suggests you should look at confidentiality in this circumstance. I haven't gone back to look at the authorities he cites to see whether there's any nuance to that but the nuance that's in the text is the acceptance that a witness will usually be free to repeat the information to others, including the other side, and so we

don't think it's a huge stretch to see that you do look at the relationships involved, in deciding whether privilege is appropriate and I would say that principle is completely consistent with the submissions I'm making about the importance of looking at the class members as members of the class, not as pure third parties.

With more time -- I'm afraid yesterday was a bit of a rush, trying to complete the skeleton for the judicial review that's due later today or tomorrow morning. My solicitors will tell me the answer to that. I'm afraid in the circumstances, whilst I was diligently looking through the books on disclosure and privilege, I couldn't find the example that I was hoping I would find and it's always more difficult to find an example of the exception rather than the exemption of the general rule, where, to furnish the CAT with some analogies, it would actually cash out the point that I'm making, because I feel that, with time, one probably could find them in the case law:

For example, it seems to me possible, indeed quite probable, for the court to confirm that a communication from one party to the litigation, addressed, for example, to the director of another party to the litigation, director of a company where it's a corporate party to the litigation, would not be covered by privilege because the recipient director should not be prevented from disclosing to his or her fellow directors the fact and content of a letter received from a party who is acting adverse to the interests of the company they all represent.

That seems to me to be a principle that would either make sense but I'm afraid to say, I do not have an authority to make good on that. Even without the authority, because we're dealing with a situation that I doubt has ever arisen before, in the sense that we are dealing with a new regime that's only been alive for a few years and it's really just getting to the business end of things now, I think even if there isn't authority that deals with precisely what I've just described, this is a situation that requires careful thought and distinction, and for the reasons that I say, that example and the wider principle

I've just said, illustrates the inherent implausibility of asserting litigation privilege in respect of communications, without considering the particular interests of the two parties to the communication in question, in respect of that communication. So here, two parties whose interests are in conflict. It's presumably considerations along these lines that led the President to conclude that he did not rule out the possibility of the parties coming to an agreed position on the content of communications from defendants to class members and that's paragraph 28(2) of the communications ruling at tab 10, page 221.

I would just note that the judicial review does not challenge paragraph 28(2) of the communications ruling. The statement of facts and grounds we don't have before us at paragraph 5. It's clear that it's challenging the rule in paragraphs 14 and 15, as applied in paragraph 27. So the wider comments about the way the regime might work and the like, are not the subject of the dispute in the judicial review, at least not in the way that's been described in the statement of facts and grounds.

So that's the second point I say in relation to privilege.

So the first point was about documents. The second one was about looking at the position of the Class Representative specifically and the third, very much alternative argument, is that even if there was a credible argument, these communications between the Defendants and the very persons against whose interests they are defending these claims, should attract privilege, then it's highly unattractive of the Defendants to raise this complaint when, as already noted, it would have been open to them to protect their privilege simply by refraining from making the paragraph 18 reference in the letter as to the possibility of seeking to make an order to compel disclosure. And we're back here to the point that you and I discussed a moment ago. It would have been open to the Defendants to explore the possibility of asking a represented person to provide them with testimony or to protect that exploratory

contact and to protect that exploratory contact with alleged privilege. And, as I say, if such privilege exists which we don't accept, simply by framing the draft communications in purely voluntary terms. This must have been obvious to the Defendants and, indeed, it formed one of the planks of my learned friend's submissions and one can only assume the inclusion of a single gratuitous paragraph like that, adverting to the possible application, was deliberate. My learned friend says it was to be fair to the represented persons contacted. We note that the Baker Botts letter of 9 August, which I referred you to earlier -- I think it was at tab 20. Let me just double check -- doesn't include such provision and it didn't strike us that that letter smacked of being unfair. So we would say, with the greatest of respect, we don't think that's the primary driver for the inclusion of this paragraph.

MR PICCININ: Just to be clear, I wasn't purporting to give submissions on what the subjective motivations for drafting that letter in one way or another were. That's obviously privileged --

MR GIBSON: I'm happy to withdraw that, if that's a submission.

For those reasons, the Class Representative respectfully invites the Tribunal to proceed as the Class Representative had proposed in its letter of 25 September, namely to allow the Defendant to send the proposed communication to the other party, subject to the Defendant first making the edits to the draft communication as had been proposed in the mark-up enclosed, subject -- I'm going to come on -- to the fact we can narrow those points further. Two, to require the Defendant to copy the Class Representative to the communications and to ensure that the Class Representative receives copies of subsequent communications because they follow on from this initial communication in which the possibility of compulsion has been mentioned. And then, three, to require the Defendant to provide the Class Representative with any documents or information which the Defendant receives through this process without

a filter, in full, and promptly on receipt.

I think that's largely dealt with most of the questions that you had raised yourself, Madam, but I would touch on -- I think we dealt with question 1, we dealt with question 2. Question 3 is in relation to the narrowing exercise and I think it's helpful to look at the letter if we do that. Question 4 I've essentially dealt with already by way of privilege. With that in mind, I'm going to look at the letter and look briefly at some of my learned friend's submissions, just to sweep up points that --

MS LUCAS: Thank you.

MR GIBSON: So the letter -- I'll have to remind myself where it appears now.

It's most convenient, I think, to turn up the mark-up that we proposed, which is at page 696, behind tab 30 and to read that -- I'm going to take the page out, because it would be easier to look at them next to each other. I don't know if you can achieve that on the screen in the same way. So page 703 contains the list or schedule, helpfully listing the objections that my learned friend's clients take to the edits that we proposed.

MS LUCAS: Yes.

MR GIBSON: So I'll just take them as we go. The first one was the objection to the insertion of the basis for their understanding as to the recipient of one of the largest fleets of vehicles. We don't press that point, but we would observe that the Baker Botts letter actually did include something precisely to that effect in paragraph 6 on page 672 at tab 20. So --

MS LUCAS: So that's what its genesis was but you're not pressing that.

MR GIBSON: We don't think it's an unreasonable request and my learned friend has made passionate submissions about the fact it shouldn't be included or its appropriateness, but as I said, the Baker Botts letter includes something to that effect, so we don't press the point.

MS LUCAS: Yes.

MR GIBSON: Paragraph 5, the first of the two insertions, the option 1 wording, we fully accept, now that it's been explained in the course of submissions, written submissions, that they're only going to be approaching the people that they'd already approached for the July 2022 letter situation. We accept, obviously, that it's unnecessary to have either or wording if there's no-one that falls into the either category, so that too can be ignored. The second change to paragraph 5 in relation to the option 2 wording --

MS LUCAS: Yes.

MR GIBSON: -- we do maintain. We've heard, obviously, the conversation between yourself and my learned friend and we would respectfully suggest we don't think it's an alternative to remove reference to the letters altogether. We think the letters -- there's a risk. If we don't mention the letters and contextualise them and contextualise them in a way that makes pellucidly clear the way that the Tribunal viewed them, then there's a risk that the people, as recipients of this, are going to go back and pick them up anyway. "I think I got a letter from these chaps a couple of years ago." If that's not consciously addressed and the nature of these letters properly described -- we think we've done it, actually, in a reasonable way, and I'll come on to describe what we've done. But something that contextualises it in a way that makes clear that these letters should not be relied upon and were inappropriate, I think is essential, if they're going to write to the same people again.

MS LUCAS: Yes.

MR GIBSON: As to the particular points about that, I think my learned friend said that it was irrelevant because Rule 63 won't be appropriate to Rule 62. I can't remember the exact nature of his submission. I think we touched on this earlier. We don't accept that Rule 63 is irrelevant in the context of dealing with represented persons, albeit that

there's Rule 89. It's a bit like the point I made about looking at them as third parties with a particular hat on. If you're making a Rule 63 application, which may or may not be possible, we need to think more about it, you're obviously not going to do it without regard to the fact they're class members. That's going to be an additional feature of whatever you do under Rule 63. Whether you go under Rule 89 or 63 with an 89 gloss, I'm not sure would be an appropriate way. We don't accept it's entirely relevant to make the change that we put in there for that reason and we don't accept that it's complicating either. The complication, if there is one, arises from the fact that my learned friend's solicitors chose to write in a way that's being censured by the Tribunal. So we don't think we can be criticised for maintaining reference to that now.

Also there's four points addressed in the footnote, footnote 1 of page 697. It's so small to look at. The first is we note you're not a claimant. My learned friend on that said the Court of Appeal has used the phrase "claimant" and we accept that. But there's a world of difference between the Court of Appeal in the judgment using that as a shorthand, albeit one that's not as precise as it might have been, and using it in a letter to the people who are at risk of thinking of themselves as a claimant. Some people are familiar with litigation and know the obligations that come from being a claimant. Some people know the difference between being a third party. I think it's important, when you're corresponding with the person who's being labelled in this way, to be much more precise than the Court of Appeal is in its judgment, with the greatest of respect to the Court of Appeal, because you're dealing with the person in question. So we don't accept it would be wrong to raise that point. There's a point there, "nor is there any obligation on you to take legal advice." We think that's a fair point to mention, "or to preserve documents", that's a fair point to mention and we think it's also important to reference the CAT's ruling, for reasons you yourself have given and the fourth point, the content of this letter has been shown to the Class Representative in

the CAT prior to the sending, I think is important and actually helps my learned friend's clients because that's what gives this letter, subject to reaching a point where we're happy with the wording, the imprimatur of being okay, in stark contrast to the previous letter. And I think that will be important. If you're showing them the fact there was this criticism of the way the letter in July 2022 was written, I think that's part and parcel of actually correcting that, insofar as one can shut that stable door after the horse has bolted and run off half way across the field. This is the best we can do. I don't think we should be criticised for trying to do the best we can in that circumstance.

That's the point we wanted to make on paragraph 5.

Paragraph 9, I think essentially my learned friend's objection was that this was their letter, so why should we be writing that and changing this paragraph? To which we would say it's our position you're describing, writing to our class and in the battle between "our letter" versus our class and our position, we would say that our position and our class should trump "our letter".

Are you with me on --

MS LUCAS: I think we skipped one of the paras.

MR GIBSON: We've skipped 6 and 7 --

MS LUCAS: Yes.

MR GIBSON: -- because no specific objection was taken in the schedule I'm looking at on page 103.

MS LUCAS: No, that's fine.

MR GIBSON: I fully accept my learned friend's primary position is none of these changes should be made.

MS LUCAS: Yes.

MR GIBSON: I accept that, but I was focussing on what I had understood to be the areas of primary dispute.

MS LUCAS: That's fine. Paragraph 9.

MR GIBSON: To the extent they are objecting, we would say all of those changes are working clarifications to make the letter more precise and more balanced and I'm not intruding on the rights of them to characterise the requests in the way they want. It's contextualised in the way we think is entirely appropriate.

MS LUCAS: I think there's an objection that it didn't summarise your client's case as he understands it to be.

MR GIBSON: Are we on paragraph 9 now?

MS LUCAS: Paragraph 9.

MR GIBSON: Okay.

MR PICCININ: Yes, Madam. In essence, that is not the way we would describe their case. The way we would describe their case is the way that we had drafted it and so my learned friend says: well, it's his case so we should describe it in his words but it's our letter, setting out how we understand the Class Representative's case. The problem with this is he's asking us to give our description of his case, in words that don't match up with the way we understand it.

MS LUCAS: Yes.

MR GIBSON: I think to the extent that they can point to elements of our pleading which are inconsistent with what we're saying now, we're all ears. Unless that is the point. To the extent that it's a question of how they want to present the case, given that it's being written to class members who we represent and it's in respect of our position in respect of how we are representing them, with the greatest of respect, I do think that our interests trump theirs. If there's some specifics about whether this doesn't match up with the pleading, this is precisely the kind of point that should have been dealt with in correspondence and could have been very neatly addressed. They should have said: paragraph 56 of the statement of case just doesn't reflect this point.

We would have gone away, realised there had been some infelicity in expression, and we would have changed it. But the general point, that if you're describing the position of a party who happens to be the class representative in respect of the class that they're representing and I think maybe in the unusual circumstances where they said the words are right, it's a reasonable thing to say, that's not how we put our case: please will you express it as we've expressed it, in circumstances where it's going out to the class we're representing. I don't think that's an extravagant or unreasonable position for us to take.

MS LUCAS: Is the way that the Defendants describe it actually wrong? The last thing the Tribunal really wants to get involved in is negotiating the terms of a sentence. I mean, is it actually wrong?

MR GIBSON: I hesitate to get into it precisely because it's going to go -- we submit that the changes we made render the paragraph accurate to how we reflected the case. What I would respectfully suggest would be helpful is if you make a ruling on principle, that, as a matter of principle, a reflection of a position taken by a party, that party should be able to suggest wording that they say is accurate or more accurate, unless the other party can show that it's inconsistent with something they said in their pleading. As a point of principle, that's a fair point to make. I'm just hesitant to try to get into debating the precise wording of that, without understanding what it is they say is wrong by reference to our pleading and I'm not sure this is a particularly fruitful --

MS LUCAS: I appreciate that Mr Piccinin will say this is exactly the kind of debate that we want to avoid if there is going to be a hearing like this.

MR GIBSON: I appreciate that, but it's the kind of thing that's most usefully focused in correspondence, where people actually have time to go back and look at the detail of what are pages and pages of pleadings to make sure that things are accurate. We say what we've done here is accurate. If they have a proper objection by reference to

the pleadings, then that's something that could and should have been dealt with in correspondence, we say.

MS LUCAS: I hesitate to say it, but I were minded to make a ruling in principle, do you think that the two parties could agree the text of this sentence if, and Mr Piccinin, I'm not anticipating anything, the Class Representative -- I find the Class Representative is entitled to at least propose amendments?

MR PICCININ: I think it's very difficult to say that in the abstract. I mean, the comments that are being made on our draft letter are comments the Class Representative accepts it couldn't make on a letter that was sent -- on a voluntary basis and it's got nothing to do with the fact that it refers to the coercive power of the Tribunal. So my submission is this is exactly the kind of thing that you shouldn't be bothered with. It's just party/party correspondence. But, I mean --

MS LUCAS: I'll come to you in reply.

MR PICCININ: I would say, of course, that any direction you give us, we'll do our best in accordance with our duties under Rule 4, like we always do.

MS LUCAS: Yes. Thank you. Sorry, Mr Gibson.

MR GIBSON: Not at all. I don't think that the parties are that far apart on this point. This isn't the kind of thing we want to be troubling you with. We say it's something that could be dealt with quite simply. The point being, this isn't just normal party/party correspondence. We're going round and round, but this is correspondence with the class in respect of the Class Representative's position, so I think you have my point and I don't intend to put it any further.

So there's another point. The additional wording that they propose, if you look at page 703 --

MS LUCAS: Yes.

MR GIBSON: They say: if you're going to insert this wording, then you should put in

place these additional qualifications and it may be this addresses the point we're debating. You see on page703, the box in relation to 9. We're content to include that wording.

MS LUCAS: Thank you.

MR GIBSON: So I think that may be the way of resolving what we discussed there.

MS LUCAS: Yes.

MR GIBSON: Paragraph 17, and again, I'm skipping over the paragraphs that aren't referenced in the schedule. Paragraph 17 takes objection to how we've addressed the issue of costs.

MS LUCAS: Yes.

MR GIBSON: Having heard what my learned friend has to say, if the letter reflected what my learned friend said, namely we're not going to commit to paying costs until we know what the costs are, and that's the sole caveat to us paying costs, that could neatly be reflected in a letter and would address the concern we have. What we're concerned about is the phrasing that it currently is, "would in principle be willing to pay", is far broader and far more open to them taking a different position for other reasons. If the only reason is an understandable reason not to commit themselves until knowing what the costs are, we of course understand that and we think that that could easily be reflected in the wording in a more accurate way. It may be, again, the parties don't have a great deal of distinction between them on that point, if the wording is changed to reflect my learned friend's submissions.

The last point we had was at paragraph 21, which I think is picked up by the submissions I've already made. This is about copying them in on correspondence and the subsequent letters, which I think we've covered.

MS LUCAS: That's the point of principle.

MR GIBSON: The point of principle in relation to communication and privilege.

MS LUCAS: Yes.

MR GIBSON: Or alleged privilege, I should say.

So that deals with the detail of the letter and the only thing we would also say is we do maintain that it would be appropriate to refer to included brands but you have our submissions on that already in writing, I don't propose to take it further. Can I just check instructions on that one for one moment? **(Pause)**.

Sorry, my solicitors have said that paragraph 9, it is a misleading over-simplification of their case, as is borne out by the fact they made those changes, but they being much closer to the detail, have confirmed they do maintain that position, in response to the question you asked.

MS LUCAS: Yes, thank you.

MR GIBSON: It just remains for me to check if there's any points, sorry to vex you further, any points arising from my learned friend's submissions I would like to touch on. I think some of them I've dealt with already.

Yes, my learned friend made some points around how they could have approached things differently, i.e. not including paragraph 18. They could have included everything but paragraph 18 and then sent a shorter letter, just making that paragraph 18 point after the event.

MS LUCAS: Yes.

MR GIBSON: To which we would have said: the first letter you wrote, voluntary; first sentence regime, we agree. But once you then write a letter that is following on from that other one which then puts it in the compulsion, it would obviously make sense and would require, as a matter of fairness, for us to see the previous letter and to address any defects in that in writing to the letter as part of the Rule 18 letter, if I can put it that way.

MS LUCAS: Yes.

MR GIBSON: So yes, it may mean that initially at least they avoid our involvement but once we are involved, we're entitled to look back at what's actually been done immediately before, because the artificiality of not doing that is presented by the way my learned friend put his point in submissions. He also puts the point they could have gone straight to a formal application. Again, yes, they could have done that and we've addressed our position in relation to how we would say an application would need to be dealt with.

One of the points that my learned friend said, both in his introductory remarks and at this point in his submissions, was talking about the only reason, as he put it, being -- for the rule and this regime -- is to guard against inappropriate -- I can't remember what word he used, but the type of behaviour that was censured in the July 2022 letters --

MS LUCAS: Yes.

MR GIBSON: I'm not trying to misrepresent you.

MR PICCININ: The submission I made and this was the overarching point throughout my submissions was that the scope of the Tribunal's enquiry in an application under paragraph 5 of the April 6 order, is informed by the trigger for that application needing to made. In other words, it should be focused on any unfairness or other problem that calls for intervention that is connected to the reference to coercive powers of the Tribunal. It's not an opportunity for a free ranging discussion about whether other bits of the letter could be drafted differently or might be better drafted differently. It's focused on intervening ex ante to avoid references to the coercive power of the Tribunal from causing some unfairness or some other difficulty.

MS LUCAS: Yes, and I think you said that, in order to assess that correctly, you would actually only have to --

MR PICCININ: Read the whole letter, obviously.

MS LUCAS: Consider it in the round.

MR PICCININ: Yes.

MS LUCAS: But yet, the focus, you said, was on the trigger issue.

MR PICCININ: That's right, and everything needs to be -- both the submissions that are made by the Class Representative and any intervention from the Tribunal on whether the letter could be sent or how it should be sent or what it should say, all should be geared towards that, addressing the unfairness that arises from the reference to the coercive power of the Tribunal.

MS LUCAS: Yes.

MR GIBSON: I'm very grateful to my learned friend for his clarification. It's important when I'm addressing the submissions he makes. I apologise for misconstruing that. Nonetheless, I actually think the point I'm making is still good which is there is obviously one version of events, where you look at it in the narrow way that my learned friend describes. We would urge you to look at it more broadly, for the reason that the way in which the communications ruling looked at things, was, as I discussed earlier, not resting solely on the concern about the inappropriateness of the reference to the possibility of disclosure, which was obviously one of the things that we were concerned about in making the original application objecting to those letters. But also, the point that the President rightly picked up on in the paragraph 28(2) point, about not creating a litigation free for all, which obviously is in some ways related but we would say is a separate strand, if we put it that way, and provides an independent reason for what the Tribunal's concerned with here. So I'm grateful to my friend for clarifying his point but I still think the point I'm making is of utility and force in that context. We don't need to guess, with respect, as to what the Tribunal's rationale was for putting in place this regime and what we should be doing in this case because the President and the Tribunal in that judgment, made clear that it was about both those things. So I think a fair reading of the background to where we are today, supports my position that you're

looking at two things. Albeit that they sometimes may overlap, they are two distinct issues to be addressed.

I think my learned friend made point about practicality and the good use of resources for us wordsmithing, as he put it, a letter. I think we touched on this already. Parties do, and the CAT does, look at the detail of disputes between the parties and try a narrow things and that often, being lawyers, does come down to the words used. I've already said it doesn't need to be a hearing. The scope of the dispute, I think having gone through the letter between us now, is actually relatively narrow, particularly if you deal with the last point of principle as being one that's addressed either for or against on that point. The drafting falls out of that. We say it could be done on the papers and we don't accept it needs to be impractical or disproportionate or off the scale and also, in making that submission about what parties generally do, it ignores the point I pressed upon you about needing to look at the specificity of this regime and the context of the Class Representative and I've made that point briefly.

We don't think it's more or less efficient to go through the route that we've currently done, as against the other options my learned friend described. We think it's a matter for the Defendants to decide how they want to go about pursuing a tension of evidence in this way and we don't accept the submission that it's necessarily less efficient to do it one way or the other.

Forgive my while I double check. I don't want to make points that have already been dealt with sufficiently.

No, I'm just going to check there were no further comments from my -- thank you. That's all my submissions then, unless I can be of further assistance.

MS LUCAS: Very helpful. Thank you.

Submissions in reply by MR PICCININ

MR PICCININ: I hope I can be relatively brief. I have two preliminary remarks and then I propose to turn to the substantive submissions that my learned friend made.

The first preliminary remark is just as to the scope of what we're debating here today, because I'm afraid my learned friend made extensive submissions in relation to other aspects of the evidence gathering activities of the Defendants generally and he took you to particular letters which constituted evidence gathering requests and then correspondence between those firms of solicitors and the Class Representative's solicitors about what they would do or wouldn't do with any information that they received pursuant to those letters.

In some instances, although it wasn't entirely clear to me on what basis the submission was being made, criticism was made of some of the responses from some of those Defendant solicitors and the point that I just want to make at the outset is that I've been instructed by the Defendants that I identified at the outset to attend this hearing, to make the application that we've made and that the Tribunal has convened a hearing to hear. I'm not instructed by those Defendants -- I mean, one of them, I'm counsel for in the case generally, but I'm not counsel for the other Defendants generally and I don't have instructions to defend or argue the toss on any of those other pieces of correspondence or what should or shouldn't be done with any documents or data that are received pursuant to those letters. And I would just say that, just before you intervene, that if the Class Representative is concerned that it's not being provided with some document or disclosure to which the Class Representative considers that it's entitled, the proper course is to make an application for specific disclosure. We have a regime already in place governing disclosure between the parties.

MS LUCAS: Yes.

MR PICCININ: And then, if you make an application in the proper way, it can be responded to in the proper way and I am not here to do that today. I don't know --

MR GIBSON: All I wanted to do is say the submissions were made -- I hope they were to contextualise the way the different approaches can be taken and it was in that spirit they were made --

MS LUCAS: That's the spirit in which I understood it.

MR GIBSON: Indeed, and my learned friend, I accept he can't make submissions on behalf of people who are not here and I'm certainly not expecting him to do so.

MR PICCININ: I'm grateful for that clarification, I just wanted to make it clear what was or wasn't in scope.

The second point is I just wanted to make a submission, trying to clarify where it is that we stand at the end of this hearing, because some questions and positions have been floated from the chair, understandably, entirely properly, others have been floated from my learned friend and, as I understand my learned friend's submissions, at the end of this hearing, when the Tribunal gives its decision, assuming that the Tribunal approves the sending of some sort of letter in some sort of terms, my client would have three options. One would be to send the letter in the form that is approved by the Tribunal, assuming of course, that you say that we can send it rather than the Class Representative. That's the first option. The second option my learned friend didn't canvas, because I think it was implicit, was we could decide not to send the letter. So we could decide that, in light of the way this game has ended up being played, and all the strictures that are put on it, actually, it would be better not to go out and gather evidence of this kind and just see what happens in the litigation, fight with one arm tied behind our back and we get to where we get to. So that's a factual decision that could be made.

MS LUCAS: Yes.

MR PICCININ: In principle. And then the third option which I think followed from my learned friend's submissions but I'm not sure what the Tribunal's position on it is, is

that we also send the letter without paragraph 18. In other words, we could send a letter that has the same substantive disclosure requests, says all the same things about the substance of the case or different things, if we're minded to say different things, doesn't copy the Class Representative, not notified to the Class Representative or the Tribunal, no permission sought or needed and that's the way that the first sentence of paragraph 5 of the order that currently stands, stands.

So I put that out there not to say that that's what we're going to do. I don't have instructions. I'm acting for a number of firms. I don't know what anyone's going to do, but I do want to be clear about what the lie of the land is and this isn't a responsive submission, it's a plea to you, when you give your ruling, just to make clear whether that is or isn't the position and what the reasons are in either case.

MR GIBSON: I'm sorry to keep jumping up. Just to clarify our position. On the second point, it may be an inference my learned friend drew. We're certainly not saying that they shouldn't send the letter, that it's better not to, and that's obviously a matter for them. That's not what we're suggesting. We're suggesting the letter should be sent in a form that -- we've never objected to them sending a letter.

MR PICCININ: I understood that. All I'm saying is that we might choose not to send a letter, if we don't like the revised draft and everything that comes with it.

MS LUCAS: Yes.

MR PICCININ: That's all I'm saying.

MS LUCAS: Yes.

MR PICCININ: So I don't --

MS LUCAS: I'm glad you didn't ask me for a response straight away.

MR PICCININ: I just wanted to put it out there so you were mindful of that request for clarity.

MS LUCAS: That was the third option.

MR PICCININ: So I'll turn to the questions that my learned friend identified in his submissions. The first of those were, essentially, should the Class Representative be able to comment on our draft letters and my first submission on that is that it's the wrong question. There's no dispute about the fact that an application needed to be made to send this letter and that it's an inter partes application and so obviously the Class Representative is free to make comments on the application, including by reference to the letter. But the question, right question, is whether the comments that should be entertained by this Tribunal (and therefore should properly have been made) are limited to -- and this is the point I made earlier in my interruption -- limited to trying to deal with the consequences of the reference that is made to the coercive powers of the Tribunal, or whether the exercise is a drafting by committee free for all, where the Class Representative can make whatever points they want, even if they're points that could arise equally on sentence one type letters, for example, and don't take on any different complexion because this is a sentence two type letter, if you know what I mean by that.

MS LUCAS: Yes.

MR PICCININ: As in a purely voluntary letter, the same points might arise and they arise in exactly the same way and the Class Representative accepts that it wouldn't have any right to comment on those.

MS LUCAS: But you do get to this position where, if Mr Gibson says, "well, actually this sentence here we think..." and duly summarises and therefore mischaracterises our case, this is a sentence that we hope is not controversial, I mean, are you saying that he can't do that? I mean, admittedly you could have sent the letter with the description of the Class Representative's case that you prefer. But if he does say that, I think we are at a hearing, am I to ignore what he says?

MR PICCININ: Obviously you can do what you like with it and you can accept his

evidence or not. My submission is a bit of a meta one, which is one of the governing principles of this tribunal in Rule 4 is that they should be -- I'm going to misquote the words -- but they should be carried out proportionately.

MS LUCAS: Yes.

MR PICCININ: And saving unnecessary expense. Now, you might say, well, we're here now and all of the points have been made now and we've had almost a full day's hearing now, so I might as well decide all of the points and I could understand that. That seems logical. But what I'm concerned to avoid is a situation where those kind of comments are going to be entertained generally, because, if that's the world that we're in, then I'm afraid my learned friend -- I don't know what the basis is for his optimism to say that these things are all going to be agreed. Drafting by committee is not a good way to draft documents generally and it's very likely to result in disagreements. If we just look at what happened in this case, after they received the letter, which was many weeks ago, they -- I think it's more than a month ago, they provided us with their mark up, which contained numerous small points of detail and big points of principle, all of which we disagreed with, for one reason or another, the first time there has been any rowing back from that by the Class Representative, any constructive engagement with it or dropping of points is today on his feet, just a few minutes ago. I'm concerned that, unless we circumscribe the exercise in the way that I've set out or in some other way that marks it manageable, what we're going to have is, every time a letter like this needs to be sent, in this case or in any case, you're going to have that kind of drafting by committee. "Oh, I rather you described our case this way rather than that way", and someone saying, "No, I don't want to describe your case in that way rather than this way".

MS LUCAS: Yes.

MR PICCININ: And then you end up hearing that dispute, either on the papers or at

a hearing and either way it's just extremely inefficient.

MS LUCAS: No. I understand the point you're making.

MR PICCININ: That's why my submission, actually in agreement with my learned friend, is that there is a balance that has been struck in paragraph 5. I don't go so far as to say it's the right balance. Of course, we say there shouldn't have been a second sentence and the whole thing shouldn't have arisen. But, in so far as we're going to do this at all, it really does make sense to make the second sentence mean what it says.

Now, my learned friend says on this topic, as in it should it be a free for all or should it be limited to the purpose of the exercise, he says that the starting point is that there should be no communications between defendants and class members and he also referred to paragraph 28(2) of the communications ruling and he relied on that for the submission that there shouldn't be a litigation free for all, in which people just go sending letters to class members left, right and centre.

I have two observations to make about that. The first is that sometimes the submissions that he was making on that topic sounded suspiciously like submissions that were intended to elicit some sort of comment from the Tribunal about the reasons why the original class communications ruling was made and of course the background to that is that there is a dispute in the judicial review as to whether it is already clear from the ruling that the same order would have been made even if a different construction of the rules had been adopted. So that's something that we're all arguing separately in the judicial review and -- I'll just finish this point first -- and the Class Representative has written in the Tribunal to ask it to endorse the Class Representative's interpretation on that issue and the Tribunal quite properly, as you probably know, declined to do so, because of course that's not a matter for the judicial review --

MS LUCAS: I don't actually know anything about that correspondence.

MR PICCININ: You don't know? Okay. Well, there was a letter to the Tribunal and the Tribunal quite properly said that, as we said in our acknowledgement of service, we're not participating in the judicial review and we're not going to comment any further, and the judgment speaks for itself and the place to argue about why it was made or whether it was rightly made or all of that is in the judicial review, which is where I intend to argue those points.

In any event, it's all a red herring because of course it's not true standing here today that the starting point is that there should be no communications between defendants and class members and it's not true standing here today that paragraph 28(2) of the class communications ruling is all that the Tribunal has said on the topic of this kind of communication, because the Tribunal has actually exercised the supervisory jurisdiction that it referred to in paragraph 28(2) already. I don't mean once and for all, but it has made an exercise of that jurisdiction.

MS LUCAS: That's in the April order.

MR PICCININ: In the order of April. Exactly. So now, standing here in October, the starting point is as my learned friend right said actually, many times, that we are free to send a letter of this kind without paragraph 18. That's the starting point for this application.

MS LUCAS: Yes.

MR PICCININ: And that puts all of it in a different complexion and in my submission is the reason why the inquiry has to be a limited one, subject to the point of you deciding that you just want to deal with everything that's been made because we're here and you've heard it anyway. So that's a different point.

MR GIBSON: Can I briefly allay my learned friend's fears. Firstly I hadn't intended to suggest that the starting point was November. I accept the starting point is where we

are today and I think that was tolerably clear from my submissions, taken as a whole, and I'm sorry if one of my restatements may have caused any concern on that front.

MS LUCAS: No, no. I'm working on the assumption the 6 April in the two sentence paragraph --

MR GIBSON: Indeed. I think that my first sentence/second sentence got quite nauseating but it's hopefully clear.

Secondly, we are certainly not seeking to elicit anything by some subterfuge from you and we would strongly urge you from commenting in any way that could impact on the judicial review, as I'm sure you would be conscious of doing. So we can allay my learned friend's fears on that front too.

MR PICCININ: I'm very grateful and to allay my learned friend's concerns, I certainly would never have suggested that he intended to elicit anything by subterfuge. That wasn't the point at all.

MR GIBSON: Sorry.

MR PICCININ: No, no, not at all.

Right, so that's my submission on the main point of principle. There are two other points I need to deal with under this heading of should they comment. One is the suggestion that we should have written first and to some extent this is a bit of a red herring, like an unnecessary detour, because we are where we are now.

But since quite a lot was made of it, I would like to make just a few short points about that. One is that one aspect of the context for this application was that it was already I think -- it was September 23.

MS LUCAS: Yes.

MR PICCININ: And at that time, and I think still technically now, the deadline for this is December. So we're running a bit short on time. The second point I've already made, that this is not one of those occasions where there's any risk of hitting the same

class member twice, because we already know the Class Representative is not interested in this exercise of gathering data of this kind.

Then the third point is that, well, we've seen what would have happened if we'd written first. We would have got the response that we then did get. We would have responded in terms saying don't be ridiculous, all those are bad points. We then would have got the submissions that we got whenever it was, last week, and then we would have been here having the hearing that we've had. So on this particular occasion -- and I think this is an illustration of a broader point, that, if you create a process that requires the parties to agree on correspondence, that correspondence is going to be quite a lot more expensive than if you allow parties to get on with things themselves.

So that is in further support of my main point.

Yes, finally on this point, although I think you have this point, a practical concern that, if you endorse the, you know, free ranging let it all hang out approach of the Class Representative in relation to engaging with our correspondence, then costs are going to multiply and it's difficult to see what the limiting principles will be.

That takes me on to my --

MS LUCAS: Sorry, that's the point about whether or not they should be copied in on all the replies, is that right, or reply to all the documents?

MR PICCININ: That's where I'm coming next. Yes. So so far I've just been on the question of whether they should be able to comment on the drafting and to what extent.

So that topic I've finished with.

The second and third points that my learned friend made were about whether they should receive the replies and any documents and data that are produced and I was going to address those together now.

MS LUCAS: Yes. It's just you said that the costs would escalate and, copy in replies, would that necessarily escalate costs a lot? Would it necessarily escalate costs --

MR PICCININ: No, the costs points was a point about the commenting on the drafting.

MS LUCAS: Oh, I see. I'm sorry.

MR PICCININ: That wasn't the point. I'm moving on now to talk about -- I'm sorry, it's my fault not yours. But I'm moving on now to talking about the responses and documents, to which different issues arise.

MS LUCAS: Yes.

MR PICCININ: My learned friend's submission, as I understood it, was that the duty to ask for them to be copied in on responses and, if they're not copied, to provide the responses to them, arises because all of that future correspondence, and all of the documents that are produced under it, are following on from the original sin of a letter that was a sentence 2 letter. So because you've had a sentence 2 letter that triggered the Tribunal's jurisdiction to consider the terms of the letter in the first place, it follows logically that everything that comes after that needs to be provided as well.

My first submission in relation to that is that that's just a non sequitur and, again, it ignores what was the function of the Tribunal's review under the second sentence procedure itself, which is the same point that I've made before.

MS LUCAS: Yes.

MR PICCININ: If we'd gone through that process and the letter was ex hypothesi a fair letter that adverted to the possibility of an order being made in a way that was entirely reasonable and the Tribunal was happy with it, then that unfairness has been avoided. After that, if no one else is making any reference to the possibility of an order being made, we're just back in sentence 1 land. It doesn't follow at all that we should be required to produce that material.

Then --

MS LUCAS: What do you say about -- okay, we might be dancing on pinheads now, but what do you say if there was a toing and froing in correspondence with the class

member and then there was a letter to be sent by the Defendants which said we repeat our requests, we're not satisfied with your answer, we refer you to our letter of X date, which does advert to the possibility of proceedings? What would you say about that letter?

MR PICCININ: I think we would want to be careful in the way that we do it so that we don't inadvertently create a letter that is referring to that possibility and so we just need to draft our letters carefully bearing in mind the jurisdiction that the Tribunal has set up here. So either do it in a way that doesn't advert to that possibility, you know, doesn't remake the threat, if I can put it that way -- I mean, threat is the wrong word, but -- or, if it's necessary to advert to that again, which seems unlikely, then we need to apply for permission and that's the way that works under the order.

I think my learned friend accepted that this obligation to provide responses and documents and all of that only arises in these second sentence cases and doesn't arise in a first sentence case.

MR GIBSON: The obligation to copy us.

MR PICCININ: Yes.

MR GIBSON: I agree. The obligation to provide the documents at the end of the process, I disagree.

MR PICCININ: Okay, but for responses -- I'm sorry.

MR GIBSON: No, it's just the documents.

MR PICCININ: Just the documents. Right, and I anticipate then the reason why he wants the documents is the pre-existing documents, is what he's referring to, they're not privileged and they're required to be disclosed on some basis.

We can park those ones but the key point then for present purposes is he accepts that the subsequent correspondence, as in the responses, don't need to be provided to the Class Representative and so I say follows by parity of reasoning, if the first letter was

a fair one, then there's no reason why those responses, the responses to this fair letter, should need to be provided either.

MS LUCAS: What do you say about the point of principle though? That the Class Representative is bringing the claims of the class members and you are corresponding with them about those claims and you're suggesting the Class Representative not know what is said between the Defendants and the class members about the class members' claims.

MR PICCININ: Yes and no, actually. We're not saying that the class member is prohibited from communicating with the Class Representative at all or vice versa. So the Class Representative and the class member can communicate privately without us knowing about it to their heart's content. The class member is free to copy the Class Representative on their response to us, if they please. All of that is right.

The question we're debating here is a different one, which is should there be a duty on the Defendant to provide this correspondence to the Class Representative in circumstances where the class member has chosen not to and --

MS LUCAS: You're positing a positive view choice, of course.

MR PICCININ: Well, yes.

MS LUCAS: But it might not be a positive choice. It might just be we'll reply to the person who wrote the letter.

MR GIBSON: In my submission it doesn't matter whether they decide to or think about it or don't think it. It's worth remember here that we're writing to very sophisticated class members and we're addressing the letters to their -- I think it's the head of legal. So it's not like we're taking about a vulnerable person or indeed any natural person.

MS LUCAS: They're not witnesses pure and simple, are they? So if we think about the Hollander example in the book, class members aren't just witnesses.

MR PICCININ: That's right, and so I've been thinking about this in the context of

privilege, which is where this issue really comes up, and my learned friend did make that submission, albeit not supported by authority, that maybe privilege doesn't apply because, although they're not a party, they're sort of nearly a party, and we have several answers to that.

So one is suppose that we were sued by a large number of class members, or even just two of them individually, so not in collective proceedings, but just individually, and it doesn't really matter for now these purposes whether the proceedings are managed together or not. What I'm going to say applies either way. We could in principle communicate with one of them privately and receive information from them privately that would then be confidential in our hands and that would obviously be privileged vis-a-vis the other claimant, just because there would be nothing to take that out of the usual situation, vis-a-vis the other claimant who is suing us. So claimant 1 is suing us and we talk to claimant 2 and receive information from them about the facts of the case for any reason, it doesn't really matter why. Vis-a-vis claimant 1, we would have no obligation to disclose that material at all, because it's privileged. It's our communications with --

MS LUCAS: I mean, isn't the -- it would depend if it was relevant to the other person's claims.

MR PICCININ: Well, it doesn't actually, because if what we're being provided with is information, not pre-existing documents but information or a draft witness statement, for example, in either case, those are communications between us and someone who for claimant 1 is a third party and it's for the dominant purposes of our litigation with claimant 1. So that would just straightforwardly be privileged. The fact that claimant 1 and claimant 2 both have causes of action against us is neither here nor there. Now --

MS LUCAS: So in the example you're positing, your draft witness statement, are you

suggesting that in your first -- let's call them will proceedings A, claimant 1 against the defendant, and then the B proceedings, which is claimant 2. The draft witness statement you're talking about relates to which of those? Proceedings A or B?

MR PICCININ: Suppose they're the same issues in both cases and so we're going to be deploying it in both of them. Say they're being heard together. It doesn't really matter.

MS LUCAS: Now I am confused, because in proceedings A there is no privilege as between the claimant and the defendant, is there?

MR PICCININ: Well, that's where I was going next. Right? So obviously --

MS LUCAS: They're opponents in litigation.

MR PICCININ: That's not the point, Madam. The point is --

MS LUCAS: Okay.

MR PICCININ: Sorry. We talk to claimant 2 and we obtain information from claimant 2. There's no privilege vis-a-vis claimant 2 because the information and documents are in their hands just as much as they're in our hands. There's not confidentiality as between claimant 2 and the defendants because it's claimant 2 that's given us the information in the first place. It's their information. So of course we can't assert privilege as against claimant 2 but we certainly can assert privilege against claimant 1 and claimant 1 has no right to compel us to provide that information, those communications, with claimant 2. It's unlikely to arise obviously --

MS LUCAS: Because you're opponents in one set of proceedings.

MR PICCININ: That's right. So both claimant 1 and 2 are our opponents. Yes? Claimant 2 is providing us with something, some information, and my point is that for whatever reason --

MS LUCAS: In the course of the litigation against claimant 2, he provides information -- or it provides information, is that right? Is that the example you're

positing?

MR PICCININ: Sorry, I don't mean it serves on us a witness statement in the proceedings. What I mean is we ask it for information outside of the -- not within RFIs it's not in the form of a pleading, because pleadings aren't confidential.

MS LUCAS: Just inter partes correspondence.

MR PICCININ: That's right, just inter partes correspondence or taking a witness statement, because it might be an actual person. Either way.

MS LUCAS: You won't be taking a witness statement from the person on the other side.

MR PICCININ: I agree, but we're trying to address a question of principle about the law of privilege.

MS LUCAS: Yes.

MR PICCININ: And, when you come to apply what Hollander tells us about privilege, the point is there's no reason why that information should not be privileged vis-a-vis claimant 1. There's just no reason at all. It might be information that is -- just allow me to finish for a moment. I'm just trying to think about how it might happen. It might be information that is adverse to claimant 1 without being adverse to claimant 2. I don't know. I mean, it depends on the complexities of the litigation and they may have an interest in doing that because they don't like claimant 1. That's a possibility or it's in their interests for whatever reason --

MS LUCAS: But then you'd be communicating for a different purpose, wouldn't you? So if you've got inter partes correspondence in the course of one set of proceedings, that's one thing. If you then say, oh, by the way, claimant 2, you might be able to help us, we've got a claim from claimant 1, will you provide us with information relating to that, I can see that you might have something in your privilege argument. But I'm not sure --

MR PICCININ: But even then only vis-a-vis claimant 1. We could never assert privilege -- it would be nonsensical to assert privilege against the person who was provided us with the information.

MS LUCAS: Yes, exactly right.

MR PICCININ: That question, you can't even pose it. It's just a category error.

MS LUCAS: Exactly right.

MR PICCININ: But as against the other claimants, there's no reason why you can't assert privilege, because it's a communication that's for the dominant purpose of litigation and it's confidential in the hands of the defendant. Those are the requirements for the litigation privilege.

So we do say that that that sort of communication would be privileged and I should just make two other points about this. One is -- sorry, to complete that thought, the same is true here. So if a class member who was not a party to the proceedings is happy to provide us with information and doesn't want to provide that information or doesn't provide that information to the Class Representative, for any reason or none, then there is again no reason why we should be compelled to do so. It seems odd to compel to us do that for that class member's benefit when that class member could do it themselves and has chosen not to, and maybe they don't, you know, like class actions, maybe they don't like claimant law firms, maybe they've been sued by them before. Who knows? All sorts of reasons why a class member might not want to help the Class Representative.

MS LUCAS: Might not want to help the class, well, then they would opt out, wouldn't they?

MR PICCININ: Sorry?

MS LUCAS: Wouldn't they have opted out if that was there?

MR PICCININ: They might have, they might not have. I mean, we're speculating at

that point as to what they might or might not want to do.

But I would just make this point again, because this is an area where, if I might say so, this hearing has strayed a bit from the question that we're actually here to answer and I am a bit concerned that one of the Defendants in particular, K Line, is not here, and you may not know, but K Line actually had factual witness statements that they gathered in -- I think they were factual witness statements, weren't they -- at the certification stage of the proceedings.

Now, I don't know whether those people had or hadn't purchased vehicles in the UK. Most people, I suspect a lot of people over the age of 30 or so, have purchased a vehicle over the relevant period and if you were to articulate a principle that you couldn't have privilege in any communications with the person who was the class member, that would be very far reaching proposition not just in relation -- in fact its implications for this issue are virtually none. I can't really see how it arises, something you need to decide today. But for people who aren't here it's potentially very important and in other cases as well it's potentially very important. I mean, in the Merricks case, as I'm sure you know, there are tens of millions of class members, as anyone who was alive and bought anything in the United Kingdom with or without a payment card, so even by cash, during a very long period of time is a class member. So to suggest that -- and their claims are worth nothing, right? Next to nothing. Yet what they stand potentially to gain from co-operating with the defendant and having their costs paid or just the interests of justice or whatever, the reason they have for working with the defendant could well outweigh that and there's no reason why privilege shouldn't apply to that.

One more submission on this topic, although it is still subject to that point that this really isn't something you need to decide, but it is that this elision between the class representative and the class member is complex at best and really wrong actually. It's

true that they are pursuing in a sense the claims of the class members. That much is true up to a point.

But, when we're now talking about information and talking about documents, it's not true that the class representative is in the shoes of the class or has any relationship with them at all really. So you can think of this in a couple of different ways. There's no general obligation of disclosure that the class representative has for documents that are held by representative persons. That's one point.

Another point is that a class representative, not in this case, where they don't want facts, but in another case where they're interested in investigating the facts of the case, they might positively want to get disclosure of documents from class members and those class members might not want to provide it. So you could easily be in a situation where a class representative is actually making a contested application for disclosure from members of the class in the interests of the class but obviously not in the interests of that particular class member, who may --

MS LUCAS: Then doesn't this bring us to a point where in fact communications ought to be through the class representative --

MR PICCININ: No --

MS LUCAS: -- because then, if a class member doesn't want to provide them, but is happy to help the defendants, they can say, well, I'm not prepared to give you a statement, but I will --

MR PICCININ: No, the submission runs entirely the other way. The point is that the class representative is not the class member and doesn't have an identity of interest with the class members.

MS LUCAS: No, I'm not suggesting that.

MR PICCININ: Even in relation to documents. So, if there is a category of document -- I mean, I think we can all agree that there will be cases where it is

appropriate -- as Mr Gibson said, there will be cases where it is appropriate for a request to come from the class representative to class members.

MS LUCAS: Yes.

MR PICCININ: Usually that be where the class representative wants to obtain the documents for the purposes of litigation. But on that issue of conduit, we do say, in circumstances where the class representative is not the one who's seeking the documents, it's not the class representative's case that these documents are being sought to pursue, it's our case, actually our right to talk to these people who are not parties to the litigation and to ask them for information and documents shouldn't be interfered with.

I also struggle to see how this conduit point could work unless you were changing paragraph -- could make sense unless you were charging paragraph 5 of the order and it sometimes not clear whether the debates we are having are on the footing of the existing law or on the footing of a different order that hasn't yet been made.

MS LUCAS: No, no. So I think, to be fair to you, if any form of order in that form was made, it would inevitably cut across the first sentence of that paragraph 5.

MR PICCININ: Yes. Well, there would be a further difficulty with making that order today, which is, although you, sitting as the chair, certainly do have the power to make an order of that kind, you're sitting as a chair at a hearing at which some of the parties are not in attendance.

MS LUCAS: That part of the order only affects you, I think, doesn't it?

MR PICCININ: Sorry, is that ...?

MS LUCAS: Am I right, that part -- or does it affect all Defendants? Remind me.

MR PICCININ: I think so, because it was made following the CMC.

MS LUCAS: Is it all Defendants?

MR GIBSON: I think it's common ground that it affects all Defendants.

MS LUCAS: It is all Defendants, is it?

MR GIBSON: I mean, the whole regime is set up not just in the Defendants in this case, but to apply to defendants generally. The order in this case, the April order, is in respect of these Defendants. But unless there's some kind --

MS LUCAS: Can we check the terms of the April order? Where do we find it?

MR GIBSON: Forgive me if I've misunderstood the position.

MS LUCAS: Here we are. Tab 13 I think it is, is it? The Defendants in the McLaren proceedings and you're not representing all of these.

MR PICCININ: It's all 12 of them, yes.

MR GIBSON: That's what I was intending to say.

MR PICCININ: Yes. In that case I think we're in agreement. I think actually the same is true of the December one, but in any event --

MS LUCAS: Yes. I have that onboard now.

MR PICCININ: So I have strayed slightly from the privilege point to the conduit point.

MS LUCAS: Yes.

MR PICCININ: But just concluding on the privilege --

MR GIBSON: After you've finished -- sorry to trespass again. Because this point about the claimant 1/claimant 2 is I think new, I would just like to make one sentence in response to it when my learned friend has finished his point.

MS LUCAS: Yes. I was going to ask you about that actually.

MR PICCININ: Sure. It's new because it's responsive to the submission that was made.

MR GIBSON: No, I understand the context --

MR PICCININ: The final point I just wanted to make is that, in a claim of this kind, and actually a fortiori in other cases with even larger classes, it is just crucial that defendants have the ability to conduct the usual evidence gathering activities that they

do with the same protection of privilege that both defendants and claimants and class representatives do in all cases and, where you have numbers of class members and a fortiori where it's not clear to a defendant whether a person is or is not a class member, it would be seriously -- it would be a very serious inhibition on rights of defence to have a new rule of law or a new order that prevents defendants from gathering evidence in that way and, as I say, that has been common ground because the first sentence of the April order was completely common ground without it being subject to any proviso at all between the parties and even the proviso that was added by the Tribunal didn't interfere with that as far as it went.

So it was possible as of the April order that we could take witness statements from people without needing to tell anyone about it. I think we were all proceeding on the basis, or I suspect everyone was proceeding on the basis, that that was privileged, like it always is, and it would be quite remarkable and inconsistent with Article 6 rights if that were to be done away with today.

MS LUCAS: So I think that your submissions have put into sharp focus that there is difference, isn't there, or there appears to be a difference between what we started with in the letter which is essentially data and documents.

MR PICCININ: That's right.

MS LUCAS: And witness statements or proofs and information.

MR PICCININ: As between those things. I've been clear all along and we've never suggested that pre-existing documents are covered by privilege. I think they're just obviously not. That's not a special point about class particulars.

MS LUCAS: And just so I'm clear on what you're saying about this, if you have your correspondence with the class members and they come back and say your request is too broad, I have the following categories of documents, now what do you want to do.

MR PICCININ: Yes.

MS LUCAS: Is that a response that you say should not go to the class representative, so the class representative won't know what categories of documents their own class members have?

MR PICCININ: I wouldn't put it in that way because to say it shouldn't go to them is making a statement about what the class member should do. What I'm saying is that you've heard my submissions earlier that that we shouldn't be required to positively ask them to do it and also, if they don't it, of they don't send it to the class representative I don't see why we should be required to send it the class representative either.

So that is my position and then likewise, in relation to pre-existing documents and data, obviously those aren't subject to privilege and the disclosure regime that we've got is what it is. I think we don't have all of the details of that here. But I certainly wouldn't want to suggest that there was some general order that all documents and data that anyone has in their possession at any time that relate to the case have to be disclosed. That's not the order that's been made and it's not the order that's been made in relation to either party.

But of course, if you obtained documents or data that were pre-existing and that fell within the scope of the disclosure order, then you would disclose them.

MS LUCAS: Yes. Thank you.

MR PICCININ: Just double checking my notes.

Finally that takes me to the comments on the letter and, again, my overarching submission is that the comments that have been made by the Class Representative just have nothing to do with the reference that the letter contains --

MS LUCAS: To the adverting to proceedings.

MR PICCININ: Exactly. For example, the whole debate about how we describe the way that the Class Representative puts its case, which itself is of tangential relevance,

it's impossible to understand what that has to do with the fact that the letter contains a reference to the possibility of a disclosure application and really I say those comments illustrate the problems with a wider approach to this paragraph 5 jurisdiction, whether it's first sentence or second sentence, which is that, if you start requiring us to co-operate with the Class Representative and produce drafts of correspondence, then that is going to lead to exactly this kind of debate.

Just then turning to the letter itself --

MS LUCAS: Yes.

MR PICCININ: -- one last time, I think there was a debate again about -- so it's page 697 in the bundle.

MS LUCAS: I've found that now. Yes.

MR PICCININ: There was a debate again about paragraph 5 and my learned friend disagreed with your approach of deleting it entirely and insisted that we write a kind of mea culpa that goes into what the last letter said and the respect in which the last letter was incorrect or that the Tribunal didn't like it or whatever it was and my submission is that that is all just a massive distraction from what this letter is trying to achieve, which is a constructive discussion about disclosure of documents.

I wasn't entirely clear on exactly where we ended up. I think the Class Representative accepted that it had been wrong to say that we had said that there was any obligation on them to take legal advice about document retention or the preservation of documents but I'm not sure then exactly what they did want us to say in the mea culpa and I think your suggestion, if I may say so, of just deleting the whole paragraph makes much more sense than trying to do yet more drafting by an even larger committee.

Then there was paragraph 9, which we've already talked about. I don't think I need to add anything to that.

Paragraph 17, there was a suggestion that we should provide further agreed wording

on the nature of our commitment or not as to costs and, again, I don't know what that wording would be, but, again, this just goes to illustrate the inappropriate nature of this whole exercise and I think the -- yes, the final one was paragraph 21, which is the point of principle that we've already discussed.

So if I can just turn briefly and check.

MS LUCAS: Yes.

MR PICCININ: Those are my submissions.

MS LUCAS: Thank you. That's been very helpful. Thank you.

Submissions in reply by MR GIBSON

MR GIBSON: Just very briefly. I think our response to the claimant 1/claimant 2 example, which my learned friend described as arising because they've got separate interests, indeed they may even have an axe to grind each other, is inapposite as a paradigm --

MS LUCAS: Class members have --

MR GIBSON: Well, class members and class representative, we would say, if not the same interest, the class representative represents their interests, is the way that I would put it, which is effectively the same as the same interest for these purposes. So we just say, if there's a category error, we are that category error so we shouldn't be within the privilege.

Then I can't remember whether my friend previously said this, and if he did I apologise for making this as a reply to a reply, but the point about us asking the same question in parallel and being open to do that I think is just a charter for inefficiency, it would bombarding them in precisely the way that the Tribunal said we shouldn't do. So I would just say that wouldn't be an appropriate way to proceed.

MS LUCAS: Thank you.

Well, that was a very helpful discussion and thank you for attending today and for your written submissions. I'm sorry you have sat later and I now know that you all have other things to be doing, not unrelated to this but not in a way that's going to trouble me.

So I will obviously be reserving my ruling. I will try and get this dealt with very quickly so that you know where you stand. I'm conscious of the time, which does bring me to one point but the Referendaires turn round and remind me. From your submissions I think there's been some change to the timetable agreed for positive cases.

MR PICCININ: Maybe it's best if you --

MR GIBSON: Well, the letter was written by us but it was a collaborative effort. We've proposed by consent order an extension of time from the 15 December deadline to -- I think it's 1 March -- 1 March, which effectively pushes it back and takes account of the fact that it then goes across the Christmas break, and then the negative position statement is also pushed back by an equivalent period, but two weeks less, because it doesn't have a Christmas period. But that's the consent order that's been agreed by the parties and has been I think sent to the Tribunal.

MS LUCAS: I think it's only recently appeared.

MR GIBSON: Until yesterday. Oh right. I apologise. I had the idea it was sent longer ago but it's only just come to the Tribunal.

MS LUCAS: So I will have to consider that. Obviously there's a hearing fixed to determine issues arising out of the positive cases for I think the Tuesday after you have now agreed between yourselves to exchange your positive cases. So I am going to have to look at that.

MR GIBSON: Indeed, and the letter addresses the fact there are case management conferences slotted into the diary and puts forward the parties tentative proposals as to how the Tribunal might wish to deal with it. But obviously it's a matter for the Tribunal

to decide how best to do it and we'll follow whatever order you make.

MS LUCAS: Right. Thank you. But thank you very much for your assistance and, as I say, I'll reserve this ruling.

MR PICCININ: I should say many thanks from us as well, particularly to the staff for sitting over lunch.

MR GIBSON: Yes. I would like to echo that. Thank you.

MS LUCAS: Thank you.

(The Hearing Concluded)

(3.24 pm)