**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**

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# 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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Tuesday, 1 April 2025

(10.30 am)

Limitation (continued)

Submissions by MR KENNEDY

THE CHAIR: Good morning, Mr Kennedy.

MR KENNEDY: Sir, you may have hoped that the promise of submissions from me on a 19th century authority was Mr Hoskins's idea of an April fools so I'm sorry to disappoint you. You'll be glad to know, however, that as Mr Hoskins said yesterday, the issues have considerably narrowed.

THE CHAIR: Yes.

MR KENNEDY: Well, of the four cases identified in footnote 1 of section 17.6 of *Bennion*, the PCR now only relies on one, which is the *Arnold v the Borough of Gravesend* decision from 1856. The PCR also relies on a subsequent decision of the Court of Appeal. That's the *Byker Bridge Company* case from 1889. I will address both of those decisions very briefly.

THE CHAIR: Yes.

MR KENNEDY: Each decision in *Arnold* and the *Byker Bridge* case refer to a number of statutory provisions. Those are not in the authorities bundle. But Mr Rabinowitz has prepared a handy table which sets out the relevant passage with the chronological title and the short title and the relevant passages, which will hopefully --

THE CHAIR: Which have just been handed up.

MR KENNEDY: Which have been handed up, which hopefully will be of assistance during my submissions and subsequently.

Turning then, sir, to *Arnold*, which is at tab 112 of the authorities bundle and it starts at page 3252.

THE CHAIR: Yes.

MR KENNEDY: As I said, this is a decision of the Court of Chancery from 1856. The passage cited by *Bennion* and relied on by the PCR is at page 3259 of the bundle.

THE CHAIR: Yes.

MR KENNEDY: And it's the third paragraph there, inconveniently not numbered. It's the paragraph that starts, "*It seems to me*", and it's the second sentence that is relied on by the PCR:

"*I should have thought it impossible successfully to contend that a saving would give any further right than the party already had. 'Saving' means that it saves all the rights the party previously had, not that it gives him any new rights*."

And, sir, two issues arise in respect of that passage. First, whether or not it's obiter and second, whether it establishes a point of general principle. In our submission, the passage is clearly obiter and does not establish a point of general principle. Sir, the judgment is rather impenetrable, so I hope you forgive me if I summarise the background and summarise the judgment in various parts.

The background is as follows: in 1828, the defendant's local authority borrowed £1,000 from the plaintiff. By way of security, the defendant executed a bond under which the defendant would pay the plaintiff £2,000 if it failed to maintain interest payments on the £1,000. Interest payments were made until 16 April 1850. In January 1852, the plaintiff brought proceedings in the Court of Common Pleas to recover the £2,000 and damages. The plaintiff's claim in the Court of Common Pleas succeeded. The plaintiff then sought to execute the judgment against a proprietary interest acquired by the defendant in a ferry crossing across the Thames, which was acquired in 1851, and in *Arnold v Ridge*, which is the Court of Common Pleas' decision, it was held that on the proper construction of section 92 of the Municipal Corporations Act 1835, the plaintiff could not execute the judgment against property acquired by the defendant local

authority after the passing of the 1835 Act.

Before the Court of Chancery, the plaintiff sought a declaration that, pursuant to section 13 of the Judgments Act 1838, the judgment of the Court of Common Pleas operated as a charge on property acquired by the defendant after the passing of the 1835 Act. So, in that sense, the proceedings before the Court of Chancery were a second bite of the cherry by the plaintiff.

THE CHAIR: Yes.

MR KENNEDY: If we turn up page 3254, we'll see where the Vice-Chancellor's judgment begins. About two-thirds of the way down, judgment was reserved. April 22nd. Vice-Chancellor Sir Page Wood. And if we go over the page --

MR ALTY: Mr Kennedy, where is this in --

MR KENNEDY: It's tab 112 and it's page --

MR ALTY: Sorry, of the core bundle?

MR KENNEDY: Of the authorities bundle.

MR ALTY: Authorities bundle.

THE CHAIR: So, F.

MR ALTY: Right. Okay.

THE CHAIR: Okay. That's fine.

MR KENNEDY: And if we just pick it up at the top of page 3255, it's in the second paragraph, we see the Vice-Chancellor said:

"*I will assume, in the first instance, that I am bound to follow the decision of the Court of Common Pleas in Arnold v Ridge* ..."

And in the subsequent paragraphs, the Vice-Chancellor set out the effect of sections 92 and 94 of the 1835 Act, which was effectively to impose a trust on the local authority's property, subject to certain exceptions, thereby restricting the local authority's ability to deal with its property.

We pick it up in the final paragraph on page 3255. We see that the Vice-Chancellor said:

"... *it appears to have occurred to the Legislature ... that persons who were creditors of corporations before the passing of the [1835] Act might be seriously injured, for at the time when such debts were contracted the creditors would consider the corporation as they would an individual, viz., as a body competent to deal with their property present or future, and would therefore expect to exercise their rights against future as well as present property ... accordingly, in the following year, [the Legislature] passed ... the Borough Fund in Certain Boroughs [Act 1836]*."

And, sir, in relevant part, the 1836 Act provided -- and we can see this at the end of the first paragraph on page 3256 -- that:

"... *it shall be lawful for the council of any borough named in the said schedules to execute from time to time any deed or obligation in the name of the body corporate whose council they are, for securing repayment and satisfaction of any debt or obligation contracted by or on behalf of the said body corporate before the passing of the said Act for regulating corporations*."

Which they reference back, sir, to the 1835 Act. There then follows a discussion of the terms of the 1836 Act, section 28 of the Municipal Corporations Act 1837, which is not important for our purposes, and also a summary of the effect of section 13 of the Judgments Act 1838.

And if we pick it up again, sir, at page 3257, over the page, we see there the Vice-Chancellor's conclusion and the conclusion was that even assuming that he was bound to follow the decision in *Arnold v Ridge* in respect of the effect of section 92 of the 1835 Act, the power given to the local authority by the 1936 Act is a power which it might exercise for its own benefit, within the meaning of the Judgments Act 1838 and that by operation of section 13 of the 1838 Act, the judgment of the Court of

Common Pleas operates as an execution of that power and the plaintiff has the benefit of a charge over the property acquired after the passing of the 1835 Act.

And, sir, in my submission, that's the ratio. The Court of Common Pleas had not had regard to the 1836 Act. The Vice-Chancellor assumed that the Court of Common Pleas was correct about the 1835 Act but --

THE CHAIR: Could you take this a little more slightly so --

MR KENNEDY: Of course, sir.

THE CHAIR: -- the Court of Common Pleas in Arnold against Ridge ...

MR KENNEDY: Had failed to take account of the 1836 Act.

THE CHAIR: Yes.

MR KENNEDY: And essentially had thereby fallen into error.

THE CHAIR: Yes.

MR KENNEDY: And so, the Vice-Chancellor and the Court of Chancery could assume that the Court of Common Pleas was correct about the construction of the 1835 Act.

THE CHAIR: Yes.

MR KENNEDY: But because Parliament's intention was clearly indicated by the passing of the subsequent Act, the 1836 Act, he could nonetheless find that by operation of section 13 of the Judgments Act 1838, the plaintiff could have a charge on property acquired after the 1835 Act.

THE CHAIR: I see, yes. So, you say that's the ratio (overspeaking) --

MR KENNEDY: That's the ratio and sort of central to my submission going forward, sir, is that he assumed that the Court of Common Pleas was correct in coming to that decision.

THE CHAIR: Yes.

MR KENNEDY: Then what we see in the next paragraph, page 3257.

THE CHAIR: Yes.

MR KENNEDY: The Vice-Chancellor said:

"*I cannot part with the case without considering section 92 of the Municipal Corporation Act [that's the 1835 Act] and the decision ... in the case of Arnold v Ridge*."

THE CHAIR: Yes.

MR KENNEDY: I must say, [that] after giving it the most careful consideration, that I cannot come to the conclusion at which the learned Judges arrived in reference to the 92nd section.

THE CHAIR: Yes.

MR KENNEDY: So, the Vice-Chancellor disagreed with the Court of Common Pleas and, sir, I say that's relevant for two reasons. First, I've shown you that the ratio of the Vice-Chancellor's decision was premised on the assumption that the Court of Common Pleas was correct --

THE CHAIR: Yes.

MR KENNEDY: -- and it follows that the Vice-Chancellor's remarks as to why that decision was not correct were obiter.

THE CHAIR: Yes.

MR KENNEDY: They were not necessary to his conclusion. And secondly, this comes on to the point about general principle, sir. The reason why the Vice-Chancellor disagreed with the judgment of the Court of Common Pleas is relevant to understanding whether he was laying down a general principle or not in the passage relied upon by the PCR. You will have noticed, sir, that the passage relied upon falls in that part of the judgment which comes after the ratio. In terms of the structure of the judgment, I say it's clear that it's obiter.

But if we can pick it up, 3258. Sir, you should see the second paragraph begins, "*I come now to the savings clause*", and that sets out the savings clause in section 92 of the 1835 Act. And then, in what follows, sir, the Lord Chancellor noted that in *Arnold*

*v Ridge* both the Lord Chief Justice and Mr Justice Cresswell had referred to section 92 of the 1835 Act as giving a person a "*remedy*". You can see that at the bottom of 3258 and the top of 3259.

And if we can go over to 3259, we'll then pick up the start of the passage, which includes the words relied on by the PCR. Pick it up in the final sentence of the first paragraph:

"*But I ask, when the statute only 'saves' rights, why should we say it 'gives' them?*"

"*The learned Judge, after having said that the right is given by the 92nd section, proceeds to say that the Legislature, having given this right, was apprehensive that the future-acquired property would be affected; and therefore they passed the further proviso at the end of the section that nothing in the Act contained shall be construed to render liable to the payment of any debt contracted before the passing of the Act by any body corporate any part of the real or personal estate of the said body corporate, which before the passing of the Act was not liable thereto.*

*"It seems to me that this proviso, [the proviso in 1835 Act] never could apply to the saving clause. I should have thought it impossible successfully to contend that a saving would give any further right than the party already had. 'Saving' means that it saves all the rights the party previously had, not that it gives him any new rights.*"

So, we're back to the passage relied upon by the PCR. And in my submission, sir, what we see is that in this passage, the Vice-Chancellor is commenting on the references in *Arnold v Ridge* to section 92 of the 1835 Act giving rights, and he's explaining why he disagrees and the reason he gives is because the statute says it's saving a right or rather, it saves rights. And in my submission, it's clear that when the Vice-Chancellor put the word 'saving' in quotation marks in the second section of the passage relied on by the PCR, that he's quoting from section 92 of the 1835 Act.

So, sir, in our submission, when read properly in context, the Vice-Chancellor is clearly

not purporting to lay down any general principle applicable to all savings clauses. He is simply setting out what he considers to be the correct construction of section 92 of the 1835 Act alone.

Sir, unless you have any questions, that's all I propose to say about *Arnold*.

We turn then, even more briefly, to the *Byker Bridge* case. It's tab 116 of the authorities bundle starting at 3325.

THE CHAIR: Yes.

MR KENNEDY: And, sir, the PCR says that the dictum in *Arnold* was specifically endorsed by a unanimous court of appeal in the *Byker Bridge* case. This is a decision from 1889. So, we're still in the 19th century, albeit law and equity have been merged by this point.

THE CHAIR: Yes.

MR KENNEDY: The facts are not particularly important for our purposes, the issue before the court was whether a contractual payment could lawfully be made by Newcastle council.

THE CHAIR: Yes.

MR KENNEDY: That turned on the proper construction of, amongst other things, section 140(4) of the Municipal Corporations Act 1882, and the passage relied upon by the PCR is at page 3331. It's the second paragraph which begins, "*The savings clause* ..."

THE CHAIR: Yes.

MR KENNEDY: And Lord Justice Lindley said:

"*The saving clause, section 140(4), does not confer rights but saves them (see the judgment of [the Vice-Chancellor] on the corresponding clause in the former Act: Arnold v Mayor of Gravesend) ...*"

Which, of course, is the decision we have just been looking at. And, sir, three short

points on *Byker*.

First, Lord Justice Lindley's judgment is, on its face, confined to the effect of section 140(4) of the 1882 Act. It is not a statement of general principle.

Second Lord Justice Lindley's judgment confirms that the Vice-Chancellor Wood's judgment in *Arnold* is similarly confined to the effect of the predecessor provision, section 92 of the 1835 Act, and again not a statement of general principle.

And third and finally, both section 92 of the 1835 Act and section 140 of the 1882 Act are provisions which preserve certain rights in general terms and as Mr Hoskins submitted yesterday, Rule 119 of the 2015 Rules is of an entirely different nature. It does not save certain rights in general terms. It provides for the continued application of a piece of legislation after its general revocation. Neither *Arnold* nor *Byker Bridge* provide the Tribunal with any assistance in construing a clause of that nature.

Sir, unless I can assist ...

THE CHAIR: Yes. Do we see the provision concerned, 144, do we see that in -- is it quoted in --

MR KENNEDY: It's in the table.

THE CHAIR: In the table. Yes.

MR KENNEDY: You pick it up bottom of page 5, you'll see Municipal Corporations Act 1882. And then it's about two-thirds of the way down page 6.

"*Saving nevertheless, in relation to the application of the Borough Fund as authorised by this section or otherwise by this Act, all rights, interests and demands of all persons in or on the real or personal estate of the municipal corporation, by virtue of any legal proceeding or of any mortgage or otherwise*." [as read]

And it may be helpful, sir, just to compare it to section 92 or the relevant part of section 92, which we can pick up at the bottom of page 1.

THE CHAIR: Yes.

MR KENNEDY: "*Saving all rights, interest, claims or demands of all persons or body corporates in or upon the real or personal estate of any body corporate, by virtue, [et cetera]*". [as read]

It's identified as being the predecessor provision by Lord Justice Lindley and we can see that the text has remained largely unaltered.

THE CHAIR: Yes.

MR KENNEDY: And we say materially not distinguishable for the purposes of our cases, it's a clause that says certain types of rights are safe for certain purposes. It's not a clause that says this piece of legislation is saved for certain classes of cases.

THE CHAIR: But one can see why it might have been referred to by the learned authors of *Bennion*, in the sense that it plainly is dealing with rights and whereas the question that I put to your learned senior yesterday as to what the rights were here, and he reserved your position in that regard to wait and see what the PCR have to say about that. But it's quite a different, on one view, quite a different context, the one that we have, where one's talking about, essentially, in what context do the 2003 Rules continue to operate post their revocation paragraph 118 or Rule 118 of the 2015 Rules.

MR KENNEDY: Absolutely, sir. In my submission, the finding in those cases is not surprising. It's not surprising that the bondholder's right was limited to the right that he accrued at the time he entered into the contract. And were our clause similar to those decisions, we'd be having a different conversation, but we say it's an entirely different species of clause and has different legal consequences, sir.

THE CHAIR: No, that's helpful.

MR KENNEDY: Unless I can assist, sir, those are my submissions.

THE CHAIR: Thank you. That's very helpful.

MR HOSKINS: I've got nothing else to add. Unless you've got any more questions

for me, then that's our application.

THE CHAIR: Thank you very much.

Good morning, Mr Thompson.

MR THOMPSON: Good morning.

THE CHAIR: Just rearranging the furniture? (Pause)

I was going to comment that I was pleased that the wall had seemed to be slightly lower today, so I'm glad even if it's disturbed the water to some extent.

MR THOMPSON: No, that's fine. I was told that I was a little bit further away from the microphone than other advocates yesterday, so this is actually a slightly cleaner arrangement.

Submissions by MR THOMPSON

MR THOMPSON: I did have three preliminary points, but given the way we've started this morning, I think it's probably best to deal with *Bennion* straight away. It might be worth just reminding the Tribunal how this issue has arisen.

THE CHAIR: Yes.

MR THOMPSON: It starts in our skeleton argument at tab 3 of bundle B, page 23 --

THE CHAIR: Yes.

MR THOMPSON: -- where we quote various passages from *Bennion* including this section 17.6. I'm not sure whether we -- yes, I think we emphasised it and then it was emphasised back at us by Mr Hoskins's team.

THE CHAIR: That's paragraph 10 of your skeleton?

MR THOMPSON: It's paragraph 10(c), yes, that's where the issue arose.

THE CHAIR: Yes.

MR THOMPSON: Then, we referred back to it at page 37, paragraph 47(c) at the bottom.

THE CHAIR: I think your paragraphs for some reason are -- you're one out. 37(c) is

on page 38 of our bundle. I don't know why that is.

MR THOMPSON: Sorry, page 17 of the skeleton.

THE CHAIR: Oh well, perhaps if we just go on paragraph --

MR THOMPSON: 47(c).

THE CHAIR: Ah, 47(c), that's on page 39. Yes. Sorry.

MR THOMPSON: Ah, yes. I think there must be a difference between the electronic and the pagination.

THE CHAIR: If we go on paragraph numbers, that will help.

MR THOMPSON: Thank you. That's at 47(c) and we quote 7(c) and then we effectively summarise it:

"*Savings provisions may be expressed 'in wider terms than the provisions to which they relate' because the drafter of such a provision may opt to 'keep it simple' on the basis that 'if a saving incidentally catches things that are not caught in the provision to which it relates [here,* r*ule 31] it will do no harm: a saving cannot confer any right which did not exist already'*."

THE CHAIR: Yes.

MR THOMPSON: We obviously don't know what the thought process was in the opposing camp, but it appears that Mr Hoskins set his team to work, and they looked at *Bennion* and found that there were these four cases referred to. Then, I think last Thursday, they laid down the gauntlet as to whether these cases were actually any good for the propositions cited in *Bennion*, presumably a sort of general attack on the credibility of *Bennion*.

THE CHAIR: Yes.

MR THOMPSON: What they didn't say is whether they agreed or disagreed with the principle and we're still not entirely clear whether they do agree with it and, if they do agree with it, whether they have any answer to the point, because we would say that

rights are conferred here and it's contrary to the nature of a savings clause, but we'll come to that in more detail in a moment.

Then, our response to the challenge is at tab 10 of bundle B and I think we made it reasonably clear in that note that we rely positively on the *BCL* and *DSG* cases for the construction of Rule 31, which is at tabs 45 and 59 of bundle F and we'll come back to them.

THE CHAIR: Yes.

MR THOMPSON: We rely on the dictum in *Arnold*, which is at F 112 which we've just been looking at, and we rely on the endorsement of that dictum by a unanimous Court of Appeal of some considerable distinction, Messrs Esher, Lindley and Bowen, and we say that they do support the emphasised wording in *Bennion*.

Then, for good measure, we point out that *Bennion* actually refers to a much more recent case of the House of Lords which expresses certain views about savings clauses which we explain in our note. We then added a reference to a case called *Fish v Robertson* from the outer Court of Session, which is at F118.

So, that's where we are on *Bennion*: we've been laid a challenge, and we've responded to it in those terms. But I don't think we've ever relied on the more obscure footnote to *Bennion*. We've relied on *Bennion* itself as the standard text on statutory interpretation and then when we've been challenged as to the basis for that, we've responded in the terms of the note and in particular by reference to the judgments of the Court of Appeal, the House of Lords and the Outer House of the Court of Session.

So, that's where we are on *Bennion*.

THE CHAIR: I can only applaud the diligence on both sides of the bar, but I think it would be helpful, certainly speaking personally, to understand -- and I'm sure you'll come to this -- how this part of the argument fits into the overall scheme because whilst I now am a lot clearer than I was in the beginning of the morning about the 19th century

precedents for the footnote in *Bennion* and what you say about it too, it's not clear to me how it fits into the argument as a whole.

MR THOMPSON: I think that comes down to this quite knotty construction issue about the interaction of Rules 31 and 119, where we say on analysis, the application doesn't stand up.

THE CHAIR: Yes. And I think it would be helpful when we get to that part in your argument -- I don't want you to take you out of order just to deal with this single part of the argument, I imagine it's part of a larger structure, as it were -- if you refer back here so that I see how it fits together.

MR THOMPSON: Yes, sir. If I could just pick up three points first that arose --

THE CHAIR: Yes.

MR THOMPSON: -- yesterday, I think one of them is relevant to this question. The first is that my Lord, Lord Richardson, raised the question of whether there could be an interaction between the limitation and certification issues and that was at page 74 of the transcript yesterday, which we received, slightly to our pleasant surprise, yesterday evening.

THE CHAIR: Yes.

MR THOMPSON: Secondly, my Lord asked Mr Hoskins what rights were affected by the respective parties' reading of Rules 119 and 31 and that was at page 111.

THE CHAIR: Yes.

MR THOMPSON: Thirdly, Mr Hoskins at the start of his submissions, I'm not sure whether it was a complaint, but he stated that the claims didn't yet have a clear start date. That was at page 93 of the transcript.

THE CHAIR: Yes.

MR THOMPSON: On the first point, the potential interaction between the various applications, the Tribunal will recall that there are four remaining issues of contention

in relation to certification. We say that three are wholly independent of the limitation issue: first of all, the objectivity and clarity of the class definition and also the two remaining funding and insurance issues that have been raised in respect of certification, we say they're not affected by the Proposed Defendants' applications.

THE CHAIR: Yes.

MR THOMPSON: The only issue where the point appears to be of any relevance at all is in relation to Rule 79(2)(e), but we would submit that it has little if any weight in that context either, for various reasons.

First of all, these proceedings are at an early stage; secondly, Dr Davis has already undertaken a great deal of work to explain both his proposed methodology and the likely data sources in considerable detail.

THE CHAIR: Yes.

MR THOMPSON: And obviously, there's a regulatory context which goes back, I think, to 2007. It's self-evident that the four MNOs are all very substantial businesses that have operated in the United Kingdom for many years and clearly have extensive business records. There's no reason, at least at this stage, to suppose that an aggregated approach couldn't be adopted based on data available to the parties for an extended period prior to 2015, apparently at least as far back as 2007.

Dr Bishop will, of course, be aware that the Tribunal has certified Dr Davis himself to perform a very detailed exercise to assess individual damages at different levels of the supply chain in respect of the Trucks cartel from 1997 to 2015.

THE CHAIR: Yes.

MR THOMPSON: So far as the rights are concerned, we did in fact address that issue at paragraph 48 of our skeleton argument which is at -- I hesitate to say this, but I think it's at page 39 of bundle 3. It's paragraph 48. It actually says 38 at the bottom of the page; I don't know whether the Tribunal has that.

THE CHAIR: Yes, but ...

MR THOMPSON: We say that the rights of the class members and the Defendants "*in respect of 'stand-alone' competition law claims arising prior to 1 October 2015 were and continue to be those conferred by the domestic limitation legislation,*" which is our portmanteau expression for the English and Welsh, Scottish and Northern Irish legislation. The Secretary of State had no power to alter those rights or to substitute any alternative limitation provisions with retrospective effect after the 2003 Rules had been revoked by implication without any suggestion that this was the legislative intention.

THE CHAIR: But just so I understand, prior to 2015, no PCM had a right to bring a stand-alone claim in the CAT?

MR THOMPSON: That's correct.

THE CHAIR: And so that right hasn't been affected by any change in the 2015 Rules, has it, so far as the CAT's concerned?

MR THOMPSON: Well, the right was created with effect from 1 October 2015 --

THE CHAIR: Yes.

MR THOMPSON: -- by the CRA 2015 and the amendment to section 47A(1) --

THE CHAIR: Yes.

MR THOMPSON: -- effectively by the deletion or removal of section 47A(5)(a) which used to preclude -.

THE CHAIR: Yes.

MR THOMPSON: It wasn't that such claims didn't exist; they were there under 47A(1), it's just that you weren't allowed to bring them.

THE CHAIR: Yes. And if you're using the terminology of rights, if we're talking about the 30th September 2015 --

MR THOMPSON: Correct.

THE CHAIR: -- a PCM had no right to bring a stand-alone claim in the CAT. That's correct, isn't it?

MR THOMPSON: Yes. Our point is, on 1 October they did.

THE CHAIR: Yes.

MR THOMPSON: And I'll come to this in a moment, but we say that in the absence of the Rule 119 as construed by Mr Hoskins, those rights would have been governed by the domestic limitation legislation. So, when the primary legislation was enacted, those rights, very substantial rights to bring individual and collective claims in the Tribunal in relation to alleged infringements, were conferred by Parliament in the amended section 47A -- I think it's 47A(2).

THE CHAIR: Yes.

MR THOMPSON: So, we say that Parliament conferred those rights, and if the Secretary of State had not done what Mr Hoskins says he would have done, then millions and millions of people would have had rights which would have been governed by the domestic limitation legislation, including my clients.

So, we say that, as read by Mr Hoskins, there was a very drastic intervention with our rights to bring these claims.

THE CHAIR: I suppose where I'm slightly struggling with this is ... so, in this part of your argument, you're differentiating between, as it were, the primary legislation, amending, the 1998 Act and the secondary legislation introduced as part of that reform, but you're saying the primary legislation created the rights and if Mr Hoskins is right, the secondary legislation then removed them?

MR THOMPSON: Yes.

THE CHAIR: So, they existed for the time between primary legislation coming into force and the 2015 Rules being amended. Is that --

MR THOMPSON: It's more just a counterfactual. It's that they may have been --

THE CHAIR: But for --

MR THOMPSON: -- they may have come into force at the same scintilla temporis, if that's the right expression, but ...

THE CHAIR: It's a nice expression anyway, yes.

MR THOMPSON: The hypothetical would have been, if this hadn't been done, if they hadn't done it --

THE CHAIR: I understand.

MR THOMPSON: -- then we would have had the rights governed by the domestic limitation legislation. I'll come back to that in a moment to show that that is correct.

In respect of the start date, we would say with respect that this is not an issue where we or Mr Gutmann are being evasive; in fact, we've set out our position reasonably clearly, I would submit, in our claim form. If I give you one example, that's in bundle A, tab 1, page 30. I'm always slightly hesitant that that's going to be correct, but it should be paragraph 85.

THE CHAIR: Yes.

MR THOMPSON: We say this:

"*As to duration, Mr Gutmann understands that the infringement has been ongoing since the inception of CHA Contracts. Accordingly, damages are sought on behalf of all PCMs identified above who have suffered losses as a result of the Infringement from its inception to date. [He] understands that, for the purposes of quantifying loss at this stage (*i.e., *before the provision of relevant data, information and/or documents from the Proposed Defendants), publicly available data is only available from 1 January 2007 and that as such, it will be necessary to limit the calculation of the preliminary estimates of damages to the period starting on 1 January 2007. It is anticipated that further calculations of loss will be possible following the provision of relevant data, information and/or documents from the Proposed Defendants including*

*the circumstances in which their commercial strategies in respect of CHA Contracts was adopted.*"

So, it's a bit of a forensic to and from, but we're essentially hitting the ball back to them and saying that the reason why we don't know is because they haven't told us.

We say that the PCR doesn't at present know when the CHA policy was first formulated or who by and implemented; for example, whether any one of these MNOs initiated this unusual commercial practice or whether it evolved simultaneously between them in some way, and if so, when and how.

So, we say those are matters that must be within the corporate memory of the Proposed Defendants, whether in documentary or personal form. One or more of them could, of course, make an early voluntary disclosure or provide witness evidence explaining these issues in detail.

THE CHAIR: Yes.

MR THOMPSON: We say this point is also relevant to the issues that Ms Demetriou and Mr Williams intend to address this afternoon.

To be clear, our current intention is as stated, to claim for all losses arising from the CHA policy once implemented by each Proposed Defendant. Following disclosure, Mr Gutmann will be in a better position to confirm the specific start dates for each Defendant. We are aware that Ofcom appears to obtain data going back to 2007 which may or may not correspond broadly or narrowly to the origins of this policy.

THE CHAIR: Yes.

MR THOMPSON: So, those are the three preliminary points.

THE CHAIR: Thank you.

MR THOMPSON: So far as Mr Hoskins's application goes itself -- I should say that we're now at 11.05; I would hope to finish by lunchtime, but if I can do better than that. I would be surprised if I go on after lunch, but we'll see how we go.

The PCR has set out his case on the May application in some detail, both in the response that we drafted and in particular the skeleton argument, which is at bundle B, tab 3. We've already looked at it briefly and we obviously rely on that in full, but I will try and give a presentation that's reasonably comprehensible and elegant in the time.

In the skeleton argument, we follow the history of the legislation and then we address the statutory purpose, the powers of the Secretary of State, and then finally, the true construction of Rules 31 and 119. The Tribunal will have seen that we have tried to put together what we think would have been the necessary amendments to give effect to what Mr Hoskins says Rule 31 now means; we've set that out at pages 40 to 41, towards the end of our skeleton argument.

THE CHAIR: Yes.

MR THOMPSON: In these oral submissions, I'll reverse the order by first setting out our overall conclusion, then looking in more detail at the meaning of Rule 31, then Rule 119 and the nature of savings provisions before more briefly addressing points raised by Mr Hoskins and the broader questions of vires and statutory purpose, which I think we've dealt with in some detail in our written submissions already.

THE CHAIR: Yes.

MR THOMPSON: I make one preliminary observation that, in following this course, I'm emphasising our positive case. The issues of vires and statutory purpose don't arise on that positive case.

It is not, as I understand it, disputed by the Defendants that the Secretary of State had the power to save Rule 31 in respect of follow-on claims, nor is it alleged that there was any inconsistency with the statutory purpose in maintaining the status quo for follow-on claims, thus providing consistency for both claimants and defendants and continuity in relation to both regimes until the new regime was up and running and new

claims were governed by 47E.

So, the first topic I come to is the application of the domestic limitation legislation in the Tribunal for claims arising prior to 1 October 2015. We would submit that the conclusion we invite the Tribunal to reach in respect of standalone claims is in reality a very modest one.

It is simply that the domestic limitation legislation applied generally as the default limitation or prescription regime in the Tribunal until it was displaced by a different or more specific rule so that the position in the Tribunal maintained the position described, for example, by the Court of Appeal in *BCL Old* before the CRA 2015 widened the jurisdiction of the Tribunal. So, it simply continued the position that had existed in the High Court in the Tribunal. We wouldn't say that that was a particularly startling or surprising outcome.

THE CHAIR: Yes.

MR THOMPSON: I've referred to it as a default position and the reason why I say that is, one sees from our skeleton and as a matter of principle anyway, that the domestic limitation legislation had always applied to all claims for damages under competition law until 20 June 2003 and that it continued to apply to all standalone claims between 20 June 2003 and 1 October 2015.

Thirdly, it was adopted by Parliament itself to apply in the Tribunal generally to all claims with effect from 1 October 2015. We'd say in that context, it's hardly a controversial proposition to suggest that this continued to be the case for pre-existing stand-alone claims in the Tribunal when its jurisdiction was expanded in 2015.

THE CHAIR: Yes.

MR THOMPSON: Turning to the limited instances of that default position being displaced by specific rules in the Tribunal, in the case of follow-on claims, the general rules -- the domestic limitation legislation -- were displaced by Rule 31 of the 2003

Rules with effect from 20 June 2003.

THE CHAIR: Yes.

MR THOMPSON: The domestic limitation legislation was then reinstated on a statutory basis by section 47E(2), with effect from 1 October 2015, subject only to the savings provisions of Rule 119 of the 2015 Rules in respect of preexisting claims. I don't think it's controversial that Rule 119 preserved Rule 31, at least in relation to follow-on claims.

THE CHAIR: Yes.

MR THOMPSON: In the case of stand-alone claims, the application of the domestic limitation legislation under the general law was replaced by statutory provisions applicable in the Tribunal in section 47E(2) of the Competition Act 1998, as amended, with effect from 1 October 2015. Although perhaps slightly paradoxically, those new rules in fact retained the domestic limitation legislation and applied them to all new section 47A claims until they were themselves replaced with effect from 9 March 2017. The next point is that the application of the Limitation Act 1980, in the Tribunal, in the context of follow-on claims, in the period before the changes made on 20 June 2003, has been confirmed recently by the Court of Appeal in the *DSG* case and applied by the Tribunal itself in the *Merricks* case. So, I think it might be worth just turning that up. That's at bundle F, tab 59, page 1312. (Pause)

It's in the third volume of hard copy for those who are using that. It's actually a judgment we'll come back to again in relation to the second application because it lays down some quite interesting principles about how limitation claims should be dealt with in the context of competition law.

THE CHAIR: Yes.

MR THOMPSON: But for present purposes, the relevant paragraph is paragraph 54 at page 83 of the judgment.

THE CHAIR: Yes.

MR THOMPSON: The Chancellor, as he then was, Sir Geoffrey Vos states:

"*54. Starting then at the beginning, the words of Rule 31(1) and (2) provide for present purposes that 'a claim for damages must be made within' two years of the final determination of the competition authority. That is, as the Claimants submit, a new limitation period in respect of a new way of bringing follow-on claims through the Tribunal. Prima facie, I agree also that section 39 of the Limitation Act [1980] operates so as to exclude the application of that Act, where Rules 31(1) and (2) apply*."

So, there was a disapplication of the Limitation Act as a result of the rules that came into force in June 2003.

Then at 55, he confirmed:

"*Up to 2002, [it's just below (e)] both follow-on claims and stand-alone claims had to be brought in court. The only limitation periods applicable were found in section 2 and 9 of the Limitation Act 1980 relating to torts and breaches of statutory duty*."

But for my purposes, what is interesting is that there was then a debate about what happened pre-June 1997, and it was agreed that the Tribunal -- because this was an appeal from a Tribunal case -- basically had to operate the Limitation Act for that pre-2003 period, including section 32. That's summarised in the conclusions of pages 1324 to 5 of the bundle, pages 95 to 6 of the judgment.

MR HOSKINS: I'm really sorry. If Mr Thomas could tell us the paragraphs he's relying upon for that proposition, that would be incredibly helpful. Sorry to interrupt, I really --

MR THOMPSON: What's the problem?

THE CHAIR: I think the point, Mr Thompson, as I understood him -- and I was going to ask you the same question. In relation to the part in *DSG* as to where the Chancellor deals with the pre-June 1997 situation.

MR THOMPSON: Well, the reason why that was relevant --

THE CHAIR: Yes.

MR THOMPSON: -- was that if the Limitation Act period of six years hadn't expired --

THE CHAIR: I see, yes.

MR THOMPSON: Then the new rules kicked in.

THE CHAIR: So, so pre-1997, we get there by going six years back from 2003.

MR THOMPSON: Yes, exactly.

THE CHAIR: That's the point.

MR THOMPSON: Yes.

THE CHAIR: Okay. But just in terms of -- I think you referred to some page references, I just didn't catch them. So could you take me to the --

MR THOMPSON: Oh, I'm sorry. It's the end of the judgment. It's simply that the chancellor summarises his conclusions by reference to section 32 of the Limitation Act, both at paragraphs 109 and 110.

THE CHAIR: Thank you for those.

MR THOMPSON: They're pages 95 and 96 of the judgment, 1324 and 5 of the tab.

THE CHAIR: Nice, and the conclusions 108, 109 and 110. So that's --

MR THOMPSON: Yes. The point I'm making is a relatively simple one: that there doesn't seem to be any question that the Tribunal had jurisdiction, which was governed by the Limitation Act.

THE CHAIR: Yes. I'm interested -- and it may be that I'm tripping over just one word in that, which is the word "jurisdiction", and it may be the same thing -- but are you not essentially saying that the Tribunal, is governed by the 1980 Act? Or rather, the 1980 Act governs the limitation of claims wherever they're brought, prior to the commencement of the 2003 Rules. Would that be a summary of the same point?

MR THOMPSON: What I'm saying is the default position --

THE CHAIR: Yes.

MR THOMPSON: -- is governed by the domestic limitation citation --

THE CHAIR: Yes.

MR THOMPSON: -- unless it's substituted by specific Tribunal Rules.

THE CHAIR: Unless -- yes, unless something else is there. Yes, yes.

MR THOMPSON: That's confirmed by the way in which -- I think it was Mr -- I'm always tentative about these cases because I think Mr Hoskins was in that one and Ms Demetriou was in the other, so no doubt they will pop up if I've misrepresented what happened in the case in any way, but I don't think I have. If one turns then to the *Merricks* case --

THE CHAIR: Yes.

MR THOMPSON: -- at tab 114.

THE CHAIR: That's *DSG*, yes. (Pause)

So, we're going to *Merricks*; is that right?

MR THOMPSON: Yes. *Merricks* -- I'm not sure if I've got the hard copy bundle -- ah, yes, I do. It's at tab 114. (Pause)

For example, at paragraphs 9 and 10.

THE CHAIR: Could you give the page number?

MR THOMPSON: Page 3277 in the electronic bundle, or in the paginated bundle.

THE CHAIR: Thank you.

MR THOMPSON: Here it says that Mastercard raised limitation and prescription defences. Again, it appears that they were governed by the Limitation Act and the rules under that Act, and then equivalent rules of Scottish law. The trial was concerned with whether or not defences -- I'm sorry, not defences, but extensions -- under the Limitation Act were available, for example, at paragraph 23, page 3283.

THE CHAIR: Paragraph 23, did you say? (Pause)

MR THOMPSON: We say there was no specific provision of law providing such

application in the Tribunal, and that there's nothing paradoxical or surprising to suggest that the domestic limitation legislation also applied to stand-alone claims in the Tribunal arising before 1 October 2015, when the Tribunal first obtained a retrospective jurisdiction over all section 47A claims.

Of course, Mr Hoskins says that his construction forces a different position. All I'm saying here is that my conclusion is perfectly reasonable and conventional, and simply reflects the fact that the default position, including in the Tribunal, is the domestic limitation legislation.

With all due respect to Mr Hoskins, the fact that section 47E(2) did not apply to either stand-alone or follow-on claims arising prior to the date of its entry into force on 1 October 2015 is nothing to the point. Had it done so, then the issues that are currently before the Tribunal would not have arisen. All claims, both stand-alone and follow-on, would then have been subject to the domestic limitation legislation by operation 47E(2), with effect from 1 October 2015, including claims arising before that date.

Unless section 47E had included some sort of savings clause itself -- which of course it doesn't -- then section 47E is simply silent on what limitation or prescription rules applied prior to 1 October 2015.

There's nothing in section 47E(2) to indicate that the domestic limitation legislation did not continue to apply to stand-alone claims arising prior to 1 October 2015 as a matter of the general law --

THE CHAIR: Yes.

MR THOMPSON: -- as indeed it always had done. The fact that the Tribunal had an expanded jurisdiction over such claims did not affect the operation of the domestic limitation legislation any more than it had done when the 20 June 2003 changes were made.

MR ALTY: Could you just repeat that last point about the "Tribunal had expanded its jurisdiction".

MR THOMPSON: We say that the mere fact that the Tribunal had an expanded jurisdiction --

THE CHAIR: Yes.

MR THOMPSON: -- over stand-alone claims --

THE CHAIR: Yes.

MR THOMPSON: -- didn't affect the operation of the domestic limitation legislation any more than it had done when the 20 June 2003 changes were made.

THE CHAIR: Although in 2000 --

MR THOMPSON: Perhaps I put that badly, but the point we just looked at --

THE CHAIR: Yes.

MR THOMPSON: After that date, it did affect it, of course, because it substituted Rule 31 --

THE CHAIR: Yes.

MR THOMPSON: -- and set aside the Limitation Act, as the chancellor explained in *DSG*.

THE CHAIR: Is it relevant, or to what extent is it of relevance, to your argument that the Tribunal obviously is a creature of statute, and its jurisdiction is defined by statute and by the rules? To that extent, when you talk about 'the default position' -- and I understand why you characterise it in that way, not least because it fits into the coherence of your argument, and I see that.

But I wonder to what extent it's correct to talk about a default position in relation to stand-alone claims in the CAT prior to 2015 because there was no jurisdiction in the CAT for stand-alone claims prior to that. So, the notion of there being any limitation of those claims simply didn't arise.

Now, I mean, that may just be a question of terminology perhaps, but do you see the point I'm making?

MR THOMPSON: Indeed, I do. It's obviously a question that I suspect Mr Hoskins, and I have thought about.

THE CHAIR: Yes.

MR THOMPSON: But the reason I've taken you to the 2003 transition --

THE CHAIR: Yes.

MR THOMPSON: -- and the recent cases, which have, oddly enough, had to grapple with this question --

THE CHAIR: Yes.

MR THOMPSON: -- is that they have indeed. They haven't said, 'Oh, I don't know what the rules were then', they've said the default position is the Limitation Act even in the Tribunal.

THE CHAIR: Well, I don't know about the use of the term 'default position', but they said that the law that applies the law then --

MR THOMPSON: Well, the law that applies is the domestic limitation legislation.

THE CHAIR: No, I understand.

MR THOMPSON: Not by operation of 47E(2) --

THE CHAIR: No.

MR THOMPSON: -- but presumably by the intrinsic -- I mean, what else could it be?

THE CHAIR: Yes. No, I see that. I mean --

MR THOMPSON: We say there's nothing surprising in that being the position.

THE CHAIR: No, I quite see that. The reason I think it's possibly an interesting point from my perspective is that you're talking about the default position being limitation, whereas the default position north of the border is prescription --

MR THOMPSON: Yes.

THE CHAIR: -- which means that as a matter of law, the claim is extinguished as opposed to one simply not having a right to bring it.

MR THOMPSON: Yes.

THE CHAIR: The prescription of a claim is something which one would not expect to find within the rules of court, because it's the operation of a legal rule that one would expect to find in an Act of Parliament, as indeed one does.

MR THOMPSON: Yes.

THE CHAIR: So that's maybe just explaining why I'm approaching it in that way as opposed to anything else. I appreciate both of you are agreed that the one thing you're not talking about is the prescription of the Limitation Act 1973, so I won't go back on that.

MR THOMPSON: I'm not sure in this respect --

THE CHAIR: Yes.

MR THOMPSON: -- domestic limitation legislation does include the Scottish law.

THE CHAIR: It does, yes, absolutely.

MR THOMPSON: I think Mr Hoskins is saying that they're kicked out as well.

THE CHAIR: Well, I think what Mr Hoskins says is essentially that so far as the rules that apply to the CAT are concerned, that where we need to look for those is the 2015 Rules and 119, essentially. In essence, his argument starts from the other end of the telescope from you. He says 119(2) dictates an absolutely clear answer, that the 2003 Rules continue to apply. So that doesn't affect prescription because the 1973 Act is unaffected by any changes to the 2015 Rules precisely because they only apply to the CAT.

MR THOMPSON: Yes, they do, but the CAT has a pan-UK jurisdiction.

THE CHAIR: It does.

MR THOMPSON: And in fact, Rule 119 itself refers both to limitation and prescription.

THE CHAIR: It does.

MR THOMPSON: So --

THE CHAIR: But I think the point is that if one is subject to a Scottish jurisdiction, you could go to the Court of Session and vindicate your rights there, and what the 2015 Rules say about the CAT is irrelevant to that. I think that's the reason that they don't -- that's how Mr Hoskins would see the -- as I understand his argument.

MR THOMPSON: I think that's true in the English courts as well.

THE CHAIR: Yes, it is.

MR THOMPSON: You can still bring your proceedings, and then they are governed by the limitation.

THE CHAIR: It is.

MR THOMPSON: The question is whether there's either anything paradoxical in what I'm suggesting, or (overspeaking).

THE CHAIR: Yes. No, I quite see. I quite see.

MR THOMPSON: Or what the lacuna would actually be and how Mr Hoskins said it would be filled if the Secretary of State hadn't exercised this discretion.

THE CHAIR: No, I see that.

MR THOMPSON: But with that, again, somewhat preliminary point, if we could look now at Rule 31 itself.

THE CHAIR: Yes.

MR THOMPSON: I think it's probably worth taking it up and starting at bundle F, tab 24, which I don't think Mr Hoskins actually went to in opening the matter, but in my submission, in one sense, are the critical provisions, alongside section 47A(5), which of course we have looked at.

You'll recall that 47A(5) expressly says that section 47A(1) claims may not be brought in the Tribunal until there's been a relevant infringement decision. I mean, given the

importance, perhaps we should look at that as well.

THE CHAIR: Yes. This is pre the 2015 changes.

MR THOMPSON: Yes. If you look at tab 5, page 57. So, this is the legislation that governed -- in various forms -- but in essence governed the 2003 Rules for the entire time they were in force.

THE CHAIR: Yes.

MR THOMPSON: So 47A(1) is in open terms:

"*(1) This section applies to --*

*(a) any claim for damages.*"

I don't think we need to worry about (b).

"*Which a person who suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom*."

So, 47A(1) is an entirely general term. So, it's any competition law damages claim of the defined kind.

THE CHAIR: Yes.

MR THOMPSON: And then the relevant prohibitions are in (2), and then there's a statutory prohibition at (5)(a), saying:

"*No claim may be made in such proceedings*" *[that's Tribunal proceedings]*

*(a) until a decision mentioned in subsection (6) has established that the relevant prohibition in question has been infringed*."

So, that's where you get the concept of a follow-on claim. Then there are the various procedural and other details, because 47A(5)(b) prohibits bringing these proceedings without permission, effectively, during the appeal period. That's specified in some detail at paragraphs 7 and 8.

THE CHAIR: Yes.

MR THOMPSON: There have been some quite spectacular instances of that where not only has the decision been a long time after the relevant events, as Dr Bishop and I are familiar with in *Trucks* -- where the events in 1997 were the subject of a decision in 2016 -- but then in the related *Scania* case, the decision was taken in 2017, but the final decision of the Court of Justice was only taken 1 February 2024, so in fact time is still running in relation to that claim. So, there's some quite striking effects.

THE CHAIR: Yes.

MR THOMPSON: These, you know, 2003 Rules are still biting now.

THE CHAIR: Yes.

MR THOMPSON: So, if we then go back to tab 24. There are various interpretation provisions and in particular "*damages*" is defined as "*any sum which may be claimed under section 47A of the 1998 Act*". So, in my submission that means follow-on claims.

THE CHAIR: And we're in rule --

MR THOMPSON: Rule 2, the definition of damages is "*any sum which may be claimed under section 47A of the 1998 Act*".

THE CHAIR: So, Rule 2 of the 2003 Rules, yes.

MR THOMPSON: Yes. It's subject to the prohibition, so it doesn't include anything other than stand-alone claims of the kind we've seen.

THE CHAIR: Yes.

MR THOMPSON: Likewise, Rule 3(d) --

THE CHAIR: Yes.

MR THOMPSON: -- states:

"*Part IV of these Rules applies to claims for damages*."

So, that again is limited to stand-alone claims.

THE CHAIR: Yes.

MR THOMPSON: Sorry, am I saying 'stand-alone'? I'm sorry. For the transcript, when I said 'stand-alone' I meant 'follow-on', I think probably for the last three entries. It's limited to follow-on claims.

THE CHAIR: Yes. Well, I think you said it doesn't include stand-alone claims, which would also be right.

MR THOMPSON: Okay, I'm sorry. I may have got confused.

THE CHAIR: But maybe I heard that and assumed --

MR THOMPSON: Everyone knows what I'm saying.

THE CHAIR: So, I mean essentially what you're saying is the 2003 Rules only apply to follow-on claims, as is defined by --

MR THOMPSON: Correct, as defined by the Rules themselves, both in two and three. Then when you get to 30:

"*The rules applicable to proceedings under sections 47A and 47B of the 1998 Act (claims for damages) are those set out in this Part*."

We say, again, this is limited to follow-on claims. When you get to 31, we say that the limited scope of 31 is clear on its face. We say that this has been found not only in the passage we looked at from the chancellor in *DSG*, but there's actually a slightly fuller description in the *BCL* case. If we just look at that, and then maybe that'd be a good time for a break, I don't know. That's at tab 45 of the F bundle, and that's the second volume.

It's a relatively early case that ended up in the Supreme Court, but on a different point, not on the description of the regime. The description of the regime is at pages 678 to 679, paragraphs 10 to 13.

THE CHAIR: Yes.

MR THOMPSON: And Lord Justice Lloyd, first of all, describes the position before 47A came into force on 20 June 2003:

"*This remedy could only be sought in ordinary proceedings in the High Court. As such, a limitation period of six years would apply to it, under section 2 of the Limitation Act 1980. The period would run from the date on which loss was suffered, but the start of the period would be postponed if material facts were deliberately concealed by the defendant*."

So that's obviously the section 32 issue.

THE CHAIR: Yes.

MR THOMPSON: Then there's a reference to the position in Scotland, rather vaguely expressed in paragraph 11, so I'll pass over that quickly. Then paragraphs 12 and 13 --

THE CHAIR: Yes.

MR THOMPSON: -- describe the changes made by the Enterprise Act by introducing section 47A into the 1998 Act:

"*This procedure is available when there has been a relevant decision that article 81 or the Chapter I prohibition has been infringed*."

Then there's a description of the type of decision:

"*This type of claim is known as a follow-on claim, as distinct from the normal procedure referred to as stand-alone claim. It is an alternative to a stand-alone claim, subject to the relevant provisions being satisfied, a claimant may pursue either according to its choice.*

13. There are special rules about bringing a follow-on claim under section 47A, to some of which I have alluded. [And then there's reference, there must have been first a decision, then a potential appeal.] The time limit for such a claim is laid down by the Rules, and is two years.

We've seen the detail of that in the rule itself. So, in my submission, the Court of Appeal, both in this case and in *DSG*, has clearly said that Rule 31 applies to follow-on

claims. That's the nature of the beast, as it were.

Is that a convenient place to pause for a minute?

THE CHAIR: Yes.

MR THOMPSON: Thank you.

THE CHAIR: Yes. We'll rise now to try and sit again in ten or 15 minutes, something like that.

MR THOMPSON: Thank you.

(11.37 am)

(A short break)

(11.52 am)

MR THOMPSON: I think where we got to was that looking at 47A(5) in its old form --

THE CHAIR: Yes.

MR THOMPSON: -- and its application in Rules 2, 3, 30 and 31 of the 2003 Rules, we say it's clear on its face that the 2003 Rules were only concerned with follow-on claims, as they were then understood, and that this was the clear understanding of Lord Justice Lloyd in 2010 and the Chancellor in 2020.

We say that those findings which were, as it were, black letter findings and findings of authority --

THE CHAIR: Yes.

MR THOMPSON: -- are confirmed by looking at Rule 31 itself, which we would say is a unique limitation rule. I'm not aware of any precedent for it. That it was fashioned specifically to operate in relation to follow-on claims in the Tribunal provided for in the previous version of section 47A --

THE CHAIR: Yes.

MR THOMPSON: -- i.e., claims based on prior infringement decisions by regulators.

If one looks at the legislation itself, it's a point we've made in writing, but it's obviously

an absolutely critical point, which, in our submission, Mr Hoskins somewhat skipped over. Perhaps I was going to say hopped over. But the relevant date for the purposes of paragraph 1 -- so that's the key operative provision -- is the later of two dates which are set out in A and B, and one of them is 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.

THE CHAIR: Can you just -- I haven't got the rule in front of me.

MR THOMPSON: Sorry. It's at page 205 --

THE CHAIR: Thank you.

MR THOMPSON: -- in tab 25 of F.

THE CHAIR: Yes, of F.

MR THOMPSON: And as I understand it, what is being said against this is somehow you can just ignore the wording of Rule 31(2) and somehow skip over both the word "*later*" and the whole of (a) and somehow say that in the context of stand-alone claims, the relevant date is the date on which the cause of action accrued. I think you just sort of skip over the actual legislation.

But the effect of that is to say that there's some implicit rule that if there isn't going to be a decision then it's actually the earlier of the two dates that applies, at least on a sort of provisional basis, because as we've seen in the *Trucks* case, nobody actually knew on 1 October 2015 whether there'd be a decision or not or when any appeal might or might not succeed. So, you'd have to have -- Mr Hoskins, as I understand it, says, that you skip over it for a bit, but if there is then a decision, then somehow 31 comes galloping back. And in my submission, that's a very extraordinary approach to statutory construction. We've not seen any precedent and it appears to be just an assertion that that's obviously what it all means.

But in my submission, a more powerful submission is it's obviously not what it all

means.

And that point --

THE CHAIR: Sorry. So, your conclusion is that it can't apply or that it doesn't apply? It doesn't apply, isn't it, because you're arguing --

MR THOMPSON: It doesn't apply as a matter of jurisdiction.

THE CHAIR: Say again.

MR THOMPSON: Because -- it doesn't apply as a matter of jurisdiction because it only applies to follow-on claims by operation of Rule 47(5)(a) and (b) and Rules 2 and 3 of the 2003 Rules --

THE CHAIR: Yes.

MR THOMPSON: -- which have not been amended or changed or repealed or I mean, they've been revoked, but they haven't been changed in any way.

THE CHAIR: Yes. I'm trying to understand how the point of 31(2)(a) fits into the argument that -- so you're saying Mr Hoskins's argument just assumes that it's (b) because there's no (a) but you say, well, the decision might come later, but I wonder is that necessarily a flaw, a fundamental flaw of Mr Hoskins's argument, in the sense that if a decision turns out later, is that not just a matter that the parties can argue about then?

MR THOMPSON: But then has the time expired or not, because --

THE CHAIR: That would tend --

MR THOMPSON: He seemed to think it's provisionally expired because later means earlier and you can just ignore the first limb. I don't really understand how that's a possible approach to statutory construction by implication --

THE CHAIR: No. I --

MR THOMPSON: -- to say that you can imply that later means earlier and just ignore one of the two dates that have been laid down in the Rules.

THE CHAIR: I understand the argument, yes.

MR THOMPSON: And then the position gets worse because in (3), and that gives effect to 47A(5)(b), and this is one of the Rules that is specifically preserved by Rule 119.

THE CHAIR: Yes.

MR THOMPSON: It says that:

"*The Tribunal may give its permission for a claim to be made before the end of the period referred to in paragraph (2)(a) after taking into account any observations of a proposed defendant*."

So that seems to mean that given that on Mr Hoskins's reading this rule applies in the present case, there's a sort of curious system whereby we have to seek permission for a claim, and I don't think it's said that 47B was introduced, the whole certification process was to give an effect of this. It's that somehow there's some principle whereby Rule 119 introduced this curious rule for stand-alone claims that the Tribunal could give permission for a stand-alone claim to be made because by definition, it would be before the end of the period referred to in paragraph (2)(a) because that certainly wouldn't have happened; it might never happen.

But again, I think it's the same skip-over approach that Mr Hoskins says, 'Well, don't worry about that because it doesn't apply, you can just ignore it'. Well, to my submission, that's not the way to go about construing legislation. What you have to do is look at what it means and what it says and not just ignore it.

We say Rule 31 was only ever intended to apply to follow-on claims; that the Court of Appeal was perfectly correct, indeed, it was absolutely, blindingly obvious, and that the terms of Rule 31 make that -- it's perhaps rather disrespectful to the Court of Appeal, but I certainly don't disagree with what they found. And indeed, the Chancellor said that that was why the Limitation Act was set aside pursuant to

section 39 of that Act, but only in relation to follow-on claims in the Tribunal.

THE CHAIR: Yes.

MR THOMPSON: If we then turn to Rule 119, which I think -- I'm afraid there may be another dog joke coming but Mr Hoskins made a joke about a tale of a chihuahua wagging the Great Dane or something, but in my submission, the basic point is that the meaning of Rule 31 is not, and could not have been changed by the terms of Rule 119 which does not, in fact, support the Defendants' case. From the dog point of view, we say that it is a savings provision from nose to tail, that there's no wagging to be done.

First of all, Rule 119 needs to be construed as a whole and in context. Yes, it's tab 70, sub 33, page 236. It's the second page of tab 33 of bundle F. It's the first bundle.

THE CHAIR: Do you have the volume?

MR THOMPSON: It's F/1, it's the first volume, which in my mind was rather empty so I moved it into a smaller file. And it's perhaps worth starting at 235 because we've had some discussion of it. It's part 8 of the 2015 Rules headed, "*Revocation and Savings*" and I don't think there's any controversy about the heading for revocation, which is followed by:

"*The following Rules are revoked --*

*The Competition Appeal Tribunal ... 2003*".

And then some amending Rules 2004. And then there's the heading, "*Savings*". We say that the first provision is a classic revocation provision and the second provision is a classic savings provision. There's nothing in the wording of Rule 119 that suggests in any way that it wasn't intended as such. Indeed, the heading "*Savings*" precisely reflects the character of Rule 119 read as a whole and in conjunction with the other rules and statutory provisions. I'll come back to the significance of our note, or the note on the significance of savings provisions in a moment.

So, if you look at the wording of the Rule.

THE CHAIR: Yes.

MR THOMPSON: First of all, Rule 119(1) is a general savings provision applying to all proceedings commenced before the Tribunal prior to 1 October 2015, preserving the 2003 Rules as a whole in respect of such proceedings. It would therefore apply to the full range of Tribunal proceedings, for example, appeals under the Competition Act, which now appears as part 2 of the 2015 Rules; judicial reviews under the Enterprise Act, now part 3, as well as claims for damages, which of course are now included in an expanded form in parts 4 and 5 of the 2015 Rules. But those three broad categories would certainly all be caught by 119(1).

THE CHAIR: Yes.

MR THOMPSON: By contrast, Rules 119(2) to (4) contain a more specific set of savings provisions relating to damages actions; limited in scope to Rule 31(1) to (3) of the 2003 Rules and related provisions of the previous version of section 47A; one sees that at 119(4). So Rule 119(3) defines the scope of Rule 119(2) to (4) to limit the application of Rule 119(2) and (4) to section 47A damages claims, now under parts 4 and 5 of the 2015 Rules arising prior to 1 October 2015, and perhaps to state the obvious Rule 119(3) thus explicitly confirms that Rule 119(2) does not apply to parts 2 and 3 of the 2015 Rules or the equivalent procedures, namely appeals and reviews.

We say there was nothing in Rule 119(2) or (3) to suggest that there was any intention to amend or widen the scope of Rule 31, which is simply referred to in terms. In particular, the wording of Rule 119(2) does not support the Proposed Defendants' case, contrary to the submissions made yesterday.

First of all, the rather awkward wording reflects the statutory wording of section 47A(4) of the amended legislation, where the wording, "*The limitation or prescriptive period which would apply in respect of the claim*" is used, and that's at bundle F, tab 7,

page 74. I don't know --

THE CHAIR: Just the point you're making there. The wording of 119(2), you're saying, reflects the wording of 47 --

MR THOMPSON: If you look towards the end of the paragraph, it says:

"... *determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made on or after 1 October 2015*." [as read]

Which is quite a sort of curious expression for a limitation rule. But where that comes from is the equally rather curious wording of 47A itself.

THE CHAIR: As amended.

MR THOMPSON: Yes, which is at page 74 at tab 7.

THE CHAIR: Yes.

MR THOMPSON: Where it says that in order to identify claims which may be made in civil proceedings:

"... *any limitation rules or rules relating to prescription that would apply in such proceedings are to be disregarded*".

So, in order to know whether something is a 47A claim or not, you ignore limitation. It's a very -- I don't know -- the statutory draftsman is obviously a mastermind but it's quite difficult to understand in some respects.

THE CHAIR: I'm looking at 47A -- which is the subsection you're referring to?

MR THOMPSON: 47A(4). It states a limited purpose:

"*For the purpose of identifying claims which may be made in civil proceedings [which picks up the wording of 47A(2)]* ..."

THE CHAIR: Yes.

MR THOMPSON: It says that:

"... *any limitation rules or rules relating to prescription that would apply in such proceedings are to be disregarded*".

So, you don't worry about limitation for the purposes of counting heads, as it were. And I think that's why the wording in 119(2) is as it is, is that it says that Rule 31(1) to (3) continues to apply in respect of such a claim for the purposes so, as it were, you haven't worried about it and then this puts the wording back in, in terms of Rule 31(1) to (3).

But what Rule 119(2) doesn't say, with all due respect to Mr Hoskins --

THE CHAIR: Yes.

MR THOMPSON: -- is that Rule 31 applies to all section 47A claims or that no other limitation or prescriptive period might also apply to such claims. (Pause)

Your Lordship's having a look at it, but I don't -- Shall I make my submissions --

THE CHAIR: I'm just reflecting on it. I mean, that's true, but it also doesn't say that stand-alone claims are to be dealt with by the -- stand-alone claims within the Competition Appeal Tribunal are to be dealt with by the 1980 or 1973 Acts. It doesn't say that either.

MR THOMPSON: No, I would say that that's not something the Secretary of State either could or should have concerned himself with that, or herself, with -- that the Limitation Act applies because it's the Limitation Act and likewise the rules of prescription. It doesn't require the Secretary of State to say so. As we've seen in *DSG*, the disapplication was because of the specific rules in 31 relating to follow-on claims. There's been no equivalent disapplication certainly not expressed. Mr Hoskins has to say that there's an implied disapplication here.

THE CHAIR: I'm not sure he does because -- and this was when we come back to the discussion we had about default and whether that's the correct term or not -- because one way of looking at it would be to say the Competition Appeal Tribunal, the rules of limitation, have been the Rules set down by Rule 31 up until this comes into existence. If you go to the moment just before the 2015 Rules came into

force, the only limitation rule that applied, so far as claims in the Competition Appeal Tribunal was concerned, was Rule 31. So insofar as there is a pre-existing position, it is that Rule 31 applies.

The difference between you is you say, "Well, this is a different kind of claim so, therefore, the rules that applied outwith the Competition Appeal Tribunal should continue to apply, even though that we're now inside the Competition Appeal Tribunal", whereas Mr Hoskins says, 'Oh no, no, no, we're in the Competition Appeal Tribunal so therefore the rules that always apply to the Competition Appeal Tribunal should continue to apply'. And that's the --

MR THOMPSON: I understand what he said.

THE CHAIR: Yes.

MR THOMPSON: What I'm saying is that he has no real substance to justify it because Rule 31 has, by Rule 118 of the 2015 Rules, just been revoked.

THE CHAIR: Yes.

MR THOMPSON: So, there's nothing for this argument to gain traction on because the revocation of the 2003 Rules coincided with the revocation of the old section 47A(5).

THE CHAIR: Yes.

MR THOMPSON: So, there's no reason to construe the 2003 Rules any differently unless you somehow say that somehow it must be that the primary legislation was revoked marginally before or replaced marginally before the secondary legislation, but in my submission, there's no basis for that. The 2003 Rules as a whole were governed by the legislation that was in force when it was in force.

THE CHAIR: Yes.

MR THOMPSON: And Rule 2 is quite explicit that it's not any old damages claim, it's a damages claim that may be made in the Tribunal, which means a follow-on claim.

Can I go through my points and perhaps we --

THE CHAIR: Yes. No, no, do.

MR THOMPSON: I mean, the second point and is perhaps related to the one I've just made --

THE CHAIR: Yes.

MR THOMPSON: -- is that Rule 119(2) does not say that Rule 31 shall now be deemed to apply to a wider category of claims than those provided for in the 2003 Rules themselves.

THE CHAIR: Yes.

MR THOMPSON: And then, perhaps most tellingly, and I think also tellingly that Mr Hoskins didn't address it, is that it positively asserts that Rules 31 to 3 of the 2003 Rules continue to apply in respect of a claim, which falls within paragraph 3. If it wasn't a claim that falls within paragraph 3 that already fell within the Rules, then "*continues to apply*" is completely inapt. We say that a new claim that never fell within the scope of the Rules while they were in force, it's just again, torturing language to suggest that a rule could continue to apply to such a claim.

THE CHAIR: Is the "*continues*" not in that context because this is, as it says, a saving provision? It's saying 118 has just told us the 2003 Rules are gone and then 119 says but they continue to apply, the Rules continue to apply in relation to these cases. Is that not the continuation, as it were? It's a continuation of the 2003 Rules, isn't it?

MR THOMPSON: Well, in my submission, that's not a natural use of the word 'continued' if you were going to do that, so it's going to be a new category of claim that wasn't previously within the 2003 Rules, the natural wording would have been 'shall apply'. And that's in effect, what Mr Hoskins is saying.

But he has another problem because Rule 31(1) to (3), Rule 31(3), I think is a rule that he says doesn't apply to stand-alone claims. So, this says, on his reading, that it does

apply but he says it doesn't. Whereas he says you just skip over it in relation to a stand-alone claim.

THE CHAIR: I'm not following this bit. Sorry. Are we talking about --

MR THOMPSON: If you look at the first line, it says, "*Rule 31(1) to (3) of the 2003 Rules* ..."

THE CHAIR: Yes.

MR THOMPSON: "... *continues to apply*".

THE CHAIR: Yes.

MR THOMPSON: And he says that that includes stand-alone claims.

THE CHAIR: Yes.

MR THOMPSON: But then he says that Rule 31(3) doesn't apply to stand-alone claims because it makes no sense in relation to such claims.

THE CHAIR: So, in other words, you're saying because of the argument we were just talking about in terms of the "*later of*" is that the --

MR THOMPSON: Yes. Well, there's "*later of*".

THE CHAIR: Yes.

MR THOMPSON: But if one goes back to Rule 31(3), you may recall that's the permission requirement.

THE CHAIR: Yes.

MR THOMPSON: Page 205. And in his skip-over approach he says, 'Don't worry about that, that doesn't apply to stand-alone claims'.

THE CHAIR: Yes.

MR THOMPSON: But then when we look at 119, he says, 'Oh yes, it says it does because it's widely construed'. But in my construction that makes perfect sense because it's follow-on claims.

THE CHAIR: Yes.

MR THOMPSON: But on his construction, he first of all says, 'Oh yes, it's very important, it applies to 31(1) to (3) and that's obvious'.

THE CHAIR: I see.

MR THOMPSON: But then when he looks at 31, he says, 'Oh no, it doesn't apply'.

THE CHAIR: So, you're saying insofar as 31(3) only applies to follow-on claims then that, you say, supports your reading of 119(2) which is applying only to follow-on claims essentially.

MR THOMPSON: So, it continues to apply, and it does indeed apply. I mean, it's a sort of a painful process but in a way, it's only painful because these curious points have been taken. If one took --

THE CHAIR: I'm sure Mr Hoskins would say the same thing.

MR THOMPSON: But if one took it in its natural sense into follow-on claims, then it would all make perfect sense, because everything would be the same.

THE CHAIR: I think I'm possibly repeating a point I've already made, but just so that I make sure that you've heard it, and you can respond to it.

The difficulty that I have with your reading of this provision is essentially, approaching this from the perspective of the CAT, I look to the Rules to tell me which Rules should apply, and when I look to 119, it tells me that I ought to apply the 2003 Rules in certain circumstances. I mean, thus far you're in agreement with Mr Hoskins.

Now, you say I should read this implicitly as meaning that stand-alone claims do not fall within the terms of this provision. You say that because you say I should read this, bearing in mind the point you've made about the construction of the 2003 Rules applying here, so that implicitly this doesn't apply to stand-alone claims, you're saying. But it doesn't explicitly, therefore, tell me what rules should apply in those circumstances.

Now, you say that the reason it doesn't need to do that is because the 1980 Act or the

1973 Act will continue to apply and the point you've made already, which is that one would not expect the Rules to tell me what the substantive law that applied in the Tribunal was. You know, that's a matter of substantive law, not procedural law. Perhaps it just comes to this, that your reading of it, if it means what you're suggesting it means, it might have been said a lot more clearly than perhaps it has been, but that's maybe a point that could be taken on both sides.

MR THOMPSON: With respect, it is because if one looks at the legislation, as it were, through my lens, I don't think Mr Hoskins has any problem with it. It's perfectly straightforward; it is what it says. Rule 31(1) to (3) clearly was designed for follow-on claims.

THE CHAIR: Yes.

MR THOMPSON: It says so in terms and there we go. As I understand it, the only problem, which I think your Lordship is putting to me although I'm not sure it was put to me specifically by Mr Hoskins, is you're saying that there's then a gap?

THE CHAIR: Well, I mean, I see that both constructions are -- I don't think the gap point is really a fundamental issue for the point you've already identified, but it's more a question of which is the more natural construction of the provision, I think.

MR THOMPSON: Yes. And we're going to come to the savings point, but if I can keep going on --

THE CHAIR: Yes, no, do carry on.

MR THOMPSON: -- this point of construction.

THE CHAIR: Yes --

MR THOMPSON: I think the rest of these are sort of negative points that, if it were making this change to the operation of Rule 31((1), you'd not only expect it to be more explicit about what amendments were being made to 31 to accommodate this expanded scope for Rule 31, you'd also expect it to disapply Rules 2, 3 and 30 or to

amend the definition of damages in the 2003 Rules, which it doesn't do. Given that the, as I've put it, default position is to displace the general provisions of the domestic limitation legislation, you'd expect it to say so.

Then finally, and it's the point that I think I've mentioned already about the amendments that we say would be necessary to make any of this make sense, it doesn't actually contain any amending or dealing provisions that suggest any intention to alter the meaning or application of Rule 31. On the contrary, it says "*Rules 1 to 3 apply*", whereas if Mr Hoskins were right, you'd expect it to say, "1 to 3 apply to follow-on claims; 1 and 2(b) apply to stand-alone claims". The word later should be ignored in 31(2). I mean, it's just a shambles and you wouldn't expect the Secretary of State just to have ignored all those problems.

Mr Hoskins drew a distinction between Rule 119(2) and (3) and 119(4). In my respectful submission again, that doesn't assist him. The purpose of Rules 119(2) and (3) was to save the application of Rule 31 which had previously applied to follow-on section 47A claims under the previous wording, as I've already submitted.

THE CHAIR: Yes.

MR THOMPSON: And in respect of equivalent claims, so follow-on claims as we would say, are now provided for under the new wording of section 47A. We'd say in that context, it was unnecessary to refer to or save the previous wording of section 47A, for example, 47A(1), for that purpose after the earlier version had been revoked. The old version of section 47A(1) was simply redundant. Once the new version was in force, they were saying broadly the same thing, but there was no point in having 47A(1) still in place, so it's perfectly natural just to refer to 47A.

We say, by contrast, that Rule 119(4) was intended to make it clear that Rules 31(2)(a) and 3, the Rules that Mr Hoskins says no longer apply to stand-alone claims, but we say they're Rules that only make sense in respect to follow-on claims, continued to be

operable as they had been under the old wording of section 47A. I don't know whether it would help to look back at --

THE CHAIR: Yes, it would.

MR THOMPSON: It's a bit of a mind game. But if one goes back to page 205, you see that 31(2)(a) expressly refers to section 47A(7) or (8) of the 1998 Act, and that 31(3) expressly refers to paragraph (2)(a). So, to make that operative, you have to have 47A (7) and (8) of the old Act. And so all 119(4) is doing by referring to the old Act, the 1998 Act as they had effect before they were substituted, is making 31(2)(a) and (3) operative.

THE CHAIR: Yes ...

MR THOMPSON: Because if it wasn't in the terms of the old Act, then when you get to 31(2)(a) in relation to follow-on claims and 31(3) in relation to permission, it wouldn't bite on anything.

THE CHAIR: No, I see that. I think Mr Hoskins' point -- and forgive me if in following the argument I missed this -- was that in 119(2) and 119(3), by referring to section 47A of the 1998 Act as amended, as it were, that therefore included stand-alone and follow-on claims; whereas, and I think the point he was making was that in subsection (4) of 119, the draftsperson has specifically made clear that -- by the way, we're talking about 47A pre-amendment. Just for the reasons you're saying, I don't think we disagree with that; he's saying the reason we were looking at the old one is because obviously if you looked at the new one it wouldn't make any sense.

MR THOMPSON: Yes.

THE CHAIR: But he's saying -- I mean, in a sense, it's a relation of the kind of arguments you're making about, well, if they'd wanted to make the point you're making, they could have made it more clear if they'd done it like this. He's, I think, suggesting that if they wanted to make clear that this only applied to follow-on claims, they could

have said 'proceedings under section 47A of the 1998 Act as it was effective before it was substituted by blah blah blah'. See what I mean?

MR THOMPSON: I don't entirely see what you mean. I think the point I was trying to --

THE CHAIR: Sorry, I put it much less elegantly than Mr Hoskins.

MR THOMPSON: Well, no, no, I think it's just that when you actually look at the change that was made to 47A, you can see that there was an important change made and that 47A(7) and (8) of the old Act were effectively deleted.

THE CHAIR: Yes.

MR THOMPSON: The point I was probably trying to make inelegantly was that there wasn't an equivalent change to 47A(1) and (2); that 47A(1) was already about monetary claims in the Tribunal, and 47A(2) is about monetary claims in the Tribunal. So, there was no need to refer to the old 47A, that it was just monetary claims in the Tribunal and that was therefore within the scope of 47A.

THE CHAIR: I see, yes.

MR THOMPSON: In my submission, that doesn't cast any light as to what Rule 31 means.

THE CHAIR: Yes.

MR THOMPSON: Sir, it's not part of my case that 119(3)(a) in particular, that you have to imply some wording into that, that section 47A (as it applies to follow-on claims) applies. It's just got to be a 47A claim.

THE CHAIR: Yes.

MR THOMPSON: My point is that Rule 31(1) to (3) only apply to follow-on claims and nothing in these Rules changes that situation. On the contrary, all the indications are that this was concerned with follow-on claims and that continues to apply and the reference in 119(4) and the reference to 31(1) to (3) all suggests this is all about

follow-on claims.

THE CHAIR: Can you -- no, sorry, I just wanted to look at 31 again, but no, thank you. I understand that point.

MR THOMPSON: Our overall submission is that the purpose of all this was to preserve the status quo that claimants -- and I keep going back to *Trucks* because I know that it's a familiar case -- who were the subject or the beneficiaries of the decision still had their two years to bring the claim. That's what actually happened; I think the decision was made in June or July in 2016, so after this came into force, and they were able to bring their claim within two years, so by June or July or possibly later in 2018. They had two years.

So, at the time when this came into force, there wasn't a very hard and fast distinction between claims that could be brought by follow-on and claims that could be brought by stand-alone. So, the wording was just used "*section 47A*". But in my submission that doesn't cast any light on what Rule 31(1) to (3) of the 2003 Rules meant.

In my submission, it's perfectly clear what they meant and that there are indications even in this rule and the way it's drafted that that was what the Secretary of State was getting at. Because he was saying Rule 31(1) to (3) continue to apply -- (3) is only really sensibly applicable to follow-on claims -- and 119(4) makes specific provision, which only really makes sense in relation to follow-on claims.

So, we say when you actually look at 119(2) to (4), there's nothing that makes any sense in relation to stand-alone claims. You've got an inappropriate rule specifically preserved continuing to apply and then with a specific provision of the earlier regime preserved to enable follow-on claims to continue. And on the other side, there's nothing.

THE CHAIR: Okay. Thank you.

MR THOMPSON: I said the status quo. What I meant by the status quo was not only

this, but also the status quo in relation to stand-alone claims, which the Court of Appeal had said was governed by the general limitation rules and had been throughout. And then the jurisdiction of the Tribunal is expanded, but there's no specific provision made for any other rules than the limitation rules, the domestic limitation rules, to apply to those claims. This doesn't make any specific provision for it, and nothing else does either. So, we say the Limitation Act continues to apply.

That is a rational position and indeed it is particularly rational because that was the position up to the 1 October 2015, and it was the position after 1 October 2015, under 47E(2). We say that it's a particularly odd outcome that the limitation regime that had existed both before and after the 1 October 2015 should suddenly be radically changed by implication so that it applied in a different way to historic claims for a period after 1 October 2015. We say that doesn't really make much sense, whereas our approach is not only a natural way of reading the legislation, but also makes sense when you look at the overall regime.

THE CHAIR: Yes.

MR THOMPSON: I think that takes us naturally to the significance of savings provisions which we addressed in our note in response to the challenge from Mr Hoskins last week.

THE CHAIR: Yes.

MR THOMPSON: I think the basic challenge was that *Bennion* has some funny old cases in the footnotes and so what is *Bennion* actually worth? I think we have two responses. One is that *Bennion* is the standard textbook that is relied on and that was the basis on which we relied on it.

The second is that when you actually look, there is case law to support the proposition and in particular, there's a very strong Court of Appeal judgment which appeared to find the proposition obvious. So, if and when *Bennion* is updated, it might be

appropriate to get rid of some of those old cases and put in a judgment of Esher, Lindley and Bowen.

THE CHAIR: Just before we embark on this. We've been through your argument now and it's very helpful, but as I read the original line from *Bennion* that the point about a savings provision not comparing new rights, I read that as essentially an explanation by the learned authors of *Bennion* as to why it was that people who are drafting savings provisions tend to make them a bit broader in drafting, simply because they could err on that side because they didn't confer any new rights.

MR THOMPSON: Yes.

THE CHAIR: Now, I understand that, and whether it's obiter or not from these authorities from various parts of the 19th century, what I'm keen to understand is how do you say that proposition supports your argument? Because before we get into whether or not it is supported or unsupported by those authorities, how is it relevant?

MR THOMPSON: Yes. We say the new rights are the rights of defence that the Proposed Defendants assert against these claims for stand-alone damages in the Tribunal.

We say that the fact that the 2003 Rules didn't previously apply at all to such claims, which were outside the jurisdiction of the Tribunal, doesn't mean that the rights conferred by Rule 31 on the Proposed Defendants' construction are not new. On the contrary, they drastically curtail the rights conferred by sections 47A and 47B of the 1998 Act, as amended by the CRA 15. So, that's the rights point, as it were. (Pause) Yes, I mean, I think the breadth and narrowness point is that we say that the mere fact that the saving provision is in one sense broader doesn't cast any light as to the scope of the preexisting rule because it can't confer new rights. Here, the effect of the Defendants' argument is to confer very substantial new rights by an implied amendment rather than, as we would say, a saving of Rule 31(1) to (3), because

a saving of it would simply be as applicable to follow-on claims for the reasons that I've already described, whereas they're actually arguing for a very substantial expansion of Rule 31 by reference to their arguments under Rule 119.

Then, the second point we made is that when we actually read the passage of *Bennion* that they were taking us to task with about the footnotes, we thought it was appropriate to bring to the Tribunal's attention the fact that there were two more recent cases, one which was referred to in *Bennion* itself and the other which my diligent junior Mr White found when he was put to proof on what is the basis of these rules in *Bennion*, which is the Scottish case which may be of interest to the Chair, Lord Richardson.

And it's a different point, but the point that is made both by the House of Lords in the *Ealing* case and in the *Fish v Robertson* case in the Outer House of the Court of Session, is that precisely because a savings provision doesn't amend the saved provision, it doesn't matter if the savings provision is somewhat loosely drafted. I don't know whether the Tribunal has the stomach to look at these cases. Again, they're slightly obscure on the facts --

THE CHAIR: If you give us the bundle references, that'll be helpful.

MR THOMPSON: Yes. I can give you a sketch of what the issue was. The *Ealing* case -- it's rather a long way away from our present facts -- was an issue about the meaning of national origins under the relevant race relations legislation. The exception included issues such as nationality and residence. It was argued by some distinguished counsel that that must mean that national origin should be more broadly construed because otherwise, why was nationality included as one of the exceptions? And the House of Lords said, no, that's not how it works, savings are often rather loosely drafted, and you can't reach that conclusion.

Similarly, Lord Doherty -- if I could give the references, it's in F6, tab 117 and the three passages in their Lordships' judgments, where the issue of savings is discussed is

Viscount Dilhorne, Lord Simon and Lord Cross. The relevant passages are at pages 3352, 3356 and 3359.

THE CHAIR: Yes.

MR THOMPSON: The passage that's cited in *Bennion* comes from the judgment of Lord Simon, which begins at 3353 and has a rather learned analysis of construction generally. Then, he comes to the point about savings at 3356 in the middle of the page. He says:

"*I think that considerable caution is needed in construing a general statutory provision by reference to its statutory exceptions. 'Saving clauses' are often included by way of reassurance, for avoidance of doubt or from abundance of caution, [and then gives a striking example. It says] nothing in the Act shall invalidate certain rules restricting certain classes of employment to 'persons of particular birth, citizenship, nationality, descent, or residence'*."

Lord Simon makes the point that residence is not conceivably within the scope of the Act.

THE CHAIR: Yes.

MR THOMPSON: So, it's, as it were, a different route to the same conclusion that you can't rely on a savings provision either to confer new rights or as a guide to the meaning of the saved provision, here Rule 31.

The same point appears in the judgment of Lord Doherty; that is a sort of side wind point that he makes right at the end of his judgment in the *Fish* case. It's sometimes called the law case, I apologise if we've got the reference wrong, but it's called in this report *JLL Fish Pension Scheme v Robertson*.

THE CHAIR: Yes.

MR THOMPSON: It's a passage in paragraph 26 which both cites, I think, the predecessor version of *Bennion* and the observation of Lord Simon in *Ealing*, but then

over the page states a proposition of legal logic which we've adopted and modified in our note and applied it to the present situation.

THE CHAIR: Yes.

MR THOMPSON: It's been relatively knotty going, so I might risk another dog joke, but the suggestion I had was that if the Dangerous Dogs Act 1991 were repealed but subject to a saving for animals born before 1 October 2015, that would not mean that the Dangerous Dogs Act applied to old cats and tortoises. It would still only apply to dogs, as for example, section 1(1) is headed "Dogs trained for fighting".

We say by parity of reasoning, the saving of Rule 31 by Rule 119(2) and (3) did not change the meaning of Rule 31 which was defined by the 2003 Rules itself and only applied to follow-on claims.

So, it's perhaps rather a laboured joke, but that's the point. (Pause)

The next heading was that the -- and I probably touched on some of these points already -- Proposed Defendants' construction of Rules 119 and Rule 31 is both incoherent and inconsistent. We've said that our construction of the 2003 Rules reflects its plain and natural meaning in Rules 2, 3, 30 and 31, with the conclusion that Rule 31 applies and continues to apply only to follow-on claims. We say that requires no straining of the natural meaning of the 2003 Rules, or of Rule 119, and in particular it reflects the reference to Rule 31(3) in 119(2), and the terms of 119(4), both of which are premised on a prior regulatory decision, and in the latter case, subject to appeal. In fact, in both cases subject to appeal.

The logic of the Proposed Defendants' position, by contrast, is that Rule 119 impliedly amended Rule 31, and the Tribunal will, I think, have seen our attempt to work out what the amendment would have to be, and that's at bundle B, tab 3, pages 40 to 41. It's page 20 of the skeleton, paragraph 55.

I'm not a huge enthusiast for submissions made on headings, but for what it's worth,

we would say that what Mr Hoskins has argued for is neither a revocation nor a saving, and we've reflected that in what we think the headings would actually have been. If it did mean what he said, we'd see "*Revocation, savings, and new limitation period for stand-alone*".

Claims likewise, in Rule 119, would have to say, "*Savings and limitation period for stand-alone claims that arose prior to 1 October 2015*". At the words, "r*ule 31(1) to (3)*" -- it may be that we've been overgenerous, because I'm not sure that (3) should really stay in there; there may be a further amendment. But we've suggested:

"*Rule 31(1) to (3) of the 2003 Rules shall apply as amended*."

Then over the page, we've suggested what we understand to be the substance of what is proposed by the Proposed Defendants, that at 31(2), it's qualified by limiting it to follow-on claims, and we've suggested suitable wording based on the wording of 47A:

"*In a claim in respect of an [alleged] infringement decision as defined in section 47A(2) of the 1998 Act*."

Then we've got the existing wording, but then, as we understand it, what is in substance being said is that, in relation to stand-alone proceedings, and the way we've put it in legal language:

"(2A) *The relevant date for the purposes of paragraph (1) is, in a claim in respect of an alleged infringement, as defined in section 47A(2) of the 1998 Act … the date on which the cause of action accrued*."

That avoids the 'now you see it, now you don't' aspects of Mr Hoskins's approach whereby sometimes you just sort of take his word for it as to what the legislation means in the relevant context.

Likewise, (3) -- this is perhaps an alternative to amending Rule 119 -- would be further amended:

"*The Tribunal may give its permission for a claim [and then you'd add in] in respect of*

*an infringement decision as defined in section 47A(2) of the 1998 Act*."

That would then make 31(3) make sense and pull the legislation together. Then we make submissions about what the position would be without such an amendment. We say that that is nothing like a savings clause, but that goes way beyond what is actually permitted or envisaged and is not reflective of the statutory wording as it actually stands.

THE CHAIR: Yes.

MR THOMPSON: The only alternative, I think, would be to interpolate a new rule, either into Rule 119, or -- it would probably be into Rule 119, because Rule 31 has been revoked -- which would be:

'A claim for damages for an alleged infringement of the Chapter I or Chapter II prohibition shall be commenced within a period of two years, beginning with the date on which the cause of action accrued.'

That seems to be the substance of what Mr Hoskins and the Defendants have in mind, but we say that that would be quite a drastic measure, and quite improbable that it would have been included, certainly as a savings provision, or at all, we would say, in the 2015 Rules. If that had been the statutory intention, it would have been much better handled by primary legislation, particularly given that, Parliament was legislating in this area, in any event.

THE CHAIR: Yes.

MR THOMPSON: However, Mr Hoskins has seemed to be arguing for some sort of shadowy third way that sought to avoid the obvious difficulties of arguing that a savings provision could somehow make major amendments to the save provision, or could involve the interpolation of a completely new time limit regime for a particular category of claims. He appeared to argue that Rule 31 could remain unaltered, but somehow be applied differently to different categories of claim to avoid absurdity.

We say that that submission was advanced simply by assertion, with the constituent provisions of Rule 31 applied or disapplied to the different categories of claim, essentially, at his diktat. He didn't suggest that this 'now you see it, now you don't' approach conformed to any known canon of construction of legislation, particularly in an important area of this kind concerning civil rights, whereby the same wording could have different meanings or applications, simply by assertion, and without amendment or relevant qualification to the relevant provision in either primary or secondary legislation.

THE CHAIR: Yes.

MR THOMPSON: As I said, I've sort of gone in reverse from the way we argued it in our skeleton argument. But that leaves two more points: the question of vires and statutory purpose.

THE CHAIR: Yes.

MR THOMPSON: As we understood it, Mr Hoskins suggested that there could be no vires issue, relying on the general wording of section 15 of the Enterprise Act and paragraph 11(1) of Schedule 4 to that Act. Might be worth just looking at that. Again, that's at tabs 13 and 17.

THE CHAIR: Yes. Page number, please.

MR THOMPSON: Page 105:

"*The Secretary of State may, after consulting the President and such other persons as he considers appropriate, make rules with respect to proceedings before the Tribunal*."

THE CHAIR: I'm sorry --

MR THOMPSON: I'm sorry, am I going too fast?

THE CHAIR: Yes, so this is tab --

MR THOMPSON: This is page 105.

THE CHAIR: In the bundle, tab 13, did you say?

MR THOMPSON: Yes, tab 13. It's the second page of tab 13.

THE CHAIR: Yes, I have that, yes.

MR THOMPSON: I have no problem with either this or the other rule as the basis for a savings provision, but we do have considerable difficulty as to whether this could be the basis for a substantive amendment to the time limits regime.

THE CHAIR: Yes.

MR THOMPSON: Part 2 of Schedule 4 is provided for in section 15, and I think the point that Mr Hoskins relies on is without prejudice to the generality of subsection (1).

THE CHAIR: Yes.

MR THOMPSON: But in my submission, the Tribunal should be reluctant to accept that the whole of Schedule 4 is essentially a waste of time because the Secretary of State can, in fact, do whatever he likes, because he can always rely on section 15(1). And of course, 15(1) isn't actually, completely, a carte blanche, because it does require consultation of the President. So, we say it would be a very odd thing indeed for him to just rely on that, given the specific powers that are provided for in the legislation.

THE CHAIR: Yes.

MR THOMPSON: Then the relevant provision of the Rules, in their original form, are at page 118 of tab 17. (Pause)

THE CHAIR: This is Schedule 4, part 2.

MR THOMPSON: Yes. So, they were incorporated by operation of section 15.

THE CHAIR: Yes.

MR THOMPSON: I think the passage that Mr Hoskins relies on, it says:

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

That's obviously a general power and would apply to everything; judicial reviews or

appeals or whatever.

THE CHAIR: Yes.

MR THOMPSON: But then it goes on with a specific power:

"*11(2) That provision may, in particular:*

*(a) provide for time limits for making claims to which section 47A of the 1998 Act applies in proceedings under section 47A or 47B*."

We would say that was a very apt power for the 2003 Rules, and that in reality that was the basis for those Rules being made.

THE CHAIR: Yes.

MR THOMPSON: Otherwise, there would be no point in having those Rules at all, and Rule 31 is the obvious manifestation of that power.

THE CHAIR: Yes.

MR THOMPSON: Then if one turns to the next tab, you find what happened to that power. Tab 18, page 125.

THE CHAIR: Yes.

MR THOMPSON: So, 11(1) stays the same, and these changes were made on 3 August 2015, so before the changes to the Competition Act itself.

THE CHAIR: Yes.

MR THOMPSON: 11(1) stayed the same, but 11(2)(a) was deleted completely in its original form and replaced with a much more modest power:

"*11(2) That provision may, in particular:*

*(a) 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 appears to constrain the rule-making power in relation to 47A time limits within a pretty narrow bound. We listened, but we didn't really understand any clear

explanation from the Defendants as to why these changes were made if, in reality, the powers of the Secretary of State rested in the general powers under section 15 of the Enterprise Act, or 11(1) of Schedule 4.

It seemed to us that the natural and obvious explanation was that, whereas the Secretary of State had had wide powers in 2003 and until August 2015, but that those powers had been very substantially rolled back by Parliament in August 2015, and the 2015 Rules were actually made a few weeks later; one finds that at tab 26.

THE CHAIR: Just before we leave this, did the provisions of Schedule 4 address transitional provisions? In other words, did they empower the Secretary of State to make powers in relation to transitional provisions?

MR THOMPSON: I see the time, perhaps --

THE CHAIR: I think.

MR THOMPSON: Perhaps I can answer that question at 2.00 pm.

THE CHAIR: Saved by the bell.

MR THOMPSON: Shall I just make the point I was going to make?

THE CHAIR: Please do.

MR THOMPSON: And then I'll come back to you on that interesting question.

I think my general answer was that we wouldn't dispute that section 15 was wide enough to deal with savings.

THE CHAIR: I mean, I was just asking because it occurred to me.

MR THOMPSON: Yes.

THE CHAIR: I wondered whether an obvious point might be said about 11(2) is that clearly this is dealing with the situation as it will be prospectively because it's saying prospectively, the Secretary of State can't make substantive changes to what is primary legislation, as will now be the case in terms of section 47E, or which then takes you to either the 1980 Act or the 1973 Act. So that's all primary legislation, and the

Secretary of State can't change that by the rules here.

MR THOMPSON: Yes.

THE CHAIR: So, then I thought, if that's prospective, it would be interesting to know whether Schedule 4 says anything about how we deal with the previous position.

MR THOMPSON: I understand that point. I mean, I think our general point is that it's an improbable statutory strategy.

THE CHAIR: I understand that.

MR THOMPSON: To take away the powers which were then given effect in September. Your Lordship's note is at page 206 of tab 26.

THE CHAIR: Yes.

MR THOMPSON: Again, it's another indicator that our construction is correct, and that this one is full of problems; that's the broad submission, if I could come back to that.

THE CHAIR: No, of course.

MR THOMPSON: I'm nearly there, so I would hope that I'll be no more than half an hour and possibly less.

THE CHAIR: Thank you. That's very helpful.

Very well, well, we will rise and start again at 2.00 pm, then.

(12.59 pm)

(The short adjournment)

(2.02 pm)

THE CHAIR: Thank you. Mr Thompson.

MR THOMPSON: There were -- I'm nearly on the home track, and I've got two pieces of homework, one which was, I think, imposed by the Tribunal and the other which I've imposed on myself.

In relation to the first, which is obviously is the more important one, which is that we

have, so far as it is possible, given the forest of different legislative provisions --

THE CHAIR: Yes.

MR THOMPSON: -- that are potentially applicable under the CRA 2015, the Enterprise Act, the Competition Act. So far as we can see, there's no general transition power that is relevant to the savings provisions. So, I think that we're looking at the provisions we were looking at before lunch and whether they were done under the general powers under sections 15 or 11(1); it doesn't seem suitable for 11(2)(a) in its new form.

But certainly, as we interpret it, we don't see any problem with the savings provision as we understand it as a true savings provision. Our problem is only with the Defendants' interpretation of it.

THE CHAIR: Yes.

MR THOMPSON: The other one was the *DSG* case, which we looked at at one point.

THE CHAIR: Yes.

MR THOMPSON: There were some cries of anguish from across the other side, and I thought it might assist clarification for me to say what I am and am not saying. We looked at this. It's bundle F3.

THE CHAIR: Yes.

MR THOMPSON: Tab 59, pages 12 to 13.

THE CHAIR: Yes.

MR THOMPSON: There are subtleties here, and I'm not pretending that there aren't any; your Lordship is precisely on point with everything else, or on the same point as everything else.

THE CHAIR: Yes.

MR THOMPSON: But it's really three passages. The first is at paragraph 54 at the top of page 1312, where the Chancellor refers to section 39 of the Limitation Act and

says that it:

"*Operates so as to exclude the application of that Act, where [Rules] 31(1) and 2 apply*."

That appears to confirm my submission that the Limitation Act under English and Welsh law is the default rule that would otherwise have applied because otherwise, it's difficult to know what the significance of that observation is.

It seems to be saying that the Limitation Act is a sufficiently robust vehicle; it would apply in the Tribunal in the default of anything else because that seems to be what the Chancellor is saying.

THE CHAIR: Yes.

MR THOMPSON: The second point, and I think this may get more into the area where Mr Hoskins is the expert, having been counsel in this case, is at paragraph 60. There's a further arcane dispute that we haven't, fortunately, had to get involved with; the meaning of Rule 31, which was essentially a sort of transition provision that arose when these Rules were originally enacted in 2003.

THE CHAIR: Yes.

MR THOMPSON: They were intended to preserve various rights that were preexisting, and to say that Rule 31 didn't cut away from those rights.

THE CHAIR: Yes.

MR THOMPSON: But there was an issue here because some of the claims that were potentially affected arose before and some after 1 October 2015. One of the oddities was that 31(4) was not preserved by the Rules we've been looking at, Rule 119. So, there was a sort of funny lacuna --

THE CHAIR: Yes.

MR THOMPSON: -- in relation to this. Then given that some of these claims are extremely old, including claims that my learned friends have been involved in relation

to Mr Merricks. There was then a question, 'Well, what do we do with these extremely old claims? Are they still governed by something analogous to 31(4)?'

THE CHAIR: Yes.

MR THOMPSON: And at lines 3 and 4, the Chancellor says, ignoring 31(4):

"*That does not inform the question of whether, in the absence of [r] 31(4), accrued limitation rights are to be abrogated*."

So, that appears to suggest that these being Tribunal proceedings, the Tribunal would have to take account of the Limitation Act, even in the absence of 31(4).

Then towards the bottom of the page, there's a further observation of the Chancellor, where he says:

"*In this connection, it is to be noted that new [s] 47E introduced in 2015 restored the application of the Limitation Act for claims arising after 1 October 2015*."

"*Restored*" suggests that the Limitation Act applied at some point in the past, and the only obvious time would be the time we were talking about, which is before the bespoke rules in Rule 31 came into force.

So, it's those three. I'm not saying that these were the core findings of the Court of Appeal, but I'm saying that they're entirely consistent with the points I was making at the start of my submissions about the default rule, and why it might be that the Secretary of State hadn't thought it necessary to make any specific provision for stand-alone, because there was a perfectly good regime already in place, which had been tried and tested in various cases and endorsed by the Court of Appeal in many cases, including the two we looked at this morning --

THE CHAIR: Yes.

MR THOMPSON: -- admittedly in the High Court, but effectively the whole point of this was to expand the Tribunal's jurisdiction to make it the regime -- the forum for damages claims in the United Kingdom.

THE CHAIR: Yes.

MR THOMPSON: So, in my submission that all makes good sense.

So, if I could just wrap up on vires, I'll just make six points:

As we looked at this morning, the Secretary of State had a specific power to make rules in relation to damages between 2003 and August 2015. In 11(2)(a) of Schedule 4 to the Enterprise Act.

Secondly, those powers were drastically and obviously deliberately curtailed in August 2015 with the amendment and replacement of 11(2)(a) by the Consumer Rights Act 2015.

On the Defendants' case, it's not clear why Schedule 4, Rule 11(2)(a) was ever introduced, or why it was removed, if the relevant power was in section 15 of the main Act, or the preceding Rule 11(1). The natural reading of the original rule, and the amendment, was that whereas the Secretary of State had a specific power to adopt the 2003 Rules, he no longer had the power to lay down substantive time limits when he adopted the CAT Rules 2015 in September 2015.

THE CHAIR: Yes.

MR THOMPSON: Fifthly, we have no objection to the saving of existing Rule 31 powers in relation to follow-on claims under the general powers, either section 15 or Rule 11(1). We don't consider that those general powers enabled the Secretary of State either: to disapply the domestic limitation legislation, which would otherwise have applied -- i.e., primary legislation in the three jurisdictions; or to introduce new substantive rules, and to do so by way of a savings provision; or thirdly, to do so without any express reference to either change.

THE CHAIR: Yes.

MR THOMPSON: So, that's our position on vires. Then, finally, statutory purpose. In a way, it's quite a short point, because we're primarily looking at the first paragraph of

the judgment in *Merricks*, but I'll spell it out slightly more because we've made some more points at paragraphs 56 to 59 of the skeleton argument at B3, 41 to 42.

THE CHAIR: Yes.

MR THOMPSON: We say that, once properly understood as the drastic change that we've sought to describe in the amendments we've marked up, it's contrary to basic principles of law.

First of all, it takes away rights of access that would otherwise exist in the Tribunal to bring stand-alone claims on either an individual or collective basis which would otherwise have been governed by the domestic limitation legislation, and does so on a retrospective basis because I think it's an inevitable consequence that there will be claims, for example, in 2011 or 2015, which would be perfectly valid under the Limitation Act but which are knocked out with retrospective effect. Perhaps 2015 is a bad example, but we're all familiar with really quite venerable cases which are still viable under the Limitation Act.

THE CHAIR: Yes.

MR THOMPSON: The second point is that we say it's based on an implied amendment to Rule 31 by subsequent legislation without satisfying any of the requirements for such a change. We say it requires the legislation to be read contrary to its natural meaning, whereas we say that our construction is its natural meaning. We say there's no necessity for the implication, and we say that it's in breach of the established legal principle that a savings provision can't be relied on to create new rights.

Finally, it's a slight variation of the well-known 'Simms' doctrine, but we say that it falls within the scope of it in that it's purporting to take away existing rights without doing so either in clear primary or secondary legislation. We say if they wanted to take away such rights, either Parliament or the Secretary of State would have had to face up to

what they were doing and express that clearly.

THE CHAIR: Just so I understand that point, these are rights that were only created by the legislation; is that right? This is the point we talked about --

MR THOMPSON: Yes, created by the legislation.

THE CHAIR: But by the amendments in 2015?

MR THOMPSON: Yes.

THE CHAIR: Yes, so they didn't pre-exist. What you're saying is insofar as the changes brought about in the Competition Act 1998 by the Consumer Rights Act 2015 created rights, then if they were going to at the one moment create and then take away, they should have done so expressly.

MR THOMPSON: Yes. Created by Parliament and then taken away by the Secretary of State in this funny way. We would say that that's not a proper way to take away substantive rights.

I hesitate to mention this, but in the back of all this, everyone is aware that there have been numerous questions raised about the compatibility of any of this with principles of EU law. We have raised this entirely as a matter of domestic law, but there must at least be a question as to whether a two-year retrospective right with no qualifications at all is compatible with EU law.

So, I just put that down as something which everyone has to be aware of because there are a lot of cases milling around.

THE CHAIR: Yes, I suppose the difficulty that any such argument would face is that there was nothing stopping any of the people bringing their proceedings in the High Court or the Court of Session. So ...

MR THOMPSON: I mean, I just make it --

THE CHAIR: No, no --

MR THOMPSON: -- because I made it in footnotes at least and everyone's aware that

this is another painful area of law. We feel that we've probably got enough going on here, but it's something that I think everyone must be aware of.

THE CHAIR: Yes.

MR THOMPSON: Then finally, and this is really where we get back to where we started, we say these points reflect the fact that the Defendants' case is contrary to the statutory purpose. That's the point we make at paragraphs 35 to 40.

THE CHAIR: Yes.

MR THOMPSON: It's B3, pages 34 to 36. In fact, Mr Kennelly addressed this in passing, I think, yesterday, asserting that individual class members could in theory have brought claims in the High Court subject to the Limitation Act.

THE CHAIR: Yes.

MR THOMPSON: But in response to that, we say that the central purpose of the 2015 reforms was to enable consumers with valid legal claims to bring them collectively in the Tribunal.

We say that realistically, the Defendants' application would frustrate that statutory purpose for very large numbers of people, including the claimants in this case, and that the chilling effects of the Defendants' approach to the legislation, we say is not only wrong as a matter of statutory construction for all the reasons I've given, but is also contrary to that purpose and wouldn't be limited to the present claims.

I don't think quoting from the Supreme Court would be regarded as a jury point, so if I could just close by referring to the judgment note of Lord Briggs, Lord Sales and Leggatt. It's in the *Merricks* judgment, which is F62, which I think is in the same bundle as *DSG*, the third one, and it's page 1508, paragraphs 84 to 85.

THE CHAIR: 84 to 85, yes.

MR THOMPSON: It's dealing with the rationale for class actions.

"*The central rationale for any class action regime [that's line 3] is that it enables*

*claimants to benefit from the same economies of scale as are already naturally enjoyed by the defendant as a single litigant. It does so by allowing numerous individual claims to be combined into a single claim brought on behalf of a class of persons. Such a procedural device is especially valuable where a defendant's wrongful conduct has caused harm to many people, but each individual claim is too small to justify the expense of a separate lawsuit. Without such a device what may in aggregate be very substantial harm is likely to go unredressed*."

Then a reference to the well-known statement of Judge Posner:

"*The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30*."

So, I don't think it's difficult to see the point that I'm driving at. However, in theory these claims could be brought in the High Court, in reality, this is the forum that's been created for them and the effect of this is to frustrate that purpose for very large numbers of potential claimants whose claims, whether or not they would be met with a satisfactory limitation defence, certainly would have a better chance than a two-year rigid rule, which is what the Defendants say is all that's available.

So, those are my points unless there's anything else.

THE CHAIR: That's helpful. Thank you very much.

Reply submissions by MR HOSKINS

MR HOSKINS: I'm going to endeavour not to repeat myself; you have our points on the construction so just trying to pick up what are relatively new points.

THE CHAIR: Yes.

MR HOSKINS: At the start of his submissions, the PCR's counsel sought to address the question of what rights are affected. It was put this way: a right to bring stand-alone claims in the Tribunal was created by the Consumer Rights Act in 2015. It was then said those rights would have been governed by the Limitation Act 1980 absent the

Tribunal Rules. It was then said that the Consumer Rights Act therefore created rights, and the Tribunal Rules removed them.

That with respect is simply not correct. There was no gap, there was no period in which there was a right to bring stand-alone claims before the Tribunal that weren't subject to the limitation periods in the Rules.

What happened, as you've seen, is that the legislature introduced the right to bring stand-alone claims in the Tribunal -- that was the done by the Consumer Rights Act -- and at the same time, and as part of the same legislative process, the Secretary of State established the relevant limitation periods in the 2015 Rules. So, the theory of the rights affected just is factually incorrect.

But not only that -- and here I will repeat myself because it's a good point, but I'll be as restrained as possible -- paragraph 8 of Schedule 8 of the Consumer Rights Act expressly said that the new section 47E of the Competition Act did not apply to claims before 1 October 2015. Section 47E is the one that applies the Limitation Act going forward.

Second point is this: the PCR submitted that the domestic legislation, i.e., the Limitation Act 1980, applied by default in the Tribunal until it was displaced by a specific rule. But again, with respect, that is simply not correct.

Before 1 October 2015, the Limitation Act 1980 had never applied in the CAT, either by default or otherwise. The only way in which it was relevant was through Rule 31(4) of the 2003 Rules, and I'll take you to that in a minute.

But the important point to note is that up until the 1 October 2015, limitation in the Tribunal was always governed by a specific rule, and that was Rule 31 of the 2003 Rules. There was no lacuna, there was no application of the Limitation Act by default, there was a specific rule for limitation.

So, let's look at Rule 31(4) of the 2003 Rules. Can we go to F1, tab 25, and it's

page 205. We've focused in particular on Rule 31(1) to (3), but I now want to focus on (4).

THE CHAIR: Yes.

MR HOSKINS: "*No claim for damages may be made [that's in the Tribunal] if, were the claim to be made in proceedings brought before a court, the claimant would be prevented from bringing the proceedings by reason of a limitation period having expired before the commencement of section 47A.*"

So, this was a sort of transitional provision in itself. When it became possible to bring claims for damages in the Tribunal, what Rule 31(4) said was, if you have a claim but it has already been or would already be time-barred in the High Court, you don't get any extra time to bring it in the Tribunal.

That's why, as we'll show you in a minute, in *DSG* and *Merricks*, the courts, the Tribunal was looking at what the limitation position was in the High Court. It wasn't because the Limitation Act applied by default to the claims brought in the Tribunal, it was because of this very specific transitional provision in 31(4).

Just to show you that then in practice, in the two cases that the PCR referred you to, let's start with *Merricks*. That's F6, tab 114, and if you could go to page 3282. And if you want to see the title page again it's 3272. It's the Competition Appeal Tribunal, *Merricks* and *Mastercard*. If I could ask you to read paragraph 20, please, you'll see what the case concerned. (Pause)

Then, you were taken over the page, I think at 3283, to paragraphs 22 and 23 and you were shown the references to the Limitation Act. But that's not because the Limitation Act applied by default; it's because of what you see in paragraph 20.

THE CHAIR: Yes.

MR HOSKINS: The position is the same in relation to *DSG* which is bundle F3, tab 59. Let's look first of all at paragraph 2 of the then-Chancellor's judgment; that's

page 1296.

THE CHAIR: Yes.

MR HOSKINS: You see Sir Geoffrey Vos said:

"*The first question (issue 1) turns on the proper construction of Rule 31(4) of the Competition Appeal Tribunal Rules*."

So, that's what we're looking at. Again, it's a 31(4) case.

Then if you go to paragraphs 60 to 61, you were shown those by Mr Thompson a moment ago, you'll see the discussion there in 60 in relation to 31(4). And you'll see the punchline at 61 on the first issue:

"*In my judgment, the Tribunal ought to have held that Dixon's pre-20 June 1997 claims were prima facie time-barred under Rule 31(4)*."

Now, I won't take you through all the intricacies of what the underlying dispute was; the simple point is this is just another 31(4) case. It's not a case in which the Limitation Act is being applied directly to a claim in the Tribunal.

The third point I wanted to reply upon was in relation to the relationship between Rules 31(2)(a) and (b). Again, a well-trodden path: F1, tab 25, page 205. What I want to explain is the respective positions that we have, and that the PCR has as to what the limitation periods look like for stand-alone and follow-on claims that relate to the period before 1 October 2015.

Now, on our interpretation of Rule 119, we say it directs you to Rule 31 and we say that Rule 31(1) and (3) of the 2003 Rules apply to both stand-alone and follow-on claims and that's because Rule 119, in our interpretation, sends you there for the answer.

Now, under these provisions, it is possible that the time limit for a stand-alone claim could expire, but a new limitation period could then apply for a follow-on claim if a relevant regulatory decision was adopted in relation to the same infringement and

you had that discussion with Mr Thompson.

But in such a case, both the potential stand-alone claim and the follow-on claim would be governed by the same limitation provision, i.e., Rules 31 of the 2003 Rules. You find the answer in the same place is the point I'm making.

Distinguish that from the PCR's interpretation. Under the PCR's interpretation, different limitation regimes would apply to each potential claim because under the PCR's interpretation, a follow-on claim would be subject to Rule 31(1) to (3) of the 2003 Rules, but the Limitation Act would apply to a stand-alone claim.

Now, again, it's possible in that scenario that the six-year limitation period under the Limitation Act could expire for a potential stand-alone claim but then a regulatory decision could be adopted subsequently and then you get another further two years. So, that sort of possibility of a new time period beginning to run exists in both our worlds, in both our interpretations.

But the difference is, whilst in our world the answer for both of those scenarios is found in one provision, Rule 31, in the PCR's world, you have two different provisions applying: Rule 31 for follow-on claims and the Limitation Act for stand-alone claims. You have already my submission that if the legislature had intended different limitation regimes to apply to stand-alone and follow-on claims arising before 1 October 2015, it would have said so expressly in Rule 119 of the 2015 Rules.

I'm not going to repeat myself in terms of the general language points, et cetera.

In relation to *Bennion*, sir, you put the question to Mr Thompson, "How do you say *Bennion* supports your argument?" And the answer from the PCR was that the Defendants' interpretation, our interpretation, "curtailed claimants' rights to bring stand-alone claims as conferred by the Consumer Rights Act'.

Now, you have the first point I made about no gap and not applying by default, but there is a further point. Because Rule 119 does not save or curtail rights. Rule 119

determines what limitation rules are to apply to claims prior to 1 October 2015. Limitation defences might arise by application of the relevant limitation rules, but the limitation rules themselves are not rights.

And sir, you made the point --

THE CHAIR: It's rather that the application of the rules determining which rules apply is not right. It's -- yes.

MR HOSKINS: That said, that is what strengthens my point.

Sir, you made the point to Mr Thompson that of course behind all this, damages claims can still be brought within the time period established by the Limitation Act 1980 before the High Court. And with respect, the PCR submissions on a number of -- they just forget that; that is always there, that doesn't go away.

The final point, Mr Thompson said he was 'hesitant' was the word he used to mention EU law, but he was right to be hesitant because this is a wholly domestic claim. The claim is based on the Competition Act. There is no claim based on EU law; therefore, the EU principle of effectiveness is simply not relevant.

With respect, for it to be somehow suggested that EU law is relevant just before the PCR's counsel sits down, it simply cannot be a sensible suggestion that the application is being defended on the basis of some EU law argument in a purely domestic claim. I'm not even going to try and tilt that windmill; I don't even know what the windmill looks like.

Sir, unless you have any further questions, that's all I want to say. Mr Kennedy is going to install you just very briefly with some more historical observations. You may have some questions for me.

THE CHAIR: No, I think so far as your submissions are, that's very helpful.

MR HOSKINS: Thank you very much. Thank you.

Reply submissions by MR KENNEDY

MR KENNEDY: Sir, we find ourselves in the 20th and 21st centuries now. Mr Thompson referred you to two further cases on savings provisions.

THE CHAIR: Yes.

MR KENNEDY: These were raised for the first time in the PCR's (several inaudible words) -- relevant, starting with the *Ealing Borough Council* case, which is a House of Lords decision from 1972, that's at tab 117 of the bundle.

As Mr Thompson said, the question there was whether an exception could inform the meaning of the principal rule, in that case, whether the word 'nationality' as it appeared in an exception to the prohibition on discrimination on the grounds of national origins could inform the meaning of the words national origins. In our case, Rule 119 is, if you like, an exception, not to Rule 31 of the 2003 Rules, but to Rule 118 of the 2015 Rules. That's the principal rule here. As you know, Sir, there's simply no dispute about the meaning or effect of Rule 118 of the 2015 Rules before you.

Turning to the Outer House decision in *Fish v Robertson*, if I could ask the Tribunal to turn that up very briefly, it's tab 118 and it starts at page 3364. It's the decision of Lord Doherty of 28 April 2017, and the passage on which my learned friend relies starts on page 3372 and paragraph 26.

You'll notice, sir, that it opens by saying.

"*Finally, I record that the submissions also briefly touched upon the words of exception in Schedule 1, para 2(e) ..."*

And that's the 1973 Act prescription.

THE CHAIR: Yes.

MR KENNEDY: If we just move down a few lines, we see that the argument was not developed because the meaning of the words, "*'any obligation relating to land' must be given its natural and ordinary meaning*".

If we skip down after the quotation, we'll pick it up the second sentence:

"*While nothing turns on it in the present case (and I have not expressed a concluded view) ...*"

Then, his Lordship went on to make the observations on which my learned friend relies. We say simply that this is not authority for anything. It's not a concluded view, and it's entirely obiter.

In any event, sir, you'll be, I hazard, familiar with Schedule 2 to the 1973 Act.

THE CHAIR: Yes.

MR KENNEDY: What the case concerned was whether an exception to the principal rule could inform the proper interpretation of an exception to the exception. We're just a million miles away from Rule 119 of the 2015 Rules. For that reason, the purported transposition exercise which the PCR engaged in at paragraph 12 of its note on the savings provision is simply nonsensical.

Sir, unless I can assist, those are my submissions in reply.

THE CHAIR: Thank you very much. No, thank you very much, that's very helpful.

Very well. So, on that basis, good afternoon, Ms Demetriou. You're standing up, I'm assuming, because you're about to open --

MS DEMETRIOU: The Second Period Application.

THE CHAIR: Yes.

Second Period Application

Submissions by MS DEMETRIOU

MS DEMETRIOU: May it please the Tribunal. By this application, the Defendants seek to strike out the claim for the period prior to 8 March 2017, insofar as it's subject to the Limitation Act and the equivalent Northern Ireland provisions. You'll have seen that it's common ground that the Limitation Act applies to the period between 1 October 2015 and 8 March 2017. That's what we've been referring to as the "second

period".

THE CHAIR: Yes.

MS DEMETRIOU: And of course, you know that the Defendants' position is that in the period before that, the period before that is governed by the limitation provisions in the Tribunal's Rules, as you've just been hearing.

THE CHAIR: Yes.

MS DEMETRIOU: If, contrary to Mr Hoskins's arguments which we of course adopt, the Tribunal concludes otherwise and finds that the Limitation Act applies, then our application also addresses the first period. So that's how it works. And it's common ground that under the Limitation Act the limitation period is six years. And it's common ground that for the period prior to 8 March 2017, the PCR needs to establish that section 32 of the Limitation Act applies so as to postpone the commencement of the limitation period and that requires, in a nutshell, the PCR to establish, first, that a fact or facts relevant to the causes of action of the class members has been deliberately concealed by the Defendants and second, that class members did not have actual knowledge of those facts or could not, with reasonable diligence, have discovered those facts until 28 November 2017. As I think we indicated at the outset --

THE CHAIR: You're talking about November of 2017.

MS DEMETRIOU: Yes.

THE CHAIR: The date for your second period is March 2017.

MS DEMETRIOU: That's correct and the reason -- so again, the reason why we've taken March 2017 for the second period is that, I think we've explained this in our skeleton argument, there were new rules that were adopted that cover that interim period between March and November 2017. So, our application only relates to the period before March 2017. November 2017 is, of course, six years before the issue of this claim.

THE CHAIR: Yes.

MS DEMETRIOU: Now, as we indicated at the outset, Mr Williams for Vodafone and I have divided the submissions up and I'm going to be addressing the tribunal on our case as to the core commercial terms and then Mr Williams will address you on the further way we put the case, which is on the basis of the materials in the public domain, the publicity materials. I propose to develop my part of the submissions as follows. I want, first of all, to summarise in a nutshell what the Defendants' position is.

THE CHAIR: Yes.

MS DEMETRIOU: Secondly, I'm going to address you on the legal framework for the application of section 32 of the Limitation Act. And finally, I'll draw together our submissions and in doing that will address the main points made by the PCR in his skeleton argument.

THE CHAIR: And just purely so I know whether we're on track or not, how long do you think you're likely to be?

MS DEMETRIOU: I will finish this afternoon. I'm not quite sure whether we'll get on to Mr Williams this afternoon, but I think we're well in time, in terms of -- we'll finish before the end of tomorrow.

THE CHAIR: I certainly hope so.

MS DEMETRIOU: Yes.

THE CHAIR: Yes. That's because I think I'm right in saying that you, between you, as it were, had 2.5 hours as originally planned.

MS DEMETRIOU: Yes.

THE CHAIR: And you have, perhaps if we include the break, an hour and a half today. So yes, that's helpful. The timetable as originally planned, you'd still broadly feel --

MS DEMETRIOU: We haven't expanded, no. We still broadly -- we're still proposing to keep to that. I think just because of the way -- the time is now I'm just not sure

whether I'll have finished, and we'll be on to Mr Williams or not.

THE CHAIR: I understand that. That's helpful. But would I be right in understanding also that the legal framework, as you develop it under the second heading of your submissions, is likely to be something that Mr Williams will follow on from?

MS DEMETRIOU: We've co-ordinated. He's not going to duplicate anything. It may be that he's got some additional points that relate particularly to his parts.

THE CHAIR: Parts of the argument. No, that's very helpful, I do understand.

MR WILLIAMS: Given your question, sir, can I just say this? You'll have seen that there is a certain amount of evidence, in my part of the case. Given that we're not under significant time pressure, I do want to show you some of that evidence, and I don't want to rush through it. So, I'm not going to be expanding my time substantially, but I thought it would be -- given the time we have, I thought it might assist the tribunal for me to take that in good time, rather than to rush through it and leave you with more to read to yourselves. But there'll be no time pressure on the hearing tomorrow.

THE CHAIR: I think it'd be useful, perhaps, for counsel to appreciate that in light of where we are, I think that tomorrow is, the end of tomorrow, is going to be a hard stop and I think the Tribunal sitting after 4.00 tomorrow, we may be under a bit of pressure from, certainly the Chair, given train timetabling. But I'm sure you will take that into account.

MR WILLIAMS: No, there's absolutely no difficulty on that.

MS DEMETRIOU: Thank you, sir. So, starting with a summary in a nutshell of our position on core commercial terms, can I just start by taking you back to the claim form. Bundle A1, we can take it from tab 2, which is the claim against my client, BT, but as you know, they're in materially identical terms. If we start at paragraph 3, which is on page 41 of the bundle, do you have that? If you just remind yourselves of what paragraph 3 says, can I just give you a moment to look at it again.

THE CHAIR: Yes.

MS DEMETRIOU: And then moving on to paragraph 4, you see the definition of "loyalty payment" and the definition of loyalty payment -- sorry, "loyalty penalty", and that is said to be the alleged overpayment that's referred to in paragraph 3 of the claim form.

THE CHAIR: Yes.

MS DEMETRIOU: And then if you look at paragraph 6, you see the summary of the alleged infringement and it's that the Defendant "abused a dominant position" by requiring, those overpayments, alleged overpayments, to be made. That's essentially the infringement.

So pausing here, the infringement of competition law, the alleged infringement, was the charging of the loyalty payments and pausing here, the key facts, we say, that a consumer would need to know in order to bring this claim were that they were paying an amount after expiry of the minimum term of the contract, which exceeded the amount they needed to pay for the airtime-only services. So that, at its core, are the facts that a potential class member would need to know.

THE CHAIR: Is that right, though, in that, would they not also need to know that the person charging them the money was in a dominant position because an action -- if BT were not in a dominant position, what you've just described wouldn't give rise to an actionable tort, did it?

MS DEMETRIOU: Sir, I think there are two answers to that. The first answer is that that's not how -- so that's not something the PCR argues. And I'll show you how they explain the relevant facts in a moment. They don't contend that a person would need to know that the Defendant was in a dominant position, and I apprehend that the reason that they don't contend that is because, of course, it's not something for the purposes of section 2 that could be deliberately concealed. It's not in the nature of

a fact that could be deliberately concealed. So that's the first answer.

And the second answer I'll show you when we come to the *Gemalto* case, is that a claimant doesn't need to know chapter and verse. So, you need to know the essential facts to engage in the preliminaries to issuing a claim and what you don't need to know is that those facts can be characterised as a legal breach of duty. So, that's the second answer, and I'll come back -- I'll come back to show you that point.

But can I take you, first of all, to how the PCR describes the facts. If we go to the PCR's skeleton argument at bundle B, tab 4, page 53. It's 53 of my bundle; it may be 55 of the PDF, if you're working from the PDF. Paragraph 24. And so, under the heading, "Relevant facts":

"The facts that would allow a reasonable person in the position of PCMs to know that they have a worthwhile claim ... are at least the following:"

And then you have a, b, c, and d, so a is:

"That, at the end of the Minimum Term ... the PCM would continue to make payments under the ... Contract unless they took positive action to stop ..."

The second is:

"That the rate payable ... after the expiry ... would not be reduced to reflect the fact that ... the Handset would have been paid for in full;"

The third is:

"That, instead, the rate the PCM would continue to pay ... would incorporate a sum that represents an instalment payment for a product ... (i.e., the Handset) [that would have been paid for in full by that point]."

Then over the page:

"d... at the time [of expiry] of the Minimum Term ... other alternative and cheaper rates are likely to be available to the PCM in respect of Airtime Services only ..."

So those are the facts. And then at 25 -- so just pausing there, those facts at a, b, c

and d -- the facts at a, b and c overlap somewhat.

THE CHAIR: Yes.

MS DEMETRIOU: We say that they could be distilled down further and made even simpler, but I'm content, for the purposes of this application, to take the facts as set out in the PCR's skeleton argument.

THE CHAIR: Yes.

MS DEMETRIOU: And again, pausing here before we get to paragraph 25, the Defendants' case is a very simple one, in a nutshell. We say that these facts are all core features of the contracts that the PCMs entered into, or they're allegations that can be made on the basis of those core features. By core features or core terms of the contract, what we mean is the fact that the contracts had a minimum term and provided for periodic payments to be made, and those core facts were not concealed from consumers, deliberately or otherwise. They are matters of which consumers would have had actual knowledge or in any event, could have discovered with reasonable diligence simply by reading their contracts.

THE CHAIR: Yes.

MS DEMETRIOU: If we go on to paragraph 25. Now, it's unclear -- Could I just ask you, please, to remind yourselves of what paragraph 25 says.

THE CHAIR: Yes. (Pause) Yes.

MS DEMETRIOU: It's unclear. It's unclear to us whether the PCR is saying here that a consumer would need to know that the facts at paragraph 24 amounted to an infringement in law, i.e., could be characterised as an infringement as a matter of competition law, or might amount to an infringement of competition laws. It's unclear whether they're saying that or whether they're simply pointing out that in *Gemalto*, that what *Gemalto* establishes, is that the facts relevant to a cause of action need to be known with enough certainty so as to justify embarking on the preliminaries towards

issuing a claim, including seeking advice from lawyers.

Now, if what they're saying, if they're saying -- if it's the latter, then paragraph 25 doesn't add anything to paragraph 24. If they're saying that a PCM would need to know that those facts were arguably a breach of the Chapter II prohibition, then we say that that's wrong as a matter of law, because on the express wording of section 32, which I'm going to come to now, section 32 is concerned with deliberate concealment of facts, not of characterisation of facts as an arguable breach of duty.

THE CHAIR: Yes, I mean, I suppose whether an undertaking is in a dominant position, is that not a fact?

MS DEMETRIOU: So, that is a fact but it's not a fact that would need to be established in order to -- it's not a fact that's capable of postponing the running of the limitation period in this case.

THE CHAIR: Just so I understand, sorry to interrupt you, so I understand your argument. You're saying this would be a fact, so it would be a fact which a claimant would require to know but you're saying it doesn't postpone -- is this your argument -- doesn't postpone it because of the wording of section 32?

MS DEMETRIOU: It doesn't postpone it. The simple point is that the PCR doesn't contend that that fact has been deliberately concealed so it's not a fact that's relied on.

THE CHAIR: But does not turn on your reading of paragraph 25 of their skeleton?

MS DEMETRIOU: No, because when we look at deliberate concealment of relevant facts, which is the next section of their skeleton argument, there is no contention here. There's no argument that the Defendants concealed the fact that they were in a dominant position. Indeed, we say that such an argument would be extremely difficult to run because, as the Tribunal knows, the question of whether an undertaking is in a dominant position is often, and indeed will be in this case, a very contentious question that turns on, usually, rival expert analyses by expert economists. And so,

the PCR is quite right to say that that's not a fact that could have been deliberately concealed. It's a fact which turns on objective factors and, as I say, is often a contentious, finely balanced issue that will only be determined at trial.

To put it this way, if it were the PCR's contention that this were a factor that was concealed and could postpone time running, time would not start running until the point had been determined at trial. So, it would prove too much. And of course, the way that dominance has been alleged in this case is by reference to an expert report adduced by an economist instructed by the PCR. So, it's not being said, in this case, "Oh, well, the defendants are dominant because of this factor, which is out there, which has been concealed by them". The very basis for their case is a piece of expert analysis which they have commissioned. So, there is no allegation, in this case, that dominance is a fact that has been concealed in some way and so for that reason, it's not relevant to the section 32 analysis.

THE CHAIR: I understand that point.

MS DEMETRIOU: Yes, and so the way we read -- so paragraph 25 of the skeleton argument doesn't say, for example, that a claimant would have needed to have known about dominance. What we think it says is that adding up the points at 24(a) to (d), joining the dots, a claimant would have had to have known that they arguably amounted to a breach of the law. We say that that's just incorrect as a matter of law because, as I say, section 32 is concerned with facts, not legal characterisation of facts.

Could we turn now to section 3. So, this is in bundle F, tab 2. Yes. Bundle F1, tab 2. The Tribunal will see -- so it's 32(1)(b) of course that we're concerned with and that provides that:

"... where in the case of any action for which a period of limitation is prescribed by this Act --

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant;

the period of limitation shall not begin to run until the plaintiff has discovered the ... concealment [so the concealment of the fact] or could with reasonable diligence have discovered it."

And then at subsection (2):

"For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it's unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

So that's another route to establishing deliberate concealment of a relevant fact. But then, of course, you still need to show the Defendants -- the Claimant still needs to establish that the fact was not known or could not, with reasonable diligence, have been discovered.

I want to show the Tribunal, briefly, three authorities. The first one I'll take extremely briskly. It's the *Canada Square* authority and it's referred to by the PCR in its skeleton argument. If we go to bundle F4, please, tab 84. This authority is concerned with deliberate concealment, the question of deliberate concealment, and the facts can be seen readily from the headnote and in summary, the facts were that the claimant had taken out a loan with the defendant and bought a payment protection insurance policy with an insurer, and the claimant was not told that over 95 per cent of the premium for the policy was paid to the defendant as commission for arranging the policy. They brought an action under the Consumer Credit Act.

Now, I mention the facts because one point that's made by my learned friends in their skeleton argument -- we don't need to turn it up, but it's paragraph 46 of their skeleton argument -- they say, "Well, the facts in *Canada Square* are analogous to the facts in the present case" but of course they're not because in *Canada Square*, the fact that

95 per cent of the premium was a commission was concealed; that was concealed and it was the crucial fact relevant to the cause of action. So, without knowing that, the claimant could not have known that she had a cause of action and what we say, and I'll come on to elaborate our submissions on this, but of course, what we say here is that, by contrast, there is no essential fact that the PCR can point to in the present case that was concealed, that a claimant would have to know in order to bring their claim. And so, there is no factual analogy between the cases.

But I wanted to show you briefly paragraph 109, which is on page 2485 of my copy. And this just sets out the Supreme Court's conclusion in relation to section 32(1)(b) and they're saying that there had been "confusing analyses" of the law and:

"It should return to the ... simplicity of Lord Scott's authoritative explanation in Cave."

And then we see this:

"A claimant who proposes to invoke section 32(1)(b) in order to defeat a Limitation Act defence must prove the facts necessary to bring the case within the paragraph. [So, burden of proof, of course, is on the claimant.] He can do so if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information, but, in either case, with the intention of concealing the fact or facts in question."

And then:

"What's required is (1) a fact relevant to the claimant's right of action, (2) the concealment of that fact from her by the defendant, either by a positive act of concealment or by a withholding of relevant information and (3) an intention on the part of the defendant to conceal the fact or facts in question."

So, that's the way in which the Supreme Court explains how section 32(1)(b) works. And of course, we're concerned with facts relevant to the cause of action rather than with the characterisation of those facts as breach of a legal duty. And then just turning

to paragraph 153.

THE CHAIR: Is that just -- forgive me for interrupting you. You'll appreciate, as we are squarely now in 1980 territory, this is territory which may be considerably more familiar. I'm sure it's considerably more familiar to those on that side of the bar than it is to me. The fact that there is a distinction being drawn here between section 32, subsection (1), paragraph b, in relation to concealment or withholding -- would I be right to understand that that is a different situation than would apply if we were dealing with subsection (2) of section 32, where you are dealing with breach of duty. That's a different --

MS DEMETRIOU: Yes. So, should I just show you the part that relates to section 32(2)?

THE CHAIR: Please, yes.

MS DEMETRIOU: So, if we go to paragraph 153. If I just ask you to read paragraph 153, and then I'll make a brief submission about how we say section 32(2) works.

THE CHAIR: Yes, that's helpful.

MS DEMETRIOU: So, sir, section 32(2) provides another route to establishing deliberate concealment of facts.

THE CHAIR: Yes.

MS DEMETRIOU: It provides -- so if the PCR could establish that the Defendants deliberately committed a breach of competition law in circumstances where it was unlikely to be discovered for some time. So, if they knowingly, deliberately breached competition law, but in circumstances where it was unlikely to be discovered for some time -- so typically that might be a cartel, for example -- then that amounts to deliberate concealment of the facts involved in that breach of duty.

But two points to make: the first is, just focusing on the words "in circumstances where

it was unlikely to be discovered for some time", of course, if the facts are out there, then that proviso is unlikely to be satisfied; that condition is unlikely to be satisfied.

THE CHAIR: Yes.

MS DEMETRIOU: Secondly, section 32(2) is concerned with establishing deliberate concealment, but even assuming deliberate concealment is satisfied, either through the section 32(1)(b) route, or under section 32(2), the claimant still needs to establish that he or she did not have actual knowledge of the facts, or could not, with reasonable diligence, have discovered them. So, that's how the two sections fit together. I hope that answers your question, sir.

THE CHAIR: Thank you, yes.

MS DEMETRIOU: Sir, I want to turn now to *Gemalto*, bundle F4, tab 75, page 2122 maybe 2128 in the PDF, is where it starts. The case concerned the reasonable discoverability limb of section 32(1)(b). Because it concerned a secret cartel, there was no dispute about the deliberate concealment limb.

MR ALTY: Could you give me the page reference again, please?

MS DEMETRIOU: Of course. So, if you're using a hard copy, it's 2122.

MR ALTY: 2122, thank you.

MS DEMETRIOU: So, it's only about reasonable discoverability because of a secret cartel. It was a follow-on damages claim, and the question was the date on which the cartel was reasonably discoverable by the claimants.

The judge, at first instance, had found that it was reasonably discoverable when the commission issued its statement of objections, rather than its decision on the cartel, which was later, and the Court of Appeal agreed. So that's the context for the Court of Appeal's reasoning.

THE CHAIR: Yes.

MS DEMETRIOU: I'm showing the Tribunal the case because the Court of Appeal

addressed the degree of certainty with which a claimant would need to be aware of relevant facts in order to start time running under section 32(1)(b); that's really the main reason I'm showing the court the case. It is, of course, a recent Court of Appeal authority that concerns the application of section 32(1)(b) in a competition context.

If we start with paragraphs 2 to 3, near the beginning of the judgment. So, in the hard copy it's 2131, it may be 2137 of the PDF. The court here was comparing two formulations of the test. The first is "the so-called statement of claim test", pursuant to which time begins to run from the point that a claimant and its professional advisers know sufficient about the facts to plead a claim.

Then there is what's called the "FII test", after the *FII Group Litigation* tax case, which went to the Supreme Court, and we see that in paragraph 3. That provides that time begins to run from the time that a claimant has "sufficient confidence to justify embarking on the preliminaries to the issue of proceedings, such as taking advice". Those were the two possibilities before the court.

Pausing here, if the PCR's argument -- going back to paragraph 25 of their skeletons; the point we looked at -- is that a claimant could only embark on the preliminaries to the issue of proceedings if they knew that the relevant facts gave rise to an infringement as a matter of law, then we say that that would be wrong, and it's inconsistent with the terms of *Gemalto*, as I'll show you.

If we go forward, please, to paragraph 34 in the judgment, we see here the Court of Appeal discussing the reasoning in *FII*, and they set out paragraph 192 of the Supreme Court's judgment there. Can I just ask the Tribunal just to read that para 192 to yourselves?

THE CHAIR: What's the paragraph number?

MS DEMETRIOU: So, it's paragraph 34 of this judgment, but then it insets para 192 of --

So, pausing here, one can see that the Limitation Act, or section 32, is concerned with the facts giving rise to a claim, not with any understanding by the claimant as to the legal characterisation of those facts. So, taking the example of a pedestrian who's knocked down and injured by a car, they know the facts that allow them to go away and decide whether to bring a claim. They don't need to know at that stage, or understand, that the knocking down by a car is negligent as a matter of law.

We see from the beginning of paragraph 35, that the Court of Appeal there talking about being unaware of the circumstances giving rise to his cause of action. So, it's the circumstances giving rise to the cause of action, not the existence of a cause of action in law that is the key point for section 32.

Then if we go on, please, to paragraph 45, page 2141.

THE CHAIR: Sorry, the paragraph was?

MS DEMETRIOU: Paragraph 45. The court there is saying:

"The parties were right to submit that, after *FII*, limitation begins to run in a deliberate concealment case when the claimant recognises it has a worthwhile claim, and that a worthwhile claim arises when a reasonable person could have a reasonable belief that there had been a cartel."

So, the cartel there was the fact that was relevant for the purposes of knowing that they had a worthwhile claim. Of course, a layperson may or may not know that a cartel is a breach of competition law -- a breach of the Chapter I prohibition, or of article 101, but once they know that there's a cartel, like the person who's been run over at a zebra crossing, they're in a position to embark on the preliminaries to a claim.

Then paragraph 46:

"The *FII* test makes clear that the claimant is not entitled to delay the start of the limitation period until it has any certainty about its claim succeeding."

Then a bit further down:

"In concealment, what needs to have been discovered is just that, the concealment. Once the claimant knows objectively that a cartel [is being] concealed, it does not need to have certainty about its existence or about the details of that cartel. That is why the Supreme Court made clear that the claimant needs only sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim, taking advice and collecting evidence."

Then, looking at paragraph 47, picking up in the middle of that paragraph, the example again of the person who's being run down:

"The person who is run down knows that they have a worthwhile claim, even if they may eventually be shown to have been responsible for the accident by running in front of the vehicle. The claimant cannot postpone the start of the limitation period until it has had time to investigate the details of the claim and the possible defences, [et cetera]."

And then if we go down finally to paragraph 49, you can see:

"The *FII* test requires that the claimant has --"

Sorry, the question:

"Perhaps the most difficult part of this aspect of the case is really the question of whether, in a concealment case, the *FII* test requires that the claimant has discovered every essential element of the claim that's been concealed. The pre-FII cases made clear that that was necessary. In my view, however, post-FII, that can no longer be necessary at least in a concealment case.

"50. It makes no sense to say that the test for whether the limitation period has begun to run is when the claimant recognises it has a worthwhile claim, and then to say it doesn't have a worthwhile claim when it knows there may have been a cartel, but did not know, for example, the period during which the cartel operated. The formulation for the necessary knowledge is 'knowing with sufficient confidence to justify embarking

on the preliminaries to the issue of a writ'. One can embark on the preliminaries to the issue of a writ once one knows there may have been a cartel without knowing chapter and verse about the details. That is what one either finds out when making investigations or will only find out upon disclosure within the eventual proceedings."

So, sir, that's what I wanted to show you in this case. I was going to take you to *Merricks*, but it may be that this is a convenient moment to take the break.

THE CHAIR: If it's a suitable point for you, then absolutely.

MS DEMETRIOU: Great.

THE CHAIR: Let's rise now and we'll try and sit again in ten or so minutes.

MS DEMETRIOU: Thank you.

(3.17 pm)

(A short break)

(3.29 pm)

MS DEMETRIOU: Thank you, sir. So, I was going to take you back to *Merricks*. You've already looked at it in the context of the other application, but I'm taking you to it for a different point. So, it's F6, tab 114, and if we could pick it up from paragraph 23, page 3283. I think electronically it may be 3289. Paragraph 23. Oh, is it on the same page? Okay. That's good. So, 3283.

What you can see from paragraph 23 is that Mr Merricks puts his limitation argument in two ways: firstly, on the basis of section 32(1)(b) or 32(2) of the Limitation Act, that was the first way in which he put his case; alternatively, Mr Merricks relies on the EU principle of effectiveness. So, he put his case secondly on the basis of EU law, and that was on the basis of the *Volvo* decision.

As to section 32(1)(b), if you go on, please, in the report to page 3290, paragraph 46. The class representative set out four facts, and this is for the purposes of 32(1)(b), you can see the heading at G.

"Four facts which they rely on as relevant and deliberately concealed:

(1) there was an EEA MIF applying to cross-border transactions;

(2) this EEA MIF was set by Mastercard;

(3) it was set above zero;

(4) it acted as a fallback [interchange fee] for domestic transactions."

What you'll see here is that Mr Merricks did not argue that he would also have needed to have been aware that these facts, in relation to the MIF, gave rise to an arguable breach of competition law. He didn't argue that because that wouldn't have been consistent with section 32(1)(b), which talks about the facts relevant to the cause of action.

That was so, even though an average consumer could hardly have been expected to have joined the dots and concluded, on the basis of this information about multilateral interchange fees, without the benefit of legal advice, that these facts arguably gave rise to an infringement of the Chapter I prohibition.

Now, contrast the position under EU law, where the Court of Justice's decision in the *Volvo* case, which potentially required a more generous approach to limitation -- I mean more generous to the claimant -- to the question as to when time would begin to run. In that context, Mr Merricks did seek to advance an argument that a claimant would have needed to have known that the facts amounted to a breach of competition law.

We see that if you go to page 3308, paragraph 85. You can see what the Tribunal referred to as "an expanded list of 'relevant facts'", and this was under the Volvo limb -- the EU law limb -- of the argument. You can see, if you then look at paragraph 86, the tribunal says:

"This list, and in particular points (4) and (5), goes significantly beyond the list of 'relevant facts' relied on for the purposes of [section] 32(1)(b)."

Which is what we just looked at. And if you look at (4) and (5), (4) is that the MIF had the effect of preventing, restricting or distorting competition. So, that was a point -- a relevant fact -- that was relied on by Mr Merricks in support of the EU law argument, but not under section 32(1)(b).

But then what we see is that even under the Volvo limb of the argument, the tribunal rejected this expanded version of the list. We can see that if we go to paragraph 100 on page 3313. Could you please read paragraphs 100 and 101 to yourselves? I think that might be more efficient than me reading them out. (Pause)

So, thinking about paragraph 101 there, and going back to the question that the chairman put to me about dominance, "Isn't that a fact?" So, dominance, I would suggest, is a conclusion of law based on facts, similar to restriction of competition, which is what the Tribunal was considering here at paragraph 101.

Of course, it might, in principle, be the case that there is some material fact that is relevant to the question of dominance or restriction of competition, which is concealed, which one would need to know in order to make the allegation. Then, of course, that could be relevant for the purposes of section 32(1)(b), but in this case, the PCR has not alleged that there is any particular fact relevant to the question of dominance that was deliberately concealed.

Of course, an allegation of deliberate concealment is a serious allegation, and so one would expect the PCR to think long and hard before advancing such an allegation.

Now, I want to make one further point on the law -- before turning to our submissions -- and then I'll show you an authority. So, the point is: that if a claimant was aware of necessary facts at some stage, the claimant can't rely on section 32, even if they subsequently forget that fact. So, it doesn't avail the PCR to say that even if the core terms of the contract were known to consumers when they entered into the contract, by the time the minimum term expired, they'd forgotten what those terms

were. So, that's not an argument that's open to the PCR under section 32(1)(b).

We've cited two authorities. I don't think it's contested, this point, but we'll see what Mr Thompson says. Let me take you to one of the authorities we've referred to, which is in F3, tab 56. And this is the *Libyan Investment Authority*, a commercial court judgment of Mr Justice Bryan.

We can see from paragraph 1 of the judgment, so page 1152, that the limitation arguments arose in the context of an application to serve out of the jurisdiction. So, similarly to the present case, the question was whether there was a real prospect of success, so very similar to the strike-out standard. This was a point that was decided on a summary basis and not following a trial.

If we go to paragraph 23 on page 1158, you can see the citation of *Easy Air v Opal Telecom*, which is the classic case which is cited by the PCR and by us, indeed, in this case, in relation to the standard to be applied on a summary judgment application.

Moving forward, you see that that limitation is addressed at the bottom of page 1159, and if we go over the page, paragraph 28 makes the point that the burden under section 32 is on the claimant. We've already seen that.

Then if we look at paragraph 35, please, on page 1162, we see that:

"For limitation purposes, a person is treated as always knowing something even though he or she has subsequently forgotten it."

So that's really the point of law that I wanted to show you.

It may be of interest to the Tribunal to see, given that this was also a summary disposition of the case, at paragraph 42 the approach that the court took. So:

"Turn to address whether the LIA has demonstrated that it has a reasonable prospect of success with respect to the issue of limitation on the evidence presented to the court."

So, looking at whether the claimant had demonstrated, on the evidence, that they had

a reasonable prospect of success. What you see, from paragraph 62 onwards, starting at the bottom of page 1169, is quite a granular consideration of the evidence. If we look, for example, at paragraph 68, we see, under the heading, "Fees having been paid to Lands in, in connection with the Transaction":

"If further information was needed [...], the Transaction Term Sheet expressly contemplated that further details were available on request, and so the same was discoverable with reasonable diligence. It cannot be credibly suggested that JP Morgan would not have supplied such information."

So, the focus is on what a claimant could do when you're thinking about reasonable diligence under section 32(1)(a).

Immediately, you see how that applies in the present case, which is where the facts come down to the basic contractual terms; not only does it make no sense to say that those terms were concealed, but the terms were obviously available to any consumer that wanted to discover them.

Then we see the conclusion at paragraph 88 on page 1175, and the conclusion was that the limitation argument had no real prospect of success, because the claimant either knew or could, with reasonable diligence, have discovered the facts necessary to plead the claim. So, that's the law that I wanted to show you.

Turning to our submissions, we say that any PCM, any potential class member, entering into a CHA contract would have known that the contract was for a minimum term and that they were required to make periodic payments. Those were the basic essentials of the contract. The PCR doesn't suggest that those basic essentials of the contract were concealed or that the PCMs would not have had actual knowledge of them, nor could the PCR make any plausible argument to that effect. That's really why we're in summary judgment strike out territory.

We say it's obviously implausible that PCMs would not have known those basic things,

otherwise what contract did they think they were signing? Those were the basic elements that described the contract they were entering into.

It's clear that that's how the contracts were publicised; I just want to show the Tribunal a couple of examples. These are from bundle E. If we go to E page 36. I just want to make sure that those looking electronically have the same page; does your electronic page say HTC Wildfire on it?

THE CHAIR: 36? Yes.

MS DEMETRIOU: Thank you. So, this is an example, a T-Mobile example relating to a particular phone as you see. What you see at the bottom of the page is the periodic payment: £20 a month for 24 months. That's the minimum term. And if we go --

THE CHAIR: Sorry, where do I see that?

MS DEMETRIOU: Sorry, the very bottom of the page. "Our best deal on the HTC Wildfire where the phone is FREE", £20 a month, 24 months.

THE CHAIR: Yes, yes.

MS DEMETRIOU: So, anybody signing this contract would know that they had to pay £20 a month for a minimum period of 24 months, and then they would get the phone for free. So, that's the essential features of the contract. And we see this --

THE CHAIR: Does it follow, or might the person think they were getting the phone for free at the beginning? It doesn't say the phone "will be free"; it says, "is free".

MS DEMETRIOU: Sir, I don't think that that --

THE CHAIR: Might not matter.

MS DEMETRIOU: -- matters for the purposes of my argument.

Certainly, what they would know is that if they paid, whether they got it at the beginning or whether they, they paid for 24 months at £20 a month, nobody could take the phone away from them at the end of that period of time. That's really the point.

So, that's the T-Mobile example. If we go back to page 34, we see an example for

Three. You see a similar thing, 18-month contract, £17 a month. There are lots of these, this is how all the contracts were described.

Page 75. Could I just ask you to look at that? This is an example from Vodafone -- sorry, page 34. You can see the three examples are Nokia phone, and then you can see 18-month contract. Depending on the plan details, you could have different periodic payments per month.

THE CHAIR: 74?

MS DEMETRIOU: 75 is an example from Vodafone. You can see it relates to a particular phone, Sony Xperia Z3 on pay monthly. Then you have again, further down, the minimum period and the periodic payments.

As we've said in our skeleton argument, and I don't think this is disputed, there were regulatory requirements in place saying that the minimum term of the contract had to be specified as a matter of law. That, just for your reference, is footnote 9 of our skeleton argument. But I don't think that any point is taken -- sorry, of our application, not our skeleton argument. The reference is bundle A3, tab 48, page 2308, footnote 9, sir.

THE CHAIR: Thank you.

MS DEMETRIOU: So, any PCM entering into a contract would know that they were required to make periodic payments and that they had to do so for a stated minimum period. Those were the essential features of the contract. As I said, they would know that if they did that, they were entitled to keep the phone. That's the point of having a minimum term contract.

After expiry of the minimum period, PCMs also knew, or could with reasonable diligence have discovered that they were continuing to pay the same amount. Of course, they knew because they were the ones paying it. The money was coming out of their accounts. That's not something that could be concealed from them, deliberately

or otherwise.

So, if we turn back, please, to the PCR's skeleton argument at paragraph 24, so bundle B, tab 4, page 53, our case is that none of these facts was concealed. That's the first point. All of them were within the actual knowledge of consumers, and they were at least reasonably discoverable by consumers.

We don't need to succeed on all three limbs, anyone will do, but in fact, we do succeed on all three limbs. Looking at the facts as set out here by the PCR, so fact A -- if you just remind yourselves what fact A is -- of course a PCM would know that they were continuing to make payments under the contract because they were in fact making them; they still had a network connection; the contract was continuing beyond the minimum term. That's not a fact that was concealed or that could have been concealed. It's a fact that the PCMs had actual knowledge of; in any event, they could have discovered it by looking at their bank statements.

Fact B: the rate payable would not be reduced to reflect the fact that the handset would have been paid for in full. Similarly, again, obvious that the rate was not reduced after expiry of the minimum term. Again, that's not something that was concealed or could have been concealed, and it's a fact that the PCMs would have had actual knowledge of or at least it was reasonably discoverable by them. As I said, the PCMs would have known from the basic terms of their contract that they were entitled to the handset at least by the end of the expiry of the minimum term. That was the essential bargain.

So, if they were paying, once they saw, they would have known they were paying the same amount after expiry of the minimum term and so this allegation -- they knew all the facts that give rise to the allegation at subparagraph B.

Then fact C, that:

"The rate the PCM would continue to pay after expiry would incorporate a sum that represents an instalment payment for a product that the PCM would, by that point,

have already paid for in full (the handset)."

That overlaps, that fact, with the fact at subparagraph b, but again, it's an allegation that can be made simply on the basis of the central terms of the contract. The inference is drawn from the fact that the contract had a minimum term, if you like, because at the expiry of that minimum term, a consumer would be entitled to terminate the contract. Again, PCMs knew the facts that enabled them to draw this inference and those facts were at least reasonably discoverable. There's no realistic argument that they were concealed.

Now, we emphasise that the PCM would not need to know with certainty or even on the balance of probabilities that this inference was correct. The case law, as I've shown you in *Gemalto*, is unequivocal that the standard is lower than that. The standard is sufficient confidence to embark on the preliminaries, such as taking advice or submitting particulars to a defendant. So, a consumer would be able to go to a lawyer and say, "Well, hang on, I've signed up to this minimum term of 24 months paying £20 a month, which entitles me to the phone, and I've passed that period. I'm still paying £20 a month. Something's wrong." Those are the essential facts that can't have been concealed, weren't concealed, and they're the only facts that a consumer would have needed to know.

Finally, we turn to fact D. This is a little bit different. Fact D is that alternative and cheaper rates were likely to be available for airtime-only contracts. Now, our submission in relation to this fact is that such rates were widely advertised. Again, let me just show you some examples of that. If we go back to bundle E, and if I could ask you to turn to page 119. Bundle E, sir, tab 119. You should have a page that says T-Mobile pay monthly SIM cards. Do you have that?

THE CHAIR: Yes.

MS DEMETRIOU: And so, what you'll see -- I'm just showing you some examples -- is

you have a huge amount of material in this bundle to show that these airtime-only SIM-only contracts were widely publicised, as indeed they had to be. Everybody had to know what the price was of the SIM-only contract and there were a variety of plans out there. You see here this one is SIM-only, monthly allowance 50 minutes, monthly charge £7.50. Let me show you --

THE CHAIR: I'm sure there are many examples that you can show, and I didn't want to stop you taking particular ones if you think they're important. How do we deal with Mr Kennelly's point that of course it would be impracticable for our consumer at the end of the minimum term to know which SIM-only contract to compare with? How would they necessarily know that any of these were cheaper or not? Because if you take Mr Kennelly's point, then it was impracticable to do so.

MS DEMETRIOU: Sir, yes, this is, I think, the point or similar to the point you put to Mr Kennelly yesterday about there being a tension.

THE CHAIR: Which he passed on to you.

MS DEMETRIOU: He passed the buck to me, so I'm going to accept the buck and now address the point.

THE CHAIR: Yes.

MS DEMETRIOU: So, we say that there is no conflict in our position for two reasons.

THE CHAIR: Yes.

MS DEMETRIOU: The first is the reason given by Mr Kennelly yesterday which is that the identifiability exercise that arises from the PCR's proposed class definition requires looking backwards for a substantial period of time. So, it requires a class member now to look backwards some years to work out what the comparable SIM-only price was, whether it was lower than the price they actually paid. So, that's the exercise that's driven by the proposed class definition.

By contrast, when applying the Limitation Act, we're thinking about what consumers

knew at the time that they were parties to the CHA contracts or immediately afterwards. Of course, the position, thinking back to that time as to the actual knowledge of PCMs is doubly clear as regards any PCM who did change to a SIM-only contract at some point after the end of the minimum term. Those PCMs would obviously have been aware of the availability and pricing of SIM-only contracts because they entered into them. So, they would plainly have understood that their minimum term had ended, and they could switch to a SIM-only contract at a different monthly price.

THE CHAIR: Your argument can't depend on that, though, can it? Because you're saying, based on your summary judgment argument, well, it doesn't matter whether they transferred or not because it's not fact-sensitive.

MS DEMETRIOU: No. So, we're saying -- yes, although there's a nuance to that, which is that if we fail on our summary judgment application and this becomes a matter for trial, then that is a matter which is going to turn on facts which are different for each particular class member and so that does go to certification. That's a point Mr Williams is going to deal with tomorrow.

The first point is that the nature of the exercise is different because the class definition one requires looking back now, which is inherently much more difficult than asking --

THE CHAIR: Well, it doesn't, though, doesn't it? Because class definition would apply also to someone who took out a contract at the beginning of the year. And Mr Kennelly says it's impracticable and requires expert evidence and can't be done. He was very careful to avoid saying impossible, which is my word; he said impracticable. But it's still -- I don't think that gets you home, that distinction in terms of the tension, does it?

MS DEMETRIOU: Well, sir, can I say my second reason, because the second reason definitely does get me home. I hope you'll agree.

So, the second reason, which is perhaps more important, flows from the case law on

limitation.

THE CHAIR: Yes.

MS DEMETRIOU: That's that, as we saw from *Gemalto*, in order for time to start running, it was necessary only for a consumer to know sufficient facts to embark on the preliminaries to issuing a claim, so they didn't need to bottom the position out. It was sufficient for them to know that there were other plans out there that look cheaper on their face. That's all they needed to know. They didn't need to conduct a kind of granular comparator exercise. That's really the point made in *Gemalto*.

You'll remember that in *Gemalto*, the Court of Appeal said, "You just needed to know that there may have been a cartel. You didn't need to know the details of that cartel." That's really the key difference.

In fact, I would say that the tension identified by the Tribunal in fact goes in the other direction, because in seeking to argue that there would be no difficulty for class members in working out whether they're a member of the class, my learned friend Mr Thompson said that class members could be expected to know what their contracts provided for, and to be able to compare those contracts with SIM-only contracts. Can I just show you what he said yesterday? Does the Tribunal have the hard copy transcript?

THE CHAIR: I think we do.

MS DEMETRIOU: Should we hand them up?

THE CHAIR: I think no, it's in these folders.

MS DEMETRIOU: Okay. Can we look, first of all, please, at page 72. Can I just check we've got same pagination? My line eight says, "I think Mr Kennelly's point". Are we on the same -- thank you.

THE CHAIR: I think I see the point, and then we have the haystack.

MS DEMETRIOU: Yes. So, Mr Thompson said:

"Mr Kennelly's point was that it's all very, very difficult because you're 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 when the minimum term ends, what the terms of that contract were, any particular add-ons, and so won't just be floundering around in a sea of material, you'll be looking to see what SIM-only deals are available on the day of the minimum term expiring. So, it will be a focused investigation."

THE CHAIR: Yes.

MS DEMETRIOU: Then, if we look at page 73, please, looking at line 10. He says there that the complexity is 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."

Then just one final point on the transcript, if you go back to page 21, and if you look at the top of the page:

"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, we say it's also readily comprehensible."

So, sir, Mr Thompson is essentially agreeing with the basis on which we put our case on limitation second period. These are not technically sophisticated contracts and the facts that a consumer would need to know in order to make the key allegation that they were paying more than they needed to pay on expiry of the minimum term are all facts which are there in the contract itself which a consumer would know simply by the fact that they were paying those amounts after the end of the minimum term, and because

of the plethora of other deals available and advertised by the Defendants.

So, for these reasons, we say that the second tranche of the claim should be struck out or the Tribunal should give summary judgment in the Defendants' favour.

You'll have seen that we put our case both on the basis of Rule 41, which is strike out and on the basis of Rule 41, the PCR has no reasonable grounds for making this part of its claim, and also on the basis of Rule 43, reverse summary judgment on the basis that the PCR has no reasonable prospect of succeeding on this part of the claim.

There is no real dispute about the legal standard. As I've said, both parties have cited the *Easyair v Opal Telecom* case, which is a classic formulation of the test.

So, that's essentially our argument. Now, what does the PCR argue in response? The PCR's main argument is that this should not be decided on a summary basis as the tribunal will need to see all of the facts at trial. But the fundamental difficulty with that submission is that the PCR has not identified what these facts are that are going to move the dial at trial. What are the facts and the evidence that might emerge at trial that could conceivably bear upon these issues?

As the case law makes clear, and we've cited the relevant authorities at paragraph 14 of our skeleton argument, it simply is certainly not enough to assert that something might turn up at trial.

So, if we're right that the relevant facts at paragraph 24 of the PCR's skeleton are no more than the core commercial terms of the PCM's contracts or inferences drawn from those terms plus the widespread availability of SIM-only deals, then if we're right about those things, then there are no facts that could come out at trial that could assist the PCR and there is no reasonable prospect that the PCR could discharge the burden on it at trial.

Indeed, not grasping the nettle now would create significant problems down the line.

Can I just show you on that point paragraph 43 of the PCR's skeleton argument. So,

if we go to bundle B, tab 4, bottom of page 59, paragraph 43. The PCR says this:

"If the Second Period Applicants in due course wish to contend that one or more individual PCMs are precluded from bringing their [SPA] claims during due to their individual awareness of the relevant issues, then that is a matter to be pleaded and particularised on the basis of evidence."

Pausing there, the PCR is right, we say, to say that section 32(1)(b) needs to be satisfied by each member of the class; that follows from the wording of section 32(1)(b), and the fact that collective proceedings are an aggregation of separate claims. But in arguing that the simple point we raise has to be deferred to trial, you can see what the PCR has in mind. It says that the Defendants need to plead actual knowledge in respect of each class member. Now, obviously that's wrong in terms of burden of proof, but leaving that aside, it's completely unworkable as a strategy for this litigation.

Now, staying on the PCR's skeleton argument, go back please to page 55. This is under the heading, "Deliberate concealment of facts".

THE CHAIR: Sorry, go forward to paragraph 55.

MS DEMETRIOU: Back, please, to page 55.

THE CHAIR: Oh, back to page 55.

MS DEMETRIOU: Yes. So, you can see at page 54, you've got the heading, "Deliberate concealment of relevant facts". I know you've read the skeleton, so let me just try and summarise what they're getting at. They give reasons at paragraphs 29, 30 and 31. These are their points in favour of saying that deliberate concealment should be deferred until trial, because it's fact-sensitive.

THE CHAIR: Yes.

MS DEMETRIOU: What the Tribunal will see is that the PCR is referring to evidence and findings of regulators to say that consumers didn't understand properly their

options at the end of the minimum term, or didn't understand precisely what their payment obligations were. They say, for example, because there's no evidence that this had been explained to them when they entered into the CHA contract, or on expiry of the contract.

But with respect, this line of -- yes, so "some consumers"; of course, they can't make that submission in relation to all consumers. They say this should go to trial because some consumers were not aware -- didn't understand the nature of the payment obligations.

But this line of argument, we respectfully say, conflates two different things. It's one thing to allege that the Defendants should have taken more positive steps to ensure that unengaged consumers fully understood their options, particularly on expiry of the CHA contract. So, for example, to alert consumers that they were coming to the end of their contract, that they had other options available at that point.

That's one thing, but that doesn't establish that the facts necessary to embark on the preliminaries to a claim were concealed from consumers; that's a different point. As I said, they were not concealed, because all the consumers needed to know was that their contract required them to make periodic payments for a minimum term, entitling them to their handset, and that they were continuing to make those payments after expiry of the minimum term. Those basic facts weren't concealed. None of the regulatory materials referred to by the PCR says that they were concealed, or that consumers couldn't reasonably find out this information.

For the reason I gave earlier, PCMs had actual knowledge of those essential facts from the time of entering into the contract, and if some of them had forgotten those facts by the time they got to the end of their minimum term, and if regulators thought they should be prompted, this can't mean, as a matter of law, that the limitation period is postponed. So, that's deliberate concealment.

Then if we go forward to page 57, we see, "Reasonable diligence". Pausing there, of course, we say, for the same reasons I've given, that PCMs had actual knowledge of those essential facts.

Then we see what the PCR says about reasonable diligence. So, if the Tribunal needs to get to this, if -- you're not with us on concealment or actual knowledge -- it's clear that consumers could, with reasonable diligence, have discovered the facts, because they're written down in the contracts and it relates to monies they were paying after expiry.

Again, the PCR says that regulators have said that phone companies should have taken positive steps to alert consumers they were continuing to make payments after expiry of the minimum term. This doesn't help the PCR, because, as I say, it's one thing to say that the MNOs should have issued alerts or made the contract clearer, it's quite another thing to say that those terms were not reasonably discoverable; they were, simply by reading the contract.

Then finally, section 32(2) doesn't take matters any further. We, of course, deny that the Defendants were deliberately committing any breach of duty, but even assuming that the tribunal says, "Oh, well, that's a matter for trial whether or not the defendants were committing a breach of duty", section 32(2), as I said earlier, applies to establish deliberate concealment only where the breach of duty was committed in circumstances where it was unlikely to be discovered for some time. That isn't satisfied here, for all the reasons I've given.

Even if you're not with me on that, you still have to consider whether or not the facts were known or could, with reasonable diligence, have been discovered. So even if section 32(2) establishes, through that route, deliberate concealment, you still have to consider: were the facts within the actual knowledge of consumers, or could there have been reasonably discovered by consumers?

Sir, that's how we put our case. We say that even before getting on to Mr Williams's way of putting it, we succeed on this basis. Once you strip down, identify what the facts really are to make the claim, they're facts which were not concealed and were within the actual knowledge, or could have been discovered.

So, unless you have any questions, those are our submissions on this part of the application. Thank you very much again.

Submissions by MR WILLIAMS

MR WILLIAMS: Sir, I'm conscious that I'm currently one of the things between you and your train, so I'm going to make a start.

THE CHAIR: Please do.

MR WILLIAMS: I've got an introduction; I've got an outline. I'll at least do that.

THE CHAIR: Yes, that'd be very helpful. Thank you, yes.

MR WILLIAMS: So, members of the Tribunal, I'm going to deal with the second part of what we've called the Second Period Application, based on what we call the publicity materials. The Tribunal will appreciate that this point only arises if you don't accept that Ms Demetriou succeeds on her points about concealment and core commercial terms.

THE CHAIR: Yes.

MR WILLIAMS: To the strike-out standards.

Our position is that there is a further and distinct reason why any claim that is subject to the Limitation Act and the equivalent Northern Irish legislation should be struck out in any event. I'll outline why that is now.

THE CHAIR: Yes.

MR WILLIAMS: The submission I make is that the facts on which the claim is based became reasonably discoverable by class members, at the latest, by or in October 2017. That is more than six years before the claim was issued, and hence

the claim can't go back more than six years.

THE CHAIR: Yes.

MR WILLIAMS: The reason we say that, as the Tribunal will have seen from our application and skeleton argument, is that there was widespread publicity about the issue on which the claim is based, principally as a result of two public campaigns by consumer interest bodies, one by Which? in 2015, and one by Citizens Advice in October 2017. Those campaigns had the purpose of alerting consumers to the very issue that forms the basis for this claim, and they were expressed in a way that mirrors the language of the claim as it's now put.

We've produced for the Tribunal a body of material that shows what was in the public domain in the period 2015 to 2017. It may not be exhaustive, but it is substantial, and, in our submission, it paints a very clear picture. I will show you some examples of the material tomorrow, but in overview, there are six features of the material which, in our submission, combine to make the relevant facts reasonably discoverable by October 2017, on any view. Six features.

First, the material addresses all of the relevant facts as posited by the PCR. So, we're taking the PCR's position in paragraph 24 at its highest.

Secondly, the material on which we place weight is all in consumer facing publications. This isn't a situation where consumers are being asked to find press notices about a statement of objections on the European Commission's website; they're not even being asked to delve into the business pages of the Financial Times. The material on which we rely is all directed at consumers; it's consumer facing.

Third, the concerns are expressed by consumer interest bodies in terms which are clear to consumers -- extremely vivid terms, as we'll see tomorrow. I should be clear, we don't accept the concerns that are expressed about consumer harm, but that is a separate point. The point here is about the clear and direct content of what is

consumer facing material.

Fourth, the coverage on which we place principal reliance is in the mainstream media. There's plenty of coverage in more industry-focused sources as well, but I will be pointing you mainly to the national and regional news coverage.

Fifth, there's a wide range of publications, so that the information was available to consumers wherever they get their news from.

And sixth, and relatedly, there is coverage on a range of media. We've got at least three types: we've got internet news; we've got print press; and we've got radio coverage. We've said in the application that as we can see coverage on the BBC, ITV and Sky News websites, it does seem very likely that there was coverage on television as well. I can't prove that; the Tribunal may be prepared to draw an inference, but it's a subsidiary point; we can see coverage across the media.

THE CHAIR: What was your fifth point?

MR WILLIAMS: Fifth was there's a wide range of publications so that the information was available to consumers wherever they get their news from. So, I'll show you a whole range of different newspapers, websites and so on. Sixth was the range of media.

I've been referring so far to the facts that are stated in the publicity materials, and you have Ms Demetriou's submissions about the importance of the facts (inaudible) and the characterisation. Can I be clear on what I mean by "facts" for the purposes of this argument?

THE CHAIR: Yes.

MR WILLIAMS: As Ms Demetriou has submitted, facts here are really the key features of the consumer contract, and the availability of SIM-only rates. That's what we see in paragraph 24 of the PCR skeleton.

The PCR's response to that, as Ms Demetriou was just considering at the end of her

submissions, is to say that reference to core terms of the agreement isn't good enough, because consumers didn't or couldn't understand the implications of the contract they'd entered into, and they complain about a lack of transparency and so on.

Now, we don't accept that argument, as Ms Demetriou has said, and the Tribunal will have to decide that point as part of Ms Demetriou's argument.

THE CHAIR: Yes.

MR WILLIAMS: But if the Tribunal thinks there's anything in that point, we say it breaks down completely at the point where there is a broad public campaign which spells the issue out in terms which are materially indistinguishable from the way the PCR now puts the case.

The publicity materials are completely clear about what the contract terms were, what their effect was, and why it is said that those terms combined to give rise to the complaint that now forms the basis of this claim. So, in short, there's an express joining of the dots between the points to create the factual narrative that the PCR now relies on and puts forward.

If we're right in this part of the case, it doesn't matter if facts were ever concealed, or whether the conduct involved the deliberate commission of a breach of duty -- neither of which I should stress, we accept. We say that even if that were arguable, by October 2017, any consumer or class member could reasonably have known and understood the facts they needed to know to bring forward the claim as it's now put.

We do say it is striking that the PCR has had two chances to meet the way we put this part of the application, first in its response to the application, and secondly in its skeleton, and it hasn't taken either of them. It isn't an answer to say that this is all acutely fact-sensitive, or that we're asking for a mini-trial before the Tribunal, because we aren't asking for a mini-trial. The PCR hasn't identified a single, contested or even contestable fact about any of the matters that we rely on; the application is based

squarely on the objective content of the documentary record.

So that's an outline of what we say. I've got two discrete points I can probably deal with before we break today. Just to tell you where I'm going more generally, I've got two issues which go to how we say section 32(1)(b) applies: those are the questions of whose knowledge are we considering; and what is the date of knowledge, given that the evidence is to some degree spread over time? Those are the two points I'll cover today.

The next and core part of the submission is to show you, the Tribunal, some of the evidence. I can't show you everything, but I will show you some of the key examples, and explain how we put the case.

Then thirdly, I'll deal with some of the other points.

Then once I've dealt with those topics which go to the limitation point, I'll come back to the certification issue at the end of tomorrow.

So, starting with whose knowledge we're considering. Ms Demetriou touched on this at the end of her submissions. Under section 32, it's the knowledge of the claimant, but under the reasonable discoverability tests, that's an objective test. So, the question is, what sort of consumer does the Tribunal have in mind for that objective standard?

The PCR says that the standard is the standard of the sticky customer. That's based on a case called *OT Computers*, which I'm not going to open up, if I may, but in broad terms, the Court of Appeal held that one should look for claimants in similar positions, and it drew a distinction between a claimant that's carrying on a business on the one hand, and a claimant that's in liquidation, and says, "Look, those are very different animals; one can't expect a company in liquidation to know everything that a company that's running a business to know".

THE CHAIR: The case was, sorry?

MR WILLIAMS: It's *OT Computers*, but I mean, this is the way Mr Thompson --

THE CHAIR: No, that's -- thank you.

MR WILLIAMS: So, on our facts, we don't have anything like that clear distinction in terms of the claimants' identity or characteristics, in terms of what information they'll have been exposed to. If what the PCR means is the benchmark is people who have this sort of claim, then by definition that is true, because they're a claimant. But the question, in my submission, is does this affect the application of the reasonable discoverability test? Is the sticky consumer distinctive -- different from consumers generally?

The PCR hasn't identified anything to suggest that people who have this sort of claim have any characteristics to distinguish them from consumers generally when it comes to the discoverability of the facts that are relevant in this case. So, we say that the submission is an empty one.

But I do make three further points, particularly in relation to my part of the case:

First, sticky customers are not a distinct or homogenous class. Someone who spills over the minimum term by, let's say, a month, because they're busy in that month, or because they go on holiday, they may be a very different sort of consumer from someone who doesn't switch for a year or 18 months or two years. So, we don't accept that this is a homogenous class of consumers.

Secondly, we can't see why the point is relevant to the way that we put the case, because we rely on mainstream media coverage. Sticky customers presumably get their news from the same places as unsticky customers, so we don't think it's going to affect anything I say.

And thirdly, even if there was anything in the point, the campaign and the publicity and the material I'll be pointing you to was all directed to sticky customers; it was directed to people who were at the end of their contract and had gone over the minimum term

and were said to be continuing to pay the same rate.

So, for all of those reasons, we say this point goes nowhere, and if the purpose for which it's relied on is to say, "Well, this in some way raises the bar to establish a reasonable discoverability", which seems to be where the point is going in some unexplained way, then we don't accept that.

The second issue is what do we say about the date of knowledge, given that the evidence that I'll be pointing to is, to some extent, spread over time? What we say is that the Tribunal should focus on the October 2017 position. That is first and foremost because it's enough for us to show that the facts were reasonably discoverable more than six years before the claim was issued, and it doesn't matter whether it was six years and a month or whether it was eight years, the upshot is the same. So that's the primary point.

It is also true, as you'll see tomorrow, that our researches have revealed more examples of publicity for the 2017 campaign than the 2015 campaign; we've got nine examples for 2015 and approaching 60 for 2017, so the case gets necessarily stronger over time. So that's another reason why we put it in that way.

I will show you tomorrow that the issue was very clearly in the public domain and widely publicised in 2015, and if I needed to submit that the 2015 material was enough by itself, I could make that submission, but I'm not going to make life more difficult for myself than I need to.

You will also see reference in the application to an Ofcom report and also to a Citizen's Advice report, which I'll show you tomorrow. These were published in between the two media campaigns. Just to be completely clear, I'm not asking the Tribunal to find that those publications by themselves made the conduct reasonably discoverable at particular points in time; what we say about those publications is that they're part of an overall picture, which built up over time through a combination, really, of different

strands.

There was an expression of interest in the matter by consumer interest bodies; there was an expression of interest in the matter by regulators; the media picked up on this. So, in a sense, it's all probably linked in the factual matrix, but we don't ask you to focus on the regulatory and Citizen's Advice reports on their own. What we say is that the picture was gradually filling out, and it had filled out substantially by, at the latest, October 2017.

So, for those reasons, we focus on the position by October 2017, and I stress, by that date.

THE CHAIR: If that comes to --

MR WILLIAMS: I've got one more point, actually, but I'm also very happy to do it tomorrow.

THE CHAIR: No, no, no, go on.

MR WILLIAMS: I've got one point and then I'm into the evidence, sir, so it's (inaudible). It's to deal with the tension point, actually. It's the point that you put to Mr Kennelly, and then Ms Demetriou dealt with it.

THE CHAIR: Yes.

MR WILLIAMS: I'm just going to add my two penn'orth on that. We say there is no tension between the two different arguments, and Ms Demetriou has really covered the points. But to put it in my terms, we're proceeding on the basis of the case as the PCR puts it, which is that, in general, consumers who stayed on the same rate could have switched to a SIM-only deal, whether with their own MNO supplier or with another MNO, and hence they were being overcharged. That's the PCR's position as a general proposition.

You will see tomorrow that that is what the publicity materials assert as well. Mr Kennelly's point is that when you actually get into that, it's much more complicated

than that, certainly at many years removed as Ms Demetriou said. But the way I put it is to say, well, the publicity materials alerted the consumer to the exact way that the PCR puts the case now, which is that consumers in this position, generally, could save money by taking out an airtime-only deal.

So, there is then a more granular issue about whether a given claimant could actually have saved money, but as Ms Demetriou said, that's something then to be dealt with as part of the preliminaries. The general point, which is what is said to give rise to a worthwhile claim -- that was very, very clearly out there in the material I'll be showing you tomorrow.

So, I will break there, sir, and pick it up with the evidence tomorrow.

THE CHAIR: Yes, that's very helpful. Thank you, and thank you for making such constructive use of the time we had available.

Housekeeping

THE CHAIR: Mr Thompson.

MR THOMPSON: Partly out of selfish interest, but also in the interest of the Tribunal, I think the timetable has slipped around, and there's already been quite substantial challenges put to me by both Ms Demetriou and Mr Williams.

THE CHAIR: Yes.

MR THOMPSON: I don't know if we could have some indication of when the Tribunal thinks we might swap over again, because --

THE CHAIR: You would like to know.

MR THOMPSON: I would like to know, and although it's enjoyable to read press articles and radio transcripts, I suspect most of us have got the gist of the point that Mr Williams is making already. I don't know how long that's going to take.

THE CHAIR: Mr Williams, how much of tomorrow do you think you might use?

MR WILLIAMS: I can't see that I'll be more than an hour, sir.

THE CHAIR: I think that would provide you with ample time to respond. Would you agree, Mr Thompson?

MR THOMPSON: We'll be comfortably in time for your train, then, I'm sure.

THE CHAIR: Yes.

MR WILLIAMS: The longest I'll be is until the break.

THE CHAIR: No doubt Mr Thompson will be on his feet to tell me that we've passed that time, if we get to that stage.

MR WILLIAMS: (Several inaudible words).

THE CHAIR: Thank you very much. I'm grateful to counsel today, again. Thank you.

(4.28 pm)

(The court adjourned until 10.30 am on Wednesday, 2 April 2025)