IN THE COMPETITION APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 31st March – Wednesday 2nd April

Before:
The Honourable Lord Richardson
John Alty
Dr William Bishop

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Justin Gutmann

Proposed Class Representative

v

Vodafone Limited and Others.

Proposed Defendants

A P P E A R AN C E S

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

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Wednesday, 2 April 2025

(10.30 am)

THE CHAIR: Good morning, Mr Williams.

Second Period Application (continued)

Submissions by MR WILLIAMS (continued)

MR WILLIAMS: Good morning, sir, members of the Tribunal. I'm now going to get into the main part of my submission where I show the Tribunal the evidence. Like Ms Demetriou, I'm going to be making my submissions using paragraph 24 of the PCR's skeleton and as Ms Demetriou said yesterday the subparagraphs of that, they overlap and repeat each other somewhat. It's clearer to take the PCR's case on its own terms than for us to reframe it and run the risk of it being said that we are not taking their position at face value.

THE CHAIR: Yes.

MR WILLIAMS: Before I do that, just to pick up on the point which was touched on yesterday which was the relationship between paragraphs 24 and 25 of the PCR's skeleton. I don't know if you have the skeleton to hand.

THE CHAIR: Yes.

MR WILLIAMS: Do you have it electronically?

THE CHAIR: I have it before me. It's --

MR WILLIAMS: It's a short point.

THE CHAIR: Yes.

MR WILLIAMS: If you look at the second line of paragraph 25.

THE CHAIR: Yes.

MR WILLIAMS: It says:

"... a PCM would need to know enough to have a reasonable belief that the facts

outlined above may give rise to a violation of competition law."

And they use the same language in paragraph 26, "The facts outlined above ..." and then we see in brackets (and potentially other facts) and footnote 6 says this is an "early stage ... no disclosure has been provided", it will be premature, et cetera, et cetera. We say that that isn't good enough, footnote 6. I mean, this is the PCR's claim; they have pleaded it; they know what facts they rely on to plead their claim. And so, they can't say, "Well, we don't know what facts we rely on until we've had disclosure". This is a pleading point. So, this is a classic something may turn up sort of point. And Ms Demetriou addressed you on that yesterday.

THE CHAIR: Yes.

MR WILLIAMS: So, to streamline my submissions today, my junior, Ms Lawrence, and I prepared a hand-up, which I've given to Mr Thompson, which I hope is in front of you.

THE CHAIR: That's this one?

MR WILLIAMS: It's that.

THE CHAIR: Yes.

MR WILLIAMS: So, as I mentioned yesterday, there were two campaigns: one by Which? in 2015 and one by Citizens Advice in 2017.

THE CHAIR: Yes.

MR WILLIAMS: And what the hand-up does is it takes the two news releases and sets out how they address all of the points in the PCR's skeleton, paragraph 24. The left-hand side is the skeleton, and the right-hand side is the content of the news releases. You'll see the first two pages are the Which? news release and the third and fourth pages show how they were addressed by Citizens Advice. This is just to streamline things so that I don't need to point here and there and say that this is covered. Hopefully, that will streamline that part of --

THE CHAIR: Yes, thank you.

MR WILLIAMS: (overspeaking) -- my submission.

And of course, as I said yesterday, we don't only rely on these news releases; we rely on the fact that they went on to generate substantial media interest and coverage so that the content was then broadcast widely.

Sir, if we can start with the Which? release, which is bundle E, tab 1, page 295.

THE CHAIR: Yes.

MR WILLIAMS: You want the heading further down the page:

"Millions of pounds wasted paying for mobiles you already own."

I'm going to be reading out a lot of content of that nature. I'll just say one more time. Obviously, we don't accept the content; we don't accept the allegations. But that's not the point for today's purposes.

THE CHAIR: Yes.

MR WILLIAMS: The point is, it was conveyed through the media. And this is very short, it might help you just have a quick read of it, unless you've already looked at it.

THE CHAIR: Just to read --

MR WILLIAMS: Just to read this page on to the top of the page.

THE CHAIR: Yes.

MR WILLIAMS: The date is at the end, 15 April 2015. The table now sets out the correspondence between the paragraph 24 points and the content of the news release. So, I'll just make five overarching points.

THE CHAIR: Yes.

MR WILLIAMS: One, it's clearly dealing with what the PCR calls "CHA contracts", which include the purchase of a phone and airtime.

THE CHAIR: Yes.

MR WILLIAMS: Secondly, it makes clear that such contracts involve a bundled

payment for the handset and airtime, and it refers to the fact that customers of Vodafone, EE and Three make that bundled payment. And obviously, those are the three second period applicants. That is the paragraph that starts "O2", it says at the end, "whereas customers on Vodafone, EE and Three," so that those are the three MNOs that are identified.

THE CHAIR: Yes.

MR WILLIAMS: Thirdly, it says consumers continue to pay that bundled price, which includes the payment for the phone after the contract period. It uses language like "continue to be charged", "price doesn't change".

Fourthly, it says, three times, that as a result of this consumers are paying for a phone that's already been paid off, which is the allegation that's at the heart of the claim. It really couldn't be more clearly stated.

And fifthly, it says that consumers who don't switch are overpaying relative to a calls and data only rate, i.e., airtime only. And the example that's given by saying, for example, is an O2 split contract price, where the data and calls element is £24 out of the £49. But the point is that, once the minimum contract expires, you only need the data and calls element. You only need to be paying the £24, not the £59. And obviously that point applies to any airtime-only SIM-only deal. And I'm going to come back to that point in just a minute.

THE CHAIR: Yes.

MR WILLIAMS: Just to tell you about the rest of the material, if you turn on to 297, we see the MailOnline article dated 15 April 2015. One of the most read websites in the country, I believe, and you can see that it essentially reproduces the press release. I'm not going to ask you to read all this material in the hearing, we would never finish, but I will try and give you a route through it.

THE CHAIR: Yes.

MR WILLIAMS: Turn to page 300. Just one more example. If I can ask you to look at, this is the Daily Express. You can see it's the Daily Express from some extremely small font towards the bottom of the page where it says above the big heading, "express.co.uk".

THE CHAIR: Which page?

MR WILLIAMS: 300, sorry. Towards the bottom of the page there's a big heading, "Are you overpaying for your mobile phone contract?" And just above that you can see "express.co.uk".

THE CHAIR: Yes.

MR ALTY: Which page is this again?

MR WILLIAMS: 300.

MR ALTY: 300.

MR WILLIAMS: Just the point I wanted to flag on this, you can see at the bottom of page 301, it says:

"... nearly half of British consumers do not change their pay monthly plan when the original date comes to an end."

And then over the page, top of 302:

"By missing the opportunity to switch to a cheaper SIM-only price plan, smartphone owners are collectively overpaying ..."

So, it's exactly the way the PCR puts it in terms of there are cheaper SIM-only deals out there. That's drawing that point right out. But it is obviously the logic of the PCR's position.

So, I'll just give you references to the other material in this part of the case, which is in the same vein, and it all closely corresponds to the Which? press release. It's ITV News at 304; Guardian, 312; Telegraph, 316; Times, 319. And the story was picked up in print as well. It's been harder to find print copies, but we've got three examples

which are at tab 2 at the back end of this bundle. We've got the Daily Mail and the Scottish Daily Mail and the Times, and that's pages 727 to 729.

THE CHAIR: 727 to 729.

MR WILLIAMS: Yes. 2015, April 2015, very clearly the same complaint as the PCR makes now; very clearly articulated by Which? and widely publicised in a number of publications, each of which has a slightly different audience.

Before we get to the 2017 Citizens Advice release, there are two documents which fill in the chronology which I should show the Tribunal.

The first is at 326, and this is a Citizens Advice -- I've just realised my microphone is not on, I'm so sorry, I hope I --

This is a Citizens Advice report called "Hung up on the handset", which dates from March 2016. And this is part of the building picture that I referred to yesterday. Just to give you the context for this, you can see on the left-hand side of page 330, you can see on the left-hand side in the bottom half of the page, Citizens Advice have done a mystery shopping exercise and what they've done is they've investigated whether consumers are getting the most appropriate contract for their needs, in particular in terms of minutes and data and so on. The problem they identify, you can see in the middle of page 331, is it says in chapter two they refer to a:

"discrepancy between the stated needs of our mystery shoppers and the tariffs recommended by sales staff."

So, that's the context, which is not exactly our point. But if you then look down at the last paragraph on page 331, it says:

"Our mystery shoppers were clear that they had no preference for a particular handset and only wanted the optimal tariff. Yet time and again the sales process focused strongly on the handset. The common practice of combining the cost of the handset with the service charge distorted the tariffs offered to our shoppers, making it difficult

to find the right deal."

Hence the title "Hung up on the handset".

Our issue arises in the course of discussion, and I'll just show you where that is. It's 349, is the first reference. In the middle of the page there's a paragraph that starts, "The way in which ..." Has the Tribunal got that? And then the, I think it's the second sentence, "Some networks, for example ...", that's our point.

"... most networks combine the cost of the handset with ... the service into one contract, with one monthly payment."

And then that is picked up further on page 355. The second paragraph starts, "Tools which help ..." and five lines down sentence starting, "Alongside the risk ..."

THE CHAIR: Yes.

MR WILLIAMS: "... the consumer continuing to make payments for a handset they've already paid for in full."

As I say this is all part of this building picture.

And the second document in this vein is the Ofcom pricing trends for communication services in the UK report. This is back in the bundle; this is at 204. And I think this document is specifically relied on in the claim form at paragraph 22 so there's no dispute that it's on point.

THE CHAIR: Sorry, what was the reference in there?

MR WILLIAMS: Paragraph 22.

MR ALTY: Sorry, can I just ask the date of the Citizens Advice, the previous --

MR WILLIAMS: Yes, March 2016.

MR ALTY: Ah.

DR BISHOP: Paragraph 22 of --

MR WILLIAMS: Paragraph 22 of the claim form --

DR BISHOP: Oh, right.

MR WILLIAMS: -- refers to this Ofcom document.

DR BISHOP: I thought it was the PCR's report.

MR WILLIAMS: The point I'm making is the PCR relies on this document, which is a fairly good indicator that it's on point and the significance of this, as I said yesterday, it's not that consumers read these sort of publications, it's just part of this building picture. Although I will come back to that point when we look at what the PCR says in response to our application.

So, just to show you where the issue is addressed in this document, 207, there's a heading, "Key metrics" and then underneath that, "Pricing and bundling". So, bundling is obviously what we're interested in. If you look, three different types of services, mobile services, in the middle and in the middle of that box, "66 per cent of post-pay customers cover the cost of their handset within their contract but we estimate that over 1 million of these customers continue paying the full contract price after their contract ends".

THE CHAIR: Mm-hmm.

MR WILLIAMS: Then, if we could just look at a couple more references. On to 209, you'll see there's a heading at the bottom of the page numbered (3), "Consumers may not receive value ..." and the first paragraph under that heading is a different point about whether the device is more expensive under these sorts of contracts. But if you look at the second paragraph under that heading, on 210, which starts, "Additionally", you will see that it is our point.

THE CHAIR: Which page, sorry?

MR WILLIAMS: 210. Just over the page from that -- second paragraph on that page: "Additionally, Ofcom research shows that 6% of UK post-pay ... report paying their full monthly charge after the end of their contract ..."

So same point expressed in the same terms.

And then on to 227, there's a heading in the middle of the page on 227 which is, "Post-pay mobile services". And then on to 228, there's a bold heading about two-thirds of the way down, "We estimate over a million mobile users pay their full monthly charge after the end of their contract". And that makes the point, same point we've already seen, which is that customers are paying more than they need to when they could be paying a SIM-only service -- you see that in the first paragraph -- rather than switching to a SIM-only service.

And it is interesting to note in passing, the second paragraph under the heading: "Ofcom research suggests that nearly a fifth of post-pay mobile users are not aware that they can drop down to a cheaper tariff with their existing supplier once their contract ends."

So nearly a fifth aren't aware. That means that over 80 per cent are aware. So, what's going on, if they are aware. You can see from the first line in the first paragraph in that section:

"A further issue in post-pay tariffing is that unengaged consumers may continue to pay."

This is not obviously about what consumers could reasonably know, or indeed, what they do know, it is whether they're engaged or not; that's the concern.

MR ALTY: Can I just ask, what does "post-pay" mean in this context?

MR WILLIAMS: "Post-pay" means you pay a monthly -- you make a monthly payment for your contract at the end of the month, rather than it being a prepaid mobile service. Sorry, there is some jargon, I'm sorry about that.

The "unengaged consumers" is the point. And that's more relevant to Ms Demetriou's part of the argument but I just thought helpful to flag that as I went through.

We then get to the Citizens Advice press release, which is at 366, 20 October 2017, and as I mentioned yesterday, this is an important step because we can see that it

triggers a really significant wave of publicity, which I will show you.

You can see the heading, "Mobile phone networks overcharging loyal customers", so you can see the resonance with the way that the claim is now put in terms of loyalty penalties.

THE CHAIR: Just pausing there, Mr Williams, a point you made yesterday about the date of assessment. Date of assessment, in your part of the argument is October, isn't it?

MR WILLIAMS: Yes, so this is 20 October.

THE CHAIR: Yes.

MR WILLIAMS: And then there's press over the subsequent week or so. If you look at the index, you can see, but yes.

THE CHAIR: By the end of October.

MR WILLIAMS: End of October.

THE CHAIR: And just to clarify the position in the Second Application, despite the fact you're saying that the date of assessment is the end of October, you're only actually insisting in your argument, as it were, until March. There's a date in March, and --

MR WILLIAMS: That's because of the temporal scope of the Limitation Act --

THE CHAIR: Yes.

MR WILLIAMS: -- and Northern Irish legislation. There was a disconnect between the dates.

THE CHAIR: So essentially, you're saying although you could assess it right up to October of 2017, you're only actually insisting on the argument to March of 2017 or reserving your position or what's --

MR WILLIAMS: Well, there are -- sorry. There's a potential issue about which is that --

THE CHAIR: The application, I checked this last night, which is why I'm asking the question.

MR WILLIAMS: The application is clearly up to that date.

THE CHAIR: Yes. So, insofar as you're seeking orders from this Tribunal, it's March.

MR WILLIAMS: Yes.

THE CHAIR: That's right.

MR WILLIAMS: Yes, that's right. Yes, yes, yes. Yes, exactly, it's all to do with the date of damage. That's the point. You can cut off on the date of damage in March. But because of the applicable rules, one looks to whether the claim was discoverable six years before the date of issue. Yes. I think the Tribunal has the point that the relevant date is November, it's the end of November.

THE CHAIR: For assessment?

MR WILLIAMS: Yes. So, we say it was in the public domain by the end of October which is before the date at the end of November, which is six years before the claim. That's how it fits together.

THE CHAIR: Yes.

MR WILLIAMS: I don't know if the Tribunal has looked at this news release previously. It's an important document and it might be worth you just -- I'm going to take you through a couple of the notes to editors, but if you want to cast your eye over it down to the notes to editors, and then we can look at those together.

THE CHAIR: Yes.

MR WILLIAMS: It's at 366. (Pause)

So, I can cut the submissions a bit short because of the hand up, but having read it, you will see the correspondence between what the PCR says and what Citizens Advice are saying. Essentially, it's a rerun of the Which? press release in substance, and on points A, B and C, it's very similar to the Which? press release. It makes the point that the payments under the contract continue after the minimum term unless the customer switches; the level of the payments isn't reduced after the minimum term

even though it's said the phone has been paid off; and the handset is covered by the payments over the minimum term so that consumers are paying for the phone again. Same complaint. So, it's all clearly covered.

But I do want to highlight what we say about 24(d) of the skeleton, which is the SIM-only rates were available. If you look in the middle of the first page of the release, you can see it says, "The extra cost", can you see that paragraph? "The extra cost can be as much as £38 a month on iPhone 7" and then "for the iPhone 8 separate analysis ..."

So, that's kind of the headline overcharge according to Citizens Advice. But if you then look at footnotes 1 and 2, I'd just ask you to read those because it's really quite significant. (Pause)

So, you can see footnote 1 uses the language of loyalty penalties, so we're absolutely squarely in the PCR's claim. More specifically, we can see that the method used to derive the headline overcharges is a comparison with a sample of SIM-only rates, which is exactly the way the PCR puts the case. It's exactly the paragraph 24(d) point.

I hope that makes good the point I made yesterday as to why there's no tension between my submission and Mr Kennelly's submission because this is publicising the position the PCR takes, that customers are suffering an overcharge based on a broad comparison with available SIM-only rates. It may be that when you get into it, things are more complicated than that, but this is the factual basis for the PCR's claim, and this publicity is alerting consumers to the very point that the PCR takes.

So, we say it really could not be clearer that this is the same complaint as the PCR makes and if consumers were really somehow in the dark about the effect of their contracts, then this publicity is very much switching the light on for them.

Now, what one then --

MR ALTY: I just want to ask a question.

THE CHAIR: Yes.

MR ALTY: I mean, it's really going back to your point about customers who are unengaged and customers who are not aware and how you define the difference between them.

MR WILLIAMS: Well, my application -- that was an observation on the way through. My observation is that this material is reasonably discoverable. What I think Ofcom was referring to when it talked about unengaged customers were customers of whom many knew that there were cheaper deals available, but they just didn't get around to switching their contract. So, a customer who doesn't act on the fact that there is a better value deal available for them, such a customer isn't engaging with the offers available on the market, but that's got nothing to do with what they know or what's reasonably discoverable by them.

THE CHAIR: Okay. Thank you.

MR WILLIAMS: So, what one then sees, from tabs 110 to 168 of this bundle, is that this story gained real traction and there was substantial media coverage and commentary. It all dates from, as I said, that week at the end of October 2017. The press as good as reproduces the Citizens Advice press release, I mean, shamelessly so in some instances, sort of cut and paste in places.

They all refer back to Citizens Advice as the source of the story, and they quote Gillian Guy. So, if the consumer wanted to find the Citizens Advice press release, they could do that, although the articles gave them the same content and were perfectly clear by themselves.

I can't show you everything, but I'm going to show you a couple of examples in a bit of detail and then give you a map through the material. If you look at the material, in due course, you will see that the various stories are very similar and the main point of looking at more examples is to get an idea of the scope of the coverage, not because

it's new content. In fact, even if you look down the index to bundle E, once you've got a flavour for it, you can see the scope of it.

So, on page 372, this is the trusted BBC, "Mobile companies overcharging customers after contracts end". That's the headline. If you read the paragraph in bold at the top of 373, the same message again, "after the cost of the handset has been paid off". Second paragraph:

"Citizens Advice found that customers who do not take out a new contract are paying an average £22 a month extra."

Then, interestingly, if you look at the middle of the page, you see in bold, "Who's affected and what can you do?" It says:

"Anyone who purchased a mobile deal with the operators Three, Vodafone or EE, which included a handset, is being overcharged when their contract comes to an end."

Anyone. As you know, we don't accept that, but this is what consumers are being told. Then, the second bullet under that heading clearly sets out the consumer's options:

"Ask their phone company to switch them to a cheaper SIM-only deal, or they can end the contract and find another provider."

Under that, there's a link which says, "The consumers who were overcharged". Do you see that? That's a link and I'm going to show you what that links to in just a minute. Over the page, that big heading "Exploiting consumers" and then under that, the quotes from Citizens Advice and the overcharge figures that we saw in the press release.

So, that's one example. If you then turn over to --

THE CHAIR: Can I just ask on that, the third bullet there that says, "No one is automatically entitled to compensation"? I think the word there is automatically.

MR WILLIAMS: So, if one -- I mean, obviously there are consumer affairs situations where rulings are issued and consumers have an entitlement, but it's saying that that's

not the situation. But in terms of the facts that are giving rise to the complaint, they're very clear.

So, on to 379, 20 October, it's linked to the last article: "Mobile phone charges: 'I didn't think I could complain'." What we see over the page on 380 and 381, is some reactions from BBC news readers, so these are proposed class members. There are five stories from 380 to 81. The last one is a positive story, possibly for balance, although I'm bound to say the overall effect is not very balanced. If you just look at the first one as an example, which is "Luis in London via WhatsApp". Have a read of that to get a flavour of what this is.

THE CHAIR: Yes.

MR WILLIAMS: So, I would ask the Tribunal to look at the rest in due course if you would, but what we take from this is first of all, there are consumers who did work out the issue for themselves, so there's clearly going to be a limitation defence in at least some cases.

I'm not sure we can plead to the position of Luis in London specifically, not knowing Luis's surname, but it's a good illustration of the general point we make.

Secondly, for present purposes, if there were any consumers who hadn't appreciated the impact of these arrangements, which is what the PCR says, you can see this story is prompting a reaction -- this coverage is prompting a reaction from consumers and it's resulting in publicity which is unpacking the position for them and we see the concerns expressed in consumers' own words. So, that's that document.

Now, the material in this part of the case is quite repetitive, so I'm just going to ask you to turn through the bundle, if you may, just so I can show you, but I'm not going to ask you to read things, as we stand here.

If we could just go back to 358 first, because I think MailOnline got a tip off because this story is dated 19 October which is the day before the news release. This is from

the "This Is Money" section, and the heading, it's pretty attention-grabbing, I think it says at the top:

"Are you one of the mobile customers 'routinely' overcharged at the end of a contract? Here's how to beat the trap."

So, when I talk about consumer-facing language, this is the sort of thing I'm referring to. The content is then the same as the Citizens Advice news release. But then interestingly, if you look at the last section, which is on page 359, halfway down the page, "how to beat the mobile trap", it's a very, very clear guidance on what consumers need to do: they need to switch, they need to find a SIM-only deal. That's how to avoid what's said to be an overpayment.

So, if we could then turn through to 362, we see The Independent. If we turn on again to 404, we see the Mail Online again. That was the "This Is Money" section; this is now the Consumer Affairs editor. So, it's been covered in two different aspects of the paper now.

Heading here is a different heading:

"Mobile giants are charging customers up to £46 a month for handsets they already own."

The text of this is corrupted; we've got better copies if you'd like it, but it is legible, the text. But sir, we can hand them up a bit later on or now, if that's helpful, just so that you've got them.

THE CHAIR: Yes.

MR WILLIAMS: But otherwise, it's the same story as before.

Anyway, on to 409, we've got the Daily Mirror, heading "£38-a-month mobile rip-off". We don't accept it's a rip-off, but consumers are being told it's a rip-off.

421, ITV. For your note, there's also Sky News on 471. So, we've got BBC, ITV, Sky News, major news providers across a range of channels, and that's why I made the

point yesterday that it's a pretty strong likelihood that there was also television coverage, but I can't prove that.

434, when the Tribunal is ready, is the Manchester Evening News, heading:

"How mobile phone companies are ripping you off for being loyal customers; Staying on your current contract [et cetera, et cetera]."

It's all very vivid. I've just highlighted this as one example of regional news, but there were many of them as you'll see when you look at the index. We've got the Liverpool Echo, we've got Somerset Live, we've got Lincolnshire Live, we've got the Birmingham Mail and so on and so on. So, significant coverage in regional media.

Over the page, we've got Metro, which is in one sense a regional paper, it's focused on London, but obviously it's handed out for free. I discovered when preparing for today that in fact, at around this time, Metro crossed over with the Sun for being the largest circulation of any paper. I'm sorry to give evidence about that, but I thought it was interesting to see that Metro really is a significant channel of distribution.

On to 454, a slightly different example, we see Martin Lewis, the Money Saving Expert, top left. Do the members of the Tribunal know who Martin Lewis is?

THE CHAIR: Yes.

MR WILLIAMS: So, this is his website. It's a consumer affairs website, you know, often focused on financial products with mobile phone contracts falling broadly into that category. He is covering the story too or his website's covering the story too. My copy is upside down, I don't know if yours is, so sorry about that. It's just that pages, 455 to 456. If the Tribunal would like us to sort that out, we can do that, but I think you get the gist.

480, The Guardian.

THE CHAIR: Would I be right in understanding, Mr Williams, that essentially -- I think you've said this, but just to confirm my understanding -- all of this media that we've

been looking at which post-dates the Citizens Advice publication on 20 October essentially is just cribbing and repeating.

MR WILLIAMS: Yes. No, it is, exactly.

THE CHAIR: So, you're showing it to us to show that it's --

MR WILLIAMS: Yes, exactly. It's the circulation of the story, exactly, rather than the content.

THE CHAIR: Okay.

MR WILLIAMS: So, Guardian, 480, and obviously different news sources have different audiences, but you can see the range here, you know, different newspapers, different websites, different types of websites is another point I'm making.

496 is The Sun, with not one but two pictures of Matt Hancock who was the relevant minister at the time, the Digital Minister. As I said, this is around the time when The Sun was still just about the most read newspaper, although Metro was crossing over.

505 is The Telegraph, and 508 is The Times. 546 is The Sunday Times.

THE CHAIR: Thank you.

MR WILLIAMS: Then interspersed with all that mainstream coverage, we've got various consumer technology and industry-focused websites like Trusted Reviews at 512, TechRadar at 543. There are too many to show the Tribunal; there are too many even to mention.

Then, we have some transcripts of radio news -- who knew you could do this six years after the event, but you can. Now, these transcripts, they're not perfect because they're computer generated, but you can get the picture. 598, we've got Radio 2.

Just so that you know where to look in this sort of stream of consciousness with no punctuation, if you go down to the line that starts "successful conclusion", I think the coverage starts with, "It emerged that millions of mobile phone users", which is, I think, line 7-ish. It starts "successful conclusion" at the beginning of the line and then there's

a sort of chunk of text and I think it ends with the words "sharp practice" at line 15.

THE CHAIR: Yes.

MR WILLIAMS: Then one more example of this sort is at 603. This is Radio 5 Live, the date 20 October. I should have said, it was the same date for Radio 2. On 5 Live, if you look down -- I was going to say by the hole punch, but you probably don't have a hole punch -- it's about two thirds of the way down, "loads of people" is where it starts at the beginning of the line. "Loads of people being overcharged." Then actually, the whole of the rest of that is a little feature because there's an interview with the Daily Telegraph's consumer affairs editor and then there's a discussion of the issue. So, it's pretty fulsome. That's radio coverage and I am getting to the end now, I promise.

Finally, print copies of newspapers. As I said earlier on, these have been a bit harder to get hold of, but we've got a significant number. These are at the end of this bundle starting at 730, which is tab 2 in the hard copy. I will ask you to just turn through these, if you don't mind.

THE CHAIR: 730?

MR WILLIAMS: 730, yes. So, the first one is a Daily Mail article, which you can see it's got a different heading, "Mobile phone contracts con". It is basically the same story; it's written by the consumer affairs editor so I think it's the same story, but you can see that the content is presented slightly differently. Obviously, we don't accept it's a con, but that's a different matter.

And then 731, front page of The Telegraph, "Millions charged too much for mobiles", which I think is a really good measure, in my submission, of the fact that this is a story with a high profile at this point in time. Anyone who walked into a newsagents might have seen that headline.

THE CHAIR: This is also the 20th October 2017?.

MR WILLIAMS: I think people still walked into newsagents in 2017. And then 733 is

The Sun. "Mobile phones rip-off: Overcharged £450". 734, bottom left, is The Times and 735 bottom left is The Guardian.

So, the Tribunal can see that the issue had comprehensive coverage across multiple media. I made my submissions yesterday about the combined effect of that publicity and I'm not going to repeat that now, but I hope the Tribunal can see why we say that if there was any issue about concealment, it can't seriously be said that this issue wasn't reasonably discoverable by consumers by October 2017. If this issue wasn't reasonably discoverable by that date, it's hard to see what could ever be good enough by way of publicity to set time running in a consumer case like this.

There is one more point, which is that we do ask rhetorically, how is this issue going to look different at trial? The Tribunal has got a clear picture of the evidence going to the question of reasonable discoverability in the way that we put it. It's all a matter of record, and there has to be a high probability that if the Tribunal were to leave the point over, we would just end up back where we are now, having spent some years litigating the point and going back through all the same evidence at trial.

There was a preliminary issue in *Merricks* on limitation, but the discoverability issue was determined principally on the documents in the same way that we're putting the case today. That's partly why we encourage the Tribunal to grasp the nettle today.

THE CHAIR: What was the point about *Merricks*?

MR WILLIAMS: In *Merricks*, it was a preliminary issue rather than a strike-out or summary judgment, so it was a trial.

THE CHAIR: Yes.

MR WILLIAMS: But when it actually came to how the issue was tried, it was tried essentially -- the discoverability issue, not the concealment issue -- by looking at the sort of material I'm showing you.

Final point before I turn to deal with the PCR's position. It is possible for the Second

Period Applicants to succeed in this application for a combination of the reasons that I've given and Ms Demetriou's reasons.

We say that both ways of putting the application are a complete answer in themselves, but you could find that there was no arguable concealment of some items of information and then that other items of information became discoverable based on these materials in any event. So, we say they both work on their own terms, but they could operate in combination. I just wanted to join the two arguments up in that way.

So, what is the PCR's response? The high watermark of its response to the application is paragraph 42 of the skeleton, which I just asked the Tribunal to look at. (Pause)

"... the mere fact that various complaints had been made to regulators about their pricing practices prior to that date ... was sufficient to put [them] on notice ..."

I mean, that doesn't begin to engage with the way we put the application; our case isn't based on the fact of complaints to regulators, it's based on an express spelling-out of the issue in a widespread multimedia campaign. So, there is, I'm afraid, a total lack of engagement with the way we've put the application.

But the PCR does have a positive case as to when time started to run, which we see in paragraphs 39 and 40 of the skeleton. There are two alternatives: the first is that time runs from the beginning of the claim because of the publicity around the fact of the proceedings, that's 39; and in 40, it's the publication of a CMA report.

So, it is common ground that the running of time has been triggered. The question for the Tribunal is what and why; what triggered it and why? We say there are obvious problems with both of the PCR's alternative cases, and they are both manifestly less plausible triggers for the discoverability of the facts than the mainstream media campaign that the Tribunal's seen.

The argument in paragraph 39, that time didn't run until the claim was brought, is hard to understand, in my submission. I make three points.

First of all, the claim is no more than the legal framing of facts, which had already been expressed in identical terms in the earlier press coverage. So, that's the first point.

Secondly, no explanation is given as to why the PCR had a unique ability to comprehend the facts and translate them to consumers, given the very clear and direct terms of the media coverage we've seen.

Thirdly, there's a logical problem with the argument, because the PCR seems to say that the relevant facts became discoverable as a result of media coverage of a claim based on the relevant facts, but not when there was direct media coverage of the facts themselves. We say, with respect, that really isn't a coherent position. Yes, and as I say, it's much more likely that consumers are going to encounter the sort of press and publicity that I've shown the Tribunal than publicity relating to a claim.

So that's the PCR's position on the first issue. The second way of putting the case is reliance on a CMA report from 2018. I think what's said about this is that it's a statement of a regulator, which gives it a different status. We say, well, if that's the right way of looking at it, then why doesn't the 2017 Ofcom report suffice? PCR can't have this point both ways, and we don't see what the answer to that point is.

I've made the point that the publicity that I've shown the Tribunal is obviously more discoverable by consumers than a CMA report published on its website, but the reality is that the CMA report is a reconsideration of the same issues as the previous material; it's just another stage in this story.

What we see, and I'll show you some references, is that it's expressly tied back to the previous materials, albeit with some updated calculations. It's not new content; it's not revealing new facts; it's certainly not revealing anything new in relation to the paragraph 24 points.

So, if you could look at bundle A, please, volume 2, tab 12, page 689. This is the report.

THE CHAIR: 689?

MR WILLIAMS: Yes. I mean, in one sense this is a reply point, but we've only got a very short --

THE CHAIR: Bundle A, which volume?

MR WILLIAMS: Bundle A, volume 2. It's a hard copy. Tab 12.

THE CHAIR: Tab 12.

MR WILLIAMS: It should be a blue page saying, "Tackling the loyalty penalty".

THE CHAIR: It's here, yes.

MR WILLIAMS: So, this is the document, it dates from December 2018, in response to a complaint made by Citizens Advice. I mean, the fact that it's a response to the complaint made by Citizens Advice sort of tells you all you need to know, because it's following through on the same point that we've already seen Citizens Advice are all over.

THE CHAIR: What's the significance -- I see it at the bottom it says 19 December 2018.

MR WILLIAMS: That's the date, sir, but the complaint is 28 December.

THE CHAIR: I see. The complaint is 28 December.

MR WILLIAMS: 28 December. Just to give you a few references, if you turn on to 704, you'll see paragraph 1.9 says:

"We examined a range of evidence. [Including] work and analysis undertaken by Citizens Advice."

Footnote 6 refers to "Hung up on the handset", which we've already looked at -- the last reference in that footnote. So, footnote 6, last reference in there.

THE CHAIR: The last --

MR WILLIAMS: It refers to a series of prior reports. The last one is "Hung up on the handset", which I showed the Tribunal.

THE CHAIR: Yes, sorry. Yes, yes.

MR WILLIAMS: Then if we turn on to 738, there is discussion of the "Size of the loyalty penalty". So, this is doing the calculations. If you then turn on from there to the top of 740, you can see that there are two calculations, one based on the way Citizens Advice looks at the issue and one based on the way Ofcom looks at the issue. If you look at the content, it's the same issue, it's just an updated -- we're talking about the size, here. So, they've got new calculations as at December 2018 about matters.

THE CHAIR: And that's in the table?

MR WILLIAMS: I'm sorry, in the top of the table, first row of the table.

THE CHAIR: Yes.

MR WILLIAMS: It's not a new point; it's a new calculation. Then on to 741, and paragraph 4.12.

THE CHAIR: Yes.

MR WILLIAMS: "In terms of the average price differential for those who pay a loyalty penalty, two estimates are similar."

And there's a reference to footnote 998, what Citizens Advice does to calculate this. You can see it's the same method we saw in the 2017 press release; they calculate the differential using SIM-only rates.

Finally, 748. (Pause)

THE CHAIR: Yes.

MR WILLIAMS: This is a slightly different point, because here the discussion is focused on vulnerable consumers, which I think you will have seen was covered in the Citizens Advice press release. This is just a "for completeness" point. If you look at footnote 121, that refers back to the October press release, so it's the same content again.

We say this isn't this new; this is just another report going over the same material -- the

same facts -- that were already very clearly out there.

So, that's our application, sir. (Pause)

Can I just take a moment? (Pause)

THE CHAIR: Yes.

MR WILLIAMS: Sorry. Mr Leith and Ms Demetriou remind me that I asked the rhetorical question how this would look different at trial, and I said it wouldn't.

THE CHAIR: Yes.

MR WILLIAMS: Paragraph 14 of our skeleton makes the point that, actually, if the PCR has a position about how this issue were to look different at trial and going to the question as to whether, in fact, this is a matter capable of disposal by summary judgment, then it's incumbent on the PCR to bring that case forward now. They can't just wave their hands and say this is an early stage; they've got to explain what they say is preventing the Tribunal from disposing of the issue now. That's paragraph 14 of our skeleton.

THE CHAIR: Yes.

MR WILLIAMS: So that just leaves the outstanding certification issue, which I'll deal with now. So, as I said on Monday, there is one further certification issue which only arises if you're not with Ms Demetriou and I on this application, and we're dealing with it here, I hope, for obvious reasons, because it follows on from the points we've been making about actual and constructive knowledge.

THE CHAIR: Yes.

MR WILLIAMS: It was originally framed in the application as "no common issue", but the real emphasis of the point isn't on whether the issue is common or not; it's a question of triability. I'm going to explain that now. It's the way we put it in the skeleton, but just to be totally clear.

The issue is this: these claims will only reach a resolution when all of the issues that

go to liability and quantum have been resolved. The Tribunal can't award aggregate damages until it's dealt with all issues, including the Defendant's defences, which -- you will now have the point -- will include limitation defences.

The Tribunal can already see that there are going to be limitation defences based on actual knowledge, because some consumers clearly did know about the issue before November 2017. I've shown you some examples. In those examples, the date of knowledge is the date on which the consumer in question became actually aware of the issue. There are obviously going to be examples beyond Luis.

Now, actual knowledge is inherently individual to each claimant. There is no substitute for knowing what the state of knowledge is, so clearly there are going to be claimant-specific issues about actual knowledge. We all know how this Tribunal relies heavily on the contribution of experts. But notwithstanding Dr Davis's many talents, he isn't going to be able to construct a statistical regression, which is going to tell you what the date of knowledge is for consumers across the country; this is a question of fact.

Depending on what the state of knowledge is, a given claimant within the class may have no claim at all, or they may have a time-limited claim. That issue arises hundreds and thousands of times over across the claims, so it's going to have to be addressed.

Now, in our application and our skeleton, we called limitation a "non-common issue". The PCR says, "Well, it is a common issue, but it's a common issue without a common answer". On reflection, the point is not whether this is a common issue or not, because we're not saying that the PCR hasn't identified common issues, which are in principle capable of certification. The point is, the point I've already made, that you can't decide what is recoverable; you can't award aggregate damages without knowing whether there is a limitation defence, who it applies to and from what date.

What this means is that the PCR needs a plan to apply the limitation defences. In our

skeleton, at paragraph 16, we've cited Mr Gutmann's case in the train tickets area in the Court of Appeal. That says that the PCR needs a methodology to raise the issues that he wants resolved, which ultimately go to questions of damages. This is what's often referred to now as the "blueprint to trial", and if I can show you one other authority which.

MR ALTY: Sorry, I didn't hear that last -- it's often referred to now as the what?

MR WILLIAMS: The blueprint. The blueprint to trial.

MR ALTY: Oh, I see.

MR WILLIAMS: If I could show you one other helpful authority which the PCR cites in its response, which is Gormsen 2, this is authorities 87 at 2671.

THE CHAIR: Sorry, which tab?

MR WILLIAMS: 87. Actually a footnote 11. As I say, the PCR quotes this footnote in its response, because it is illuminating. If you just read footnote 11. (Pause)

First point is: the question is, is this a point being taken by the respondent; is it a point that needs to be grappled with? We say very clearly, yes, it does need to be grappled with. It's a point we've squarely raised.

So, the question arises: is there an insurmountable, in case management terms, barrier to an orderly trial? So, the PCR needs to show as part of its method, as part of its blueprint, that these trials, these claims, can be tried in an orderly way in collective proceedings. If they can't be sensibly resolved on a collective basis, then they're not suitable to be brought in collective proceedings under Rule 79(1)(c). That's how we put it in paragraph 45 of our skeleton, and that's the point I'm making.

Now, Ms Demetriou showed you paragraph 43 of the PCR's skeleton yesterday, which says that it's for us to plead that case. Now, that is wrong in law, as Ms Demetriou showed you when she showed you *Canada Square*; the burden of pleading is on the PCR. The PCR has to allege a lack of knowledge and a lack of reasonable

discoverability. The PCR, it seems to us at the moment, can't do that when he has no idea which class members actually knew the relevant facts, and when they knew them. So, what we say is that the onus is on the PCR to say how this issue is going to be addressed, in a way that grapples with the limitation defence, and in a way that's not going to lead to systemic over-recovery, which seems to be the current idea, that a limitation defence is sidelined unless we can tell the PCR exactly who knew what when.

The problem is obviously most acute for actual knowledge, because actual knowledge is inherently individual. As far as constructive knowledge is concerned, we've put our application today on the basis that there is a simple answer to constructive knowledge, that applies to the whole class, but for the purposes of this argument, I'm assuming we're wrong about that. So, if we are wrong, how is it going to work? If you've got the PCR's certification skeleton, not their limitation skeleton.

THE CHAIR: That is in the A bundle, is it? Oh, it's in the B bundle, sorry.

MR WILLIAMS: Is it tab 2?

THE CHAIR: Yes.

MR THOMPSON: I'm sorry to rise, but there does seem to be some shifting of position. There was some reference to how Mr Williams put it in his skeleton argument, but I'm lost, really, as to which skeleton argument he's talking about.

MR WILLIAMS: I'm sorry, Mr Thompson's dealt with it in his certification skeleton, we've dealt with it in our limitation skeleton. It's paragraph 45 of our second period skeleton.

MR THOMPSON: This isn't a change of position from --

THE CHAIR: Well, Mr Thompson, why don't I hear what Mr Williams has to say?

MR THOMPSON: Yes, I just wanted to know what it is that I'm listening to.

THE CHAIR: Yes.

MR WILLIAMS: You're listening to what I'm saying. It's in paragraph 45 of our second period skeleton.

THE CHAIR: So, you say this is your argument in paragraph 45 of your second --

MR WILLIAMS: Second period skeleton.

THE CHAIR: Yes.

MR WILLIAMS: Do you want to look at that now?

DR BISHOP: Could you give us a page reference? Just so we're all on the same page.

THE CHAIR: Why don't we start there, and then we can go back.

DR BISHOP: There are four or five skeletons, here.

MR WILLIAMS: Yes, I know.

DR BISHOP: So, it's a bit confusing.

MR WILLIAMS: I'm sorry.

DR BISHOP: There are pages, however, which are unique to --

MR WILLIAMS: Page 17 of --

DR BISHOP: Of the bundle?

MR WILLIAMS: -- our second period skeleton.

DR BISHOP: Can you give me the bundle reference?

MR WILLIAMS: Page 107.

DR BISHOP: 107.

THE CHAIR: Yes, just the last paragraph.

MR WILLIAMS: It's the final paragraph. (Pause)

THE CHAIR: Yes.

MR WILLIAMS: That tied back into paragraph 16 -- you don't need to look at it now, but that's where we set out suitability and common issues, and we refer to Mr Gutmann's case in the Court of Appeal in London and South Eastern Railway.

So that's where we refer to the need for a methodology under the authorities.

THE CHAIR: Yes.

MR WILLIAMS: It just struck me that the authority the PCR cites, the Gormsen 2 case, that's also very on point, so I gave you that reference too.

THE CHAIR: Yes. Then you were about to take this to --

MR WILLIAMS: Paragraph 34 of the certification skeleton.

THE CHAIR: Of the PCR?

MR WILLIAMS: That was tab 2, page 13, paragraph 34(b). It's a short point.

THE CHAIR: Yes.

MR WILLIAMS: There's an allusion there to the idea that this issue can be dealt with by groups. We don't know what that means. It seems as that could raise another problem, which is how one ascertains -- if one is going to identify groups, can we query what those groups would be, how it would work, and what the idea is? Even if there were groups, you'd then need to work out who's in what group. So, it could just raise another individualised question, which it may or may not be possible to answer.

So, it seems to us, that there isn't a plan at the moment, and if there is one, it certainly hasn't been articulated. So, I mean, the submission is: it doesn't actually help consumers to spend millions of pounds on a trial dealing with market definition, dominance, abuse and quantum, if one can't then work out what's recoverable. If collective proceedings can't get you to an orderly resolution of the claims, then the claims aren't suitable for a collective proceeding, and to our eyes, the PCR hasn't shown that they are suitable for a collective proceeding, if we're wrong about the limitation application.

THE CHAIR: Yes.

MR WILLIAMS: Sir, unless I can assist the Tribunal further?

THE CHAIR: No, thank you. Thank you very much.

MR WILLIAMS: Thank you.

MR ALTY: Last point, which you've sort of linked to the limitation, but it's a wider point, presumably. It's not linked to a particular time frame, is it, whether you can identify individual knowledge and so forth?

MR WILLIAMS: Well, it relates particularly to a limitation regime in which state of knowledge is the relevant date for --

MR ALTY: It doesn't just arise before 2017, does it?

MR WILLIAMS: It doesn't arise?

MR ALTY: It's a general point about whether you can certify the case; I'm just trying to understand whether you're making it about the --

MR WILLIAMS: Oh, I see what you mean.

MR ALTY: Yes.

MR WILLIAMS: Well, the point applies to any proportion of the claim in relation to which there is a limitation defence based on a date of knowledge.

MR ALTY: Right.

MR WILLIAMS: I think that's the way we put it, if you look back at the end of paragraph 45 of the skeleton, it refers to those parts of the claim that should be refused.

MR ALTY: Right.

MR WILLIAMS: I can't say that you can't certify a part of the claim where there's no knowledge-based limitation defence because --

MR ALTY: Right (overspeaking).

MR WILLIAMS: -- (overspeaking) ongoing triability, because the issue wouldn't arise. I mean, the only other point I should make is there are another set of limitation rules which we haven't looked at, which potentially apply from March. Date of knowledge does come into that equation, and we aren't dealing with that today. The focus is on

the Limitation Act, but that's one other issue we could conceivably need to come back to.

MR ALTY: Thank you.

THE CHAIR: Well, thank you very much. What we will do now is -- no -- what I was going to say -- I don't know if this cuts across what you were going to suggest, Mr Thompson, was that we would take the break now.

MR THOMPSON: I haven't looked at my watch, but I thought you were going to say that I had to speak, but if we're going to take a break, that's (inaudible).

THE CHAIR: You're not going to object to that. Excellent. Well, we will take the break now and start again in ten or so minutes, thank you.

(11.42 am)

(A short break)

(12.01 pm)

Submissions by MR THOMPSON

MR THOMPSON: Good morning, again.

THE CHAIR: Good morning, Mr Thompson.

MR THOMPSON: Another day, another issue.

THE CHAIR: Yes.

MR THOMPSON: The Second-Period Application, which is what we're concerned with today, is an application by the three MNOs, other than O2, Mr Hoskins.

THE CHAIR: Can I just pause you for a moment? (Pause)

Sorry, do carry on.

MR THOMPSON: The three MNOs other than Mr Hoskins's clients.

THE CHAIR: Yes.

MR THOMPSON: I make that point just because at some points, both Ms Demetriou and Mr Williams appeared in some way to suggest that this was our application,

focused on a particular paragraph of our skeleton argument.

THE CHAIR: Yes.

MR THOMPSON: But it is their application to strike out, which has arisen in a rather curious form in a long letter from Slaughter and May dated 21 October 2024, which I don't think either Ms Demetriou or Mr Williams took you to. That's at tab 48 of bundle A.

THE CHAIR: The date of the letter was?

MR WILLIAMS: 21 October 2024. It's part of that letter. The letter starts at page 2300, and then there's a description of the law, and then the application starts under the heading, "The Present Application", paragraph 22 at page 2305, and then runs through to -- It's not entirely clear where it ends. I think it ends at paragraph 39. Then there are the two other points that were dealt with; the last one about what is now -- I think, not the common issue point -- but the methodology point that Mr Williams was talking about.

Then there's a sort of "bonus ball" element at paragraphs 42 to 45, which is the point that if I were to win yesterday's battle, they would then say that they could win the limitation point on the substance, going back beyond 2015.

THE CHAIR: Yes.

MR THOMPSON: So, in a sense it's got three limbs, although one limb is much bigger than the others.

As I noted on Monday, this application doesn't raise issues of Scottish law and is not pursued by Mr Hoskins's clients.

THE CHAIR: Yes.

MR THOMPSON: However, I will refer to either the Proposed Defendants or MNOs for simplicity, with no disrespect to Mr Hoskins. Of course, in respect of any overlapping issues with certification, O2 is also included in my remarks. Again, I'll

focus on the Limitation Act without any disrespect to Northern Irish members of the proposed class.

THE CHAIR: Yes.

MR THOMPSON: So, we submit in outline that the first and third application should be dismissed -- by which I mean the main application and the fallback application, or the bonus application -- and that the proposal in the Second Application should be rejected, insofar as it's now raised as an objection to certification.

We raised it in its original form in our certification skeleton at paragraphs 31 to 35, which is at bundle B, tab two, pages 12 to 13. (Pause)

THE CHAIR: This is the certification issue.

MR THOMPSON: I thought we could get that out of the way straight away.

THE CHAIR: Yes.

MR THOMPSON: As I understand it, it's now shrunk. I think tacitly, maybe, Mr Williams accepted the force of the first point that different answers are acceptable as long as the question is the same. But he now challenges, I think, our second point, which is that in practice, we don't think, in a collective case, involving aggregate damages, it's at all likely -- any more than we would get into individual assessments of damages -- that we would get into individual assessments of states of mind.

Our submission would be that that's the same as in the High Court; that it is an objective standard, tailored to the specific circumstances of the relevant person. If we're talking about sticky customers, then the Tribunal would have to reach a view -- and indeed, I think some of Mr Williams's submissions himself this morning were to that effect -- that what could you expect of particulars? I think Mr Alty also raised it with Mr Williams.

So, we think in reality, a relatively pragmatic approach would be taken once the evidence was properly before the Tribunal. We don't think there would be any need

for PCM-by-PCM analysis.

In our submission, this is, in fact, a particularly good example of the tension in the Defendant's position, whereby issues that they say are very easy when they go one way suddenly become very difficult when they go the other, because I think Mr Williams was making some fairly generic submissions about the impact of reading certain press articles, but he suddenly says, "Oh, no, it'd be very difficult, you'd have to have a person-by-person –"

THE CHAIR: I think to be fair to Mr Williams, he said, "Well, that's if you're against me on this argument". I think the point that can be made is that the Tribunal might reach the view that we can't decide that he's right now, but we might decide he's right later. So, in other words, we can't decide it as a strike-out summary judgment issue, but we might well decide, having heard evidence, that he's right about it after, or at some stage once the proceedings proceed.

MR THOMPSON: Well, for present purposes, that's fine --

THE CHAIR: Yes, indeed.

MR THOMPSON: -- as far as I'm concerned. It's just I hope this application will come back another day and do it properly. But that's not an issue --

THE CHAIR: I mean, for your present purposes, that would be enough for you?

MR THOMPSON: Yes.

THE CHAIR: Yes.

MR THOMPSON: So, I was going to deal, first of all, with the main thrust of the applications, effectively separate applications, presented to the Tribunal, which correspond, in fact, to two sections of the letter. So, I've got no objection from that point of view. Then I've some remarks about the factual context in which this issue arises. Then the relevant legal issues as we see them, which then would lead into a mix of issues of law and fact about the different parts of section 32 of the Limitation

Act. If time allows, I'll say something more briefly about the tension issues that have cropped up from time to time.

So, starting first with the main thrust of the application, as we understand it, the main application as they appeared in the submissions of Ms Demetriou yesterday and today. They split their submissions into two parts, reflecting the structure of the Slaughter and May letter. Ms Demetriou made some submissions on the law, and on the first element of the first application -- deliberately concealed facts -- whereas Mr Williams addressed the other issues raised in the letter, and in particular notice, and what could have been known when.

I'll make some comments on the law below, but I will first address the substance of their respective submissions. Ms Demetriou's area, corresponding to paragraphs 30 to 33 of the application itself, which is at pages 2307 to 9, addresses the issues raised in those paragraphs, asserting that the core commercial terms of the contracts offered by the MNOs were sufficient in themselves to put the PCMs on notice of the material facts needed to bring proceedings against the MNOs.

Paragraphs 34 to 39 in the letter were addressed by Mr Williams. That's at pages 2309 to 2315. He asserted that various media reports, between 2015 and 2017, were sufficient to put all PCMs on notice of facts, sufficient to put them on inquiry about possible proceedings. In oral submissions yesterday, and to some extent, also today, he appeared to rely primarily on media materials, conveniently, perhaps, from just before November 2017, which is, from his perspective, the cut-off date for limitation.

In response, the PCR submits, in summary, that Ms Demetriou's core commercial terms are wholly inadequate to reflect the essential facts on which a potential claimant PCM would rely. Indeed, they clearly omit the core allegation on which the claim is founded, as elaborated at paragraph 24 of the PCR's skeleton, which has obviously become like a sort of holy grail for Mr Williams and Ms Demetriou. But it is just

a skeleton argument.

We would say that the core allegation in the claim form is that for many years, the MNOs, and in particular these three MNOs' CHA contracts, concealed the fact from users that, at the end of the minimum term, the Defendants continued to include charges based on the capital costs of the handset, agreed at the start of the contract, for an indefinite period after the handset had already been paid for during the minimum term, thereby allowing the MNOs to charge excessive prices for the airtime services they in fact supplied under those contracts, again for an indefinite period.

We would say that that was a particularly gross form of a "something for nothing" abuse. Contrary to Ms Demetriou's submissions, the alleged abuse, which for the purposes of the present hearing at least, the Proposed Defendants accept is arguable, is closely analogous to the position of Mrs Potter in the *Canada Square* case that Ms Demetriou took you to, where she found that she was paying concealed commission charges until she was advised by lawyers very shortly before she commenced proceedings. We noted the similarities -- I don't think we need to turn it up -- at paragraphs 44 to 46 of our skeleton argument, which is at tab five, I think, B5, page 60.

THE CHAIR: Yes.

MR THOMPSON: We say that it also bears a resemblance, at least a generic resemblance, to the Boundary Fares abuse, whereby passengers are charged twice for journeys within their Travelcard zone. Against that, in that context, we say that the MNOs' description of the core commercial terms is completely inadequate. One sees that, for example, at paragraphs 18 and 20 of their skeleton argument, which is at bundle B, tab 6, and in particular at paragraph 18.

The two core commercial terms, which are used as a term of art, are that each CHA contract had a minimum term, and each CHA contract provided for periodic, typically

monthly, payments. In my submission, that does not lead anyone to think that anything like the alleged abuse is going on; identifying those two features would not have enabled them to identify the concealed abusive practice, or to bring a claim.

THE CHAIR: Could you help us, Mr Thompson, just by flicking your finger -- I think you've kind of touched on it, but just as we're right here, what is it you say a PCM would need to know beyond that? Because clearly, they would need to know those two things, but I take it you're not arguing that -- they would know there was a minimum term, and they would know they were making monthly payments.

MR THOMPSON: Yes.

THE CHAIR: Yes, but so what's the difference, as it were, between paragraph 18 in this skeleton and paragraph -- and I take your point about paragraph 24 in your skeleton, is just your skeleton, but it's been used as a useful summary.

MR THOMPSON: Yes, I will come to it, but --

THE CHAIR: Just to pin down what you say specifically is the difference; what's the gulf that --

MR THOMPSON: What is concealed, I mean, what's everyone been complaining about?

THE CHAIR: Yes.

MR THOMPSON: I tried to articulate it a moment ago, but I'll try again. The complaint is that -- you may recall, I was going to come to this. There was an exchange yesterday about free phones.

THE CHAIR: Yes.

MR THOMPSON: Slightly surprisingly to me, Ms Demetriou made a virtue of that, that the advertisements were for free phones, and the price was given for this free phone. But what was not said was that the downside of the free phone was that there's no such thing as a free phone any more than a free lunch, that you pay a higher monthly

charge from the start. You might think, well, fair enough, but what's not said is that -- imagine yourself two years down the track, what's going to happen?

You might think, as if you took out a higher purchase on a car, once you'd paid for the car, the higher purchase payments would stop. Likewise, if you have a mortgage, once you've paid the mortgage, the mortgage payments stop. What they don't tell you is that under this regime, the payments don't stop; you just go on paying the same thing, effectively forever. So, you end up paying the amortised cost, if that's the right way, or the interest-inclusive cost, which has been calculated for the minimum term, and then the boat just carries on. So, you effectively fall into a concealed trap at the end of the minimum term.

THE CHAIR: Just pinning it down, the fact that the payments are continuing is known. What's not known is that any part of the payment you're making is for the handset; is that right?

MR THOMPSON: Yes, yes.

THE CHAIR: Yes. Because to take your free phone example, let's say the person comes along, looks at the investment and says, "Right, great, I get a free phone, and I have to pay £30 every month, and it's got a minimum term, but if it's convenient to me, I can just carry on".

MR THOMPSON: Yes.

THE CHAIR: If they think the phone is free and they're paying their £30, just carry on doing that.

MR THOMPSON: Yes.

THE CHAIR: It turns out that actually the £30 was £15 for the phone and £15 for the air services.

MR THOMPSON: Yes.

THE CHAIR: That's the bit that's concealed; is that right? Do I understand that

correctly?

MR THOMPSON: Yes, and without giving evidence, I'm sure I'm not the only person who has on occasion had a split contract where you see it overtly, that the price of the phone, and you can even do a deal; if you want a £500 phone, you can pay the £500, or you can pay £100 and then your figures go up and down. But once it's paid, it stops. What's not made clear is that, under this system, they calculate it to repay the sum of the £200 over the 24 months, but if you don't do anything about it, it goes on forever and you carry on paying your monthly instalment forever. So, that's the oddity here.

DR BISHOP: I'm a bit bothered by this argument. It is ubiquitous in business and commerce for businesses to observe that consumers are frequently not very attentive and indeed whole businesses are almost based on that. Subscriptions to magazines are based on that. How do we know that -- you said that the price has been calculated to fully amortise the phone at the end of, say, two years. Is that right, really?

I mean, what I've observed in business and commerce over the years is that in this pre-market/aftermarket structure, you frequently get bidding down -- these mobile phone companies compete with one another. They all want to have the customer. They all want to have this aftermarket opportunity of high payments going on. This is ubiquitous. I mean, every lift or elevator is built on that basis. It's because of the maintenance contracts. Razors, you know? I mean, it's almost everything, consumer products that we have. Are you sure --

MR THOMPSON: I don't want to interrupt, but my basic submission, and it was a submission I was going to make anyway, that there's a risk that this application to strike out a response to a defence that hasn't been pleaded will mutate, in fact, into a Trojan horse for the substance of the case. I well imagine that, assuming --

DR BISHOP: I take your point; it shouldn't be for this proceeding. It's a matter of substance in the case and it's very complicated.

MR THOMPSON: I can well believe that you and Dr Davis will have some interesting conversations about how this is properly to be analysed from an economic point of view and what adjustments should be made.

At the moment, I'm making the point that it's not simply, "Oh, I've got a CHA contract, oh, I pay it monthly, therefore I'm going to sue EE". That doesn't make any sense. It's not the basis for our case. And the suggestion that, as long as you know that, you can then sue BT and EE or you're put on notice of inquiry, both that's wrong as a matter of law and it would make the entire edifice of the complaints that Mr Williams took some trouble to describe and the regulatory efforts that were made to address this, it would make them impossible to understand. In a way, that's the whole problem with this application.

I hesitate to call it victim shaming, but it's coming to something like that. It's basically saying this was all obvious, either because you just had to read the contract or because you just had to read the Daily Mail. But that's not really an answer when they're not challenging the substance of the application; they're not seeking to strike out the substance.

THE CHAIR: I'm not sure that's -- certainly I follow you in relation to the terms of the contract. I think that the question, not singling out the Daily Mail necessarily, but insofar as it becomes -- let's say, Mr Williams's submission could be taken as coming to the point of saying it's common knowledge, the content of the -- the high point of this submission, which is the Citizens Advice press release in October 2017. Does that not go to the question of discoverability? I'm not sure that's -- is that victim blaming?

MR THOMPSON: No, no, no, I'm not saying that it's not a legitimate point in itself.

THE CHAIR: Yes.

MR THOMPSON: I mean, to take the extreme point, the authors of that report and the

authors of the various press releases would probably be in some difficulties in saying that they had no understanding of the swindle, as I think it's uncharitably been described.

THE CHAIR: Yes.

MR THOMPSON: But what this is about is whether everybody should be prevented from bringing a claim because everybody was in that same frame of mind. I think there was a question from Mr Alty about sticky customers and the focus will be the people who weren't very alert, weren't necessarily analysing their contracts and weren't reading the newspapers. The question is whether those people should all be debarred on limitation grounds.

THE CHAIR: Yes.

MR THOMPSON: We would say that on a summary judgment basis, the MNOs certainly can't show that all potential class members with claims arising prior to November 2017 were put on notice to investigate facts relevant to their potential claims against the MNOs, either by the terms of the contracts themselves or by a selection of media reports circulating between 2015 and 2017. Of course, none of them that we've looked at were based on any sort of allegation of breaches of competition laws.

So, I'm not sure whether it's being said that this sort of material could have formed the basis on its own for coming to this Tribunal or whether BT and EE would have ridiculed any such application.

THE CHAIR: That's not the test, though, is it? I mean, the test comes to be, whether one's taking it from *FII* or *Canada Square* or wherever, that's the test you have to meet, not whether the Defendants think you have a good claim or not, because --

MR THOMPSON: No, I didn't mean it in that sense. It's that you wouldn't have -- and I think it's the first question you put to Ms Demetriou yesterday was that, "Is that really

right?" Because just to have a viable competition case, you've got to put that together as well. I'll come back to that in a moment by reference to *Gemalto* which was actually a case that Ms Demetriou relied on, but in my submission, it's dead against her in two respects. First of all, it wasn't a summary judgment case and secondly, the key issue was an investigation by the European Commission.

THE CHAIR: Yes.

MR THOMPSON: We say that the documents that the Defendants have themselves produced to bolster their letter obviously don't equate to specific evidence of the kind considered sufficient by the High Court and the Court of Appeal in *Gemalto*, where the court considered documentary and witness evidence from the claimant company that demonstrated that it had been fully aware of dawn raids by the Commission in 2009 and of a statement of objections alleging a cartel in 2013 when it had considered taking heavyweight competition law advice. So, *Gemalto* in my submission gives you very little assistance for the present case.

I don't want to get too dragged into too much of the press material that we looked at just now, but I think there are two points I'd make about it.

First of all, I wouldn't say that it was particularly uniform. The periods that were covered, I think, were April 2015, some press coverage; March 2016, a Citizens Advice report, and the passages we were taken to, particularly at page 350, appeared to record considerable confusion on the part of consumers rather than any certainty about what the position was, which in my submission goes rather against any suggestion that they were put on notice of a potential claim, whether a competition claim or otherwise.

Likewise, the Ofcom report in March 2017, although it does have some statistics, insofar as it is recording the state of mind of consumers, it seems to be recording a state of confusion. Even what I think your Lordship called the high watermark point

in October 2017, the Citizens Advice document of page 366, there's no mention of competition law and when it was reported in the BBC, the suggestion was that there was no, at least automatic, right to compensation. If we could just look at that page at E373.

THE CHAIR: E373?

MR THOMPSON: Yes, it's got two tabs, but the bulk of it is a single tab. Mr Williams took the Tribunal to this passage: "Who's affected and what can you do?" And I think Mr Alty raised with him, it says:

"No one is automatically entitled to compensation -- consumers can only make a claim if it wasn't made clear in their contract that the deal would continue at the same price." That's quite an obscure form of words to rely on to say that everybody must have known or been put on notice of a potential claim.

THE CHAIR: But that's a completely different basis of claim, isn't it, from the one you're advancing?

MR THOMPSON: Indeed. But that seems to be the nearest that it comes to any sort of advice that there might be a claim, which is pretty negative. If this is being relied on as telling consumers to get out there and sue BT for abuse of dominant position.

THE CHAIR: How do you reconcile, or what do you say in terms of the knowledge that the PCMs are required to have? Where do the facts end, and the law begins? Because Ms Demetriou and I discussed this yesterday and she made various arguments in that regard.

MR THOMPSON: Yes.

THE CHAIR: We talked about dominance, for example.

MR THOMPSON: Yes.

THE CHAIR: But I'm interested in understanding where you say the line should be drawn in terms of what you say is the facts that the PCM requires to know, equivalent

to being knocked down by a car?

MR WILLIAMS: Yes. Well, I think the difficulty which arises in this area is that it's so obviously very different from being run down by a car because you're talking about, quite apart from the collective aspect of it, even if it was an individual claim such as the *Royal Mail Trucks* claim, I think that lasted for 14 years going back to 1997. So, even for an individual, the claim can be quite complicated and so the borderlines between what you can and can't be expected to know, I think, are relatively complex. But when you come back to the fact that this is their application for a strike out. The fact that it raises complicated issues of fact and law is precisely what makes it completely unsuitable for a strike out, because none of this has been defined. All we've had is a solicitor's letter, and we now find ourselves in front of the Tribunal and getting dragged into questions which are quite difficult, and which would certainly warrant carefully-considered pleadings on both sides. We don't know what Mr Hoskins thinks about the substance of it. We don't know what each of the individual firms think about the substance of it, or how we might respond to each of them. So, you know, it's full of reasons why this is a very unsuitable case for a strike out.

Can I just show you the other point I was going to take you to, that inevitably, from Mr Williams's point of view, he was focusing on what information was getting through to consumers that looked a bit like the sort of things we're complaining about.

But I think it's also relevant to look at what Vodafone itself was saying in response. You see that just in a convenient form on page 373. There's a reference to Mr Hancock, but then there's a reference to Vodafone:

"Vodafone told the BBC it strives to give customers 'the price plan that best suits them. Wherever possible, we contact customers nearing the end of their contract to offer them a range of options. These include being able to upgrade their handset, receiving an extra allowance to enhance their existing plan, or if they at any time to discuss the

range of options available should they wish to change their plan with us.'

And EE commented: 'Separating phone and tariff doesn't always represent the best deal for consumers, it can sometimes result in them paying more.'"

Then O2 makes a comment as well, but O2 is more negative.

But in my submission, that further illustrates the fact that when you look at the reality of the situation, it's far from clear what consumers were being told because they were not only watching the BBC or reading the newspapers, but they were also in direct contact with their phone companies who no doubt were saying things like this, not only to them but also to the regulators. So, it's a far from clear picture of what was being told. All we've got here is some gobbets which no doubt some industrious lawyers have found by trawling the internet, but it may or may not give an accurate account of what proposed class members were seeing even in October 2017.

So, in my submission, it's not that this is a counsel of despair and that it all becomes incredibly granular and complicated, but that the parties need to define what it is they're arguing about by pleadings and then, under the auspices of the Tribunal, if this is hived off as a separate issue as it has been in Merricks, then we think about what's the best way to determine the issue and then we do it properly. What we don't do is just turn up like this and argue about a letter and some exhibits to that letter prepared by the applicants.

There's a further aspect which I think I might as well deal with now, what I've called the third application, the default application if I were to win in relation to Mr Hoskins's arguments and the May application, and we say that that application should be dismissed in any event.

It's not supported by any evidence at all and even if the Tribunal were to find, contrary to my main submissions, that every PCM suffering loss between October 2015 and March 2017 would have been put sufficiently on notice of a possible competition law

claim as a result of Mr Williams's media reports, in particular the ones in October 2017 which we deny, we say that wouldn't be sufficient to justify the same conclusion for PCMs who'd suffered loss at an earlier stage.

For example, a PCM, might or might not be an elderly PCM, who suffered loss by sticking to a high-priced contract from, say, 2009 to 2012, would not be likely to have been put on notice to investigate a possible competition law claim in respect of that loss by media reports three or five years later. We say that's certainly not a matter that suitable for determination on a summary basis.

We also say that the context for the prospects of these arguments being determined on a summary basis needs to be looked at in the light of other materials which are in front of the Tribunal, in particular those we cite at paragraph 29 of our skeleton, which is paragraph 23 of the, for example, Vodafone claim form, which is at bundle A tab 1. The passage we rely on, as it happens, in our skeleton argument is from 26 September 2018 which is full of explanations of how consumers are confused. So, in the second paragraph --

THE CHAIR: Page?

MR THOMPSON: I'm sorry, it's page 11 of bundle A, tab 1. In the second paragraph: "People often don't understand their options. Some consumers do not understand what coming to the end of their minimum contract means and they are unaware of the options, savings, or benefits available to them."

In Ms Demetriou's and Mr Williams's world, while that might be true, you'd think that Ofcom would be saying, "More fool them, they should have been reading the newspapers in October 2017". But that's not the case.

I think it's when we look at a file of extracts from the internet all about the same topic, it may seem that that's something that everyone was doing, but that's certainly not how the regulator who investigated this matter repeatedly over an extended period dealt

with it. In my submission, it would be a very extraordinary thing to say that that's how they should have done it on a summary basis on the basis of evidence that's been put forward by the applicant itself. In my submission, that in itself is completely inconsistent with both the bases on which the MNOs rely for their application for summary judgment.

THE CHAIR: So, in short, you're saying because, in this instance in 2018 Ofcom are looking at the market and saying people don't understand what's going on, you say, how could we, the Tribunal, conclude on a summary basis that actually they ought to have known, or they did know.

MR THOMPSON: Everyone was on notice. The implications of the core commercial terms, which we say are not at all clear on their face and that they should all have been carrying their Citizens Advice banners and getting ready to litigate them but it's just completely unreal.

I mean, even if one -- leaving aside the hopelessness of this application and you said, well, there might be some categories of consumers, for example, the authors of the press articles setting out the principal facts, many of those persons wouldn't be PCMs at all. Moreover, even if some of them might fall within the class definition and might have been aware of the situation and said that it was unfair, that doesn't mean that they were put on notice of a possible competition law claim.

This isn't a case where a regulatory body is investigating a suspected cartel, as in *Gemalto*, or even whether regulatory cases were being run either on the basis of competition law or on the basis of market power and something like that happened in *Le Patourel* and there are various telecoms issues that can arise which turn on the market power of the operator, including Ms Demetriou's client, BT.

MR ALTY: When Mr Thompson referred to an Ofcom 2018 document a couple of submissions ago, I didn't get the reference. I just wanted to --

THE CHAIR: It's in paragraph 23, I think.

MR ALTY: Of the claim form. I thought it -- I thought.

MR THOMPSON: I'm sorry, it's page 11 and 12 of tab 1, bundle A.

MR ALTY: Thank you.

THE CHAIR: It's a 26 September 2018 consultation paper.

MR THOMPSON: There are some other dates in 2018 as well, I think, May 2018 as well.

And then the point about competition law as a, a component is actually addressed in the application itself at paragraph 39(b), which is at A/48, page 2314.

THE CHAIR: Sorry, can you give the page reference again.

MR THOMPSON: It's page 2314 of bundle A4, I think it is. Core bundle. And then (a) concerns abuse. It says:

"The facts which form the basis for the ... abuse were reasonably discoverable by no later than 20 October 2017 as set out above."

THE CHAIR: Paragraph 39.

MR THOMPSON: That's 39(a) at 2314. I'm sorry, am I going too fast?

THE CHAIR: No, no, I just didn't have the paragraph reference, but yes.

MR THOMPSON: So that's the point about abuse. And then (b), the applicant:

"The facts relied on by the PCR in respect of its case as to market definition and dominance are matters in the public domain and/or overlap with the matters which form the basis of the allegation of abuse. Insofar as the relevant facts overlap with the allegedly abusive practice, they were also reasonably discoverable by no later than the same date."

They seem to be saying two things: that there may be issues that are not in the public domain but only those which overlap with matters of abuse. But in my submission, that can't possibly be right, that everything that was relevant to dominance and abuse

is in the public domain and has been at all relevant times, and I assume that means available to all potential class members, so that none of those facts can be regarded as deliberately or intentionally concealed. And we make that with some feeling, because even now the PCR has necessarily had to advance its case on those limited materials.

But I'm sure Dr Bishop will readily believe that once the sleeves are rolled up, Dr Davis will be seeking additional material in relation to market definition and market power, which includes information within the possession of the Defendants, which they have, possibly for very good reasons, deliberately not made public and under the legislation that is material which is deliberately concealed because the Supreme Court has confirmed that hiding something under your pillow is deliberate concealment. Contrary to, I think, something that Ms Demetriou said yesterday, there's nothing bad about concealing something, it's just you haven't revealed it. (Pause)

I'll endeavour to avoid repeating myself. I was going to make some points by way of factual context, but it may be that we debated some of them. So, I'll go along and if I think we've said them already then, I won't say them again.

We say first of all, for the purposes of this application, which arises in the context of a certification procedure under section 47B, the MNOs haven't contested the merits of the claims against them, that they engage in abuse of dominant position in the form of excessive pricing at the expense of their customers over an extended period, despite repeated regulatory interventions by Ofcom and the CMA. One of the core elements of the abuse that we allege is the absence of transparency of the MNOs' pricing practices to the proposed class members.

Secondly, we have touched on this, but it may be right for me to put it formally, given this application has been made at the CPO stage, it's arisen before the Proposed Defendants have pleaded any limitation defence and before the PCR has been able

to respond to any such defence. The matter has been conducted only by correspondence between solicitors, culminating in the letter that we've looked at.

Thirdly, at this stage, there has been no disclosure, simply some documentation selected by the MNOs themselves to support their application. There have been no directions for witness statements so that the matter can be properly prepared for and determined at a trial, as was the case in *Gemalto* and *Merricks*. The MNOs or the three MNOs now rely entirely on their own self-selected material in support of their application. They don't rely on a regulatory investigation of competition law infringements, such as the stated objections by a regulator, as in *Gemalto*.

Although various assertions were made by Ms Demetriou concerning the contracts that were offered to consumers, no such contracts have in fact been disclosed in support of her application against which her various assertions could be tested.

Sixthly, these are large-scale consumer collective claims in which the effect of the application will be to debar all such claims within the scope of the application, without a trial.

Seventhly, this is a complex claim that raises issues of economics that will require not only expert analysis but substantial disclosure to determine the issues of both dominance and abuse.

Precedents based on the position of individual claimants who have been victims of obvious negligence or have suffered personal injuries by being run over or well-informed and resourced corporate clients are of no real assistance to a claim of this complexity and magnitude. As we've noted in our skeleton argument, but Ms Demetriou failed to mention, Lord Justice Green specifically reserved his position on the position of consumers at the end of his judgment in *Gemalto*.

And finally, and this is a point that is significant legally, another issue that's very likely to arise with respect to the substantive claims and, to some extent this touches on the

point debated with Dr Bishop, is the level of awareness of the proposed class members of, first of all, the pricing practices of the MNOs and also the alternatives open to them at the expiry of the minimum term of the CHA contract. There's been no evidence filed on this issue either.

Although the MNOs and Ms Demetriou and Mr Williams and indeed Mr Kennelly have made various unevidenced assertions, again either wholly undocumented or based on their own selection of documents, we say, and I think this is really the point that I was trying to get across before, we say there's an obvious risk that this application is a form of Trojan horse for (audio distortion) rulings on a summary basis of issues that haven't been raised in respect of certification and that can only properly be determined at trial. Those were contextual factors that I wanted to bring to the Tribunal's attention in a sort of collective form, because together it seems to me that the whole position really is pretty hopeless from the applicant's point of view.

I see the time and I'm doing reasonably well but if I could just start on -- maybe I can do the principles relevant to strike-out on summary judgment, which I suspect are familiar, but it's obviously an important area and one or two remarks were made from the other side which I didn't agree with.

THE CHAIR: So, are we moving on to the second -- the legal ...

MR THOMPSON: I'm now moving on to legal issues. I had hoped to do that before lunch, but I think I won't quite manage that.

So, first of all, what I was going to do -- the legal issues I was going to address were, first of all, strike-out and summary judgment and secondly, the relationship between limitation and summary judgment, which we've touched on to some extent in discussion, but I need to address the key cases in that area as well.

THE CHAIR: Yes.

MR THOMPSON: The summary judgment point I can take briefly because I suspect

it is very familiar to your Lordship, perhaps in a slightly different form. I suspect the principles will not be so very different. It's dealt with in our skeleton argument. We've given quite a lot of authority set out explicitly. And that's at tab -- sorry, wrong bundle, but it's tab 4 of bundle B. So, that's page 45 following the electronic version.

THE CHAIR: Yes.

MR THOMPSON: I think there was a quick reference to *EasyAir* in the submissions of Ms Demetriou and we've set that out in detail and it's a familiar summary of the case law. And then, as we say in paragraph 4, we say:

"... the threshold for strike out [is] satisfied where a claim [or here an unpleaded but likely defence] is 'certain to fail' [in fact, it's not even a defence] and where the claim is 'substantively unarguable'."

It's agreed the test for summary judgment is set out in the judgment of *EasyAir* and we also set out a number of other important authorities, which I will refer to briefly. First of all, I think it's one of the most recent Tribunal authorities, the *JJH Enterprises* judgment, where summary judgment was refused and that's -- I thought I had the reference for that. Oh, yes, it's at F5, tab 98. I don't think we need to turn it up, but that's where it is. We rely on the two quotes that we've put in the skeleton. We say it's:

"... ordinarily unsustainable where the issues raise difficult questions of law in a developing area [and] that caution is required in granting summary judgment where the application will not dispose of the whole case."

And then that point is made at a somewhat greater length.

And then:

"... on the issue of compelling reason, it may be inappropriate to grant summary judgment where similar issues would remain to be determined at a full trial and extensive factual and expert evidence would have to be called."

Here we make various points but, as we say, not only is there an overlap between the issues that have been raised and issues that are raised by the substance, particularly in relation to transparency but also more generally into what sticky customers could or should have known as a matter of substance. But there's also because the Scottish law position is not covered by this application and indeed, Mr Hoskins's case is not covered by this application and that is obviously a substantial case in its own right. I mean, for good reasons, these cases are being managed together but there's obviously a considerable diminution of value, if in fact, we're going to be looking at much the same material over much the same period for different reasons.

And there's also the question that the period that's not on any view time barred, I think, from November 2017 onwards and the Scottish law issues, whatever the final position on prescription might be, those still raise a lot of the same substantive issues and, as we've seen from the discussions this morning, there is a considerable overlap between some of the issues that have been raised in support of the present application and some that are going to be debated as a matter of substance. So, in reality, there's not very much gain and it's not appropriate to decide those issues on a summary basis.

The other two cases I just wanted to refer you to, which we summarise at paragraphs 8 and 9, are the *Three Rivers* case and *Okpabi*. I don't think we need to turn up *Three Rivers* because a critical part of it is cited in *Okpabi*. But if I give you the reference: *Three Rivers* is at F2, tab 39 and *Okpabi*, which I think we could look at just before lunch, is at tab 64 of F3. (Pause)

Simply because it's a reason but not the most recent Supreme Court judgment which we say is pertinent and where the principles, in fact, were stated independently of anything from *EasyAir,* so in that sense it's more authoritative. And the discussion that I rely on, I don't think you need to worry about the facts, is at paragraph 103 following, pages 1602 to 1604. And it's really the passage running from 107 to 112. We cite the

points we particularly rely on in our skeleton argument. And the worry was that you would be drawn into a mini trial.

And at 107, Lord Hamblen says:

"The result is that instead of focusing on the pleaded case and whether that discloses an arguable claim, the court is drawn into an evaluation of the weight of the evidence and the exercise of a judgment based on that evidence. That is not its task at this interlocutory stage. The factual averments made in support of the claim should be accepted unless, exceptionally, they are demonstrably untrue or unsupportable."

And then 109:

"This was not a trial of a preliminary issue. It was not for the judge to make 'findings'. Although he was no doubt put in a difficult position by the way in which the parties had chosen to present the case, he should have insisted that the focus of the inquiry be the arguability of the claim which should have been fully set out in the particulars of claim, rather than the weight of the evidential case."

And then there's discussion which we summarise at paragraph 110 but, given the time, I won't read it all out. The only other passage I rely on is at paragraph 21, pages 1586 to 7 where Lord Hamblen sets out, at length, guidance from Lord Hope in the *Three Rivers* case as to the correct approach to take in matters of a strike out. And, in my submission, those are statements of high authority which have been confirmed on numerous times and which Lord Hamblen specifically refers to in that case. So, I'm just bringing that to your attention as recent statements of high authority as to the right approach.

I had some comments on some points of law made by Ms Demetriou and Mr Williams in their skeleton argument, but I think should we take those after lunch?

THE CHAIR: I'm very happy to do that. Just in terms of -- someone's taken the timetable away from me -- how do you think you're progressing? How much further?

MR THOMPSON: I would say I was a good halfway, and it rather depends. I'm slightly in the Tribunal's hands as to what level of detail to go into about the various Limitation Act points. I mean, I think you probably have the outline of what I'm going to say, but obviously it's an important point for us as well.

THE CHAIR: Yes. Of course. So, you're essentially -- do you think a further hour is likely to ...

MR THOMPSON: I can certainly work on that basis, and then if we take the break and then we should be comfortable, or we may even finish before that.

THE CHAIR: Yes. And that would still provide an opportunity for Ms Demetriou and Mr Williams to come back and reply. Excellent. Well, I'm grateful to you all. Thank you.

(1.02 pm)

(The short adjournment)

(2.00 pm)

MR THOMPSON: I was going to go to paragraph 14 of the skeleton on behalf of the applicants.

THE CHAIR: Is that your skeleton or the others?

MR THOMPSON: No.

THE CHAIR: The applicants in the --

MR THOMPSON: Tab 6.

THE CHAIR: Thank you.

MR THOMPSON: Page 96. That is the "something may turn up" point.

THE CHAIR: Yes.

MR THOMPSON: We were looking at *Okpabi* and then at the end, it says:

"In the High Court, a respondent who claims that further evidence will be available at trial must serve evidence substantiating that claim."

I was a bit surprised by that, particularly in the present context, especially when Ms Demetriou, if that's who wrote this, said, "The same approach should be followed in the Tribunal."

THE CHAIR: Can you repeat the paragraph? Sorry.

MR THOMPSON: It's paragraph 14 on page 6 of the skeleton.

THE CHAIR: Yes.

MR THOMPSON: It's slightly difficult to see how that could be. It's then said, "The same approach should be followed in the Tribunal" and the authority for that is the *Korea* case, which is F3, tab 41, page 614. Oh, that's not right. We have two. Sorry.

THE CHAIR: 614 is the paragraph reference perhaps.

MR THOMPSON: I got it wrong as well. Yes, it's 613 to 614.

THE CHAIR: Yes.

MR THOMPSON: It says:

"Allianz criticised the judge for having failed to make allowance in its favour for the likelihood that additional evidence relating to various aspects of this defence would be available at trial to cast a more benevolent light on events, but in my view that criticism is unfounded. It is incumbent on a party responding to an application for summary judgment to put forward sufficient evidence to satisfy the court that it has a real prospect of succeeding at trial."

That's obviously primarily in relation to a claimant, but mutatis mutandis.

THE CHAIR: Yes.

MR THOMPSON: "If it wishes to rely on the likelihood that further evidence will be available at that stage, it must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court."

Then there are various points made about that. Then at the bottom it says:

"It is not sufficient ... simply to say that further evidence will or may be available, especially when that evidence is, or can be expected to be, already within its possession, as is the case here."

So, I think the "something may turn up" was a rather unsympathetic situation there, because the court took the view that they could be expected to have the information themselves.

But the point I point to, and it's perhaps a drafting point, but the paragraph 14 rather telescopes. It's not that Lord Justice Moore-Bick says they must serve evidence substantiating the claim, it's that they must describe, at least in general terms, the nature of the evidence, its source, and its relevance to the issues before the court. So, it's more of a descriptive thing than that they have to serve evidence.

THE CHAIR: Yes.

MR THOMPSON: We say in the present consumer context, it's plainly enough for the PCR, as a representative of a very large consumer class with very limited access to relevant information, to refer in general terms to the categories of evidence that are likely to be available at trial, for example, disclosure and witness evidence from the Defendants themselves as to their market position and their pricing strategy, the basis for adoption and redemption of their loyalty penalty policy for CHA contracts over a period of years.

I should say that's not a formal disclosure application, but the sort of information that we would need. We say they're highly material matters that are not currently within the knowledge of the PCR or the PCMs; indeed, it's notorious that in competition claims the bulk of relevant information is inevitably in the possession of the Defendants, as is obviously the case here.

So, we're not saying that information in some sinister way has to be intentionally concealed. We're saying that there's likely to be a substantial volume of material

evidence relevant to a claim of abuse of dominant position that the Defendants hold, no doubt perfectly lawfully for commercially confidential reasons, and that currently PCMs and the PCR don't have it. So, that's what we would say is the legal position.

I was then going to move on to the question of the interaction between limitation and summary judgment. I think, to some extent, we touched on it in the discussion of *Gemalto*, but I was just going to show you two cases. The *Gemalto* case at first instance, which is in bundle F6, tab 119, and the *Merricks* case that we've looked at, just to show how an issue like that was dealt with by the High Court.

You'll understand that my broad and original primary objection to this whole thing was that it was misconceived for procedural reasons and that it should have been dealt with, if at all, as a fully evidenced preliminary issue, not as a letter with some documents attached. If the Tribunal has it, it should be at page 3374 in the electronic bundles.

THE CHAIR: Yes.

MR ALTY: Is that F?

MR WILLIAMS: Yes, it's F6, tab 119, 3374. It shows paragraph 1 on page 3375 that this was a hearing of a preliminary issue in relation to time bar in paragraph 2 and then at paragraphs 9 and 10, *Gemalto* called four witnesses as to its knowledge and then they are listed, and the witnesses were cross-examined by video link.

Then, perhaps most relevantly, paragraphs 16 to 18. The claim form was issued on 19 July 2019. The defence as originally pleaded didn't raise the limitation issue. The issue was first put forward in draft amended defences. *Gemalto* didn't oppose the applications, nor that there should be a preliminary issue.

Then at 18:

"Those directions included orders for disclosure regarding the preliminary issue and directions permitting the parties to serve specific supplemental pleadings relating to

the preliminary issue. *Gemalto* duly served a statement of case on limitation on 30 April 2021, and the Defendants served responsive statements of case [in] May 2021." It was on the basis of that that the facts emerged which were relied on by the Court of Appeal about the issue of the statement of objections and the internal emails that were evidence that the claimant had in fact known about the statement of objections and indeed, some four years earlier had known about a dawn raid.

So, it's simply really a procedural point, which is then followed up -- I don't know that we necessarily need to turn up *Gemalto* on those facts, but there is a point in *Gemalto* in the Court of Appeal at F4, 75. The passage that I rely on is paragraphs 17 to 26, which is at 2134. There's quite a detailed account of the facts, and it's apparent that that's derived either from witness evidence or from internal emails, so for example, at paragraph 19 on page 2135, there's reference to the dawn raids and internal emails that were sent on 7 January 2009, including to and from *Gemalto's* chief executive officer and apparently that Infineon had been already been caught red handed, "la main dans le sac", so it was quite a specific piece of information.

Then at 20, *Gemalto* considered consulting a law firm with heavyweight competition law experience.

Then what was actually operative with paragraph 23, "The Statement of Objections was announced on 22 April 2013" and again, there are references to a *Gemalto* board meeting at paragraph 24 at 2136.

So, I don't want to labour the point but I mean, it's clear that this was fully evidenced and that the reason why the time bar was imposed was that Mrs Justice Bacon found that the individual company in that case had been fully aware of the statement of objections and indeed had been aware of the investigation some four years before.

Although it was only shortly time barred, she found that the statement of claim in that case had been issued more than six years after the statement of objections, and she

therefore barred it, and the Court of Appeal upheld it on that issue.

The other reason to go back to *Gemalto* is in fact the very last paragraph. There were two judgments, one of Sir Geoffrey Vos and one of Lord Justice Green, who's obviously a very experienced competition lawyer, and he agreed with the result, but he expressed a few policy reservations under five headings. Then the final one was at paragraph 89 at page 2152.

"Finally, in relation to a risk that this rule will prejudice unwary consumers I do not think that the courts would permit this to happen. The Supreme Court in *FII* was clear that the application of the test was fact and context sensitive and took into account the nature of the claimant (corporate or otherwise) and its resources including access to legal advice and corporate priorities. The position of a consumer relative to that of a corporate litigant might be very different. Time might well not begin to run from the same point as it did in relation to a corporate claimant. A typical consumer might be oblivious to the facts of the unlawful conduct, or as to its concealment, or as to the existence of an SO even if the fact of the SO was in the public domain, or as to its significance even if known of."

Then it goes on that the typical consumer might not have the resources and funds to instruct lawyers to provide specialist advice or exploratory work, especially if the claim is modest compared to the costs.

So, in my submission, that's highly material in terms of the weight that can be given to *Gemalto* and the way it should be applied here, both in terms of the procedure and in terms of the standard that should be applied in relation to limitation.

The other point I can take more briefly; it's also in F6. We did look at it briefly with Ms Demetriou, I think. It's the *Merricks* limitation judgment at tab 114. And it's simply looking at the evidential basis for that, ruling which one finds at paragraphs 9 to 10 on page 3277.

One sees that, at paragraph 9, Mastercard pleaded both in relation to English law, Northern Irish law and Scottish law and indeed, foreign law, and that the Tribunal, perhaps understandably, decided to deal with it as a preliminary issue. Then, at 12, there's a fairly complex description of the pleadings that were put together to deal with that.

At paragraphs 20 to 30, there's a lengthy description of the pleadings and the nature of the trial, including at 29, three witnesses. So, that's simply how the case was done in terms of procedure.

And indeed, if your Lordship still has it, it's paragraph 43. There appears to have been some moving about of the class representative's case. I think Ms Demetriou knows about this, about the relevant facts that were alleged to be concealed during the course of the trial. So, there was obviously a process of pleading and repleading or at least amendment of skeletons during the trial.

We would say that that is, as it were, the positive story both in the High Court and the Tribunal. The more negative story, as it were, of the perils of going ahead on a different basis is illustrated by the *DSG* case, which we have looked at in relation to a different issue yesterday. That's at F3, tab 59.

In some respects, that's more relevant to the present facts even though it was a corporate claimant in respect of a claim against Mastercard because that case was a summary judgment application where a key question under section 32 was when the claimant company had been put on notice of a possible claim. It's tab 59 starting at 1292.

There was an issue about whether or not the claimant in that case needed to have been put on notice, which Sir Geoffrey Vos described as a "trigger" and whether the trigger was required for investigation. The Tribunal had somehow assumed that no trigger was required, and that the claimant must have been on notice in relation to the

limitation defence, but the Court of Appeal disagreed. The relevant passage is a relatively long one, but I don't think we need to look at all of it. It starts at paragraph 62.

THE CHAIR: What page is that?

MR THOMPSON: It's at page 1314. There's quite a long discussion about this trigger issue and why the Tribunal had come to the wrong conclusion. In particular, Sir Geoffrey Vos approved a judgment of first instance by Mr Justice Foxton which he cites at some length at paragraph 65, and he says at 66 he agrees.

Then, there's the point about the particular circumstances of the claimant which is a similar point to the one we've just been looking at in the judgment of Lord Justice Green. Then, I think the relevant passage is really paragraphs 69 and 70:

"In my judgment, these authorities demonstrate that the Tribunal ought not to have considered whether the claimants could with reasonable diligence have discovered the facts concerning the infringements before 20 June 1997 (a) as a purely hypothetical question, and (b) on the assumption that the claimants were on notice of the need to investigate. The question of whether there was something to put the claimants on notice had to be determined on an objective basis, but as Lord Hoffmann explained in *Peconic* that 'leaves open to argument the extent to which the personal characteristics of the plaintiff are to be taken into account in deciding what diligence he could reasonably have been expected to have shown'. As Henderson LJ agreed in *Gresport Finance* whether the claimant could with reasonable diligence have discovered the relevant concealment is a question of fact in each case.

"In this case, the Tribunal considered some of the things that the claimants might have known about the alleged infringement, but did not ask itself what precisely had put the claimants on notice of the need to investigate a potential claim against Mastercard. At

[paragraph] 106, the Tribunal wrongly assumed that the claimants were aware of important press articles as I have already explained. As it seems to me, the question of whether or not the claimants in this case had reason to investigate and whether they could with reasonable diligence have discovered the relevant concealment requires disclosure and factual evidence to be fairly determined. In particular, I think Mr Pickford was right to point out that, in an internet age, huge numbers of documents are in the public domain; it does not follow that, even objectively judged, a potential claimant was on notice of a particular claim, or that it could with reasonable diligence have seen particular documents."

In my submission, that's relevant specifically to the type of material that we were looking at this morning. But, more generally, the conclusion at the end at 71:

"It follows from what I have said that the Tribunal fell into legal error in enunciating and applying the test under 32(1)(b) of whether the claimants were put on notice of their claims against Mastercard and could with reasonable diligence have discovered the relevant concealed facts."

Then I think we've looked at the conclusions before, but at 108 and 110, there was a conclusion that the matter shouldn't have been dealt with by way of summary judgment and that the matter needed to be dealt with on the facts. So, I would submit that that's, as it were, the negative case that the right way to deal with this is not by way of summary hearings.

In fact, we say that our case is at the opposite pole from *Gemalto* and is, in a way, a much clearer case than *DSG*, where an investigation of the facts was considered necessary by the Court of Appeal, even in a corporate context, and for extremely stale claims going back before the entry into force of the original amendments to the Competition Act. But even in *Gemalto* and *Merricks*, the Court of Appeal, the court and the Tribunal didn't seek to resolve the issues on a summary basis, even though

the limitation arguments were ultimately successful.

If I could now turn to my last main area, the Limitation Act itself. We've set this up fairly systematically in our skeleton argument, but I'll go through it as economically as I can. It might first of all be helpful to look at the Limitation Act itself, which is at tab 4 of bundle B in our skeleton argument, or the actual legislation is at F1 tab 2, page 4. It's wording that's caused a certain amount of difficulty in the courts over the years. The operative material is 32(1)(b), that the period of limitation doesn't begin to run, in the case of (b), where:

"any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant."

Then it says:

"[It] shall not begin to run until the plaintiff has discovered the ... mistake ... or could with reasonable diligence have discovered it."

Then 32(2):

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

So, 32(2) is, as it were, a sort of dealing provision in relation to 32(1). It's another way that you can get back into 32(1).

So, at this stage, we rely on both limbs of that: both the concealed fact and the deliberate breach of duty. As we've explained in the skeleton argument, the tests under each limb have been authoritatively summarised now by the Supreme Court in a recent judgment, *Mrs Potter and Canada Square*, or vice versa, and I think the core finding is that deliberate is not a complex term of art, it effectively means "intentional". It doesn't mean "and likewise that concealment doesn't have any prejudicial value"; it simply means that it was hidden: either it was positively hidden or not revealed. That

has simplified the law, because there was a lot of debate about whether there was some duty to disclose or whether and to what extent it had some sinister connotation. I think the example I gave of a somebody hiding jewels under a pillow was sufficient to constitute deliberate concealment. All it needed was that it was purposeful and that there was either positive or negative concealment.

A general observation I'd make is that the test we would submit under 32(1)(b), although it has different elements -- namely the fact, the concealment, and the reasonable discoverability -- one can see from cases such as *Gemalto* that they are not watertight compartments, that to some degree the nature of the entity, the nature of the facts, and the nature of the concealment are all, as it were, relative to one another, so that in the *Gemalto* case you had a company with particular knowledge, and it was also relevant what the nature of the infringement was; in that case, a cartel; in our case, abuse of a dominant position.

The Defendants have hardly addressed section 32(2) at all, even though we would say that there are both legal and factual issues that would need to be addressed in the context of a large-scale competition law claim, where the information relevant to the issue of breach of duty is likely to be exclusively in the possession of the Defendants, and that that's particularly so if they seek to proceed on a summary basis.

A point that is made in *Canada Square*, which we put in our skeleton argument, is that there's a slightly different focus under 32(1)(b) and 32(2). Whereas the focus in 32(1)(b) is on the facts, the focus in 32(1)(b) is effectively on the illegality, or the alleged illegality -- the breach of duty.

THE CHAIR: You mean in 32?

MR THOMPSON: I'm sorry, I meant in relation to 32(2).

THE CHAIR: Yes.

MR THOMPSON: So, you've got a different focus in the two cases. So, going first to

32(1)(b), and that takes us back to the skeleton, the paragraphs 24 and 25.

THE CHAIR: Yes.

MR THOMPSON: I have to some extent tried to cover that straight away --

THE CHAIR: Yes.

MR THOMPSON: -- at the beginning, but ... (Pause)

We were discussing this, I think it may be that some of the issues that have been raised may concerns the tenses about "would and would", and whether it should be "did and did", because what we're getting at here is, as it were, (a) and (d) are what you might call contextual. The first one is that the contract is an evergreen contract, and in itself, that's not necessarily a bad thing, that you have a contract which goes on until it stops; it's not a particularly unusual feature. The end is, as it were, part of the definition of the class, but also, it's a matter that, as we've seen, the type of class member that we're concerned with is precisely the sort of person who is not very price-sensitive and not looking around. There'll no doubt be a debate at some point about the significance of that fact.

So, the core issues are about the rate, because this is, after all, a pricing issue, and those are at (b) and (c). One element is that the rate payable by the PCM after the expiry of the minimum term would not be reduced to reflect the fact that by the end of the minimum term, the handset would have been paid for in full. Whereas, you know, in the clearest case in a split contract, that would obviously happen, and in other cases where you buy something over a period, you don't normally continue to pay the instalments at the end once the goods have been paid for, whether it's a house or a car or anything like that. No doubt there will be a debate about that, but that's one of the elements we say is unacceptable, particularly in an evergreen contract, which is why we put in (a).

Putting essentially the same point in a different way, the rate the PCM would continue

to pay after the expiry of the minimum term -- so on an indefinite basis, because it's an evergreen contract -- 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, i.e., the handset. Again, there can be a debate about the economics question, but I don't think it's difficult to understand what it is we're saying and what it is that was concealed, because in our submission, that is the germ, both of the grievance that was raised in the past, but also of the matters that are, we say, lacking in transparency and which caused consumer harm, or caused harm to our consumer class.

So, as it were, the core elements, both of abuse and of concealment, are 24(b) and (c), and we say that those matters were indeed concealed. They weren't revealed by either the publicity for CHA contracts or SIM-only deals; they weren't revealed by the core commercial terms that Ms Demetriou relies on. Although there were certainly some people who were complaining about it, as early as 2015, and it was causing regulatory concerns, those regulatory concerns were not allayed by the fact that there'd been a press campaign. On the contrary, they continued, and the regulators took increasingly robust measures to address those questions between 2018 and 2020.

So, that's the way we put it. Then when you get to 25, you get into the debate that I think we've to some extent already had, and I think which you had with Ms Demetriou, is what more do you need to know? In *Gemalto*, it was said that the existence of the cartel was effectively revealed by the commission initially, their dawn raid, and then their statement of objections. But it's clear, as we would say, from the judgment and the need for a worthwhile claim, that it's not enough to know just bare facts. In order to start a competition law claim, you need to know that there's some basis for a violation of the competition rules. I think that's actually accepted by the Defendants.

MS DEMETRIOU: No, that's not accepted, sorry.

MR THOMPSON: In their application, it was accepted. It may not be accepted now, but in their application, it appears --

THE CHAIR: (Inaudible) took us to the paragraph. I have your point in that regard.

MR THOMPSON: Yes. I think --

THE CHAIR: Just to pick up on this, when you're talking about the bare facts, you say it is not enough to just have the bare facts, because there needs to be a basis of violation. I think my question is, is the basis of violation also a fact, or is it not a fact?

MR THOMPSON: Well, it depends. Well, no, that's not meant to be a flippant remark; there are basically two routes, as the Tribunal will be aware. In the cartel route, yes, if I can call it that --

THE CHAIR: Yes.

MR THOMPSON: -- in crude terms, you need an arrangement. That, in one sense doesn't need economic analysis; that essentially needs more of a factual analysis about the states of mind of at least two undertakings; that they have to have some sort of meeting of minds that they're going to do something, and then you have to look at the economic effects.

THE CHAIR: So, in *Gemalto*, the cartel was a fact. The knowledge the existence of the cartel was a fact.

MR THOMPSON: Yes.

THE CHAIR: Yes.

MR THOMPSON: That's why it was critical that the starting of the statement of objections, as it were, put *Gemalto* on notice, given the evidence there was --

THE CHAIR: Yes.

MR THOMPSON: -- that there was this cartel in the offing. Indeed, they seem to know quite a lot about it.

THE CHAIR: Yes.

MR THOMPSON: In this case, you're not looking for an agreement, you're looking for an abuse of dominant position. So, you need both things. For the dominant position, you need facts about the market, and you need facts about the position of the company in that market, broadly speaking, and then you need the abuse.

I think, to some extent, I don't think there's that much between us because the factual issues about abuse are most naturally more factual sort of things that can be debated and hidden. The issues about the market and about the position of the individual company, or the two companies, or whoever it is in the market, is a more complex economic issue. I think what's being said by Slaughter and May, if not by Ms Demetriou, is that the sort of material that is relevant to that question probably is more likely to be market analysis reports, things of that kind, rather than the more secret aspects of a cartel, which I think is what Ms Demetriou was getting at.

THE CHAIR: As I understood Ms Demetriou's point on one of a number of points, in fact, she made during the helpful discussion I had with her on this point was that she said, "Well, it might be said that the fact that the PDs were in a dominant position might be a fact, but that wasn't a fact which fell either under 32(1)(b) or 32(2)". If I understand what you're saying, you're not necessarily disagreeing with that.

MR THOMPSON: Well, I think I'm only disagreeing, really, as part of the general question of whether we should be probing into the precise --

THE CHAIR: I understand, but for a --

MR THOMPSON: -- boundaries of competition law because I think it's all fairly untested stuff.

THE CHAIR: But so subject to whether we should be getting into it and to what extent we should be getting into it now, just a matter of conceptually working out where the lines are.

MR THOMPSON: Yes.

THE CHAIR: I suppose what you would say is the case that you would come to argue, if it were pled against you and we went through all the process as you presently envisage it, would be that the issues of concealment or deliberate breach of duty would relate to questions of abuse as opposed to dominant position.

MR THOMPSON: Yes, (inaudible) questions of abuse.

THE CHAIR: Yes.

MR THOMPSON: Although we wouldn't pull back from the fact that you couldn't just turn up in the competition appeal Tribunal and say, "I am a consumer, I'm going to sue BT because I don't like my phone contract". In order to get that case off the ground, it's got to be a competition case.

So, unless we can show that there's some sort of agreement, what we'd have to show is that the company is either in a dominant position or in a joint dominant position. That may go to the question, going back to Lord Justice Green's test, that for a consumer, that is a mountain to climb, on any view, to take on one of the major mobile phone companies in relation to their telephone contract, which is a sort of issue we were debating on Monday.

If all they knew was their position about their own contract, that might be a rather hopeless case. In order to get the case off the ground, you've also got to show an effect on competition, which you might not be in much of a position to do. So, it may be that reading an article saying it was all a crying shame wouldn't put you on the spot to think, "Well, I better investigate a competition claim", particularly when the article didn't mention competition law and the competition regulators Ofcom and the CMA were using their regulatory rather than their competition law powers.

We would say that Mr Williams and Ms Demetriou have got quite an uphill battle to suggest that every consumer was put on notice of a potential competition law claim because they happened to read the Daily Mail or the Daily Telegraph in October 2017.

We just think that's pretty hopeless, but if they want to plead it, then we will respond to it.

What I'm not doing is conceding, at the moment, that we won't also say that they might need to know a bit more about market power. I think they'd certainly need to know more about the market and how prevalent this was, to get their competition law case off the ground.

THE CHAIR: Yes, I suppose the point I'm trying to at least understand is -- and as I say, leaving to one side for the moment the argument you've made thus far about whether this is the appropriate point at which these issues should be ventilated and resolved. The issues about dominant position and market power are issues that you are more ready to accept would be matters which wouldn't be subject to concealment, and so --

MR THOMPSON: Some of them, at least --

THE CHAIR: -- 32(1)(b) and 32(2). Just testing the argument then, if we took our PCM, and they knew everything about -- I'm not saying this is the case, but just to test it --the nature of the abuse, but they weren't necessarily aware that the particular Defendant with whom they had a mobile phone contract was in a dominant position, that would be viewed through the prism of section 32. That wouldn't necessarily help them because those wouldn't, on the face of it, appear to be matters which it is contended were concealed, or other subjects of deliberate breach.

MR THOMPSON: It's given rise to a very curious position if that's -- you know, certainly if that were a hard rule, because if the Tribunal were to agree with me that it's not realistic that you could embark on a competition law claim on your own, without any advice, and that the type of information you were given, for example, in that consumer advice thing, was that there's this scam going on, but there's nothing you can do about it unless you prove quite a specific matter that would put you on notice

of a competition law claim in October 2020.

THE CHAIR: You're answering a slightly different point. My question was hypothetical, I wasn't trying to --

MR THOMPSON: I thought you meant if you were satisfied that they did know the type of matters that I've been complaining about under the heading of abuse, broadly --

THE CHAIR: Yes.

MR THOMPSON: -- (overspeaking) paragraph 24, would that be enough to put them on notice of the competition law claim? I think I'm pushing back on that.

THE CHAIR: Yes.

MR THOMPSON: Actually, it wouldn't, because the competition law claims, you'd need to know more.

THE CHAIR: And what I'm asking you is how does the absence of knowledge about the competition law claim -- how is that relevant to section 32?

MR THOMPSON: Well, that's going back to *Gemalto*.

THE CHAIR: Yes.

MR THOMPSON: That *Gemalto* was the issue that both Sir Geoffrey Vos and Lord Justice Green were concerned about, and I'm sure Mr Justice Baker, was whether the claimants were put on notice of a competition law claim.

They obviously thought it was important not that a man ran in and said, "There's a cartel going on over here", but that the European Commission was involved in that, exercising its public law powers, and not only conducted a dawn raid, then it issued a statement of objections. Both Geoffrey Vos and in particular Lord Justice Green remark on the fact that if you've got a serious regulator who's exercising their regulatory powers in that way, that gives you a reasonable belief that you've got a competition law case. That's why the claim was barred, because apart from the internal evidence, they said that the factual evidence about the investigation put them

on notice that there was a competition law claim in the offing.

I think all I'm doing is pushing back that if you've got one person who reads a paper and says, "You're being ripped off on your handsets contract", that doesn't put you on notice of a competition law claim; you need more.

THE CHAIR: No, that's helpful. The putting on notice issue, which you draw our attention to, that -- that was in *Gemalto*, was it? Yes.

MR THOMPSON: Yes, yes. The reasonable diligence.

THE CHAIR: Yes.

MR THOMPSON: That's partly why I made the point that these are not watertight compartments, that you're applying an objective standard, but to a particular type of claimant, and, we would say, a particular type of claim.

THE CHAIR: Yes.

MR THOMPSON: We would say, and I think the words used in the *Gemalto* judgment is "you don't need to know chapter and verse", but you do need to know that there's a worthwhile claim. I suppose our broad point is something we touched on earlier, that this is a much more substantial issue in abuse of dominance case than would apply to the victim of a road traffic accident or medical negligence, where the essential facts are unlikely to be concealed at all, and the basis of the claim is likely to be obvious. (Pause)

THE CHAIR: Yes.

MR THOMPSON: Yes, I mean, to put it bluntly, a competition law claim advanced in the absence of either an anti-competitive arrangement or market dominance would stand to be struck out for that reason, for failing to plead to the constituent elements of the section 47A case in respect of an alleged infringement. So, you do have to plead market dominance. Obviously, when you've got a specialist legal team and an economic expert, you're in a position to do that, but if you're an individual, then you

may well not be, just because you think something unpleasant has happened to you.

THE CHAIR: Yes.

MR THOMPSON: In relation to deliberate concealment, I think I've already made the point that in *Canada Square*, it's being defined as simply meaning either intentional withholding of information, either positive or negative. We say that that applies squarely here. The underlying nature of the repayment obligation was plainly and deliberately concealed in this case from class members.

Indeed, the central basis for the regulatory concerns was that the MNOs had systematically failed to make it clear to their customers that the price they'd continued to pay for an indefinite period after the end of the minimum term would continue to include the monthly cost recovery charge for a handset that the PCM had already paid for, and that was the whole basis for why this aspect of the market was said to be handled badly. (Pause)

Just looking, I think I had positive submissions, but I think we've debated most of them. Yes, in relation to reasonable diligence, you have my point that it has two elements: a trigger requirement, and the inquiry itself, and that the standard to be applied is an objective one, concerned with the knowledge that's to be expected of a person sharing similar characteristics with the claimant in question -- the illustration from Lord Justice Green. We also refer to *OT Computers*, the *DSG* case, and *FII* itself, at paragraphs 15 to 18 of our skeleton argument, which is at B4, page 50.

THE CHAIR: Yes.

MR THOMPSON: So, just drawing that together, we say applying that case law, one must look at the standard to be applied in respect of the specific group of claimants who are before the Tribunal in these proceedings -- the potential or the proposed class members, who we've referred to also as the sticky customers, who share the characteristic, in our case, of having been sufficiently disengaged to have incurred

loyalty penalties. The preliminary evidence of Dr Davis is that they form a separate group under the different market definitions that we have adopted.

That's relevant because we say that the evidence that's been adduced by the MNOs falls well short of showing that such customers, the PCMs, should have been put on notice of the need to investigate the facts that would be necessary to plead a claim of this kind before the six-year period before these proceedings were brought.

The persistent failure of, in fact, these specific three MNOs to provide suitable information to their customers was a central concern of both Ofcom and the CMA.

In effect, Mr Williams is saying the media materials on which he relies were sufficient to put everyone on notice, without any need for regulatory intervention, whereas Ms Demetriou seems to go further and say that it was all obvious from the start on the basis of the core commercial terms. We say that flies in the face of the regulatory findings.

That was all I was going to say about 32(1)(b), unless there are any other questions the Tribunal has for me.

In relation to 32(2), we rely on that -- and I've called it a dealing provision -- that it concerns the deliberate commission of a breach of duty, that's unlikely to be discovered for some time. I can be relatively brief on this issue because it's something that can't properly be determined on a summary basis, and we note that it was neither raised nor addressed in the original application, and that the overwhelming majority of the submissions on the other side, both in writing and orally, have been about 32(1)(b).

We say that there is a strong prima facie case that these three MNOs carried out the conduct that constitutes the abuse in this case, deliberately over a period of years, in the knowledge of the concerns that had been expressed and the regulatory concerns that had been expressed, including those that Mr Williams himself has brought to the attention of the Tribunal, and in the knowledge that the sticky customers with which

these proceedings concerned would not discover their wrongful conduct for some time. We say that that's certainly arguable. In fact, that's quite a natural inference from particularly the regulatory findings. However, that's a matter that's impossible to determine on a summary basis without any evidence as to the origins of the policy at issue in these proceedings. These commercial implications for the MNOs must always have been obvious, and where the nature of the allegations under competition law makes the application of the relevant standard difficult to apply.

For example, the standard for intention to be applied to a major corporation that engages in an anti-competitive practice for a period of years, and persists in that practice in the face of persistent complaints and regulatory action, is obviously a more complex issue than, for example, the case of a negligent doctor or solicitor who mishandles a single operation or transaction.

We say it's very difficult to see how, particularly for these three applicants, before any disclosure or evidence on the issues has even been discussed, and before the matter has been pleaded, that the PCR's position on this question could be said to be either certain to fail, or so unrealistic as to be fanciful.

That was what I was going to say about the Limitation Act. I was just going to finish in relation to the tension issue, which we've debated every now and again. Just to set out the position where I think Ms Demetriou teased me, as perhaps it's been going either way over the three days.

Whereas the MNOs say it was very straightforward for consumers to know the terms of CHA and SIM-only contracts, but very difficult to know that those same individuals had a worthwhile claim, but they say that we say that the PCR says that it was very difficult for consumers to know they had a worthwhile claim, but easy to identify a suitable comparator for the purposes of the class definition. So, it might look like a bit of a tit-for-tat dispute.

But, in my submission, the alleged symmetry is illusory; there's nothing inconsistent or paradoxical in saying that an abusive practice that was successfully concealed for years, and that raised major regulatory concerns, was not easy for consumers to spot, while at the same time saying it's not difficult to compare the terms offered to them under a historic CHA contract with the terms that would have been available on a SIM-only basis, once that what one's looking at. In a sense, that's not that much more difficult than, if you know somebody's name, looking them up in a telephone directory -- although if you don't know their name, it's all very complicated. But we would say it's not a difficult possibility -- rather an old-fashioned example, but I think the Tribunal will understand what I mean.

We say that the position of the MNOs is quite different, and that it is indeed playing fast and loose with the facts to say that it would be difficult for the Tribunal, Dr Davis, or individual PCMs, to identify suitable comparators for the purposes of these proceedings, while at the same time saying that all PCMs should be deemed, on a summary basis, to have had all the information that they needed to make enquiries about a potential damages claim. We say that that is indeed a very awkward inconsistency for the MNOs, between the stance of Mr Kennelly on Monday and of Ms Demetriou and Mr Williams yesterday and today.

Can I just ask if anyone wants me to say anything else? (Pause)

Those are my submissions on the three issues.

THE CHAIR: Thank you very much, that's very helpful. Thank you.

Ms Demetriou, I'm wondering if we might take a short break now.

MS DEMETRIOU: Of course.

THE CHAIR: If we were to come back in ten minutes, do you think that would provide you enough time between now and 4.00 pm?

MS DEMETRIOU: Absolutely, yes.

THE CHAIR: Thank you very much.

(2.58 pm)

(A short break)

(3.11 pm)

Reply submissions by MS DEMETRIOU

MS DEMETRIOU: Sir, members of the Tribunal, it seems now to be accepted that the following facts were not concealed but consumers knew them. First of all, consumers knew that they were signing up to a contract with a minimum term. That doesn't seem to be disputed. Consumers knew that they would have to pay a specified amount each month. Again, not disputed. Consumers knew that under the contract they would get the phone. The phone would be theirs. Again, not disputed. Fourthly, consumers knew that they continued paying the same amount even after the expiry of the minimum term.

Mr Thompson, in his submissions, hasn't disputed any of those four things. And when the chairman asked him the £6 million question, which is, well, what is the fact? What's the delta? What is the fact that you say, beyond those facts, needed to be known for a consumer to believe they had a worthwhile claim, Mr Thompson gratefully accepted the proposition put to him by the Chairman, which was that the consumer would need to know that the price paid under the CHA contract included an amount for the handset. So, that's really what my part of the argument comes down to. Is that fact, a fact that was concealed or that consumers didn't know? And was that fact necessary in order for consumers to know they had a worthwhile claim?

Now, our response to the point is to say that that conclusion, that fact, that the price paid under the CHA contract included an amount for the handset, is an inference that a PCM could have advanced on the basis of the core facts that I've just summarised that the PCR now accepts the consumer would know. And the inference is drawn by

saying this, by saying, "To get the phone, I have to sign up to the contract for two years or whatever the minimum term is, I infer that the monthly price payable covers the phone and the connection". So, that is the inference that can readily be drawn and pleaded from those two primary facts.

Now, an important point is this: The Defendants don't accept that this inference is correct. And that really comes back to a point that Professor Bishop was putting to my learned friend. The Defendants don't accept that that inference is correct. And, for your reference, we say that at paragraph 25(b) of our skeleton argument, footnote 10.

But what follows from that is important. In circumstances where the Defendants do not accept that that fact is correct, it cannot be said that it's a fact that the Defendants have concealed from them, from the Claimants. It makes no sense.

The second point that follows is this: the PCR has already pleaded the inference on the basis of the primary facts available to it. Presumably, the ones that we've identified that they accept were not concealed and that consumers would have known.

And crucially, crucially, what the PCR has failed to do, it's failed to point to anything that the MNOs have concealed, which would have enabled the PCR, or which the PCR required in order to plead that inference. So, the inference is not accepted by the MNOs and the PCR has failed, crucially, to point to anything, any primary fact, that he says the MNOs have concealed that was necessary in order to plead that inference.

So, they're not saying, the PCR is not saying a consumer could only have pleaded this inference when he discovered X, Y or Z fact that was concealed by the MNOs. Not saying that. And this brings us squarely into the territory of *Arcadia* in the Court of Appeal, which has been referred to in the skeleton arguments. Let me just take you to it. So, it's in F2, tab 50, page 820.

Could I just point out at the outset that this was a case that was decided -- it concerned

the application of section 32(1)(b) in a competition claim -- so it was an interchange case -- and it was decided in favour of the Defendants on a summary judgment, reversed summary judgment, strike out application. So, Mr Thompson pointing to various cases in which limitation was dealt with as a preliminary issue doesn't help him. There's no reason why the point can't be decided to a summary standard, and it was in *Arcadia* and upheld by the Court of Appeal.

Let me just take you to the very pertinent, for my purposes, paragraphs of the judgment. And if you could turn, please, to page 833. Let me show you the claimant's argument at paragraph 54. So, there was, as in this case, there was a statement of claim, "endorsed with the usual statement of truth". Do you see that at paragraph 54: "Mr Randolph accepted that the proceedings cannot be struck out as failing to disclose reasonable grounds for bringing the claims ... Indeed, [they're listed for trial]. The appellants accept [so that's the claimant] that no new material facts came to light in the six--year period prior to the commencement of the proceedings. In particular, although they say it was the *2007 Mastercard* decision [that's the commission decision] that gave them comfort to commence proceedings, they accept that the decision did not disclose any new facts relevant to their cause of action within section 32(1)(b). On the face of it, that is the end of any possible case for postponement of the six--year limitation period beyond the Limitation Dates."

Now just pausing there. Here you see the clear distinction between facts and characterisation of the facts. But then reading on paragraph 55:

"Mr Randolph submitted, nevertheless, that there are facts relevant to the cause of action within section 32(1)(b) which were concealed at the date the proceedings were issued and some of which are still concealed so that even now the limitation period has not begun to run in respect of claims prior to the Limitation Dates. As I understand Mr Randolph's submissions, he had a wider point in three narrower points ... His wider

point was that relevant facts within section 32(1)(b) are all facts 'necessary and sufficient to enable the appellants to come to an informed view on the economic assessments'."

You can see there are shades of Mr Thompson's argument in this case. His narrower point was that further detail, essentially, was needed as to, to the detail of the MIFs.

And then we see reference to the Kriti Palm, which again was endorsed, you saw that in the *Canada Square* judgment by the Supreme Court. And then we see this at the bottom of page 834, paragraph 62:

"As to the second contention in paragraph 60 above, what is sufficient knowledge to constitute discovery within section 32(1) depends on the particular facts. More importantly, for the purposes of this appeal, the point has no relevance to proceedings such as the present ones where a complete cause of action has been pleaded, the particulars of claim are endorsed with a statement of truth, and it's accepted that no new facts necessary to complete the cause of action have been discovered during the previous six years. I agree with the respondents' submission that it's logically inconsistent for the appellants both to assert that the particulars of claim plead a complete cause of action and cannot be struck out ... and yet also to contend that, for the purposes of the 'statement of claim' test, the limitation period has not [yet] begun to run because there are concealed relevant facts within section 32(1)(b)."

Now, of course, in this case, the PCR accepts that time has begun to run. So, they accept that. But what these passages in Arcadia make clear is that where a statement of case has been pleaded, and of course, the point that the Chairman put to Mr Thompson as to the CHA contract, including an amount for the phone, that point has been pleaded. The key point is that Mr Thompson hasn't identified any fact that was suppressed, enabling the PCR, or that a consumer, a PCM, would have needed to know to plead that inference. That really is the answer to that point. And beyond

that, Mr Thompson has not identified anything else in the delta between the facts, which he accepts were not concealed, the core commercial terms and, of course, going back to paragraph 24(d) of the skeleton argument, the availability of lower SIM-only rates. He has not identified any additional fact that was concealed, that was necessary for claimants, PCMs, to know to plead the claim.

Now that takes me on to a slightly separate point. And this was another question put by the chairman to Mr Thompson. Sir, you asked Mr Thompson where he drew the line between facts and legal characterisation of facts. And you have our submissions about that. I'm not going to repeat it. We say section 32(1)(b) is concerned expressly with facts. And you have the submissions I made about *Merricks*. And it's worth -- I'm not going to take you back to it now -- but it's worth just remembering with *Merricks* that for the purposes of section 32(1)(b), the relevant facts were the existence, essentially, of the MIF. So, it wasn't a relevant fact that that restricted competition.

Now, what Mr Thompson sought to do was to rely on *Gemalto*. He said, "Well, *Gemalto* shows you that you don't only need to know facts for the purposes of section 32(1)(b), but you need to know that those facts arguably amount to a legal wrong". That is just flatly wrong on the law. It's flatly inconsistent with the words of section 32(1)(b) and it's not what *Gemalto* says, of course. And again, I made these points in the opening, but *Gemalto* talks about the discoverability of the cartel. That was the fact. It wasn't necessary for a consumer to know that a cartel was a breach of competition law. Now, of course, many consumers may know that, but it wasn't necessary for the purposes of section 32(1)(b); a failure to know that doesn't result in the postponement of time.

And it's no good for Mr Thompson to say, "Well, in that case, the claimant knew about it because there was a statement of objections that had been issued", because that's to conflate two separate points. And the two separate points being, first of all, what

are the facts that are relevant for the purposes of section 32(1)(b): the fact in that case was the cartel. And secondly, on what basis, what was the mechanism through which the fact was reasonably discoverable? In that case, it happened to be a statement of objections, which also would have told the person, by way of happenstance, that the fact amounted to an actionable wrong. But it's not relevant for the purposes of the statute of section 32(1)(b).

Now, Mr Thompson rather flip-flopped on the question of whether dominance would need to be known, and I'm still not clear as to what his position is, but I'm going -- At one point he seemed to accept the point put to him by the Chairman that that's not something that was concealed and then he seemed to row back on that. So, I'm going to address it just in case you go back through the transcript, and you say, "Well, Mr Thompson was actually saying that dominance needed to be known".

Now, let me just tell you, our position. Our position is that dominance is a legal conclusion. It's a legal conclusion that needs to be pleaded in an abuse of dominance case and it's a legal conclusion that needs to be pleaded on the basis of primary facts. Now, I'm not disputing that theoretically there might be cases, although it's difficult to imagine -- I've been racking my brains -- difficult to imagine such a case. There might be a case, in theory, where there is a primary fact that's essential to know in order to plead dominance and that fact is being concealed. But that is not this case. And can I just show you the pleading.

If we go back to bundle A1, tab 2, which is the pleading against BT. The pleading starts at page 40, can I take you to page 56. And what you have between page 56 and page 60 is the pleading on market definition and dominance. It starts with para 36, " ...precise market definition ... is a matter for expert evidence".

Para 37 pleaded:

"... by reference to the provisional views of Dr Davis ... based on the data and other

information available to him ..."

Then if we go through further, if we look through all of those paragraphs. 39:

"... based on the information ... available, Mr Gutmann considers that the relevant geographic market is the UK."

Then we come to "Dominance". Paragraph 41:

"On the basis of Dr Davis's provisional economic analysis, and other information available at this stage, Mr Gutmann contends that [the MNOs were dominant]."

I don't need to do this in detail, but you will see, if you go through each of the paragraphs. Look at paragraph 44. Mr Gutmann's there relying on particular features of the market, the market being highly concentrated, the market being a consumer market, et cetera.

And the short point is that there is nothing here, nothing in these paragraphs, that the PCR has relied on, that is in the nature of a primary fact that can be said to have been concealed so as to postpone the commencement of the limitation date, let alone a fact without which a case on market definition and dominance could have been pleaded. So, really, any suggestion that dominance is relevant for the purposes of section 32(1)(b) is dead in the water.

And, of course, to be fair to my learned friend, in paragraph 24 of their skeleton argument, they do not contend that any fact relating to dominance has been deliberately concealed.

Now, another thing that Mr Thompson repeatedly fell back on, he kept saying, "This is not a matter for summary judgment because it's very complicated. It needs to go to trial". And that, with respect, is an inadequate response to our application. Mr Thompson took you -- and it really comes down to the point that we've addressed at paragraph 14 of our skeleton, that it's just not enough to say, "It's complicated, something might turn up at trial", because, if that were right, it would always be a basis

for defeating an application to strike out or an application for summary judgment.

And that's why the case law, including the *Korea* case and the other authorities we cite at paragraph 14, consistently says that it's not enough to assert that something needs to turn up, you need to be analytical about it. You need to say, you need to put forward sufficient evidence, as the language of the Court of Appeal in *Korea*, sufficient evidence to say what it is that might turn up at trial that's going to affect the analysis that the court has to engage in.

And here the short point is that the PCR has not even identified, in principle, what kind of thing, what kind of information, what kind of disclosure might be produced at trial that could affect the analysis. We say, of course, that the facts that a consumer needs to know are there on the face of the contract, they are the four facts that I summarised, plus the availability of the SIM-only rates.

And the problem with Mr Thompson resorting to the point that more might come out at trial is that he has not explained what disclosure there could be that would undermine our case on those points. What could emerge that's conceivably relevant to the way that we put this part of the case?

One final point, maybe the penultimate point, I have two final points. So, penultimate point is that Mr Thompson said, "Ofcom and the regulators have found that consumers were confused. How could they possibly have known the facts if they were confused?" And he seemed to see an inconsistency between those two things. But there is no inconsistency. Section 32(1)(b) imposes an objective standard, and people may very well be confused about something which is also discoverable with reasonable diligence by them. And, indeed, they might be confused by something which has never been concealed from them. And that's our position, of course. We say that these fundamental terms of the contract were never concealed from consumers. They might have been confused by them, but they weren't concealed. And so, you don't get into

section 32(1)(b) to start with.

I want to take you briefly to the OTC case; that's at F4. It was referred to by Mr Thompson in this context. So F4, tab 67, page 1742 is the start of the report. I just want to show you a few paragraphs.

If we could pick it up, please, from 1756 and you see the question there, if you have that:

"The second aspect of 'reasonable diligence' identified by the judge was: how far the test of reasonable diligence falls to be qualified by the particular circumstances of the claimant, and in particular by the fact that OTC went into administration in January 2002 and into liquidation in February 2004."

So, the issue before the Court of Appeal was that this company was in liquidation. Should it have been expected to have carried out the same investigatory measures as a company that was actively trading? That was essentially the point.

And if you look at paragraph 38, the court says there, Lord Justice Males with whom the other members of the court agreed, said there that:

"I would agree that personal traits or characteristics bearing on the likelihood of the particular claimant discovering facts which a person in his position could reasonably be expected to discover, such as whether the claimant is slothful, naive, shy, nervous, uncurious or ill-informed, are not relevant."

And that's an important point because it shows that this point about consumers being unengaged is, by large, not relevant to the question of section 32(1)(b). Relevant to regulatory standards might well be desirable in a regulatory sense to alert consumers to things but not relevant to 32(1)(b).

If you go on, please, I just want to show you as we go through, paragraph 47. The reason I'm showing you paragraph 47 is this. So, that says, that's dealing with the trigger. So:

"... although the question what reasonable diligence requires may have to be asked at two distinct stages, (1) whether there's anything to put the claimant on notice of a need to investigate and (2) what a reasonably diligent investigation would then reveal, there is a single statutory issue, which is whether the claimant could with reasonable diligence have discovered ... the concealment."

And for my part of the argument, if we get to reasonable diligence because, of course, I say there's not even concealment -- but if we get to reasonable diligence, we don't need a trigger because it's there on -- it's the basic terms of the contract. There's no statutory requirement to have a trigger and there's no need for a trigger. So, that's by-the-by as we're going through.

And the final paragraph I want to show you is 1762. And can I just ask you to read paragraph 59 to yourselves. It's the conclusions. I just want to show you where the court got to. (Pause)

And so, in short, you're looking at the particular claimant. So, you can't ignore the fact that the company is in liquidation. But then it's an objective test and so questions such as naivety and disengagement are not relevant because it's an objective test. But you have my key point on this, which is that if we're right about the key terms of the contract, if we're right about that, then the fact that for regulatory reasons, regulators thought for consumer protection reasons, regulators thought, "Oh, well, mobile phone companies should structure the contracts differently or alert consumers when they're coming to the end of the contract", those points don't bear on the question that the Tribunal has to decide for section 32(1)(b).

The very final point I have is section 32(2). Mr Thompson says, "Well, that asks you to focus on the legal wrong", which is correct, but you have the points that I made in opening, which is that a breach by itself is not enough. It has to be a breach, a deliberate breach committed in circumstances where it would not reasonably be

discovered. And that takes you back to the core points of the contract, the core terms of the contract point. And so that's the reason why, we say, that that provision is not satisfied.

So, unless there are any questions for me, over to Mr Williams.

THE CHAIR: Thank you very much.

Reply submissions by MR WILLIAMS

MR WILLIAMS: Sir, I've got seven headings in reply. The first six are on limitation and the seventh is certification. Some of the points are very short and the main heading is the third one where I'll deal with the core discoverability issue.

The first point the suggestion was made that this application is a Trojan horse and that we're trying to get findings on substance under the guise of a limitation application. I hope it's clear that nothing in my argument -- that criticism can't possibly apply to my argument which is straightforwardly about the discoverability of the core facts as the PCR puts them in the claim and as they were conveyed through the publicity materials. So, there's nothing in that point.

The second heading is Mr Thompson's submission that paragraph 24 is just a skeleton argument. As Ms Demetriou has said, Mr Thompson's position on paragraph 24 has moved around somewhat. I'm just going to make a few points as to why paragraph 24 is not just a skeleton argument.

We haven't fixed on paragraph 24 as a convenient target. The application was originally targeted at paragraphs 3 and 4 of the claim form. I don't think we need to turn it up now, but those paragraphs are at A1 page 2, and you'll see that we targeted them in the application from A48, 2306, paragraph 29.

The reason this hasn't been an issue, at least until yesterday and today, is that the PCR has since restated his position in the same terms three further times such that the relevant facts are those stated in paragraphs 3 and 4 of the claim form and that

has been common ground.

I'll just give you some references if that's a convenient way of dealing with it, rather than take up time turning them up. You have the certification response at tab 33, two references, paragraph 6(b) on page 1864, where the PCR sets out the basic complaint in exactly the same terms as we've been discussing for the last 24 hours or so, and 6(d) and (e) on page 1865, where you'll see something which looks very like the paragraph 24 facts set out. Then, again, in paragraph 24, the position was set out in the same terms again.

We haven't picked paragraph 24 as some sort of strategic straw man to knock down; what we've done is take on the PCR's own position on its own terms which is obviously the right thing to do on an application of this nature. I think that may well be where we ended up again at the end of Mr Thompson's submissions, but that's certainly how we put it; we've taken their case on as they put it.

The third heading is points on the substance of my argument about discoverability. I've got five topics under this heading. The first one is this. In dealing with my part of the case, Mr Thompson accepted that the authors of the articles and the reports on which I placed reliance knew enough to bring a claim, but he submitted the Tribunal doesn't know anything about the population at large. Two points arise from that.

The first is that the concession which Mr Thompson made, which we say was an inevitable concession, accepts that the content of these articles did in fact contain the facts which a potential claimant needed to know. That's why the authors would have been in a position to bring a claim, and we say the same is true of any person who might reasonably have been exposed to the same content. That is our submission; that's our case.

We say, on my part of the case, that only leaves the question of whether the facts were reasonably discoverable and that the idea that there might be any other facts

that might bear on the matter completely falls away.

Then, the second part of Mr Thompson's point was, "Well, the authors knew, but we don't know about the population at large". We say that is focusing on actual knowledge, whereas our submission is based on reasonable discoverability. In my submission, it is telling that Mr Thompson slides between actual knowledge and reasonable discoverability because he actually doesn't have an answer to our position on reasonable discoverability. So, that's the first point under this heading.

The second point is *DSG* and the need for a trigger event. There's a short answer to this point, which is the answer I gave when making the application this morning: it is common ground between us that publicity about these issues was sufficient to trigger the running of time, because that is Mr Thompson's own position in paragraph 39 of his skeleton where he says that the running of time was triggered by publicity about the PCR's claim.

As I put it to you this morning, that really leaves a narrow question which is whether class members knew enough or could know enough about the claim to bring the claim before the publicity about this claim, or whether it was only when this claim was publicised that time could have started to run.

Now, Mr Thompson hasn't actually explained or provided any evidence about the nature of the publicity about this claim, but I've made my submissions as to why the earlier publicity clearly covered the facts that support the claim as distinct from the legal framing of the claim. That's the way I put the application this morning. That's the answer to the point and in my submission, it means *DSG* falls away. There's no dispute about the need for a trigger event. The question is whether the trigger event we rely on is good enough, or whether there wasn't enough information available until the claim was actually issued.

The *DSG* argument also falls away because of Mr Thompson's secondary position in

paragraph 40 of his skeleton that the CMA report which we looked at this morning was the trigger. Now, we didn't get into that any further, but in my submission, that is, on any view, a less plausible trigger than all of the mainstream media material that I showed the Tribunal.

There are a number of points to make about *DSG* which are secondary to that principal answer. As Mr Thompson explained, the problem in *DSG* was that the Tribunal took a wrong turn because it didn't recognise the need for a trigger event. It assumed that the claimant was on notice of the need to carry out an investigation, so there was a basic error of law. As I've explained, I'm not asking you to make any assumption about that and indeed, it's common ground that there has been a trigger event, and we've produced evidence of media coverage which we say is about as broad as it could possibly be in relation to this broad consumer interest case.

Our facts are fundamentally different from those of *DSG*, where the question was whether Dixons knew enough about interchange fees so that they could bring a claim against Mastercard or Visa. So, the focus there was on facts which were concerned with the way in which card schemes operated and how the fees operated within the card scheme. Our fact pattern is completely different; we're talking about a broad consumer-facing campaign, which was intended to make consumers aware of issues in relation to their own dealings with MNOs, so it's really got nothing in common with *DSG* at all.

Mr Thompson's point was that, in *DSG*, the Court of Appeal concluded that the question of whether Dixons knew enough about interchange fees to bring a claim should go off to trial, a trial based on evidence, disclosure and cross-examination. That was, of course, a claimant-specific issue which was going to be dealt with in that case through the conventional trial process. Mr Thompson says that that's obviously what ought to happen in this case.

Now, it is important to note that, in the certification part of our application, Mr Thompson makes the opposite submission. He says that the issue needs to be done on a broad brush and generalised basis. Now, we looked at paragraph 34(b) of Mr Thompson's certification skeleton this morning, but I think it is worth just opening it up again because it's extremely pertinent on this point. It's bundle B, tab 2, page 13, paragraph 34(b). It says:

"The PCR thinks it likely that, in collective proceedings, the issue of the date of deemed knowledge for the purpose of section 32 ... would be determined by reference to the knowledge either of the class as a whole or of categories of PCMs."

We did look at it this morning.

Our primary position and our position on this part of the application is we agree; we say that it's clear on the basis of the facts of this case, that there was sufficient publicity about the issue to put consumers or class members generally on notice of this, and that the facts were reasonably discoverable. We say that's the answer now, and it would be the answer at trial.

Unless the Tribunal thinks that Mr Thompson has reasonable prospects of persuading you otherwise at a trial, then we should succeed in our application. I've made my submission. The evidence is overwhelming, Mr Thompson has given no plausible contrary answer, and it is a vain hope that the issue is going to look different at trial. So, that's what we say about that.

But if we don't succeed in that argument, then we agree that the issue would need to be dealt with at trial and I've made my submission about how the PCR hasn't explained how an orderly trial of that issue would be possible.

But what I do say very, very clearly is that Mr Thompson can't have it both ways. He can't ask for a trial to avoid summary judgment, and then claim that the issue is sufficiently generalised to be suitable for certification. That's having it both ways.

Our primary position, just to reiterate, is that the Tribunal can only realistically decide the question of reasonable discoverability by looking at the nature of publicity. I've shown the Tribunal its scope, its reach, and whether it reasonably put affected consumers on notice. That's how we put the application.

The third point under this heading is that Mr Thompson had almost nothing to say about the publicity materials which we say is a telling point in itself. He made two points about the BBC coverage, which I just want to respond to.

The first related to what was said to be a negative commentary on the prospect of a claim. The answer to that is the point which, you, sir, put to Mr Thompson, which is that that was dealing with a different sort of claim. It was being cautious about the prospect of a claim for mis-selling. That's obviously quite different from the sort of claim we're dealing with, but it's not the point anyway. The point is about the discoverability of the facts rather than about the presentation of the prospect of any particular sort of legal claim. The facts are clearly there.

Secondly, Mr Thompson relied on the reference to the MNOs' responses to the issues. It's obviously not surprising that in that situation, Vodafone and other MNOs said that they didn't accept that they'd mistreated consumers, but there's nothing in that aspect of the article which in any way cuts against the clear publicity of the facts on which the claim is based.

The fourth point under this heading is about paragraph 23 of the claim form which Mr Thompson showed the Tribunal. He relied on references to the 2018 Ofcom publication in which Ofcom made reference to the fact that some consumers didn't understand their options. Our short answer to that is that that is just not addressing the question of reasonable discoverability; it's addressing the question of actual knowledge. I showed you earlier that in fact, Ofcom's position elsewhere was that over 80 per cent of consumers did in fact know that they were continuing to pay the

same rate after the minimum term. So, one has to understand some people in that context. Ofcom is obviously concerned to understand that consumers know enough about the position to be able to exercise their rights and to take advantage of the deals that are available, but that is all totally separate from the question of reasonable discoverability. The fact that some consumers may not have understood the position doesn't mean that the facts weren't reasonably discoverable.

The last point, which is a tiny point: Mr Thompson said that some of the publicity that I rely on is conveniently just before the November 2017 date. We don't really have any control over the date of facts in the past, but the fact is the fact, the evidence is the evidence, and the timing gives rise to the legal consequences that we put forward, whether it was a month beforehand or two years beforehand.

So, just a few observations on *Gemalto*. We rely on *Gemalto* for the legal test in a section 32(1)(b) case. We don't rely on it as a factual precedent, which seemed to be the basis on which Mr Thompson made his submissions, drawing distinctions on the facts. That's not why we rely on it at all.

The facts of *Gemalto* were, again, very different. It was a cartel case, which is obviously a fundamentally different fact pattern. Obviously, most people and businesses operating in a particular sector are not aware that a cartel has happened in their sector until that cartel somehow enters the public domain. It's in the nature of cartels. What happened in *Gemalto* is that the claimant, my client, was alerted to the fact of a Commission investigation, and from there the legal argument proceeded and the Court of Appeal concluded that sufficient facts about the cartel became reasonably discoverable for time to start running. So, that's what happened on the facts of that case. The factual evidence that Mr Thompson focused on was about how *Gemalto* became aware of the Commission's investigation and so on. Of course, that was the only possible source of information about a suspected cartel; that's how the matter

entered the public domain.

Our case isn't about a secret cartel. It's completely different. Information about the issue wasn't only available through an ongoing investigation by a competition authority; that was the whole thrust of my submission. So, there's just no parallel at all.

Mr Thompson relied on *Gemalto* paragraph 89 and what he described as policy observations of Lord Justice Green. I think I made clear as part of the application that our fact pattern is completely different from *Gemalto*. We're not talking about time running on the basis of the publication of a statement of objections. So, the caution that was expressed in paragraph 89 of *Gemalto* about what might be sufficient to start time running in a consumer case, those concerns, that caution doesn't arise at all given the mainstream media nature of the coverage. It's again a completely different fact pattern.

Mr Thompson made -- this is my fifth heading -- a number of process complaints which I'll just deal with extremely briefly. He complained that all we've got is a solicitor's letter. I mean, it is standard in this Tribunal for applications to be made by correspondence in that way and we don't really understand the objection because our points were very clearly stated.

The evidence we rely on is documentary; it's all before the Tribunal, so we don't see what possible process of objection there could be to the way that that's developed.

He said we haven't got a pleading. If he had a pleading, it would say, "Your claims go back more than six years, and they're time-barred". The burden would then be on Mr Thompson to explain his position on concealment and reasonable discoverability. That is, of course, where we are. That's the way that the application has unfolded, so we don't understand that complaint either.

As far as the complaint that we haven't had disclosure is concerned, it's impossible to

see how disclosure would affect the arguments I've been making before the Tribunal.

Sir, last limitation point, Mr Thompson said that our argument based on publicity in 2015 or 2017 doesn't necessarily deal with claims from further ago in time --

THE CHAIR: It doesn't deal with?

MR WILLIAMS: Claims -- he said, well, we rely on the limitation (overspeaking) --

THE CHAIR: Right, yes.

MR WILLIAMS: -- if we're wrong about -- in the May Application, we rely on this argument of going back. He said it's not necessarily right to say that we can rely on the same points. In my submission, it's not a logical argument; the publicity to which we refer is all about a particular type of contract, and the payments the consumer may make under that type of contract. On the PCR's case, the core facts underpinning that claim are the same for all such contracts over time. So, we don't understand how it can be said that our argument doesn't deal with historic claims going back further in time.

That just leaves certification, and I'm sure I'm not going to make you miss your train, sir.

THE CHAIR: Very good.

MR WILLIAMS: There's only one point to make about this, which is related to points I was making earlier on. Mr Thompson said our certification objection fails because he says we accept that knowledge is dealt with by an objective standard. As I've already alluded to, that submission doesn't separate out our distinct position on the limitation and certification issues. And I think you put this to Mr Thompson.

We've put the limitation application on the basis that it can and should be dealt with on an objective basis as I was saying earlier on -- on the basis of the reasonable discoverability test. That's a submission I've been making today.

But if you're not with us on that, then we move into a different territory in which actual

knowledge is an issue. Actual knowledge is not an objective standard. Mr Thompson said that I made generic submissions about knowledge, but my generic submissions were about reasonable discoverability. I didn't say that actual knowledge is a generic issue, because it isn't a generic issue; it clearly isn't. Once that's recognised, in my submission, Mr Thompson didn't offer any answer to the argument I made this morning.

So, unless you have anything further, sir, those are my submissions.

THE CHAIR: No, thank you very much.

Well, I'm grateful to all counsel for the cogency, clarity and efficient use of the time. Unsurprisingly, we will reserve judgment. Thank you very much.

(3.57 pm)

(The court adjourned)