IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1624-1627/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 31st March – Wednesday 2nd April

Before:
The Honourable Lord Richardson
John Alty
Dr William Bishop

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Justin Gutmann

Proposed Class Representative

v

Vodafone Limited and Others.

Proposed Defendants

A P P E A R AN C E S

Rhodri Thompson KC, Nicholas Gibson and James White (Instructed by Charles Lyndon Limited) on behalf of Justin Gutmann
Rob Williams KC and Jenn Lawrence (Instructed by Slaughter and May) on behalf of Vodafone Limited and Vodafone Group PLC
Marie Demetriou KC and Hugo Leith (Instructed by Freshfields LLP) on behalf of BT Group PLC and EE Limited
Brian Kennelly KC, Daisy Mackersie and Hollie Higgins (Instructed by Linklaters LLP) on behalf of Hutchinson 3G UK
Mark Hoskins KC, Matthew Kennedy and Jacob Rabinowitz (Instructed by Ashurst LLP) on behalf of Telefonica UK Ltd

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Monday, 31 March 2025

(10.30 am)

Housekeeping

THE CHAIR: Well, good morning. I should begin by giving the customary warning that some of you are joining us live stream on our website. An official recording is being made, and an authorised transcript will be produced but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of court.

Now, that having been said, who's going to begin?

MR THOMPSON: I think that falls to me.

THE CHAIR: Good morning.

MR THOMPSON: As you may appreciate, I don't think this is a hostile barrier, quite convenient --

THE CHAIR: Indeed.

MR THOMPSON: I'm for the class representative. This array of legal counsel on my right is for the various phone companies.

THE CHAIR: Yes.

MR THOMPSON: You may recall some exchanges about how long all this is going to take.

THE CHAIR: Indeed.

MR THOMPSON: Happily, I think, there's a general feeling that quite a lot of things have now been resolved.

THE CHAIR: Yes.

MR THOMPSON: And so perhaps I -- I don't know if I exactly owe an apology, but certainly --

THE CHAIR: No, not at all.

MR THOMPSON: -- your perceptive view has I think prevailed in that we will be able to get through quite comfortably in time.

THE CHAIR: Yes. Having looked at the very helpful revised provisional timetable, which I think was possibly intimated to the Tribunal on Friday, the Tribunal was working on the basis that we should comfortably finish on Wednesday afternoon. I see that Thursday is held in reserve, but I think the Tribunal's sense of the matter, unless you or anyone else is going to try and persuade me otherwise, is that we should be able to finish by Wednesday. Is that your --

MR THOMPSON: That's certainly my expectation, but obviously I'm half of the sandwich.

THE CHAIR: Indeed.

MR THOMPSON: My half, I think, will be comfortably within that and I can't control what --

THE CHAIR: Of course.

MR THOMPSON: -- may come against me and what I may have to reply to.

THE CHAIR: Of course.

MR THOMPSON: My impression is that we're well within the three days.

THE CHAIR: Does anyone ... Good morning.

MR KENNELLY: Good morning.

I'm dealing with certification matters.

THE CHAIR: Yes.

MR KENNELLY: Our collective view is the same as Defendants: that we should be finished by the end of Wednesday and hopefully the certification issues will be done before the end of today and I've alerted Mr Hoskins to that fact, too. He'll be dealing with the May application for the Proposed Defendants.

THE CHAIR: Yes. And in that regard, then, in relation to limitation?

MR HOSKINS: Well, we were sort of indented for a day and I certainly don't see us taking any more than that.

THE CHAIR: And are you dealing with the first limitation point?

MR HOSKINS: Just the first limitation point. My client isn't actually a party to the second limitation point.

THE CHAIR: And then --

MS DEMETRIOU: Sir, it's me and Mr Williams who are splitting the tranche 2 limitation point of the Defendants.

THE CHAIR: Yes.

MS DEMETRIOU: We're obviously not going to duplicate, and I think that that can comfortably be dealt with within one day.

THE CHAIR: Yes. So, on that basis, everyone seems confident that we'll finish by Wednesday afternoon, so we'll proceed on that basis.

MR THOMPSON: Yes. I think probably the only case management matter in question is whether, if we get through comfortably today, there's any purpose in starting the application. Because it's a discrete issue, it may be that it's better to keep it clean and have the separate hearings on the separate days, but that's obviously a matter for --

THE CHAIR: Yes. I don't know if you have discussed this already, or if you have a view as to if we were to finish and there was a reasonable amount of time for you to make a start, it might be sensible to do that equally. I suspect it's going to be, if we're only talking 15 or 20 minutes, it may be that you're going to repeat yourself tomorrow again anyway.

MR HOSKINS: If we're sort of half an hour plus, very happy to start today (several inaudible words).

THE CHAIR: Excellent. Well, that's very helpful. So, Mr Thompson, do you want to open?

Certification

Submissions by MR THOMPSON

MR THOMPSON: I mean, given the general agreement as to where we are, I thought it might be helpful if I gave an overview of that question first --

THE CHAIR: Yes.

MR THOMPSON: -- of the various different issues.

We would say that the issues between the parties have narrowed, particularly on certification. Of the various points that have been canvassed over the period since we last met at the CMC, we understand that there are only six issues remaining for determination at this hearing overall.

There are three substantive issues of law, one relating to certification and two arising out of the Defendants' applications in respect of limitation.

THE CHAIR: Yes.

MR THOMPSON: And there are three discretionary issues to be taken into account by the Tribunal in the exercise of its supervisory role in respect of collective proceedings.

Just to unpack that a little bit, the three substantive legal issues arise, first of all, under Rule 79(1)(a) of the CAT Rules, which doesn't correspond precisely to section 47B(5) or (6) or (8), but appears to be implicit in 47B(7)(b), which is the requirement that the CPO order should define the class. And so, the first issue is whether the proposed class definition is sufficiently clear and objective to satisfy the requirement that these proceedings are brought on behalf of an identifiable class of persons. That's rule 79(1)(a). I can obviously go to any of this, but I'm assuming the Tribunal is reasonably familiar with this material.

THE CHAIR: Yes.

MR THOMPSON: The second issue is the issue that which will occupy us tomorrow,

which is Rule 31(2) of the 2003 Rules.

THE CHAIR: Yes.

MR THOMPSON: And the Limitation Act and the equivalent Northern Irish statutory instrument, but not the Scottish provisions. I'm sorry, that's wrong. I think that applies generally.

Did the savings provisions in the 2015 Rules have the effect of amending the scope and meaning of Rule 31 of the 2003 Rules, despite their simultaneous revocation, the effect alleged by the Proposed Defendants being to introduce a new and rigid two-year time limit on all claims for alleged infringements of competition law in the Tribunal arising before 1 October 2015.

THE CHAIR: Yes, in a sense, that issue really turns on the interpretation of the provision within the 2015 Rules, doesn't it? Because it's the 2015 Rules that arguably do or don't take you back to the 2003 Rules.

MR THOMPSON: Yes. There's a debate which actually I should mention to you. You may have seen that there are two notes that are --

THE CHAIR: Yes, yes.

MR THOMPSON: -- (overspeaking) on the significance of savings provisions.

THE CHAIR: Yes.

MR THOMPSON: I think that was fairly joint on that.

THE CHAIR: Yes.

MR THOMPSON: I think that does address the question about whether the savings provision has some impact on the true meaning of Rule 30. We obviously say it doesn't, and the Defendants obviously say it does.

Our submission is that the Limitation Act, the equivalent general provisions of Scottish and Northern Irish law, continue to apply to such claims, i.e., claims alleging alleged infringements arising both before and after 1 October 2015, so there's continuity in

both claims.

Thirdly, section 32 of the Limitation Act and the equivalent provisions of Northern Irish law, but not Scottish law -- that was a mistake I made known to you -- should all the proposed section 47A claims under both English and Northern Irish law against three of the Proposed Defendants, EE or BT, Three and Vodafone, arising between 1 October 2015 and 9 March 2017, be dismissed on a summary basis on the basis that all such claims are time barred by the English and Northern Irish limitation rules applicable to these claims pursuant to section 47E(2)(a) and (c) as it stood at the relevant time, or is this a matter to be decided on the facts and evidence at trial?

THE CHAIR: Yes.

MR THOMPSON: So, our basic submission, just to set it out, on these legal issues is that the PCR is clearly correct on each of them.

THE CHAIR: Yes.

MR THOMPSON: The proposed class definition is clear and objective, the CPO Application therefore satisfies all of the statutory requirements for certification. The Limitation Act and the equivalent Northern Irish and Scottish provisions continue to apply to claims based on alleged infringements of competition law arising before 1 October 2015. Rule 31 of the 2003 Rules has never applied to such claims, whether arising before or after 1 October 2015.

THE CHAIR: Yes.

MR THOMPSON: Finally, the application of the domestic limitation legislation of England and Wales, Scotland and Northern Ireland to the claims of PCMs, and in particular section 32 of the Limitation Act, is a fact-sensitive issue to be determined on the evidence.

It can't be said with any confidence that the PCMs were put on notice of a potential section 47A claim for breach of section 18 of the Competition Act against Vodafone,

EE and Three more than six years before these proceedings were commenced in November 2023.

We note that Mr Hoskins and his team for Telefonica and O2 don't appear to disagree with the PCR on this last point.

MR HOSKINS: I should make clear we don't agree with the PCR. We fully reserve our position.

THE CHAIR: I understand.

MR HOSKINS: Sorry.

THE CHAIR: No, it's ...

MR THOMPSON: I put it reasonably cautiously.

THE CHAIR: You've got to give Mr Thompson credit for making the point.

MR THOMPSON: Then, turning to the discretionary factors set out in Rule 78(2) and (3) and Rule 79(2), our essential position is that there's only three factors that are still relied on by the Defendants of very limited weight, and they're massively outweighed by a series of other considerations that militate strongly in favour of certification of this application.

THE CHAIR: Yes.

MR THOMPSON: So, applying the statutory requirements in section 47B (5) to (8), first of all, these claims are plainly eligible for certification by reference to the statutory requirements, including in particular, their suitability for collective proceedings.

Secondly, it's eminently just and reasonable to authorise Mr Gutmann as class representative in these proceedings as he has been authorised previously in other proceedings.

THE CHAIR: Yes.

MR THOMPSON: So, to summarise some of the relevant factors in favour of certification, first of all -- I don't know whether your Lordship will treat this as a jury

point or not -- there's certainly no application to strike out any part of the substantive case under section 18 of the Act on a summary basis or otherwise on the two limitation grounds which we say are misconceived. We say that's a matter of relevance to the Second Period Application that we'll consider later this week.

Secondly, there's no remaining challenge to Dr Davis's methodology, either on abuse or quantification of aggregate damages.

Thirdly, the other issues on class definition have now been resolved both in relation to the end date and the definition of handsets.

THE CHAIR: Just in relation to the end date -- sorry to interrupt you, Mr Thompson, what is the final position as you understand it?

MR THOMPSON: Well, I think your Lordship will remember the case that you decided, *Neill v Sony*.

THE CHAIR: Yes.

MR THOMPSON: I think you referred to the possibility of "procedural gymnastics".

THE CHAIR: Yes.

MR THOMPSON: I think we've engaged in a modest -- I think it was the only piece of gymnastics I ever managed, which was called the forward roll. So, we've rolled it forward to today, in fact, and I think it's been agreed by the parties that we can do that. So, we've accepted that we will amend on that basis.

THE CHAIR: Yes.

MR THOMPSON: I think both sides possibly reserve their position as to what the position might be in future, for example in the light of the judgment, whether we might apply to amend again.

THE CHAIR: Yes.

MR THOMPSON: But that's where we've got to at the moment.

THE CHAIR: No, that's helpful.

MR THOMPSON: In relation to handsets, the definition is now made explicit: it's smartphones, mobile phones and tablets.

The issues other than the two we'll come to on funding have been resolved. That was, in particular, an issue about assignment and an anti-avoidance exclusion. Those have both been resolved.

There's no direct challenge to issues under Rule 79(1)(b), the common issues which the Tribunal will be aware is often a vexed issue in these CPO cases. There's no outstanding issue on common issues, although I should say that there is one slightly odd point which may arise on Wednesday, which is a sort of interim point: the three Defendants to the Second Period Application say that, were the Tribunal to find that the substantive limitation question requires evidence, having said it was frightfully easy and we all should be struck out, they then say it becomes frightfully difficult and we would have to engage in a very complicated factual issue, which I think they say is not common. But they're not actually running this as a point in relation to certification, I suppose because they say it doesn't arise.

Sir, the only three remaining --

MR WILLIAMS: Sir, we are running it as a point on certification, but we run it after the limitation point because it's closely related to it, and it makes sense to deal with it after limitation.

THE CHAIR: I see. So, for clarity, that's not a point that Mr Kennelly will be developing, but you'll --

MR WILLIAMS: No, I'll deal with it, but it makes much more sense to deal with it after the limitation issues because it (inaudible).

MR THOMPSON: Sir, I think I'd probably better give my indication outside of my response, but we'll deal with that on Wednesday.

THE CHAIR: Yes.

MR THOMPSON: The only three remaining discretionary factors fall into two categories, one relating to whether the claims are suitable for collective proceedings under Rule 79(1)(c) --

THE CHAIR: Yes.

MR THOMPSON: -- and the other two relating to the question of whether it's just and reasonable to authorise Mr Gutmann as the class representative under Rule 78(1)(b).

THE CHAIR: Yes.

MR THOMPSON: The remaining suitability question or suitability factor is whether there are any alleged difficulties that may arise in identifying at least some class members and is that a sufficiently material factor to cast doubt on whether these claims are suitable to be brought in collective proceedings?

THE CHAIR: Yes.

MR THOMPSON: Then, in relation to funding and insurance, the complaint is now limited to two points: the absence of a group guarantee from the parent company of the funder, and the absence of provision for direct enforcement of ATE insurance by the Defendants.

So, the question is therefore under that head whether the absence of one or both of those features is a material factor, casting doubt on whether it's just and reasonable for Justin Gutmann to act as class representative.

In relation to that question, we say that it is highly relevant that other important positive factors relevant to both authorisation and eligibility have never been challenged. I'm sure the Tribunal will be familiar with the judgments in the *Merricks* case, where this sort of thing is seen to be a broad balancing exercise of plus and minus factors for the Tribunal.

THE CHAIR: Yes.

MR THOMPSON: So, first of all, we say that Mr Gutmann's personal suitability to act

as class representative is obvious and uncontested, and has never really been challenged, for example, his fairness, his capacity and his lack of any conflicts of interests.

In relation to suitability, there are multiple reasons why these claims are suitable for opt-out collective proceedings. So far as we're aware, there are no alternative proceedings. It's obviously suitable for an aggregate award and we would say that the strength is fairly obvious, both as a matter of the facts, but also because of the regulatory context.

We note that the Defendants themselves don't suggest that these claims could realistically be brought as individual section 47A or High Court claims, either in the Tribunal or in the courts.

THE CHAIR: Yes.

MR THOMPSON: Then, the third point is that, subject to the two points we'll discuss this afternoon, the witness evidence of Mr Gutmann and Mr Moloney in relation to the litigation plan, distribution and funding and insurance arrangements has been accepted subject to those two points.

Finally, a negative point. We note that there's no expert or witness evidence from the Proposed Defendants at all, despite the fact that they're obviously in possession of vast quantities of relevant data and industry knowledge, some of which was provided to Ofcom, the CMA, in the context of their investigations, very little of which is available to Mr Gutmann at this stage.

THE CHAIR: Yes.

MR THOMPSON: That's what I was going to say by way of introductory salvo just as overview.

This morning, I'm going to address the only hurdle issue, Rule 79(1)(a), that's still pursued in respect of our application for certification, subject to Mr Williams's point;

and secondly, the only discretionary factor under Rule 79(2)(e) still said by the Defendants to be relevant to the eligibility of the claims for collective order. Then, this afternoon, I'll address the two discretionary factors but obviously we'll have to see how the timing goes.

THE CHAIR: Yes.

MR THOMPSON: So, first of all, identification of class members, if I can call it that in high level.

THE CHAIR: Yes.

MR THOMPSON: The first point we make is that we say there's a clear defect in the Proposed Defendants' arguments in that they consistently fail to distinguish between the two issues arising, respectively, under Rule 79(1)(a) and 79(2)(e). One can see that very clearly from their skeleton argument, which is in reality devoted exclusively to the 79(2)(e) issue. If one looks at their skeleton, tab 5 of bundle B.

THE CHAIR: Yes. Tab 5 of the B bundle, yes.

MR THOMPSON: I don't know whether the Tribunal is using paper or electronic?

THE CHAIR: I think there's a mixture.

MR THOMPSON: If you can open the tab, it's page 67, the number at the bottom of page.

THE CHAIR: It seems to be 65 in the electronic bundle.

MR THOMPSON: I'm working off the numbers as they appear on the page.

THE CHAIR: Yes.

MR THOMPSON: I don't know how that's happened. Now we've lost two pages. Oh, I see. It starts at page 64 and then the first paragraph is page 65. If I could take you to paragraph 7 where the Defendants very fairly set out Rules 79(1)(a) and 79(2)(e).

THE CHAIR: Yes.

MR THOMPSON: Then, the second and third lines, the 79(2)(e) test is:

Whether it is possible to determine in respect of any person whether that person is or is not a member of the class".

But then when you go over to 12, the first point under 79(1)(a) is said to be "*whether it is possible to ascertain whether a particular person is a member of the class*", which is the 79(2)(e) point, so they go straight in on the practicality question.

That doesn't seem to be a coincidence, because if one goes to paragraphs 20 and 21, again, allegedly under 79(1)(c), there are a number of allegations about how difficult individuals might find it to undertake a relevant comparison exercise. There's reference to "*some individuals may not be able*", and then in 21 towards the bottom: "*The prospect of millions of individuals making such requests and carrying out such searches is highly impractical*." [as read]

So, in my submission, there's basically just a muddle in the submissions, and that essentially the only point the Proposed Defendants make relates to practicality.

THE CHAIR: Yes.

MR THOMPSON: I would respectfully invite the Tribunal not to follow this approach, which we would say is a recipe for confusion and is inconsistent with the guidance of the Supreme Court in Merricks, for example at paragraph 61 in the judgment of Lord Briggs.

So, turning to Rule 79(1)(a) in its true form, as we would say, we say it's concerned with conceptual clarity and that that was clearly found in an earlier case which some of the present company were also involved in, the *Trucks* CPO litigation. One finds that at paragraph 188, the judgment of Sir Peter Roth, which is at bundle F, tab 74.

THE CHAIR: Yes. Paragraph 188.

MR THOMPSON: In the hard copy, it's 2089. It's volume 4, page 2089.

THE CHAIR: 2089. Paragraph 188.

MR THOMPSON: It's page 80 of the judgment. (Pause)

THE CHAIR: Thank you. I think we have that.

MR THOMPSON: Yes. Then, if you turn back a page, it's under the heading "*Identifiable class of persons*".

THE CHAIR: Yes.

MR THOMPSON: In fact, the basic submission that it wasn't raised in their skeletons or in their oral submissions, but that Iveco and Daimler contended in their amended responses that its class definition is not sufficiently clear as to who is included and therefore fails to satisfy the requirement that claims are brought on behalf of an identifiable class of persons. Then, at 188:

"*Iveco, in submissions adopted by Daimler, contended it's not clear how purchasers and lessees falling within the class definition can be identified from licence data held by the DVLA or DVSA*."

And then -- this is mine and Mr Gibson's submission it is accepted that:

"*The identifiability requirement in rule 79(1)(a) is concerned solely with the objectivity and clarity of the class definition*."

Reference to the Guide, which we can look at in just a moment.

"*Therefore*, *the definition should not be based on subjective or merits-based criteria. The requirement is not concerned with the manner in which a PCM proves that they come within the objective class definition, a question which generally arises only at the time of distribution of damages. Iveco's argument under rule 79(1)(a) is accordingly misconceived*."

The Guide is at tab 35, which is in the first bundle, bundle F, and it's pages 240 to 241. Now, the first --

THE CHAIR: Yes. So, the paragraph in the Guide you were referring to, Mr Thompson.

MR THOMPSON: 6.37 --

THE CHAIR: 6.37.

MR THOMPSON: -- at the bottom of the page, and it goes over to the next, and in plain terms:

"*It must be possible to say for any particular person, using an objective definition of the class* --"

I'm sorry.

THE CHAIR: Just a minute. Sorry, do carry on.

MR THOMPSON: "*It must be possible to say for any particular person, using an objective definition of a class, whether that person falls within the class. The need for an identifiable class of* persons *serves several purposes. It sets the parameters of the claim by clearly delineating who's within the class and who's not, thus determining who will be bound by any resulting judgment. It affects the scope of the common issues raised by the collective proceedings. It has practical implications, such as in relation to the requirements to give notice. Indeed, it is the class definition which potential class members will read when considering whether to opt in or out of the proceedings ... However ... the claim form must give an evidence-based estimate* --"

I think that we don't need to worry about that -- and then:

"*Accordingly, class definitions based on subjective or merits-based criteria (for example 'persons having suffered loss as a result of the defendant's conduct') should be avoided. Further, the class should be defined as narrowly as possible without arbitrarily excluding some people entitled to claim. If the class is too broad, the proposed collective proceedings may raise too few common issues and accordingly not be worthwhile*."

So, we rely both on the objectivity issue, but also those last words that there is an injunction -- if I put it like that -- to be as precise as you can, at the initial stage, to limit the scope of the hearing as far as possible.

THE CHAIR: Yes.

MR THOMPSON: We've obviously borne that in mind, well, we sought to bear that in mind, in our approach. We say that the points that the Defendants raise are, in reality, misconceived in this sense under Rule 79(1)(a), they're only relevant to 79(2)(e) as factors to take into account in relation to suitability.

THE CHAIR: Yes.

MR THOMPSON: We say that our class definition comprises two elements: first of all, the monthly combined handsets charge actually levied by a Proposed Defendant after expiry of the minimum term, including an ongoing charge in respect of the capital costs of the handset; and secondly, the monthly SIM-only charge levied by that that Proposed Defendant for the airtime services actually received by the proposed class member after the minimum term.

The proposed class definition simply requires comparison between the two charges, and we'll give a simplified but reasonably realistic example, ignoring inflation, et cetera: Vodafone, or one of the other Defendants, charges a consumer £40 a month for a combined handsets and airtime contract. £20 a month is attributable to the handset -- phone, smartphone or tablet -- multiplied by 24, so that's £480 capital plus interest over the two-year minimum term, and £20 a month attributable to airtime services, for example, the agreed level of data, texts and voice minutes.

At the end of the minimum term, two years later, Vodafone is charging £20 for the equivalent SIM-only contract, i.e., for the airtime services alone. If that consumer continues to pay £40 a month after the minimum term, under his CHA contract, then they are a class member.

We say that it is apparent from the evidence assembled by Ofcom and the CMA, and referred to in the Claims Forms, that there are very likely to be hundreds and thousands, and possibly many millions, of proposed class members that fall

straightforwardly within the scope of this definition. I don't think we need to turn it up, but the Tribunal will no doubt have looked at our Claim Form and the references to the regulatory materials, and in the Vodafone Claim Form -- the references are at paragraphs 11, 29(1), 34(6), which is bundle A, tab 1, pages 5, 13 to 14, and 17. I think one of the findings is that there are two million people in this broad category.

THE CHAIR: You said paragraphs 11 and 34(6), and there was a paragraph in between the two.

MR THOMPSON: 11, 29 --

THE CHAIR: 29.

MR THOMPSON: -- so paragraphs 1, and 34, subparagraph 6.

THE CHAIR: Thank you.

MR THOMPSON: So, we say this is essentially a question of practicality: how difficult is it to establish these two elements, and will that cause a problem in practice?

The first point we make is that it is not necessary or appropriate for the tribunal to engage in an individual assessment of specific facts at the CPO stage, or at all. Indeed, that approach would completely undermine the purpose of the collective regime, as explained by the Court of Appeal and Supreme Court in *Merricks*, and in subsequent cases, and the issue is summarised in a convenient form, but I suspect it is familiar to the tribunal. For example, I give the reference of the judgment of Mr Justice Roth again in one of the Gutmann cases, which is at bundle F, tab 69, pages 1853 to 1854, where he picks up the references to *Merricks* and the Court of Appeal and the Supreme Court.

THE CHAIR: Are you going to take us to that or ...

MR THOMPSON: I'm very happy to go to that, if that would be helpful, my Lord.

THE CHAIR: Yes.

MR THOMPSON: It's at tab 69.

THE CHAIR: And 1853, you said?

MR THOMPSON: 1853, yes.

THE CHAIR: Yes. (Pause)

Did you have a paragraph reference? (Pause)

MR THOMPSON: I think the clearest passage is at the bottom of 112, where the Tribunal cites the Tribunal. That's in relation to pass-on, but I think the point has now been generalised -- for example, by the Court of Appeal in this same case:

"*To require each individual claimant to establish loss in relation to his or her own spending and therefore to base eligibility under Rule 79 on a comparison of each individual claim [which], as I've said, run counter to the provisions of section 47C(2) and require an analysis of the pass-on to individual consumers at a detailed individual level which is unnecessary when what is claimed is an aggregate award. Pass-on to consumers generally satisfies the test of commonality of issue necessary for certification*."

So, I mean, it's an extended passage, but I think it's the first time that the Tribunal considered this. Then a similar point was raised in the Court of Appeal with a similar outcome, that it would be self-defeating to bar individual claimants to prove their case, and that's not what the collective proceedings are about.

THE CHAIR: Yes.

MR THOMPSON: The second point I'd make is a characteristic passage in the second report of Dr Davis, which is at tab 34 of bundle A, page 1932. (Pause)

I've been using the electronic versions, I'm a little slow with the paper versions.

THE CHAIR: Yes, unfortunately we're using all forms, so you need to give references across. You said tab 34, and --

MR THOMPSON: It's tab 34 at page 1932.

THE CHAIR: Yes.

MR THOMPSON: And it's paragraphs 16 to 19.

THE CHAIR: Yes.

MR THOMPSON: I don't know whether the tribunal has had a chance to look at this, but it's, you would say, a characteristically careful and rigorous analysis.

THE CHAIR: Yes. (Pause)

Yes. (Pause)

MR THOMPSON: What you're primarily looking at is, I think, the point which the Defendants no longer pursue, as to whether or not effectively you have to wait until Dr Davis had opined until the class definition was applicable at all. I don't think they run that point anymore; I think they now say it's just more difficult. But the point he's making is that there's a stark difference between the exercise he would have to do for the purposes of assessing an aggregate award, and the question of what would happen in any individual case, which is the practicality question we're currently thinking about, at least in the abstract.

The point he makes is that, in fact, an individual or a tribunal, for example, at the distribution stage, would need relatively little information to determine whether any individual fell within the class. All they'd have to show is that there was at least one monthly payment under its CHA contract, after the end of the minimum term, that exceeded the SIM-only price for the airtime services actually received under that contract.

We say that the first element, the CHA price after the minimum term, is easily satisfied; that the class members own charges on expiry of the minimum term, whether 24 or 36 months after the contract starts, we say that both the class members and the Proposed Defendants are very likely to have both financial and billing records in a digital form of those monthly payments.

THE CHAIR: Yes.

MR THOMPSON: Obviously, there's a possibility that everyone will have lost them, but in principle, I think it's virtually a matter of judicial notice that anyone with a mobile phone contract gets a monthly bill, and they're all sitting there on the relevant supplier's website. The second element, the post minimum term SIM-only price --

THE CHAIR: Yes.

MR THOMPSON: -- we say it's also readily comprehensible, and easily satisfied in many cases, based on three factors: first of all, the airtime services that are actually provided by the Defendants themselves under their CHA contracts, for example, the minutes, the texts and the data; secondly, the Defendants' own published SIM-only prices over time; and in due course -- we think this is something that the Tribunal can certainly take into account -- internal evidence from the Defendants as to how they calculated the initial charging structure for CHA contracts, for example, and in particular, the cost recovery of the handsets and airtime services over the minimum term. One might care compare the approach of O2 in particular, but others, in relation to their split contracts, where they clearly have no difficulty in distinguishing between the handsets costs --

THE CHAIR: That --

MR THOMPSON: -- and the airtime costs.

THE CHAIR: Sorry to interrupt you, Mr Thompson. That final third point, the internal evidence. How is that a matter that we consider now? Is that because you say this is a practicality point rather than --

MR THOMPSON: Yes. Realistically, it will be hopeless to expect individual consumers to speculate on what information might be available when this matter has been properly litigated. But as a matter of practicality, the kind that Justice Roth mentioned in *Trucks*, it's obvious that there's a great deal of information sitting on the other side of this room.

THE CHAIR: So, you're not contending that that would be something that would be relevant to 79(1)(a) --

MR THOMPSON: Yes.

THE CHAIR: -- but you're saying it's something that we can take into account in assessing the 79(2)(e) point, is that -- that's it.

MR THOMPSON: Yes. I could imagine an executive from the Defendants giving a fairly clear explanation of how they price CHA contracts; one would have thought it's one of the things they think about most intently.

THE CHAIR: Yes.

MR THOMPSON: The point here, and it emerges at paragraph 15 of the Defendants' skeleton, where they make it as a positive point. If one sees that, it's over the page from where we were before, page 69.

THE CHAIR: This is back in the B bundle.

MR THOMPSON: Yes, B5, 69.

THE CHAIR: And which paragraph?

MR THOMPSON: Paragraph 15.

THE CHAIR: Yes.

MR THOMPSON: The Tribunal is probably aware that, as part of the Second Period Application, the three Proposed Defendants who brought it have exhibited over 60 cases of CHA adverts and over 30 cases of SIM-only adverts. Here they summarise this by reference to particular years, saying that each of the three Defendants offered a wide range of SIM-only deals, if I can put it like that.

THE CHAIR: Yes.

MR THOMPSON: They appear to argue that this is a point in their favour, because there are a wide range of SIM-only prices, and essentially, speculatively, say that it might not be easy to compare the CHA price with all these different SIM-only prices.

THE CHAIR: Yes.

MR THOMPSON: Well, we make two points in response: first of all, that it's irrelevant. Just because there were a lot of different prices really doesn't get anybody anywhere; that could equally be said, there are large numbers of different rail fares and large numbers of different trucks and prices, but I don't think anyone's ever thought that was a reason why collective proceedings couldn't be proceeded.

THE CHAIR: Yes.

MR THOMPSON: We say that, secondly, the fact that they offered a range of SIM-only prices, they published tariffs, and that a great deal more of this sort of information is inevitably going to be available on disclosure, is actually a point in our favour. We say the only issue is whether there's likely to be at least one SIM-only price, either identical or reasonably comparable to the price for the airtime services supplied under the PCM's CHA contract, because we know what those services were.

THE CHAIR: Yes.

MR THOMPSON: The fact that there were, on the Proposed Defendants' own evidence, a galaxy of different published SIM-only prices --

THE CHAIR: Yes.

MR THOMPSON: -- makes it particularly unlikely that none of them is suitable for this purpose, because you've got one on one side and a lot on the other, and all you've got to do is compare that one with at least one of these ones, and the suggestion that there are lots of them over a very wide range, in my submission, makes it very unlikely that none of them are at all suitable for that purpose.

THE CHAIR: Yes.

MR THOMPSON: The third point is that it's obvious that the Defendants are sophisticated suppliers, and that the prices on both a CHA and a SIM-only basis, are carefully calculated. It's therefore no less obvious that the value of those different

propositions would have been the subject of internal evaluation at all relevant times, and that will inevitably be an area for an application for disclosure and witness evidence in due course.

THE CHAIR: Yes.

MR THOMPSON: Fourthly, we note that the Defendants don't actually positively assert that there isn't, in fact, a suitable published or internal comparator for at least a substantial proportion of the services supplied under CHA contracts. We say that is quite an unlikely proposition, given that these are services which they themselves supplied under their CHA contracts.

They don't say that the airtime services offered on a SIM-only basis were never the same as airtime services offered on a CHA basis, which seems intrinsically implausible. It's not suggested that airtime services offered on a SIM-only basis were invariably worse than airtime services offered on a CHA basis. We say that it would obviously be impossible to make any such submission, as one can see, just from a cursory look at some of the material that is available to the Tribunal -- and I don't know if the Tribunal still has Mr Davis's report to hand, but --

THE CHAIR: In the A bundle.

MR THOMPSON: It's -- yeah, it's A4, tab 34, page 2008.

THE CHAIR: This is his second report.

MR THOMPSON: Yes.

THE CHAIR: Yes.

MR THOMPSON: Yes, the second report.

THE CHAIR: Yes.

MR THOMPSON: Given some of the criticisms that were made, Mr Davis did quite a lot of diligent additional work.

THE CHAIR: This is table 6, you're taking us to.

MR THOMPSON: Yes, and one of the things he did is he looked at some actual prices and say, for example, you'll see a range of three prices as at July 2013, and in particular the three bottom ones, priced between £12.90 and £18 with unlimited data and 5,000 text messages, and either 200 or 2,000 call minutes.

Then towards the bottom you'll see a range of Vodafone prices priced between £11.50 and £29, and in the middle range, 20 and 24, you see unlimited call minutes and text messages, and either 2 or 4GB of data.

This is obviously exactly the sort of exercise that you're not supposed to do, but I think it gives the Tribunal a flavour of what we're dealing with here if one goes to bundle E -- and the index has numbers, but mine is just a single blot in two tabs; 1 and 2.

THE CHAIR: Yes.

MR THOMPSON: The pages are at 43. (Pause)

My version of the printout is very small, in fact, but --

THE CHAIR: Is this the details of an iPhone 5?

MR THOMPSON: Yes, that's right. The point -- perhaps if one goes back to the index. That is an advertisement on Three's website for an Apple iPhone 5 on 26 September. Sorry, it's an advertisement --

THE CHAIR: Scroll down.

MR THOMPSON: I'm sorry, my Lord, if I go online, I might --

THE CHAIR: It seems easier to read, from what I can see on the --

MR THOMPSON: Has everyone (inaudible) on the screen?

MR ALTY: Yes, it is. I'm just looking at yours, I don't --

THE CHAIR: Yes.

MR ALTY: That's okay. I think I get the point, anyway.

THE CHAIR: Yes. (Pause)

MR THOMPSON: The point being that the product they were advertising two years before Mr Davis's SIM-only prices included products which were essentially identical to those which were offered when Mr Davis did his survey, but the prices were very considerably higher. The second example, which hopefully will be easier to read, was the Vodafone example, which should be at page 59. (Pause)

We may have to come back to this, I've got the references on the -- (Pause)

I think there's something going wrong with the references. Perhaps I can come back to this point in due course, my Lord. The point is the correspondence between the price and services, and the SIM-only price -- it's always a danger of working on two versions. I'll give the tribunal the reference.

THE CHAIR: Just so I'm understanding the point. In simple terms, what you're contrasting is table 6 in Mr Davis's second report, which you say contains a summary, or a survey, of SIM-only prices.

MR THOMPSON: Specific SIM-only prices.

THE CHAIR: Yes.

MR THOMPSON: And then comparing them to the CHA prices that were levied for essentially the same services --

THE CHAIR: Yes.

MR THOMPSON: -- but with a handset (overspeaking).

THE CHAIR: Yes, and the second part, you've pointed us to two, as it were, snapshots -- literally, perhaps snapshots -- that we find within that bundle.

MR THOMPSON: Yes, it may be more convenient to print them out (inaudible) so everyone can see what they --

THE CHAIR: Well, I think if you're able to just to find what the reference in electronic bundle is, we can find it.

MR THOMPSON: Yes, because of the number of images, something's gone wrong.

I'll come back to that.

We say it's not, as suggested, that the CHA charges were not based on an aggregation of the costs of the relevant handset and the SIM-only charge, the airtime services offered under that contract or indeed, perhaps observing that the Defendants didn't understand how their own pricing works.

THE CHAIR: Yes.

MR THOMPSON: And so, if you take the examples and possibilities, we say that if the airtime services were publicly offered on a SIM-only basis, identical or better than those offered under a CHA contract, then there's no problem. One can simply compare the prices directly. The highest that the Defendants can put their case is that there may at least be some instances, and I think Mr Davis accepts that that is likely, where the only available SIM-only offers by a Proposed Defendant were either worse in some respects or not easily comparable with those provided under the CHA contract.

THE CHAIR: Yes.

MR THOMPSON: We say that in such cases, both Dr Davis and the PCR accept that you may need an exercise of judgement or additional internal evidence from the Proposed Defendants to determine the value of the airtime services actually supplied under a contract after the minimum term. But we note that even in such cases, the comparator is still the airtime services actually supplied by the Proposed Defendants to the proposed class members under the CHA contract and the price that would have been charged by that Proposed Defendant for those same airtime services independently of the handset price. We say the Defendants have not produced any evidence to suggest that they would be able to value the airtime services offered to CHA customers after the minimum term, or at least to set a range within that value lies.

One of the points that Dr Davis makes in the passage we were looking at is that the proposed class definition is operable with relatively small amounts of data in many, if not all, individual cases and in particular, he makes a point about ordinal and cardinal sums, and he says that all is required is assurance that the actual CHA price, in my example, £40, is higher than the SIM-only price, not the precise SIM-only price, which may fall within a range, for example, it might be between £15 and £25. So, all you've got to prove is that the range of SIM-only prices is below the actual CHA price.

THE CHAIR: Yes.

MR THOMPSON: And then finally, in perhaps a rather elementary point that arose in the Court of Appeal in *Gutmann*, the possibility that some class members may ultimately find it difficult or may be able to or unable to prove their membership of the class is not a material factor in relation to suitability or certification. The validity of the class definition is not undermined by the possibility that some class members may ultimately be unable to prove that they're members of the class or that they've suffered any loss, or indeed, that they may fall within a subcategory of class member that the Tribunal considers have failed to establish any loss. And the reference to *Gutmann* in the Court of Appeal is paragraphs 38 to 39, bundle F, tab 77, pages 2188 to 2189.

I see the time. I think we were probably thinking on the time scale that we would take a break after my submissions. So, unless Mr White or Mr Gibson want to say anything else, or indeed anyone else, then that's where we are.

THE CHAIR: Well, that's very helpful. They both seem content. Very well. Well, on that basis, we will take the customary break at this point. Thank you.

(11.29 am)

(A short break)

(11.47 am)

MR THOMPSON: Sir, before Mr Kennelly starts, I think he was willing for me to have

another shot at my slightly unsatisfactory referencing.

THE CHAIR: Yes.

MR THOMPSON: If I could give you the references.

THE CHAIR: Yes, please.

MR THOMPSON: First of all, in bundle E, I think it's probably easier if you start in the index, which is internal, which is at pages 2 and 3.

THE CHAIR: Yes.

MR THOMPSON: And it's tabs 10 and 18, which should have a Three advertisement for October 2011 and a Vodafone advertisement for January 2014.

THE CHAIR: So sorry, we're in the E bundle.

MR THOMPSON: Yes. There's an internal index.

THE CHAIR: Oh, sorry. An internal index for --

MR THOMPSON: Pages 2 and 3.

THE CHAIR: Yes, I have that. Sorry.

MR THOMPSON: Just to make sure we get the right ones, it's the Three advertisement for October 2011 and the Vodafone advertisement for January 2014. And I think I gave you an incorrect reference. It's pages 41 and 59. So, if you turn to page 41, you find the first example. It's a Samsung Galaxy --

THE CHAIR: Yes.

MR THOMPSON: -- which was being advertised on a 24-month contract under something called “The One Plan" with 2,000 minutes, 5,000 texts and "All-you-can-eat" data.

THE CHAIR: Yes.

MR THOMPSON: And that was at £35 a month and then at 59, we find Vodafone advertising another 24-month contract with a range of prices and the top of the range ones were unlimited minutes and unlimited texts but with either two or four gigabytes

of data.

THE CHAIR: Yes.

MR THOMPSON: And then there were unlimited minutes and texts with one gigabyte and then there were only 600 minutes with unlimited texts with 500MB and the prices range from £38 to £47.

THE CHAIR: Yes.

MR THOMPSON: If we then go back to Dr Davis's table, and I've chosen examples broadly two years after this to illustrate the exercise.

THE CHAIR: Yes.

MR THOMPSON: You'll find, on page 2008 of tab 34 of bundle A4.

THE CHAIR: Yes.

MR THOMPSON: You'll see exactly the same service offered: 2,000 minutes, 5,000 messages and unlimited data in July 2013 by Three for the price of £15. So, that's an example -- obviously we've only got a tiny sample -- but that's an example where the same core minutes, the same messages and the same data, the price is massively lower on a SIM-only basis.

THE CHAIR: Yes.

MR THOMPSON: And then if you look at Vodafone in September 2016, there's a vast range of offers and the two corresponding are the ones, three and four from the bottom: unlimited, unlimited with either two or four data and the prices are £20 and £24. And even a much better offer of unlimited, unlimited and eight is only £29. So, that illustrates the range point that you might have actually a much better offer available but at a much cheaper SIM-only price. So that was the point that I was seeking to make by illustration of the materials that we have. Obviously, we only have a tiny sample at the moment.

THE CHAIR: Yes.

MR THOMPSON: That was it from my point of view, my Lord.

THE CHAIR: Thank you. Thank you.

MR KENNELLY: May it please the Tribunal, I'll deal first, if I may, with whether the proposed class is identifiable within the meaning of Rule 79(1)(a) of the Tribunal Rules.

THE CHAIR: Yes.

MR KENNELLY: And in summary, we say the proposed class is not identifiable even allowing for a reasonable degree of uncertainty and ambiguity and even if one draws reasonable assumptions and uses common sense. The position as to the law under Rule 79(1)(a) is not at all as my learned friend presented it, and I will need to come back to the authorities in some detail.

In order to show that the class is identifiable, the PCR needs to show that, in general, proposed class members can be identified at the certification stage with reasonable certainty and it's common ground, we heard it today, that the proposed class definition requires a comparison between the actual price paid by a proposed class member under his or her CHA contract and another price which the proposed class definition defines as the "*relevant SIM-only price*" and I'll show you how that phrase is defined in the proposed class definition.

But for present purposes, the PCR said that in order for an individual to know whether they are in the class, they would have to compare the actual price they paid under the CHA contract with the actual price of one or more SIM-only contracts, and this is the key bit, offering comparable services. It's necessary to do that exercise because on the face of the Claim Form, there is a significant proportion of users who paid lower prices under their CHA contract than they would have paid under comparable SIM-only contracts. I'll give you those references when I come to the evidence.

But the problem for the PCR is that there is no workable means for the Tribunal or consumers to identify, at this stage, the comparable SIM-only price for any CHA contract. And I propose, after a brief introduction, to take the Tribunal to the law, then to the class definition and the PCR's own evidence, Mr Davis's reports.

And as to the law, I'd ask the Tribunal to turn up the most recent judgments of the Tribunal. The *CICC 1* judgment first. This judgment comes after the authorities which my learned friend showed you and summarises them and went on in a further judgment in 2024 to apply them in greater detail. I'm not going to go back to the Rules; the judgment itself contains the Rules and the Guide to Proceedings. It's easier just to go straight to the case and show you that. It's in the fourth volume of authorities, tab 80 and begins at page 2261.

THE CHAIR: This is bundle --

MR KENNELLY: It's F, volume 4, tab 80, page 2267; I think I gave you the wrong page number.

THE CHAIR: Yes.

MR KENNELLY: The judgment of the Tribunal from 2023. I'll come back to the facts when we look at the class definition in this case, but I'll go, if I may, first to the law, which is at page 2281 at paragraph 54, the Tribunal sees again rule 79 set out. There's no need to go back to that, it was read to you by my learned friend.

THE CHAIR: Yes.

MR KENNELLY: Over the page, page 2282 at paragraph 58, we see an extract from the Guide to Proceedings, the very same extract that you saw earlier this morning. But I would ask the Tribunal to go back to this and read it with some care. It's in the indented passage after paragraph 58, and it quotes paragraph 6.37, same paragraph which you saw this morning, and dealing with 79(1)(a) you see this in italics at E, "*The claims must be brought on behalf of an identifiable class of persons*". We see, first:

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

And as you will see from the authorities, that means it must be possible to work out if any particular person is in the class and we get an idea of what is meant when we identify the purposes, and that's addressed in the next sentence, in paragraph 6.37:

"*The need for an identifiable class of persons serves several purposes. It sets the parameters of the claim by clearly delineating who is within the class and who is not, thus determining who will be bound by any resulting judgment. It affects the scope of the common issues ... And it has practical implications, such as in relation to the requirements to give notice*."

And then this upon which we place particular reliance:

"*Indeed, it is the class definition which potential class members will read when considering whether to opt-in or out of the proceedings*."

And that makes it even clearer that for 71(a), it is relevant to consider whether it is practicable for individuals to work out if they are in the class or not, because unless they know whether they are in the class or not, how are they to exercise their right to opt out? And that's an important procedural safeguard because otherwise individuals will be bound by the result of litigation brought on their behalf to which they have not consented. So, the procedural right to opt out is an important one and in order to be meaningful, it can only be exercised if the potential class member knows with reasonable certainty whether he or she is in the class or not at the start of the process.

Now, if we go on through this definition, the Guide to Proceedings makes clear that the claim form must give an evidence-based estimate of the size of the class but it's not necessary to identify each class member or specify exactly how many persons are within the class.

THE CHAIR: How is that? How can we read that together then? Because if we're

reading this in the way, you're saying that we should, it would seem to suggest that we should be able to tell immediately whether someone is. In fact, we should be able to tell everyone who is or is not within the class, if it reads as you say it should be read. But yet, that's not what we're to do, as the Guide tells us. So, I'm just wondering how you resolve that tension.

MR KENNELLY: We resolve it by acknowledging that although 79(1)(a) requires that class members can, with reasonable certainty, work out if they are in the class or not; that comes with a healthy dose of flexibility. It is not necessary to show that each and every class member in every scenario can work out if they are in the class or not. And we'll come to this in the judgment.

THE CHAIR: But if (inaudible) going to come to it, then --

MR KENNELLY: Sorry, but the answer is absolute certainty is not required. So, if I showed you that in a number of situations, it would not be possible to work it out --

THE CHAIR: Yes.

MR KENNELLY: -- this argument would go nowhere. My point is that in general, it's not possible to work out if any potential class member is within the class or not, because of the difficulty with the definition and in particular the difficulty in obtaining the information necessary to work out if a SIM-only price is comparable or not.

MR ALTY: You're saying that there's no -- none could be ascertained at all? You can't ascertain whether anyone falls into this class?

MR KENNELLY: In general, of course, it may be possible for certain individuals to work it out. They may be the lucky ones that can work out how to use the various Wayback machines and they may be the lucky ones for whom there is data, but in general it is not workable, not practicable for class members to work out if they are covered by the definition or not.

MR ALTY: Mmm.

MR KENNELLY: Now, the next point deals with subjective or merits-based criteria. It's the next indented paragraph:

"*Accordingly, class definitions based on subjective or merits-based criteria ... should be avoided*."

That's been, obviously, shown to you already and you'll see that in this case, in fact, there are subjective criteria which, in our case, in the case before you, subjective criteria are also necessary.

Then the next paragraph, paragraph 59, the *Trucks* judgment is cited. This passage has actually been read to you from the *Trucks* judgment. And again, we don't shy away from that passage. Rule 79(1)(a) doesn't require the PCR to show at the certification stage that a PCM (potential class member) can prove that she or he is in a class, the kind of proof needed for damages, that level of certainty is not required.

In the *FX* case, similar points were made, summarised at paragraph 61 and then at paragraph 62, the Tribunal draws the threads together.

"(1) In our view, these Rules, [79(1)(a) and 79(2)(e), and the distinction between those two Rules has been shown to you by my learned friend] while overlapping, perform distinct functions ... 79(1)(a) is a hurdle… [whereas] rule 79(2)(e) is a factor to consider among others...

(2)... 79(1)(a) asks whether an objective and clear class definition has been proposed. It is about the design of the proposed class definition and whether, on its face, it is capable of sensibly identifying a class."

And as we'll see in this *CICC* judgment, that goes to questions of practicability even in relation to Rule 79(1)(a). This underpins important features of the regime, such as the assessment of issues and the ability to identify those who are bound by the result of the proceedings.

And then (3), although it's a hurdle, it's important that it's not applied too strictly, and

I'll take you to the second half of that sub 3:

"*There may well be some ambiguity or uncertainty permitted in a class definition and reasonable assumptions based on common sense may be required. [And you] 'have regard [obviously] to all the circumstances'*."

That goes to the Chairman's question a moment ago.

Over the page, we see a sixth factor, page 2284:

"*Despite having distinct functions, rule 79(1)(a) and 79(2)(e) are inherently linked. A poor class definition will make it more difficult to reach a reasonably evidenced conclusion about class membership ... while a well thought out one will likely lead to ease of verification of a person's membership of the class*."

Now, we see how this was applied in the *CICC* judgment. If you go, please, to page 2286. It's useful to see that the class definition in that case; there were two class definitions; there was an opt-in class and an opt-out class -- the opt-in class was basically for larger merchants, opt-out for the smaller ones -- and -- actually, before I go to the definition itself, it's just useful to recap what this case was about.

It may be very familiar to you, but the underlying claim concerned credit and debit card fees, called "multilateral interchange fees", that were set by Visa and Mastercard. In that case, in the *CICC* case, the particular multilateral interchange fees in issue were those charged for interregional transactions and commercial card transactions, as opposed to domestic consumer card transactions, which attracted a different interchange fee.

The card schemes of Visa and Mastercard set a whole range of different MIFs -- as they were called -- for different types of transactions, and although these were set by Visa and Mastercard, the MIF was paid by merchants to the banks which processed the merchants' transactions, called the "acquiring banks". The problem here was that the acquiring banks charged a blended fee to the merchants, which mixed up all the

different multilateral interchange fees. So, a merchant couldn't know, couldn't figure out, on the face of it, if they'd actually paid the particular interchange fee that was at the heart -- the subject of the litigation. But it was common ground, as you'll see here, that there were merchants who did pay the particular interchange fees for commercial cards and interregional transactions, and we'll come to that.

With that introduction in mind, we look at the class definition at paragraph 74 for the opt-out class. The proposed class was:

"*All Merchants who paid a Merchant Service Charge, (including a Multilateral Interchange Fee) in respect of one or more Inter-regional ... and/or Commercial Card Transactions: (i) during the Claim Period ... where the transaction occurred in the UK*."

And over the page, 2287, we see that there was no doubt there were certain merchants that did pay those kinds of interchange fees, in particular businesses catering to tourists, or businesses which took payments from business people using commercial company cards.

If you go to page 2288, paragraph 84, you see the blending problem that I mentioned. Paragraph 84:

"*For blended (also known as standard pricing) contracts, for any given transaction the acquirer [that's the bank processing the card transaction] does not automatically pass through at cost the interchange fee applicable to the transaction ... any given MIF is not an identifiable and transparent part of the charging structure*."

The PCR's expert acknowledged, paragraph 85:

"*Claimants that use standard pricing contracts are charged a blended ... rate and are not able to directly observe the individual components of the MSC*."

That included the individual interchange fees that they were paying.

So, go next please, to 2294. Page 2294, where the Tribunal comes to apply Rule 79(1)(a). At the top of 2294, at paragraph 113, we see the heading; they're

dealing with eligibility and the question of an identifiable class.

At paragraph 114, we see what the question was:

"*The issue that arises is a function of the focus in the proceedings on interregional and commercial card MIFs (as opposed to MIFs [in general]), in combination with the prevalence of blended contracts across the greater proportion of the merchant population. This means that merchants will not necessarily know whether they've accepted payments to which an interregional or commercial card MIF applies*."

The PCRs hadn't made proposals to address that issue, and this is for the purposes of identifiability. You'll see it's clearly at 79(1)(a).

We go, please, next to paragraph 119, so page 2295. They pressed counsel for the PCR "*how, in practice* --"

And the Tribunal will see here the emphasis on practicability and workability:

"-- *a merchant would know that they had conducted a transaction to which an interregional or commercial card MIF applied. The response ... was twofold:*

A merchant could ask their acquirer to provide them with the information."

We see echoes of that in Davis's evidence, and we'll come back to it. And then two:

"*A merchant would ... know that they'd conducted transactions ... because these types of cards could be differentiated by their appearance and the merchant would be able to see that at the time of the transaction*."

He did notice -- again, it's a common point in our case, the case before this Tribunal:

"-- *that accepting only one transaction of either type of card would be sufficient to establish the merchant as a class member*."

Moving down, then please, to the Tribunal's analysis that's on page 2303, paragraph 180. The Tribunal finds, in dealing with this question of eligibility and identifiability, that:

"*We are not satisfied that there is an identifiable class for the opt-out proposed*

proceedings, as required by 79(1)(a), or that it will be possible in many cases for individual merchants to be able to determine, pursuant to rule 79(2)(e), whether or not they are class members."

[It's] a consequence of the complications [the Tribunal went on] caused by [the PCR's] choices to include claims only in respect of interregional and commercial card MIFs and to define the opt-out class so broadly as to include large numbers of small merchants on blended contracts."

182, the first choice, going for only two MIFs, those two:

"... *creates the difficulty that a merchant cannot be presumed to be a class member just by reason of having conducted transactions which attracted MIFs under the Visa and/or Mastercard card schemes. Unlike claims based on domestic or even intra-EEA MIFs, it can't reasonably be assumed that every merchant has in fact carried out an interregional or commercial card transaction*."

In the same way, here, it can't be assumed that every user who had a CHA contract was worse off at the end of the minimum term. So, we know from the Claim Form that between 27 and 32 per cent of users may have been better off, according to Ofcom, under the CHA contract than under the SIM-only comparable contract. The Tribunal went on, 183:

"*The second choice means that merchants have no obvious way [this is 79(1)(a), and the focus is on whether it's obvious] of determining that question themselves, as there is no reason for the acquirer to provide that type of transaction detail to merchants in the ordinary course, given that the MSC in blended contracts is not dependent on the transaction mix*."

184: "*Outside the ... sectors in which most interregional and/or commercial card MIFs are paid, there is a very large potential class of merchants, (... hundreds of thousands) on these blended contracts ... and there was [no] sensible means by which these*

merchants, or indeed anyone else, could determine whether or not they had accepted transactions to which interregional commercial card MIFs would apply."

Again, there's a reference to what the PCR suggested at 185. We'll move on beyond the visual recognition point, but at (2), I do emphasise 185(2), the "*acquirers could be asked [suggested the PCR] to verify the position*". The Tribunal said:

"*This seems equally unrealistic, given that we are talking about hundreds of thousands of merchants and dozens of acquirers. There was also no evidence at all that acquirers would themselves hold sufficient and readily available records for merchants on blended contracts*."

There was late evidence about the fact that Visa did have data for every card transaction that the PCR suggested, but then we'll see how the Tribunal dealt with that at 187.

Both witnesses for Visa, Mr Holt and Mr Steel -- Mr Holt was the expert, Mr Steel was the factual witness:

"... *made it clear that, for various reasons, it was not easy, or indeed possible in some cases, for Visa to map data about MIF types to individual merchants. It was necessary to undertake a manual exercise* ..."

Skipping down two lines:

"*While the mapping exercise was possible for a relatively small number of larger merchants, [the] evidence was that it would be impractical for greater numbers of smaller merchants*."

Again, the language of practicability. If we go over the page, page 2305, to paragraph 190. Again, in my submission, dealing with the requirements of rule 79(1)(a), the Tribunal says:

"... *a very large number of other merchants may have no reason to assume, one way or another, and no ability to verify the position. [There's] a serious risk that some*

merchants will not register as class members [that's the opt-in problem], even though they are in fact valid class members, and that some ... will register when in fact they should not, with no easy way to determine the validity of their position. They will additionally not be able to exercise their opt-out rights, because they will not know if they're included in the class. The idea that hundreds of thousands of merchants could request and receive this information from the acquirers they deal with is, in our view, entirely unrealistic. Nor, for the reasons given above, are we satisfied that the same merchants can reasonably expect the ... Defendants to provide that information."

"*For these reasons, we think serious problems about identification apply in relation to both Rules 79(1)(a) and 79(2)(e).*"

So, my learned friend is quite wrong to say that these considerations that I've been canvassing are irrelevant to 79(1)(a); the Tribunal said otherwise in this judgment.

Then paragraph 192, turning first to Rule 79(1)(a):

"... *it appears that the design of the class is flawed (through the combination of the selection of MIFs underlying the claims to be combined and the breadth of the merchants included in the proposed class). [It's] apparent from the basic factual circumstances surrounding the merchants in question, as they were apparent to us, and in particular the difficulty that any merchant on a blended contract might have in understanding whether they are a member of the class*."

193, and this is the point I was promising to come to:

"*We read 79(1)(a) as allowing for a degree of uncertainty, in the sense that there need not be an absolutely rigid definition of the class, so that no doubt might arise at the certification stage about who is included or not included*."

To that extent, they agree with the PCR's counsel, and they go on to analyse the class definition in the *Merricks* judgment, which was individuals who had purchased goods or services from businesses that accepted Mastercard cards, and residents of the UK.

That, summarised, the Tribunal found, is a perfectly clear class definition, one which users could be reasonably certain whether or not they satisfied. But the class definition in the *CICC* case was nothing like that.

If you go on, please, to paragraph 196, over the page. About halfway down, 196:

"*While it's theoretically possible* --"

THE CHAIR: What page?

MR KENNELLY: I'm so sorry. We're on page 2306, halfway down paragraph 196:

"*While it's theoretically possible that there will be consumers who have never made a qualifying purchase, [this is in Mastercard], it's unlikely that will be a material number. Most importantly, it's reasonable to expect that an individual will know whether they have bought goods or services from a merchant who accepts cards (and is therefore likely to accept Mastercard). Most people will be able, with some confidence, to reach the conclusion they are (or are not) a member* ..."

197: "*However, that's not the case in these ... proceedings. There's no obvious basis on which [again, no obvious basis] it is reasonable to assume that smaller merchants in large parts of the UK will know they've accepted a commercial card or a card from outside the EEA in the last six years... there'll be a significant number of merchants ... who have not accepted such a card*."

"*Further, there is in practice, a very high likelihood that a significant number of merchants will have no view about whether they accepted such cards and will be unable to determine whether they are class members, because they are on blended contracts and have no visibility of the actual types of MIFs which their acquirers have paid the issuers of the cards*... "

Then please, could you go to page 2308, paragraph 211:

"*In relation to the PCRs' arguments, we have ... rejected the argument that Visa's ability to identify the types of MIFs ... resolves the position*."

Skipping down to the next sentence.

"*The PCRs' submission also seems to miss the point in relation to rule 79(1)(a), [and I emphasise this] which is that a merchant has no access to Visa's records at this stage, and therefore no way of knowing if they are a class member*."

"*As was made clear in Trucks ... the verification of a class member's claim is a different question from the ability ... to know whether they are, or even likely to be, a class member. The PCRs seem to be confusing the points, [said the tribunal]. The problem, which arises under rule 79(1)(a) ... is a consequence of both the focus on types of cards which would not necessarily be apparent to a merchant at the time of transacting and the nature of their contracts with acquirers, which is opaque as the type of MIF involved*."

"*It makes no difference ... that some members of the class may not face this problem*."

This is to Dr Bishop's point to me earlier.

"*There are hundreds of thousands of merchants on blended contracts who will face it and have no sensible means (as far as we're aware) to deal with it*."

And so, there's an assumption by the PCRs; the simplicity of the definition leads to a presumption of inclusion of all merchants. The Tribunal says:

"*We don't agree... is not at all simple when one understands the background circumstances and in particular the complications caused by the nature of the MIFs and the prevalence of blended contracts*."

Then, just to be absolutely clear that we've been talking about 79(1)(a), over the page, we see the Tribunal turning to 79(2)(e), per paragraph 216:

"*In relation to rule 79(2)(e), we're far from satisfied that it will ever be possible in many cases for individual merchants to establish that they are class members*."

And they say at 217 that that is a serious problem. (Pause)

So, at this stage, what we take from that, in my submission, is that rule 79(1)(a) and

79(2)(e) are asking similar questions but for different purposes. 79(1)(a) asks if the class can be identified in a real, practicable sense, not just as a question of abstraction, but that test is applied, as I said, with a healthy dose of flexibility, so as not to act as an obstacle to the statutory purpose. 79(2)(e) asks specifically how easy is it for a PCM to work out if he or she is in the class. That is a question of degree, and the answer is a factor which will be fed in with the other factors in the overall suitability assessment.

So, a class definition may be realistic in the sense that a particular class member can just about work out whether or not she or he is in the class, and that might allow 79(1)(a) to be passed, but the difficulty in working it out is a factor which goes to the 79(2)(e) assessment.

I'd ask the Tribunal now to turn to the sequel to the *CICC 1*, when the PCR amended the class definition, and the Tribunal ruled a second time, in 2024. That's in the fifth volume of authorities, tab 92. (Pause)

As the Tribunal may know, and I know, obviously, this is very familiar ground for Dr Bishop, at this stage, the PCR dropped the interregional MIFs and offered two alternative proposed class definitions. We see those at 2766. (Pause)

Page 2766, paragraph 9, we see the first proposed class definition. It's called the "*revised class definition*", and it's:

"*All Merchants who ... had in place a Merchant Agreement with an Acquirer which enabled the Merchant to accept Commercial Cards* ..."

It's enough to have an agreement with an acquirer where the merchant had the ability to accept commercial cards, not whether they had in fact accepted them or not.

Then at paragraph 11, we see the alternative class definition in the indented passage:

"*Merchants who paid a Merchant Service Charge in respect of one or more Commercial Card Transactions* ..."

That was called the "*adjusted original class definition*". If we go on, it's useful to see how the Tribunal dealt with those definitions, because it goes to this question of the extent to which the class can include people who have no claim.

If you go, please, to page 2771. Again, just to make clear a factual point which made a big difference between the *CICC 1* case and the *CICC 2* case, because in *CICC 2*, the PCR took a new point, which was that under the Interchange Fee Regulation, as adopted in the UK post-Brexit, it was possible for merchants to find out from their acquirers, even merchants on blended contracts, which particular MIFs they had paid, when, and by how much.

If we could go, please, to 2779 of the Tribunal's analysis. (Pause)

2779, and the identification of a class. The Tribunal looked at the first revised class definition. The revised class definition was the one which said, "*It's enough to show that you have an agreement with an acquirer that allows you to accept these transactions*", and the Tribunal didn't like that. We see at paragraph 52, they said:

"*The argument conflates two different issues [the PCR's argument defending it]*:

The possibility that a member of a class might turn out not to have suffered a loss [because the merchant surcharge customers and passed the loss on]; [and]

(2) The fact that a proposed class member might have no claim, because they [were never] exposed to the wrongful act complained of."

We would say, and I'll come to this, in our case, that would be a situation where a user with a CHA contract, in fact, was better off at the end of the minimum term, in view of the comparable SIM-only contracts available at the time.

THE CHAIR: That is comparable to which, 1 or 2?

MR KENNELLY: 2.

THE CHAIR: I see. Would it not be more similar to 1? It's no loss.

MR KENNELLY: No, because they're not within scope at all. I'll show you in this.

THE CHAIR: No, don't let me take you out of your order, so if you're going to come back to it ...

MR KENNELLY: No, sir, I'll take you to it right now. If you look at page 2781 --

THE CHAIR: 2781.

MR KENNELLY: -- at the same judgment. Page 2781, paragraph 56.

THE CHAIR: Yes.

MR KENNELLY: Counsel for the PCR referred back to the *Merricks* judgment and made his point -- it was made in *Merricks*, and my learned friend took you to it, which said that of course, in any class definition, there will inevitably be some members who have suffered no loss.

THE CHAIR: Yes.

MR KENNELLY: Paragraph 56:

"*Lord Wolfson KC relied on this passage [and the point I just made] as support for his argument that it was permissible to include in the class large numbers of merchants who did not have a claim. We disagree*."

Sorry, it was referenced to the Court of Appeal in *Gutmann*, *Trains*.

THE CHAIR: Yes.

MR KENNELLY: "... *in fact demonstrates is the distinction between class members who have not suffered a loss and class members who have no claim. Hence, passengers without a Travelcard at the time of travel have no claim and are said to be 'not in scope'.*"

So, that's the first category -- no, sorry, that's the second category from paragraph 52 that I showed you.

THE CHAIR: Yes.

MR KENNELLY: "*The other examples discussed concern passengers who have a claim but may not have suffered loss* ..."

We see then an example:

"... *passengers who may not have bought a cheaper ticket anyway* ..."

So, in order to be in that class where you have a claim, but you suffer no loss, the Tribunal posited the example of someone who had the possibility of a cheaper ticket but wouldn't have bought it anyway. Someone who was indifferent as to whether or not to take the offer of the bargain. But in order for that to work, the cheaper ticket would have to be available to them.

THE CHAIR: Yes.

MR KENNELLY: In our case, on the Ofcom evidence relied on by the PCR, there are between 27 and 32 per cent of potential class members who didn't have a cheaper alternative available to them.

THE CHAIR: Yes.

MR KENNELLY: At the end of their minimum term, a comparable SIM-only contract was not cheaper than the CHA contract in which they continued.

THE CHAIR: But let's just test that, shall we? If one's dealing with a situation where, on the margin, there is a dispute about what is comparable. So, a claimant says, "At the end of my contract, I think the most comparable contract was this one, and that was cheaper than what I carried on paying".

And it would be open to the proposed defendant to say, "Oh, no, you don't understand this, actually, because you've misunderstood the technical aspects of this, and in fact, the more comparable contract was this one, which was a bit more than you were paying. So, you've suffered no loss".

Now, that seems to me essentially a case of no loss as opposed to no claim, because you have the claim, you're advancing the claim because you say, "Well, if I'm right, the proposed defendant was abusing its dominant position, et cetera, et cetera, et cetera and here is my loss", and you say no. I'm struggling to see that case -- and maybe

we're at cross-purposes -- but I'm struggling to see that example as anything other than a no-loss case rather than a no-claim case.

MR KENNELLY: That kind of case, sir, at the margins, would be closer to a no-loss situation. I tried to accept at the very beginning, there will be marginal cases, even on a proper class definition, where there will be disputes about whether -- it will be unclear in some situations, whether someone fall within the definition or not. So, that's why I'm not asking the Tribunal to apply a rigid approach to 79(1)(a).

THE CHAIR: But just to understand that. So then, am I right to understand -- I'm just looking at the judgment you're taking us to -- the distinction between no-loss and no-claim? What kind of distinction is it? Is it a bright line distinction, an essential distinction, or is it one -- because if we get to the margin and we can't be quite sure whether it's one or the other, I'm not sure how useful a distinction it is.

MR KENNELLY: In principle, it's a bright line distinction, because before we get into whether someone suffered a loss or not, the starting point has to be, on the PCR's own case, that the SIM-only contract -- the comparable SIM-only contract -- was cheaper than the CHA contract the class member held.

THE CHAIR: Yes.

MR KENNELLY: That's the starting point. That's the bright line distinction.

THE CHAIR: Yes.

MR KENNELLY: Now, in proving that, we fully accept that there may be difficulties at the margins, but the problem the PCR has is that it cannot be said that, in general, potential class members will be able to even get to first base to identify any comparable SIM-only contracts. At most, my learned friend can point to a few examples where it might be done.

THE CHAIR: But if they can point to any, is that not sufficient?

MR KENNELLY: Yes, yes, but even to point to any comparable SIM-only contract, the

PCR cannot show you that that is practicable for the vast majority --

THE CHAIR: What about the examples that we've just had in the --

MR KENNELLY: They were extremely limited samples --

THE CHAIR: But I mean, you said "any" --

MR KENNELLY: No, I mean "any" for "any individual class member". It's enough --

THE CHAIR: Well, what about a class member who bought one of these phones in the adverts we saw that Mr Thompson took us to?

MR KENNELLY: But as in *CICC* -- the Tribunal said in *CICC* --

THE CHAIR: Yes.

MR KENNELLY: -- the fact that some class members can satisfy this definition is not enough.

THE CHAIR: I understand, maybe I'm just struggling with your use of the term "any", because it sounds to me as if you may be saying that the examples they're pointing at are de minimis; is that what you're saying? But I mean, just to say "any" suggests that there's some problem with even the examples Mr Thompson's put forward.

MR KENNELLY: The threshold for them is not to show a more than de minimis number that can satisfy the definition.

THE CHAIR: I see. So, when you say "any", you don't mean "none", you mean "not very many"; is that fair?

MR KENNELLY: Yes, not -- well --

THE CHAIR: Or very, very few.

MR KENNELLY: Well, actually our case is that only very few can --

THE CHAIR: Yes.

MR KENNELLY: Yes, exactly, yes. Because, in general, it's just not possible. You see that -- I mean that's the test; *CICC* was very clear that it's not enough to show that a few can do it. When there's a significant number that can't, then the class definition

is not practicable; it is not it does not do what it's required to do under 79(1)(a).

THE CHAIR: Yes, no, I understand that.

MR KENNELLY: So --

MR ALTY: Sorry, can I just follow that up?

THE CHAIR: Yes.

MR ALTY: I mean, there are quite a few years, contracts, companies, in the examples we were shown. You're suggesting that (a) that's going to cover very few customers, and (b) is not representative of the information generally available to people.

MR KENNELLY: Yes.

MR ALTY: Okay.

MR KENNELLY: I say, "very few", that's all we can take from the sample. That's not the standard I need to satisfy. It's sufficient for me to show that a considerable number will not be able to work out if they are in the class or not.

MR ALTY: Well, you said all except the de minimis number.

MR KENNELLY: No, I said our case is that -- it's a fortiori here, because really the PCR has shown only a small number can do it. But that's not the standard; the standard we see from *CICC* is that they need to show that in general, any class member can work it out.

MR ALTY: Sure. I don't think they were suggesting those were the only people who could do it; that was an example. So, I guess the question remains open as to whether that is unusual or representative.

MR KENNELLY: When I come to the evidence, I'll show you how difficult -- because the problem is, it's about comparability, and it's not just price. The difficulty for any class member is in doing a comparison where the considerations are not just whether the price is comparable, but whether the overall package is comparable, by reference to data, roaming, add-ons --

MR ALTY: Sure.

MR KENNELLY: -- Disney+ subscriptions, Netflix subscriptions, warranties. It is an extremely difficult task, even for an expert, but even more so for an individual consumer.

THE CHAIR: Perhaps the point -- it may be not for you; it may be for Ms Demetriou to deal with later, but there does seem, on the face of it, to be a bit of a tension between the argument you're advancing here and the argument that's being advanced in the second limitation claim, in the sense that you're saying this is essentially impossible for the great majority of potential claimants. And yet, on one view, it could be thought that what's being contended is that those class members already had the information in 2015. Is there a tension there, or how do you resolve that, or are you just going to pass that on to your learned friends?

MR KENNELLY: No, there's no tension. The test, of course, is not that it's impossible. We've seen from *CICC* --

THE CHAIR: No, I appreciate that.

MR KENNELLY: -- the language of practically.

THE CHAIR: Yes, I'm sorry. I was just trying to -- not practical. Noted.

MR KENNELLY: There is no tension, because my point is that the Tribunal is looking at the situation here and now -- here and now, how is a potential class member to work out if he or she is in the class in relation to a contract which terminated in 2010 or 2012, or earlier? That's quite different from the point that my learned friends will make about limitation, which was at the relevant time, they could have identified the problem -- the alleged problem -- and brought their claim. No doubt my learned friends will expand on that later, but that's the basic answer.

But this Tribunal is concerned with whether, in 2025, these potential class members can work out whether there was a comparable SIM-only price that was cheaper than

the CHA contract that terminated in 2008, or 2010, or 2015. That, we say, is extremely difficult; there's no practicable way to do it, and when I come to Mr Davis's evidence, I can show you that, relying only on the evidence from the PCR themselves.

Just coming back then -- I was going to page 2782, paragraph 61. (Pause)

Here again, the Tribunal is making this distinction which we've been discussing, paragraph 61:

"*In a class definition, which might inadvertently produce the result that a class member turns out not to have a claim, and the deliberate inclusion in the class of a large number of class members in respect of which it's known they have no claim*."

So, for example, if they were to say, "Everyone who had a CHA contract", we would say that is including a load of people who have no claim, because on the material of the Claim Form, we see that a very significant proportion were better off with their CHA contract when they look at comparable SIM-only contracts.

For that reason, the Tribunal prefer the second definition. If you go to page 2785, paragraph 69. Again, this goes to the point that my learned friend made that all these considerations of practicability are irrelevant if one looks at Rule 79(1)(a).

We look then at paragraph 69 of this judgment, and the Tribunal says:

"*We see no reason to depart from the view expressed in the 2023 Judgment that the primary exercise under rule 79(1)(a) is to decide whether or not the class definition is, on its face, using reasonable assumptions based on common sense, capable of sensibly identifying a class. The Tribunal was unable to reach that conclusion in the 2023 judgment [why?] because there was, on the face of the evidence before the Tribunal, no reason to believe that a large number of merchants could determine, with any relative ease [and that's the standard], whether they were included in the class or not*."

The point is made again at paragraph 70; that doesn't mean every merchant needs to

be identified. The PCRs don't have to establish that every merchant who might be in a class can verify the position.

"*The exercise is a more general one [this is paragraph 70], involving an objective assessment of the class definition on the basis of reasonable assumptions, and allowing for uncertainty or ambiguity [to a degree]*."

Paragraph 71:

"*The Tribunal concluded there was no reasonable basis to assume that a merchant on a blended contract could say with any certainty whether they were within the class*."

That was a point of identifiability for the purpose of Rule 79(1)(a).

Then, one looks at Rule 79(2), so moving on from Rule 79(1)(a). We're at paragraph 72, the question is about practicality, and "*the tribunal will exercise its judgment in broad terms*". It looks at the mechanics, and this is important, members of the tribunal, because the Tribunal for 79(2), including 79(2)(e), asks:

"*Is there going to be a workable methodology which will allow the mechanics of registration, distribution, and the like to be given effect?*"

So, it's not just about the distribution at the end of the process. My learned friend suggested that 79(2)(e) was only relevant at the end of the trial after all the evidence had been put in and conclusions made. 79(2)(e) applies now, applies at every stage of the process, and registration, of course, in an opt-in claim, which is what was an issue in part here, is at the beginning of the process.

2788 please, over the page. Just to wrap up the decision on the facts. In the end, the PCR was certified because the Interchange Fee Regulation allowed merchants to get the information to work out, if they had paid commercial card MIFs or not. The Tribunal found that the IFR allowed them to do that. (Pause)

That concludes at paragraphs 85 and 86 and 87, but there's no need to go to that.

That was the basis upon which, in that case, the Tribunal was satisfied that merchants,

businesses, could work out for themselves if they were in the class or not. They could get from their acquirers, under regulation, the information they needed.

Turning to the evidence, then, in this case, and going to the particular class definition, and we see it in the PCR's Reply. That's in A --

THE CHAIR: Sorry to interrupt you, Mr Kennelly. There is a version in the skeleton for the claimant which I thought was the more up to date version, but I may be wrong about that.

MR KENNELLY: It's the same one.

THE CHAIR: It's the same?

MR KENNELLY: I only went to the Reply because it was --

MR THOMPSON: I think we've updated the date. I'm not sure whether we've updated anything else, but we certainly put it at the back of the Reply.

THE CHAIR: I just want to make sure I had the right version.

MR KENNELLY: Of course, and I'm sure you want to --

MR THOMPSON: Sorry, about the back of the skeleton, I think we've updated it, but possibly only the date. I can't think of anything else that we've agreed. We've also included the definition of “Handsets”.

THE CHAIR: Thank you. So, so far as Mr Kennelly, the main point is the same?

MR KENNELLY: I'm going to the Reply just to save time.

THE CHAIR: Yes. No, absolutely.

MR KENNELLY: Other points are there.

The Reply is in bundle A, the fourth volume, tab 33. The part that I want to go to is page 1872. Here, we see for my purposes the relevant parts of the proposed class definition. You have the point, it's in the italicised passage at the very bottom of that page: "*a class member needs a particular CHA contract*" and over the page, "*they need to have made one or more periodic payments*" -- this is the top of page 1873 -- "*in*

excess of the relevant SIM-only price after expiry of minimum term and SIM-only price of the periodic charge in respect of airtime services only".

The word relevant before SIM-only price is key. It tells us that not any SIM-only price will do; it needs to be the SIM-only price offered by the MNOs for airtime services comparable to the airtime services provided under the particular CHA contract which the user held. That was all confirmed by my learned friend this morning.

The key question is how is anyone to ascertain what this SIM-only price is? How are they to do it? If you go to page 1876, paragraph 34, the PCR here is dealing with our concerns about the ability of potential class members to understand the class definition. Again, we see confirmation that it's necessary to compare two prices that were offered by suppliers -- this is 34(a) -- the CHA contract price and a SIM-only price. There's no question, just pausing here, that the comparison is between the CHA price and any counterfactual price that the expert has to work up the comparisons between two prices which the MNO in question actually offered at the relevant time.

Still in 1876, there's 34(b), there's a reference to the "*information available to individual PCMs*", a reference to "*analysis carried out by Ofcom*". If you go over the page, you'll see why that analysis is relevant because it compares the PCMs' contract prices and actual SIM-only contract prices. And then this for a similar type of contract plan in the same year. Then, at 34(c), bottom of page 1877 again, there's a reference in the very last line to a "*broadly equivalent package of airtime services*". So, it's common ground that the exercise for the potential class member is to identify the SIM-only price for comparable services at the relevant time.

So, what is involved in identifying the comparable package of airtime services? The answer to that is given by Mr Davis. When you see his reports, my submission will be that it demonstrates just how unrealistic it is for any potential class member to work out for himself or herself how much a subjective judgment is required.

If you go to Mr Davis's first report, A1, the first A volume, tab 5, page 325.

Here, Mr Davis is estimating the overcharge. He's dealing with his damages methodology. Obviously, we accept that that is a different exercise from the one that a potential class member needs to undertake to work out if he or she is within the definition. But it is useful because, for this purpose, it shows us what is meant by the comparison; in principle, what needs to be compared to identify broadly similar SIM-only packages.

At 286, Mr Davis speaks of the comparator-based methodology. He says that:

"*Mobile phone plans vary along several dimensions. In identifying a comparable plan, I need to make sure they are as close as possible on those dimensions so as to avoid any variation in monthly tariffs due to differences in plan characteristics*."

At 286(a), he proposes to identify a comparable or slightly better plan from the same provider, then at (b):

"*Since the contract relates to CHA contracts, the comparable plan must ... be a different contract type*."

And here there's a choice. Here we see the first bit of subjective analysis in the approach. He would start with a pay-monthly SIM-only contract, over the page, but he notes that the airtime service component of a split contract may also provide a suitable comparator. The split contract is where a user has one contract for the handset and another contract for the airtime services.

Then at (c):

"*Controlling for planning characteristics would ... involve ensuring that the choice of comparator contract had the same or similar (or ... slightly better) characteristics as the CHA contract*."

Then he identifies what goes into this comparison, first:

"*Allowances: Contracts vary in terms of the number of minutes, text and data*

included ... Potentially more challenging, [of course], other add-ons may be offered, such as access to a subscription service."

At footnote 470, we see Mr Davis telling us what that is. First of all, he says he's following Ofcom's approach in comparing contracts and comparable SIM-only contracts. It's not enough just to look at the price, and the data allowance, but it's also necessary to look at add-ons. Actually, what add-ons include comes later in this report, but you'll see it. Add-ons, as I said, are subscriptions such as music or TV subscriptions which can be included in these mobile phone packages.

Over the page, page 327, the timing of the match, the comparison, is important. And at paragraph 287, Mr Davis says it's important, he thinks, to compare the CHA contract price with the comparable SIM-only package available at the end of the minimum term. So, again, it's necessary for a potential class member to work out if they're in the class, necessary to work out if the comparable SIM-only package available at the time at the end of the minimum term was better or worse than the CHA contract they were paying under at that time.

My learned friend acknowledged that the comparison had to be done, but he said, "Don't worry, it's a very straightforward task". Just to get a sense of how far from straightforward that task is, and how extraordinarily difficult it would be for an individual consumer, one must begin with the range of SIM-only contracts that were available during this period.

It's one thing to have your CHA contract, which is itself difficult and we'll come to that, but just for a sense of the range of SIM-only contracts, one gets a flavour of that in the E bundle that you've already had a look at.

Could I ask you to take up the E bundle and turn please, to -- all of these references are behind tab 1. To E tab 1, page 121. I hope I have more luck with my references than my learned friend. Page 121.

Does the Tribunal have T-Mobile? Does it say, "Pay monthly sim cards?"

THE CHAIR: Solo.

MR KENNELLY: Yes, perfect. So, pay monthly Solo. Solo is a SIM-only package. You see here, after page 121, there are several pages of similar contracts. The short point is they range from paying £10 per month to £30 a month, depending on the minutes, texts and so forth that have to be included. That's just for T-Mobile at that particular time in 2009.

If you go to page 142, it should be packages offered by Vodafone, this time in 2011. This is just to give you a flavour of the huge range of SIM-only packages that were on offer at the time. Here --

THE CHAIR: Do we know it's Vodafone just because of the heading right at the top of the page; is that right?

MR KENNELLY: Yes, exactly. Well, actually, no. It should also be clear from the ...

THE CHAIR: It's just that the only reference to Vodafone I can see is --

MR KENNELLY: I see that, sir.

THE CHAIR: Oh no, no, fair enough. It does say --

MR KENNELLY: It's actually the Wayback Machine. In that very small font, it tells you that the Wayback Machine has been used by Mr Davis's team to dig out old, archived pages related to Vodafone.

The short point is that here again, we see a range of SIM-only packages, a huge range depending on the minutes, texts, data allowances from £10 to £30 up to page 147. The price, of course, is only part of the picture. Similarly, on page 157 --

MR ALTY: Sorry, I may have misunderstood, but I thought Mr Kennelly was saying that this was Dr Davis's evidence. This is material that ...

THE CHAIR: No, I don't think he's saying this is -- I understand it's not Dr Davis's evidence we're looking at.

MR KENNELLY: Forgive me, this was, of course --

MR THOMPSON: Material put in by the Defendants.

MR ALTY: Indeed.

MR KENNELLY: No, I wasn't suggesting -- I'm sorry. I may have misspoken. I didn't mean this was -- is it, Dr Davis?

THE CHAIR: I hadn't noted that.

MR KENNELLY: I also apologise for saying "Mr Davis"; I've been corrected, it's Dr Davis. I didn't mean to say it was his evidence.

But again, if my friends doubt the accuracy of this or have anything to say about it, the short point is there's a huge range of SIM-only packages. And to save Tribunal time, and I see I'm already going over my time, you'll get the same in relation to other mobile phone providers at pages 181 and 185.

Now, a potential class member may have a record of his or her payments under the CHA contract that they had in the past. Harder, of course, for that class member to retrieve the actual allowances, data allowances, the particular add-ons they had, whether they had roaming or not, but to work out the comparable SIM-only price, is just not realistic for a consumer because what is required is a very difficult exercise of judgment.

Even bearing in mind the grey area that's implicit, just in principle, whether the SIM-only package is cheaper than the CHA contract package involves comparing a range of variables such as the add-ons, data roaming, minutes, text warranties, and so forth. Of course, a package that offers slightly more data, but no roaming may be just as valuable as a package that offers roaming, but slightly less data.

THE CHAIR: I have that point. I understand that point, speaking for myself, certainly. I suppose if one would just have the bundle open in front of me at the moment, if we look to those prices and we have our potential class member and they say, "Well,

I know I was paying £X per month and I've looked at these ranges and they're all lower than mine now", are we not then in that marginal territory where there might be an argument to say, oh, well, actually misunderstand because there isn't a comparable or when they're properly priced or we need to get Dr Davis or any other expert who's going to tell us about that. But we're not then in the question of the value of the claim or whether it's a no loss rather than no claim at all.

MR KENNELLY: Sir, indeed. That's my next point, which is if a potential class member had access to all this information, if they had access to all the information necessary to make these comparisons, although they might make mistakes and there could be some difficulties -- it may be more difficult for me to make these points -- the problem is that they do not have ready access, to use the language of the Tribunal in *CICC*, far from ready access to the information necessary to make the comparison. That's again from Dr Davis. This information that we see here is not readily available to potential class members.

THE CHAIR: I notice the time, Mr Kennelly, and no doubt partly because we've been asking you some questions, you've run over. How much longer do you think you have to go?

MR KENNELLY: Fifteen, 20 minutes. Well, depending on the Tribunal's interventions, but if I have plain sailing, then about 20 minutes left.

THE CHAIR: I can't guarantee plain sailing.

MR KENNELLY: I'm not asking --

THE CHAIR: Schools come out of nowhere. I think what I'm minded to do is rise now for lunch and when we come back after lunch, you can -- maybe that gives you an opportunity to work out the points you want to make thereafter, but certainly, there'll be an opportunity for you to reply at that stage.

THE CHAIR: Yes.

MR THOMPSON: I obviously would wish -- I've got a few things to say.

THE CHAIR: Yes.

MR THOMPSON: Whether they're necessarily part of Mr Kennelly or whether I have a single shot at the end, I don't particularly mind, but I will need some time.

THE CHAIR: Yes. No, I understand that.

MR KENNELLY: To reassure the Tribunal, I have probably less for my funding submissions than the timetable allows. I hesitate, no doubt you'll have questions about that too, but it will not be as detailed as this.

THE CHAIR: We will rise now, then, and sit again at 2.00. Thank you.

(1.00 pm)

(The short adjournment)

(2.02 pm)

Submissions by MR KENNELLY

THE CHAIR: Good afternoon, Mr Kennelly.

MR KENNELLY: Good afternoon, sir. Just to sum up very briefly where we've got to before we move into the evidence of Dr Davis's second report --

THE CHAIR: Yes.

MR KENNELLY: -- and to come back to a point, sir, that you put to me about whether there's really a problem if the definition is applied in an overly inclusive way and class members are caught up who turn out at trial not to have a claim at all because they got the comparison exercise wrong.

THE CHAIR: Yes.

MR KENNELLY: I think, sir, you put that as a no loss point; it's probably a no claim point, because they wouldn't have had a claim in the first place. But at the margins, if there was a group like that, that would be a very different argument.

But that's not our concern. We are raising a qualitatively different objection, and it has two parts. The first is that the comparison exercise which the proposed class definition requires them to make isn't workable in the first place in general for these proposed class members. Secondly, even if it were workable in principle, they don't have ready access to the information they need to do the exercise.

THE CHAIR: Yes.

MR KENNELLY: In relation now to the information available to them, I'd ask you to go to Dr Davis's second report, which is in the A bundle, volume 4, tab 34 and page 1933.

THE CHAIR: Thank you.

MR KENNELLY: Here at paragraph 18, Dr Davis makes the point that -- well, first he says, and we agree, that the exercise which an individual has to take as to whether they're in the class or not is different from the full damage assessment which he would have to undertake at trial.

THE CHAIR: Yes.

MR KENNELLY: He sets out what he says an individual would need to do to satisfy the class definition. He says:

"*It would be sufficient for the individual to obtain data to ascertain: whether there was some month in which they were beyond the minimum term for their CHA contract, for which the price the individual paid for their CHA contract [now, this is the comparison, working out the comparator] considering information on the airtime allowances (minutes, text and data included), as well as, if appropriate, any other add-ons they were entitled to (for* e.g., *roaming, additional subscriptions [the type of subscriptions])*."

The question is whether, combining all of those things, that price for that package is greater than:

"*some contract for Airtime Services only ("SIM-only contract") with comparable (or if necessary*, *slightly better) airtime allowances and add-ons (if appropriate) compared*

to those which were available under the individual's CHA contract [at that month], in month T."

That's Dr Davis's own evidence.

THE CHAIR: Yes.

MR KENNELLY: We look at the information then -- so, we start with the CHA contracts themselves, and the Tribunal obviously has in mind that on the PCR's case, the claim period may begin even earlier than 2007; that's paragraph 85 of the Claim Form.

So, with that in mind, we look at paragraph 21 of Dr Davis's second report on page 1934. So, how does the individual work out what the package they actually had under the CHA contract was?

They may have personal records in the form of bank statements or bills which may tell them their price, their actual monthly payment, and also whether they went beyond their minimum term since those terms relate to their actual payments. He doesn't know the proportions of people that would be able to access such records, but Ofcom indicates that individuals can estimate how much they typically pay -- pay in the present tense -- on their mobile phone contracts. That doesn't tell us what they could estimate they paid many years ago, and -- this is about what they paid -- on the face of it, it doesn't tell you that allowances, add-ons and particular dimensions, to use Dr Davis's language, that they had under their CHA contract at the relevant time, bearing in mind the claim period may begin earlier than even 2007.

So, what's the solution? Paragraph 22, Dr Davis proposes that these individual consumers make subject access requests to the MNOs in question -- this is part of 22 -- under the GDPR.

Now, before we look at what can be done under the GDPR, you will recall what the tribunal said in the *CICC 1* judgment when the PCR suggested that merchants and businesses in that case could write to their acquiring banks for the information and

that suggestion was dismissed as entirely unrealistic. It was paragraph 182(2) of that judgment.

Here, it's suggested that individual consumers can write to their former or current MNOs asking for information about the particular dimensions that Dr Davis says has to be taken into account and he gives an example of a Vodafone subject access request on page 1936 over the page. That sets out the kind of information one might be able to get from Vodafone under a GDPR subject access request.

It's not entirely clear how far back one of these requests may -- as in, it's not so far back an MNO may have the material necessary for the consumer to work out if he or she is in the class. There's a reference at note 3 about halfway down the page that information about terms and conditions and plan information can be provided, but not clear how far back the MNO is willing to go or the extent to which they're willing to dig out the relevant information if it's in the distant past.

In any event, even if all the information can be obtained this way, this is an onerous burden for a consumer, to specifically contact using a legal mechanism or to write a letter under the GDPR or an email to the business asking for this information in circumstances where something similar was rejected as unrealistic in a commercial context in *CICC*.

Then, the publicly available sources. Go to paragraph 23, still on page 1936, Dr Davis -- and here, by the way, he's dealing specifically with the identifiability issue that we raised -- suggests four publicly available mechanisms whereby some of this information may be obtained: the Wayback Machine, Teligen, Pure Pricing and Ofcom. The middle two, Teligen and Pure Pricing charge a fee; they are commercial information providers and, in our submission, it's not realistic to expect consumers to pay a fee to extract information which may or may not help them to work out if they're in the class. That leaves the Wayback Machine and Ofcom.

As regards the use of what's called the Wayback Machine, Dr Davis deals with this in particular at paragraph 27 on page 1937. Just to summarise what he's saying here, the information that the Wayback Machine provides is patchy. It appears to provide nothing before 2008. Even when his team undertook a sample search, they found that, applying restrictive filters over the page 1938, the range of available information decreased from 54 per cent -- sorry, the range was from 54 per cent to 90 per cent. But the problem with this exercise was the very limited nature of the sample and you had a sense of that with my learned friend this morning. How it was done, we see at page 2001. This is how Dr Davis's team used the Wayback Machine data. Just pausing here --

THE CHAIR: Sorry, what was the page reference?

MR KENNELLY: 2001.

THE CHAIR: Thank you. It's just occurred to me that obviously, so far as the Proposed Defendants are concerned, we wouldn't need to look before 2015, would we?

MR KENNELLY: No.

THE CHAIR: No.

MR KENNELLY: But even then, even if we're successful on limitation points, all of my points remain good as to the exercise --

THE CHAIR: Post-2015.

MR KENNELLY: Indeed. The exercise involved and the difficulty in obtaining the information to do it.

Because this Wayback Machine is not a straightforward tool. There isn't time here to take you through all of this report, but when you come to go over again the passages that I took you to and how Dr Davis's team used it, he acknowledges time and resource constraints in how much they could obtain using the Wayback Machine. It is something which an expert can use, perhaps someone who is skilled in the use of it,

a non-expert, but an ordinary consumer cannot be realistically expected to use this machine, even if it produced all the relevant data, which it does not.

You can see that from paragraph 130 on page 2001 over to the bottom of page 2002. Again, I'm not going to read all that to you, but it describes how Dr Davis and his team used the Wayback Machine to see what data could be got from it, and the whole process is not one which commends itself in a straightforward way to consumers.

Even then, on page 2003, we see just how patchy the data is. On page 2003, we have table 4, which tells you what they estimated based on their review. You see in (a): "*EE, O2, Three and Vodafone have at least one data point available per month in the majority of years starting from the first full year when data was available*."

O2 had only three months of coverage in 2019; Vodafone had 38 days with captures in 2016 spread over ten months. But actually, Orange and T-Mobile are even worse, fewer captures and more variable coverage.

If you look at table 4, just to give you a sense of it, first of all, looking at Orange, if you go to 2011, 24 days where they managed to find something, spread over seven months. That's under the 2011 column.

For T-Mobile in 2014, they found data for four days only spread over three months in 2014. In 2009, 12 days spread over six months.

O2, looking at the 2019 column, four days spread over three months; Vodafone 2016, 38 days spread over ten months.

Even then, Dr Davis fairly acknowledges that this may provide an overestimate as to what might be obtained using the Wayback Machine; that's at paragraph 135 on page 2004.

Page 2004, paragraph 135, he says, he notes that this table might include captures which do not provide information that would allow individual potential class members to identify their relevant SIM-only prices, and this would imply the number of daily and

monthly captures shown may be an overestimate.

If you go to page 2006, we look at the data set ,of SIM-only data from the Wayback Machine that was used. Skipping to 2007, where Dr Davis said on particular days, individuals could compare their contracts to certain SIM-only plans, just a certain number of them, but all of this seems to be derived from only three days of samples -- you get that from table 6 on page 2008 -- over a vast claim period.

Now, the Tribunal cannot properly rely on this as demonstrating that the Wayback Machine will provide a realistic path to potential class members working out if they are within the class or not.

Dr Davis then goes on to suggest how an individual consumer could use generative AI to help with the information gathering. Again, it's just not realistic. In the sense that the Tribunal held in *CICC*, this is just not realistic from the perspective of ordinary consumers.

That leaves Ofcom. The idea that consumers could scour Ofcom consultation papers, thousands of pages long, and they're expected to do so to find a clue as to what their MNO was offering in the SIM-only space five or ten years ago - that's not realistic either.

Certainly, Dr Davis and his team can interrogate that material, and we see them doing it at page 2014. Appendix D shows how he and his team looked at data on SIM-only prices from Ofcom reports. But it only takes you, the Tribunal, to flick through this appendix, from page 2014 to page 2017, to see that this is not an exercise a consumer can be realistically expected to undertake.

Here, the confusion lies on the part of the PCR; their suggestion is that because Dr Davis and his team can do this, the consumer can be expected to do it, and that is quite wrong. This is not an exercise which a consumer can be realistically expected to undertake, just in terms of the ordinary comparison, but then when one looks at the

information, that is also not readily available to consumers in any usable form.
That's all 79(1)(a), but we make the point that for all the same reasons, this weighs heavily -- even if you're against me on 79(1)(a), the threshold point -- all of this weighs heavily in the balance under 79(2)(e) as a factor which the Tribunal must take into account in assessing suitability.
Just pausing to see if I can ... So, unless I can give any further assistance.
THE CHAIR: Thank you. No, that's very helpful, thank you. Mr Kennelly.

Reply submissions by MR THOMPSON
MR THOMPSON: Sir, I think I can keep my points in reply under four broad heads. First of all, the *CICC* cases.
THE CHAIR: Yes.
MR THOMPSON: I think Mr Kennelly took me to task as having in some way misled you on the law, but I'm bound to say that the two first items he referred to were the same ones that I referred to, and the summary given at F, tab 80, 2283 to 4, under 6 points, seemed, if I may say so, with respect, an exemplary summary of the law, with a clear distinction between the test under 71(a) and 72(e).
THE CHAIR: That's *CICC 1*, isn't it?
MR THOMPSON: Yes.
THE CHAIR: And which paragraph was it again?
MR THOMPSON: It was tab 80, pages 2283 to 4. Let me just check the paragraph number. It's paragraph 62. So, there's three paragraphs under 79(1)(a)) --
THE CHAIR: Yes, I remember being taken to that, I just wanted to make sure I had the right --
MR THOMPSON: And then two under 79(2)(e).
THE CHAIR: Yes.

MR THOMPSON: The linkage is at the sixth.

THE CHAIR: Yes.

MR THOMPSON: And although there's a linkage, in my submission, there's still a distinction between the definition and verification of a person's membership of the class. So, in my submission, that doesn't -- well, there's no suggestion that it casts doubt on the two passages that I took the Tribunal to this morning.

THE CHAIR: Yes.

MR THOMPSON: Mr Kennelly took a long time on the facts of that case, but in my submission, that's not particularly helpful in deciding whether these different facts meet the standard, particularly, because there were some twists and turns there, and ultimately, the case was decided on specific evidence.

If I may respectfully say, the distinction between the 79(1)(a) and the 79(2)(e) analysis in those judgments is not always entirely clear. There were a number of other factors, including the fact that this was a large scale opt-in, and so there was an important question about whether the potentially large opt-in companies knew what they were opting in to.

So, it's a somewhat different situation here, because here, I think we've made the point in our skeleton that there is an element of self-serving analysis here in that it's, in reality, a bit unlikely that a consumer who has a potential claim is going to want to opt out of this claim at this stage; there doesn't seem to be any particular reason for them to do that, because the reality is they're not going to then bring their own claim against these four very large Defendants. So, it has a different flavour from the *CICC* case altogether.

THE CHAIR: Yes.

MR THOMPSON: The second point was the no-loss/no-claim point, and I thought it was worth just bringing the Tribunal's attention to the analysis of the Court of Appeal

in the *Gutmann* case, where this issue is discussed, admittedly in a slightly different context. It's at F4, tab 77, pages 2218 to 2219. It's an analysis of section 47(c)(2) of the Act, and it's particularly paragraphs 38 and 39.

THE CHAIR: Yes.

MR THOMPSON: There's a reference to winnowing out no loss members, and that the Tribunal would have to do that at some point, but on an aggregate basis.

THE CHAIR: Yes.

MR THOMPSON: Then towards the end of 39, there's an example of Mr Moser doing a calculation about how an individual might work in a case of this kind.

"*He calculated that upon this basis, the trial could last decades, which, as he put it, might pose a case management challenge for the tribunal*."

And then he goes on:

"*It is a defining feature of opt-out litigation. Class representatives do not have to engage with individual class members until the distribution stage, so that it would be inconsistent for the CAT and inconsistent with the raison d'etre of the collective action regime, to order opt-out certification but then require the class representative to be forced to call each member of the class to establish liability; thereby restoring opt-in by the back door*."

I know we were at an earlier stage, but some of Mr Kennelly's more forceful submissions did have a flavour of thinking about what individuals would do, which is, in a way, the entire purpose of the collective regime to avoid.

THE CHAIR: Yes.

MR THOMPSON: More directly, the purpose of our class definition, as I'm sure the Tribunal appreciates, is to exclude, as potential class members, those whose CHA price, after the minimum term, is lower or equal to the relevant SIM-only price. So it is, in a sense, precisely intended to winnow out no-loss claimants, or no-claim

claimants, at the start.

But as the Tribunal put to Mr Kennelly, it remains open to the Defendants to contest both the scope of the class and the existence of loss, including the point that Mr Kennelly made about the point apparently accepted by Ofcom. Although I should note that Mr Davis didn't necessarily accept that as a correct analysis from an economic point of view, and I'll just give the Tribunal the reference, that's at A34, paragraphs 116 to 117.

THE CHAIR: Is this a point about that proportion of --

MR THOMPSON: Well, it's really what it means to be "better off".

THE CHAIR: Yes.

MR THOMPSON: I think he questions whether Ofcom was perhaps rather generous in some of the assumptions that were made about what "better off" might mean. And we addressed this issue --

THE CHAIR: I'm sorry.

MR THOMPSON: It's at A34, pages 1984 following.

THE CHAIR: Okay.

MR THOMPSON: And it's paragraphs 116 and 117. We address this issue in some detail in our Reply, paragraphs 92 to 97, which is A4, tab 33, pages 1904 to 5.

THE CHAIR: Yes.

MR THOMPSON: Then the third area was practicality, which I think Mr Kennelly devoted some attention to and also referred to *CICC*. We would say both that this is a 79(2)(e) issue, but also in contrast to *CICC*, we have addressed practicalities in considerable detail, and in particular in Dr Davis's second report.

Your Lordship did comment on the tension here, and in my submission there is another form of tension in that the SPA, or Second Period Applicants, have in fact provided a great deal of comparative material, including the Vodafone example that Mr Kennelly

took you to this morning at pages 181 to 185. That is, of course, old material intended to support the putting us on notice point, but the Tribunal must also be aware that now that we have agreed, in principle, you could bring a claim in relation to what happened last week or last month.

So, there will in fact be a great deal of contemporary material, in the case of Scots law and Mr Hoskins, running from 1 October 2015 to now, so approximately a decade, and in the case of the other three Defendants running from 9 March 2017, so about eight years and even on the most restricted, there's still six years going back from November 2023. So, there's a great deal of contemporary or recent data that would be available of the kind that has been sampled by the Defendants for their own purposes in the material in bundle E.

I think Mr Kennelly's point was that it was all very, very difficult because you were looking for a needle in a haystack, but in my submission, that's not the correct analogy, because the hypothetical claimant will know very precisely, you know, when the minimum term ends, what the terms of that contract were, any particular add-ons, and so it won't just be floundering around in a sea of material, it will be looking to see what SIM-only deals are available on the day of the minimum term expiring. So, it will actually be an extremely focused investigation in relation to material that the Defendants themselves have advertised they have a huge volume of.

Given digital search capacity, it may actually not be very difficult at all to see what is being offered that's equivalent to the CHA contract that the proposed class member is dealing with.

All of this, in summary, is much easier and clearer than the problem that beset the situation in the *CICC* case, where, because of the blended nature of the prices, particularly for small merchants, it was quite obscure whether they had accepted the cards for any of the relevant transactions, or suffered any loss, and the representative

of the claimants was constrained to say that that was realistic and that they couldn't realistically know whether they'd suffered loss or not.

Then just briefly, on the sort of de minimis absurdity side of things, I would note that the Proposed Defendants, so far as I'm aware, have put in no evidence on volumes or anything of that kind to suggest where it is that these problems will or won't arise. In my submission, we put in amply sufficient evidence to show that this is not a de minimis issue; that even where there are problems, that they can be addressed in a variety of ways.

To the extent that there's a point made about complexity, we would say that this is the type of point that has been raised invariably by Defendants, whether *Trucks* or any other kind. The mere fact that there are lots of different configurations of trucks, or lots of different types of phones and contracts, is not something that should detain a collective regime of this kind, particularly when the complexity is readily, easily exaggerated. These are not technically, enormously sophisticated contracts; they are essentially contracts with three major variables: data, minutes and texts. So, it's not an infinitely complex matter. The phones, although they have different details, they are broadly performing the same functions, even to the extent you can take the SIM card out of one and put it into the other.

I can't resist saying that, with due respect, the tension point in relation to the SPA application is well made; Mr Kennelly seemed to be saying that it was very difficult for people to know whether they were on notice at all, whereas I think it is intrinsic in Mr Williams' and Ms Demetriou's that the entire universe of potential claimants has been on notice for a long time, and that that matter is something that we can debate more on Wednesday.

Finally, to the extent that Mr Kennelly is emphasising the position on old cases, there's the rather elementary point that if the claimant can't prove their case, it will fail. It's

possible that there will be old cases where the data will not be available, but that's hardly a basis on which to prevent certification of a claim of this kind.

In that regard, it should obviously be borne in mind that the MNOs will be under quite substantial disclosure obligations, and if they can't -- or say that they can't -- explain the difference between their CHA contracts and SIM-only contracts, it's quite possible that, as in some of the earlier cases, adverse inferences will be drawn as to why it is that they don't provide such an explanation. The reality is, they must very well know what the basis is of their pricing.

THE CHAIR: Just in terms of the order that we deal with things. Clearly, we're dealing with certification first, and then we've got the two limitation arguments that follow on from that. But what would be your submission in terms of -- is there an approach that should be adopted?

The reason I raise that is because let us suppose that the Tribunal were not with you on one or other of their limitation arguments, in a sense that much of Mr Kennelly's argument went quite properly, your claim goes back to 2007 as pleaded. But if we, let's say we were not with you on the first limitation point, so we said, as a matter of construction, limitation comes down and cuts off all claims before October 2015, in a sense that might, on one view, be seen to strengthen your position in relation to complexity and difficulty of finding information.

So, that might suggest that the Tribunal should deal with that issue before dealing with certification. Do you have a view about that? I mean, when I say "before", I just mean obviously we're dealing with more at the same time, but conceptually in terms of our judgment, one wonders as to whether you have a view about that.

MR THOMPSON: Well, I see exactly the point you're making, and it obviously interacts with the second application --

THE CHAIR: Yes.

MR THOMPSON: -- directly as a matter of law --

THE CHAIR: Yes.

MR THOMPSON: -- but also in terms of what it is that we'll be debating on Wednesday.

THE CHAIR: I suppose just to answer my own question, it's perhaps there is no decision to be made; it's merely that we have all these issues before us and we need to address them all, and there will be an interrelation between our views about one and our views about the other.

MR THOMPSON: Yes, and I'm not quite sure what point -- I mean, Mr Kennelly I don't suppose is (inaudible) the two limitation points you both seem to emphasise, the situation is what would be if they fail. If they succeed, then it's true; it cuts away a lot of the submissions that have been made on certification, but we obviously make the goldilocks submission that we --

THE CHAIR: Yes.

MR THOMPSON: Succeed on --

THE CHAIR: On everything.

MR THOMPSON: -- not too much, not too little, just right.

THE CHAIR: Yes.

MR THOMPSON: I can see from the logic of your judgment you might want to reach a view on the legal question that will be debated tomorrow, as it were, first.

THE CHAIR: Yes.

MR THOMPSON: As that will define the scope of (inaudible). I think Mr Gibson wanted to -- (Pause)

Yes, I think it was the same point essentially, that in our view, we win even if we have the misfortune to win tomorrow and Wednesday.

THE CHAIR: Yes, I understand.

MR THOMPSON: Or also win today.

THE CHAIR: Yes. No, I see that position. That's helpful. Does that conclude what you wanted to say in reply?

MR THOMPSON: Yes, those are the points I wanted to make.

THE CHAIR: Yeah. So, I think according to the timetable you're now going to address me on funding.

Funding

Submissions by MR THOMPSON

MR THOMPSON: Yes. That's true, so it falls to me again.

THE CHAIR: You seem to be sitting down, but perhaps you're gathering strength for the next --

MR THOMPSON: Yes, I got confused for a moment, but I have the pleasure of continuing. That's good. (Pause)

Yes. As we discussed briefly this morning, there are two discretionary points relevant to the position of Mr Gutmann.

THE CHAIR: Yes.

MR THOMPSON: The first in relation to the funding -- so funding of his own costs -- and the second in relation to insurance – so, the coverage in relation to the Defendants' costs.

THE CHAIR: Yes.

MR THOMPSON: On the first of those points -- I won't repeat the points I made this morning about the balancing exercise; we say that the balancing exercise comes down very heavily in favour of a just and reasonable certify, so we say these are not roadblock or red card problems; they are balancing factors which don't weigh in the balance anyway.

THE CHAIR: Yes.

MR THOMPSON: But the position on the facts is dealt with in detail by Mr Moloney, who is the chief executive of the LCM funding group, and in particular at paragraphs 7 to 15 of his statement.

THE CHAIR: Yes.

MR THOMPSON: I'm very happy to take the Tribunal to it, but I would imagine that you probably had the opportunity to read it.

THE CHAIR: Yes.

MR THOMPSON: So, I'll simply summarise the main points.

THE CHAIR: Yes.

MR THOMPSON: The funder, LCM Limited, is the UK subsidiary of a long-established global funding business whose parent, an Australian company, is listed on the Alternative Investment Market of the London Stock Exchange. It's one of only four listed companies engaged in litigation funding; that's at paragraph 12 of Mr Moloney's statement.

We say the significance of that is that LCM is subject to rigorous transparency requirements, which are not applicable to many other non-listed funders, and that's something that the Tribunal should bear in mind.

Secondly, Mr Moloney sets out in detail, at paragraphs 13 to 15, that both the group and the UK subsidiary have access to very substantial funds, both internally and from third-party investors, and their listed status is helpful in that respect.

THE CHAIR: Yes.

MR THOMPSON: Thirdly, that the LCM Group has been, and remains, active on the international funding market, including in numerous cases in the High Court and the Tribunal; that's paragraphs 16 to 19, and that the UK cases are funded by the same UK subsidiary.

The subsidiary is not a special purpose vehicle, but a company; it's the vehicle for all the cases, and I think at the moment there are 19 ongoing cases, including four cases in the Tribunal, in addition to this one, and our submission would be that it is wholly implausible that a very large international group would default on its obligations in any one of these major cases, both because it would be catastrophic for its listing reputation, and also because it would undermine its funding position in relation to all the other cases.

THE CHAIR: Yes.

MR THOMPSON: Finally, and this is in contrast with some other cases, including the *Trucks* case that I was involved in, it's a UK company, not an offshore company, and the comparison between the SPV that was put up by my clients in *Trucks*, which was a Guernsey-based company, which was a subsidiary of a funder --

THE CHAIR: Yes.

MR THOMPSON: -- and where the Tribunal did require certain additional protections; that's in the papers at bundle F, tab 57, pages 1231 to 1236.

THE CHAIR: Yes.

MR THOMPSON: So, in the face of that, we say that the Defendants have put forward no evidence, or any substantive reasoning, to support their demand that the Tribunal should require Mr Gutmann to obtain a group guarantee to protect the interests of class members. They have advanced no evidence that could undermine Mr Moloney's evidence that the LCM Group is a substantial and viable funding business that's well capable of supporting its local subsidiaries, including LCM UK. As I've said, it would be obviously disastrous for the credibility and publicly listed share value of the LCM global business for it to default on the funding of the present claims, or of other individual claims, in a way that undermined its reputation in one of its major markets, namely the UK.

THE CHAIR: Yes.

MR THOMPSON: Overall, we would say that this was a classic example of a self-serving argument that is intended to benefit the Defendants, not the class members, by delaying or undermining the CPO process. The arrangements for funding collective proceedings are primarily a matter for the PCR and his representatives acting on behalf of class members at the CPO stage, subject, of course, to the supervisory jurisdiction of the Tribunal under the CPO regime.

So that's our essential position on that question.

THE CHAIR: Yes.

MR THOMPSON: The second issue, insurance, is a question of whether, in addition to the insurance that Mr Gutmann has taken out himself, he should have arranged for direct enforcement by the Defendants themselves in relation to adverse costs.

THE CHAIR: Yes.

MR THOMPSON: This was tangled up at one point with whether or not there should be an anti-avoidance exclusion, as has been debated in other cases. But the evidence was put in by Mr Gutmann that that would cost over £1 million to arrange, and at that point, the Defendants seemed to have backed off on that question.

On the question of direct enforcement, the PCR and his representatives have repeatedly addressed the issues relied on by the Defendants in correspondence over a period of months, and given the position that the Defendants have taken, they've now confirmed that the insurers are not prepared to agree to the direct enforcement of the ATE policy without an ATE provision, the costs of which the Defendants have now accepted as disproportionate. Given that the Defendants were not prepared to accept the position as described in correspondence by the PCR's solicitors, Mr Gutmann has obtained a statement from his broker, Mr Warner, setting out the factual position, and so we rely on that.

THE CHAIR: Yes.

MR THOMPSON: The sole basis, so far as we understand it, for the Defendants' argument now seems to be Mr Gutmann's relatively advanced age and the fact that he lives in Italy. That's the point at paragraphs 38 to 41 of their skeleton, which is at B5, pages 76 to 77.

THE CHAIR: Yes.

MR THOMPSON: We say that this suggestion ignores both the fact that the Defendants don't challenge Mr Gutmann's general suitability to act as class representative, or more fundamentally, the fact that the scenario that appears to concern them is highly unlikely ever to arise, even on the hypothesis which Mr Gutmann disputes, that there's any reasonable basis for the Defendants' concern. In particular, the powers of the Tribunal include extensive supervisory powers in respect of the class representative, notably a power to determine whether the class representative continues to satisfy the criteria for authorisation; that's Rule 85. I don't know whether that's the Rule that the Tribunal was familiar with, or whether it's worth just turning that up. That's bundle F, tab 32. (Pause)

THE CHAIR: Which volume?

MR THOMPSON: It's the first volume, tab 32, page 225. There are actually two relevant Rules, 85 and 87.

THE CHAIR: Yes.

MR THOMPSON: 85(1) states:

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

85(2)(b) says:

"*(2) In deciding whether to vary or revoke a proceeding order, the Tribunal shall take account of all the relevant circumstances, including in particular:*

"(b) whether the class representative continues to satisfy the criteria for authorisation set out in rule 78 and if not, whether a suitable alternative class representative can be authorised."

Then 87 deals with the possibility that class representatives might seek to withdraw from acting, with the Tribunal's approval.

THE CHAIR: Yes.

MR THOMPSON: In my submission, were Mr Gutmann, or any other class representative, to fall ill or to be incapacitated in any way, or were his residence in Italy become a problem for any reason, the Tribunal, or indeed Mr Gutmann himself, has ample powers to address the situation, and indeed the Defendants could address it as well.

In particular, were the Tribunal or its representative to consider that Mr Gutmann wasn't able to perform his role effectively, including in respect of ATE insurance claims, it would obviously be in both his own interests and that of class members for him to apply to withdraw as a class representative and be replaced by somebody else. As such, we say that this is not a realistic concern, and doesn't appear to have arisen as an issue in any other case in which Mr Gutmann has been authorised, and has been overseeing collective proceedings for many years.

THE CHAIR: Yes.

MR THOMPSON: We say that to the extent it is a material factor at all, it is a very weak one. It is in no material weight as against the uncontested factors, indicating it would be eminently just and reasonable to authorise Mr Gutmann to act as class representative in these cases. In rhetorical terms, in my submission, this is an Oliver Twist request; the Defendants would like some more assurance, and with respect, the

Tribunal is not under any obligation to give it to them, and I would urge the Tribunal not to do so.

THE CHAIR: Thank you.

Submissions by MR KENNELLY

MR KENNELLY: Thank you, sir. I'll take the two concerns in turn.

THE CHAIR: Yes.

MR KENNELLY: And I'll begin, if I may, with our concern about the funder's ability to pay. It's not disputed that under Rule 78(2)(a), when the Tribunal considers whether the PCR would fairly and adequately act in the interests of class members, that includes consideration of the PCR's financial resources, and it's perfectly proper for the prospective Defendants to draw this to the Tribunal's attention. It's a short point: the problem is that the funder, on Mr Moloney's evidence, has about £22 million in equity, and it's also funding other large cases, as we've just heard.

The PCR in this case alone anticipates incurring just over £20 million. Now, the funder's parent, LCM Limited, is well capitalised, and the MNOs asked if it could provide a guarantee to cover the funder's liability to pay the PCR's costs if required. It has provided similar guarantees to other companies in the LCM Group, but LCM Limited has refused.

There doesn't appear to be any good reason for the refusal; there's no particular cost or inconvenience in doing so, and where, as we say, the funder itself is looking light, that guarantee is necessary. That is the short point.

Our concerns are intensified because neither the funder nor the parent, LCM Limited, is a member of the Association of Litigation Funders, and as this Tribunal knows, the rules of that association require members to maintain the capacity to cover aggregate funding liabilities under all litigation funding agreements for at least 36 months, with

an obligation to inform the Association of Litigation Funders that they have done so, and to inform them if they cannot do so, or if they have not done so. That's the short point.

Now, if I may just take you to some documents to make those points good. To go to Mr Moloney's evidence, a director of the funder, LCM UK Limited, that's in bundle A, fourth volume, tab 37, page 2055. If you turn, please, to 2060. In paragraph 10, we see that the funder's total equity, about halfway down the paragraph, totals £22 million. Paragraph 11. It's common ground that the parent LCM Limited is, the last line, "*well-capitalised with [significant] net assets*". Over the page, page 261, we see the assurance -- this is what's supposed to give us comfort.

"*The LCM Group's funds flow to subsidiaries, including [the funder here], as required. LCM UK [the funder], which is the contracting entity for [the] UK originated investments has [we're told] the full support of [the parent's] substantial resources to draw upon to meet its financial obligations*."

But there's no suggestion that any of that is legally binding. Then we have the evidence as to the other cases which the funder is funding, and that's on page 2062, paragraph 18. This is what gives rise to some concern, because one sees right away a number of very significant cases before the Tribunal; *Boyle v Govia*, a trial has yet to come in that case; *Stasi v Microsoft*, about cloud computing, that is at an early stage; and *Apple* again, a very early stage.

We were told, I think just now by my learned friend, if I heard him correctly, that in addition to four cases in the Tribunal, the UK funder is funding 19 other cases. Now, we know that costs in some or all these other cases in the tribunal could easily use up the majority of that £22 million. Typically, we see in other cases, between ten and £20 million is considered appropriate for a class representative's costs in collective proceedings. The PCR's own cost budget anticipates that their own legal costs will be

just over £20 million, as I said. Just for your reference -- no need to turn it up -- A3, tab 24, page 1669.

THE CHAIR: Sorry, what was the page reference?

MR KENNELLY: A, tab 24, page 1669.

MR ALTY: Thank you.

MR KENNELLY: Again, we're told -- we're going back now to Mr Moloney's statement, Mr Moloney for the UK funder -- that he or his company had the full support of the parent. But again, as I say, no contractual commitment. And we ask, (inaudible), why not? Because such a commitment has been made to other companies in the LCM Group.

We see that at tab 38, it's the very next tab in this bundle. Page 2130 gives you the annual reports and financial statements for LCM, the parent. And if you go to page 2235 -- 2235 -- this is note 27 to the financial statements. Immediately below the table, one sees the heading -- this is about two thirds of the way down the page -- "*Guarantees entered into by the parent entity in relation to the debts of its subsidiaries*", and we see that LCM Limited -- that's the parent, and a number of subsidiaries, LCM Operations Pty Limited and so on, are parties to a deed of cross guarantee under which each company guarantees the debts of the others. And then it goes on to say this is a closed group for the purposes of the guarantee.

So, plainly, guarantees have been given when the parent considers it appropriate. In view of all these matters, the Proposed Defendants simply asked for something similar for the funder in this case, but the parent and the PCR have refused. Apart from a quite vague reference to its reputation and just having faith that the parent wouldn't want to be seen to let its subsidiary down, there doesn't appear to be any good reason for that refusal. There's no particular cost, as I say, or inconvenience in doing so.

That's why we -- despite having dropped many of our points -- we wish to bring this to

the Tribunal's attention to maintain that here a parental guarantee is necessary and appropriate. Those are my submissions on that first point.

The second point is our concern about the fact that we cannot claim directly under the ATE policy in the event that Mr Gutmann does not do so. What is at stake here, if this case goes to trial, if it is certified and goes to trial, and the Proposed Defendants succeed, they will likely have incurred tens of millions in costs. The PCR's estimate is £20 million in respect of the Defendants' costs. That's A, tab 28, page 1740. No need to turn that up. If this case does proceed to trial, that figure will, we say, need to be revisited; it's not challenged for the moment, but it may not be sufficient to cover the four sets of proceedings all the way to trial. But it's common ground in any event that if we succeed, the MNOs will have incurred tens of millions in costs.

Mr Gutmann is an individual; he has not incorporated a corporate SPV to act as the PCR. The funder of these proceedings, these proposed proceedings, has not undertaken to bear that adverse cost liability, as sometimes happens where the funder can take on an ATE policy. So, if these collective proceedings fail, it is Mr Gutmann personally who will be liable to pay the Proposed Defendants' costs. It's Mr Gutmann personally who is insured under the ATE policy, not the funder. And, as is common ground, the Proposed Defendants have no right to enforce the ATE policy because any rights under the Contracts (Rights of Third Parties) Act are expressly excluded in clause 9.

Stepping back, the mere fact alone that the ability of the MNOs to recover adverse costs depends entirely on the health and actions of one individual is sufficient reason for the Tribunal to exercise caution and I ask questions about what's been put in place to cover those scenarios in which the PCR personally might be in a situation where he's unable to claim under the ATE policy.

The PCR tells us we are worrying unnecessarily, that Mr Gutmann will be willing and

able to enforce the ATE policy in the event that the MNOs are successful at trial. But as I say, there is a lot riding on that one individual. And far from being unprecedented, the Tribunal recognised the risks that arise in these kinds of circumstances in the *Merricks* litigation.

And I wish to show you very briefly, one of the decisions in *Merricks* that deals with this. I'm afraid I came upon the point too late to include it in the hard copy authorities bundle. I need to hand it up, but my learned friends for the PCR have had warnings. But I will need to give you, members of the Tribunal, a copy of the judgment that I'm about to go to. (Handed)

This is one of the CPO judgments, further judgment in the *Merricks* litigation from 2021 where a new funder had come on board. And I'll just go, if I may, to page 11 and paragraph 28.

In this case, unlike ours, the funder under the litigation funding agreement had undertaken to pay adverse costs. So, Mr Merricks, the PCR in that case, had a right to call upon the funder to pay adverse costs in the event that the defendant succeeded.

Paragraph 28:

"*The consideration of adverse costs involves not only the amount of cover but the ability of the proposed class representative to pay them. An award of costs were made in favour of Mastercard. The award would be against Mr Merricks. Obviously, he doesn't personally have the means to pay the very substantial costs, but he would have to request Ainsworth Capital to pay them pursuant to their obligation under the litigation funding agreement*.

29. Mastercard has no right to enforce the LFA because its rights under the 1999 Act are excluded. It could apply for a third-party costs order but Ainsworth Capital is a Jersey company outside the jurisdiction, so Mastercard sought an undertaking by the funder to the tribunal that the funder would discharge a liability for costs ordered

against Mr Merricks." [as read]

And then this upon which I place reliance:

"*We consider that Mastercard's position is understandable; that the anticipated costs of these proceedings are vast; Mr Merricks is a private individual who obviously lacks the means to pay such costs and it's no disrespect to Mr Merricks to say that as with any individual party facing a potential liability of such magnitude, the other party to whom liability might arise has a concern about personal risks, whether of insolvency or indeed untimely death. The former would leave Mastercard an unsecured creditor. The latter would greatly complicate recovery*." [as read]

And then 31:

"*An analogous issue arose in the CPO application in Trucks, where the potential adverse cost liability was governed by an ATE policy in the name of the funder, which was a Guernsey company. The concern was the risk the funder could go into liquidation and the applicant there addressed the risk by obtaining an endorsement to the insurance policy, whereby the respondent could enforce the policy under the 1999 Act*." [as read]

So that's a very simple solution. You simply allow a third party to enforce till the exclusion under the Contracts (Rights of Third Parties) Act is removed. And then at 32, we see:

"*In light of the tribunal's indication, Ms Demetriou QC informed the tribunal that the funder had no objection to giving a suitable undertaking along the lines sought by Mastercard*." [as read]

Similarly, here we cast no aspersions upon Mr Gutmann's character or reputation, but the sorts of concerns identified in *Merricks* were adverse costs, liability may fall upon his shoulders and in particular, the ability to call upon the ATE policy arise in any case. And again, I don't mean this to be insensitive or disrespectful, Mr Gutmann could

be -- I hope he is in superb health -- but it is relevant that he is 76 years old and it's relevant that he lives in Italy. That's common ground; that's in his own second witness statement at A, tab 35, page 2028.

If unfortunately, any problems were to arise with his ability or willingness to claim under the ATE policy, there is a risk that his entitlements, whether anyone could enforce the ATE policy other than Mr Gutmann personally, that might be governed by Italian law. We raised this in our response some time ago, our Response to the CPO Claim Form, and we've never had a satisfactory answer. If anything were to happen to Mr Gutmann, who would have standing to claim under the policy?

There is a risk that this would be governed by foreign law. My learned friend said today that Mr Gutmann has ample powers to deal with this, but where are they? We've not had any comfort in relation to this and the Tribunal obviously has powers too but as we stand today, the risk that arose in *Merricks* arises here also. And that's why we asked for a direct right of enforcement, the solution of choice in *Trucks*, as noted in *Merricks*.

In response to this, the PCR says that their insurer would only amend the ATE policy to allow for this direct enforcement right if the PCR procured an anti-avoidance endorsement, which would cost, we're told, about £1 million. It's not at all clear why an anti-avoidance endorsement is necessary. The idea is simply that the ATE policy can be effective in the event that Mr Gutmann doesn't claim under it when he should, and that, on the face of it, doesn't seem to increase the insurer's risk. It's not clear why Mr Gutmann should have to pay so much more for it.

And there is something odd about the situation where the insurers want £1 million for this. Why is it worth so much? Far from allaying our concerns, it suggests that the risk is increased where the insurers may not have to -- the price suggests that it increases the risk for the insurers that they'd have to pay in circumstances where they

would otherwise not have to.

Now, we've seen the evidence the PCR filed on Friday, that simply restated what had been said in correspondence. It tells us that the insurers refused what we have requested and wanted about £1 million for the anti-avoidance endorsement, but no reason as to why that was necessary. We're told that it's the first time the insurers have seen this, but we know that's not -- well, the insurers may not have seen it but it's certainly something which came before the Tribunal in *Merricks* and *Trucks*.

As regards the anti-avoidance endorsement, we don't seek one but just for the Tribunal's note, they were provided in *BSV v Bittylicious*, *Coll v Google* case and *Kent v Apple* suggesting they weren't cost prohibitive. So again, reason to query that million-pound figure but there's little I can say about that; I have no evidence of my own to gainsay it.

And my very final point is, of course, just to draw to your attention that our rights, the Proposed Defendants' rights, are reserved on the funding agreements overall, pending the outcome of the appeals in *Sony*, *Apple* and *Visa* and the *Mastercard* proceedings. We mentioned that in our Response but I was asked to remind you of it. It's obviously a potentially very important point. And unless I'm told to add anything to that, those are our short submissions on the second of the two funding points.

THE CHAIR: Thank you very much.

Mr Thompson.

Reply submissions by MR THOMPSON

MR THOMPSON: Just very briefly, I think I made most of the positive points already.

THE CHAIR: Yes.

MR THOMPSON: In relation to -- I think it was page 2235 -- the point Mr Kennelly made that there were instances where the parent company had given guarantees.

Obviously, this is not a very clear piece of evidence, but it does appear that this is a cross guarantee between a number of companies. And it says:

"*The specified subsidiaries represent a 'closed group' for the purposes of the guarantee* ..."

So, it does seem to be a rather different type of commercial arrangement from the one that I think is being envisaged here. And I don't think it really acts as a precedent for what is being requested in this case.

THE CHAIR: Yes.

MR THOMPSON: And in my submission, what is being offered is sufficient from Mr Moloney and from the group. And the fact that LCM is not a member of ALF is addressed specifically by Mr Moloney in his statement, and he makes the point that it is within a commercial group and the points that I've already made about it being a listed company, which has its own obligations and that should be sufficient.

So far as the ATE insurance goes, the precedent that Mr Kennelly raises in relation to *Merricks* doesn't appear to be exactly on all fours with the present case because there it seems that the funder was a Jersey company and the question was what was the basis on which the company would be liable, and that it gave a form of undertaking to the Tribunal that it would discharge a liability for costs. That's the passage over the page on 29 to 30.

So, it doesn't seem to be a precedent for what is being sought in this case. It appears to be a different type of question, and I guess that the person standing in the shoes of Innsworth in this case would be the insurers. I certainly have no instructions, and it would be a matter for commercial discussion whether or not that was a feasible possibility. But it's not a precedent for what is being sought by Mr Kennelly and the other Defendants here.

Closer to that is the *Qualcomm* case, which was referred to in the statement of

Mr Warner, which is in the papers, which is bundle F4, tab 73, pages 2006 to 2007 and the paragraphs 118 to 121. The first part of that discussion, the Tribunal has it.

THE CHAIR: What was the page reference again? Sorry, 2006 --

MR THOMPSON: Pages 2006 to 2007 in the hard copy.

THE CHAIR: Yes.

MR THOMPSON: Paragraphs 118 to 121.

THE CHAIR: Yes.

MR THOMPSON: And then there's a question about AAE which has fallen away in this case but the quoted cost of £1.7 million seems to be in the same ballpark as we've been quoted in this case.

THE CHAIR: Yes.

MR THOMPSON: And the Tribunal agreed that that was a disproportionate expense given the status of Which? and at 120, they dismissed the risk that Which? might act in a "*fraudulent or deliberate breach of its duty*", and note that they reached a similar conclusion in relation to the RHA. Although Mr Gutmann is an individual rather than a consumer organisation, in my submission, his status is similar and there's absolutely no reason to question his good faith, with respect.

And then the final point is the one that bears here:

"*As for the fact that Qualcomm is not able to enforce the policy directly, we have not seen anything indicating that there's any risk at all that Which? would not take steps to claim under its ATE policies in order to meet an adverse costs order. The Tribunal rejected a similar complaint in relation to the RHA's policy in Trucks (Funding) at [84].*"

And, in my submission, the somewhat speculative risks that the Defendants have raised here don't lead to any different conclusion. I've already addressed you in positive terms on that in my opening remarks.

Can I just ask if there's anything else that anyone wants to say? (Pause)

Our understanding is that the cross guarantee are between a number of Australian companies but I'm not in a position here to give evidence on that. I suppose the broader point is that given the protections that Mr Moloney has already identified in his witness statement, there must be a question of how far the Tribunal really should get into the question of telling a global business how to structure its finances if it's satisfied that, for the reasons Mr Moloney gives, isn't actually a material risk, that a substantial funded company of this kind, business of this kind, would default on a claim of this order. The point that there's only a certain amount of money in this jurisdiction, there may be very many commercial reasons why that is the case, but unless there's a substantial reason to believe that the group would walk away from this particular claim, in my submission, it doesn't provide a basis to order a specific guarantee in this particular case.

I think there's one other point. I think there may have been a slight confusion. I think the four CAT claims are within the 19 claims currently in the United Kingdom, I don't think they're additional to those claims. (Pause)

I think I may have missed it, but I understand there was a brief reference to two other cases: *Coll* and *Kent*. The point that's been made to me by my learned juniors is that in both those cases; they were AAE cases so difference (inaudible) the present case.

THE CHAIR: *Kent* and what's the other one?

MR THOMPSON: *Coll*. I'm not sure whether they're in the papers even, but it went quite quickly at the end.

THE CHAIR: Thank you.

MR THOMPSON: Those are my points, and so I don't know how the Tribunal wants to move forward now.

THE CHAIR: Thank you. Well, I think what we're minded to do is to take the break now and then perhaps, Mr Hoskins, if you wouldn't mind beginning. It seems that you

should have a good hour to make progress, if that doesn't -- (overspeaking) Excellent. Thank you very much.

(3.15 pm)

(A short break)

(3.30 pm)

Limitation

Submissions by MR HOSKINS

MR HOSKINS: I'm going to address you on the first limitation application. This is on behalf of all four Defendants.

THE CHAIR: Yes.

MR HOSKINS: The first point is that the claims have no specified starting date. They are entirely retrospectively open-ended in terms of a date. You'll see that if you go to bundle A1, tab 1, page 29. That's the claim form, at paragraph 81.

You've seen the proposed class definition, it's the definition of relevant period, and it means "*any date up to the date of filing of the CPO application or such later date as may be ordered*", and we have the issue about today. But my point is the retrospective one, it's completely open-ended retrospectively.

Our submission is that the claims are time barred insofar as they include damages for any harm suffered prior to 1 October 2015. The issue for the Tribunal to decide is a purely legal one, and the issue is what limitation rules apply to a stand-alone claim for damages brought in the Tribunal in relation to the period prior to 1 October 2015.

Just to set out the two positions, we say that you find the answer in Rules 119(2) to (4) of the 2015 Tribunal Rules. What those provisions of the 2015 Rules tell us is that the relevant limitation period for both stand-alone and follow-on claims is to be found in Rules 31(1) to (3) of the 2003 Tribunal Rules. Obviously, I'll take you through those

provisions.

The PCR's contention is the following. First of all, they say that the relevant limitation period for stand-alone claims is laid down by the Limitation Act 1980 and the equivalent Scottish and Northern Irish statutes. So, Limitation Act 1980 for stand-alone.

However, they accept that the relevant limitation period for follow-on claims as established by Rule 119(2) to (4) of the 2015 Tribunal Rules is to be found in Rules 31(1) to (3) of the 2003 Tribunal Rules. So, in short, according to the PCR, you have different limitation regimes applying depending upon whether it is a follow-on or a stand-alone claim.

I'll make my apologies. For the sake of simplicity, I'm just going to refer to the Limitation Act 1980, in my submissions, no disrespect intended to the legal systems of Scotland or Northern Ireland. I apologise in advance.

I'd like to structure my submissions in two ways. First of all, I'd like to make the submissions as to how we say the Rules apply in this case. In the second part of my submissions, I'll address the arguments of the PCR.

So, what's our case? Let's start with the position prior to 1 October 2015. Prior to that date, it was necessary to distinguish between stand-alone and follow-on claims. The Tribunal only had jurisdiction to hear follow-on claims. If we go to F1, tab 5, page 57. This was the Competition Act as it applied at the relevant time. You'll see in particular subsections 5 and 6. If you could read those, please.

THE CHAIR: This is 47A, isn't it?

MR HOSKINS: 47A, that's right.

So, you'll see that as a result of 47A(5), the Tribunal only had jurisdiction to hear follow-on claims. The permission of the Tribunal was required if claims were brought before the expiry of any potential appeal proceedings against the decision relied upon. You'll see that in 47A(5)(b) and also (7) to (8). If you read those, you'll see the sorts

of decisions that were relevant for follow-on claims.

The limitation rules for such follow-on claims in the Tribunal were set down in Rule 31 of the 2003 Tribunal Rules. We're still in bundle F1, we're going to tab 25 and it's page 205. That was the limitation rule that applied; by definition it applied to follow-on claims because they were the only ones that could be brought in the Tribunal at that stage. I'll come back to the language of Rule 31 when I say what should happen in our case. But that's the scheme in the Tribunal prior to 1 October 2015.

The other part of this picture in that period, though, was of course, court proceedings. So, in England and Wales, for example, the High Court had jurisdiction to hear both stand-alone and follow-on claims. Limitation in the High Court was governed by the Limitation Act 1980 -- you'll be familiar with it, it's an old friend, but if you go to F1, tab 1, page 2, it was a section 2, the time limit for actions founded on tort:

"*An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued*."

A similar provision in Northern Ireland; similar in Scotland, save for five years instead of six. I know I'm not doing it justice.

THE CHAIR: I think we can live with similar.

MR HOSKINS: Let's then look at the relevant legislative changes. With effect from 1 October 2015, the Competition Act was amended by Schedule 8 of the Consumer Rights Act 2015. A new section 47A was substituted into the Competition Act and that removed the restriction on the Tribunal from hearing stand-alone claims. So, in short, with effect from 1 October 2015, the Tribunal has had jurisdiction to hear both follow-on and stand-alone claims.

If we can look at the Consumer Rights Act, that's bundle F1, tab 20 at page 137, the relevant provisions are to be found in Schedule 8, which is at page 138 of this extract. And you'll see Schedule 8, part 1 at paragraph 4(1) "*for section 47A substitute*". Then,

you have the new section 47A, and the eagle-eyed will spot that the old subsection 5 has been removed; the old subsection 5 was the provision which meant the Tribunal did not have jurisdiction to hear stand-alone claims. There's a new subsection 5.

Importantly, if one goes to page 142, a new limitation regime was introduced for the Tribunal which effectively applied the Limitation Act for claims going forward. If I could ask you to read the new section 47E -- it's in paragraph 8 at the bottom of page 142 -- subsection (1) and subsection (2), please.

So, the Consumer Rights Act introduces section 47E into the Competition Act and section 47E says that going forward, the relevant limitation periods in the Tribunal is to be found in the Limitation Act.

Crucially for this application, if you go over the page to page 144, this is paragraph 8(2), it's above the box which says, "*Commencement Information*", paragraph (2) says:

"*Section 47E of the Competition Act 1998 does not apply in relation to claims arising before the commencement of this paragraph*."

That's on page 144. If you see the box with "*Commencement Information*" about a third of the way down the page, it's immediately above that.

THE CHAIR: I think, to be completely strict, what it says is the Limitation Act 1980 doesn't apply by dint of section 47E. It doesn't say that it doesn't apply at all. No doubt that PCR will argue the contrary, but you're glossing that to a degree.

MR HOSKINS: Prior to 1 October 2015, the Limitation Act 1980 did not apply, and the Tribunal has seen that.

THE CHAIR: No, indeed.

MR HOSKINS: A new regime has been introduced.

THE CHAIR: Yes.

MR HOSKINS: The new regime is, going forward, the Limitation Act applies.

THE CHAIR: Yes.

MR HOSKINS: The legislature at the same time went to the specific trouble to say that the provision which is introducing the Limitation Act for the first time in the Tribunal does not apply in relation to claims arising from the commencement.

THE CHAIR: Yes.

MR HOSKINS: That's my argument; you're absolutely right that the PCR will say otherwise. But in our submission, the language, the fact that there is this specific provision to that effect is, we would say, pretty much fatal to the PCR's argument. I have other arguments, but this one is particularly damaging to their suggested interpretation.

Paragraph 8(2) of Schedule 8 of the Consumer Rights Act commenced on 1 October 2015. This is just sort of tidying up the loose ends, but I'll show you the provisions and show you why that's the case.

If we stay in bundle F, tab 21, page 163, you will find the Consumer Rights Act 2015 (Commencement No. 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015.

If you look at page 164, at paragraph 3, "*Provisions coming into force on 1 October 2015*", "*the following provisions of the Act come into force on 1 October 2015*".

If you go to (j), you'll see Schedule 8 is brought into effect on that date, save to the extent not already in force.

So, just to complete the picture, if you go to tab 19, you will find the Consumer Rights Act 2015 (Commencement No. 2) Order 2015. If you look at paragraph 3, "*Provisions coming into force on the 3 August 2015*", that does not include Schedule 8.

Then if you go over the page, the explanatory note explains that "*this is the second commencement order made under the Consumer Rights Act*" and if you go to the note

as to earlier commencement orders, we're told:

"*The following provisions of the Consumer Rights Act have been brought into force by commencement orders made before the date of this order*."

Again, you'll see at the bottom, Schedule 5 is partially brought in, Schedule 9 is partially brought in, but Schedule 8 was not brought in. So, Schedule 8 came into force on 1 October 2015.

What, then, is the position for claims arising before 1 October 2015? We're told, as we've just seen, that section 47E does not apply to them, so what is the position?

The relevant limitation periods for claims arising before 1 October 2015 were laid down in the Tribunal's new 2015 Rules which were adopted by way of Statutory ,Instrument and they were all part of this package of amendments to the CAT's jurisdiction.

If we go to F1 tab 33 -- this is an extract from the Tribunal's 2015 Rules, 235 -- you'll see the heading "*Part 8: Revocation and Savings*". Rule 118: "*the following rules are revoked: the Competition Appeal Tribunal Rules 2003.*" So, there's the revocation.

Then the heading "*Savings*" and Rule 119. Now, first of all, Rule 119(1) provides that the 2003 Rules continue to apply in their entirety to claims which had been commenced before the 1 October 2015. But the claims in this case were filed in 2023, so Rule 119(1) is irrelevant to this application.

What one then has in Rule 119(2) to (4) is a detailed provision dealing with claims arising before 1 October 2015 but commenced on or after the 1 October 2015. I wish to make the following points in relation to those Rules. I should invite you to read them; I imagine you've probably read them before now.

First point is this. The language of Rules 119(2) and (3) is in entirely general terms. They do not make any distinction between stand-alone and follow-on claims.

The second point is that the Rules do draw a distinction between section 47A of the Competition Act 1998, before and after its substitution by the Consumer Rights Act. If

you look at (2) and (3), you'll see that they both refer simply to section 47A of the 1998 Act. If you look at (4) in contrast, it says:

"*Section 47A(7) and (8) of the 1998 Act as they had effect before they were substituted by paragraph 4 of Schedule 8 to the Consumer Rights Act 2015 continue to apply to the extent necessary for the purposes of paragraph 2*."

In our submission, that contrast in wording confirms that Rule 119(2) and (3) refer to section 47 of the Competition Act after its substitution by the Consumer Rights Act, and (4) refers to the Competition Act before its substitution by the Consumer Rights Act.

Section 47A of the Competition Act after its substitution by the Consumer Rights Act allows both follow-on and stand-alone claims to be brought in the Tribunal. Therefore, in our submission, it's clear that the reference to section 47A of the 1998 Act in (2) and (3) confirms that those provisions apply to both follow-on and stand-alone claims.

We submit that the conditions for the application of Rules 119(2) and (3) are plainly fulfilled in the present case. First of all, let's look at Rule 119(2). Well, the PCR's claims were made on or after 1 October 2015, so that is satisfied. As I've already alluded to, Rule 119(2) does not make any distinction between stand-alone and follow-on claims made on or after 1 October 2015. It applies to all proceedings under section 47 of the Competition Act, follow-on and stand-alone.

The second criterion or condition for application. We look at Rule 119(3)(a). Section 47A of the 1998 Act applies to the PCR's claims. Same point, Rule 119(3)(a) does not make any distinction between stand-alone and follow-on claims. All claims to which section 47A of the Competition Act as amended fall within Rule 119(3)(a).

The third condition, to be found in Rule 119(3)(b), the PCR is seeking to bring claims arising before 1 October 2015. Again, Rule 119(3)(b) is not limited to follow-on claims; it applies to any claim that "*arose before 1 October 2015*".

So, in our submission, our interpretation of Rule 119 is entirely consistent with its wording. In contrast, the PCR's approach would require the Tribunal to introduce a distinction between stand-alone and follow-on claims into Rules 119(2) and (3). Such a distinction would be entirely inconsistent with the general wording and structure of those Rules.

THE CHAIR: Thank you.

MR HOSKINS: So, in our submission, the answer to this application is really in Rule 119, because it tells you what the limitation rules that are to be applied to cases of this sort are. They tell us that it's Rule 31 of the 2003 Rules which is relevant. If we could go back to that please, that's F1 tab 25, page 205.

MR ALTY: Thank you.

MR HOSKINS: So, this is Rule 31 of the 2003 Rules. How does this apply in this case? Rule 31(1):

"*A claim for damages must be made within a period of two years beginning with the relevant date*."

31(2):

"*The relevant date for the purposes of paragraph (1) is the later of the following*."

Rule 31(2)(a):

"*The end of the period specified in section 47A(7) or (8) of the 1998 Act in relation to the decision on the basis of which the claim is made*."

On its language, that is clearly only applicable to follow-on claims, because in stand-alone claims, the claim is not made on the basis of any decision. So, Rule 31(2)(a) is therefore irrelevant to stand-alone claims.

Rule 31(2)(b):

"*The date on which the cause of action accrued*."

In competition claims, that is when the harm was suffered and that is plainly applicable

to stand-alone claims. So, in our submission, in our case, pursuant to Rule 31(2)(b), the applicable limitation period for bringing these claims in the Tribunal is two years from the date on which the cause of action accrued.

That means that any claim arising before the 1 October 2015 would have to have been brought by the 1 October 2017 at the latest. The claim forms in these proceedings were not issued until 28 November 2023 and in our submission that follows that all claims arising before the 1 October 2015 are time barred. That's our case.

What does the PCR say? First of all, can we go to the PCR's skeleton bundle B, tab 3, page 41 and it's paragraph 54. Perhaps you could just remind yourself of what the PCR says at paragraph 54 of the skeleton.

So, you see there are two points made which suggest that our interpretation leads to absurdity. The first point that the PCR makes is to suggest that our interpretation of Rule 119 gives rise to "*absurd or perverse consequences*", as time might never start to run in relation to stand-alone claims because one of the two dates specified in Rule 31(2) will never arise.

But with due respect, that's not correct. I don't know if you still have Rule 31 to hand -- F1 tab 25, page 205. As I've already explained, Rule 31(2)(a) only applies when the claim is made on the basis of a decision. The only relevant date for stand-alone claims is the date on which the cause of action accrued, and that is therefore the only relevant date that applies for the purposes of limitation of stand-alone claims. The idea that you would wait for a decision never to be adopted, that's the absurd proposition.

The second point that the PCR makes under this heading is to suggest that the date specified in section 47A(7) and (8) of the Competition Act -- and you'll remember that those are the dates concerning appeals from regulatory decisions -- might also never arise. So, they suggest that all stand-alone claims would apparently need permission

from the Tribunal to be commenced pursuant to Rule 31(3).

Again, this is a non-issue. Look at Rule 31(3): it refers back to Rule 31(2)(a), which only applies to follow-on claims. So, Rule 31(3) therefore does not apply to stand-alone claims and so permission is not required to bring a stand-alone claim.

The second category of submissions made by the PCR can be found if you go to page 34 of their skeleton, so B3, tab 3, page 34. I'd invite you to refresh your memory on what is said in paragraphs 35 to 36 and the heading is "*general legislative intention*". (Pause)

The PCR here is relying on the fact that the legislative intention of the Consumer Rights Act was to facilitate the vindication of rights adversely affected by breaches of competition law. From that, the PCR then argues that it is:

"... *intrinsically implausible that the Secretary of State intended to introduce a new and far more restrictive limitation period for* 'stand-alone' *claims in the Tribunal [in circumstances where competition claims in the High Court were governed by the Limitation Act 1980]*."

Three points in relation to that. First of all, the Consumer Rights Act did facilitate the vindication of rights adversely affected by breaches of competition law. For the first time, it allowed stand-alone as well as follow-on claims to be brought in the Tribunal. It also allowed collective proceedings to be brought. Our interpretation doesn't affect any of that.

The second point is, of course, that the position in the High Court remained unchanged. Both stand-alone and follow-on claims could be brought in the High Court, subject to the Limitation Act 1980. There is no taking away of rights. There is a new right to bring a stand-alone claim in the Tribunal, but the rights in the High Court are completely unaffected by that.

The third point is one you've seen already; the Consumer Rights Act introduced the

Limitation Act for proceedings in the Tribunal, but it expressly provided that section 47(E), which was the provision by which the Limitation Act was applied, did not apply to claims arising before 1 October 2015. In our submission, there's absolutely no basis upon which to depart from the clear wording of the specific limitation provisions in the Consumer Rights Act, and Rule 119 of the 2015 Tribunal Rules, on the basis of some high level and vague general legislative intention. We're far too into the weeds for that sort of argument to carry any weight.

Can I deal next with the ultra vires point that's been raised. The Secretary of State has the power to adopt Tribunal Rules pursuant to section 15 of the Enterprise Act 2002, and the PCR suggests that the Secretary of State did not have power to adopt rules in the manner that we suggest, because of amendments to the relevant rule-making powers introduced by the Consumer Rights Act.

We've set out the relevant powers in the Enterprise Act before and after the amendments made by the Consumer Rights Act, and the table, which hopefully you've seen in our skeleton -- and you will find that in bundle B at, tab 5, page 89. (Pause)

You'll see that these are extracts from the Enterprise Act 2002. In the first column you have the position before 3 August 2015, in the right-hand column the position after 3 August 2015, and the amendments to the rule-making powers introduced by the Consumer Rights Act are marked in red.

First of all, section 15(1)(1) of the Enterprise Act:

"*The Secretary of State may, after consulting the President and such other persons as he considers appropriate, make rules (in this Part referred to as 'Tribunal Rules'), with respect to proceedings before the Tribunal*."

And then the amendment was added:

"*Including proceedings relating to the approval of a collective settlement under section 49A or 49B of the 1998 Act*."

So both before and after, section 15(a) of the Enterprise Act gave the Secretary of State a wholly general power to make rules with respect to proceedings before the Tribunal, and the only amendment, which was made to section 15(1), i.e., the language in red, related to collective settlements, and is not relevant to this application. Then if you go over the page, a provision that remained the same after amendment; part 2 of Schedule 4, which makes further provision about the Rules, has effect, but without prejudice to the generality of subsection (1). So, it follows that part 2 of Schedule 4 could not limit the Secretary of State's general rule-making power in section 15(1). (Pause)

But in any event, part 2 of Schedule 4 does not contain any relevant limitation on the Secretary of State's powers. You'll see the heading in our little table, right hand column, "*Schedule 4: Tribunal procedure*". Section 11(1):

"*Tribunal Rules may make provision as to the period within which and the manner in which proceedings are to be brought*."

Again, in wholly general terms and not amended by the Consumer Rights Act. Section 11(2)(2) was amended, and this is the amendment that the PCR relies upon. Section 11(2)(2) says:

"*That provision, [*i.e., *section 11(1)], may in particular make further provision as to procedural aspects of the operation of the limitation or prescriptive periods in relation to claims which may be made in proceedings under section 47A of the 1998 Act, as set out in section 47E(3) to (6) of that Act*."

That amendment does not help the PCR for three reasons: first of all, section 11(1), which we've just seen, confirms the Tribunal's general rule-making power. Section 11(2) only provides examples of provisions that may "*in particular*" be made. It does not impose any limitation on the general power given in or reflected in section 11(1); it simply gives examples of the manner in which that general power may

be exercised.

The second point is that the example given in section 11(2)(a) expressly refers to claims which may be made in proceedings under section 47A of the 1998 Act. "*as set out in section 47E(3) to (6) of that Act*". As we have seen, none of section 47E applies to claims arising before 1 October 2015.

Can we please go back to F1, tab 20, page 144. Keep this table to hand, please. F1, tab 20, page 144. (Pause)

So, I've already shown you (2):

"*Section 47 of the Competition Act 1998 does not apply in relation to claims arising before the commencement of this paragraph*."

In any event, if you go to page 143, and you look at sections 47E(3) to (6), you will see that they only apply to collective proceedings; that's particularly clear if you look at (4). (Pause)

If you go back to our table, the amendments the PCR relies upon don't apply to these claims because section 47E doesn't apply to these claims, and even if section 47E did apply to these claims, the relevant subparagraphs of 47E(3) to (6) concerned collective proceedings in a manner which we are just not concerned with here. (Pause)

THE CHAIR: So, what's your construction? It's maybe a dangerous thing to embark on, but why do you submit this amendment was made -- the amendment to Schedule 4(2) --

MR HOSKINS: That's my third point.

THE CHAIR: Very good.

MR HOSKINS: Possibly. The third point is this: if you look at our table, the reference to procedural aspects of the operation simply reflects the fact that, for claims arising after 1 October 2015, the relevant limitation period has been established by primary legislation, i.e., the new section 47E of the Competition Act 1998. That's why, for

collective proceedings arising after 1 October 2015, it's not possible for the Secretary of State to adopt different substantive limitation provisions, by means of secondary legislation, from the substantive rules that are contained in primary legislation. It reflects that difference.

THE CHAIR: So, your submission is that the restriction is because there is a shifting of the location of the substantive rules for limitation, pre and post these amendments, from the rules as preexisting the 2003 Rules; they move from there to being in section 47E of the Competition Act?

MR HOSKINS: That's right, by virtue of section --

THE CHAIR: I'm sorry, not the --

MR HOSKINS: The Consumer Rights Act that introduced section 47E. So, the limitation rules for claims after 1 October 2015 are now contained in primary legislation. Therefore, while the Secretary of State obviously still retains general rule-making powers, including in relation to procedural aspects of limitation, you cannot override the primary legislation substantive limitation rules by means of secondary legislation.

THE CHAIR: It might be said against you that you wouldn't need to restrict the provisions in relation to the Secretary of State's powers because the Secretary of State couldn't override primary legislation anyway.

MR HOSKINS: I'm not privy to the precise reasons why, I confess.

THE CHAIR: I understand.

MR HOSKINS: If that's the point that's remaining against us, when I've shown you the general language of Rule 119, et cetera, et cetera, I anticipate nothing in this life is perfect, and I'm sure there'll be points made that tend to point the other way. The question for you, of course, is, you know already, at the end of the day, you will weigh up the pointers of statutory construction, you will give the weight to the appropriate

ones they deserve, and you will come to a conclusion. Mine is not a counsel of perfection, but I do suggest that the factors that suggest our interpretation are overwhelming, when you see what's made against us.

The final heading I need to deal with relates to the "*Savings*" heading to Rule 119. If we go back to F1, tab 33, page 236. The PCR relies on the fact that the heading to Rule 119 is the single word, "*Savings*". Let's see what the PCR says about that. If you go to their skeleton, bundle B, tab 3, page 37. (Pause)

If you could please refresh your memory as to what's said at paragraph 45(b) of their skeleton. (Pause)

I make two points: first of all, a heading properly stands to be taken into account as part of an exercise of construction; and the second point is a savings provision cannot confer new rights that did not exist already. I'll take those points in turn.

So, first of all, to deal with the headings point. That is elaborated upon at paragraph 10(b) of the skeleton -- that's at page 24 -- and you'll see it's said at 10(b): *Bennion*'s commentary on section 16.7 on headings:

"*Headings are as much part of an Act as any other component and may be considered in construing any provision of it*."

But when one actually goes to the relevant extract from *Bennion*, it quickly becomes apparent that it does not assist the PCR. The relevant extract is bundle F5, tab 106, page 3166.

THE CHAIR: 316?

MR HOSKINS: 3166. (Pause)

You see at page 3164, the title page, so we see we're dealing with the most recent edition of *Bennion Bailey and Norbury and Statutory Interpretation*. If you go to page 3166, right at the bottom, you'll see section 16.7, "*Headings*". Can I invite you to read from there to the top of page 3168, up to and including the section on

"*Reliability, Brevity*", but no further, please. (Pause)

If I could just pick up three points from that, please. First of all, at bottom of page 3166, according to *Bennion*:

"*A heading is part of an Act. It may be considered in construing any provision of the Act, provided due account is taken of the fact that its function is merely to serve as a brief guide to the material to [which it relates], and that it may not be entirely accurate*."

In our submission, the Tribunal must focus on the words actually used in the relevant legislative provisions, not a one-word heading.

Then page 3167, you'll see there's a reference to *Stephens v Cuckfield RDC* about two-thirds of the way down, after the big quote in the middle of the page. *Bennion* says:

"*Where a heading differs from the material it describes, this puts the court on inquiry, but it is most unlikely to be right to allow the plain meaning of the words to be overridden purely by reason of a heading*."

So, again, you have my submission on the plain meaning of the words in the Consumer Rights Act and Rule 119 of the 2015 Tribunal Rules.

Then the third point, at the top of page 3168, according to *Bennion*:

"*The function of a heading is to serve as a brief guide to the content of the provisions to which it relates. A heading can only be an approximation and may not cover everything falling within the provision to which it is attached*."

Now, it's certainly right that Rule 118 of the 2015 Tribunal Rules revokes the 2003 Tribunal Rules, and the primary function of Rule 119 of the 2015 Tribunal Rules is to save the 2003 Tribunal Rules for certain purposes, you see Rule 119(1) saves the 2003 Rules "*for all purposes*" for claims that were commenced before the 1 October 2015. But the fact that Rule 119(2) to (3) also applies Rule 31 of the 2003

Tribunal Rules to stand-alone claims is not precluded by the single word "*Savings*" heading, because, as *Bennion* tells us, a heading can only be an approximation and it may not cover everything falling within the provision to which it is attached.

THE CHAIR: On your view, is there a tension? On your submission, is there a tension between this being a savings provision, and 119(2) and (3)?

MR HOSKINS: We don't accept that there is a tension. I'm going to come on to that in a sense, because -- it's slightly odd because you get things called savings provisions. You've seen the beautifully arcane notes, no doubt, of Henry VIII, et cetera, and you'll have seen examples of provisions which say, in terms, the following are saved in the actual wording of the provision. Now, that's a savings provision. I'll come on to what *Bennion* says about that in a minute. We're not even in that territory; all we are looking at is a one word heading to Rule 119, "*Savings*".

I've dealt with what weight should be attached to a heading, and I'll come on now to how we should look at savings provisions, and look at, in fact, what we have here, because in my submission, Rule 119(2) to (3) is not a savings provision as such, in the way that's normally understood, but that's what I'm about to take you to now.

The other section of *Bennion* that the PCR relies on is section 17.6, which deals with savings provisions. You'll find that in F5, tab 115, page 3322. You'll see section 17.6, "*Savings*". *Bennion* says:

"*Savings may be considered when considering other provisions but are generally an unreliable guide*."

And then:

"*A saving cannot confer a right which did not already exist*."

But one needs to put some flesh around that statement. The comment is as follows:

"*A saving is a provision the intention of which is to narrow the effect of the enactment to which it refers so as to preserve some existing legal rule or right from its operation*."

Now, of course, already that's not quite the situation we have here, because here we have a revocation in total of Rule 2003, but then its application for some limited purposes. We're already not in this world of *Bennion*.

"*Savings are often expressed in wider terms than the provisions to which they relate. The drafter will sometimes express a saving in general terms so as to keep it simple, having taken the view that if a saving incidentally catches things that are not caught by the provision to which it relates, it will do no harm*."

And it's in that context that *Bennion* says:

"*A saving cannot confer any right which did not [exist already*]."

So, you'll see it's a very specific context that *Bennion* is considering here. Footnote 1 refers to four cases, and *Alton Woods* is the Henry VIII case. Then you have *Arnold*, 1856. We're getting into the sort of more modern cases that *Bennion* refers to here, even by *Bennion*'s standards, this is quite arcane. *Butcher v Henderson*, 1868. I don't even know if it was the King or the Queen in 1884, probably Victoria, *The Queen v Pirehill North Justices*, 1884. And that's it. We put in our notes saying, well, if you read those cases, it's very painful. Which is why I got Mr Kennedy to do it, and you will struggle to find a general principle.

That's why we laid down the challenge to the PCR. Well, it's all very well to bring this passage from *Bennion*, but look at the cases that *Bennion* cites and tell us what you rely upon. Mr Kennedy is going to address you briefly on what remains in relation to that, but really, in our submission, it's dwindled to nothing, because all you're left with is the PCR does not seek to put any reliance on any case cited in *Bennion* other than *Arnold*.

Arnold was a case that was decided before the equitable and common law jurisdictions were merged, that's how old it is. Then they have cited a new case in the Court of Appeal which deals with a specific savings provision, which was similar to *Arnold*. You

will not find a general principle there. But I won't steal Mr Kennedy's thunder because he's going to, deal with that briefly, probably tomorrow, now.

So that's what *Bennion* says. But let me make the following points: first of all, this is not a case in which we are dealing with a saving, which has been expressed in wider general terms. And I say that because the language of Rules 119(2) to (3) are drafted in detail-specific terms, I've taken you through them -- the three conditions that have to be satisfied. I've addressed you on their clear meaning. This is not the sort of general savings provision that *Bennion* is considering.

The second point is this: as I've just submitted, the observation in *Bennion* -- that a saving cannot confer any right which did not exist already -- is made specifically in relation to a situation in which a saving has been drafted in general terms, and in such situations, one can see why it might be said that a general saving provision cannot confer new rights, that makes perfect sense. But that is not the case here; it is incontestable that legislation can confer new rights if appropriate wording is used. That is precisely what has been done in Rule 119.

On its clear wording, Rule 119(2) to (3) applies Rules 31(1) to (3) of the 2013 Rules to all claims arising before 1 October 2015 brought in the Tribunal, on the basis of section 47A of the Competition Act, on or after 1 October 2015. It's a very detailed provision.

THE CHAIR: I'm struggling slightly with -- what do you say is the right 119(2) is conferring? Or is it conferring a right?

MR HOSKINS: It is conferring a right. I only use that phraseology not to enter a dispute about whether there are rights in play or not, because what in fact, Rule 119(2) to (3) is doing is -- what the Consumer Rights Act does is it gives the Tribunal jurisdiction to hear stand-alone claims. The Consumer Rights Act also introduces a new limitation regime for the Tribunal from 1 October 2015, by adopting

or inserting section 47E into the Competition Act. However, the Consumer Rights Act says that in relation to all claims in the Tribunal that predate 1 October 2015, section 47E does not apply.

So that leaves you with a gap, because the 2003 Rules have been revoked, the Limitation Act has never applied in the Tribunal up until 1 October 2015. So what the legislation did, or what the Secretary of State did pursuant to his general powers, was to fill the gap that had been left by primary legislation, and the Secretary of State adopted Rule 119 with a specific rule for all claims that had already been commenced before 1 October 2015. That's Rule 119(1) and then a specific rule, subject to three conditions, for claims arising before 1 October 2015, but commenced thereafter. That's the way we say the scheme fits together.

THE CHAIR: I appreciate you may be deliberately not answering my question.

MR HOSKINS: Oh, I'm so sorry, it wasn't deliberate.

THE CHAIR: But just in the sense that -- and I appreciate it may not be your question to answer in a sense -- because you say you take us to passage in *Bennion*, which is dealing with this statement about the conferral of a right for what it's worth. I suppose my question is, and it may be a question that's really for the PCR to address, is what is said to be the right that's being conferred?

In other words, what is the right that PCR is claiming that your argument is suggesting that 119 confers? Now, maybe your answer to that is, 'It doesn't', and so therefore their argument is misplaced. That was the point I was trying to --

MR HOSKINS: I am going to deliberately try and dodge your question, (several inaudible words) in the sense that, absolutely, let's hear from the PCR, because we haven't yet. I'm taking the arguments at sort of face value, if you like. They've referred to *Bennion*, I've showed you that even if there is a right, *Bennion* doesn't help them. But you're absolutely right, there is that prior question. I'd rather respond to what the

PCR says than tilt at the windmill.

THE CHAIR: That's a reasonable deferral of an answer. Well, Mr Hoskins, that is almost 4.30 pm. Do you want to finish off a point?

MR HOSKINS: If I can very briefly finish, just to say this: Mr Kennedy will address you briefly on the arcane authorities tomorrow. Because --

THE CHAIR: In the light of the day, no doubt.

MR HOSKINS: -- he'll be very upset if I don't let him do that. He spent a lot of time looking at them, and I mean that in a sort of grateful sense.

THE CHAIR: Whether we share your gratitude --

MR HOSKINS: It might be a threat rather than a promise, but -- the final point on the savings heading is this: it cannot be the case that the single word heading, "*Savings*" above Rule 119 can defeat the clear and detailed wording of those provisions. Excuse the levity at this time. That's not just the tail wagging the dog, that's the chihuahua's tail wagging the Great Dane. It's just too extreme that that's really where the PCR's case is ending up, because all they have is a savings argument. And that is a good place to stop.

Housekeeping

THE CHAIR: That's very helpful. Just in terms of timetabling, my sense is we've made good progress on your argument.

MR HOSKINS: I've made very good progress, because I'm half an hour ahead of schedule.

THE CHAIR: Yes, but so subject to Mr Kennedy's additional observations, which we'll look forward to tomorrow, would that conclude the argument so far?

MR HOSKINS: Short of any brainstorm, or nudging from behind tonight, I've finished the submissions I wish to make.

THE CHAIR: That's helpful. So, essentially, on that basis, we're -- in terms of the timetable -- we're almost where we were supposed to be at lunchtime tomorrow.

MR HOSKINS: That's right.

THE CHAIR: Now, on that basis, subject, of course, to hearing from the PCR and the arguments in response, we would hope that we might get on to the Second Period Application tomorrow.

MR HOSKINS: Yes.

THE CHAIR: Excellent, well, I'm extremely grateful to counsel for that.

MR THOMPSON: Yes. I've been pretty confident from the approach that the (inaudible) has taken and the approach I think we need to take. We will be finished with my application tomorrow morning.

THE CHAIR: Tomorrow morning by lunchtime, let's say. Yes, well, that's extremely helpful. As I say, I'm very grateful to counsel for their efficient submissions. But we will rise now, and we'll sit again tomorrow at 10.30 am. Thank you.

(4.31 pm)

(The court adjourned until 10.30 am on 1 April 2025)