IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1602/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 12th July 2024

Before:
Mrs Justice Bacon
Charles Bankes
Anthony Neuberger
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Christine Riefa Class Representative Limited

Claimant

v

Apple Inc. & Others **Defendant**

A P P E A R AN C E S

Jamie Carpenter KC, David Went (On behalf of Christine Riefa Class Representative Limited)

Roger Mallalieu KC, Sarah Abram KC, Tom Pascoe (On behalf of First & Second Defendants)

Meredith Pickford KC, David Gregory (On behalf of Third to Seventh Proposed Defendants)

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Friday, 12 July 2024

(10.30 am)

Opening remarks

MRS JUSTICE BACON: Good morning everyone. Some of you are joining us from the live stream on our website, so I will start with the customary warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of court.

MR CARPENTER: Good morning. If I can start by just running through the cast list, I appear this morning for the PCR, Christine Riefa Class Representative Limited with my learned friend Mr Went; for Apple, we have Ms Abram KC, Mr Mallalieu KC and Mr Pascoe; and for Amazon, we have Mr Pickford KC.

This is, of course, the determination of the PCR's application for --

MRS JUSTICE BACON: Mr Pickford with?

MR CARPENTER: Mr Gregory. I am sorry, I had no idea. Mr Pickford's name was the only one on the skeleton argument. I do apologise.

Yes, madam, this is the PCR's application for a collective proceedings order on an opt out basis. There are, happily, very few live issues remaining between the parties. Hence the reduction in the time estimate for this hearing from two days to one, and it is unlikely -- I say hopefully -- that we will require the whole of today.

MRS JUSTICE BACON: Can I say on that note, I need to finish this hearing by 4. So everyone should have that in mind as the long stop. We may be finished earlier than that. I am sure we will be grateful if people's submissions are concise, but that's the long stop.

MR CARPENTER: Thank you. I am sure that is more than achievable.

We have, as the Tribunal will doubtless have seen, at page 1 of bundle A, an agreed

agenda and timetable. To explain the representation on this side, I will only be dealing with costs and funding issues which are C and D, and to the extent under E that there are any further funding issues that the Tribunal wishes me to address at the end. Mr Went will be dealing with all of the other issues. So unless there is anything I can assist the Tribunal with now, I propose simply to hand over to him.

MRS JUSTICE BACON: No. One question I do have is whether you are proposing to deal with the issues in a way that each issue would be addressed separately with submissions from all of the counsel before moving on to the next point? Or are you proposing that you will make all of your submissions on all of the issues and then we will hear from the proposed defendants?

MR CARPENTER: I think we had envisaged the former, madam, but of course that is very much subject to what the Tribunal will find most convenient.

MRS JUSTICE BACON: No, no, I think that will work.

MR CARPENTER: On that basis, then, I will give way to Mr Went.

MR WENT: So the first item on the claim form, amendments. So the PCR is applying to amend the claim form in a number of respects. We deal with it at paragraph 7 of our skeleton. It covers the class definition, changes arising from disclosure of the restrictive agreements to the PCR and changes following publication of the non-confidential version of the Spanish competition authority's infringement decision. Apple and Amazon have consented to the various amendments except for the amendments relating to the relevant period for the class definition. That's at paragraph 17.1, 79 and 80.5 of the draft amended claim form which happily I can say are a matter for the Tribunal, although subject for Apple possibly taking a point on that issue in its skeleton. They also don't consent to the claim period, the revised definition. That is at paragraph 78.4 and 89, which they both oppose although I think for different reasons.

MRS JUSTICE BACON: Yes.

MR WENT: The claim period, obviously, is subject to the strike-out application on the part of Amazon and that's item 2 on the agenda. Actually, just in passing, I mention I think Apple also raised the point at paragraph 8 of their skeleton relating to paragraph 67A of the amended claim form and that relates to the pleading of a single continuous infringement. But I think that is just putting down a marker as opposed to any formal objection.

So that's the lie of the land in terms of concerns in relation to the claim form amendments. I don't know whether the Tribunal has had a chance to review what I might call the non-controversial amendments?

MRS JUSTICE BACON: So there is one question that we do have, which relates to what's said about the off Amazon sales. We note the concerns expressed by Apple in particular about whether this is a realistic claim. But what we don't have is -- what we don't appear to have is any concrete objection to certification of a claim that extends to off Amazon sales. Nor do we have a strike-out application in relation to off Amazon sales.

Now this seems to us to be wrapped up in the question of the proposed class definition. I am not going to invite Apple to make its submissions out of turn, but I think it would be helpful for us to understand, before you make your submissions, Mr Went, what in short form is Apple -- what are Apple and Amazon's positions in relation to those off Amazon sales? Are we being invited to refuse to certify those, or is there going to be at some point a strike-out application? What is your position, Ms Abraham?

MS ABRAM: We are not inviting the tribunal to decline to certify in relation to off Amazon sales at the time. We are really concerned about that bit of the claim which is not quantified by the PCR. We are really concerned about whether it is a viable at all.

The reason for that is that it is based on this extremely improbable premise that agreements which are said to have led to price rises on Amazon are in turn said to have possibly -- it is put as may, implausible, in the claim form -- possibly lead to price rises across the whole of the wider market and we have real doubts about that. One important reason why we have doubts about that is that the whole of this part of the claim seems to be premised on the assumption that about 20 per cent of Apple's UK sales were made through Amazon.

Of course Apple, we don't have all of the data about what Amazon sold in terms of Apple products. We know what products we sold to Amazon for it to sell on, but the focus of this case is the fact that Amazon also sold Apple products that were from other are retailers.

MRS JUSTICE BACON: Just focusing on what you said at the start, you are not inviting the tribunal to refuse to certify, but you say you have real concerns about whether it is viable. Picking up the language of your skeleton, you say "hopelessly unrealistic." That is the language of strike-out or refusal to certify. What are you saying? If you are saying it is hopelessly unrealistic, then how can you accept that that would survive a strike-out application?

MS ABRAM: We don't accept that it would survive a strike-out application. We, Apple, are not able to make a strike-out application based on the data that we have available to us, because in order to make an argument to you about the proportion of sales made through Amazon -- proportion of sales of Apple products made through Amazon versus the rest of the market, we would need to have not only the data that we have about the sales that we made to Amazon, but also Amazon's own data --

MRS JUSTICE BACON: I see, so you say you won't be able to determine whether that is a viable is claim until you know the proportion of sales that are made through Amazon?

MS ABRAM: Yes.

MRS JUSTICE BACON: And that's why you have not made a strike-out. Thank you. That's yours position.

Mr Pickford.

MR PICKFORD: Madam chair, we share Apple's concerns in relation to this point. I think what I can say is that work is ongoing to ascertain Amazon's share of Apple's sales. But for the time being, we can only reserve our position in relation to that because, like Apple, we only know part of the story and there needs to be essentially further exchanges of information in order to be able to work out the entire story. We know our sales, Apple know their sales.

MRS JUSTICE BACON: Thank you. That has clarified the position for us. I was concerned that through the back door there was a suggestion that this should not be certified, but that's obviously not going to be the case.

So that then leaves the two main issues; the extension of the class definition to additional proposed class members at this point, while reserving your right to make a further application in the future, and then the scope of the claim for the damages period.

MR WENT: Indeed. I was thinking I would lead on the relevant period. I don't know whether, when it comes to the strike-out application in relation to the claim period, whether you prefer to hear Amazon first and Apple, I guess, as well, but I am in your hands as to who goes first on that.

MRS JUSTICE BACON: Yes. I think rather to avoid people bobbing up and down, I think you should just start on both issues.

Submissions by MR WENT

MR WENT: I am grateful.

So in terms of the relevant period, we deal with that at paragraphs 38 -- sorry, 34 to 38 of our skeleton. So this is the point that the relevant period for the class definition can't extend to the date of judgment or any settlement following the ruling in Neil, which also followed Merricks 3, and that's because it is not possible to bring collective proceedings in respect of contingent claims.

So the PCR is proposing to adopt the same approach that has been adopted in other collective proceedings following the ruling by the tribunal in Neil. It just referenced that sort authorities bundle volume 2, tab 28, page 1378. So we are seeking now to change the relevant period so that it ends on the date of the claim form amendments.

As you noted, madam, the PCR says it will seek to extend the relevant period during the course of proceedings so as to admit before trial further claimants who only start to purchase Apple products after that date.

Amazon doesn't seem to raise any concern in respect of this point and says it is a matter for the Tribunal. That's in the correspondence bundle B, tab 60, page 124. That was also the position taken by Apple prior to its skeleton. That's just at the next tab in the correspondent's bundle, tab 61, page 126.

Now, neither Neil -- neither the tribunal's judgments in Neil or Merricks 3 examine the situation where the PCR seeks to amend the class definition post issue. Neil, at paragraph 70 -- and that's at page 1403 of the authorities bundle -- accepts that it may be possible through procedural gymnastics to extend the collective proceedings so as to include future claimants and combine them in the proceedings.

MRS JUSTICE BACON: Sorry, which paragraph?

MR WENT: Paragraph 70.

MRS JUSTICE BACON: Yes.

MR WENT: The tribunal didn't examine the mechanism for this, but in subsequent collective proceedings the approach that the PCR is proposing has been adopted. We

say that the requirements of section 47A and 47B of the Competition Act and the reasoning in Merricks 3 is satisfied provided the end date of the class definition doesn't lie in the future. We cite the tribunal's judgment in Gormsen on that at paragraph 37 of our skeleton. It is paragraph 47 in Gormsen. The reference for that is volume 2 of the authorities bundle, tab 24. It is page 1496.

So paragraph 47. That's where the tribunal accepted that the class representatives' use of the data is for revised CPR application --

MRS JUSTICE BACON: I am just looking at that. Give us time to find the authorities: "The use of 6 October 2023 as an end date addresses the issue of an indeterminate class definition ..."

MR WENT: Exactly.

MRS JUSTICE BACON: All right. So that was amended to give a determinate end date which fell -- how close to the date of the judgment? Was that shortly before the date of the hearing then?

MR WENT: Yes. I believe so.

MRS JUSTICE BACON: Was there any suggestion that it was then going to be later amended to bring in new class members?

MR WENT: Certainly that's been discussed in a number of cases. I think that may have been the case, actually, even in -- well, it is either Qualcomm or Le Patourel where it is suggested there could be further claim form amendments, but at the latest at the PTR prior to trial. I was just going to direct you to where this has also happened in other cases.

It happened in Qualcomm, as you will be aware, that's authorities bundle volume 3, tab 57.

MRS JUSTICE BACON: That's the order in Qualcomm?

MR WENT: Exactly. And also the claim by Le Patourel, authorities bundle, volume 3,

tab 56.

MRS JUSTICE BACON: So far as I recall in Qualcomm it was dealt with by consent. Was that also the case for Le Patourel?

MR WENT: Yes, that's my understanding.

We say, madam, that there is nothing in this point. As I said, it's not even clear that an objection is being made by Apple in relation to this. They are possibly somewhat inconsistent. On the one hand in their skeleton they say it is up to the tribunal; on the other they seem to raise a couple of objections potentially. One is that it seems to be the point or could be the point that it is not possible to add new class members at any point following the issue of proceedings. We say certainly that can't be right. It is an individual proceedings, claimants can be added and there is absolutely no reason to think it is any different in collective proceedings and obviously the Supreme Court has made that point in Merricks as a general point.

Of course, you know, there are very wide powers in rule 85 for the CAT to vary or revoke a CPO, including the power to add, remove or substitute parties and the power to order amendment of the claim form. So we say there is nothing, if that is the point being made by Apple.

There is also the question in terms of whether there is a question of principle over this. But we have cited in our response -- sorry, our reply at paragraph 27, the Court of Appeal judgment in Rawet v Daimler. I don't think there is any need to turn it up, but it is authorities bundle volume 3, tab 35, page 1685. It was a High Court proceedings so not in the Tribunal, but looking at the validity of adding claimants to the claim form preservice, and the Court of Appeal noted that the restrictive approach to adding claimants to an existing claim would be inconsistent with the overriding objective in group litigation in the High Court, and to require claimants in group litigation to have to issue separate proceedings every time that additional claimants are sought to be

added entails a disproportionate approach to the cost and potentially represents denial of access to justice. So we say the PCR has identified a principle behind the proposed amendment.

So for now, madam, those are my submissions on the relevant period.

MRS JUSTICE BACON: Yes.

MR WENT: Moving onto the claim period then. I should just note at the outset that there is a point that we raised in our skeletons from an EU perspective. We have reviewed what Amazon said in their supplemental skeleton and we are not going to pursue that element further. I alerted Mr Pickford to that ahead of this hearing.

MRS JUSTICE BACON: All right. So we are purely deciding this on the basis of domestic law then?

MR WENT: Yes, exactly.

MRS JUSTICE BACON: All right.

MR WENT: So for different reasons, apparently Amazon and Apple are saying that the proposal by the proposed class rep to have the claim period run until the date of final judgment is not permissible. Apple bases its argument on the logic of the rules, while Amazon -- I think unsupported by Apple -- says it is impermissible at common law to claim for future losses post issue in the case of an ongoing tort and there is nothing in the statutory framework that overrides the common law rule.

I would start just briefly by noting -- and obviously these points have not been taken by defendants previously in any collective proceedings, while Apple and Amazon seem to be both coming at this from different angles.

I would also note, as mentioned in footnote 39 of our skeleton, that the point about losses post issue breaches for an ongoing tort was specifically considered by the Tribunal in the Gutmann boundary fares case, where the Tribunal appears to have concluded that there was no issue with including losses sustained by class members

for post issue breaches, although I accept the defendants didn't take the point in that case and there is nothing said about the point in the Tribunal's certification ruling. I mean, it is just discussed during the certification hearing.

Extending the claim period to the date of final judgment was also though expressly permitted in the Gormsen case and you can see that at -- if I give you the reference, it is authorities bundle, volume 2, tab 24, page 1495.

MRS JUSTICE BACON: Paragraph 44.

MR WENT: Yes, paragraph 44. As I said already, obviously the end date for the class definition was amended to the date when the revised CPO application was filed while the claim period still extended to the date of judgment or earlier settlement.

Again, the point was not subject to oral argument at the certification hearing, but it does seem to be the subject of written submissions after the hearing. You can see that at paragraph 42 of Gormsen.

So with those initial remarks, let me deal with Amazon's points first. I am going to spend most of the time on the argument that the ability to award damages for post issue breaches arises from the case management powers which I deal with at paragraph 41 of our skeleton.

So we said sections 47A and 47B of the Competition Act had been interpreted to mean that it is only possible to combine extant claims in collective proceedings. That is the Neill and Merricks 3 judgments. We obviously accept that and that's why we propose to amend the class definition in this case following Neill. That's fine.

However, Amazon further contends that the PCR can't claim for future losses after issue of the claim form. Now I think there is the distinction that perhaps sometimes gets blurred in my learned friend's written submissions. That's the distinction between post-issue losses arising from pre-issue breaches and post-issue losses arising from post-issue breaches in the case of a continuing tort.

My learned friend seems to say at times that neither types of post-issue losses are permitted, but the distinction, as I said, does seem to get lost at times.

Let me deal just first with the post issue losses arising from pre-issue breaches. I think it is important for setting the scene and may be relevant to points being made by Apple.

So Amazon, for example, at paragraphs 18 and 26 of its skeleton contends that the PCR cannot claim for future losses at all, but can only claim for losses which a person has suffered -- taking the language of 47A -- at the time the claim is made. So the argument isn't just that the claimant must have an extant claim at the time of issuing proceedings, but the claimant can only claim for losses suffered up to the point in time of issuing proceedings.

Then at paragraphs 27 and 29, Amazon seems to suggest that may arise from the common law prohibition.

Then at paragraphs 27 and 9 of Amazon's supplementary skeleton -- as I said we are obviously not taking the EU point anymore -- there Amazon says that neither EU law nor UK law provide a right for claims for future damages. And Amazon makes the point that in general harm must have been suffered before a court or Tribunal could order compensatory damages. In making those points, Amazon relies on the fact that the past tense is used in section 47A, subsection 2 of the Competition Act. The fact that collective proceedings do not establish a new form of action, and then also there is reliance on section 11.026 of McGregor on Damages.

There is actually a more recent edition of McGregor and we have both sets of editions in the bundle, but there is not a material difference or any difference on this point. So if we refer to the most recent version, that's at 12-026. The reference is the authorities bundle, volume 3, tab 60. It is page 2247.

Just briefly dealing with what McGregor says on this at 12-026, if you look at 12-026, it says, "But where there is a continuing wrong ..."

Then it continues:

"... the further causes of action lie still in the future ...(Reading to the words)... and therefore it is impossible to bring an action to recover respective loss even if it is it foreseeable."

That is looking at post issue losses arising from post issue briefs in the case of a continuing tort.

I know the court is all working electronically but if you are working from the hard copies, it is worth keeping that to hand it because I will return to it.

MRS JUSTICE BACON: "... where there is a continuing wrong ... it's impossible to bring an action to recover prospective loss ..."

You are saying that it is not prospective. What are you saying about this?

MR WENT: I am just saying if you look at the sentence starting, "But where is a continuing wrong ..." the point is that "the further causes of action still lie in the future and therefore it is impossible to bring an action to recover prospective loss even if it is foreseeable". So I am putting emphasis on the further causes of action still lying in the future. That's the important point there.

MRS JUSTICE BACON: What do you say about that for this case?

MR WENT: So at the moment I am just dealing with the -- I think Amazon is taking issue with both future losses arising from pre issue breaches and also future losses arising from post issue breaches. At the moment I am just dealing with the point about future losses arising from pre issue breaches, and Amazon appear to be relying on 11-026 and 12-026. I am just saying that at this point in time, McGregor does not help on that point.

MRS JUSTICE BACON: I see.

MR WENT: I will come back in a moment to look at future losses arising from post issue breaches.

So just in terms of the -- sorry, give me a moment.

Contrary to paragraph 9 of my learned friend's skeleton argument, the Amazon skeleton, in the UK and EU context damages can obviously be awarded for future losses for pre-issue breaches. You can see that very clearly. For example, if we can just go back to a previous section of McGregor, that is 12-024, that is at page 2246 of the bundle.

This point should be obvious, madam. But there the rule is:

"Damages for loss resulting from a single cause of action will include compensation not only for damage accruing between the time the cause of action arose and the time the action was commenced, but also for future or ...(Reading to the words)... whether such damage is certain or contingent. Perhaps the commonest illustration of the rule is action for personal injuries where every day damages are awarded which take into account prospective pain and suffering, prospective loss of amenities of life, prospective medical expenses and prospective loss of earnings."

Then just touching, as I said -- not taking an EU point but as my learned friend had raised it, in the bundle we have the European Commission guidelines on some quantifying harm in competition damages actions.

MRS JUSTICE BACON: I thought you weren't going to be raising the EU point.

MR WENT: I am not. It is merely to make the point that my learned friend in their skeletons suggested that you can't claim in effect for pre-issue -- sorry, future loss arising from pre-issue breaches under UK or EU law. I was merely just going to point to the guidelines where it makes very clear that you can claim for future losses. But I don't need to make the point.

Thinking about this further in the competition law context, there may well of course be future losses arising from a breach prior to issue which can be claimed for both before the Tribunal and the civil courts. If you think of damages sustained in a run-off period,

for example, the competition or breach might have occurred pre-issue, but the losses continue after issue during a run-off period.

Equally, there are loss of chance type cases in competition law where damages can be awarded for loss of the chance on a prospective basis with the damages being subject to reduction because of the contingency involved.

In this claim, we have a claim for financing losses suffered by claimants. So if a class member purchased an Apple product on finance towards the end of the class period and had an ongoing subsequent increased finance costs, those would be included in the claim.

Equally, where an injunction is sought in a competition damages claim, the remedies sought might include injunctive relief in relation to ongoing harm extending beyond the date of issue and the award of damages in lieu of an injunction is another example of awarding damages on a forward-looking basis at the date of judgment.

So this is all just to make the point, madam, that section 47A(ii) can't have the meaning that it is only possible to claim for losses already sustained at the point of issuing the claim or when damages are being assessed because it talks about claims for losses which a person has suffered. In other words, whilst section 47A requires an extant claim at the point of issue, it doesn't limit the losses that can be claimed for up to the point of issue or even up to the date of assessment.

So that was dealing with future losses, in respect of pre-issue breaches. So then moving to future losses arising from post-issue breaches.

So the question here is where a claimant has an extant claim at the point of issue of the proceedings under 47A, can they claim under 47A for post issue breaches without seeking to amend their claim form, or issuing a new claim? We say that is possible.

If we can turn back to the extract from McGregor at page 2247, section 12-026 explains the old authority to the effect that it is not possible for ongoing torts to claim

for losses for breaches that arise in the future. So that's dealt with at 12-026.

Then section 12-027 starts by explaining that this common law rule was modified by RSC order 36, rule 58 which later became RSC order 37, rule 6. That allowed damages to be assessed in a continuing cause of action case down to the time of assessment.

So McGregor says that there has only been one case in which this rule had been applied and that was in Hole v Chard Union. It was a nuisance action. I think it related to pollution of the claimant's stream. One can see, obviously, why -- across tort cases it might be -- this issue might have arisen most often in nuisance cases.

If we go over the page in McGregor, and then just after footnote 122, McGregor there says:

"However, nothing to the same effect as the old rule of court makes an appearance in the Civil Procedural Rules. ...(Reading to the words)... This apparent lacuna suggests that there is no longer provision for assessment of damages down to the date of trial, which would be an unfortunate and presumably unintended result. It would be particularly unfortunate in nuisance cases ..."

Of course we might add there, in competition law cases:

"In Hole v Chard the Court of Appeal seems to have considered the jurisdiction for damages down to the time of assessment was derived from the then RSC order 36, rule 58. ...(Reading to the words)... If this is so, logic would suggest that providing that one of the Civil Procedure Rules can be found to be broad enough to encompass the power ..."

MRS JUSTICE BACON: Yes, McGregor suggests CPR1.1.

MR WENT: Exactly. Exactly. But also says that:

"The rationale for Order 36 Rule 58 was a commendably pragmatic concern to avoid the need for a claimant to commence the second action merely to recover damage

accruing from the issue of the writ until judgment ...(Reading to the words)... The overriding objective of dealing with cases justly would surely be served by continuing to award damages in the old way."

You can read the rest of that paragraph.

So rule 4 of the CAT rules is obviously strikingly similar to CPR1.1. If so, if this argument works in the context of the High Court jurisdiction, there is no reason to distinguish the position in the Tribunal context.

So Amazon makes the point that the common law rule can only be overridden by clear statutory language. Of course, there is no need for an express overriding. The common law can also be overridden by necessary implication. The presumption that a statute doesn't alter the common law doesn't mean that enactment should be given a strained interpretation, but only means that the common law shouldn't be taken to have been altered casually or as a side effect of provisions directed to something else. The principle applies equally to secondary legislation as it does to Acts of Parliament.

So we say there is no strained interpretation of rule 4 required to give the Tribunal the power we say it has. If you want the reference, rule 4 is at authorities bundle 3, tab 48.

But the relevant provisions of rule 4 include in subsection (1) ensuring cases are dealt with justly and at proportionate cost and that includes, at subsection (2), saving expense and ensuring that each case is dealt with expeditiously and fairly.

Under subsection (4) the Tribunal must actively manage cases which includes, at subsection (5), adopting fact-finding procedures that are most effective and appropriate for the case.

So we say in light of the previous position under the RSC and reasoning in McGregor, there is a necessary implication that the Tribunal would have the power to deal with post-issue losses from post-issue breaches just as the civil court would have the power under CPR1.1.

The rationale for the old RSC rule was the pragmatic concern to avoid the need for claimants to start new actions merely to recover damages arising from the date of issue. Under Tribunal rule 4, the Tribunal must seek to ensure that each case is dealt with justly and at proportionate cost. So the necessary implication of rule 4 is that it should be possible to accrue losses for post-issue breaches in the claims since otherwise wholly unnecessary additional costs will be incurred in respect of seeking amendments through the life of the proceedings.

MRS JUSTICE BACON: Is there really no case in which this has been addressed save the Gutmann cases which you reference in your footnote 39?

MR WENT: We have not been able to identify anything, no.

MRS JUSTICE BACON: All right.

MR WENT: Those are my submissions on the Amazon position on the claim period. As I said, Apple also contests the newly defined claim period on the basis that the claim period is not the same as the period that applies under the class definition and is not the period for which the PCR is seeking certification.

However, there is nothing in the statutory language or otherwise which means that the period of the class definition, the claim period, must be co-extensive. Section 47B of the Competition Act is at tab 62, volume 3 of the authorities bundle, page 2259.

So subsection (5) explains the Tribunal can only make a CPO in respect of claims which are eligible for inclusion in collective proceedings. Then the test under subsection (5)(a) for eligibility is that they must raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.

Then subsection (7)(b) then separately says the CPO must include a:

"... description of a class of persons whose claims are eligible for inclusion in the proceedings ..."

So the class definition scopes out the persons who form part of the proceedings, here

the purchasers of Apple products, between October 2018 and the ultimate end date or initial end date of the class period. But there is no suggestion that the class period determining which persons fall within the class must be co-extensive with the claims which are eligible for inclusion of proceedings in respect of those class members.

In terms of thinking about the logic of this, and the fact that there is no reason why the claim period in the class period must be the co-extensive, I have already provided some examples which I think equally apply in this context.

So first, there might be a run-off period beyond the class period and that's actually precisely what happened in the Merricks claim. We can go to that. It is authorities bundle 2, tab 17, page 1012. Just to put it in context, this involved an application to amend the claim to include a run-off period but after the limitation had expired. As limitation had expired, it wasn't possible to extend the class period into the later run-off period, but this is dealing otherwise with the run-off period.

So paragraph 46:

"Increasing the claims period in this way will lead to a disjunct between the scope of the claim and the scope of the class but clearly to lesser extent than under the amendment urged by Mr Merricks. ...(Reading to the words)... We do not consider that this is in itself a valid objection, as Ms Wakefield pointed out in Trucks Collective, where the Tribunal was faced with a choice, this served as a reason for preferring the proposed proceedings put forward by the RHA subject to curtailment of the overrun period to those of UKTC. The Tribunal there did not hold that the disjunct in the UKTC claims precluded them from being certified. In the present case, the disjunct is the result of the limitation period. We do not see that persons within the class should be prevented from claiming for potential loss just because others who may also have suffered similar loss can no longer be included in the proceedings because of limitation."

MR BANKES: Can I just check? In that case, did the run-off period end before the claim date?

MR WENT: So the run-off period extended beyond the class definition.

MR BANKES: I understand that, but did it extend beyond the claim date?

MR WENT: I would need to check that.

MR BANKES: Thank you.

MR WENT: But I assume -- I don't know, and I don't know actually whether it will be clear on the face of the judgment, actually, whether that was the case or not.

That is run off. Other reasons as to why there might be disjunct, as I said already, there are loss of chance-type cases. In cases where an injunction is sought, the remedies sought might include injunctive relief in relation to ongoing breaches and harm extending beyond the class period.

Conversely, of course, the claim period for individual claimants who form part of the class may be shorter than the class period. In this case, I mean, a claimant could conceivably only have purchased an Apple product in the first year of the class period and not afterwards.

Of course, the aggregate assessment of damages examines loss at the class level and not the individual claimant level, and assesses loss over the specified claims period even if individual claimants might not have eligible claims extending over the time -- the entire can claim period.

I also would just note rule 80 of the CAT rules, which I am not sure we do have in the bundle, actually.

MRS JUSTICE BACON: We have purple books.

MR WENT: You have purple books.

MRS JUSTICE BACON: And I have an electronic version.

Do you want to give us the reference in the purple book?

MR WENT: I am trying to find it.

Yes, it is 4.89.

MRS JUSTICE BACON: Page?

MR WENT: 1835. It was just to point out that under rule 80 -- so this sets out what must be included in a collective proceedings order and it separately lists out at paragraph C the class definition, and then at D describing otherwise identified the claim certified for conclusion in the collective proceedings.

So just to point out that they are dealt with separately and should be in the CPO.

MRS JUSTICE BACON: I didn't quite follow that point. We have to see the description of the class and subclasses. The identification of the claim certified. Is your point simply that because they are separate, the period doesn't have to be the same?

MR WENT: Yes.

MRS JUSTICE BACON: All right.

MR WENT: So overall we say that there is no reason why the class period and the claim period must be the same, and that the Tribunal has the power to admit further losses arising from post-issue breaches under its claim management powers.

Then just turning very briefly, there is an additional argument to be raised at paragraph 42 of our skeleton.

MRS JUSTICE BACON: Damages in lieu of injunction?

MR WENT: Yes. The High Court has the power to award damages in lieu of or in addition to injunction under section 50 of the Senior Courts Act. This power has been interpreted as enabling the award of damages to the future and continuing torts and even in the case of fully anticipatory torts and you can see that in McGregor at 12-029. That's page 2248, and we also cite some cases on that front at footnote 40 of our skeleton.

We submit that the statutory framework conferring on the Tribunal the power to award damages and injunction relief under sections 47A and 47D of the Competition Act should be read in the same way. There is nothing in the language of section 47A which prevents that. Section 47A permits a claimant in the Tribunal to make any claim for damages, any other claim for a sum of money or an injunction that could be made in civil proceedings.

You can see this is dealt with also at paragraph 5.5 of the Tribunal's guide. This is at page 1947 of the authorities bundle. It is volume 3, tab 49. It simply says generally if the claim for damages or a sum of money could be made in civil proceedings in any part of the UK, they can be made in proceedings before the Tribunal.

5.6, then, just distinguishes the position with an injunction, just in the sense, obviously, there is a distinction between Scotland and other parts of the UK.

Section 47D, subsection (2) of the Competition Act requires the Tribunal to apply the principles which the High Court would apply in deciding whether to grant an injunction under section 37(1) of the Senior Courts Act. We say that these principles must naturally include whether damages should be granted in lieu of or in addition to an injunction.

Again, for the same reasons, this would obviously achieve considerable procedural efficiency for the reasons already discussed. So we say in a proper construction of the statutory framework, the Tribunal has the power to award damages in respect of losses incurred by class members after the date of issue in continuing torts using that provision.

We did also mention that there is a case management decision in Belle Lingerie, which is at authorities bundle, volume 3, tab 55. There the Tribunal allowed at least an amendment to a pleading for future losses in the form of damages in lieu of an injunction. So we say it is unlikely to be contentious to contend that the Tribunal has

this jurisdiction.

So those were the two limbs of our argument, madam. Unless I can assist further at the moment --

MRS JUSTICE BACON: Thank you very much. Who is going to go next?

Mr Pickford.

Submissions by MR PICKFORD

MR PICKFORD: Thank you, madam chair and members of the Tribunal.

I can deal very briefly with the first of the points raised by my learned friend concerning the relevant period. An amendment to the date of certification is not objected to by us, but we reserve our position on any future such application. It is certainly not normal that we have to commit in relation to future applications to amend, and we don't.

MRS JUSTICE BACON: No, and the Tribunal won't be committing either.

MR PICKFORD: Quite. That's our position on that. That's very simple.

The future damages point is somewhat more complex. I am going to need to go through that relatively slowly because Mr Went has sought to summarise the issues, but there is quite a lot within that and I would like to make sure that our submissions are properly understood.

MRS JUSTICE BACON: Although you have one less point to deal with regarding the EU point.

MR PICKFORD: Indeed. Indeed. That simplifies matters quite a lot, but not entirely.

MRS JUSTICE BACON: Just to let you know that in the usual way, at some point around quarter to 12 we will take a break, so if you get to an appropriate point in your submissions by then.

MR PICKFORD: I will keep my eye on the clock, madam.

So our position is that it is only possible to make a claim for damages in the Tribunal

under section 47A of the Competition Act 1998 for losses that a person has suffered. That is losses must have occurred at the time of the bringing or the amending of the claim. That's our point.

It follows from that that the PCR can't claim for losses which, as at the date that its claim form is issued or amended, lie in the future. There is a very good reason for that, because it gives appropriate weight to the requirement of certainty in the calculation of damages, in what, for competition claims, is already a process which is arguably somewhat fraught and has serious challenges in relation to quantification.

In my submission, in competition cases that are litigated to trial, what ordinarily happens is that the parties' experts will prepare their reports based on disclosure of data, actual data, as to, for instance, volumes of commerce and information about what has happened to competition in the market.

Now even then, the exercises of calculating damages on a retrospective basis is far from easy, because one needs to compare the actual world with the counterfactual world, and everyone knows that that has potentially serious challenges. But at least in that exercise one is comparing one real world with a counterfactual world.

But if one is seeking to quantify future damage, that exercise, in my submission, becomes exceptionally speculative because you are then comparing two hypothetical worlds, neither of which is known, both of which will be continually evolving. So for the future period, you don't even know the basic building blocks that one would ordinarily know of the volume of commerce or the prices at which the goods in question were actually sold. Indeed, we don't even know whether the allegedly infringing agreement will even be in place if we are looking to the future or whether it will be in place in the same form.

That's why, in my submission, it's very sensible that section 47A is phrased as it is. Our position, of course, is that given the legitimate scope of damages that can be

brought in a claim under section 47A, any claim for future damages, such as is brought by the PCR, will fall to be struck out and therefore cannot be certified.

MRS JUSTICE BACON: You made that point as a matter of principle. But in every case the method of damages quantification will be different. It is possible to posit conceptually a case where you might not have a quantification exercise that was sufficiently difficult that you would be unable, realistically, to calculate the damages and you might have an algorithm that can simply be extended by date. But then, equally, there will be other cases where the nature of the damage calculation is such that there may be no sensible way of extrapolating into the future, just because of the way that the damages calculation was being run.

Does it not come down to a rather fact-specific question, and in this case the question is whether there is a suitable methodology that would pass the process test for calculating damages extending beyond the -- for example, the time of the trial, down to the date of judgment or assessment --

MR PICKFORD: I have two points in response to that. The first of those is to respectfully disagree. It doesn't come down to the question of methodology, it comes down to a question of statutory construction and I am going to explain why we are right on the words of the statute and bearing in mind all the other interpretive aids that I am going to call upon, why section 47A is worded as it is. My point about understanding the reason why it might well be worded is to explain why, in fact, that's sensible.

Now, it has been suggested there may be examples where you could actually -- there might be some examples where it might work. I am not sure I find it personally very easy to envisage those. I think they are always going to be very challenging for the precise reason that I gave, which is that one in those circumstances is comparing two hypothetical worlds.

But I don't need to win on that point now. It is perfectly acceptable from the point of

view of my argument to observe that certainly in an ordinary case it will be very challenging and therefore there is nothing silly about the construction that we are urging in relation to section 47A, it is actually a very sensible one.

MRS JUSTICE BACON: Is your argument all or nothing? As in either you win or you lose on the point of statutory construction? You don't advance any other argument about the way in which the calculation is advanced or the methodology is advanced in this case?

MR PICKFORD: That is correct. I mean, well, to be clear, I would say that in this case -- so we are not in an example of whatever algorithmic case it is that madam chairman you are putting to me.

In this case, we are in a pretty normal competition case where they are saying here is a restrictive agreement, and if that restrictive agreement is still in place at some point in the future, then we anticipate that that will cause harm. Neither of those events has happened yet, because the agreement is not necessarily -- the agreement as it exists to date, we don't know whether it will or won't exist in the future, and we don't know whether there will or won't be harm in the future. In my submission, we are in fairly classic territory that very much responds to the example that I gave of it being very difficult to engage in this sort of exercise.

To be clear, to answer your question, our point -- I think it necessarily follows from the fact that it is a point of statutory construction that it is all or nothing.

MRS JUSTICE BACON: Yes.

MR PICKFORD: If I lose on that, I am not saying that the Tribunal should exercise its discretion to decide that in this case it would be inappropriate. I say there is no discretion to be exercised because the Tribunal does not have the jurisdiction.

MRS JUSTICE BACON: No, I wasn't asking you whether you also put it as a matter of discretion, but whether you put it as a matter of the methodology that they had not

done enough to get over the line.

MR PICKFORD: No, I am not putting it that way.

MRS JUSTICE BACON: No. So does that mean that you accept that if you lose on the statutory construction, there is enough in what the PCR has said to set out a sufficiently realistic methodology for quantifying future damages?

MR PICKFORD: No. We don't accept it. That's simply not the basis for my argument.

MRS JUSTICE BACON: Well, if you are not saying that they have not done enough, then you must be tacitly at least accepting -- you are not taking any objection to the methodology?

MR PICKFORD: Not in that way, no.

MRS JUSTICE BACON: So you must be effectively accepting that the methodology is good enough for it to pass the process test?

MR PICKFORD: The way I put it is we think we have a very clear strong point on the meaning of section 47A. That's the point that we have chosen to articulate in front of the Tribunal.

MRS JUSTICE BACON: But your argument is based on it being not really coherent for it to be able to be done. You say that the rationale is that you can't really do it without enormous difficulty and, yet, you accept that there is -- or you must be accepting implicitly that there is enough in the methodology for us to certify on that basis.

MR PICKFORD: No, I don't think we are. We simply have not chosen to take that point. In part because of the broad approach that in my experience other Tribunals that I have been in front of have taken to the process issue. We perhaps could have taken that point. We have not taken that point. The fact that we have not taken that point is not a concession by us that they have done enough, it is simply a statement that we have not taken the point.

The reason we have not taken the point is because we say that the clearest means by which our point comes home is the statutory construction one. So I don't accept that we have conceded that point. We simply haven't taken it. We could, obviously, go away and I could take instructions on whether we would have taken it, but obviously we haven't taken it today. I think it would be unfair to suddenly take it on the hoof because my learned friends have not had an opportunity to do so.

MRS JUSTICE BACON: Yes, but I need to understand the basis on which your case is put. So that's very helpful, thank you.

MR PICKFORD: If I could then turn to the relevant framework. If we could start, please, with the Competition Act itself, which is in tab 62 of the authorities bundle, I am going old school for this, using paper --

MRS JUSTICE BACON: This side of the bench, we are all electronic for the authorities, save to the extent you want us to look at something in the purple book which my colleagues have in hard copy.

MR PICKFORD: Very good, madam, thank you. If I could ask you to turn to tab 62 -- you probably don't need to know the volume if it is electronic -- it is page 2257. We are going to go first, in fact, to 2259 and look at 47B(1).

That provides that:

"Subject to the provisions of this Act and Tribunal rules, proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies ('collective proceedings')."

Then one sees at subsection (5):

"The Tribunal may make a collective proceedings order only ..."

And (b):

"In respect of claims which are eligible for inclusion in collective proceedings."

So if we then turn to section 47A, we see -- that's back on page 2257 -- that at

subsection (2):

"This section applies to a claim of a kind specified in subsection (3), which a person who has suffered loss or damage may make in civil proceedings ..."

And then it goes on to refer to the chapter 1 prohibition and the chapter 2 prohibition and of course it used to refer in C and D to articles 101 and 102 TFEU, but no longer post-Brexit.

One can see over the page, at page 2258, that section 47A in its current form has had effect since 1 October 2015 when it was brought in by the Consumer Rights Act 2015.

MR BANKES: Can I ask: 47A(2), it is clearly an entry level point that if you haven't suffered loss you can't make a claim. But I don't see on the face of 47A(2) that limiting the scope of claim, it is merely a qualification barrier that you need to get over in order to start a claim.

MR PICKFORD: Yes, but in my submission a claim for future loss is a different claim from a claim in loss that you have suffered.

MR BANKES: Even in the case of a continuing infringement?

MR PICKFORD: Yes.

MR BANKES: So you say every new dawn a new claim?

MR PICKFORD: In effect, yes.

So I hope it is uncontroversial that collective proceedings under section 47B are a form of procedure. They don't, themselves, establish a new cause of action. What one needs to turn to is section 47A to see what the scope of what can be brought within section 47B is. That's reflected in paragraph 6.3 of the Tribunal's guide. Simply for reference that's at authorities page 1948, but I am not intending to take the Tribunal to that, because I think that should hopefully be uncontroversial.

So that's the basic framework in the Tribunal. The PCR has put weight on the position before the High Court and took you to McGregor and so it is necessary to consider

what the true position is at common law and before the High Court.

Now, the anti-competitive agreement that is alleged in this case would constitute a continuing tort for the period that it was in effect. Every day that there is an anti-competitive agreement and every day that then damage follows from that, you have the two ingredients that you need for your tort.

Now, if, as the PCR claims, section 47A were to be interpreted to allow claims for future damages which have not yet arisen, it would, in my submission, establish a regime which is wider than the rule at common law in respect of continuing torts. That's not the reason of itself why we say they are wrong. But it is notable and one would need very clear words in either section 47A itself -- well, in my submission, one would need very clear words in section 47A in order to establish a regime which was different from the common law.

MRS JUSTICE BACON: Why do you say it would go beyond the common law rule?

MR PICKFORD: If I may, I will come -- we will look at McGregor and then I can explain why. That's probably the easiest way of doing it.

McGregor is also in your authorities, page 2246 is the relevant part that I need.

Just starting with 12-024, which is what Mr Went took you to in relation to a single cause of action, it is important to be clear what a single cause of action actually is. A cause of action is complete when there has been, if I may call it this, the bad act and the damage that follows from the bad act but is caused by it. You need both of those ingredients for a tort. If you have both the bad act and then the damage, you have a complete cause of action.

There may be continuing consequences that arise from that damage, but in relation to personal injury, the essential damage is that someone has been injured and then the question is what are the consequences of that damage.

So that's the kind of case that's being considered there. It is not to our facts at all. We

are concerned with a continuing tort which is why you were taken to 12-026 and what is said there -- and it is probably helpful to go back to it -- about halfway down:

"Where there is a continuing wrong ...(Reading to the words)... and to a lesser extent where there is a single act causing damage on two separate occasions, the further cause ..."

So there is my point there about the single act but damage on two separate occasions. What 12-024 is concerned with is a single act and single damage.

"The further causes of action lie in the future and therefore it is impossible to bring an action to recover for prospective loss even if it is foreseeable. ...(Reading to the words)... The rule here is that where a single act constitutes a continuing wrong, damages at common law can only be awarded in respect of loss accruing before the commencement of the action by the issue of a writ."

The authority for that proposition is to be found is Bexhill v Reed.

Now, my learned friend sought to distinguish between two different cases. He says: well, there is the case of the continuing wrong, which is what this is dealing with, as opposed to continuing damage from an original wrong that has stopped. In my submission, that is an incorrect distinction on the basis of this passage.

Both fall within the rule because in both cases, in order to have a completed cause of action, you need the wrong and you need the damage and so it is the case that you cannot claim under common law for future damage where the cause of action lies in the future. The causes of action, because it has two ingredients, applies both to the wrong part and the damage part. So if the damage lies in the future, you can't claim for it if it is a continuing tort.

So that's the rule at common law and we say that is exactly what the situation is on our facts. We are concerned with a continuing cause of action.

Now, what my learned friend took you to was an explanation of how in the High Court

that common law rule was previously modified by RSC order 36, rule 58, and that did allow for damages to be assessed to the time of assessment. So that overrode the common law rule in relation to the appropriate date at which the claim could be brought and to which the damages could be claimed in the claim, is a better way of putting it. Then it explained that the CPR doesn't have that rule. Then the author of the chapter speculates that in the High Court the overriding objective can potentially effectively fill that void in the context of a High Court claim and that that may allow a claim for future damages in that context in the High Court.

So the position we have in the High Court is actually quite messy. What we have is a common law rule that prevents a claimant from claiming for future damage from a continuing tort. We then have the ability to claim damages between the issue of a claim and judgment no longer being addressed by any express rule. It once was, but it now no longer is. And what the author says is in that context, in the absence of any explicit statutory rule saying whether damage can or cannot be claimed in the future, there are arguments that one can draw potentially on the overriding objective to say that you can claim in respect of future damage.

That's the High Court position. Fortunately, in the Tribunal, matters are much simpler and we don't actually have to worry about whether McGregor is right or wrong about the use of the overriding objective under the CPR as a means of claiming for the future, because the position is clear and the legislature has come down very firmly on one side.

It states quite clearly that the only types of claims that can be combined under section 47B are those under section 47A, that a class member has suffered loss, in the past tense not the future tense.

So that is definitely true in respect of a class member who has only got a claim for future loss. That's accepted by my learned friend. That's the point in Neill v Sony. If

they only have a claim for future loss, then they are outside the class altogether.

It would be helpful, actually, just to look briefly at Neill v Sony because, in my submission, the reasoning in Neill v Sony, although not expressly addressing my point, carries over and applies to the point that I am seeking to make. So when Mr Went said that there was no authority that addresses this issue, he's right, there is no authority that addresses it expressly, but actually the reasoning is quite clearly equally applicable to my point.

If I could ask the Tribunal, please -- you are going to get there quicker than me -- to go to page 1400 of the authorities bundle, this is the Neill v Sony case. If you could then go -- so we see we are at paragraph 62 at the bottom of the page, the class definition point and we have a relevant period that was defined in that claim which we see at paragraph 63.

Then at paragraph 64, first sentence -- this is very important:

"Sony's argument is that the purpose of the collective proceedings regime is to combine claims which must be extant as at the date of the claim form."

Now that is our point in these proceedings. The claims must be extant at the date of the claim form. What the Tribunal, after examining the point, went on to conclude at paragraph 70 -- that's at page 1403 -- is that in our view:

"Sony's interpretation of sections 47A and 47B is the only sensible one."

So they agreed with Sony's position that the collective proceedings must only combine claims which are extant as at the date of the claim form.

MRS JUSTICE BACON: Well, yes, but that's the point about the class definition.

MR PICKFORD: It is made in the point of the class definition. That's quite true. I accept that the focus of the Tribunal was not on the point that I am now making.

MRS JUSTICE BACON: It wasn't at all. It says the claim has to be extant at the date of the claim form. We are not talking about people who don't have a claim or claims

that don't exist, we are talking about claims that do exist at the date of the claim form and to what extent further damages may be added to that.

MR PICKFORD: My point, madam, is that those are different claims. If I could explain that further, in Sony, as you rightly say, the question was whether someone whose claim had not yet crystallised could be in the class. But in my submission, the very same point applies for a class member who has multiple claims. They may have suffered harm for past loss. Then they will therefore have a legitimate claim in respect of that past loss. So they may well be in the class on that basis.

Their claim, in my submission, that's -- that's one claim. But having a legitimate claim for past loss doesn't thereby let in, in my submission through the back door, a claim for future loss over which the Tribunal would have no jurisdiction by itself. In other words, a claim in respect of future loss is always outside the scope of the regime, and that is true whether it is the sole claim of a class member -- in which case they don't even get a foot in the door, they are not even in the class -- but it is also the case if it is an additional claim of a class member, who has the right to be in the class by virtue of their claim for past loss. That does not then give them a right to bring a further claim arising in respect of future loss.

MR BANKES: Can I just test on one thing? If you have a breach which is within the claim period, and the loss is not all experienced on day one, but runs off over a considerable period, financing or something else --

MR PICKFORD: Yes.

MR BANKES: Are you saying that one has to look at the loss flowing from that single event and cut it off, even though it continues to be experienced from a claim which has arisen within the period?

MR PICKFORD: No. So to be clear, it depends on the particular way in which the -- the claim works out. If I explain by reference to example. The short answer to

your point, sir, is we are not saying that you can't have run-off losses. I think that's the point that's being put to me. In an appropriate case you can, but they have to have occurred in the past.

MR BANKES: Yes, so you are saying run-off losses occurring the day after the claim form, although they are by their nature and all the rest of it exactly the same as the day before, there is an artificial block put on the quantification of those run-off losses by virtue of the day on which the claim is issued?

MR PICKFORD: In my submission, it is not artificial because I say it follows from section 47A. But there is a block. It is not one that necessarily is wholly insurmountable, because we don't say, as a matter of principle, that there couldn't be an application to amend. For instance, if there were an application to amend in relation to losses suffered to date, there isn't one, as far as I am aware, but if there were, I doubt we would be objecting to that, because at the time we are all here today, it would be -- that's effectively bringing in those claims.

MRS JUSTICE BACON: So your position is that you could treat the claim period in the same way that the class definition has been treated?

MR PICKFORD: Yes.

MRS JUSTICE BACON: You could have an application to amend up to the same point as the class definition is amended?

MR PICKFORD: Yes. You would have to consider the applications to amend on their own merits.

MRS JUSTICE BACON: Yes.

MR PICKFORD: One of the factors that would be relevant to that assessment is the point that I made at the beginning about this rule in fact being a sensible one because it focuses attention on comparing a counterfactual world with a real world.

For instance, it might be -- as I said, as at today we have not yet had the economic

evidence, we have not had disclosure, we have not had the reports of the experts. Therefore, one can see how one could accommodate an amendment now which said, okay, we are going to look at losses backwards from today.

It would be very different if the amendment were to come after we had disclosure of the relevant data, after we had had the expert reports, and it was still seeking to look into the future. That would raise all the sorts of practical problems.

I realise I have strayed over.

MRS JUSTICE BACON: That's all right. It wasn't a rigid cut-off. Shall we just have a five-minute break now?

MR PICKFORD: Of course.

(11.53 am)

(A short break)

(12.02 pm)

MR BANKES: Before we start, can I ask you one point?

MR PICKFORD: Yes.

MR BANKES: Do you accept that interest forms part of the claim and the loss; interest compensates for a loss. The award of damages is made and that includes an interest --

MR PICKFORD: It depends on the basis on which interest is awarded. If interest is claimed on damages, then it would be assessed on the way that damages are assessed. If interest is claimed by virtue of another rule of court, then it would be dealt with separately.

MR BANKES: But you accept that interest runs for a historical loss beyond the date of the claim issued?

MR PICKFORD: It can. However, I think --

MR BANKES: Yes, it can. That's all I need to know. It can.

MR PICKFORD: To be clear, it can, but it does depend on the circumstances.

MR BANKES: But you are not saying section 47A prohibits us from awarding interest beyond the date of the claim?

MR PICKFORD: If interest is claimed as damages rather than pursuant to a different rule of tort.

MR BANKES: In?

MR PICKFORD: As in Sempra Metals. So there are two means of obtaining interest in civil litigation. There is as a rule of court entitled, for instance, under Supreme Court rules, or because you are claiming as part of your damages, for instance following the seminal case of Sempra Metals in the House of Lords.

Now, my position is that if it is a damages claim, then the same points that I have been taking would apply to the claim for interest.

MR BANKES: So interest would stop running today?

MR PICKFORD: In relation to that means of claiming for interest. That doesn't mean that there are not alternative means of claiming for interest, which run up until the date of judgment.

MR BANKES: Thank you.

MR PICKFORD: Yes. So as Mr Gregory helpfully points out to me, in the Tribunal there is an explicit provision in relation to interest which is 105 of the Tribunal's rules. Subrule (3) of 105 provides that if the Tribunal:

"... makes an award of damages the Tribunal may include in any sum awarded interest on all or any part of the damages in respect of which the award is made, for all or any period between the date when the cause of action arose and --

"(a) in the case of any sum paid before the decision making the award, the date of the payment; and.

"(b) in the case of sum awarded, the date of that decision."

So there is an express rule in relation to interest. If you are claiming under 105, you can obtain interest up until the date of judgment. But I don't concede that if you are claiming under a different basis, under the Sempra Metals basis that it is actually part of your damage, that the position is any different from the general position of damages that I have explained.

If I could come back to this issue of the distinction between the sole claim of a class member and an additional claim of a class member, which is important obviously to my argument because I say that section 47 treats each cause of action, either from a different wrong or from different damage, strictly speaking as its own cause of action. As its own claim.

Now, I had not actually anticipated from the arguments of my learned friend that there was any real objection to my approach to section 47A by its very self. He has three arguments. His arguments depend on saying: oh, but there are other rules that then effectively colour the way you approach 47A. But if we just look at 47A in isolation -- I had not actually understood he objected to my argument so far -- but I think it probably is important because it is obviously a question that there was some dialogue with the Tribunal to develop this a bit more.

One can do so, in fact, from McGregor. So if one goes to the authorities bundle at page 2234, this is the beginning of chapter 12 dealing with past and prospective damage. The point I am going to draw from this is that each act giving rise to each aspect of damage, is itself a different cause of action, i.e., strictly speaking, it's a different claim. One sees that clearly from paragraph 12-002, where it is said:

"A complication is interested into the situation..."

So it is talking about claims for past and prospective damage:

"... because in certain circumstances the same facts may give rise to more than one cause of action. How this affects questions for recovery of past and prospective

damage is dealt with in due course. But it is necessary to clear the ground by considering four types of case where more than one cause of action arises."

There are then four types of case that are articulated. So the first of those is where there are two separate acts resulting in two separate wrongs. So, again, each act and each wrong there is a separate cause of action.

The next one is not relevant to us. That's a single act violates two separate interests. That is on page 2235.

Then the ones that are of more interest to us are on page 2238. The third is where a single act constitutes a continuing wrong.

Then four, where a single act causes separate damage on two separate occasions.

Now, in respect of each of those, the author is contemplating -- and it reflects general common law -- each of those cases gives rise to multiple causes of action. One sees it come home to roost --

MRS JUSTICE BACON: So you say we are in four territory?

MR PICKFORD: We are actually in three and on four.

MRS JUSTICE BACON: Three and four.

MR PICKFORD: Depending on whether we are concerned with the continuing wrong element or we are concerned with the continuing damage element. One can see that most clearly, in fact, back in 12-026. So that is back on page 2247 that we looked at earlier. It is the sentence that I read to you before:

"Where there is a continuing wrong and to a lesser extent where there is a single act causing separate damage on two separate occasions..."

So two things being considered there: continuing wrong or single act causing separate damage on two occasions:

"... the further causes [plural] of action lies still in the future and therefore it is impossible to bring an action to recover for prospective loss even if it is foreseeable."

There are two points that can be drawn from that. One, consistently with my approach to causes of action, each combination of a separate wrong with separate damage is its own unique cause of action. Whether that is one act followed by continuing losses or it's continuing acts followed by one or more continued losses. Both of those give rise to a situation where you have separate claims.

MRS JUSTICE BACON: So every time that there is a purchase made, in this case within the claim it would be a purchase of any Apple or Beats product, whether it is on or off-Amazon, on their case is a new cause of action?

MR PICKFORD: Strictly speaking, yes. Obviously, ordinarily, this issue is immaterial in many cases, because what claims do is effectively group -- even in noncollective proceedings, even just ordinary proceedings, claims effectively group causes of action together.

Where these sorts of matters become particularly pertinent, there are two that immediately come to mind. One is this, when we are talking about the scope of the claim and whether you can have claims for future loss. The other one is in relation to limitation. It is often the case that the limitation one does need to be very clear about what the particular cause of action is. That's often another situation where that degree of precision is necessary.

But often it is immaterial. So that's to support the position, as I explained, in relation to each claim itself needing to be assessed on its own merits individually.

As I understand the submissions of my learned friend, he effectively has three reasons now why he says we are wrong. One is he points to Gormsen; one is he points to the Tribunal rules; and the other is he points to the High Court power to award damages in lieu.

MRS JUSTICE BACON: How much longer do you think you need to deal with those points?

MR PICKFORD: I think I am going to need the best part of the rest of the morning. This is by far the biggest issue that we have to deal with --

MRS JUSTICE BACON: From your perspective?

MR PICKFORD: In terms of time. I think the other issues do not have anywhere near the same demands on them in terms of time.

MRS JUSTICE BACON: All right. We are going to hear from Ms Abram as well?

MS ABRAM: I have nothing substantive to add. I will stay where I am, so I don't have to stand up again. In relation to the relevant period point, which is this question about the end date for the scope of the class, we are in the Tribunal's hands about that. We don't take any positive points about that. And I am not going to have anything to add on these claim period points.

MRS JUSTICE BACON: Okay. I think we would like to finish this part of the argument by lunchtime. So I think you need to finish with sufficient time to allow Mr Went to respond, because we do want to spend some time this afternoon thinking about the funding issues.

MR PICKFORD: Certainly. I will do my best.

MR BANKES: And can you specify why you are arguing? What is the section of the claim form that you are objecting to?

MR PICKFORD: It is paragraph 78.4 and 89. So they define the claim period as opposed to the relevant period. You heard from Mr Went as to why they say those can be different.

MRS JUSTICE BACON: If we are in the bundle C, the confidential bundle --

MR PICKFORD: Yes, we can go to that. Just give me a moment. It is page 82.

MRS JUSTICE BACON: All right.

MR PICKFORD: There is an open-ended approach that's taken.

MRS JUSTICE BACON: What page, C82?

MR PICKFORD: C82, I believe. Is that correct? Yes, C82 contains paragraph 78.4 at the top.

MRS JUSTICE BACON: I see.

MR PICKFORD: Point 1 shows that it is possible to apply plausible and credible common methodologies to the claim period --

MRS JUSTICE BACON: Yes.

MR BANKES: That's a statement of fact, isn't it?

MR PICKFORD: It is how they define the claim period and the claim period is what they are claiming in respect of.

MR BANKES: 78.4 is merely saying that is what point one says.

MR PICKFORD: I think, then, it possibly crystallises in 79 where they claim -- which is on page 91 -- that Dr Pike plans to use regression analysis to estimate price effects of the infringement. But whether they were different before and during the relevant claim period in more detail. Then he sets that out.

Our understanding of their claim -- and certainly this wasn't something that Mr Went took any objection to -- is that they are seeking to claim until --

MR BANKES: Where on the claim form are they seeking to claim?

MR PICKFORD: In my submission, in relation to the claim period. It is possibly put slightly obliquely, but it is back in 78.4 when they define what the claim period is and they say it is:

"To final judgment or earlier settlement of the proceedings."

So we read into that -- and I have not heard anything to the contrary from my learned friends -- what they are seeking to do is to claim for damages to final judgment or early settlement of the proceedings. If there was a very simple answer which is: no, no, that's not our claim, then I think --

MR BANKES: I just want to be clear what you are asking us to do or not to do in the

light of the fact that 78.4 to me is a statement of fact, not a head of claim.

MR PICKFORD: I am asking the Tribunal to -- not to certify any claim that seeks damages in the future.

MR BANKES: And you are saying this claim does?

MR PICKFORD: Yes.

MR BANKES: By virtue solely of point 1.

MR PICKFORD: Not by virtue solely of point 1, but by virtue also of 78.4 and 89, which, read together, we understood to be the claimant's statement that they sought to claim for damages in that period.

MR BANKES: Right. This is not to do with modification. Because in my version 89 is not subject to an application to amend, it is 89 being amended. So your objection is a certification one, not an amendment one?

MR PICKFORD: Well, it depends.

MR BANKES: Maybe I am looking at the wrong version.

MR PICKFORD: If it is a certification one and therefore I think it has an implication for the amendment, which is that they can't have the amendment, if what they want by the amendment is a continuing --

MRS JUSTICE BACON: It is not a certifiable claim?

MR PICKFORD: It's not certifying --

MR BANKES: I am not sure whether it is right to deal with that now or whether it should be dealt with later when they have to produce evidence as to what they are claiming and why. As I say, I don't see a new head of claim in 78.4.

MRS JUSTICE BACON: Is the claim essentially as articulated in 99; that's what the relief sought is?

MR PICKFORD: That's how we understand it, madam. This isn't my claim. We understood -- and we gave them effectively the benefit of the doubt -- that what they

were seeking to claim for was damages up until the date of final judgment or earlier settlement. They haven't disabused us of that understanding, so therefore it's an important point that needs to be addressed.

In my submission, I can't really be -- potential defects in their claim can't really be held against me.

MR BANKES: Indeed not, but I just want to clarify what it is you are asking us not to do. You are saying this is not certifiable --

MR PICKFORD: Yes.

MR BANKES: -- because you say it is -- your argument is because it claims for that head of damage.

MR PICKFORD: At the very least it impliedly claims for that, yes, and we don't want that to be something that is within the scope of the claim.

MRS JUSTICE BACON: I think it explicitly does say because that is how the claim period is defined. It may not be very well drafted but I think that that is the purport of the claim, yes.

MR PICKFORD: That is certainly our understanding.

MR BANKES: My apologies.

MRS JUSTICE BACON: All right.

MR PICKFORD: So I will seek to crack on. I will go as fast as I can. I do need to address the points that have been put against me, but I think I can do that fairly quickly. The first one I can do very quickly, which is there was an attempt to rely on Gormsen v Meta. I don't need to go back to it.

The point was not addressed in the judgment in Gormsen v Meta. It was suggested that it must have been argued, but I don't accept that it was necessarily argued either. There is a reference at paragraph 42 to argument about class definition. Class definition. So that's, in my view, the Sony point which they have conceded. It doesn't

mean that they necessarily argue this point. I don't understand that they did. So Gormsen doesn't really take us anywhere.

What I say, however, in terms of there being any authority on this, is there is the Sony case that I took you to and you take the reasoning in Sony and it supports strongly our position, so that's that.

CAT rules is the second basis. This is going to require slightly more exploration. So it is said against me that the PCR is able to claim as it does because the Tribunal has the power to award future damages by reason of its own rules. We say this is a bad point.

The Tribunal's jurisdiction to hear collective damages actions derives not from its rules but from sections 47A and B of the 1998 Act, as we have seen. Now, those provisions limit the damages that can be claimed to past loss, which the claimant has suffered.

Now, we say the meaning of those words is plain. It is suggested against me that I was adopting a strange interpretation. It's not strange at all. It is clear and it is plain, and it is supportive of our position.

Nothing in the case management powers of the Tribunal to deal with cases justly -- which are in any event conferred by subordinate legislation -- could override the primary legislation which provides for the Tribunal's jurisdiction. The rules don't purport to do that, and they can't.

Now, in relation to the reference by the PCR to the old rules of the Supreme Court order 36, rule 58, which permitted in the case of continuing torts damages to be assessed down to the time of assessment, we say that the reliance on that is self-defeating. Because what rule 58 was doing was expressly addressing the question for claims in the High Court. It is obviously no longer part of the High Court rules, but when it was, that's what it was doing.

Section 47A of the Competition Act is the rule that expressly addresses this point for

claims in the Tribunal. It is, we say, hardly surprising that 47A is phrased as it is, because in its original form it provided for claims for infringements both of domestic and European competition law. We say that European law provides a right to claim for damages which a person -- where a person has suffered harm. It is on all fours with section 47A.

If I could go to that just very briefly, the damages directive --

MRS JUSTICE BACON: I thought we weren't getting into --

MR PICKFORD: Well, Mr Went no longer pursues the section 60A point against me.

MRS JUSTICE BACON: So why do you need to deal with that?

MR PICKFORD: Because I say it is effectively a soft interpretation point. I say that actually you can easily understand why it is that the rules that were adopted for the Tribunal, which originally allowed both claims for domestic and European competition law infringements to be pursued, are framed as they are. Because they map on to how the law is expressed -- how European law expresses the right to claim for competition damages.

So it is not a necessary part of my argument, but in my submission it is actually notable that there is a direct correspondence, we say, between section 47A and the right in EU law.

MRS JUSTICE BACON: I think, given the time, and given that neither of you are now relying on this point, you should probably move on from that point.

MR PICKFORD: I understand. Can I just give the Tribunal the references for the note? It is recital 12 on page 2172 and it is article 3 on page 2181 of the damages directive that I would have referred to, which explain how the damages directive reflects the acquis communautaire and that is phrased again in the past tense.

That's all I need to say about that.

So that's the first point then on the Tribunal's rules. We say the Tribunal's rules cannot

and do not override section 47A.

The next point is damages in lieu of an injunction -- and this is the final point on which my learned friend relies in this context -- it is the final point that I need to make. So it is suggested by my learned friend that because -- the relevant statutory frameworks, they put it in their skeleton, should be construed as conferring on the Tribunal power to award damages in addition to or in lieu of a claim for an injunction in respect of a continuing tort. And they refer to the power that does exist to do that in section 50 of the Senior Courts Act 1981.

Now, we say that this argument is hopeless for three reasons. The first point is a very simple one: an injunction is necessarily prospective. So damages in lieu of an injunction would relate to the period after final determination of the proceedings. That's when the injunction would bite, to prevent the defendants from doing something in the future.

But the PCR isn't seeking damages for that period. That's not what we are arguing about. What we are arguing about is damages between the period of making a claim, or potentially amending a claim, and final determination of that claim.

So even if -- which I don't -- accept damages in lieu of an injunction were available in the Tribunal, it doesn't cover the relevant point that we are arguing about, so it is simply an irrelevancy as far as this issue is concerned. That's the first point.

The second point, it is wrong in any event about the Tribunal having the power to award damages in lieu of an injunction. Now, the Tribunal is, as I've explained, a creation of statute, and I have referred to sections 47A and 47B. They continue ultimately to section 47F and those provisions establish a comprehensive basis for remedies in relation to certain types of private claims before the Tribunal.

Quite clearly, it is section 47A which deals with the issue of damages on its terms, and it is phrased in terms of the loss the claimant has suffered. Had the draftsperson

intended to do otherwise to reflect some other power, it could have been drafted differently, but it isn't and they didn't.

So that's the first point in relation to this. Whatever powers a different body -- in this case the High Court -- has under a different framework that provide it with jurisdiction, plainly cannot alter the powers that have been given to the Tribunal in relation to its jurisdiction.

Now, there are two provisions in relation to the Tribunal's own powers that are referred to by my learned friend. The first of those was section 47A(3)(c) which allows an injunction to be granted. There is an argument for that. Then the second is section 47D(2), and that says that in deciding whether to grant an injunction the CAT shall apply the principles that the High Court applies in deciding whether to grant an injunction under section 37(1) of the Senior Courts Act 1981.

MRS JUSTICE BACON: What page of the bundle are you reading from?

MR PICKFORD: That is, in fact, to be found -- I was trying to go more quickly here, but it is tab 62 of volume 3 and 2261.

So we are looking at 47D(2) and in particular subsection (a). So that's the core power that my learned friend relies on. I have two points to make about that.

Firstly, it's referring to whether to grant an injunction. It has nothing -- it's not referring to a power to award damages in lieu, and it makes no reference to section 50 of the Senior Courts Act which is the power under which the High Court exercises -- it's the power that the High Court exercises in order to award an injunction. So we say that there is not any appropriate read across in any event.

I beg your pardon, section 50 is the power to award damages in lieu of an injunction. I misspoke.

That's the second point. We say that the Tribunal doesn't have the power to award damages in lieu of an injunction in any event. But for reasons I gave in my first point,

you don't actually need to decide that because it doesn't help the PCR anyway.

The third point, which is the further reason why it doesn't help the PCR, is they have not claimed an injunction. They are not proposing any amendment to their claim form to claim an injunction, so it is hard to understand how the ability to obtain damages in lieu of an injunction is going to assist it in this case.

So I have rattled through the rest of my submissions on this in order to give Mr Went good time to address them. If you bear with me a moment, I have just been handed a note which I would like to read.

It has been helpfully drawn to my attention in relation to the interest point that there is a specific statutory power which provides the basis for the Tribunal's rules then being able to have provision for interest in them. That's the Enterprise Act schedule 4, paragraph 19. I don't think we have it in the bundle, to my knowledge.

But in my submission, that therefore very -- that adds weight to my point, because where Parliament wished to address a specific ability to award something effectively in the future -- to use my shorthand -- they have done so. Specifically they have allowed that power in relation to interest. What they have not done --

MR BANKES: Do you have the paragraph and schedule for me?

MR PICKFORD: It is paragraph 19 of schedule 4 to the Enterprise Act.

MR BANKES: Okay, I have it.

MR PICKFORD: That provides that the Tribunals may make provision allowing that interest is payable.

Parliament has directly turned its attention to that issue, and that follows through clearly into the Tribunal's rules again from a clear statutory basis. That supports my position that one has to look at the clear statutory basis for the Tribunal's general jurisdiction in relation to damages which is section 47A.

Unless I can be of any further assistance, those are my submissions on this point.

MRS JUSTICE BACON: Thank you very much, Mr Pickford. Thank you for condensing your remaining submissions.

Mr Went.

Submissions in reply by MR WENT

MR WENT: I think I can be fairly brief. So statutory construction, past tense, has suffered in section 47A. If we assume that there is a breach of competition law that has ended prior to issuing the proceedings, there is obviously the prospect for continuing loss from that breach after issue. We have talked about, for example, run-off losses but it could happen in other circumstances as well. There may be loss of a chance, for example, which can often arise in competition cases, for example.

In my learned friend's submission, there has just been an artificial cut-off date in issue and you can't claim after that point in time. That would also be contrary to the common law position where you have a breach prior to issue. That's set out in McGregor at 12-024. We certainly say that there is nothing in the statutory language in 47A that overrides that common law position, and would just lead to an artificial cut-off date by which you could claim damages.

I think, as Mr Bankes maybe suggested as well, 47A I think should just be viewed as a threshold issue. It goes to whether there is an extant claim to start with.

There was mention of certainty. It would give rise to a lack of certainty. It might somehow lead to some form of double counterfactual because you are having to project into the future what the losses might be.

Of course, practically speaking what would happen is, once the claim has been issued, there would be a period of time in any event before data is disclosed and gathered for the purposes of running the methodology that the expert plans to run. So there would be hard data that would be run. Normally you would calculate the damages up to that

point in time. If the class representative is ultimately successful at trial, of course, then there is scope to update the damages at that point in time. So I don't think there is anything from a certainty perspective.

There is also, of course --

MRS JUSTICE BACON: Wait a minute. If the class representative is successful at trial, you say there is scope to update the damages. Not if you have had the trial on the damages already.

MR WENT: Sorry, it could be updated just prior to trial. All I am saying is this from a practical perspective --

MRS JUSTICE BACON: Yes, but exactly how does that work? Because Mr Pickford has made the point that disclosure will follow the pleaded claim. If you have had disclosure, what exactly are you proposing is done to update at trial the damages? What do you even mean by updating the damages?

MR WENT: Even if there is not an updating, that happens, you would certainly be calculating the damage after the point of issue based on the, amongst other things, the sales data provided after that could run after the period of issue. So there is no -- you know, there is no practical concern from that.

I was also going to mention clearly, again in loss of chance type cases, which of course you have to think about as well because we are thinking generally about the construction of section 47A, you know, clearly there one can look at losses running into the future. It's not merely at the point of issuing the claim.

Only because my learned friend slipped in a reference to the damages directive, just to give you a reference -- because I was cut off a bit earlier -- there is the notice from the European Commission as to how to calculate/quantify damages. That's at authorities bundle 3, tab 53. Then specifically at page 1264, that deals with future losses. So there is no issue from an EU perspective either.

I think then, in terms of future claims from a continuing breach post issue -- and I don't know whether it helps to -- you know, how one characterises breaches of competition law, it has obviously been considered in previous cases. One of the cases my learned friend was involved in was DSG v Mastercard where the Court of Appeal cited back to Arkin v Borchard Lines, I think it was, and the continuing breaches of article 81 -- 101 in that case – were seen as a continuing breach or a series of breaches.

All we say in terms of that is that it is a case management question --

MRS JUSTICE BACON: So are you saying that the cut-off point will be a matter of case management for the Tribunal?

MR WENT: Well, yes. Yes, it is a case management decision in terms of that continuing tort post issue. And you have the case management power to do that, to avoid -- again, I think what Mr Bankes described as every dawn new claim and, you know, the expense and costs associated with that.

MRS JUSTICE BACON: So your position will be that the Tribunal, when we set a disclosure period, will be able to say: Well, that disclosure period effectively marks the claim period, and once disclosure has been given for a specific period, we are not going to keep reopening disclosure and keep re-running the exercise ad infinitum right up to the point of the day on which we give judgment. Are you accepting that as a matter of case management, and indeed a legitimate decision that the Tribunal will be able to take at that point? Because if you don't accept that, then there is Mr Pickford's concern, exactly when do you stop and how is the matter triable?

MR WENT: I think what I would say at this stage is that I would not want absolutely to commit to that. It is a matter of case management and something that can be considered in due course. So I am not sure I would accept at this point in time that the claim period has to be mapped to the disclosure data.

But it would be a matter of case management going forward.

MRS JUSTICE BACON: How is it done, if it is not? How, practically, is the Tribunal supposed to proceed if it doesn't do that? Because theoretically the claim runs to the date of the judgment. So in theory you are saying right up until the date on which -- the minute at which judgment is handed down, you could be claiming. But how, in practice, does that work when you have a trial that is held on the basis of the disclosure that has been given?

MR WENT: Well, our expert has set out a methodology for determining damages on that basis up to trial. All I would say is that I would not want to exclude the expert being able to do that.

MRS JUSTICE BACON: Do you want to just take me to the relevant bits of the expert methodology which explains how he calculates future damages?

MR WENT: We certainly accept that there has to be a cut-off at some point. I think the only point we are making is that it doesn't necessarily have to be at the point of disclosure. We don't know how this case may unfold going forward, so I suppose what I am saying is we don't want to exclude the possibility of there being some updating. I just don't want to exclude that at this stage.

MRS JUSTICE BACON: Can you just take me to relevant bit of the expert methodology?

As far as I am concerned, you are not saying that the methodology simply algorithmically extrapolates forward?

MR WENT: No, the methodology is a fairly standard regression methodology, that's based on a before analysis. It comes in section 12 of Dr Pike's report from paragraph 259 onwards. Let me just --

MRS JUSTICE BACON: You still have to have a volume of commerce against which that is applied. So how does Dr Pike extrapolate forwards to the volume of commerce after, let's say, the disclosure date?

MR WENT: As I said, madam, all I am saying is that there would be scope to have the volume of commerce updated and applied to the methodology. But as I said, we appreciate there needs to be a cut-off point, it is just a question as to when that occurs and I just didn't want to exclude at this point in time that it might be -- you know, that the date by which initial disclosure is provided. That's all. But we accept there needs to be a cut-off point at some point.

MRS JUSTICE BACON: Can you just give me a menu of possibilities as to how this might play out in practice? So one possibility is that you have the date of initial disclosure. What else are you envisaging might practically occur to give a volume of commerce at some later date?

MR WENT: So there will be initial disclosure, on the basis of which the expert may be refining the methodology, et cetera. We are saying that once that initially happens, there would at least be scope to seek further disclosure to update the methodology with new volume of commerce data. And then to run the methodology that's been scoped out at that point in time just by running the new data that's provided.

Clearly all of that needs to happen far enough in advance of trial, but I am just not excluding that possibility at this point in time.

MRS JUSTICE BACON: So you are accepting that at trial we will be determining quantum, if we get to that point, on a determined data set --

MR WENT: Yes.

MRS JUSTICE BACON: -- which will have had to crystallise far enough in advance of trial --

MR WENT: Yes.

MRS JUSTICE BACON: -- for there to be meaningful debate about that data set at trial?

MR WENT: Yes, yes.

MRS JUSTICE BACON: Which is a legitimate case management decision and you won't be submitting that the Tribunal can't apply a case management cut-off in order for the matter to be triable.

MR WENT: Yes. We accept that, madam.

MRS JUSTICE BACON: Right. Yes.

MR WENT: So unless I can help the Tribunal further, those are my submissions.

MRS JUSTICE BACON: Thank you. I think Mr Pickford just wanted to say one more thing?

Further submissions by MR PICKFORD

MR PICKFORD: Yes. There are two new points that were raised in that exchange that I can deal with very, very briefly, if I may. Just a couple of minutes.

The first is that Mr Went sought to address you on the methodology that's been adopted by the expert Dr Pike. If one goes to paragraph 333 of his report, which is to be found at page A432 of the bundle, one sees that his analysis there --

MRS JUSTICE BACON: We are talking about four?

MR PICKFORD: It is page 432 of the bundle.

MRS JUSTICE BACON: It is A432, which is actually PDF page 435.

MR PICKFORD: I beg your pardon --

MRS JUSTICE BACON: That's all right. The numbers don't line up. A432.

MR PICKFORD: Very briefly, one sees an example there that Dr Pike's methodology is not forward looking at all. If it were one that was looking to the end of the period that is claimed as the claim period, it would presumably be a different methodology. But there at least his initial methodology is retrospective and has a particular date in 2022. That's the only point.

The other one was EU law has crept in now. You may not have wanted to hear

about it, but there is now a new point that is made about EU law. I don't accept it. If the Tribunal is not interested in it, then I don't have to address it.

MRS JUSTICE BACON: No. All right.

MR PICKFORD: But there is a different one in response to the -- the point has not been made because Mr Went referred to -- made a new submission referring to some particular paragraphs of guidance from the Commission and I don't accept that they are authority for the progression that he seeks to establish.

MRS JUSTICE BACON: No.

MR PICKFORD: They are actually authority for the opposite.

MRS JUSTICE BACON: I think we have the point that you are both at odds in EU law, but both of you opened your submissions saying you didn't need to rely on it. Mr Went was not pursuing it and therefore you did not need to pursue it.

MR PICKFORD: In which case, the Tribunal doesn't need to hear from me. I just wanted to be clear on that.

MRS JUSTICE BACON: All right. That then deals with the scope of the claim for damages period.

MR BANKES: Could I just ask one question, please?

Mr Went, after lunch could you take us very quickly to this passage in Pike which you claim is cited in 78.4 of your claim form? We have just looked at paragraph 333, which has a terminal date of December 2022. You say in your claim form that Pike sets a credible methodology to final judgment or early settlement; my question is where?

MRS JUSTICE BACON: Yes. Actually, I think we should just deal with that now, because I was asking the same question.

MR WENT: So we accept that there needs to be a cut-off, and that the methodology would be run until that point in time. So regardless -- it doesn't seem to us that the point necessarily needs to be addressed in that sense because we do accept that

there will need to be a cut-off in terms of running the methodology. So the methodology is set out clearly. It is a general regression methodology. It is looking at before working out the extent to which discounts are applied and then seeing the extent to which discounts were applied after the agreements were entered into.

So I think we have accepted there will need to be a cut-off point in terms of the data that goes into the methodology. In that sense, the methodology won't be -- at that point in time -- assessing damages up until trial.

MR BANKES: So after a thoroughly enjoyable two and a half hours of legal argument, are you withdrawing your application to amend 78.4 in the terms set out in the amended claim form?

MRS JUSTICE BACON: Because Pike does not actually set out his methodology that runs up until trial, he sets out a methodology which can be run up to a given cut-off point. But he's not setting out a forward-looking methodology that can simply be applied up until trial, without more. You are going to have to have a cut-off point at some point.

MR WENT: Without more, exactly. But all I was doing, I didn't want to prejudice at this point in time exactly how that would play out in practice.

It is very standard in competition cases for damages calculations to be updated at some point prior to trial to take into account new data. It may be that transaction data is enough for Mr Pike, for the parties, to update the methodology. All I was suggesting is I didn't want to prejudice the point at which the cut-off would happen, but we do accept that in terms of running the methodology there will need to be a cut-off.

MR BANKES: Does the application to amend 78.4 stand or are you withdrawing it?

MR WENT: No, no, we are seeking to be able to capture future losses arising from claims for post-issue breaches.

MR BANKES: Do you want to take instructions? That's not quite what 78.4 says.

MRS JUSTICE BACON: Exactly. We do have a problem. Because if your claim is based up until final judgment, and you are looking at loss and damage sustained by the PCMs to final judgment, and the only place in which that is set out explicitly -- and we had a debate earlier about pleading on this point -- that is the only place it is set out explicitly is 78.4 and you acknowledge that, but you are now saying that, as a matter of practicality, it isn't going to be up until final judgment, it is going to be up until some point not yet crystallised. You say at the earliest the date of disclosure, possibly some later date, but it is not until the final judgment or earlier settlement, and you accept that that's not going to be what you can claim for. So at the moment we are faced with something that is extremely indeterminate.

MR WENT: Well, of course, there can be a finding in the final judgment that the claim extended -- you know, which may of course be helpful in terms of sorting out damages for that period afterwards.

MRS JUSTICE BACON: I just don't understand this. You say in 78.4 -- and as Mr Bankes noted earlier, 78.4 is pleaded as a matter of fact -- saying that it is possible to apply plausible and credible methodologies to determine the loss and damage to final judgment.

But one cannot simply apply those methodologies to determine the loss and damage up to final judgment without more, and indeed you say that you are not going to be able to do it until final judgment. The point in time, the cut-off, is going to have to be some point early.

MR BANKES: My supplemental point is Pike 1 doesn't do what you say it does in the amendment.

MRS JUSTICE BACON: Yes. Pike 1 runs up to a date that he determines in 2022.

MR WENT: Those instructing me have also pointed out that, of course, at the point in time the methodology was drawn up, we didn't at that point in time know that the

agreements were continuing. It is only following disclosure that that's been determined.

But as I said, we do accept there needs to be a cut-off point. We have not submitted a revised draft of the CPO on these points because we were waiting for this hearing, but of course it can be set out clearly in the CPO, the extent of the claims to which the CPO applies. So if the Tribunal takes the view that there needs to be a cut-off point in relation to that, which we accept needs to happen in terms of the damages calculation, then we accept that.

MRS JUSTICE BACON: So what you are saying is you accept that there would need to be a cut-off point and you accept therefore that you may need to amend the CPO to provide for that cut-off point?

MR WENT: Yes.

MRS JUSTICE BACON: So we may be looking at something that is not -- well, on your case now, we are looking at something that's not pleaded in the formulation that we currently have in 78.4.

MR WENT: Yes.

MRS JUSTICE BACON: Perhaps you can just take instructions over the lunch adjournment and come back with a revised formulation, whether it is 78.4 or you suggest amending some other part to make clear what the cut-off point will be.

MR WENT: Yes.

MRS JUSTICE BACON: That will be helpful, thank you.

So then this afternoon, I have three things on my list, but one of them might not be a live issue so I will just ask now.

Does anyone still object to certification on the basis of the timing point as to whether the funder can take priority over the class? Or is it now common ground that that point should be left until the Court of Appeal has determined the issue in the Gutmann

appeal?

MR MALLALIEU: For Apple, we don't take that point as a point of certification today. We are content to await the outcome of the appeal, or if the appeal for any reason does not proceed then it is a point we may seek to revisit at an appropriate stage.

MRS JUSTICE BACON: All right. Mr Pickford, Mr Gregory?

MR PICKFORD: We follow Apple on that.

MRS JUSTICE BACON: So then the remaining issues this afternoon: level of the funder's return, and connected to that suitability of the PCR. Are we going to need to go into private session this afternoon?

MR CARPENTER: I don't know if it is convenient to hear from me on this? I seem to have won the race to get to my feet.

Mr Pickford and I have discussed this. We have agreed an approach to confidentiality which means we will not need to enter into closed session but involves being able to reveal publicly slightly more than is marked as confidential in some of the documents. So for the assistance of everybody here, our position is that the fact that there is remuneration of the funder by reference to a multiple and also by reference to a minimum return, we are happy to be made public. Indeed I have just done so.

But the figures themselves should be kept confidential and shouldn't be mentioned in open court or appear in any non-confidential judgment.

MRS JUSTICE BACON: It is going to be a bit tricky. The problem is that there is always a risk that somebody just inadvertently lets slip the figure and there are lots of people looking. That's our problem.

MR CARPENTER: If the Tribunal would prefer to go into closed session to make things easier, I am sure we would have no objection to that. Just looking forward to what might be in any non-confidential judgment, I am sure the Tribunal understands where we draw the line in terms of what we are happy to be made public in the court.

MRS JUSTICE BACON: Yes, but that in itself is going to have to be a matter of discussion, what is made public.

I think, just to avoid the possibility that somebody -- which could well be me -- slips up and says something that I am not supposed to, I think we ought to at least start in private session this afternoon, which will mean appropriate arrangements being made on the live feed -- probably turning it off, I suppose -- and then we will see how we get on. At some point it may be possible that we can move on into an open session. But I think we definitely do need to start that in private session.

I can just say now, so that you can just think about it over the lunch adjournment, that at the moment we do have concerns about the level of the multiple and the way in which the -- and the level of the IRR, the way in which that has been set. Why that is necessary. The extent to which other quotes have been obtained and the extent to which the most competitive quotation which results in the best return to the class has been obtained.

We think that we will almost certainly need more evidence from the PCR. We think that we will almost certainly need to come back for a further hearing unless everyone is so much in agreement following the further evidence that all of the concerns on the opposite side of the courtroom to you evaporate, which we see as unlikely, but possible. Or that the other side is content for us to decide on the papers.

If there is going to be a further hearing, it needs to be this side -- we think this side of October because, as you may know, I am going to then be disappearing into a trial featuring various of your colleagues from the start of October, from which I will not emerge until some time later and then I happen to be going straight into another trial.

So we think that this is going to have to be resolved. Also, we don't want to -- we are reluctant to hand down two judgments. It is messy. We want to hand down one judgment. I think you need to just take some instructions as to when we could come

back for a hearing, assuming that peace and amity has not yet broken out between the sides.

We are provisionally looking at 24 September for a further one-day hearing on the funding issues. I should say now also we would want the defendants -- proposed defendants -- to be considering whether they want to apply to cross-examine Ms Riefa on any evidence.

Now, that's not something that you will need to decide now, but that's a possibility if we get to a position, after any further evidence, that everyone is still not happy about the -- not the accuracy of what's said, but about the comprehensive nature of the explanations that have been given. Because we need to make sure that we have enough information before us to decide and we don't want there to be a further hearing. So this is going to be once and for all. If there is a possibility that it is going to be said, well, we still don't have enough information following witness statements, then you may be wanting to ask further questions of Ms Riefa. The Tribunal indeed may want to ask further questions of Ms Riefa. So those are possibilities that have been occurring to us. I don't want to spring those on you this afternoon. Just think about those over the lunch adjournment, please.

And related to that we do have a concern about the suitability of the PCR. It is tied up with the funding issue and the extent to which the PCR is going to be supported in order to make an independent decision about whether these arrangements are suitable and result in the best possible return to the class. That, I think, is wrapped up in the question of the return.

So those are some of our concerns. We will return to those in an hour's time.

MR BANKES: There is one other point, which is I think Apple have objected to amended paragraph 67A of the claim form. Are you going to address us on that, or take it any further?

MS ABRAM: Sir, we don't object to the conclusion of 67A. We are just putting down a marker that it doesn't seem to have any practical relevance to the claim. That's all. No issue there.

MR NEUBERGER: There is one further issue which I would like to hear more about and that is the basis for seeking confidentiality of the arrangements in the litigation funding agreement. And particularly the question of whose interests the confidentiality serves.

MRS JUSTICE BACON: So I think we will need to consider disclosure of the arrangements at two levels. One is to the class members and, secondary, more generally so the wider question of confidentiality, whether it is necessary to maintain this. So that will be a debate we might start off with this afternoon. So you will see why I was anxious to conclude the debate on the first issue, because I think, in the slightly less than two hours remaining this afternoon, we may have quite a lot to get through. So we will come back at 2.05.

(1.06 pm)

(The short adjournment)

(2.05 pm)

MRS JUSTICE BACON: All right. Shall we start with the point where we finished, regarding the pleading?

MR WENT: Yes, we have looked at this over the lunch break. We looked at the timetable, the litigation timetable which is at 630. Page 630 in the main bundle. We are on track at the moment with the certification hearing happening in July and it is envisaged that disclosure would happen in August next year.

In terms of a fixed date, we would suggest 31 July 2025. There is obviously scope that that may move in terms of when disclosure actually takes place. But in terms of having a fixed date at this stage, that's what we propose.

MRS JUSTICE BACON: You said something about the basis for that calculation. What was the basis for that date?

MR WENT: It is we just looked at the litigation timetable and it is envisaged in that that disclosure would happen in August next year.

MRS JUSTICE BACON: I see. So that sets the date. So you set that date by reference to when disclosure is taking place?

MR WENT: Yes. One can either do it by reference to when disclosure actually takes place, but if there is to be a fixed date now. As I said, that date may move and we still would not want to exclude, depending on what happens after that and how long the case runs for, potentially for updating to happen at some point in time in terms of volume of commerce. But that's the submission.

MRS JUSTICE BACON: Can I just then have Mr Pickford's submissions on that, which looks very different to what we have currently got in 78.4.

MR PICKFORD: It does. For our part, we still object to it because it is a date in the future as we stand now. We say that if and insofar as the Tribunal were going to consider awarding damages up until that date, the way to achieve that would be for the PCR to make an application on, say, 31 July 2025 saying we are now claiming damages to this date and we are doing it on the basis of this disclosed material. That would be how it should work, according to the regime that I have outlined, not for the Tribunal to make the order now.

So that's the first point.

The second is I don't think that date even works on the claimants' own case, because plainly you don't have information. You can't disclose information to the very day that something is being disclosed. I mean, if disclosure actually took place on 31 July 2025, as they expect it will -- but of course there is no guarantee whatsoever that that is, in fact, what is going to happen, we don't know if it will be that day or another

day -- whatever day it would be on, there will be some information, one hopes, that could be disclosed. But it is not going to be information that is entirely contemporaneous with the date on which disclosure is ordered or given. So that idea doesn't work, either.

The next point I would make, developing on the point that I have just made, of course this is all entirely speculative. This is a hope that that is something that is going to happen on that date, but we simply don't know that. We don't know if we will run ahead of that timetable or behind that timetable. Therefore, it is not appropriate to be speculating into the future what the appropriate date is.

Again, it supports my construction that the right way of approaching this is that one always claims retrospectively, albeit I permit for the possibility of making of an application in the future, and we would have to consider that application on its own merits at the time it was made.

MRS JUSTICE BACON: All right, thank you very much.

Thank you, everyone. We have your submissions on that point. We will now move onto the funding issues. I think at this point, unless anyone is going to tell me we can start off in open session, then I think we will have to clear the courtroom.

MR CARPENTER: I think that might be best. I am going to make the submission, madam, that none of this information is confidential, but I am not expecting the Tribunal to start off in open court to hear that.

MRS JUSTICE BACON: Let's clear the court room. The first issue we do have to decide is the extent to which any of this should be confidential going forward.

(2.10 pm)

(Closed session)

(3.45 pm)

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1602/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 12th July 2024

Before:
Mrs Justice Bacon
Charles Bankes
Anthony Neuberger
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Christine Riefa Class Representative Limited

Claimant

v

Apple Inc. & Others **Defendants**

A P P E A R AN C E S

Jamie Carpenter KC, David Went (On behalf of Christine Riefa Class Representative Limited)

Roger Mallalieu KC, Sarah Abram KC, Tom Pascoe (On behalf of First & Second Defendants)

Meredith Pickford KC, David Gregory (On behalf of Third to Seventh Proposed Defendants)

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Friday, 12 July 2024

(2.10 pm)

PROCEEDINGS IN CLOSED SESSION

Submissions by MR CARPENTER

MR CARPENTER: Madam, to address that issue of confidentiality first, this is information which I am told the funder regards as commercially sensitive. I am not in a position to mount a fully-fledged application for confidential treatment in the face of opposition. I don't have evidence, I don't have full instructions.

What I respectfully suggest the Tribunal should do is treat the information as confidential for now and we proceed in closed session this afternoon. If in any judgment the Tribunal considered it necessary to include that information, that might be the appropriate time for the parties to make submissions on whether, in fact, it should be regarded as confidential or not.

MRS JUSTICE BACON: I think on any basis we are going to have to deal with that in the judgment, so you might as well make the submissions now or you will have to tell me you are just not prepared to deal with it, and then we will have to set a timetable for when you are going to deal with it.

From our perspective, we really need to know why, in the first place, the class can't receive basic information about the level of return, because it directly impacts on what they might recover. And if the class receives that information, given the size of the class and the identity of the class, then you might as well unredact it, because anyone can then get it.

MR CARPENTER: I take that point, madam.

MRS JUSTICE BACON: Are you telling me that you are not in a position to deal with those issues today? If not, when are you going to be able to deal with them because

we do need to address it before we hand down our judgment?

MR CARPENTER: May I take instructions on that?

MRS JUSTICE BACON: Yes.

MR CARPENTER: Madam, having taken instructions, I am told that this is a point the funder feels quite strongly about. I feel it would not be right for me to attempt to deal with it in full now.

MRS JUSTICE BACON: Right. Are you saying this is a new issue? Is this the first time that anybody has raised the question of you need -- of the confidentiality and why this needs to be treated as confidential?

MR CARPENTER: I believe so, yes.

MRS JUSTICE BACON: Have the proposed defendants not raised this? Because Mr Pickford just said he was going to say it shouldn't be treated as confidential. Have you raised this in correspondence?

MR CARPENTER: The way in which it has arisen so far is that I accepted from a pragmatic point of view in relation to this particular hearing that we were willing to proceed on the basis of approaching it as we had done in our skeleton argument, which is simply not talking about the numbers. But that was without prejudice to whether any of the information was truly confidential. We don't accept that any of the information is not truly confidential. We had simply adopted a different pragmatic way through to the one we have now adopted.

MRS JUSTICE BACON: Well, it would have been helpful on all sides if this issue had been somewhat further developed between the parties before coming before us. It seems to me quite obvious that we are going to be talking about the figure in any judgment on this issue. I appreciate that actually nobody is going to be in a position to make full submissions on this, and in particular the funders are not here and prepared to be making submissions on it.

So we are not going to be able to decide that today, so we will have to proceed in closed session today. When will we hear submissions on this point? Are we going to include this in the further evidence that is going to have to be provided after this hearing?

MR CARPENTER: We did canvas, when I was taking instructions, the possibility of it being dealt with by the Tribunal on paper on the basis of perhaps short written submissions submitted after this hearing.

MRS JUSTICE BACON: The problem is that written submissions tend to get messy. If we are going to be coming back anyway in September, that may be the right place to deal with it, to allow the parties to put in evidence or preliminary positions so that everyone knows where they are before September. Then we will deal with it at the September hearing.

Mr Pickford, do you have an alternative suggestion?

MR PICKFORD: We would prefer that course, madam. For what it is worth, we could deal with it right now, but I hear what my learned friend says which is that he can't. But I can.

MRS JUSTICE BACON: All right.

MR PICKFORD: So if he can't, then it should be dealt with at the next hearing.

MR BANKES: You tell us the funders object, and then a representative -- does your client object?

MR CARPENTER: I have not taken instructions on that, but she is bound by an agreement with the funder. I believe I can check it --

MRS JUSTICE BACON: That doesn't mean she has a position that says that she thinks it has to be confidential. She has to have her own position on this.

MR CARPENTER: I am sure she instinctively would not want to take a position contrary to that of her funder --

MRS JUSTICE BACON: Why? She's not representing the funder, she's representing the class.

MR CARPENTER: Sorry, may I take instructions?

Obviously, we hear what the Tribunal says. This is perhaps something to take away, and obviously will have to be addressed.

Can I just say this, so it is absolutely clear, because Mr Pickford said that his position in respect of today was without prejudice to any possible wider objection. That's not a reservation that I have previously been aware of, and this material went into the confidentiality ring without objection.

MRS JUSTICE BACON: Yes, which is why I asked the question whether anybody objected to it.

This is no criticism of you, Mr Carpenter, I am just saying generally it is not very satisfactory for parties to show up to the Tribunal to say that they are not accepting confidentiality, but have not actually made that objection and just leaving it in the ether. We need to resolve this.

What we will have to do at the end of this hearing in any event is to give directions for the next hearing. Those directions will need to include directions for evidence to be provided as deemed appropriate from the PCR and the funder. Reply evidence, if applicable, from the proposed defendants. Then for submissions on this to be made at the September hearing. We will have to proceed for today on the basis that it is confidential.

But I think what you need to be addressing is whether at least the headline terms are disclosed and practically speaking, although theoretically one might draw a distinction between disclosure to the class members and disclosure to the world at large, given the size of the class as I have just said there is not practically a distinction between them because anyone who wants to get those figures will be able to get them.

So I think that we -- rather than trying to draw a theoretical distinction which doesn't actually in practice make a difference, I think we should be talking about disclosure at large. Maybe not of every dot and cross in the commercial agreement between the parties, but at least the headline terms which enable the class members to know what they are not opting out of insofar as they don't opt out of it, and to make a decision as to whether they are going to opt out, and to be able to make comment insofar as possible on the arrangements which their representative is signing up to on their behalf.

MR CARPENTER: Yes, that is understood.

MR NEUBERGER: So I think that's what we are looking at, not necessarily an unredaction of the entire agreement, but the headline terms. So that is something we will need to address at the next hearing.

Do you then want to develop your main position as to what due diligence has been done to ensure that this is the best quote that can be obtained in the market, and why it needs -- why the IRR needs to be set at the levels it has been set?

MR CARPENTER: Yes. I may not answer those exact questions, but I am going to answer in general terms what was put to me before the short adjournment, and also make submissions on that. I will say at the outset that I hope still to persuade the Tribunal that there is not, in fact, the need for another hearing. But actually when and how this agreement operates is understood and put in context, the Tribunal can be satisfied that this is an appropriate funding arrangement and that the PCR can be certified as class representative with this funding arrangement in place.

To begin with what is inevitably evidence given on instructions, this relationship between the PCR and the funder did not begin in the form it is in now because this was originally a pre-PACCAR LFA that was entered into. That is an important part of the background, in my submission.

I think it would help the Tribunal to see what the equivalent provisions in the LFA that was initially executed look like and that's bundle C, tab 10.

MRS JUSTICE BACON: Why do we need to do the archaeology? What we are looking at is what we have now and whether what we have now is suitable for certification. There may be a reason why there is a different arrangement now, but what has to be justified is the arrangement that you have now --

MR CARPENTER: Yes.

MRS JUSTICE BACON: -- and how that's been agreed and the extent to which, if any, competing quotes have been obtained.

MR CARPENTER: That's precisely it, madam. Because the process of obtaining the funding was a process obtaining funding in a slightly different form. So in order to answer what you have asked me about due diligence, it is necessary to go back to the beginning.

MRS JUSTICE BACON: I see. All right.

MR CARPENTER: So it is helpful, I think, then, to turn up page 255 in bundle C, and look at what the pre-PACCAR arrangements was. Before I say anything about its details, as to its origin, this was a funding package that was obtained through brokers who are specialists in this area, particularly in the field of collective proceedings.

MRS JUSTICE BACON: Sorry, which page are you looking at?

MR CARPENTER: 255 in bundle C.

MRS JUSTICE BACON: Is it C255 or is it PDF 255?

MR CARPENTER: I am sorry, I have the hard copy. It is C255. I apologise if that is a different page number from the PDF version.

MR NEUBERGER: Yes, all right.

MRCARPENTER: I am sure the Tribunal needs no persuasion that Hausfeld, my instructing solicitors, are experts in this field. They themselves know this market and

the funding market very well.

This was the only funding offer put forward by this broker, but it was one that Hausfeld were well placed to assess against what they know to be the market and Ms Riefa expressly satisfied herself on the basis of advice from Hausfeld that it was a reasonable passage.

You asked, madam, about due diligence. That was the due diligence that took place when this contractual relationship began.

MRS JUSTICE BACON: Just let me get this clear. The broker put forward one offer. Hausfeld thought that was suitable, advised the PCR it was suitable, and the PCR took that advice?

MR CARPENTER: Yes.

MRS JUSTICE BACON: No consultative committee or anything like that?

MR CARPENTER: This PCR, the corporate entity, does not have a consultative committee. It is Ms Riefa.

MRS JUSTICE BACON: That is basically Hausfeld almost because she's not taking any other advice. It is just Hausfeld that she's getting --

MR CARPENTER: Yes, but reasonably so, in my submission. They are undoubtedly market leaders in this field. They are involved if many claims of this kind. They have obtained many funding packages of this kind. If what was offered was outside the market norm, they would undoubtedly know that.

MRS JUSTICE BACON: What's the point of her being there then, because it might just as well be Hausfeld?

MR CARPENTER: Well, there has to be a class representative. There is in all of these cases. Sometimes they are corporate bodies, with or without consultative committees. Not always. Sometimes they are individuals. It varies from case to case. Where there is an individual, there is no more to it than the individual instructing the

law firm.

MRS JUSTICE BACON: You are telling us that she's not herself done any other due diligence, she's simply taken Hausfeld's advice that this is a suitable arrangement.

MR CARPENTER: Correct. And I would respectfully suggest -- without evidence to back it up -- that that is likely to be commonplace.

MR BANKES: Could I draw your attention to Riefa 1 at paragraph 47.

I am sorry, I don't have the soft reference.

MR CARPENTER: I am sorry, I am just getting that. I have that. It is A476.

MR BANKES: It seems to me that at paragraph 45 she tells us that Hausfeld advised her on how long Asertis had been in the market and at 47 Hausfeld advises her that the funds on offer should be sufficient.

MR CARPENTER: Yes.

MR BANKES: Are you saying there is something missing from that witness statement, or was the advice limited to those two points?

MR CARPENTER: I have told the Tribunal what my instructions are.

MR BANKES: It seems to me that there is space between what you have told us and what the witness statement says.

MR CARPENTER: Yes, if I may say so, a market survey isn't normally a feature of these sorts of cases. The suitability of the funding package is judged, obviously, to an extent in objective terms, but also against a market which obviously the Tribunal also has some experience.

It is an important point, and I may well come back to it. But as said by the Tribunal in Gormsen and also in Gutmann -- and I say this with all due respect -- the Tribunal generally is and should be slow to interfere in commercial arrangements. It is only in extreme cases, unless the funding arrangement is such actually as to call into question the PCR's ability to discharge its duty as a PCR, if it is simply a question of is the cost

of funding potentially going to get too much, we are dealing with a huge range of hypotheticals. So unless it is a really extreme case like Gormsen -- and we are certainly not in that territory -- and it may be that we are having this discussion now because Amazon has made it look as if we are in that territory and we are certainly not -- and I will make that clear shortly -- that beyond that, even in, for example, Gutmann where the Tribunal said that the funder's reward was very large, it can all be left to the point where the funder is actually looking to be paid out of any damages.

So ex ante, before the event, the Tribunal is deliberately and, in my submission, rightly cautious about getting into precisely these areas. Because the test isn't: is this the best funding package which the PCR could possibly have got? PCRs do not routinely lead evidence, in my experience, of their attempt to get a better funding package. It is simply: is this a funding package with which we can regard this PCR as being suitable to be class representative?

There is an important distinction there. Also, allied to this -- I also say with respect -- is that the Tribunal in this area respects the market, it doesn't try to dictate it. If the Tribunal's view is that funders across the board are looking to gain too much -- I don't say that should be its view -- this isn't the appropriate mechanism to achieve that result. A PCR can do no more than go out into the market with suitable solicitors and obtain a package which the Tribunal regards as suitable within that market. That's the important umbrella point, in my submission, to all of this.

MR NEUBERGER: Can I just raise one question? When it comes to the Tribunal reviewing any settlement. As far as I understand from the litigation funding agreement, there is no one there at that stage to represent the interests of the class; is that correct?

MR CARPENTER: Well, the class representative must even at that stage be representing the interests of the class.

MR NEUBERGER: But if the class representative is bound to try and secure the payment of the amount in full, and to represent that as a just and whatever the phrase is --

MR CARPENTER: Yes.

MR NEUBERGER: -- settlement, then there is no one at that stage representing the interests of the class.

MR CARPENTER: That assumes, sir, that it is regarded as a zero-sum game. But it isn't, necessarily. It depends on, for example, at what point in the process is the funder being paid. I appreciate that is obviously more of an issue if the funder is looking to be paid before distribution. But whether it can be in principle is a separate question which will arise then. Obviously, it is part of the submissions that the proposed defendants make that that is inherently inappropriate, but the Tribunal in Gutmann took a different view.

There are inevitable conflicts to some extent in the class representative's role. It is not just with the funder, it relates to their lawyers as well because they will be acting on CFAs, they will be expected to get paid success fees. The class representative effectively is trusted to make a fair representation to the Tribunal which will make the decision on the basis of that material.

MR NEUBERGER: I am still not quite with you, because if the class representative is bound to represent the full amount of the funder's fee as an appropriate amount and try and press the Tribunal to make sure that any award of damages -- that in any award of damages, priority is given to that, which is the way I read it --

MR CARPENTER: Yes.

MR NEUBERGER: -- then I don't see that the class is represented at all at that stage.

MR CARPENTER: I mean, if one means in terms of technical representation, of course I see the force of the point. To a large extent the Tribunal will -- well, it will

consider entirely the interests of the class members. This is obviously a situation which in a sort of Gutmann-type case we have not yet reached. It might be that the Tribunal -- I don't know, this is entirely speculative -- appoint a sort of amicus to make those submissions.

MRS JUSTICE BACON: But that's supposed to be the class representative. The class representative is supposed to be representing the class. The Tribunal should not have to appoint an amicus to get the submissions which the class representative should be putting. I think that's what we are struggling with.

MR CARPENTER: Well, this is the Gutmann argument. We are being in a sense sort of led into it by a side wind. Of course I understand the force of that argument --

MRS JUSTICE BACON: We are not leading you into the argument as to whether -- as to who should take priority, but how in principle one can certify when the class representative's position is as it is in this case.

MR CARPENTER: By that, madam, do you mean one where there is the potential for the funder be to paid before the class members?

MRS JUSTICE BACON: Where there seems to be all kinds of conflicts which have not really properly been resolved and where we really need to understand how the class representative is going to operate so as to represent the interests of the class, which is what it is being put forward to do.

MR CARPENTER: I mean, again if I may say so, the root of that is what I will call the Gutmann point. Because if the funder is only being paid out of undistributed damages, then the class members' interests have been by definition fully satisfied. Every class member who has come forward to claim damages has received their share. There is a pot left over and it goes either to those who have claims for costs or it goes to charity. Those in that situation, there are no longer any class members to be represented, it is simply a question of the Tribunal exercising its discretion as to who gets paid in what

amount.

So all of these issues, which I am not downplaying, but they are issues which arise particularly because of that Gutmann point which in Gutmann the Tribunal was satisfied -- that constituted Tribunal was satisfied -- could be managed by the Tribunal at the stage of approving a settlement or following judgment. And obviously the Court of Appeal will express their view on that, and it is a point which today my learned friend Mr Mallalieu has expressly said is not being advanced.

So I am not seeking to be difficult here. That is really what this keeps coming back to because otherwise this is just a question of when the damages have been distributed, or as part of any proposed settlement, what is a reasonable amount for a funder to have.

MR NEUBERGER: My worry is that the proposed class representative has taken on the obligation to further the interests of the funders with no regard to the interests of the class and it seems that by putting them -- the interests of the funder -- first, there is no one there to represent the class. The interests of the class. At the point that the settlement is being negotiated or whatever.

MR CARPENTER: Yes. I mean, again, I am sorry if I sound like a broken record, but it is again precisely the Gutmann point. It is only one of a number of ways in which the funder can be remunerated under this LFA. The LFA caters for the possibility that a funder can be paid first. That is the exact issue in Gutmann which the Court of Appeal will determine and they will either say the Tribunal got it wrong and funders can only be paid out of undistributed damages or as part of the collected settlement, in which case we have no problem under this LFA because the class representative can still discharge its obligations by having the funder paid in all the other ways that the agreement provides for.

This is not an agreement which only works in that way which means that if the Court

of Appeal says no, you can't do that, we don't have a workable agreement anymore. If the Court of Appeal says yes, that is fine, then doubtless the Court of Appeal will also tell us how it is fine and what safeguards, if any, may need to be put in place.

So I am afraid my answer to all questions along those lines is inevitably going to be the same, but it is a crucially different question from the question of whether the return to the funder is in itself excessive. That's what we are concerned with here. Because this isn't a point that Amazon make, for example, limited to circumstances in which the funder seeks payment before the class. It is the point which Amazon makes in global terms. It is said this is effectively a Gormsen-type case where the Tribunal should say this is too much. And that's the point on which I hope to persuade the Tribunal that that is not right. This is not simply too much.

MRS JUSTICE BACON: All right. So you were talking about the pre-PACCAR.

MR CARPENTER: Yes, so if I can get back into the archaeology, if we are looking at C255, you will see that this is a very standard pre-PACCAR type agreement. It provides for -- and one sees it worded in different ways -- what it comes down to is the greater of the percentage and the multiple. The multiples, you will note -- of course we can say in these proceedings now what they are -- they are exactly the same as those in the present agreement.

If you look at the lines, priority multiplier and balancing multiplier, in circumstances where this goes to trial, they add up to 4.5 times. Although the wording is not perhaps quite as straightforward as it could be, what it amounts to is the funder gets the drawn funds back -- that's what it has actually paid out -- and then it gets the greater of that multiplier or the percentage. And of course it is generally assumed that the percentage is going to be the greater.

I am sure the Tribunal will know, this is an absolutely standard pre-PACCAR form of LFA. Greater of a multiple and a percentage. But everybody expects what is payable

to be the percentage.

The multiple is a commercial hedge against the risk that the result may be very small and that has never been objected to as something that is said to be unreasonable for funders to do. As a form of agreement, this is absolutely standard.

MRS JUSTICE BACON: In this case, the percentage being --

MR CARPENTER: It ranges from 15 up to 20 per cent.

MRS JUSTICE BACON: 15 to 20, okay.

MR CARPENTER: Now, this is not an agreement which was only then renegotiated after the result in PACCAR. A potential new agreement in the form that it is now was put in place contingently before the Supreme Court gave judgment in PACCAR to allow for the possibility that the result would be what it, in fact, was. That is the agreement which we now have, and that equivalent page is now to be found at C309 in this bundle, behind tab 12.

For those who are able to keep a finger in one page and look at two pages effectively at once, you will see that the multipliers are identical, but we now have this internal rate of return and I will make clear in a moment what that is, at a flat figure of 45 per cent, across all circumstances but the multipliers are exactly the same.

Now, that, I can tell the Tribunal on instructions, was not the product of any particular negotiation. That is what the funder proposed as an alternative form of agreement if PACCAR meant that you could no longer have a percentage. But, it was regarded as a reasonable proposal.

Again, the essential structure is the same in that it is the greater of the rate of return and the multiple, but it was an IRR that was regarded as -- and this is correct and I will get into the figures in a moment -- something that would only come into play at all if the proceedings were unusually prolonged. If this case turned out to be another Merricks or another Trucks. But on any normal projection -- and I will show you in

a moment the figures that we put in the reply as an example of this -- of the future course of this case, the IRR will never come into play. It only comes into play if something unusual happens.

The question is put to me fundamentally: why should there be an IRR at all? Just as, in my submission, it is reasonable for a funder under a percentage to hedge against the possibility of a small result, it is reasonable, now that post-PACCAR funders are essentially limited to multiples, to hedge against the possibility of this being an unusually prolonged claim which will, under a fixed multiple, necessarily reduce the funder's return.

As a concept in principle, in my submission, it doesn't raise an eyebrow. If there is to be any question about it, it could only be as to the level. But as to that, in my respectful submission, there is no metric against which it can really be tested. What one can do -- and the Tribunal is very welcome to do this -- is one can open Excel and you can play around with figures and you can use the XIRR function, which is specifically referred to in the LFA, and see what sort of numbers you get.

It is important to be clear that the origin of all of this -- and I am sure what leapt out at the Tribunal when reading in -- is this figure of 13 times that Amazon has trumpeted as being the possible consequence of this. It is based on a completely impossible premise, because it's based on the entirety of the funding being paid out by the funder in one go on day one. But, of course, that's not what IRR is. It's not what the XIRR function in Excel gives you. What it gives you is an overall rate of return based on disbursements of particular amounts on particular dates with a return at the end.

In a sense, you can equate IRR to compound interest, but it obviously depends on when each payment is made.

So to show you the example that we put in our reply, you will find that at tab 7 in bundle C, page C172. You will see paragraph, there the yellow highlighted text in

paragraph 35.2 which I can now read out and point you to the relevant parts. We say in a more realistic scenario, for example, if the total funding budget were paid out in equal monthly payments between 27 February 2023, which is the original LFA date, and a presumed completion of distribution of 27 September 2027, the IRR would not apply. You would be in multiplier territory.

You have to put in some pretty extreme figures before you make the IRR apply. You might say then: well, why have it at all? But it is in case this turns out to be another Trucks or another Merricks. Is it reasonable to be there? Yes, in my submission it is. Is it excessive? No, it isn't.

So that 13 times headline figure is just nonsense. It can be ignored. It's not something that helps the Tribunal at all. So what else does Amazon say? Of course, this is off the back of that 13 times figure, but I will engage anyway with what they say. They say it is too high in itself. I have dealt with that. And they say it is going to create tension and conflict because it is going to incentivise the funder -- and it is important to note that it is the funder Amazon aims this at, not at Hausfeld, not at the class representative -- it is going to incentivise the funder to do two things. It is going to give the funder an interest in prolonging the proceedings and it is going to give the funder an interest in trying to pay out as much as possible as soon as possible. That is an entirely false premise for its argument because those are things over which the funder has absolutely no control.

Dealing, first of all, with prolonging the proceedings. These proceedings will be subject, of course, to case management directions and they will be brought to an end by judgment or settlement. Quite obviously the funder has no control over the speed at which these proceedings come to trial, and it has no power to prevent a reasonable settlement. And what happens if there is a settlement offer or somebody wants to settle is expressly provided for, as it always is, in the LFA -- and I will show you that,

behind tab 12 at page C298.

First of all looking at clause 10.1:

"The PCR is under an obligation at all times to try to settle where it is in the interests of the class members."

That is what the PCR has contracted with the funder to do. The funder's only role in relation to a proposed settlement is the right to object if it considers that an offer is not reasonable. And we see that in 10.3. We see what is defined as a reasonable offer, which is an offer which the law firm -- that's Hausfeld -- advises the class representative that it is reasonable to make. And there is provision there that if the funder does not agree that the offer is a reasonable one, then 10.7 to 10.13 below apply.

And that provides for a very high speed, independent determination by a KC of whether the offer is a reasonable one or not. There are detailed provisions in schedule 3 that I don't think I need to trouble the Tribunal with now, but they provide for a decision within 15 business days of the independent KC being appointed, and their decision is bind on the parties. If it is a reasonable offer, it will be accepted.

There is nothing a funder, who does not want this claim to end, because it wants to lay out more funding and get a greater return, in the face of a reasonable offer or the class representative's reasonable desire to make an offer, there is nothing the funder can do. So that disposes of that.

MR NEUBERGER: Can I just ask one question about reasonable offer.

MR CARPENTER: Yes.

MR NEUBERGER: That means reasonable from the perspective of the -- what does "reasonable" mean in this context? I am sorry, I just don't understand the term.

MR CARPENTER: One has to take the definition from the words of clause 10.3. It is:

"The law firm advises the claimant that it considers that it is reasonable to make an

offer of settlement and in the best interest of the class members at a given level, the offer that is the subject of that advice will constitute a reasonable offer."

Of course, when we are talking about settlement, we are not in precisely the same situation as a judgment, because a settlement will provide within it the payment of costs and so forth. Of course, if anyone then puts the spectre of conflict to me in those circumstances, that is absolutely inevitable in these circumstances. That is just the structure of the regime, a settlement will cater within it for the costs element that the Tribunal will be asked to order when it approves the settlement.

Obviously, a reasonable consideration and an inevitable consideration will be in any settlement offer is there enough for the funder? Of course it will, but there is nothing improper about that. That is essential.

Beyond that, it is the interests of the class members.

MR NEUBERGER: Thank you. Thank you. That is very helpful.

MR CARPENTER: So the spectre of the funder being influenced by the funding terms to want this to go on and on and on to judgment so it can make more money, that we can absolutely forget about.

That then leaves, well, what about the funder trying to pay out the money as fast as possible? Well, again, there's absolutely nothing the funder can do to influence that. We see that at page 295C, 295, we see the clauses that deal with how funding is actually paid out.

We see in 7.9 that:

"The maximum amount of funding is as set out in the budget, provided in a non-recourse, fully contentious basis in accordance with the terms of the agreement."

7.10 just deals with purchase of an insurance policy.

Then 7.11 is just about conditions precedent. We don't need to worry about that.

7.12 says:

"The claim funding made available in clause 7.11 above will be paid in accordance with clause 8.5 below."

We need to go on two pages to C297 to see clause 8.5 and it provides for the funder to pay against invoices submitted by the solicitors on a monthly basis.

So the rate at which the funder pays anything out is entirely in the hands of the solicitors. There is nothing the funder can do to push money onto the class representative when it is not required in order to discharge an invoice. There is simply no mechanism by which that could -- that rather extraordinary proposition -- in any event take place.

So again, the spectre raised by Amazon is absolutely imaginary. This is just a very ordinary litigation funding agreement.

As for the level of the multiples themselves, they have never been expressly objected to by either Apple or Amazon in this case. They have always wrapped up their professed concerns about the funding agreement in terms of this IRR which they appear to have fundamentally misunderstood or at least misrepresented the realistic effect.

As multiples, in my submission, they are obviously not in the Gormsen sort of territory where they started at six times and ended at 14 times. That was at a level which the Tribunal called out. But they are obviously much nearer the 3.8 which, in both Gormsen and Gutmann, the Tribunal certainly didn't regard as any sort of obstacle to certification.

Might the Tribunal in due course, when it comes to actually being asked to authorise payment out, might it say that's too much? Well, maybe it will. But the whole point is that these are questions which are better left to that point, unless there is real reason for the Tribunal to think that something about this means that this PCR is just not

suitable to be a class representative. But in my submission, actually, when one really understands these arrangements and sees how they work, there really is nothing in that.

I think with that I have said everything I intended to say on this point. If there is anything else I can assist the Tribunal with --

MRS JUSTICE BACON: Thank you very much, Mr Carpenter. Who is going to go next?

Mr Pickford.

Submissions by MR PICKFORD

MR PICKFORD: That's me, madam. So what we say is that the calculation of the funder's return is both excessive and structured in a way that's contrary to the interests of the class. We say nor has the PCR done enough more generally to show that the arrangements in place are reasonable ones. And thus the PCR fails the authorisation condition in section 47B(8)(b) of the Competition Act 1998.

Would it be helpful to go there to see that? That's in the authorities bundle, D, page number 2259, but that's probably different to your electronic number, I am afraid.

MRS JUSTICE BACON: The authorities are right. It is the main bundle --

MR PICKFORD: In which case we are good.

MRS JUSTICE BACON: It is D2259.

MR PICKFORD: 2259.

MRS JUSTICE BACON: Section 47B, sub?

MR PICKFORD: Sub (8):

"The Tribunal may authorise a person to act as the representative in collective proceedings..."

Then over the page, subparagraph (b):

"Only if the Tribunal considers that it is just and reasonable for that person to act as a representative in those proceedings."

Now, a point was taken that we aim our fire principally at the funder, but of course, the representative is the person who has entered into the funding arrangement. So if the representative has entered into inappropriate funding arrangements, they shouldn't be authorised, so it doesn't take my learned friend anywhere to make that point.

We say that the Tribunal should resist certification for the reasons I am going to come on and develop. The reason why we have an interest in this is because obviously we are not the class, but we do, as litigants, have an interest in the class being properly represented in this respect, and in particular settlement being an option which is not unduly inhibited by the arrangements that have been entered into. That's why we have, as it were, standing or an interest in making these points.

If I could start, please, with the question of the evidence. Mr Carpenter submitted to you that there was nothing to see here, and everything had been done sufficiently by Professor Riefa, and therefore we were not going to need to come back for any further hearing.

If we could go, please, first back to Ms Riefa's statement that we went to earlier, so that's in the A bundle, tab 13, page 475, at least the page numbers is where the relevant evidence starts, I am looking at paragraph 45.

MRS JUSTICE BACON: Yes.

MR PICKFORD: We began at paragraph 45 and there was reference made by the Tribunal to Hausfeld's name cropping up on a number of occasions.

If we then go on to paragraphs 49 to 50, these are the paragraphs where Professor Riefa purports to explain why it is that the arrangements that she's entered into are in the interests of the proposed class. You will see no explanation there as to why she is satisfied of that. It is essentially just an assertion.

Insofar as there is any explanation at all -- and I don't accept it is -- it is contained in paragraph 50. That is particularly telling. Let's just look at paragraph 50. It says:

"In return for Asertis' commitment under the LFA, if the proposed collective proceedings are successful and there are any unclaimed damages, the PCR will make an application to the Tribunal under section 47C(6) of the Act for its costs and expenses incurred during the collective proceedings including the sums due since the LFA to be awarded from [key words] any unclaimed damages."

So the basis on which the PCR has apparently satisfied herself that these arrangements are reasonable is because she believes that the award will come from any unclaimed damages. But we heard from Mr Carpenter that his position is -- he made it in his submissions -- is that they believe that they are entitled to claim the award not from unclaimed damages but in priority to any of the claimants.

If it is helpful to the Tribunal, I can take you through the various provisions of the agreement that was in place when Ms Riefa put her statement together that show how it actually worked at that time.

If we start, please, we are in the C bundle now and we start at C236 -- I am afraid I can only ever give external page references because that's all I have.

MRS JUSTICE BACON: All right. I think we just have to add a couple on.

MR PICKFORD: We are at 236, this is the version of the agreement dated 27 February. This was the one that was in place originally. If we go, please, to page 4.1.17 -- I beg your pardon, page 237, clause 4.1.17 -- we see that this provides that the claimant shall:

"Following a final judgment or settlement instruct the law firm to request that the court makes an order that all or part of the award [I will come back to what that is defined as] may be paid to the claimant in respect of the costs, fees and disbursements including the success fee."

So any part of the award to be paid to her and then on through the priorities agreement to the funder.

If one goes back to the definitions, that's on page 226, right towards the beginning of the document. We say the award means, in respect of the claim:

"... all monetary amounts inclusive of interest which have been awarded to the claimant for the benefit of the class members pursuant to any interim order, interim payments ..."

Et cetera.

What is clearly contemplated here under this agreement is that she will be instructed to make the application to ensure that the first person that gets paid here is her, which can then be distributed to the funder. Yet her understanding of the agreement is that that doesn't happen.

Now, in my submission that's the only paragraph that follows 49 that explains why the PCR thinks that these arrangements are satisfactory ones, and yet she doesn't understand the very nature of the agreement that she's signed up to there. In my submission, that is, frankly, fatal. It is absolutely fatal to the suggestion that my learned friend makes that enough has been done to demonstrate that -- don't worry, the PCR is on top of all of this, it is all fine, due diligence has been done.

The other point I would make in relation to this, of course, is that my learned friend sought to persuade you that we don't need to come back for another hearing because of -- then a lot of evidence that he gave from the bar. That's not evidence on which the Tribunal can rely, it's not evidence, it is just his submissions on instruction. So the very fact that we heard on a number of occasions points that were made on instruction confirms the Tribunal's own concern that there is not enough evidence, and we need to come back. That, I think, is self-evident.

So that's the first point I make about the evidence. We then go on to the issue about

the return. The return is set out in the second amendment. We might as well have it open. We have heard most of it already, but we can go back to it. It is at C13, tab 13, page 326.

This is the new paragraph 9 of schedule 1 that is to be inserted into the agreement. Now, what we say is the that the sums to which the IRR in particular is capable of giving rise are potentially staggering.

Now, the point made against me is, well, I gave an example of what compound interest at 45 per cent looks like over seven years. I obviously was not saying that all of the funds would be drawn down at the very beginning. I don't know how long the proceedings will take --

MRS JUSTICE BACON: Your point was this is an illustration. But Mr Carpenter said that is a completely fanciful illustration.

MR PICKFORD: In my submission, it is not a completely fanciful illustration. We have a number of cases which so far have gone on for longer than seven years in the Tribunal. Admittedly, the earlier you are in bringing these cases, possibly the more likely it is you are going to be making visits to the Court of Appeal and the Supreme Court. But there is no guarantee that this claim will not have its fair share of legal issues that mean it takes a very long time to prosecute. So that's the first point I am at.

It is certainly capable of giving rise to very large sums. The essential point made against me is: don't worry, it's not going to bite. But there was no good answer to what if it does bite? If it does bite, what that by definition means is that we are in the territory where we are getting back in excess of 5.5 times return, which is effectively what this actually provides for, because they get back their initial investment, plus 4.5 times that investment. So in terms of the chunk that comes out of the proceeds that are awarded in damages, that's 5.5 times that initial investment.

They would not need this -- they would not be fighting to retain it -- unless they thought that the IRR clause would bite and give them something substantially more than that. If it only gives them a little bit more than that, why bother to argue about it? It must be there because they think it could give them a lot more than that.

Now the issue with the IRR can be looked at in this way: we say, in a situation where there is already a very generous multiplier and indeed the multiplier goes up over time depending on when in the proceedings the case comes to an end -- so if you go back to the table that is in tab 13 at page 326, one sees that if the case doesn't end until trial, then we get the full whack, 4.5 times multiplier, of the priority multiplier plus the balancing multiplier that is in play at that point. So we already have the multiplier increasing to reflect the fact -- effectively time value of money.

But then what the funder wants is something more. Now, in my submission, the returns that the funder needs in order to justify the essential risk that it's taking -- the basic bit -- must be covered by the multiplier. Indeed, Mr Carpenter's submissions effectively accepted that because he said the reason for the IRR is just there if it takes a very long time. Plainly -- and his submission is -- we think that it is only ever likely that we are going to get paid under the multipliers. So, plainly, that implies that for the level of risk that they think they are taking on, the multipliers are themselves sufficient. What the IRR is purportedly doing is dealing with the time value of money if the proceedings continue to go on for longer than they expect. That's what they say.

Well, in no world, in my submission, is it ordinarily the case that one values the time value of money at 45 per cent. It is extraordinary. It is a quite extraordinary rate. If what Mr Carpenter says is correct, that that's what it is there for, it is to protect them for proceedings that take longer than they expected, then we need to have a time value of money in there that is realistic for the kind of time value of money that one would ordinarily see. And 45 per cent, in my submission, is absurd.

So that's that point. The next is that it was suggested that we don't have anything to worry about, because our concern about settlement is an illusory one. They say it is never going to affect settlement because he took you to provisions that deal with opinions that must be sought in relation to settlement offers.

What his submission boils down to was this: that the concern that we raise about the class being short changed and the class interests not being sufficiently protected because the funder has incentives to allow more and more money to be spent because it gets a bigger and bigger return, and it has incentives to allow the proceedings to continue as long as possible because it gets a bigger and bigger return, he says: don't worry, Hausfeld will deal with that. In the first instance, they can expect their interests to be protected by Hausfeld and then if there is a conflict between Hausfeld and the funder, then that can go --

MRS JUSTICE BACON: To arbitration.

MR PICKFORD: Yes, effectively to arbitration.

But in my respectful submission, this is no slur on Hausfeld at all, but they are simply not in the position properly to protect the claimants, the class's interests. They obviously have their own interests as a firm of solicitors who wish to pursue these proceedings and they will be rewarded accordingly in relation to these proceedings.

There is no suggestion anywhere else by the PCR that she thinks that she can effectively delegate the issue of protecting the class's interests to Hausfeld. In my submission, Hausfeld's interests are going to be remarkably similar, in fact, to the funder's interests, and therefore this supposed protection mechanism is what is illusory rather than the problem.

MRS JUSTICE BACON: Well, that was our concern. That is our concern.

MR PICKFORD: Indeed, with respect, I very much adopt the questions that came from Professor Neuberger in relation to the absence in these arrangements of there

being proper protections for the class.

The example that I gave you at paragraph 50, I think, really demonstrates the point. We do not accept that Professor Riefa is adequately protecting the interests of the class in terms of the arrangements that she has entered into. Therefore, this claim cannot be certified.

MRS JUSTICE BACON: You say that you -- all right, we have heard your submissions on where we are now.

MR PICKFORD: Yes.

MRS JUSTICE BACON: What do you say is the way forward? I think you are saying that there should be further evidence.

MR PICKFORD: Yes. We respectfully agree with the point made by you, madam chairman, that they do need to explain how it is that they say the authorisation condition is met here, given the nature of the arrangements that they entered into. We find it impossible to understand, given the points that I have made.

The absence of market testing, which we now hear on instruction is in that respect, I would say, also telling. I think they are going to struggle. They are really going to struggle to provide the evidence that they are going to need, but they at least should explain to the Tribunal, given it is the Tribunal's certification that they want, what they say is their position on it, and we can scrutinise that and we can come back and make submissions on it.

MRS JUSTICE BACON: All right. What is your position as to what that hearing is going to look like? Is it just going to be submissions or are we going to need any oral evidence? Obviously, I am not going to hold you to it now, but I think that we need to have an idea as to what you envisage might be the shape of that hearing.

MR PICKFORD: It might well require oral evidence, yes. I think, given the nature of the case, given Mr Carpenter's submission that we can simply rely on what Professor

Riefa has said in her statement as addressing the concerns and the fact that we say it doesn't address them at all, it does the opposite, we may well require oral evidence on that to explore that issue and others.

MRS JUSTICE BACON: All right.

MR PICKFORD: Just briefly, some further points, but I am very near the end.

MRS JUSTICE BACON: Yes. We need to finish by 4 o'clock and we need to have decided what we are doing by 4.

MR PICKFORD: Yes, I am not going to detain the Tribunal much further at all.

The other issue that I wish to raise is it is said against us: don't worry, all these things can be dealt with down the line and it can all be wrapped up when the Tribunal considers a final award or settlement. In my submission, if the structure is already clearly not one that is properly aligned with the interests of the class, and if there is an inadequate evidential basis for the Tribunal to come to the conclusion that Professor Riefa has sufficiently taken into account the interests of the class, then it simply should not certify now. It is not good enough to knock this down the road because it is an essential requirement that needs to be met at the certification stage.

MRS JUSTICE BACON: Yes.

MR PICKFORD: And to allow it to continue interferes with the litigation process as we go forward.

I have just been handed a note which I need to read and understand. Please give me just one moment.

I had hopefully made this point sufficiently clear, but I may not have done. So my learned junior points out that my submissions are without prejudice to the points that we have already made today. That is the fact that we are accepting that we can come back -- because the Tribunal has suggested that is a good idea and we think it is a good idea -- we are entitled to stand up at that hearing and say what you already

heard from me today is sufficient, you can decide not to certify now.

Indeed, in my submission, you could decide that now, but I respect that the Tribunal has indicated it would prefer to hear more evidence on this first. So I am not asking for that to be done today, I am saying it could be done.

MRS JUSTICE BACON: Yes, I understand. All right, thank you.

Ms Abram, do you want to make submissions, and if so for how long?

Sorry, Mr Mallalieu on this point.

MR MALLALIEU: Madam chair, it is me, if I may.

MRS JUSTICE BACON: Yes.

MR MALLALIEU: There were just a number of very short points that will take no more than five minutes, but if you consider you have heard sufficient, I will not press the point.

MRS JUSTICE BACON: Why don't we rise for a few minutes and we can come back and hear your points and you can use that time to make sure you are not duplicating everything that has already been said.

MR MALLALIEU: Thank you.

(3.14 pm)

(A short break)

(3.26 pm)

MRS JUSTICE BACON: Yes, Mr Mallalieu.

Submissions by MR MALLALIEU

MR MALLALIEU: Thank you, madam chair. If the Tribunal, of course, has reached a point where it is satisfied as to the future course of this matter, then of course I don't want to take the Tribunal's time up unnecessarily. But subject to that, I just have a number of very short points.

Again, I don't want to repeat in substance anything that Mr Pickford has said.

We consider that this issue raised an issue of concern that it was appropriate for the Tribunal to consider and it appears that that is indeed the case. The fundamental question from Apple's perspective that we keep on coming back to is why this alternative IRR method is there. For today's purposes -- and I put it no higher than this -- the evidence to explain it is simply wholly inadequate and unsatisfactory. There is no proper explanation for it.

We noted that in the reply from the PCR and indeed in the skeleton arguments, there was no attempt to justify it. There was an argument to say the Tribunal didn't need to consider it, it could all wait until the end, but if that was wrong there was no attempt to justify or explain it and Mr Carpenter has been left to do his best today with no proper evidential support.

I will not repeat, as I say, the concerns Mr Pickford has already taken you to about the evidence of Ms Riefa.

The second short point we make in relation to this, again following on from the why point, is that it is difficult for us to understand -- and we respectfully submit probably for the Tribunal to understand -- simply what purpose it serves. Part of Mr Carpenter's submissions appear to say, it's actually nothing we need to worry about, because it is never going to arise, but that, of course, begs the question why it is there at all.

The alternative, Mr Carpenter indicates, is without evidential support, it is there to cater for the unexpected or extreme. But we respectfully submit in short that what we have here is already a substantial reward, in broad terms three and a half or four and a half times investment plus repayment of the investment of the drawn funds. We say that is the sort of award one would expect an experienced funder, if that is a reasonable award at all, which is an issue we reserve our position on, an experienced funder to have arrived at, taking into account the swings, roundabouts and unexpected

eventualities of litigation of this type.

So we say one would expect the matters that Mr Carpenter relies on already to be baked into the quite substantial levels of return that this funding agreement gives rise to.

Again, I will not repeat the points made by Mr Pickford as to the concerns as to what have been described as perverse incentives that that additional reward can give rise to, but we just struggle to understand why it is there on a reasonable basis at all.

Those concerns have been heightened today, of course, when Mr Carpenter has -- I will not say given evidence -- on instructions informed the court that when the LFA was renegotiated, the IRR was added in, and there was no negotiation about it. It was simply agreed to, presumably on Hausfeld's advice, although it is unclear if any advice at all was given or taken in relation to it. That is an issue, of course, that would give this Tribunal significant concerns as to whether the class representative is properly acting in the interests of the class if they have chosen not even to scrutinise this additional level of reward that has been added into the litigation funding agreement.

Madam chair, I said a number of short points. There is one point in relation to the documents which I just considered it may assist the Tribunal just to turn up, which is just some of the obligations that the proposed class representative has accepted under the litigation funding agreement. If I can just briefly, in the last couple of minutes of my submissions, take you to that.

It is page C291, which I think in the PDF numbering is 293. So this is the latest version of the litigation funding agreement. Just to orientate ourselves, we can pick it up on the previous page under 4.1. These are general undertakings given by the claimant, the class representative -- or proposed class representative.

We have already looked at least one of these already, but if we can just come on

briefly to 291, we can see that at 4.1.15, which is dealing with collective settlement approval orders, pursuant to CAT Rule 94 and 96, the class representative takes on the obligation to seek to satisfy this Tribunal that the terms of the settlement agreement are in accordance with its agreement unless otherwise agreed by the funder are just and reasonable.

So the class representative takes it upon herself to positively advocate that these settlements terms are just and reasonable.

Then at 4.1.17 has already been looked at. That is the part that deals with the point about seeking an order for payment. But we also highlight, because I don't think it has been referred to so far, 4.1.18: the class representative takes on an obligation to “take all reasonable steps to attain or realise the success fee in full."

That is to attain the full reward in the funder's interests. That takes me, having highlighted those points, to my last point subject to any questions from the Tribunal, which is that part of Mr Carpenter's answer to this -- and I think he said it repeatedly -- he will keep on coming back to say this is the Gutmann point and Apple in particular are not pursuing the Gutmann point here.

If I may respectfully say so, that simply puts things the wrong way round. The fact that we are not pursuing the Gutmann point today, because it is subject of an appeal in a different case, means that for today's purposes and for the purposes of certification, unless and until we do take that point, that the Tribunal must proceed on the basis that under this LFA it is permissible for this money to be taken out of the distributable damages.

Therefore, when the class representative agrees to seek this payment in full, that is her agreeing to seek this payment in full potentially out of the damages that are due to be distributed to the class -- the identified class members.

That, madam chair, subject to any questions, is the final point I want to make, because

we say when this is looked at in context there are sufficient grounds to give this Tribunal real concern as to whether this agreement is a proper agreement on which this class representative can and should be certified in these proceedings.

So, madam, unless there are any questions, those are our brief submissions.

MRS JUSTICE BACON: Thank you very much, Mr Mallalieu.

Yes, Mr Carpenter.

Submissions in reply by MR CARPENTER

MR CARPENTER: Madam, just dealing briefly with the point about those contractual provisions as they may still be open in front of you. There is nothing remotely surprising about the class representative agreeing with the funder to seek payment of the success fee in full. That has to be there, because the only way the funder can be paid is out of the proceeds of the proceedings. It would be extremely surprising if there was not such an obligation.

Mr Pickford's submissions are not so much targeted at this case, but at the entire regime. When he says that Hausfeld are not in a position to protect the class members' interests, he's talking about the position of every single firm of solicitors that acts in a case such as this. In an age post PACCAR, when funders cannot enter into percentage agreements -- and the president has said more than once that it would be much better if they could -- it would get rid of a lot of the issues that we have been discussing today, but they cannot. So in a world where multiples are what is on offer, and in a world where there is a direct link between what is spent on the proceedings and what the funder gets, that is just what we have to live with.

Hausfeld are professionals, they are well known to this Tribunal and there should have been -- I am sure there wasn't intended to have been any specific criticism of them, but if there is not, then what Mr Pickford is talking about is simply the regime that we

have to operate within.

Solicitors in their position have to be trusted to be professionals and this Tribunal has, as it has said on several occasions in other cases, a very important supervisory role which it will exercise at every stage of the proceedings from certification right through to the end.

In view of what Mr Pickford said about the need for another hearing and the value that can be placed on the "evidence" that I gave, I think it is important. I referred to it tangentially previously, but I think it is actually important to go to what was said in Gutmann quoting from Gormsen --

MRS JUSTICE BACON: This is reply submissions. We are going to have to decide what to do in relatively short order. I hope this is not going to be lengthy citation of a new point.

MR CARPENTER: It is simply the text, madam, that I referred to earlier about the importance of the Tribunal not getting into what are commercial --

MRS JUSTICE BACON: You have made that point to us.

MR CARPENTER: Yes, I am sure you have the reference, it is paragraphs 9 and 10 of Gutmann, but it is not lightly to be disregarded. Because my answer to Mr Pickford's point about the evidence is that it is simply not relevant to the question that this Tribunal has to answer.

The test is not, as I have said and I repeat: did the PCR do everything conceivable to get the best possible funding deal? The test is also not: what understanding as a non-lawyer do they have of every aspect of this agreement? What is, in my submission, to be achieved by putting her in the witness box and asking her questions --

MRS JUSTICE BACON: I thought she is a non-practising lawyer, but I thought she's an academic in this field.

MR CARPENTER: In consumer law. She's not a funding expert. She is entitled to rely on the advice of Hausfeld who are giving her that advice.

Is the Tribunal going to be assisted by her being asked questions about what she did to procure these arrangements? In my submission, no, it isn't, because that fundamentally isn't the test, and to start making that the test would be very much trespassing on the areas which this Tribunal said in Gormsen and Gutmann it shouldn't be getting into.

MRS JUSTICE BACON: There is a real difference between the intricacies of the commercial agreements and the suitability of the PCR and whether the PCR has the right expertise and, importantly, is supported by the right independent advice.

MR CARPENTER: Of course, she relies very heavily on the advice that she gets from Hausfeld.

MRS JUSTICE BACON: But Hausfeld are not independent. Hausfeld are a party to the LFA. They have their own fees to consider. They have an interest.

MR CARPENTER: They have an interest in this claim being successful by virtue, obviously, of the fact that they have their CFA, and obviously by the acting for the PCR in these proceedings they will earn fees as a result. But there is nothing unusual in that, in my submission. They are not actually a party to the LFA but obviously the funding that is provided under it pays their fees.

I was asked earlier about consultative panels and I said sometimes you see them, sometimes you don't. But what you don't see is funding experts on consultative panels. You see industry experts, you see consumer experts. But for funding, PCRs rely on the advice of their solicitors. I mean, that's absolutely normal.

So what the focus has to be, in my submission, and should only be, is simply on what the agreement is. I think, although he wouldn't quite concede it, Mr Pickford effectively acknowledged that that 13 times figure in Amazon's written submissions is not

a realistic one. But he says, well, 45 per cent is just too much. That's too great a return.

As I said previously, there is no metric against which that can be assessed. Mr Mallalieu says there is no evidence from the funder as to how that was arrived at. I think I can safely say certainly in my experience it has not been the case that in a Tribunal of this kind where a funder has ever put evidence before the Tribunal about how it arrived at the particular terms of the LFA.

This is a very large -- as was said in Gormsen -- this is a very large and potentially risky investment. If Apple and Amazon are right, the funder will not merely get nothing out of this, but perhaps many years down the line find that it has lost the best part of £20 million.

Now, the assessment that goes into deriving an appropriate internal rate of return is one which I say, with respect, this Tribunal does not have the skills to reverse engineer and decide whether that is reasonable or not. That's why I said at the beginning that the Tribunal has to reflect the market, it can't dictate the market. If ultimately these cases become unattractive, well, then, there will not be funders to take them on and there won't be claims to be brought.

So once one does away with that illusory 13 times figure, what one is left with is: is it reasonable to cater for the possibility that something unusual might happen in these proceedings and they go on for much longer than was intended? In my submission, yes. But if down the line, the Tribunal decides, when it comes to settlement or damages, the actual amount is too much, of course it has the power to alter that. But will that in the meantime compromise the class representative's ability to represent the class? No, it won't, in my submission.

MRS JUSTICE BACON: Thank you.

MR NEUBERGER: This is just one question, I guess. You said we shouldn't question

the 45 per cent, yet you resile from the 13 times multiple. It suggests that there is at some point a level which becomes unacceptable. Do you have any idea where that is?

MR CARPENTER: No, I mean, of course ultimately it is a question for the Tribunal and tantalisingly in Gormsen, we never find out what it is. So we know in Gormsen what was too much, but the president declined to tell us what was enough, or not too much.

MR NEUBERGER: Am I right in thinking that you would think that 13 times the original stake would be excessive? Is that the point?

MR CARPENTER: Sorry, sir, I don't have to defend 13 times, because it can't arise. That 13 times figure, we should be clear about that, you only get that if you pay out the entirety of the budget on day one and nothing else happens for seven years and then you get it at the end of that. It is an absurd figure. It bears -- it doesn't begin to reflect how you actually calculate the internal rate of return, or how it works.

MR NEUBERGER: But you could get that figure also by spreading the money over three years and then waiting another seven years, which is not -- I mean, you may -- it may be quite hard, I don't know, to get to 13 times, but you can get to a very considerable multiple quite quickly. You get to 2.7 on your standard.

MR CARPENTER: Yes.

MR NEUBERGER: I think it gets up to 5.5 two years later and then goes on going up.

MR CARPENTER: Of course you are already in that territory, in a fairly extreme case. One has to keep one's eye, I say with respect, on what we are talking about here, which is certification, not how much will the funder get at the end of this.

That's the other really important point that comes out of Gormsen and Gutmann. Most of the time you can leave this until the end. It may be, as it turns out, that the number which is sought is a number which the Tribunal regards as excessive, but this all

started with Amazon saying: look at this 13 times figure, this is outrageous, this will completely compromise everything. This will have the funder wanting everything paid out as fast as possible in trying to prolong the proceedings --

MRS JUSTICE BACON: Yes, we have heard your submissions on that.

MR CARPENTER: Yes. But once you realise there is nothing in that, then this just comes down to what is the number. This was a classic situation where you can't predict the number. In Gormsen it was different because you knew what it would be. You knew it would be 14 times after X date. You knew it would be six times on a much closer date. So it is much easier there to say, we can see and say right now that this is excess.

But can you say that 45 is unreasonable, but 35 is reasonable, and in my respectful submission, no, you can't.

MRS JUSTICE BACON: All right. Thank you very much. Thank you, Mr Carpenter. What I am going to do now is to go into open session, so the link can be turned on. I am going to try very hard not to say anything I shouldn't, but I think it is important that we know where we are going after this hearing.

So from now on, this Tribunal is now in open session.

(3.45 pm)

(Proceedings continue in open session)

(3.51 pm)

(The hearing joined until Tuesday, 24 September 2024)

Proceedings continue in open session

MRS JUSTICE BACON: What we are going to do is we are going to adjourn for a further hearing on this point. We will invite the parties to agree, as far as possible, directions to that hearing. We will have a little bit of a discussion in a moment about dates for evidence.

The first point to be addressed at that further hearing will be the confidentiality issue, which we discussed earlier, namely the extent to which the arrangements, or at least the headline terms of the arrangements, are going to be disclosed generally.

Secondly, we will want further evidence from the PCR as to the basis on which the PCR was satisfied as to the appropriateness of the arrangements for funding, and the level of return in the funding arrangements.

Thirdly, we will want further evidence as to the suitability of the PCR to scrutinise independently the arrangements for the benefit of the class, given that the PCR has a sole director who is not advised by a consultative committee, but who is being advised by Hausfeld who themselves have an interest in the arrangements.

We will also want to see an amended claim form to address the point that we dealt with at the start of the afternoon regarding the date for damages to run to because we need to be addressing that on the basis of something concrete. I think we have been given an indication of what that is going to say, but we would invite the PCR to look again at that. In particular to clarify exactly what claim period is being sought and what is being said about the evidence of the expert on that point.

So that's what we are going to need to do. As I foreshadowed before the lunch adjournment, the best date that we currently have -- and obviously we will need to just check this internally, but this may be where we end up at -- is 24 September. Are there any intractable problems as a matter of principle with that date?

MR PICKFORD: The only point I make in relation to that date is the directions that go back from it are going to be quite important. I have another big hearing the week before, so I would need to accommodate that at the very least, the ability for me to actually sign off on skeletons, et cetera.

MRS JUSTICE BACON: All right. Assuming that we go for the 24th, I think, given the summer vacation, a lot of the work is going to need to be frontloaded before the vacation. That may also alleviate your concerns, Mr Pickford.

What I had in mind was for further evidence on both the PCR and funding arrangements and the question of confidentiality to be provided by 26 July.

Any reply evidence, if there is any -- and I am not specifically inviting any, but you may choose to deal with this by way of submissions -- but if there is any reply evidence for that to come two weeks later.

If there is any reply evidence, which there may not be, then responsive evidence to be provided by 16th August. That's one week later.

And that, together with any reply evidence, by the 9th. Well, by the 9th, irrespective of whether any reply evidence is put in, there should be an indication of whether the defendants are likely to wish to cross-examine Ms Riefa. I was thinking August. Does anyone want to defer that decision until later?

MR PICKFORD: The date you were hoping for that indication was?

MRS JUSTICE BACON: Well, if you were putting in reply evidence, at the point of that reply evidence, but you may want to -- if you are putting in reply evidence, it occurs to me that you might want to see what is said in response before taking a view.

MR PICKFORD: Yes, please.

MRS JUSTICE BACON: So I think by at the very least the end of August, an indication given which then would give some weeks for everyone to prepare if there was going to be cross-examination.

Mr Pickford, does that give you enough time?

MR PICKFORD: Yes. I mean, I think --

MRS JUSTICE BACON: You will know --

MR PICKFORD: I think I am going to have to live with that, that timetable, because if we are going to get it done by the 24th, we need to make it work.

MRS JUSTICE BACON: Unfortunately, as I said, I don't think we are going to be able to leave it beyond that because of availability issues of the panel.

MR PICKFORD: Understood.

MRS JUSTICE BACON: By the end of August, then, the defendants to indicate whether they want to cross-examine Ms Riefa.

Then skeleton arguments, just please agree sensible dates in the usual way before the hearing, assuming that it is the 24th.

If it is not going to be the 24th, we will be letting you know very shortly probably on Monday. I am not expecting an order to be sent to me by close of business today given the time. So you will be notified early next week if there is going to be any problem with the 24th in principle. Otherwise assume it will be 24 September.

Are there any other consequential directions that we are going to need to give now or discuss with the parties? Can everyone take instructions, please.

No, all right. Thank you very much. Thank you, everyone, for truncating your submissions accordingly today, and we look forward to seeing you on, hopefully, 24 September.

(3.51 pm)

(The hearing joined until Tuesday, 24 September 2024)