Neutral citation [2025] CAT 77

Case Nos: 1624/7/7/23
1625/7/7/23
1626/7/7/23
1627/7/7/23

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

14 November 2025

Before:

THE HONOURABLE LORD RICHARDSON
(Chair)
JOHN ALTY
WILLIAM BISHOP

Sitting as a Tribunal in England and Wales

BETWEEN:

JUSTIN GUTMANN

Proposed Class Representative/ Respondent

- v -

(1) VODAFONE LIMITED
(2) VODAFONE GROUP PLC

Proposed Defendants/ Applicants

(the "Vodafone Proceedings")

AND BETWEEN:

JUSTIN GUTMANN

Proposed Class Representative/ Respondent

- v -

(1) EE LIMITED
(2) BT GROUP PLC

Proposed Defendants/ Applicants

(the "EE Proceedings")

AND BETWEEN:

JUSTIN GUTMANN

Proposed Class Representative/ Respondent

- v -

(1) HUTCHISON 3G UK LIMITED

Proposed Defendant/Applicant

(the "Three Proceedings")

AND BETWEEN:

JUSTIN GUTMANN

Proposed Class Representative/ Respondent

- v -

(1) TELEFONICA UK LIMITED

Proposed Defendant/Applicant

(the "O2 Proceedings")

Heard at Salisbury Square House on 31 March 2025 to 2 April 2025

JUDGMENT (CERTIFICATION AND LIMITATION)

APPEARANCES

Rhodri Thompson KC, Nicholas Gibson and James White (instructed by Charles Lyndon Limited) appeared on behalf of the Class Representative

Rob Williams KC and Jenn Lawrence (instructed by Slaughter and May) appeared on behalf of Vodafone

Marie Demetriou KC and Hugo Leith (instructed by Freshfields LLP) appeared on behalf of BT and EE

Brian Kennelly KC and Hollie Higgins (instructed by Linklaters LLP) appeared on behalf of Hutchison 3G

Mark Hoskins KC, Matthew Kennedy and Jacob Rabinowitz (instructed by Ashurst LLP) appeared on behalf of Telefonica UK

CONTENTS

A. INTRODUCTION 5

(1) The abuses alleged 5

(2) Background to the Hearing 7

B. THE FIRST PERIOD APPLICATION 8

(1) What are the relevant limitation rules? 9

(2) Position of the Proposed Defendants 12

(3) Position of the PCR 14

(4) The Tribunal's Decision 20

C. SECOND PERIOD APPLICATION 28

(1) Introduction 28

(2) The SPA Applicants' Submissions 30

(3) The PCR's Submissions 40

(4) The Tribunal's Decision 47

D. CERTIFICATION 59

(1) Introduction 59

(2) Eligibility Condition: 60

(a) The Proposed Defendants' principal argument 61

(b) The PCR's Submissions 65

(c) The Tribunal's Decision 68

(d) The Second Period Application Issue 75

(e) The remaining Eligibility Condition factors 76

(3) Authorisation Condition Issues 77

(a) The Proposed Defendants' Submissions 78

(b) The PCR's Submissions 79

(c) The Tribunal's Decision 82

E. DEVELOPMENTS AFTER THE HEARING 84

(1) Background 84

(2) The Proposed Defendants' Submissions 86

(3) The PCR's Reply 88

(4) The Tribunal's Decision 90

F. CONCLUSION AND DISPOSAL 94

A. INTRODUCTION

1. This judgment addresses the Proposed Class Representative's ("PCR") four applications for collective proceedings orders ("CPOs") on behalf, it is said, of millions of consumers, for alleged abuses by Vodafone, EE/BT, Hutchison 3G ("Three") and Telefonica UK ("O2") (together, the "Proposed Defendants"), respectively, of a dominant position in the UK market for the supply of mobile telephony services to the customers of each mobile network operator ("MNO") (together, the "CPO Applications"). We summarise the alleged abuses below but note at this stage that all four claims are, in substance, identical save for the identity of the relevant Proposed Defendant.

2. The Tribunal also has before it two limitation applications:

   (1) The first is an application by all four Proposed Defendants for strike out and/or reverse summary judgment of all claims for losses that arose before 1 October 2015 (the "First Period Application").

   (2) The second is an application by Vodafone, EE/BT and Three for strike out and/or reverse summary judgment of all claims for losses that arose between 1 October 2015 and 8 March 2017, alternatively on or prior to 8 March 2017 (the "Second Period Application").

(1) The abuses alleged

3. On 28 November 2023, the PCR filed four Collective Proceedings Claim Forms ("CPCFs") against each of the Proposed Defendants. The CPCFs seek to combine standalone claims pursuant to section 47B of the Competition Act 1998 (the "CA98") on behalf of natural persons, including sole traders, who, as customers wishing to purchase mobile telephone services, entered into at least one contract with the Proposed Defendants under an included brand (i.e., Vodafone, Three, O2 or, so far as the claim against EE is concerned, EE, Orange or T-Mobile), pursuant to which contract(s) the customer:

(1) agreed to make regular payments over a minimum contractual term (the "Minimum Term") to pay for: (i) a mobile telephone handset or device ("Handset"); and, as part of the same contract, (ii) other mobile telephony services (in particular services that enable the customer to make telephone calls, send text messages and/or use mobile data) ("Airtime Services"); and

(2) continued, even after the Minimum Term had expired, to be required to pay, and to pay, an amount in excess of the sum payable in respect of the supply of Airtime Services, i.e. a charge that was not reduced to reflect the fact that the customer had, by the end of the Minimum Term, already paid for the Handset.

4. Such contracts are defined in each case by the PCR as "Combined Handset and Airtime Contracts" or "CHA Contracts", and are alleged to have the following distinguishing features:

(1) They included provision for a Minimum Term and for periodic (typically monthly) payments to be made to the relevant Proposed Defendant.

(2) Each single periodic payment related to both (i) the Handset and (ii) the Airtime Services provided over the period to which the payment related, with the periodic charges set at a level to ensure that, at the end of the Minimum Term, the Handset would have been paid for.

(3) During the Minimum Term, customers had to continue to pay the periodic payments, unless they chose to end the CHA Contract by paying an early termination charge. Customers who cancelled their CHA Contract within the Minimum Term were able to retain the Handset, subject to the payment of the early termination charge.

(4) At the end of the Minimum Term, unless the customer terminated the CHA Contract, the customer was contractually required to continue to pay the Proposed Defendants' charges at a rate that did not reflect the

fact that the Minimum Term had expired, and the customer had already paid for the Handset.

5. In short, the basic allegation made by the PCR is that customers who did not immediately terminate their CHA Contracts at the end of their Minimum Term were required to overpay for the Airtime Services that they continued to receive. This is because, so argues the PCR, the periodic charges paid by the customers were not reduced at the end of the Minimum Term to the relevant SIM Only Price, but were instead maintained at the same level as had been set during the Minimum Term. This alleged overpayment is defined by the PCR in each case as a "Loyalty Penalty".

6. Accordingly, the PCR alleges that by charging Loyalty Penalties, all four Proposed Defendants abused a dominant position in breach of the Chapter II prohibition of the CA98. It is said that the cumulative effect of the practice engaged in by each Proposed Defendant has been to confer a very substantial and unjustified benefit on them over a period of years, to the detriment of their "loyal" customers.

7. Given that the relevant extracts of all four CPCFs are identical save for the name of the relevant Proposed Defendant and the Included Brands, we have chosen where relevant to refer to passages from the Vodafone CPCF, but note that the wording would be identical in any of the three other CPCFs.

(2) Background to the Hearing

8. At a case management conference held on 23 May 2024, the Tribunal considered how best to deal with the First Period Application. By Order dated 24 June 2024 (the "Directions Order"), the Tribunal directed the First Period Application be case managed alongside the CPO Applications and be determined at the CPO Hearing. Paragraph 7 of the Directions Order stated:

> "The Proposed Defendants shall file and serve a Joint Response to the CPO Applications, with liberty for each Proposed Defendant to file an annex to the Joint Response incorporating any individual responses on points that are not pursued by all Proposed Defendants. The Joint Response (and any individual annexes thereto), any factual evidence, and any further applications that the

Proposed Defendants may make for determination at the CPO Hearing shall be filed by 4pm on 21 October 2024."

9. Pursuant to paragraph 7, three of the four Proposed Defendants, Vodafone, EE/BT and Three, filed the Second Period Application. In response, the PCR invited the Tribunal to revisit its decision for the First Period Application to be considered at the CPO Hearing and also objected to the Second Period Application being considered at the CPO Hearing.

10. Having considered the issues raised, by letter dated 27 November 2024, the Tribunal refused to revise the Directions Order in relation to the First Period Application and considered that the Second Period Application was filed in accordance with paragraph 7 of the Directions Order. The Tribunal's provisional view, pending receipt of the PCR's Reply, was that there would be sufficient time to consider both limitation applications at the CPO Hearing. The Tribunal confirmed that position by letter dated 4 February 2025. In the event, there was sufficient time at the CPO Hearing for us to deal with both limitation applications.

11. Given that both limitation applications may affect the relevant period of the claim to be certified, it is appropriate to deal with those first, before moving on to deal with certification.

B. THE FIRST PERIOD APPLICATION

12. On 2 May 2024, O2 applied to strike out the proposed claims in the O2 Proceedings pursuant to rule 41(1) of the Competition Appeal Tribunal Rules 2015 (the "2015 Rules") insofar as they accrued prior to 1 October 2015 on the basis that they were time barred. Alternatively, O2 applied for reverse summary judgment pursuant to Tribunal rule 43 on the same basis.

13. That application was ultimately adopted by Vodafone, EE/BT and Three in separate letters to the Tribunal dated 2 May 2024, meaning the applications are now made in relation to each of the four claims.

14. The basic premise of the Proposed Defendants' application is that, insofar as the claims relate to the period prior to 1 October 2015, the relevant limitation period is laid down by rules 119(2)-(4) of the 2015 Rules, which, in turn, apply rules 31(1)-(3) of the 2003 Tribunal Rules (the "2003 Rules"). If that is right, and those are the relevant limitation rules, then all of the claims made by the PCR in respect of losses that arose before 1 October 2015 are time barred as the present proceedings were not made within two years of that date. While, as set out below, the PCR strongly disputed the basis upon which the First Period Application was made, there was no dispute that this application raised a pure issue of law capable of resolution by way of strike out or alternatively reverse summary judgment.

(1) What are the relevant limitation rules?

15. Prior to June 2003, the Tribunal had no jurisdiction to hear civil claims for damages, including competition law claims, which could only be brought in the Senior Courts of the United Kingdom.

16. That changed on 20 June 2003, with the introduction of section 47A of the CA98 through the Enterprise Act 2002 ("EA02"). That section granted the Tribunal jurisdiction to hear follow-on claims based upon a prior decision of a UK (or EU) regulator. The limitation rules for such claims when they were brought in the Tribunal were laid down in rule 31 of the 2003 Rules, and were as follows:

> "**Time limit for making a claim for damages**
>
> 31.—(1) A claim for damages must be made within a period of two years beginning with the relevant date.
>
> (2) The relevant date for the purposes of paragraph (1) is the later of the following—
>
> (a) the end of the period specified in section 47A(7) or (8) of the 1998 Act in relation to the decision on the basis of which the claim is made;
>
> (b) the date on which the cause of action accrued.
>
> (3) The Tribunal may give its permission for a claim to be made before the end of the period referred to in paragraph (2)(a) after taking into account any observations of a proposed defendant.

> (4) No claim for damages may be made if, were the claim to be made in proceedings brought before a court, the claimant would be prevented from bringing the proceedings by reason of a limitation period having expired before the commencement of section 47A."

17. Section 47A(5) expressly prohibited stand-alone claims from being pursued in the Tribunal, meaning its jurisdiction was, at that time, limited to follow-on claims.

18. With effect from 1 October 2015, the CA98 was amended by Schedule 8 of the Consumer Rights Act 2015 ("CRA15"). A new section 47A was substituted into the CA98, which extended the jurisdiction of the Tribunal to so-called standalone damage claims. Paragraph 8(1) of Schedule 8 of the CRA15 introduced section 47E into the CA98, which established a new limitation regime for claims brought in the Tribunal on or after 1 October 2015. In particular, section 47E(1) and (2) provided:

> "**47E Limitation or prescriptive periods for proceedings under section 47A and collective proceedings**
>
> (1) Subsection (2) applies in respect of a claim to which section 47A applies, for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made in—
>
> (a) proceedings under section 47A, or
>
> (b) collective proceedings at the commencement of those proceedings.
>
> (2) Where this subsection applies—
>
> (a) in the case of proceedings in England and Wales, the Limitation Act 1980 applies as if the claim were an action in a court of law;
>
> (b) in the case of proceedings in Scotland, the Prescription and Limitation (Scotland) Act 1973 applies as if the claim related to an obligation to which section 6 of that Act applies;
>
> (c) in the case of proceedings in Northern Ireland, the Limitation (Northern Ireland) Order 1989 applies as if the claim were an action in a court establish by law.
>
> […]"

19. Paragraph 8(2) of Schedule 8 of CRA15, however, contained the following caveat:

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

20. In parallel, new rules were adopted for the Tribunal with effect from 1 October 2015. Part 8 of those rules, headed "Revocation and Savings", contained two provisions, which provided as follows:

> **"Revocation**
>
> 118. The following Rules are revoked –
>
> (a) the Competition Appeal Tribunal Rules 2003
>
> (b) the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004.
>
> **Savings**
>
> 119. – (1) Proceedings commenced before the Tribunal before 1 October 2015 continue to be governed by the Competition Appeal Tribunal Rules 2003 (the "2003 Rules") as if they had not been revoked.
>
> (2) Rule 31(1) to (3) of the 2003 Rules (time limit for making a claim) continues to apply in respect of a claim which falls within paragraph (3) for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made on or after 1st October 2015 in –
>
> (a) proceedings under section 47A of the 1998 Act, or
>
> (b) collective proceedings.
>
> (3) A claim falls within this paragraph if –
>
> (a) it is a claim to which section 47A of the 1998 Act applies; and
>
> (b) the claim arose before 1st October 2015.
>
> (4) Section 47A(7) and (8) of the 1998 Act as they had effect before they were substituted by paragraph 4 of Schedule 8 to the Consumer Rights Act 2015 continue to apply to the extent necessary for the purposes of paragraph (2)."

21. Therefore, the short legal question raised by the First Period Application is whether, as the Proposed Defendants contend, the two year limitation period provided for by rule 31 of the 2003 Rules does indeed apply to those claims made by the PCR which arose before 1 October 2015.

(2) Position of the Proposed Defendants

22. Mr Hoskins KC set out the position of the Proposed Defendants as to the applicable limitation rules.

23. In summary, his position was that rules 119(2)-(4) of the 2015 Rules apply in respect of claims that arose before 1 October 2015, but which had not been commenced before that date. Those rules expressly direct one to rule 31(1)-(3) of the 2003 Rules as being the relevant limitation provisions for such claims. Rule 31(1)-(3) of the 2003 Rules prescribes a two year limitation period for claims arising before 1 October 2015 but commenced in the Tribunal after that date, meaning that any claims for losses that arose before that date were time-barred by the time the CPCFs were filed on 28 November 2023.

24. In support of that argument, the Proposed Defendants made the following four points:

(1) The language of rules 119(2) and (3) is in entirely general terms. It does not distinguish between standalone and follow-on claims and, for that reason, must be taken to apply to both.

(2) That logic is supported by the way in which the different parts of rule 119 differentiated between section 47A CA98 both before and after its amendment by CRA15. In particular, rule 119(4) referred to section 47A(7) and (8) of the CA98 "as they had effect before they were substituted by paragraph 4 of Schedule 8 to the Consumer Rights Act 2015" (i.e. before the Tribunal had jurisdiction to hear standalone claims). Rule 119(2) and (3), by contrast, contain no such caveat. It follows that rule 119(2) and (3) must have been intended to refer to section 47A CA98 as amended by CRA15 and, therefore, to apply to both follow-on and standalone claims.

(3) The conditions in rule 119(2) and (3) of the 2015 Rules are fulfilled, namely that: the PCR's claims were made on or after 1 October 2015 (rule 119(2)); they are claims to which section 47A of the CA98 applies

on the basis that it does not distinguish between follow-on and standalone claims (rule 119(3)); and, as the PCR's proposed class definition had an open ended start date, the claims made by the PCR clearly included claims which had arisen before 1 October 2015. As those conditions are fulfilled, rule 119(2) directs one to the limitation provisions in rules 31(1) to (3) of the 2003 Rules.

(4) The conditions contained in rule 31 had clearly not been fulfilled. The starting point for the two year limitation period, the "relevant date", is determined by being the later of the two limbs of rule 31(2). It was apparent that rule 31(2)(a) of the 2003 Rules, on its language, only applied to follow-on claims given that it refers to a "decision on the basis of which the claim is made" and so did not apply to the PCR's claims which were not based on a decision. Rule 31(2)(b), however, is plainly applicable to standalone claims because a cause of action will accrue on the date when harm is suffered. On that basis, any claim arising before 1 October 2015, but which was not brought by 1 October 2017, is time barred.

25. Mr Hoskins submitted that there were significant problems with the argument being advanced by the PCR to the effect that the limitation and prescription of standalone claims arising before October 2015 brought in the Tribunal were governed by the general law – in other words, in England and Wales, the Limitation Act 1980 ("LA80"); in Scotland, the Prescription and Limitation (Scotland) Act 1973; and, in Northern Ireland, the Limitation (Northern Ireland) Order 1989.

26. First, it was notable that the effect of the PCR's argument would essentially be that the regime established by Section 47E CA98 (as introduced by Schedule 8 of the CRA15) would apply to standalone claims arising before 1 October 2015. Yet it was striking that paragraph 8(2) of Schedule 8 specifically provided that Section 47E was <u>not</u> to apply to claims arising before that date.

27. Second, the suggestion by the PCR that the Proposed Defendants' argument in some way ran contrary to the legislative intention of the reforms introduced by

CRA15 was simply not correct. The PCR was quite correct that the legislative intention of CRA15 was to facilitate the vindication of rights adversely affected by breaches of competition law. However, the Proposed Defendants' construction of rule 119 in no way contradicted that intention. The pre-existing position in respect of standalone claims was not affected. Those claims could be brought in the Senior Courts of the United Kingdom and remained subject to the same rules of limitation and prescription. The new right, created by CRA15, to bring standalone claims in the Tribunal did not affect those pre-existing rights.

28. Third, Mr Hoskins submitted that the PCR's argument to the effect that if rule 119 meant what the Proposed Defendants contended, it was somehow *ultra vires,* was misconceived. The fundamental difficulty with this point was that section 15(1) of CRA15 made that position untenable. The power it contained was plainly wide enough to encompass the 2015 Rules. Section 15(5) made clear that the provisions of Part 2 of Schedule 4 of CRA15, relied upon by the PCR, were expressly without prejudice to the generality of section 15(1).

29. Finally, in respect of the PCR's argument based on the fact that rule 119 was entitled "Savings" we had the benefit of a detailed submission which took us through the cases referred to in the footnotes to paragraph 17.6 of *Bennion, Bailey and Norbury on Statutory Interpretation.* However, in essence, the Proposed Defendants' position was that, in respect of rule 119, the heading did not undermine the clear import of the words used. Furthermore, rule 119 was not the type of widely expressed provision which was the subject of discussion by the learned authors of *Bennion*.

(3) Position of the PCR

30. The PCR does not accept that rule 31(1)-(3) of the 2003 Rules apply to standalone claims arising prior to 1 October 2015. Rather, his view, as advanced by Mr Thompson KC, was that such claims would be subject to the time-limits set out in general prescription and limitation legislation (i.e. the LA80, the Prescription and Limitation (Scotland) Act 1973 and the Limitation (Northern

Ireland) Order 1989) and, for that reason, that the claims were brought in good time. The PCR's case was founded on five main arguments:

(1) First, that domestic limitation legislation was the "default" regime in the Tribunal at the relevant time.

(2) The wording of rule 31 of the 2003 Rules is not capable of applying to standalone claims and, as such, applies only to follow-on claims arising prior to 1 October 2015.

(3) The savings provision in rule 119 could not, and did not, expand the rights and obligations falling within the scope of rule 31 of the 2003 Rules. As such, rule 31 remains applicable to follow-on claims only.

(4) If the effect of rule 119 of the 2015 Rules is in fact to expand the scope of rule 31 to include standalone claims, then it is *ultra vires.* The Secretary of State did not, at the time of drafting the 2015 Rules, have the power to create new limitation rules for standalone claims before the Tribunal.

(5) Finally, it would be contrary to the statutory purpose of the collective proceedings regime to read rule 119 in such a way to expand the scope of rule 31 to standalone claims.

31. Starting with his characterisation of the "default" regime, the PCR argued that domestic limitation legislation applied generally as the default limitation or prescription regime in the Tribunal until such time as it was displaced by a different or more specific rule. That default position was said to have been displaced, in the case of follow-on claims only (as they were the only claims permitted in the Tribunal at that stage), by rule 31 of the 2003 Rules with effect from 20 June 2003.

32. Domestic limitation legislation was then reinstated with the introduction of section 47E(2) of the CA98 from 1 October 2015 as a result of CRA15, subject only to the savings provision in rule 119 of the 2015 Rules in respect of pre-

existing claims. The PCR does not dispute that rule 119 preserved rule 31 in relation to follow-on claims, but submits that section 47E(2) had the effect of simply retaining domestic limitation legislation for standalone claims.

33. Following the amendment to section 47A CA98, introduced by CRA15, individuals were granted rights to bring standalone damages claims in the Tribunal for breaches of competition law. But for the Proposed Defendants' construction of rule 119, those claims would have been subject to prescription and limitation in terms of the domestic regime and not rule 31 of the 2003 Rules.

34. In support of that argument, we were taken to part of the judgment of Sir Geoffrey Vos in the Court of Appeal's decision in *DSG v Mastercard* [2020] EWCA Civ 671; [2021] 1 All ER (Comm) 63 ("*DSG*"). This judgment was said to proceed on the assumption that, prior to 2003, the default position in the Tribunal was that jurisdiction was dictated by the LA80, until such time as it was displaced by a specific rule:

> "54. Starting then at the beginning, the words of rule 31(1) and (2) provide for present purposes that "a claim for damages must be made within" two years of the final determination of the competition authority. That is, as the claimants submit, a new limitation period in respect of a new way of bringing follow-on claims through the Tribunal. Prima facie, I agree also that section 39 of the Limitation Act 1980 operates so as to exclude the application of that Act, where rules 31(1) and (2) apply…
>
> 55. …Up to 2002, both follow-on claims and stand-alone claims had to be brought in court. The only limitation periods applicable were found in sections 2 and 9 of the Limitation Act 1980 relating to torts and breaches of statutory duty…"

In Mr Thompson's submission, *DSG* was authority for the proposition that when dealing with cases which pre-dated 2003, the Tribunal was required to operate the domestic limitation regime. Mr Thompson also cited *Merricks v Mastercard Incorporated & Ors* [2024] CAT 41; [2024] 6 WLUK 609 ("*Merricks Limitation*") as an example of this.

35. Turning to the points made on behalf of the PCR in relation to rule 31, the overarching point was that the 2003 Rules applied only to follow-on claims because the primary legislation underpinning them only referred to, and

envisaged, those types of claims. By way of example, section 47A(5)(a) (prior to the passing of CRA15) expressly prohibited standalone claims:

> "**47A Monetary Claims before Tribunal**
>
> [….]
>
> (5) But no claim may be made in such proceedings -
>
> (a) until a decision mentioned in subsection (6) has established that the relevant prohibition in question has been infringed; and
>
> (b) otherwise than with the permission of the Tribunal of the Tribunal, during any period specific in subsection (7) or (8) which relates to that decision."

36. The decisions which may be relied upon for the purposes of section 47A are set out in detail at section 47A(6), but the fundamental point made by the PCR was that section 47A (as it then was) only envisaged follow-on claims being brought. For that reason, procedural rules drafted on the basis of that primary legislation were only intended to apply to follow-on claims. This could be seen from the 2003 Rules themselves.

37. In particular, Mr Thompson submitted that this was reflected in the limited wording of rule 31(2) itself, which envisages the limitation clock starting to run on the later of two dates. The first, provided by rule 31(2)(a), is effectively the date of the decision on the basis of which the claim is made. The second, provided by rule 31(2)(b), is the date on which the cause of action accrued. In short, rule 31 of the 2003 Rules appears to proceed on the assumption that limitation could start to run on either of those two dates. Accordingly, the PCR submitted that rule 31(2) was inconsistent with the nature of standalone claims, which are not based on any decision. On that basis, rule 31 could not and did not apply, as a matter of jurisdiction, to standalone claims.

38. As to rule 119 of the 2015 Rules, it was emphasised that a savings provision could not confer new rights that did not exist already. In other words, it could not expand the scope of rule 31 to include claims which were not already within its ambit. That was supported by the language of rule 119, which references the "continuing" effect of rule 31(1)-(3).

39. Mr Thompson argued that this was significant because the Proposed Defendants' case necessarily implied that the Tribunal would have to rewrite rule 119 of the 2015 Rules and rule 31 of the 2003 Rules to accommodate the Proposed Defendants' argument that the provisions of rule 31 apply to both follow-on and standalone claims prior to 1 October 2015.

40. Turning to the PCR's submissions on *vires*, the basic submission was that, if the intention of rule 119 of the 2015 Rules was in fact to expand the scope of rule 31 of the 2003 Rules to include standalone claims, then the rule is *ultra vires.* That was because the Secretary of State did not, at the time the 2015 Rules were made, have the power to create new limitation rules for standalone claims before the Tribunal, or to set aside the application of the domestic limitation legislation to such claims.

41. In support of that position, the PCR compared the wording of section 15 of the EA02 as originally drafted, with the revised wording in August 2015. In particular, the initial wording afforded the Secretary of State the power to "after consulting the President and such other persons as he considers appropriate, make rules […] with respect to proceedings before the Tribunal". That power was further defined in Schedule 4, Part 2, Para 11(1) of the EA02 in the following way:

> "11(1) Tribunal Rules may make provision as to the period within which and the manner in which proceedings are to be brought
>
> (2) That provision may – in particular –
>
> > (a) provide for time limits for making claims to which section 47A of the 1998 Act applies in proceedings under section 47A or 47B."

42. Schedule 4, Part 2, Paragraph 11 was ultimately amended in August 2015. The revised wording was as follows:

> "11(1) Tribunal rules may make provision as to the period within which and the manner in which proceedings are to be brought.
>
> (2) That provision may, in particular –
>
> > (a) Make further provision as to procedural aspects of the operation of the limitation or prescriptive periods in relation to claims which may be made in proceedings under section 47A of the 1998 Act, as set out in section 47E(3) to (6) of that Act."

43. The PCR submitted that the revised paragraph 11(2)(a) seeks to restrict the rule making powers of the Secretary of State, such that he was no longer able to create time limits for making claims, particularly in respect of standalone claims. As such, if the effect of rule 119 is to extend the scope of rule 31 to standalone claims, then it is *ultra vires* on the basis that it was beyond the scope of the powers conferred upon the Secretary of State.

44. The PCR's final point was that it would be contrary to the statutory purpose of the CRA15 to construe rule 119 in such a way as to expand the scope of rule 31 to standalone claims:

(1) The Supreme Court in *Merricks v. MasterCard* [2020] UKSC 51; [2021] 3 All E.R. 285 ("*Merricks SC*") explained that the statutory purpose of the collective proceedings regime was to allow for collective claims to be brought on behalf of consumers and small businesses, where individual claims were unlikely to be viable but where the collective loss might be very substantial. Lord Briggs emphasised that the legislation intended "to facilitate rather than to impede the vindication of those rights" (at [54]) and, therefore, "it should not lightly be assumed that the collective process imposes restrictions upon claimants as a class which the law and rules of procedure for individual claims would not impose" (at [45]).

(2) Such a construction would, in any event, require rule 31 to be read contrary to its natural meaning, which currently only envisages follow-on claims.

(3) Such a construction of rule 119 and rule 31 is, in any event, inappropriate, and a breach of the established legal principle that a savings provision cannot be relied on to create new rights or amend pre-existing rights.

45. For those reasons, the PCR submits that the relevant limitation provisions for standalone claims arising prior to 1 October 2015 are to be found not in rule 31 of the 2003 Rules, but in domestic limitation legislation.

(4) The Tribunal's Decision

Background

46. The starting point for determining the First Period Application must be the statutory provisions of the CA98 (as amended) and the present 2015 Rules.

47. At present, questions of limitation and prescription are governed by the provisions of Part 5 of Schedule 8A to CA98. However, paragraph 42(1)(a) of Schedule 8A makes clear that these rules only apply to claims which relate to loss or damage suffered on or after 8 March 2017 as a result of an infringement of competition law that takes place on or after that date.

48. Accordingly, one is required to consider the terms of the provisions of the regulations which introduced Part 5 of Schedule 8A, namely, the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (2017/385) and, in particular, paragraph 5 of Schedule 2 thereof. Paragraph 5 removes the pre-existing provision which dealt with limitation and prescription in the Tribunal, Section 47E CA98, but provides that Section 47E continues to apply to claims insofar as Part 5 of Schedule 8A does not apply to them.

49. The question which then arises is: does Section 47E apply to claims arising in the "First Period" namely prior to 1 October 2015? It is clear from their submissions to us, that the parties are agreed that it does not. Given the terms of the provision introducing section 47E, paragraph 8(2) of Schedule 8 of CRA15, that is clearly correct (see paragraph 19 above).

50. Prior to the introduction of section 47E, the pre-existing position in respect of limitation of claims specifically before the Tribunal was governed by rule 31 of the 2003 Rules. The 2003 Rules were revoked on the introduction of the 2015 Rules (rule 118) and the savings from that revocation, including expressly in relation to rule 31, are provided for by rule 119 of the 2015 Rules.

The proper construction of rule 119(2)

51. This takes one to the nub of the dispute between the parties: what is the proper construction of rule 119(2) of the 2015 Rules and, in particular, does rule 31(1) to (3) of the 2003 Rules apply to the First Period claims – in other words standalone claims arising before 1 October 2015? We consider that on a straightforward and natural reading of rule 119(2) it is clear that rule 31 of the 2003 Rules does so apply. We have reached this conclusion for a number of inter-related reasons.

52. First, the starting point for determining the application of rule 119(2) is that, in order for it to apply to a claim, that claim is required to fall within paragraph (3) of the rule. In respect of the two limbs of paragraph (3), there is no dispute in respect of the second of the two limbs: namely, that the claims to which the First Period Application arose before 1 October 2015 and, therefore, that sub-paragraph (3)(b) is satisfied.

53. In respect of the first limb, sub-paragraph (3)(a) requires that section 47A CA98 applies to the claim. We consider that this is a reference to section 47A CA98 following the substitution effected by paragraph 4 of Schedule 8 of CRA15 (see paragraph 18 above) which came into force on 1 October 2015 (the same date as the 2015 Rules). In other words, sub-paragraph (3)(a) includes standalone damages claims which fall within the scope of section 47A following the amendments made by CRA15.

54. This construction is consistent with the provisions of the Interpretation Act 1978 (see sections 20(3) and 23(1)). It is also supported by two other factors. First, as was pointed out by Mr Hoskins (at paragraph 24(2) above), it is notable that the reference in sub-paragraph (3)(a) to section 47A CA98 is unqualified. This can be contrasted with the terms of paragraph (4) of rule 119 which refers to "Section 47A(7) and (8) of the 1998 Act <u>as they had effect before they were substituted by paragraph 4 of Schedule 8 to the Consumer Rights Act 2015</u>" (emphasis added). In light of the wording of paragraph (4), it would seem very unlikely that, had Parliament intended sub-paragraph (3)(a) also to refer to section 47A prior to the coming into force of CRA15, it would not have adopted similar wording in rule 119(3)(a).

55. In this regard, we also attach significance to the fact that sub-paragraph 4(2) of Schedule 8 to CRA15 provides:

> "Section 47A of the Competition Act 1998 (as substituted by sub-paragraph (1)) applies to claims arising before the commencement of this paragraph as it applies to claims arising after that time."

Sub-paragraph 4(2) of Schedule 8 CRA15 is consistent with our construction of sub-paragraph (3)(a) of rule 119 in that section 47A as substituted is to apply equally to claims arising both before and after 1 October 2015.

56. On the basis of our construction of rule 119(3)(a), it is clear that the First Period claims do fall within the scope of rule 119(3). They are claims to which section 47A applies – they are claims for damages in respect of an alleged infringement of the Chapter II prohibition (see section 47A(2) and (3)).

57. Second, on the basis that the First Period claims fall within paragraph (3) of rule 119, we do not consider that the application of the remainder of paragraph (2) presents any difficulty. One point is worthy of further comment.

58. Some significance was attached in argument to the phrase "continues to apply" in paragraph (2). The suggestion seemed to be that this wording supported the PCR's argument that rule 119(2) was not intended to expand the scope of rule 31(1) to (3) of the 2003 Rules but merely to continue its pre-existing application. There are two problems with this argument. To begin with, the use of the phrase "continues to apply" requires to be seen against the background of rule 118(a) which revokes the 2003 Rules. In other words, the "continuity" relates to the fact that rule 31(1) to (3) remains in force for the purposes identified in rule 119(2) as opposed to being related to the pre-existing scope of rule 31.

59. The second problem is that the purpose for which rule 31(1) to (3) remains in force is set out in the remainder of rule 119(2): namely, "…for the purpose of determining the limitation or prescriptive period which would apply in respect of the claim….".

60. Otherwise, the application of rule 119(2) to the First Period claims is straightforward: there is no dispute that these claims are being made after 1 October 2015 in collective proceedings.

61. Third, we do not consider that any difficulty arises in applying rule 31(1) to (3) to the First Period claims. The only issue seems to arise in respect of the reference in rule 31(2) because of the reference to the "later of the following" combined with the fact that sub-paragraph (2)(a) refers to "the end of the period… in relation to the decision on the basis of which the claim is made". On this basis, the PCR argued that, as the First Period claims were standalone claims, there was no decision on which they were based and, accordingly, rule 31(2) was in some way unworkable.

62. We do not accept the argument advanced on behalf of the PCR. Insofar as there is no decision upon which the First Period claims are made, there is simply no date for those claims to be determined under rule 31(2)(a). It follows that the "later" date will be that determined by rule 31(2)(b). Such an approach seems to us to be very far from unworkable.

The PCR's arguments

63. At this stage, in light of our view as to the proper construction of rule 119 of the 2015 Rules and rule 31(1) to (3) of the 2003 Rules, it is necessary to consider whether any of the PCR's arguments require a different outcome. In short, we do not consider that they do.

64. First, the PCR argued in favour of its construction of rule 119 based on what it described as the "default" position in respect of the rules governing the limitation of claims in the Tribunal (see paragraphs 30(1) and 31 to 34 above). The default position was said to be the rules relating to limitation and prescription contained in statutes applicable in each of the different parts of the United Kingdom: namely, in England & Wales, the LA80; in Scotland, the Prescription and Limitation (Scotland) Act 1973; and, in Northern Ireland, the Limitation (Northern Ireland) Order 1989. It was contended that the default position, as the name selected for it by the PCR might suggest, would continue

to regulate limitation within the Tribunal unless and until it was displaced. This was then the starting point for the PCR's argument that standalone damages claims brought in the Tribunal ought to be regulated by the "default" position because such claims had never been the subject of the 2003 Rules.

65. We consider that this argument is misconceived. The fundamental flaw in the argument is that it fails to recognise that, so far as the Tribunal is concerned, its procedures in respect of the bringing of claims for damages before it have always been regulated by its own rules. Prior to the changes introduced by CRA15, the Tribunal's rules in respect of limitation for all claims that could be brought before it – at that time only so-called follow-on claims – were contained in rule 31 of the 2003 Rules. Following the coming into force of CRA15, the rules governing questions of limitation and prescription in respect of the wider set of claims that could then be brought before it were contained in section 47E CA98. As set out above (see paragraphs 48 and 49), in 2017, following amendment to CA98, those rules are now to be found in Part 5 of Schedule 8A CA98.

66. Accordingly, properly analysed, there has never been a point in time at which the PCR's "default" position governed the limitation and prescription of claims before the Tribunal in the absence of the Tribunal's own rules. The Tribunal's construction of rule 119(2) of the 2015 Rules set out above is consistent with this understanding of the approach of the legislator. In framing the 2015 Rules, the legislator has made provision within the Tribunal Rules for the rules of prescription and limitation to govern claims arising before 1 October 2015: namely, rule 31(1) to (3) of the 2003 Rules.

67. Properly analysed, the case law cited by the PCR in respect of this part of its argument (at paragraph 34 above) does not support the PCR's notion of a "default" position in respect of the Tribunal. In the passages cited from *DSG,* Sir Geoffrey Vos was dealing, in particular, with the proper construction of rule 31(4) of the 2003 Rules (see paragraph 16 above) and its application to claims which had arisen more than six years before the commencement of section 47A CA98. Accordingly, because the terms of the Tribunal Rules required it, the Court had to consider the provisions of the pre-existing law which, in that case,

was the LA80. This same context was the basis of the consideration by the Tribunal in *Merricks Limitation* cited to us of provisions of the LA80 and the Prescription and Limitation (Scotland) Act 1973.

68. Neither of these cases supports the PCR's "default" argument. Rather, the cases are illustrations of the fact that when dealing with cases before the Tribunal, the relevant rules governing limitation and prescription are identified within the Tribunal Rules themselves.

69. The PCR's second argument concerned the wording of rule 31 of the 2003 Rules. We have addressed those above in setting out the Tribunal's construction of that rule (see paragraphs 61 and 62 above). In short, we do not consider that there is anything impossible or unworkable about construing rule 31(2) as we have done.

70. The PCR's third argument focusses on the fact that rule 119 of the 2015 Rules is headed as a savings provision. In short, the PCR argued that, as such, rule 119 could not, in itself, expand the scope of rule 31 of 2003 Rules to apply to standalone claims thereby creating new rights of defence.

71. We find this argument unpersuasive as it overlooks the obvious fact that prior to the coming into force of both the 2015 Rules and CRA15, the Tribunal had no jurisdiction to consider standalone claims. Furthermore, collective proceedings of the sort with which we are dealing could not be brought in any court. Against this background, although it is correct to observe that rule 119 comes under the heading of "savings", we consider that the plain meaning of the wording of rule 119(2) indicates the purpose for which rule 31(1) to (3) of 2003 Rules are being preserved – in order to determine the limitation or prescriptive period to apply to those claims which fall within the scope of paragraph (3). We do not consider that this plain meaning is overridden by the heading.

72. The fourth argument advanced by the PCR is that if rule 119 falls to be construed as we have found, then the rule is *ultra vires*. This argument appeared to be founded on the amendments which had been made to Part 2 of Schedule 4

to EA02 (see paragraphs 41 to 44 above). Part 2 of Schedule 4 contains detailed provisions as to matters in respect of which the Tribunal Rules may make provision. The fundamental and, in our view, insuperable problem for this part of the PCR's argument is that it takes no account of the terms of section 15(1) and (5) of EA02 which provides as follows:

> "**15 Tribunal rules**
>
> (1) The Secretary of State may, after consulting the President and such other persons as he considers appropriate, make rules (in this Part referred to as "Tribunal rules") with respect to proceedings before the Tribunal, including proceedings relating to the approval of a collective settlement under section 49A or 49B of the 1998 Act.
>
> […]
>
> (5) Part 2 of Schedule 4 (which makes further provision about the rules) has effect, but without prejudice to the generality of subsection (1)."

73. The wording of subsection 15(5) makes it clear that the provisions of Part 2 of Schedule 4 do not restrict the generality of the power provided to the Secretary of State in subsection 15(1). This point renders the PCR's argument untenable. Moreover, when one compares the scope of Part 2 of Schedule 4 with the content of the 2015 Rules, the unreality of the PCR's argument becomes apparent. To take one obvious example, Part 2 of Schedule 4 contains no provision in respect of the framing of governing principles (*cf* rule 4 of the 2015 Rules). Perhaps more pertinently for the present case, Part 2 of Schedule 4 also contains no provision about the revocation of earlier versions of the rules. Yet, on the logic of the PCR's argument, it would follow that these provisions were in some way *ultra vires.*

74. The PCR's final argument is that to construe rule 119(2) in the way in which we have would, in some way, run contrary to the statutory purpose of introducing collective proceedings. As noted above (see paragraph 44), the PCR's argument is, essentially, that rule 119(2) required to be construed against the context in which the 2015 Rules had been brought into force: namely, the CRA15 which had, among other things, introduced collective proceedings. The PCR pointed to Lord Briggs' judgment in *Merricks SC* in which his Lordship indicated that "the evident purpose of the statutory scheme [for collective proceedings] was to facilitate rather than impede the vindication" of individual

claims (at [54]) and also that, "it should not lightly be assumed that the collective process imposes restrictions upon claimants as a class which the law and rules of procedure for individual claims would not impose" (at [45]).

75. So, reasoned the PCR, on this basis, it was contrary to this purpose to construe rule 119(2) so as to apply the two year limitation period provided by rule 31(1) to (3) of the 2003 Rules to standalone claims.

76. We are not persuaded by this argument. It is important to appreciate that the PCR does not contend that the fact that standalone claims which arise before 1 October 2015 are subject to rules of limitation in itself runs contrary to the purpose of the statutory scheme. Given the clear public interest served by rules of limitation such a position would be untenable (see, for example, *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553 at 563 F-G per Lord Brightman). The PCR's position is that, rather than being governed by rule 31(1) to (3) of the 2003 Rules, standalone claims should be subject, instead, to what was described as the "default" position contained in statute (see above at paragraph 64). The PCR also accepts that rule 31(1) to (3) of the 2003 Rules do apply to follow-on claims whether or not in collective proceedings.

77. Properly analysed, the PCR's position comes to be that it would, in some way, run contrary to the statutory scheme for collective proceedings introduced in CRA15 for standalone claims arising before 1 October 2015 to be treated in the same way as that scheme treats follow-on claims which arise before that date. When considered in this way, the flaws in this part of the PCR's argument are exposed. Far from impeding standalone claims arising before 1 October 2015 before the Tribunal, the Tribunal's construction of rule 119(2) gives effect to a clear policy choice by the legislator that such claims, together with equivalent follow-on claims, should be subject to the limitation rules contained in rule 31(1) to (3) of the 2003 Rules.

Conclusion

78. In light of the foregoing, we will uphold the First Period Application made on behalf of the Proposed Defendants and strike out the claims for damages arising

before 1 October 2015 on the grounds that there are no reasonable grounds for making such claims.

C. THE SECOND PERIOD APPLICATION

(1) Introduction

79. As stated above, Vodafone, EE/BT and Three (the "SPA Applicants") also applied for strike-out and/or reverse summary judgment, pursuant to rules 41 and 43 of the 2015 Rules, in relation to claims that arose between the period of 1 October 2015 to 8 March 2017, insofar as the claims are subject to the LA80 and the Limitation (Northern Ireland) Order 1989.

80. It was common ground between the parties that the relevant limitation period under both the LA80 and the Northern Irish Order was six years. Accordingly, it was also common ground that the key issues to be determined in relation to the Second Period Application are whether the PCR has a real prospect of showing: (i) that the facts necessary to plead a claim were concealed; and (ii) that those facts were not reasonably discoverable before 28 November 2017 in terms of section 32 LA80 or Article 71 of the equivalent Northern Irish Order which is in materially the same terms.

81. The primary position of the SPA Applicants is that the starting point for the Second Period Application coincides with the end point of the First Period Application: namely, 1 October 2015. However, in the event that the Tribunal was not persuaded by the First Period Application, the SPA Applicants contended, in the alternative, that the arguments advanced as part of the Second Period Application are equally applicable to all claims subject to English and Northern Irish law which arose prior to 1 October 2015. Given our conclusion in respect of the First Application, we do not require to consider this alternative position any further.

82. In respect of the end point of the Second Period, the application focuses on claims that arose on or prior to 8 March 2017. In this regard, the SPA Applicants' position is based on the fact that the limitation rules upon which

they found were amended with effect from 9 March 2017. (It should also be noted that the SPA Applicants reserve their position as to any limitation defence arising under those amended rules.)

83. Section 32 LA80 provides, insofar as is relevant:

> "(1)…, where in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> …
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
>
> …
>
> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

84. Before considering the details of the Second Period Application, it is helpful to set out the following chronology:

(1) On 15 April 2015, the Consumers' Association (commonly referred to as Which?) issued a press release contending that "Mobile phone owners are collectively shelling out an extra £355m for handsets they have already paid for" as a result of continuing to pay when their contract has come to an end.

(2) On 15 March 2017, the Office of Communications ("Ofcom") published a report titled "Pricing trends for communications services in the UK", which estimated that over a million users pay their monthly charge, including the cost of the handset, after the end of their contract.

(3) On 20 October 2017, Citizens Advice issued a press release titled "Mobile phone networks overcharging loyal customers up to £38 a month". The press release characterises the issues as the charging of a

"loyalty penalty" which is said to result in the "overcharging" of consumers. The press release generated significant publicity and substantial media coverage including national newspapers, regional press, radio news and a range of websites.

(4) On 19 December 2018, the Competition and Markets Authority ("CMA") published its report titled "Tackling the loyalty penalty: Response to a super complaint made by Citizens Advice on 28 September 2018".

(5) 28 November 2023: the PCR issued the proceedings against the Proposed Defendants.

(2) The SPA Applicants' Submissions

85. As a starting point to their submissions, the SPA Applicants pointed to the basis on which the PCR advanced its claims. The PCR sets out the practice of MNOs in the UK upon which its claims are based at paragraphs 3 and 4 of the CPCFs. Customers enter into CHA Contracts which provide for a Minimum Term (e.g. 24 months) and for periodic payments (typically monthly) to be made to the relevant Proposed Defendant. These periodic payments include sums both in respect of Airtime Services and for the Handset. The periodic payments are set at a level to ensure that, at the end of the Minimum Term, the Handset will have been paid for in full. A customer could terminate the CHA Contract early, by paying an early termination charge, and then would be able to retain the Handset. At the end of the Minimum Term, unless the CHA Contract was terminated, customers continued to pay the relevant Proposed Defendant at a rate that did not reflect the fact that the customer had already paid for the Handset in full by that time. The PCR contended that failing to reduce the periodic charges at the end of the Minimum Term to the relevant SIM Only Price represented an overcharge to the customer, referred to as a "Loyalty Penalty" (as referred to at paragraph 4 of the CPCF). As a result of charging Loyalty Penalties, the PCR alleges that the Proposed Defendants have abused a dominant position resulting in a substantial and unjustified benefit over a period of years, to the detriment of their "loyal" customers (paragraph 6 of the CPCF).

86. Against this background, the SPA Applicants highlighted that paragraph 24 of the PCR's skeleton argument in relation to the Second Period Application ("SPA Skeleton") was as follows:

> "The facts that would allow a reasonable person in the position of PCMs to know that they have a worthwhile claim against the PDs are at least the following:
>
> a. That, at the end of the Minimum Term of a CHA Contract, the PCM would continue to make payments under the CHA Contract unless they took positive action to stop making those payments;
>
> b. That the rate payable by the PCM after the expiry of the Minimum Term would not be reduced to reflect the fact that, by the end of the Minimum Term, the Handset would have been paid for in full;
>
> c. That, instead, the rate the PCM would continue to pay after the expiry of the Minimum Term would incorporate a sum that represents an instalment payment for a product that the PCM would, by that point, have already paid for in full (i.e., the Handset); and
>
> d. That, at the time that the Minimum Term came to an end, other alternative and cheaper rates are likely to be available to the PCM in respect of Airtime Services only (i.e., the services that the PCM would actually receive in the period after the expiry of the Minimum Term if they remained on the CHA Contract)."

87. The SPA Applicants noted that at paragraph 25 of the SPA Skeleton the PCR argued that a Proposed Class Member ("PCM") would also need to know enough to have a reasonable belief that the facts outlined might give rise to a violation of competition law. Insofar as the PCR was seeking to argue that a PCM would require to know that the facts identified arguably gave rise to a breach of competition law, Ms Demetriou KC, for the SPA Applicants, submitted that this was wrong in law for the purposes of section 32 because that section was concerned with the deliberate concealment of facts not the characterisation of those facts. In the same way, Ms Demetriou submitted that other aspects of the competition law analysis such as dominance fell to be treated as issues of law rather than fact for the purposes of section 32.

88. Turning to the law and to the correct approach to section 32 LA80, Ms Demetriou referred to [109] of *Potter v Canada Square Operations Ltd* [2023] UKSC 41, [2024] AC 679 ("*Canada Square*") where the Supreme Court stated:

> "The elaborate and confusing analyses of section 32(1)(b) put forward in *Williams*, *The Kriti Palm* and the present case represent a wrong turning in the

law. It should return to the clarity and simplicity of Lord Scott's authoritative explanation in *Cave* (para 60):

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

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

89. In relation to "deliberate concealment" the Supreme Court concluded at [153]:

> "… "Deliberate", in section 32(2), does not include "reckless". Nor does it include awareness that the defendant is exposed to a claim. As Lord Scott said in Cave at para 58, the words "deliberate commission of a breach of duty" are clear words of English. They mean, as he added at para 61, that the defendant "knows he is committing a breach of duty"."

90. In *Gemalto Holdings BV & Another v Infineon Technologies AG & Others* [2022] EWCA Civ 782, [2023] Ch 169 ("*Gemalto*") the Court of Appeal, when addressing reasonable discoverability, considered the degree of certainty with which a claimant would need to be to be aware of the relevant facts in order for time to start running under section 32(1)(b) LA80. The court compared two formulations of the test: (1) the "statement of claim" test; and (2) the "*FII* test" (after the FII Group Litigation tax proceedings[1]). At [45] the Court concluded "the parties were right to submit that, after FII, limitation begins to run in a deliberate concealment case when the claimant recognises that it has a worthwhile claim, and that a worthwhile claim arises where a reasonable person could have a reasonable belief" as to the key fact(s). At [50] the Court of Appeal stated that the formulation for the necessary knowledge is "knowing with sufficient confidence to justify embarking on the preliminaries" to the issue of proceedings and one can embark on the preliminaries "without knowing chapter and verse about the details".

[1] *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs (formerly Inland Revenue Comrs)* [2020] UKSC 47; [2022] AC 1 ("*FII*").

91. In *The Libyan Investment Authority v JP Morgan Chase* [2019] EWHC 1452 (Comm); [2019] 6 WLUK 104, the Honourable Mr Justice Bryan stated at [35] that for limitation purposes "a person is treated as always knowing something even though he or she has subsequently forgotten it".

"Core Commercial Terms"

92. The first basis upon which the Second Period Application was advanced was the core commercial terms of the PCMs' CHA Contracts. Based on these core contractual terms, the SPA Applicants submitted that each PCM knew or ought to have known:

(1) that there was both a Minimum Term and a monthly payment;

(2) that if they complied with the contract, the PCM would receive the Handset; and

(3) that the PCM continued to make the same monthly payments after the expiry of the Minimum Term.

93. Ms Demetriou submitted that it could reasonably be inferred from these facts that the Handset had been paid for during the course of the Minimum Term. The PCR had not pointed to anything which would have prevented this inference from being drawn. As she put it, the essential bargain was that the PCM was entitled to the Handset having made the monthly payments for the Minimum Term. Ms Demetriou emphasised, further, that the SPA Applicants did not accept that this inference was, in fact, correct. This was important because, as it was not accepted by them, the SPA Applicants could not have deliberately concealed it from the PCMs.

94. The final fact founded upon by the PCR at paragraph 24 of the SPA Skeleton was that, at the end of the Minimum Term, other alternative and cheaper rates were likely to be available in respect of Airtime Services only. Ms Demetriou submitted that it was apparent from the material that had been included in the

bundle prepared on behalf of the SPA Applicants that such rates were widely advertised.

95. In relation to this final point, Ms Demetriou also addressed a point of potential tension between the submissions advanced by the Proposed Defendants on the issue of certification and the Second Period Application. As noted below, in the context of certification, the Proposed Defendants argued that the proposed class definition turned on a comparison between each PCM's CHA Contract charge and the equivalent SIM Only Price and the Proposed Defendants contended that such a comparison was, essentially, impracticable, if not, impossible.

96. Ms Demetriou suggested that there was no tension in the positions adopted by the Proposed Defendants for two reasons. First, the issue which arose in the context of certification involved requiring PCMs to revisit the question of the comparison between their CHA Contract price and a comparable SIM Only Price many years later given that the Proposed Class was unlimited in time. By contrast, in respect of the issue which arose in the Second Period Application, the Tribunal is required to consider what each PCM knew or ought to have known at the point the Minimum Term expired. The second reason was that the nature of the test was different. In the context of certification, the question was whether the proposed class definition satisfied the requirements of the 2015 Rules – in particular, rules 79(1)(a) and 79(2)(e). Whereas, in the context of limitation, as the Court of Appeal had made clear in *Gemalto,* in order for the limitation period to start running, it was only necessary for the potential claimant to understand matters with sufficient confidence to justify embarking on the preliminaries to the issue of proceedings and did not require to know "chapter and verse". On this basis, a PCM did not require to have carried out a granular comparison exercise. It was sufficient that it appeared that there were SIM-only plans that looked cheaper.

97. Therefore, the SPA Applicants contend that all of the limbs set out in paragraph 24 of the PCR's SPA Skeleton were facts which PCMs actually knew or ought, with reasonable diligence, to have found out based on each PCM's core commercial terms. Furthermore, insofar as these were facts derived from the core commercial terms, there was also no need for any evidence to be heard.

98. There was also no realistic argument that any of these facts were deliberately concealed for the same reasons: namely, there could be no deliberate concealment if all of essential facts were actually known to each PCM or were discoverable with reasonable diligence. Section 32(2) LA80 did not assist the PCR for the same reason. It could not reasonably be suggested that there had been deliberate concealment if all the essential facts were actually known or were discoverable with reasonable diligence.

99. For these reasons, the SPA Applicants sought to have the relevant part of the PCR's claim struck out (pursuant to rule 41 of the 2015 Rules) or, for the same reasons, for reverse summary judgment in terms of rule 43 of the 2015 Rules on the basis that the PCR had no reasonable prospect of succeeding with this part of his claim.

Publicity Materials

100. Further or alternatively, should the Tribunal not be satisfied by the arguments advanced by the SPA Applicants in relation to the core commercial terms, it was submitted that the relevant facts upon which the PCR's pleaded claim depend were set out in numerous mainstream media and other publications which had been directed to the attention of consumers. On this basis, the SPA Applicants contended that, by the end of October 2017 at the latest, PCMs could, with reasonable diligence, have discovered those relevant facts.

101. Mr Williams KC, on behalf of the SPA Applicants, explained that this part of the argument complemented the first basis advanced based on the core commercial terms. Insofar as it was contended by the PCR that there was any concealment whether of facts or of a breach of duty, such an argument could not stand in the face of the material relied upon by the SPA Applicants.

102. The SPA Applicants had produced a bundle of publicity material to demonstrate what was in the public domain between 2015 and 2017. Mr Williams submitted that this material was not intended to be exhaustive but it was substantial and, it was argued, it presented a clear picture.

103. Mr Williams stated that there are six features of the publicity material which combined to make the relevant facts reasonably discoverable:

(1) The publicity material addressed all of the relevant facts relied on by the PCR to advance its claim. In this regard, Mr Williams again referred to paragraph 24 of the PCR's SPA Skeleton (see paragraph 86 above).

(2) The material on which the SPA Applicants placed weight was all in consumer facing publications.

(3) The concerns expressed by consumer interest bodies were in terms which are clear to consumers.

(4) The coverage on which the SPA Applicants placed principal reliance was in the mainstream media.

(5) The body of material included a wide range of publications meaning that the information it contained was available to consumers wherever they got their news from.

(6) There was coverage in a wide range of media. The body of material was derived from three main sources: internet news (including coverage on the BBC, ITV and Sky News websites); the printed press; and radio coverage.

104. Mr Williams framed his submissions around the press releases issued on 15 April 2015 by Which? and the press release issued by Citizens Advice on 20 October 2017 (as set out in the chronology above at paragraph 84).

105. In respect of the Which? 2015 press release, Mr Williams highlighted the following points. First, it was clear that the press release was dealing with CHA Contracts. Second, the press release stated specifically that the three SPA Applicants charged customers a single bundled price both for the handset and airtime. Third, the press release emphasised that customers were continuing to pay the bundled price at the end of the contractual term (the Minimum Term).

Fourth, the press release stressed that, in continuing to make payments, customers were paying for a handset that had already been paid for. Finally, the press release drew attention to the fact that, in Which?'s view, customers were overpaying by comparison with SIM-Only Prices. Having examined the 2015 press release itself, Mr Williams then pointed to a number of examples of the press release having been reported in media from the bundle produced by the SPA Applicants.

106. In order to fill in the background in the period between April 2015 and October 2017, Mr Williams also drew the Tribunal's attention to two further documents. The first was a report prepared by Citizens Advice entitled "Hung up on the handset" dated March 2016. This was a report of a mystery shopping exercise carried out by Citizens Advice. Mr Williams highlighted how this report stated that most networks combined the cost of the handset and the cost of the service into one monthly payment.

107. Second, Mr Williams referred to a Research Document prepared by Ofcom dated 15 March 2017. This document had been referred to specifically in the PCR's CPCF. Mr Williams highlighted that, within the document, Ofcom noted that 66% of post-pay customers (making monthly payments) covered the cost of their handset within their contract but they estimated that over 1 million of these customers continued paying the full contract price after their contract had come to an end.

108. Finally, the Citizens Advice press release dated 20 October 2017 contained all of the facts relied upon by the PCR at paragraph 24 of the SPA Skeleton and therefore which were necessary to start time running for the purpose of limitation.

109. Following the Citizens Advice 2017 press release, Mr Williams drew our attention to a large amount of press coverage which had covered the story in some cases by simply reproducing the press release itself. It was notable that the coverage to which Mr Williams took us included advice being given to consumers as to how they might avoid over-paying for their handsets. It was submitted that the information which was available to the public through a wide

range of media resources should have enabled the PCMs to recognise they had a worthwhile claim with sufficient confidence to embark on the preliminaries to the issuing of proceedings.

110. During the CPO Hearing, the SPA Applicants provided a table that compared the facts the PCR considered necessary for time to begin to run for limitation purposes, as identified in paragraph 24 of the SPA Skeleton, and information contained in the Which? publication dated 15 April 2015 and the Citizens Advice publication dated 20 October 2017. The table was used to demonstrate that, by 20 October 2017, the PCR had all the information necessary to bring a claim and used similar language to that used in the CPCFs.

111. Having regard to the above, the SPA Applicants contended the PCR has not identified any relevant fact which was concealed. Furthermore, in light of the information that had been put before the Tribunal, the PCR could not point to any reason why this issue would look any different at trial. The position of the PCR could be characterised, not unfairly, as little more than "something may turn up at trial" (*cf Korea National Insurance Corp v Allianz Global Corporate & Speciality* [2007] EWCA Civ 1066; [2007] 2 CLC 748, ("*Korea National Insurance Corp*") at [14]). For these reasons, the Second Period Application ought to be granted.

112. Turning to the positive case advanced on behalf of the PCR, Mr Williams pointed to the two alternatives put forward by the PCR as to when time started to run: (1) from the date the claims were issued due to the publicity generated in relation to the present proceedings; or (2) the publication of the CMA report in 2018. Both of these triggers were manifestly less plausible for the discoverability of the facts than the mainstream media campaign relied on the SPA Applicants.

113. In relation to the first, Mr Williams contended that the claim is no more than the legal framing of the facts which had already been expressed in identical terms in the media. No explanation had been given as to why the PCR had a unique ability to comprehend the facts and translate them to consumers, given the very clear and direct terms of media coverage. In addition, the PCR adopted an

illogical position by suggesting that the relevant facts became discoverable as a result of media coverage of a claim based on the relevant facts, but not when there was direct media coverage of the facts themselves.

114. As to the second, if the CMA report, as a statement of a regulator, had a different status then the Ofcom report in 2017 should also have sufficed. The publicity material relied upon by the SPA Applicants was obviously more discoverable by consumers than a CMA report published on its website. In any event, the CMA report was a reconsideration of the same issues as the material previously referred to, albeit with updated calculations of SIM-only rates using the same method contained in the Citizens Advice 2017 press release. Properly understood, the CMA report was not new content and was not revealing new facts.

115. Finally, the PCR considered "reasonable diligence" in this case was to be applied by reference to the PCMs as defined: customers on CHA Contracts who continue to pay charges after the expiry of their Minimum Term at a rate higher than an equivalent SIM Only Price. Mr Williams submitted that so-called "sticky customers" are not a distinct or homogenous class. Someone who extends beyond the Minimum Term by one month, possibly due to being on holiday, may be very different to a consumer who does not switch for 18 months. He argued that it was, in any event, unclear why this point was relevant to the way in which the SPA Applicants put the case as they rely on mainstream media coverage. Sticky customers would presumably get their news from the same sources as everyone else.

116. Furthermore, the publicity material was all directed to the so-called "sticky customers". It was directed to people whose contract had ended and extended beyond the Minimum Term but continued to pay the same price as under the CHA Contract.

Certification Issues

117. The SPA Applicants advanced an alternative position in relation to certification issues should the Second Period Application be refused. In summary, if the

Tribunal needed to consider the actual knowledge of PCMs, the PCR had not explained how this issue was to be managed. This would be a significant non-common issue, since it would entail a more granular assessment of individual class members and the evidence relating to their actual knowledge, and to the discoverability of facts through reasonable diligence. For example, as set out above, the Tribunal would need to identify consumers who would have acquired actual knowledge of the necessary facts, at some point in time – whether when entering the CHA Contract, on the expiry of the Minimum Term, or on subsequently entering a SIM-only contract. Similarly, the Tribunal would need to ascertain the consumers who (if they had not had actual knowledge) could, with reasonable diligence, have learned of the necessary facts, at the different times and through various means.

118. The trial of these issues arising under section 32 LA80 would be highly complex and unwieldy; in short, it would be completely impractical. In any event, the PCR had proposed no methodology by which it could be carried out. Accordingly, the claims in respect of the period on or prior to 8 March 2017 were not eligible for inclusion in collective proceedings, since they raised a significant non-common issue. Further and in any event, the claims in respect of that period are not suitable to be combined in collective proceedings. As a result, certification for those parts of the claims should be refused.

(3) The PCR's Submissions

119. On behalf of the PCR, it was submitted that the Second Period Application ought to be refused on the basis that the issues raised in respect of section 32 LA80 were acutely fact sensitive and were not apt for resolution by way of either summary judgment or strike out. The PCR relied upon both section 32(1)(b) and 32(2) to postpone the commencement of the six year period of limitation provided by section 2 LA80.

120. Mr Thompson, on behalf of the PCR, made two preliminary points. First, he highlighted that, for the purpose of the Second Period Application, the SPA Applicants have not contested the merits of the claim against them. It was, he submitted, necessary to remember that one of the core elements of the abuse

alleged by the PCR was the absence of transparency of the MNOs' pricing practices to PCMs.

121. Second, the Second Period Application has been raised at the certification stage, prior to the Proposed Defendants having pleaded any limitation defence and before the PCR has been able to respond to any such defence. The parties' respective positions in respect of the matter had been set out only in correspondence between solicitors and no disclosure had been provided beyond self-selected documentation by the SPA Applicants to support their application. For example, it was notable that, despite basing the Second Period Application on the so-called core commercial terms, no contracts had, in fact, been disclosed. There had been no directions for witness evidence so that the matter could be properly prepared for and determined at trial. This distinguished the present case from both *Gemalto* and *Merricks Limitation.* This was a complex claim that raises issues of economics that will require not only expert analysis but substantial disclosure to determine the issues of both dominance and abuse.

The law

122. Turning to the law, the PCR stressed the threshold for strike-out and/or summary judgment is high. In proceedings before the Tribunal, the threshold for strike-out is the same as the threshold applied under the Civil Procedure Rules: where a claim is "certain to fail" and where the claim is "substantively unarguable".

123. Mr Thompson submitted that the appropriate test for summary judgment was as set out in the judgment of Lewison J in *EasyAir Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch); [2009] 3 WLUK 2 ("*Easyair*") at [15]. Mr Thompson also drew our attention to what was said by the Tribunal in *JHH Enterprises Limited v Microsoft Corporation & Others* [2024] CAT 69; [2024] 11 WLUK 624 and, in particular, what was said at [9]:

> "Caution is required in granting summary judgment where the application will not dispose of the whole case. See Floyd LJ in *TFL Management Services v Lloyds TSB Bank* [2014], at paragraph 27:

> "I would add that the court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross-examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action: see Potter LJ in *Partco Group Ltd v Wragg* [2002] 2 Lloyd's Rep 343, para 27(3) and cases there cited.""

On this basis, caution was equally required in the present case where the Second Period Application was restricted only to the English law and Northern Irish position and it did not relate to the O2 Proceedings as O2 was not one of the SPA Applicants.

124. Mr Thompson also emphasised what had been said by Lord Hamblen in *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3, [2021] 1 WLR 1294 ("*Okpabi*"):

> "107. The result is that instead of focusing on the pleaded case and whether that discloses an arguable claim, the court is drawn into an evaluation of the weight of the evidence and the exercise of a judgment based on that evidence. That is not its task at this interlocutory stage. The factual averments made in support of the claim should be accepted unless, exceptionally, they are demonstrably untrue or unsupportable.
>
> […]
>
> 109. This was not a trial of a preliminary issue. It was not for the judge to make "findings". Although he was no doubt put in a difficult position by the way in which the parties had chosen to present the case, he should have insisted that the focus of the inquiry be the arguability of the claim, which should have been fully set out in the particulars of claim, rather than the weight of the evidential case.
>
> 110. In his judgment at para 190 the Chancellor rejected the complaint that Fraser J had conducted a mini-trial and considered that he was doing no more than subjecting the evidence to critical analysis. He cited para 10 of Potter LJ's judgment in *ED & F Man Liquid Products Ltd v Patel* [2003] CP Rep 51 in which it was observed that factual assertions do not have to be accepted by the court if it is "clear" that there is "no real substance" in them, "particularly if contradicted by contemporary documents" -ie if they are demonstrably unsupportable. That is only going to be so in clear cases. As Carnwath LJ observed in *Mentmore International Ltd v Abbey Healthcare (Festival) Ltd* [2010] EWCA Civ 761 at [23], referring to both Potter LJ's judgment in the *ED & F Man* case and Lord Hope's judgment in the *Three Rivers* case [2003] 2 AC 1:
>
> > "__If Mr Reza was hoping to find in those words some qualification of Lord Hope's approach, he will be disappointed. The Three Rivers case was specifically cited by Potter LJ. He was in my view intending no more than a summary of the same principles. Lord Hope had spoken of a

> statement contradicted by '*all* the documents or other material on which it is based' (emphasis added). It was only in such a clear case that he was envisaging the possibility of rejecting factual assertions in the witness statements. It is in my view important not to equate what may be very powerful cross-examination ammunition, with the kind of 'knock-out blow' which Lord Hope seems to have had in mind.""

125. Mr Thompson rejected the proposition that it was incumbent on the PCR, at this stage, to serve evidence substantiating the claims. The authorities did not support the SPA Applicants' characterisation of the PCR's position as being "something may turn up" at trial. Properly understood, in the authority relied on by the SPA Applicants, *Korea National Insurance Corp*, Lord Justice Moore-Bick made clear that a party resisting summary judgement on the basis that further evidence would be available at trial:

> "14. … must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court. The court may then be able to see that there is some substance in the point and that the party in question is not simply playing for time in the hope that something will turn up."

126. Applying this approach to the present case, it was sufficient for the PCR, as the representative of a large consumer class with very limited access to relevant information, to refer in general terms to the categories of relevant information likely to be available at trial: for example, from disclosure and witness evidence from the Proposed Defendants themselves as to their market position, their pricing strategy and the basis for adoption and redemption of their loyalty penalty policy for CHA Contracts over a period of years. Such material is highly material and was not currently within the knowledge of the PCR or the PCMs and the bulk of this information was inevitably in the possession of the Proposed Defendants.

127. Mr Thompson submitted that the decision of the Court of Appeal in *DSG* gave helpful guidance in relation to the consideration of section 32 LA80 in the context of a summary judgment application. Sir Geoffrey Vos focussed the question as being whether or not the issue of reasonable diligence in terms of section 32(1)(b) LA80 was to be approached hypothetically and on the basis that the claimant was on notice of the need to investigate. In *DSG*, this question was important because if that was not the correct approach, it followed that the

Tribunal ought not to have addressed the section 32(1)(b) issue summarily as it had done. The Court of Appeal concluded that the court below, the Tribunal, had erred. It ought not to have approached the issue as a purely hypothetical one and on the assumption that the claimants were on notice of the need to investigate (at [69] and [70]).

"Core Commercial Terms"

128. Mr Thompson, on behalf of the PCR, submitted that assertions have been made concerning contracts that were offered to consumers and yet no such contracts have been disclosed in support of the Second Period Application to enable the assertions to be tested.

129. The core allegation in the CPCFs is that for many years, the MNOs, including the SPA Applicants, concealed from PCMs the fact that, in terms of their CHA Contracts, at the end of the Minimum Term, the PCMs continued to be required to make regular payments based, in part, on the capital cost of the Handset notwithstanding the fact that, by that point, the Handset had been paid for in full. This allowed the MNOs to charge excessive prices for the Airtime Services they supplied under those contracts for an indefinite period. It was this core allegation which was touched upon in paragraph 24(b) and (c) of the PCR's skeleton (see paragraph 86 above).

130. It was submitted that it was the subject of this core allegation which was not revealed in the core commercial terms relied upon by SPA Applicants. Further, it was this concealment which regulators had, despite publicity, continued to be concerned about in 2018 and thereafter.

131. The PCR submitted that the alleged abuse in these proceedings was closely analogous to the position in *Canada Square* where the claimant only discovered that she was paying concealed commission charges when she was advised by lawyers very shortly before commencing proceedings.

132. Mr Thompson rejected the suggestion that there was any tension in the PCR's position on this point and in respect of the use of SIM-only contracts as a

comparator for the purposes of the class definition (see below at paragraph 194). Any supposed symmetry was illusory. There was nothing inconsistent about saying, on the one hand, that it was not easy for consumers to spot an abusive practice which had been successfully concealed for years and which had raised significant regulatory concerns and, on the other, that, after the event, it was not difficult to compare terms offered under a historic CHA Contract with the terms that would have been available on a SIM-only basis.

Publicity materials

133. The PCR made the following points in respect of the publicity materials relied upon by the SPA Applicants:

(1) The publicity material was not uniform. The periods covered were: April 2015, in relation to the Which? publication; March 2016, in relation to the Citizens Advice report; and March 2017, in relation to the Ofcom report. It was also notable that the reports appeared to record considerable confusion on the part of consumers.

(2) The publicity materials did not indicate that PCMs had a competition law claim in relation to the overcharge. The PCR noted that, for example, in the BBC article dated 20 October 2017, titled "Mobile companies overcharging customers after contracts end", the suggestion was that there was no, at least automatic, right to compensation. Under the heading "Who's affected and what can you do?" it is stated:

> "No one is automatically entitled to compensation -- consumers can only make a claim if it wasn't made clear in their contract that the deal would continue at the same price."

134. Mr Thompson drew our attention to the fact that the position of the regulator, Ofcom, did not support the SPA Applicants' position that the position of a PCM ought to have been clear beyond argument by the end of October 2017. In the CPCFs, the PCR relied upon an Ofcom consultation paper dated 26 September 2018 which highlighted its view that, even at that date, some consumers did not understand the significance of the Minimum Period or what their options were at the end of that period. This was not consistent with the notion that by the end

of October 2017 all PCMs would reasonably have been aware of their position either from considering their core contractual terms or simply by reading the newspapers.

135. The claim advanced by the PCR was complicated and the borderlines between what a PCM can and cannot be expected to know are complex. The proceedings raise complicated issues of fact and law and the issues are not sufficiently clear. This makes it completely unsuitable for resolution on a summary basis at this stage of the proceedings.

136. In relation to section 32(1)(b) LA80, Mr Thompson argued that the Tribunal must look at the standard to be applied in relation to the specific PCMs who are before the Tribunal in these proceedings, referred to as "sticky" customers being sufficiently disengaged to have incurred Loyalty Penalties. Given this is an application for summary judgment and/or strike-out, the PCR contended that the Tribunal would have to be satisfied that there was no remaining issue in relation to the fact the claim is being advanced on behalf of such "sticky" customers. This is particularly relevant considering that the evidence of investigations appeared to show that consumers continued to be confused. Unlike *Gemalto*, this is not a case where a regulatory body was investigating a suspected cartel.

137. Mr Thompson submitted that the evidence adduced by the MNOs fell well short of showing that such customers should have been put on notice of the need to investigate the facts that would be necessary to plead a claim of this kind before the six-year period in these proceedings were brought. Mr Thompson accepted, on the basis of *Gemalto*, that it was not necessary for the PCMs to know "chapter and verse" but the information required to put them on notice of a competition law claim was plainly much more significant than that which would be required in, for example, a simple personal injury claim arising from a road traffic accident.

138. In relation to the deliberate commission of a breach of duty that is unlikely to be discovered for some time (section 32(2) LA 1980), the PCR submitted that this issue is something that cannot be determined on a summary basis without

any evidence as to the origins of the policy of the SPA Applicants at issue in the proceedings. There was a strong *prima facie* case that SPA Applicants deliberately carried out the conduct that constitutes the abuse in this case over a period of years, in the knowledge of the regulatory concerns that had been expressed and in the knowledge that the "sticky" customers with which these proceedings concerned would not discover their wrongful conduct for some time. Such matters were certainly arguable and were a natural inference from the regulatory findings but could not be determined on a summary basis.

Certification Issues

139. The PCR rejected the alternative position advanced by on behalf of the SPA Applicants. Mr Thompson argued that in collective proceedings, involving aggregate damages, that there would not be a need for a PCM-by-PCM analysis. Such an approach would not be taken for the assessment of damages and there was no reason in principle why such an approach ought to be taken for limitation. A pragmatic approach would be taken once the evidence was properly before the Tribunal.

(4) The Tribunal's Decision

The legal test

140. Perhaps recognising the fact that, unlike the First Period Application, this application did not turn on a pure issue of law, both parties made submissions as to the correct tests to be applied when determining applications for strike out and reverse summary judgment. The parties were agreed that there were no material differences between the tests for strike out and summary judgment (as recognised in *Le Patourel v BT Group PLC (CPO Application)* [2021] CAT 30; [2021] 9 WLUK 536, at [25]).

141. The parties were also agreed that the appropriate test had been set out comprehensively by Mr Justice Lewison in *EasyAir* at [15]. We consider that this summary of the correct approach is worth quoting in full:

"i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond* (No 5) [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

The stage of proceedings at which the application is made

142. In contrast with the First Period Application, the PCR disputes whether the Second Period Application can appropriately be dealt with by the Tribunal at this stage by way of strike out/reverse summary judgment.

143. It is important to note, as the PCR observes, that the Second Period Application is made prior to the SPA Applicants setting out their respective positions in pleadings; without any disclosure and without the Tribunal hearing from any witnesses. As a result the evidential material before the Tribunal is potentially restricted. We consider that the potential restriction in the evidential material before us is significant in two related respects in determining the Second Period Application.

144. First, it means that when the factual basis for the PCR's claims is being assessed in light of the material which has been produced by the SPA Applicants (see [15(iv)] of *EasyAir*), it is important to bear in mind that this material has been selected without disclosure by those parties. For example, we consider it striking, for reasons we return to below, that the SPA Applicants sought to advance an argument on the basis of the "core commercial terms" on which the PCMs had contracted without providing the Tribunal with any of those terms.

145. Second, the potential restriction in the material available is also relevant to the Tribunal's assessment of the evidence which may reasonably be expected to be available at trial (see *EasyAir* [15(v)] above). In this regard, the SPA Applicants sought to emphasise that the PCR ought not to be able simply to counter the Second Period Application by saying that "something might turn up at trial". That is of course correct. We consider that the appropriate test is as formulated by Lord Hamblen in *Okpabi* at [128]:

> "I consider that Lord Briggs JSC's formulation of the proper approach is to be preferred. In other words, are there reasonable grounds for believing that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success?"

146. So, while the SPA Applicants are also correct that it is incumbent on a party responding to an application for summary judgment to put forward sufficient evidence that it has a real prospect of succeeding at trial, the responding party can discharge that onus by relying on the likelihood that further evidence will

be available at trial and substantiate that assertion by describing in general terms, the nature of the evidence, its source and its relevance (see *Korea National Insurance* at [14] per Moore-Bick LJ). Such an approach would seem appropriate where, unlike in the *Korea National Insurance* case, the further evidence in question may not be in the hands of the responding party and there are reasonable grounds for believing that it is to be found in the hands of those making the application for summary judgment.

The correct approach to section 32 LA80

147. We note that the parties were agreed that, for present purposes, the correct approach to section 32 had been set out by the UK Supreme Court in the *Canada Square* judgment. We agree and derive two propositions from that case:

(1) In relation to section 32(2)(1)(b) LA80, a claimant who seeks to invoke that section is required to identify: (i) a fact relevant to the claimant's right of action; (ii) the concealment of that fact from him or her by the defendant either by a positive act of concealment or by a withholding of the relevant information; and (iii) an intention on the part of the defendant to conceal the fact or facts in question (at [109]).

(2) For the purposes of both section 32(1) and (2), "deliberate" and "deliberately" meant simply that the result in question was intended. Recklessness was not included (at [108] and [153]).

148. We also agree with the parties that the test for the commencement of the period of limitation in cases of deliberate concealment has been authoritatively set down in the judgments of the UK Supreme Court in *FII* as applied by the Court of Appeal in *Gemalto.* The limitation period will begin when the claimant recognises that it has a "worthwhile claim" meaning that a reasonable person has sufficient confidence to justify embarking on the preliminaries to the issue of a writ. This test is to be applied with common sense: the claimant does not require to know "chapter and verse" before the limitation period commences (see *Gemalto* at [45] to [53]).

Summary judgment in the context of section 32 LA80

149. The interface between the test for summary judgment and the application of section 32 LA80 was dealt with by the Court of Appeal in *DSG.* In that case, as in the present, the court was dealing with an application for summary judgment which was based upon discoverability by reasonable diligence. The defendant was arguing, amongst other things, that the claimant should, with reasonable diligence, have discovered any deliberate concealment more than six years before the proceedings were raised. For present purposes, we consider that the following two points of guidance can be drawn from the leading judgment of Sir Geoffrey Vos.

150. First, having reviewed the previous authorities, the court concluded that the court below, the Tribunal, had erred in dealing with the issue of reasonable diligence in section 32(1)(b) on the basis that it raised an entirely hypothetical question to be approached on the assumption that the potential claimant was on notice of the need to investigate. Sir Geoffrey Vos agreed with the approach of Mr Justice Foxton in *Granville Technology Group Ltd (in liquidation) v Infineon Technologies AG* [2020] EWHC 415 (Comm); [2020] 2 WLUK 319 and, in particular, the following passage:

> "If s.32(1) did involve a statutory assumption that the claimant was on notice of something meriting investigation, it would make it very difficult for many claimants to satisfy the s.32(1) test. Further, the application of s.32(1) in a number of the authorities has involved an enquiry into whether the claimant was on notice of something which merited investigation, with the courts holding that in the absence of such a "trigger", the claimant could not be said to have failed to exercise reasonable diligence in its investigations…."

151. At [69] and [70], Sir Geoffrey Vos concluded that:

> "69. In my judgment, these authorities demonstrate that the Tribunal ought not to have considered whether the claimants could with reasonable diligence have discovered the facts concerning the infringements before 20 June 1997 (a) as a purely hypothetical question, and (b) on the assumption that the claimants were on notice of the need to investigate. The question of whether there was something to put the claimants on notice had to be determined on an objective basis, but as Lord Hoffmann explained in *Peconic* that "leaves open to argument the extent to which the personal characteristics of the plaintiff are to be taken into account in deciding what diligence he could reasonably have been expected to have shown". As Henderson LJ agreed in *Gresport Finance*, whether the claimant could with reasonable

> diligence have discovered the relevant concealment is a question of fact in each case.
>
> 70. In this case, the Tribunal considered some of the things that the claimants might have known about the alleged infringement, but did not ask itself what precisely had put the claimants on notice of the need to investigate a potential claim against Mastercard. At [106], the Tribunal wrongly assumed that the claimants were aware of important press articles as I have already explained. As it seems to me, the question of whether or not the claimants in this case had reason to investigate and whether they could with reasonable diligence have discovered the relevant concealment requires disclosure and factual evidence to be fairly determined. In particular, I think Mr Pickford was right to point out that, in an internet age, huge numbers of documents are in the public domain; it does not follow that, even objectively judged, a potential claimant was on notice of a particular claim, or that it could with reasonable diligence have seen particular documents."

152. Accordingly, we understand the Court of Appeal to be holding that, prior to considering the question of what reasonable diligence might have revealed, it was necessary to determine whether, objectively, the claimant had been put on notice of the need to investigate. Further, although consideration as to whether a claimant had been put on notice was objective, resolution of that question could take into account the personal characteristics of the claimant. We are confirmed in this understanding by the subsequent judgment of the Court of Appeal in *OT Computers Ltd (in liquidation) & Others v Infineon Technologies AG & Another* [2021] EWCA Civ 501; [2021] 3 W.L.R. 61 (see [47] per Males LJ).

153. The second related issue arising from *DSG* which we consider to be of significance for the present case is the order in which the various issues arising from section 32(1) ought to be addressed. The Court of Appeal concluded that Tribunal ought, first, to have considered whether, objectively, it could be said that the claimants were on notice of the need to investigate before going on to address what, with reasonable diligence, it could be said that the claimants would have discovered (see [72]).

154. The order in which these issues are addressed was important in *DSG* because, like the present case, they arose in the context of an application for summary judgment. The Tribunal, having wrongly over-looked the prior question of whether the claimant was on notice of the need to investigate, went on to

consider the question of what reasonable diligence would have disclosed on a summary basis (see [62]). Sir Geoffrey Vos identified what he considered was the problem with this approach:

> "74. The problem with the Tribunal's approach was that it did not address those concerns having decided that the statement of claim test would be satisfied if publicly available documentation could have been obtained before 20 June 1997 that identified the four necessary elements of the claim.
>
> 75. As I have already explained, that would have been a perfectly reasonable approach if it had been common ground that the materials in question could with reasonable diligence have been discovered at the relevant time by the claimants, but not otherwise. In this case, there was a prior question of whether the claimants were on notice of the claim in the first place before it could be determined what materials they could, applying the test set out above, with reasonable diligence have discovered.
>
> 76. In my judgment, the Tribunal ought to have concluded that, so far as the intra-EEA MIFs were concerned, those issues could not be fairly decided without disclosure and evidence, because, as the authorities make clear, the claimants' position may have some relevance to the way in which the objective test is applied. This is particularly true where questions arise as to whether specific public domain documents and newspaper articles could with reasonable diligence have been obtained. Here, there will also be, in due course, issues as to the availability of documents, and the claimants' actual knowledge of them. The Tribunal suggested at [76] that actual knowledge was not in issue before them. That was correct insofar as Mastercard's application for summary judgment was concerned, but it was common ground before us that if Mastercard's application were unsuccessful, the claimants' actual knowledge would be in issue at trial."

155. For the sake of completeness, we note that, in the above passage, reference is made to the "statement of claim" test. This is in contradistinction to the so-called *"FII* test*"* (subsequently formulated by the Supreme Court in the FII Group Litigation tax proceedings). Whilst noting the difference between these two formulations, we do not consider that, for present purposes, anything turns on this. In particular, we do not consider that the reference to the earlier formulation in anyway undermines what was said in *DSG* as to the correct approach to section 32. In this regard, we note that in the subsequent *Gemalto* decision, Sir Geoffrey Vos thought it was unlikely in most cases that there would be a real difference between the application of the two tests and that the statement of case test was, in effect, little more than a gloss on the *FII* test (see [45]).

The PCR's case

156. The parties were broadly agreed as to the relevant facts which a reasonable person in the position of a PCM would require to know in order to appreciate that he or she had a worthwhile claim. The PCR had set these facts out at paragraph 24 of the SPA Skeleton which, for ease of reference, we repeat here:

> "The facts that would allow a reasonable person in the position of PCMs to know that they have a worthwhile claim against the PDs are at least the following:
>
> a. That, at the end of the Minimum Term of a CHA Contract, the PCM would continue to make payments under the CHA Contract unless they took positive action to stop making those payments;
>
> b. That the rate payable by the PCM after the expiry of the Minimum Term would not be reduced to reflect the fact that, by the end of the Minimum Term, the Handset would have been paid for in full;
>
> c. That, instead, the rate the PCM would continue to pay after the expiry of the Minimum Term would incorporate a sum that represents an instalment payment for a product that the PCM would, by that point, have already paid for in full (i.e., the Handset); and
>
> d. That, at the time that the Minimum Term came to an end, other alternative and cheaper rates are likely to be available to the PCM in respect of Airtime Services only (i.e., the services that the PCM would actually receive in the period after the expiry of the Minimum Term if they remained on the CHA Contract)."

157. The PCR contends that these facts were deliberately concealed from PCMs by the SPA Applicants in terms of section 32(1)(b) LA80. Or, alternatively, that the actions of the SPA Applicants amounted to a deliberate breach of duty in circumstances which were unlikely to be discovered in terms of section 32(2) LA80. The PCR contends further that PCMs were not put on notice until late November 2023, when the PCR publicised the making of the present claims, failing which the PCR contends that PCMs were put on notice in December 2018, that being the date of publication by the CMA of their regulatory findings criticising the practices of the Proposed Defendants.

158. In essence, the Second Period Application requires us to decide whether the PCR has a realistic prospect of success in defeating a defence based on limitation raised by the SPA Applicants.

Were the PCMs on notice of the need to investigate?

159. As we have set out above, it is clear from *DSG* that in a case, such as the present, involving section 32(1)(b) LA80 in which there is a dispute as to whether or not the potential claimants were on notice to investigate that issue requires to be considered before going on to address questions of what reasonable diligence would have disclosed. This is particularly so when the potential claimants' answer to a potential limitation defence is being tested in the context of an application for summary judgement (see paragraphs 153 and 154 above).

160. Having considered the material before us in light of the competing submissions, we are satisfied that this issue cannot be disposed of in the SPA Applicants' favour without going to trial. For the following reasons, we do not consider that the SPA Applicants have established that the PCR has no reasonable prospect of succeeding at trial.

161. First, we are not persuaded by the SPA Applicants' argument based on the core commercial terms. To begin with, we must observe that this was an ambitious position for the SPA Applicants to adopt – to contend that the PCR had no realistic prospect of success at trial based on SPA Applicants' contractual terms but to do so without having disclosed the terms themselves.

162. In the absence of the terms themselves, Ms Demetriou was forced to argue on the basis of inference. As we understood it, the SPA Applicants' argument was that PCMs ought to have inferred from the facts that (1) their contracts contained both a Minimum Term and a monthly payment; and (2) if they complied with the terms of the contract that they retained the Handset; that Handset was paid for during the course of the Minimum Term. On the basis of this inference, so contended the SPA Applicants, a PCM ought to have been on notice that he or she was required to investigate a potential competition law claim for the Loyalty Penalty paid following the expiry of the Minimum Term.

163. It is far from clear to us that the inference upon which this part of the SPA Applicants' argument depends is the only possible inference or even the most obvious one arising from the facts upon which it is founded. By way of

example, it was notable that, as was pointed out in the course of Ms Demetriou's submissions, the example of advertising material cited to us by Ms Demetriou did not support the inference she sought to draw. That advertisement for an HTC Wildfire supported the suggestion that the Handset was free not as Ms Demetriou would have it would be free if the monthly payments were made for the Minimum Term. Having been told by the MNO in question that the Handset was free at the outset of the contract, it is not clear to us why the PCM would necessarily infer that he or she was in fact paying for it during the course of the Minimum Term.

164. Accordingly, in the absence of the actual terms on which any PCR contracted and on the basis of the material before us, we are not prepared to conclude on this basis that the PCR has no realistic prospect of undermining the inference which the SPA Applicants requires to draw. We also consider that there is a reasonable likelihood that further relevant evidence will be available at trial in the form of the SPA Applicants' standard terms and conditions as well as the communications made by SPA Applicants to their customers.

165. Second, our disquiet in relation to the inference on which the SPA Applicants rely in the core commercial terms argument is reinforced by a consideration of Ofcom's consultation paper dated 26 September 2018 which is referred to by the PCR in its pleadings (see paragraph 23 CPCFs). The consultation paper refers to the confusion on the part of consumers, some time after the point at which the SPA Applicants contend the limitation period had commenced in October 2017, as to their options at the end of the Minimum Term or, even what ending the Minimum Term actually meant. The evidence of this confusion on the part of consumers is not consistent with there being an obvious inference arising from the core commercial terms. We consider that this is an issue which would benefit from a fuller investigation into the facts at trial.

166. Third, when this evidence of confusion on the part of consumers is combined with a consideration of the publicity materials relied upon by the SPA Applicants in the second part of their submissions, we conclude that the issue of whether the PCMs were on notice of the need to investigate the claim cannot fairly be decided without disclosure and evidence. We consider that the

situation before us is very similar to that presented to the Court of Appeal in *DSG* (see [76] quoted above). Here, as in that case, the SPA Applicants rely in making their application for summary judgment on what they say was available in the public domain both in the form of documents and media reports. In these circumstances, we consider that in this case, as in *DSG,* questions arise as to the position of the potential claimants. It is significant that this case is being brought on behalf of consumers which may give rise to particular considerations in this regard (cf *Gemalto* at [89] per Green LJ). We also note that the PCR seeks to advance a case, supported by the expert report prepared by Dr Davis, that so-called "sticky" consumers are a separately identifiable group and form a distinct market. In our view, these are matters which cannot be resolved on an application for summary judgment and or strike out.

167. We are not persuaded by the counter-arguments advanced by the SPA Applicants on the notice issue.

168. First, the SPA Applicants suggest that, in some way, there was common ground between the parties that publicity was sufficient to put PCMs on notice because of the PCR's position that PCMs were not put on notice until he publicised the fact of making the present claim in late November 2023 or, in the alternative, the CMA publicised its regulatory findings in December 2018. This argument has no merit in our opinion. Although it is true that both sides are founding on publication, they clearly do not agree as to the significance of what is published. In particular, the PCR submits that the distinguishing factor, from the point of view of PCMs being put on notice of the need to investigate, was, on its primary case, the inclusion of some reference to a claim based on competition law or, on the alternative case, at least a public statement by the regulatory authority. In this regard, it was notable that within the publicity material put forward by the SPA Applicants, it appeared that the only references to the possibility of a claim against the MNOs were based on consumer remedies based on the contractual terms. In our view, in these circumstances in which claims are being advanced on behalf of consumers, we are not satisfied that the SPA Applicants have met the test for summary judgment.

169. Second, the SPA Applicants argue that the facts of the *DSG* case were so different that it falls to be distinguished from the present case. It is true that the detail of the *DSG* case involved the complexities of interchange fees – both intra-EEA and domestic – and the present case turns on quite different facts, but we can see no proper basis arising from those for not applying the approach of Sir Geoffrey Vos to the present case for the reasons we have set out above at paragraph 167. Having carefully considered the judgment of the court in *DSG* we do not understand the approach taken to dealing with reasonable diligence in the context of section 32(1)(b) LA80 to be restricted in some way by or to the facts of that case.

Conclusion

170. Our conclusion on this issue is sufficient for us to dispose of the Second Period Application. We are confirmed in this conclusion by a recognition that, as was pointed out by the PCR, even if the SPA Applicants had been successful in this application, it would not have resolved all the issues arising in relation to time bar given that it did not relate to the O2 Proceedings and did not address the claims to which Scots law applied.

171. We emphasise that we have reached no conclusion on what the ultimate merits of the SPA Applicants' limitation defence might be once it is fully traversed at trial. We express no view at all on the merits of the competing arguments, save to determine whether the SPA Applicants are able to establish an entitlement to a summary remedy at this stage.

172. Finally, we consider the arguments made by the parties in respect of the Second Period Application but which related to certification (see above at 117, 118 and 139) in the following section of this judgment.

D. CERTIFICATION

(1) Introduction

173. The requirements that must be fulfilled in order for the Tribunal to make a CPO are well established and set out in section 47B CA98 and rule 77 of the 2015 Rules.

174. The Tribunal must be satisfied: (i) that the person bringing the proceedings can be authorised to act as the class representative in the proceedings, pursuant to rules 77(1)(a) and 78 of the 2015 Rules (the "Authorisation Condition"); and (ii) the claims are eligible for inclusion in collective proceedings, pursuant to rules 77(1)(b) and 79 of the 2015 Rules (the "Eligibility Condition").

175. The Proposed Defendants' position as to certification has developed since proceedings were commenced. In their Joint Response dated 21 October 2024, the Proposed Defendants raised eight objections to certification but, further to correspondence between the parties and following amendments proposed by the PCR, these narrowed to three:

(1) In relation to the Eligibility Condition, the principal argument advanced was that the proposed class of proposed claimants was not "identifiable" for the purpose of rule 79(1)(a) and, relatedly, it was not possible to determine in respect of any person whether he or she was a member of the class in terms of rule 79(2)(e) of the 2015 Rules.

(2) Also in relation to the Eligibility Condition (as we have set out above), the SPA Applicants, as an alternative to the Second Period Application, contend that the issue of section 32 LA80 would be a significant non-common issue and the PCR has proposed no methodology to address this (see paragraphs 117 and 118 and for the PCR's response see 139).

(3) In relation to the Authorisation Condition, the Proposed Defendants contend that the PCR's funding arrangements are unsatisfactory in certain respects.

(2) Eligibility Condition:

176. The proposed class definition in the four proceedings is identical and, further to the amendments proposed by the PCR, is as follows[2]:

> "Any Relevant Customer who in the Relevant Period (i) entered into at least one Combined Handset and Airtime Contracts with one of the Proposed Defendants (and/or any other company which was, from time to time, within the same corporate group as the Proposed Defendants) under an Included Brand and (ii) pursuant to the Combined Handset and Airtime Contract(s) made one or more periodic payments in excess of the SIM Only Price after the expiry of the Minimum Term; or, in the case of such a deceased Relevant Customer, the Personal Representative of that deceased Relevant Customer.
>
> "**Relevant Customer**" means a natural person (including a sole trader but excluding a natural person in a business partnership) who enters into a personal or business Combined Handset and Airtime Contracts for the supply of mobile telecommunications services during the Relevant Period.
>
> "**Relevant Period**" means any date up to 31 March 2025. ~~[(i) the date of filing of the CPO application or (ii) such later date as may be ordered].~~
>
> "**Combined Handset and Airtime Contracts**" means a contract offered to customers in the United Kingdom for the provision of both (i) a Handset and (ii) Airtime Services, pursuant to which the customer makes an indefinite sequence of single periodic payments in respect of both the Handset and Airtime Services at a rate calculated to pay for the Handset over the Minimum Term.
>
> "**Handset**" means a mobile telephone device or another device which, with a SIM card, enables the ~~device~~ user to access a mobile communications network; this definition encompasses mobile telephones, smartphones and tablets.
>
> "**Airtime Services**" means retail telecommunication services that enable customers, through a SIM card, to use their Handsets to make and receive telephone calls, send and receive text messages and/or use mobile data.
>
> "**Included Brand**" means the 'Vodafone' brand.
>
> "**Minimum Term**" means the period during which the customer is liable to pay a charge for early termination of a Combined Handset and Airtime Contract.
>
> "**Proposed Defendants**" means Vodafone Limited and Vodafone Group Plc.
>
> "**SIM Only Price**" means the periodic charge ~~reasonably~~ payable ~~by a Relevant Customer~~ to the Proposed Defendants (and/or any other company which was, from time to time, within the same corporate group as the Proposed Defendants) in respect of Airtime Services only (i.e. without the supply of a Handset).

[2] As set out at paragraph 81 of the CPCF in the Vodafone Proceedings with amendments indicated (additions underlined and strikethrough reflecting removals).

> "**Personal Representative**" means the representative of the estate of a deceased Relevant Customer."

(a) The Proposed Defendants' principal argument

177. Rule 79(1)(a) of the 2015 Rules provides that, in order to certify proposed collective proceedings, the Tribunal must be satisfied, having regard to all the circumstances, that the claims sought to be included are "brought on behalf of an identifiable class of persons". In this regard, the Tribunal's Guide to Proceedings (2015) (the "Guide") states at paragraph 6.37:

> "It must be possible to say for any particular person, using an objective definition of the class, whether that person falls within the class. The need for an identifiable class of persons serves several purposes. It sets the parameters of the claim by clearly delineating who is within the class and who is not, thus determining who will be bound by any resulting judgment. It affects the scope of the common issues raised by the collective proceedings. And it has practical implications, such as in relation to the requirements to give notice. Indeed, it is the class definition which potential class members will read when considering whether to opt-in or out of the proceedings. However, although the claim form must give an evidence based estimate of the size of the class, it is not necessary to identify each class member (in an opt-out claim) or specify exactly how many persons are within the class.
>
> Accordingly, class definitions based on subjective or merits-based criteria (for example 'persons having suffered loss as a result of the defendant's conduct') should be avoided. Further, the class should be defined as narrowly as possible without arbitrarily excluding some people entitled to claim. If the class is too broad, the proposed collective proceedings may raise too few common issues and accordingly not be worthwhile."

178. Rule 79(2)(e) of the 2015 Rules states, when considering whether claims are suitable to be brought in collective proceedings, that the Tribunal shall take into account "whether it is possible to determine in respect of any person whether that person is or is not a member of the class". This requires a workable methodology to allow somebody to identify whether or not they are a member of the class, which is necessary to allow for steps including opting-in or out and distribution.

179. The two rules are related but perform distinct functions. Rule 79(1)(a) is a hurdle to bringing a collective action, while rule 79(2)(e) is one factor to consider among other factors when considering suitability. The Tribunal was referred to *Commercial and Interregional Card Claims I Ltd & Others v Mastercard Inc*

& Others [2023] CAT 38; [2023] Bus L.R. 1218 ("*CICC 1*") in relation to the interplay of rules 79(1)(a) and 79(2)(e), where the Tribunal made the following observations at [62]:

> "(1) In our view, these rules, while overlapping, perform distinct functions. As is clear from *Merricks SC* (by analogy with the test for common issues), *Trucks CPO* and *FX*, rule 79(1)(a) is a hurdle to bringing a collective action, while rule 79(2)(e) is a factor to consider among other factors when considering suitability.
>
> (2) Rule 79(1)(a) asks whether an objective and clear class definition has been proposed (see *Trucks CPO* at [188]). It is about the design of the proposed class definition and whether, on its face, it is capable of sensibly identifying a class. This underpins important features of the collective proceedings regime, such as the assessment of common issues and the ability to identify those who are bound by the result of those proceedings.
>
> (3) While rule 79(1)(a) is identified as a hurdle, we note the importance, as summarised in *Le Patourel CA* at [29], of collective actions facilitating access to justice. It should not easily be assumed that the existence of a hurdle, in the form of rule 79(1) generally, requires an overly prescriptive approach. There may well be some ambiguity or uncertainty permitted in a class definition and reasonable assumptions based on common sense might be required. In doing so, the Tribunal is required to "have regard to all the circumstances".
>
> (4) Rule 79(2)(e) is dealing with the mechanics of a particular person verifying whether or not they are included in the class. That is a question of methodology and seems important in relation to issues such as registration of class members and the distribution of any award of damages.
>
> (5) Rule 79(2)(e) is one of a number of factors relating to suitability under rule 79(2) (in order to meet the requirement in rule 79(1)(c)). Each factor is to be weighed along with the others and an overall judgment reached about suitability (see Merricks SC at [61] and [62]).
>
> (6) Despite having distinct functions, rules 79(1)(a) and 79(2)(e) are inherently linked. A poor class definition will make it more difficult to reach a reasonably evidenced conclusion about class membership of a person, while a well-thought-out one will likely lead to ease of verification of a person's membership of the class."

180. In *CICC 1*, the Tribunal found that the proposed class definition – all merchants who had paid interregional and commercial card multilateral interchange fees – did not satisfy the requirements of either rule 79(1)(a) or rule 79(2)(e). This was because: (1) it could not be presumed that all merchants were class members, since they might not have carried out interregional or commercial card transactions; and (2) many smaller merchants had no way of determining that

question for themselves because they were not provided with that detail by acquirers. There was therefore "no obvious basis on which it is reasonable to assume that smaller merchants" would know whether they had accepted the relevant card type; and a significant number of merchants would be "unable to determine whether they are class members".[3]

181. In *Commercial and Interregional Card Claims I Ltd & Others v Mastercard Inc & Others* [2024] CAT 39; [2024] 6 WLUK 181 ("*CICC 2*"), the second certification judgment in those proceedings, the issue was only resolved because new information had been brought forward to show that acquirers were required to make available the relevant transaction information to merchants under the Interchange Fee Regulation 2015.[4]

182. Mr Kennelly KC, on behalf of the Proposed Defendants, submitted the principal issue remaining between the parties related to the proposed class definition and to the comparison of the prices actually paid under the CHA Contract with the actual price of one or more SIM-only contracts offering comparable services, having regard to the fact the claim period may begin prior to 2007. In short, the proposed class definition relied upon a consumer being able to obtain the "relevant SIM Only Price". The issue is that there is no workable means for the Tribunal or consumers to identify, at this stage, the comparable SIM Only Price for any CHA Contract to enable such a comparison.

183. During the relevant period, there were a very large number of SIM-only contracts on offer at any one time, with prices at very different points. Determining which of the prices charged under one or more of these types of contracts for Airtime Services was comparable to a particular CHA Contract charge is a complex and uncertain task, which involves the exercise of significant expert judgment. This would be a very difficult exercise for the Tribunal, still more for a PCM, even if the necessary information were readily available. A comparison of different mobile phone contracts in which different

[3] See *CICC 1* at [182]-[284]; and [196]-[198].
[4] See CICC 2 at [85].

allowances and other features may be offered is not a mechanistic or straightforward exercise.

184. The PCR's expert, Dr Davis, in setting out his methodology for assessing damages, considers it important to compare the CHA Contract price with the comparable SIM-only package available at the end of the Minimum Term. This would require PCMs to work out if the comparable SIM-only package available at end of their Minimum Term was better or worse than the CHA Contract they were paying at the time. The difficulty arises in relation to the range of SIM-only packages, depending on specific elements such as the minutes and texts included and data allowance, of which price is only part of the overall picture.

185. A PCM may have a record of his or her payments under the CHA Contract they had in the past. However, it is hard to retrieve information regarding the actual data allowances and particular add-ons to enable a comparison with a SIM Only Price. It would not be realistic to expect a consumer to undertake such a comparison which requires a very difficult exercise of judgment.

186. In any event, even if such a comparison were workable in principle, the Proposed Defendants argued that the information necessary to make the comparison was not readily available to PCMs. Dr Davis, the PCR's expert, states that PCMs may have personal records in the form of bank statements or bills, which may indicate the price paid under the CHA Contract, and whether they went beyond their Minimum Term. He admits that, at this stage, he does not know the proportion of people who would be able to access such records, but Ofcom indicates that individuals can estimate how much they typically pay (presently) on their mobile phone contracts. However, it does not inform PCMs as to the amount paid many years ago and, on the face of it, does not tell one about allowances, add-ons and other particular "dimensions" under the CHA Contract at the relevant time. Dr Davis proposed that PCMs seeking the necessary information could seek it from the relevant MNOs, either directly or by way of a Subject Access Request. Mr Kennelly submitted, by reference to the *CICC 1* judgment that it was unduly onerous, and therefore, unrealistic to expect PCMs to be required to proceed in this way in order to be able to determine whether they fell within the proposed class definition.

187. Mr Kennelly submitted that none of the four publicly available sources of information identified by Dr Davis provided an adequate remedy for this problem. Two of the sources identified by Dr Davis, Teligen and Pure Pricing, were commercial providers and required the consumer to pay for the requested information. Accordingly, in Mr Kennelly's submission, these could be disregarded on the basis that it was not realistic to expect consumers to pay a fee. Turning to the third, the Wayback Machine, Mr Kennelly submitted that it was clear from Dr Davis' research that the use of this search engine was not straightforward, and that the results it produced were extremely patchy. Dr Davis' final proposal was for consumers to use information generated by Ofcom. This too was unrealistic. It was not realistic to expect consumers to comb through the many pages of the Ofcom reports to identify the relevant SIM Only Price.

(b) The PCR's Submissions

188. The fundamental problem with the approach of the Proposed Defendants was that it conflated the requirements of rules 79(1)(a) and 79(2)(e). Rule 79(1)(a) is concerned with conceptual clarity (see the judgment of Sir Peter Roth in the *Trucks CPO Litigation* [2022] CAT 25, [2022] 6 WLUK 85 at [188]).

189. The proposed class definition, as amended, set out at paragraph 176 above is framed in objective terms. It simply requires a comparison between two prices levied by the Proposed Defendants: the charge levied under the relevant CHA Contract after expiry of the Minimum Term, and the charge for Airtime Services in isolation. PCMs are persons for whom the former charges are higher than the latter. Thus, the proposed class definition is capable of readily being understood in objective terms, both by the Tribunal and by PCMs. Therefore, the requirements under rule 79(1)(a) are satisfied as are the matters raised in paragraph 6.37 of the Guide.

190. Mr Thompson submitted that it is not necessary or appropriate for the Tribunal to engage in an individual assessment of specific facts at the CPO stage, or at all. Indeed, that approach would completely undermine the purpose of the collective actions regime. Furthermore, it was also important to distinguish

between the requirements of the proposed class definition, on the one hand, and the proposed methodology of the PCR's expert Dr Davis. The two exercises were quite different. All a PCM would require to determine whether he or she fell within the proposed class is an awareness that there was at least one monthly payment under their CHA Contract, after the end of the Minimum Term, that exceeded the SIM Only Price for the airtime services actually received under that contract.

191. The PCR argued that the CHA Contract price after the Minimum Term was easily satisfied, as both PCMs and the Proposed Defendants are likely to have both financing and billing records in a digital form of those monthly payments. The SIM Only Price was also readily comprehensible based on three factors:

(1) the airtime services that are actually provided by the Proposed Defendants themselves under their CHA Contracts (e.g. the minutes, texts data allowances);

(2) the Proposed Defendants' own published SIM Only Prices over time; and

(3) internal evidence from the MNOs as to how they calculated the initial charging structure for CHA Contracts (e.g. the cost recovery of the handsets and airtime services over the Minimum Term). A comparison may be made in relation the approach of the MNOs in relation to split contracts, where the cost of the Handset and Airtime Services are distinguished. (The PCR made clear that this is a factor that is relevant to rule 79(2)(e)).

192. In relation to the wide range of SIM Only Prices, Mr Thompson submitted this was irrelevant and the same type of point could easily be said in a range of cases where there are a number of different prices. The range in prices cannot be a reason why collective proceedings should not proceed. In addition, the range of SIM Only Prices, and the amount of information likely to be available following disclosure, were factors in favour of the PCR. The only issue is whether there was likely to be at least one SIM Only Price, either identical or reasonably

comparable to the price for the Airtime Services supplied under the PCM's CHA Contract. The fact that from the Proposed Defendants' own evidence prepared for the Second Period Application, there were a galaxy of different published SIM Only Prices made it particularly unlikely that none of them is suitable for that purpose.

193. The PCR submitted that it is obvious that the MNOs are sophisticated suppliers, and that the prices charged in a CHA Contract and a SIM-only contract are carefully calculated. It was therefore no less obvious that the value of those different propositions would have been the subject of internal evaluation at all relevant times, and that will inevitably be an area for an application for disclosure and witness evidence in due course.

194. The Proposed Defendants did not positively assert that there was not, in fact, a suitable published or internal comparator for at least a substantial proportion of the services supplied under CHA Contracts. The PCR asserted that is quite an unlikely proposition, given that these are services which they themselves supplied under their CHA Contracts. The Proposed Defendants did not say that the Airtime Services offered on a SIM-only basis were never the same as the Airtime Services offered on a CHA Contract. Further, it was not suggested that Airtime Services offered on a SIM-only basis were invariably worse than Airtime Services offered on a CHA Contract.

195. Mr Thompson stated that if the Airtime Services which were publicly offered on a SIM-only basis were identical or better than those offered under a CHA Contract, then there is no problem. One can simply compare the prices directly. The highest that the Proposed Defendants can put their case is that there may be some instances where the only available SIM-only offers by a Proposed Defendant were either worse in some respects, or not easily comparable with those provided under the CHA Contract. In such cases, both Dr Davis and the PCR accept that you may need an exercise of judgement or additional internal evidence from the Proposed Defendants to determine the value of the Airtime Services actually supplied under a contract after the Minimum Term. However, the comparator is still the Airtime Services actually supplied by the Proposed Defendants to the PCMs under the CHA Contract, and the price that would have

been charged by that MNO for those same airtime services independently of the handset price. The PCR argued that the Proposed Defendants have not produced any evidence to suggest that they would not be able to value the Airtime Services offered to CHA customers after the Minimum Term, or at least to set a range within which that value lies.

196. Inputs for Dr Davis's methodology, for abuse and to assess aggregate loss, will require data in relation to actual SIM Only Prices (i.e. data disclosed during the post-certification stage). To complement actual SIM-Only Prices, Dr Davis will need to model certain SIM Only Prices:

(1) It is unlikely disclosure of actual SIM Only Prices will provide comprehensive data for all relevant contract plans, at all relevant points in time. Therefore, some degree of approximation and modelling will be required to achieve a robust analysis of prices that the individuals actually paid, and prices that would have been paid.

(2) A granular comparison of each relevant factual price that was paid after the expiry of a CHA Contract Minimum Term with each and every factual SIM Only Price is not required or desirable. Such an exercise is not feasible. It is entirely proper that the PCR's proposed methodology for these proceedings will seek to harness appropriate modelling techniques as part of the assessment of abuse and class-wide harm.

197. The possibility that some PCMs may ultimately find it difficult or may be unable to prove their membership of the class is not a material factor in relation to Eligibility Condition or certification. The validity of the proposed class definition is not undermined by the possibility that some class members may ultimately be unable to prove that they are members of the class or that they have suffered any loss, or indeed, that they may fall within a subcategory of class member that the Tribunal considers have failed to establish any loss.

(c) The Tribunal's Decision

The Proposed Defendants' principal argument

198. We consider that the key to dealing with the Proposed Defendant's principal argument in respect of eligibility is understanding the related, but separate, functions served by rules 79(1)(a) and 79(2)(e).

199. In our view, the relationship between those two rules has been clearly and helpfully summarised in the two *CICC* decisions. As we have quoted above (at 179), in [62] of *CICC 1*, the Tribunal concisely set out both the separate functions and the inter-relationship between the two rules.

200. Rule 79(1)(a) sets out a threshold requirement – a hurdle – which needs to be overcome before claims are certified as eligible for inclusion in collective proceedings. This rule focuses on the design of the proposed class definition, seeking to ensure that it is objective, clear and *"whether, on its face, it is capable of sensibly identifying a class."* (*CICC 1* at [62(3)]). The Tribunal recognised that there might be some ambiguity or uncertainty in a proposed class definition but, in making this assessment, the Tribunal ought to make "*reasonable assumptions based on common sense*" (*CICC 1* at [62(3)]).

201. By contrast, rule 79(2)(e) is one of the factors which the Tribunal is to consider in assessing the suitability of the claims for collective proceedings. It is concerned with issues of practicality and the mechanics of verifying whether a particular individual falls within the proposed class. As such, it involves a consideration of questions relating to, for example, the registration of class members and the distribution of any damages awarded.

202. As the Tribunal noted in *CICC 1,* it is obvious that these two rules are inter-related. If one has a proposed class definition which, on its face, is incapable of sensibly identifying the class, it follows that it will be difficult, if not impossible, to determine whether any particular member falls within that proposed class. However, the fact that the two rules are linked does not mean that their requirements are the same, or that the more mechanical considerations required by rule 79(2)(e) should be promoted to being part of rule 79(1)(a).

203. That clarification is apparent from the Tribunal's judgment in *CICC 2.*

> "69. We therefore see no reason to depart from the view expressed in …[*CICC 1*] that the primary exercise under rule 79(1)(a) is to decide whether or not the class definition is, on its face, using reasonable assumptions based on common sense, capable of sensibly identifying a class. The Tribunal was unable to reach that conclusion in …[*CICC 1*], because there was, on the face of the evidence before the Tribunal, no reason to believe that a large number of merchants could determine, with any relative ease, whether they were included in the class or not.
>
> 70. That is not, however, to suggest that the PCRs are faced with a hurdle that requires them to establish that every merchant who might be in the class can easily and quickly verify that position. At least as far as rule 79(1) is concerned, the exercise is a more general one, involving an objective assessment of the class definition on the basis of reasonable assumptions, and allowing for a degree of uncertainty or ambiguity. The core question (both in …[*CICC 1*] and in relation to this issue in the Revised Applications) concerns the reasonable assumptions that apply in making that objective assessment.
>
> 71. In …[*CICC 1*], the Tribunal concluded that there was no reasonable basis to assume that a merchant on a blended contract could say with any certainty whether they were within the class. Put another way, the PCRs failed to address this point of identifiability with any sufficient contextual material that might reasonably support such an assumption.
>
> 72. When one comes to consider rule 79(2), the question becomes much more about practicality, and the Tribunal will exercise its judgment in broad terms at the CPO stage, provided it is satisfied that there is going to be a workable methodology (or, possibly, methodologies) which will allow the mechanics of registration, distribution and the like to be given effect. That requires, in practice, at least a credible suggestion about how merchants might be able to identify themselves."

204. Approaching the Proposed Defendants' principal criticism of the proposed class definition in light of this guidance, we consider that it should be rejected.

205. In respect of requirements of rule 79(1)(a), we are satisfied that the proposed class definition, viewed objectively, does, on its face, set out a clear class definition – namely those consumers who, after the expiry of the Minimum Term, have made a periodic payment to one of the Proposed Defendants which is in excess of the SIM Only Price. There is no question of this definition including proposed class members who have no claim (cf. *CICC 2* at [51]-[56]).

206. We consider that the Proposed Defendants' argument, properly understood, seeks to impose on the PCR a hurdle to the effect that, paraphrasing *CICC 2* at [70], every consumer can quickly and easily identify the SIM Only Price. As such, the Proposed Defendants' argument proceeds on a misunderstanding of

the function and requirements of rule 79(1)(a). At the more general level required by rule 79(1)(a), we are not persuaded that the proposed class definition is deficient.

207. Having considered the second expert report of Dr Davis ("Davis 2") on behalf of the PCR, we are satisfied that the assumptions he makes as to the approach of a potential PCM to the proposed class definition are reasonable and consistent with common sense. Dr Davis states:

> "18. Put simply, for an individual PCM to determine whether they are in the Proposed Class they would require less information than an expert attempting to estimate aggregate damages. Indeed, for an individual to take a view on whether or not they individually satisfy the PCD, it would be sufficient for the individual to obtain data to ascertain:
>
> > a. whether there was some month, call it month t, in which they were beyond the Minimum Term for their CHA Contract, for which
> >
> > b. the price the individual paid for their CHA Contract in month t, considering information on the airtime allowances (minutes, text and data included), as well as, if appropriate, any other add-ons they were entitled to (for e.g., roaming, additional subscriptions), was greater than
> >
> > c. the price of some contract for Airtime Services only ("SIM Only Contract") with comparable (or if necessary slightly better) airtime allowances and add-ons (if appropriate) compared to those which were available under the individual's CHA Contract in month t.
>
> 19. Second, although there is no guarantee that it will be the case for every individual, I note that in some instances an individual (with an understanding of the CHA Price they paid) will:
>
> > a. be able to determine whether they meet the PCD even if the individual:
> >
> > > i. can only observe the price of an exactly comparable SIM Only Contract for some periods (i.e. even if they cannot observe a comparable SIM Only Contract price for all of the periods in which they might potentially meet the PCD); or
> > >
> > > ii. cannot observe the price of an exactly comparable SIM Only Contract, provided they instead have data on a SIM Only Price with better Airtime Services (and if appropriate add-ons); or in some cases
> > >
> > > iii. cannot observe one of the two prices themselves with certainty. For example, an individual PCM may know that the CHA Price was, say, between £40 and £50 per month and may understand from the available information that SIM Only Prices for comparable or better Airtime Services were no more

> than, say, £30 per month. In this example, even with less than certain information, the PCM would know that their CHA Price was higher than the SIM Only Price.
>
> b. be able to learn about whether they meet the PCD from data and information relevant to other individuals. Specifically, on the basis of my current understanding, the terms of a given type of contract will be common across subsets of purchasers at a given point in time since price structures in the industry do not appear to be individual specific."

208. In essence, we agree with Dr Davis that, for the purposes of a PCM identifying whether he or she may fall within the proposed class definition, it is not unreasonable to assume that the PCM will fairly readily be able to determine (i) the services that he or she received from the relevant MNO; (ii) the monthly payment he or she was making; and (iii) the period for which he or she made those payments. As to the comparable SIM Only Price, we are satisfied that, having regard to all the circumstances, it is reasonable to assume that a PCM will be able to identify, using one of the sources referred to by Dr Davis, that, as a minimum, he or she has made at least one monthly payment which is greater than the prices quoted by the MNO for comparable or better SIM-only services. In this regard, it is, in our view, important to remember that the purpose of the collective actions procedure is to facilitate access to justice, and we ought not to adopt an overly prescriptive approach (see *Le Patourel v BT Group* (CA) [2022] EWCA Civ 593; [2022] Bus LR 660 at [29]).

209. We recognise, as indeed it appears does Dr Davis, that the methodology to be employed for quantifying the damages claimed by the PCR is a considerably more complex task, which will require both detailed analysis and significant amounts of information which are not publicly available. However, we do not consider that this recognition impacts on our conclusion that the proposed class definition meets the requirements of rule 79(1)(a).

210. We also recognise that it may be that, as a result of the potential complexities of carrying out the exercise of comparing the services provided in terms of CHA Contracts and SIM-only contracts founded upon by the Proposed Defendants, there may be PCMs apparently falling within the proposed class definition who, upon more detailed analysis, turn out not to have a claim. This possibility also

does not, in our view, undermine our conclusion in respect of rule 79(1)(a). As was noted in *CICC 2* (at [61]):

> "There is also, in our judgment, a clear distinction between a class definition which might, inadvertently, produce the result that a class member turns out not to have a claim, and the deliberate inclusion in the class of a large number (potentially the majority) of class members in respect of which it is known that they have no claim. The former is a necessary function of the type of proceedings, involving classes with large membership, and reflects the discouragement by the Tribunal in [129] of Gutmann of "speculative examples". The latter seems to us to disregard altogether the plain requirements of section 47B" (emphasis added)

211. Turning to the separate requirements of rule 79(2)(e), the Proposed Defendants' argument comes to be that the proposed class definition means it will not be possible to determine whether any person is or is not a member of the class. The focus of the Proposed Defendants' criticism are the issues they raise in relation to the identification of the SIM Only Price. In this regard, we consider it is important to appreciate that the requirements of rule 79(2)(e) are focused on determining whether there is going to be a workable methodology which will allow the mechanics of registration, distribution and the like to be given effect. However, as noted in *CICC 2,* that requires at least a credible suggestion as to how a PCM might be able to self-identify (see *CICC 2* at [72]).

212. Essentially, for the reasons we have set out above in respect of the requirements of rule 79(1)(a), we are satisfied that the approach identified by Dr Davis is adequate for the purposes of PCMs identifying themselves as members of the proposed class.

213. First, in terms of making the comparison between the price paid under a consumer's CHA Contract and the SIM Only Price, there appears to us to be an air of unreality in relation to the Proposed Defendants' argument. The proposition appears to be that, as a result of the variety of services offered by an MNO, a consumer may not definitively know which SIM Only Price to use as a comparison, and it will be impossible (or at least impracticable) for that consumer to determine whether he or she falls within the proposed class. However, if such a comparison is so difficult, it is surprising that the regulator, Ofcom, felt able in its September 2018 publication to state:

> "3.6 If customers on bundled contracts do not take action at the end of their minimum contract period, their contract rolls forward and by default they continue to pay a price which effectively includes the cost of the handset, which in many cases they will have already paid-off and therefore own outright. This price is often significantly higher than if they switched to a SIM-only contract." (emphasis added)."

214. We consider that the flaw in the Proposed Defendants' approach is to assume that, without being able definitively to determine the exact SIM Only Price, no comparison is possible. However, as Dr Davis points out, even without an exact comparator, meaningful comparisons can be made to enable a consumer to determine whether he or she fell within the proposed class definition (see Davis 2, paragraph 19a(i) and (ii), quoted above at paragraph 207).

215. Second, in relation to whether PCMs would be able to access the information necessary to make the comparison, we are satisfied, for the purposes of rule 79(2)(e), that the sources of information identified by Dr Davis represent a "credible suggestion" (as it was put in *CICC 2* at [72]) as to how a PCM could source information to identify whether he or she fell within the proposed class. When it is understood that the necessary comparison need not be for the entire period of a PCM's potential claim, and may not be with an exactly comparable provision of services, we are satisfied that the sources of information identified are adequate for the purposes of rule 79(2)(e).

216. We are fortified in this conclusion by the apparent ease with which the SPA Applicants produced historic pricing information in respect of SIM-only contracts for the purpose of advancing its argument in respect of the Second Period Application. In this regard, we are not persuaded, despite Ms Demetriou's best efforts to argue the contrary (see paragraphs 95 and 96 above), that the Proposed Defendants could satisfactorily resolve the tension between the principal argument in respect of certification and Second Period Application, particularly in light of our decision on the First Period Application. We struggle to see how, at least for the SPA Applicants, they can argue both that there is information now available on the basis of which it is contended that PCMs ought to have known by October 2017 (at the latest) that there were cheaper rates available for Airtime Services only, and that it is impracticable for a PCM to utilise this same information to determine whether he or she falls

within the proposed class. Having considered the material produced, we are of the view that it supports Dr Davis' suggestion that the Wayback Machine could be used to provide PCMs with access to information necessary to verify their membership of the proposed class.

(d) The Second Period Application Issue

217. As we have noted above (at paragraphs 117 and 118), when making submissions in support of the Second Period Application, Mr Williams, for the SPA Applicants, advanced an alternative position in the event that the Second Period Application was refused. The argument was to the effect that if the Tribunal required to consider the actual knowledge of PCMs for the purposes of limitation, this would represent a significant non-common issue. The PCR had not, it was submitted, put forward a methodology as to how this was to be managed. Accordingly, this represented a reason why the Tribunal ought not to certify the claims in respect of the period prior to 8 March 2017 in terms of rule 79(1)(b).

218. We do not consider that, having regard to all the circumstances, this issue represents a reason to refuse certification. We reach this conclusion for two principal reasons. First, we do not consider that, properly understood, the argument made by Mr Williams highlights a non-common issue. The application of the English (and Northern Irish) law of limitation to the applicable claims which form part of the proposed collective proceedings is a common issue. In truth, Mr Williams' complaint is that the answer on behalf of each of the PCMs may not be common. However, as the Court of Appeal made clear in *Gutmann (Trains)* [2022] EWCA Civ 1077; [2022] 7 WLUK 388 ("*Gutmann Trains CA*"), endorsing the decision of the Tribunal below, what matters is the question and not the answer:

> "41. …a common issue does not require that all members of the class have the same interest in its resolution. The commonality refers to the question not the answer, and there can be a significant level of difference between the position of class members. Therefore the question may receive varied and nuanced answers depending on the situation of different class members, so long as the issue advances the litigation as a whole."

219. Second, and in any event, we are not persuaded that it necessarily follows from our rejection of the Second Period Application that the Tribunal will need to embark on a PCM by PCM inquiry into actual knowledge. These proceedings are in no way unusual in involving potential defences arising from the LA80. However, to proceed to a factual inquiry on a PCM by PCM basis in proceedings of this sort would be extremely novel. Without reaching a concluded view on any question of further procedure, we see force in the suggestion made by the PCR that there may be ways in which the date of deemed knowledge for the purposes of section 32 LA80 could be approached without requiring a PCM by PCM inquiry.

(e) The remaining Eligibility Condition factors

220. Turning to the remaining factors, we note, as was pointed out in submissions by Mr Thompson:

(1) The Proposed Defendants did not seek to strike out any part of the PCR's substantive case (other than in respect of the two applications based on limitation dealt with above).

(2) No challenge was made to the methodology adopted by the PCR's chosen expert, Dr Davis, in respect of either abuse or the quantification of aggregate damages.

(3) Other than the issues dealt with above, the parties had agreed the class definition. In that regard, the PCR had agreed to amend the definition of "Relevant Period" to incorporate an end date of 31 March 2025, being the date of the first day of the CPO Hearing.

221. Beyond the specific points raised by the Proposed Defendants, there was no dispute that: collective proceedings were an appropriate means for the fair and efficient resolution of the common issues (rule 79(2)(a)); there were no other separate proceedings making claims of the same or a similar nature (rule 79(2)(c)); and that the claims were suitable for an aggregate award of damages.

222. In all the circumstances, we are satisfied that the Eligibility Condition is met.

(3) Authorisation Condition Issues

223. The PCR has secured funding in excess of £18 million from LCM Funding UK Limited ("LCM UK" or the "Funder") to fund the separate proceedings collectively and cover costs incurred by the PCR. LCM UK is an English company incorporated on 16 December 2019, and its principal business activity is investing in litigation financing projects. LCM UK is a wholly-owned subsidiary of LCM Group Holdings Proprietary Limited ("LCM GH"), an Australian company, which is in turn a wholly-owned subsidiary of Litigation Capital Management Limited ("LCM Ltd"), an Australian public company. LCM Ltd has net assets of A$188,941,000. LCM GH and LCM Ltd will collectively be referred to as the "LCM Group".

224. In addition, the PCR has taken out after the event insurance ("ATE Policy") which provides adverse costs cover of £20 million in respect of the relevant proceedings collectively.

225. The PCR has filed the following evidence in relation to funding issues:

(1) the First and Second Witness Statements of the PCR, Mr Justin Gutmann;

(2) the First Witness Statement of Mr Patrick Moloney, a director at LCM UK, in relation to the funding provided; and

(3) the First Witness Statement of Mr Robert Warner, an international broker for speciality legal risk insurers, in relation to the possibility of providing a right of direct enforcement for the Proposed Defendants to claim under the ATE Policy.

(a) The Proposed Defendants' Submissions

226. The Proposed Defendants raised two issues in relation to the PCR's funding arrangements.

227. First, the Proposed Defendants highlighted the absence of a legally binding guarantee from the Funder's parent company. The Proposed Defendants submitted that LCM UK has equity of just £22 million in the year ending 30 June 2024 and, although Mr Moloney states that the LCM Group's funds flow to its subsidiaries as required, and that the Funder has the "full support" of LCM Ltd, the PCR (and/or the Funder) have refused the request for a legally binding guarantee from LCM Ltd that it will meet the Funder's liability to pay the PCR's costs if required.

228. The Proposed Defendants submitted that this is a reasonable request given LCM UK's limited capital resources and its role in funding other proceedings before the Tribunal. Mr Kennelly also noted that LCM Ltd was not a member of the Association of Litigation Funders and, as such, was not subject to the rules of that association which imposed obligations to maintain funding capacity. There was no obvious reason why a guarantee from LCM Ltd could not be readily provided and the Proposed Defendants specifically note in this regard that LCM Ltd already provides an internal guarantee to other companies within the LCM Group (albeit not LCM UK). A guarantee would provide the necessary assurance to the Tribunal for the purposes of rule 78(2)(a) that the PCR will be able to meet his own costs of running the proceedings.

229. Second, the Proposed Defendants raised the question of the absence of a right on their part to claim directly under the ATE Policy. The Funder has not agreed to indemnify the PCR in respect of any adverse costs order. These costs are instead covered by the ATE Policy taken out by the PCR. It was therefore essential to the Proposed Defendants that the ATE Policy would be enforced in the event an adverse costs order is made.

230. The Proposed Defendants did not pursue the matter on the basis that Mr Gutmann is not reputable. However, the Proposed Defendants have raised

concerns, in light of Mr Gutmann's personal circumstances including his age, the fact that he resides in Italy and the likely time period over which any policy may be required to respond, that there is a more than minimal risk that he will not be in a position to make a claim under the ATE Policy and that decisions regarding the ATE Policy will be instead governed by the rules of a foreign jurisdiction.

231. The Proposed Defendants sought a direct right of enforcement under the ATE Policy to overcome such concerns. There was no reason why the insertion of a direct right of enforcement in favour of the Proposed Defendants would serve to increase the PCR's insurer's risk. It would simply put the Proposed Defendants in the same position as the PCR.

232. Mr Kennelly noted that the PCR's position was that, in order to obtain a direct right of enforcement, he would also be required to obtain an anti-avoidance endorsement ("AAE"). Mr Kennelly clarified that the Proposed Defendants no longer sought an AAE in light of the evidence provided by Mr Gutmann that it would cost in excess of £1 million to procure an AAE from the insurers under the ATE Policy. However, Mr Kennelly submitted that the PCR had not adequately explained why the two issues were related. Far from allaying the PCR's concerns, the fact that the provision of a direct right of enforcement was going to cost £1 million heightened the Proposed Defendants' concerns.

(b) The PCR's Submissions

233. Mr Thompson began by highlighting the fact that Mr Gutmann's personal suitability to act as the class representative has never really been challenged. The fact that he has acted as a class representative in other collective proceedings was well known, and his fairness, capacity and lack of any conflict were unimpeached.

234. In relation to the PCR's ability to fund his own costs, the Funder is the UK subsidiary of a long-established global litigation funding business. Mr Thompson stressed the fact that the Funder is a UK company. It was not based offshore like certain other funders which fund other proceedings before the

Tribunal and which were, as a result, not subject to certain additional protections (*cf UK Trucks Claim Limited* [2019] CAT 26; [2019] 10 WLUK 722 ("*Trucks CPO Funding*") at [58] to [67]). The Funder's ultimate parent, LCM Ltd, is listed on the Alternative Investment Market of the London Stock Exchange. It is only one of four listed companies engaged in litigation funding. As a result, LCM Ltd is subject to rigorous transparency requirements, which are not applicable to other non-listed funders.

235. As set out in detail by Mr Moloney in his witness statement, both LCM Group and the UK subsidiary, LCM UK, have access to very substantial funds, both internally and from third-party investors. LCM Group has been, and remains, active on the international funding market, including 19 ongoing cases in the High Court and the Tribunal. The UK cases are funded by the Funder.

236. On the basis of this material, Mr Thompson submitted that it is wholly implausible that a very large group of international funders would default on its obligations in any one of these major cases, both because it would be catastrophic for its listing reputation, and also because it would undermine its funding position in relation to all its other cases.

237. Mr Thompson pointed out that the Proposed Defendants had put forward neither evidence nor any substantive reasoning to support their demand that the Tribunal should require Mr Gutmann to obtain a group guarantee to protect the interests of the PCMs. They have advanced no evidence that could undermine Mr Moloney's evidence that the LCM Group is a substantial and viable funding business, well capable of supporting its local subsidiaries including LCM UK. Mr Thompson also submitted that the intra-group guarantees provided by LCM Ltd did not appear to be analogous with what the Proposed Defendants sought in the present case.

238. In relation to the Proposed Defendants' request for direct enforcement under the ATE Policy, Mr Thompson submitted that there was no basis for a right of direct enforcement to be required; imposing such an obligation is unnecessary and would be onerous and disproportionate. There is no general rule of law or practice that a right of direct enforcement for defendants must be provided. On

the contrary, augmented costs protection for defendants has only been required in special circumstances (*cf Consumers' Association v Qualcomm* [2022] CAT 20; [2022] 5 WLUK 318 ("*Qualcomm")* at [121]).

239. As stated in Mr Warner's witness statement, based on feedback from the insurers which have underwritten the ATE Policy, a direct right of enforcement would not be given absent an AAE being put in place. Mr Thompson noted that, although at one point the Proposed Defendants had sought to argue that an AAE should be obtained, they had backed away from making that argument. In any event, the costs of obtaining an AAE would be well in excess of £1 million, which was manifestly disproportionate to any additional benefit that it would provide.

240. The sole bases upon which the Proposed Defendants advanced this argument seemed really to be Mr Gutmann's age and the fact that he lived in Italy. However, Mr Thompson submitted that there was no reasonable basis to consider that the PCR would fail to claim under the ATE Policy if he were ordered to pay the Proposed Defendants' costs. Mr Gutmann has a track record of acting with integrity in the proceedings he commences before the Tribunal. Further, he has an obvious incentive to claim under the ATE Policy should the need arise (i.e., as opposed to choosing not to make a claim such that he is liable to satisfy a costs order from his personal funds). The Proposed Defendants have not sought to argue that the exclusions under the ATE Policy are inconsistent with exclusions in other certified cases.

241. In addition, Mr Thompson drew attention to the additional powers the Tribunal had to address issues relating to the PCR. First, pursuant to rule 85 of the 2015 Rules, the Tribunal may, at any time, and of its own initiative, make an order to vary or revoke a CPO. In deciding whether to vary or revoke a CPO, the Tribunal shall take into account all of the relevant circumstances, including whether the class representative continues to satisfy the Authorisation Condition and whether a suitable alternative class representative can be authorised. Second, rule 87 relates to the circumstances when a class representative may seek to withdraw from acting with the Tribunal's approval. Therefore, if the PCR were to fall ill or be incapacitated in any way, the Tribunal, and indeed Mr

Gutmann himself, have ample powers to address the situation. The Proposed Defendants could also make an application to require such matters to be addressed.

(c) The Tribunal's Decision

242. We consider that it is important to begin by reminding ourselves that the Proposed Defendants' arguments are advanced in relation to the question of the authorisation of the PCR under rule 78(1)(b) and (2). Accordingly, the two points being raised by the Proposed Defendants are being made to form part of our consideration as to whether we consider that it is just and reasonable for the PCR to act as the class representative.

243. Under that general heading, the Proposed Defendants raise two points. The first, which relates to the absence of a guarantee from the Funder's ultimate parent company, is said to relate to rule 78(2)(a) which provides for a consideration by the Tribunal of whether the PCR would fairly and adequately act in the interests of the class members. The second, which relates to the Proposed Defendants' request for a direct right to enforce the PCR's ATE Policy, relates to rule 78(2)(d) and is directed towards the Tribunal's consideration of whether the PCR will be able to pay the Proposed Defendants' recoverable costs if ordered to do so.

244. Having considered the Proposed Defendants' arguments, we are not persuaded that either materially impacts on our view as to whether it is just and reasonable for the PCR to act as the class representative in the proposed proceedings.

245. In respect of the Proposed Defendants' first argument, it is notable that no general challenge is made in respect of the funding arrangements which the PCR has secured with the Funder. Further, at the hearing, the Proposed Defendants did not seek to impugn the reputation of either the Funder or the LCM Group of which it is part. In this regard, we note that this Tribunal has previously certified collective proceedings funded by the Funder without the additional guarantee sought by the Proposed Defendants (see *David Courtney Boyle v Govia Thameslink Railway Limited & Others* [2022] CAT 35; [2022] 7 WLUK 485*).*

However, without making such a challenge, the Proposed Defendants sought to argue that the funding arrangements put in place by the PCR are materially deficient because the Funder has no legally binding means of obtaining funding from the LCM Group.

246. The principal difficulty we have with the argument advanced by the Proposed Defendants is that, while they had not identified any reasonable basis for inferring that the Funder will, at some point, no longer be able to access funding from the LCM Group, they sought to suggest that this represents a fundamental problem with the funding arrangements put in place by the PCR. Indeed, it was contended by the Proposed Defendants that, in some unexplained way, the absence of a guarantee is of such significance that it will impact on the PCR's ability to act fairly and adequately in the interests of the class members. In short, we are entirely unpersuaded by the Proposed Defendants' argument.

247. We find ourselves in a similar position in relation to the Proposed Defendants' second argument concerning their request for the right to claim directly under the PCR's ATE Policy. The Proposed Defendants are careful to make clear that they do not seek to impugn the reputation of the PCR himself, Mr Gutmann. Considering the PCR's professional background and his involvement in two other sets of collective proceedings before this Tribunal, the position adopted by the Proposed Defendants is entirely understandable.

248. However, the Proposed Defendants seek the right of direct enforcement on the basis of unspecified "reasonable concerns" that, in the event it becomes necessary to claim on the ATE Policy, either the PCR will not do so or will be prevented from doing so. The Proposed Defendants have failed to explain how their concerns in fact arise from either of the suggested bases - the PCR's age and the fact that he currently lives in Italy. Their concerns remain vague and unspecified.

249. Furthermore, the Proposed Defendants have also put forward no evidence to counter the statement of the insurance broker, Mr Warner, relied upon by the PCR. Mr Warner is clear that, on the basis of his discussions with four of the five insurers underwriting the PCR's ATE Policy, obtaining such a direct right

of enforcement would require the PCR to also pay for an AAE at a cost of well over £1 million. Given the existence of significant prejudice to the PCR were we to require him to procure a direct right of enforcement for the Proposed Defendants, we consider that the PCR is in a stronger position in this case than was so in *Qualcomm.*

250. In these circumstances, we do not consider that the failure by the PCR to have obtained a direct right of enforcement under the ATE Policy impacts on our view of the PCR's ability to pay the Proposed Defendants' recoverable costs if ordered to do so.

E. DEVELOPMENTS AFTER THE HEARING

(1) Background

251. In October 2025, at a point when the Tribunal was on the point of issuing its judgment in respect of the applications addressed above, the Tribunal received correspondence on behalf of all of the Proposed Defendants which raised concerns arising from the content of the annual statement for the year ended 30 June 2025 issued by the Funder's ultimate parent, LCM Ltd (the "LCM 2025 Statement").

252. In particular, the Proposed Defendants pointed out that within the LCM 2025 Statement, LCM Ltd's directors reported, among other things, that:

> "Given the number of adverse case outcomes in recent months, which have impacted cash inflows and increased indebtedness, the Directors have considered a range of scenarios, including plausible downside scenarios, and note that in certain circumstances, further case losses could lead to a breach of LCM's debt covenants.
>
> While LCM's lender has been responsive in providing near-term covenant waivers to date, any further amendments, should they be required, will be subject to negotiation. This assessment is linked to a robust evaluation of the principal risks facing LCM and the potential impact of these risks being realised.
>
> After considering LCM's forecasts, stress testing and available mitigating actions, and having regard to the inherent risks associated with the binary nature of LCM's investment model, the Directors have concluded that a material uncertainty exists which may cast significant doubt on LCM's ability to continue as a going concern.

> The material uncertainty relates to LCM's ability to comply with its debt covenants in the event of certain adverse case outcomes. The Directors have a reasonable expectation, based on current discussions, that LCM will continue to receive the necessary support from its lender to allow it to continue in operational existence for the foreseeable future. Accordingly, the financial statements have been prepared on a going concern basis, whilst noting the material uncertainty above.
>
> However, these events and conditions indicate that a material uncertainty exists which may cast significant doubt on LCM's ability to continue as a going concern, and therefore the entity may be unable to realise its assets and discharge its liabilities in the normal course of business and at the amounts stated in the financial report. The financial report does not include any adjustments relating to the amounts or classification of recorded assets or liabilities that might be necessary if LCM does not continue as a going concern." (LCM 2025 Statement, p. 39).

253. The LCM 2025 Statement explained further:

> "Given the number of adverse case outcomes in recent months, which have impacted cash inflows and increased indebtedness, the Directors have considered a range of scenarios, including plausible downside scenarios, and note that in certain circumstances, further case losses could lead to a breach of LCM's debt covenants.
>
> LCM's lender has granted a debt covenant waiver through to 30 December 2025 and as part of this arrangement the interest rate on the loan increases by 2.00% per annum during the waiver period, and a one-time waiver fee equal to 1.50% of the principal amount outstanding will be payable.
>
> While LCM's lender has been responsive in providing near-term covenant waivers to date, any further amendments, should they be required, will be subject to negotiation. This assessment is linked to a robust evaluation of the principal risks facing LCM and the potential impact of these risks being realised.
>
> After considering LCM's forecasts, stress testing and available mitigating actions, and having regard to the inherent risks associated with the binary nature of LCM's investment model, the Directors have concluded that a material uncertainty exists which may cast significant doubt on LCM's ability to continue as a going concern.
>
> The material uncertainty relates to LCM's ability to comply with its debt covenants in the event of certain adverse case outcomes. The Directors have a reasonable expectation, based on current discussions, that LCM will continue to receive the necessary support from its lender to allow it to continue in operational existence for the foreseeable future. Accordingly, the financial statements have been prepared on a going concern basis, whilst noting the material uncertainty above." (LCM 2025 Statement, p. 10).

254. Given the nature of the concerns raised, the Tribunal invited the PCR to make any additional submissions it wished, in writing, in respect of the LCM 2025 Statement and, thereafter, provided the Proposed Defendants with an

opportunity to respond to those submissions, again in writing. The PCR duly lodged submissions together with a Second Statement of Mr Moloney of LCM UK. In their response, the Proposed Defendants contended that, as a result of what had been disclosed about the position of LCM Ltd, the PCR did not satisfy the Authorisation Condition. In light of this development, we afforded the PCR an opportunity to reply. Together with his reply submissions, the PCR also lodged a First Witness Statement from Rodger Burnett, a director at Charles Lyndon Limited who are acting for the PCR in these proceedings.

(2) The Proposed Defendants' Submissions

255. The Proposed Defendants' argument was, in essence, that, in light of the position of what was disclosed about the position of LCM Ltd, the Tribunal could not have confidence in the PCR's ability either to fund his own costs of bringing the proceedings and/or to act fairly and adequately in the interests of the class.

256. The first of these issues arose as an extension of the factor raised expressly in rule 78(2)(d) of the 2015 Rules, namely, that the Tribunal consider the PCR's ability to pay the defendant's recoverable costs if ordered to do so (see the Guide at paragraph 6.33). The second issue arose in the context of the Tribunal's consideration of the factor identified in rule 78(2)(a), namely that the PCR would act fairly and adequately in the interests of the class members. Consideration of the funding arrangements which the PCR had in place for his own costs arose in this context because the Tribunal is required to be satisfied that appropriate arrangements had been put in place which would enable the potential class members to have the benefit of effectively conducted proceedings (*Trucks CPO Funding*, at [52]). As noted below, the Proposed Defendants also directly called in question the PCR's ability to act fairly and adequately in the interests of the class as a result of what were perceived by the Proposed Defendants to be inadequacies in the PCR's response to the LCM 2025 Statement (see paragraph 260 below).

257. The Proposed Defendants submitted that the LCM 2025 Statement showed that LCM Ltd was in a serious financial predicament. It had been necessary for

LCM Ltd to obtain a debt covenant waiver from its lender, Northleaf Capital Partners ("Northleaf"). That waiver expires on 30 December 2025 and would be the subject of further negotiation. These circumstances had led LCM Ltd's directors to conclude that a material uncertainty existed. As such, the issuing of the LCM 2025 Statement represented a significant change in the PCR's funding position from the certification hearing. The Proposed Defendants highlighted the extent to which the PCR had relied on the financial covenant of the LCM Group at that hearing (see paragraphs 233 to 236 above).

258. The Proposed Defendants submitted that, in light of the LCM 2025 Statement, the Authorisation Condition was not satisfied for three reasons.

259. First, the Tribunal could not be satisfied that the PCR had the ability to fund his own costs. It was apparent that 25% of the £18,819,832.00 funding being provided to the PCR by the Funder was based on LCM Ltd's own funds. That significant proportion of the PCR's funding was now in doubt. LCM Ltd's net asset position disclosed in the LCM 2025 Statement depended on its own appraisal of the returns it would make through litigation funding rather than cash in the bank. In relation to the remaining 75% of the funding which was sourced from funds obtained from third party investors, the PCR had provided no explanation as to whether these third party funds would remain available to the PCR in the event that LCM Ltd ceased to be a going concern. This seemed very unlikely. Furthermore, although the Proposed Defendants had not challenged the adequacy of the amount of funding to be provided, they noted that this figure was significantly lower than the costs budgeted or incurred in other sets of collective proceedings which involved only one defendant.

260. Second, the Proposed Defendants submitted that the PCR had failed candidly to acknowledge the very serious issues evident on the face of the LCM 2025 Statement. This failure, they stated, cast serious doubt on his ability to fairly and adequately act in the interests of the class.

261. Third, the Proposed Defendants argued the PCR's ability to pay the Proposed Defendants costs were also put in doubt. This issue arose because in terms of the PCR's ATE Policy, a "Second Deposit Premium" became payable in the

event that a CPO was granted. Given the uncertainty as to LCM Ltd's financial position, the Proposed Defendants could not be confident that the PCR would be in a position to pay the Second Deposit Premium and, therefore, that the ATE Policy would remain in place.

(3) The PCR's Reply

262. The PCR submitted that the arguments advanced by the Proposed Defendants were speculative, opportunistic and ought to be rejected. The approach of the Proposed Defendants was not consistent with the guidance provided by Lord Briggs in *Merricks SC* (see above at paragraph 44(1)). In particular, the Proposed Defendants were seeking, through the collective proceedings regime, to impose restrictions on claimants as a class which the law and rules of procedure would not impose on individual claimants. The Proposed Defendants were seeking to impose on the PCR a level of scrutiny of his funding arrangements which went beyond what was required for the broad assessment of his suitability to act as class representative (see *Trucks CPO Funding* at [75] and [109]).

263. It was important to consider all the issues raised by the Proposed Defendants through the prism of the test for authorisation in terms of rules 78(1)(b); 78(2)(a) and (d); 78(3)(c)(iii). Contrary to the Proposed Defendants' contentions, the PCR had prepared a robust litigation plan and budget in accordance with rule 78(3)(c)(iii) and had evidenced his ability to fund his costs. The PCR would continue to keep these arrangements under careful review in relation to all developments including, in particular, those disclosed in the LCM 2025 Statement.

264. The PCR also stressed that the Tribunal's supervisory function was an ongoing one pursuant to rule 85. This meant that the certification stage was not the last opportunity for the Tribunal to review the PCR's ability either to fund his own costs or to pay the Proposed Defendants' costs if so required. Accordingly, it was not appropriate for the Tribunal to test the PCR's arrangements by reference to a "worst case" scenario.

265. In respect of his funding arrangements, the PCR noted that, at the collective proceedings hearing, the Proposed Defendants had not challenged the adequacy of the c. £18.8 million. Even in their most recent submissions, it was not contended that this level of funding was a reason to refuse authorisation. The PCR also noted that the LFA enabled him to seek further funding if that was required.

266. The structure of the PCR's funding arrangements was, contrary to the Proposed Defendants' submissions, highly relevant to the Tribunal's consideration. In relation to the 25% of funding which was to come directly from LCM Ltd, the LCM 2025 Statement simply provided no basis for concluding that LCM Ltd would be unable to meet that commitment. The criticisms which were made of LCM Ltd's asset position as disclosed in the LCM 2025 Statement were no more than an unsubstantiated attempt to look behind the audited accounts. Those accounts had been prepared in accordance with the relevant standards. Furthermore, the PCR noted that LCM Ltd was a highly experienced litigation funder which had been operating for over 25 years. In respect of the remaining 75% of the funding, the PCR highlighted that, as was apparent from the statements provided by Mr Moloney, these funds had already been secured and committed for these proceedings. Those funds would remain available for the proceedings independently of LCM Ltd's financial position.

267. The PCR emphasised that the transparency as to LCM Ltd's financial position afforded to the PCR, the Proposed Defendants and the Tribunal, which arose from LCM Ltd's status as a listed company, was a positive aspect of the PCR's funding arrangements. Most fundamentally, the PCR submitted that the LCM 2025 Statement indicated that LCM Ltd was a going concern. The "material uncertainty" referred to arose from the inherent uncertainty in respect of the outcome of other cases which LCM Ltd was funding. The comment was premised on LCM Ltd sustaining further future losses in a material number of cases whilst not winning on any of its other cases. The 2025 Statement also made clear that LCM Ltd's directors had a reasonable expectation that the company would continue to receive the necessary support from its lender for the foreseeable future (see paragraph 252 above). That position was also borne out by Mr Moloney's second statement.

268. Against this background, the fact that the Proposed Defendants were asking the Tribunal to consider the detail of the LCM Ltd's funding arrangements with Northleaf demonstrated how far the Proposed Defendants had strayed from the questions which the Tribunal is actually required to consider in respect of the PCR's authorisation.

269. As to the Second Deposit Premium, the PCR submitted that this point was hopeless. There was simply no basis whatsoever to conclude that the PCR would be unable to pay the Second Deposit Premium as and when it fell due. Moreover, the Funder had agreed to pay this sum to the PCR's agent to be held in trust until it fell due.

270. Finally, the PCR submitted that the suggestion that the LCM 2025 Statement cast doubt on the PCR's ability to act fairly and adequately in the interests of class members had no proper basis. It was apparent from the statement prepared by Mr Burnett that the PCR had acted promptly and conscientiously to address the issues which arose from the LCM 2025 Statement. He had done so before any issue was raised on behalf of the Proposed Defendants. In the event that any issue were to arise in future, Mr Burnett's statement confirmed that, even in the event that LCM Ltd ceased to be able to provide funding to the PCR, it was reasonable to consider that alternative funding arrangements could be put in place within a reasonable timeframe.

(4) The Tribunal's Decision

271. As with our treatment of the issues raised by the Proposed Defendants in respect of the Authorisation Condition at the hearing (see above at paragraph 242 and following), we consider that the starting point requires to be the criteria set down in rule 78(1)(b) and (2).

272. On that basis, we consider that by far the most serious aspect of the challenges made in the Proposed Defendants' submissions is the suggestion that the PCR's response to the LCM 2025 Statement in some way casts doubt on his ability to act fairly and adequately in the interests of the class members (rule 78(2)(a)). As we understand it, this assertion is made on the basis that the PCR has failed

to acknowledge candidly, in the submissions made on his behalf, the issues evident on the face of the LCM 2025 Statement. The Proposed Defendants contend that this failure is compounded by the failure by the PCR either to explore or put in place any alternative or contingency arrangements.

273. Having considered the submissions made on behalf of the PCR and, in particular, the statement made by Mr Burnett, we have no hesitation in rejecting this aspect of the Proposed Defendants' submissions.

274. It is apparent from Mr Burnett's statement that the PCR acted promptly and assiduously on becoming aware of the content of the LCM 2025 Statement. On his instruction, his solicitors sought further information and assurances from LCM Ltd prior to this issue being raised by the Proposed Defendants. Moreover, it is also apparent that the suggestion that the PCR has failed to consider and explore the possibility of LCM Ltd's failure is simply unfounded. Mr Burnett makes clear both the PCR's approach, the steps he has taken and the advice he has received. On this basis, we see no reasonable grounds for questioning the PCR's approach. Nor do we see any reason to doubt that the PCR will continue to keep his funding arrangements and the position of LCM Ltd under review.

275. Furthermore, the Tribunal is unable to identify any particular aspect in which the submissions made on behalf of the PCR to the Tribunal in respect of the LCM 2025 Statement either lack candour or demonstrate an unrealistic approach. In this regard, we note that, despite making this serious allegation in brief and general terms, the Proposed Defendants have been apparently unable to particularise it to any degree. Having regard to the lack of particularisation, we are compelled to observe that we are surprised that the Proposed Defendants considered it appropriate to articulate a challenge to the authorisation of the PCR on this basis.

276. In light of this, the question which remains is – does the content of the LCM 2025 Statement raise any basis for considering that it would <u>not</u> be just and reasonable for the PCR to act as class representative. In this regard, the two particular factors that are highlighted in the Proposed Defendants' submissions

are, first, the PCR's ability to ability to fund his own costs; and, second, his ability to pay the Proposed Defendants' recoverable costs if ordered to do so.

277. We consider that the second factor can be easily disposed of as being simply unfounded. On the basis of Mr Burnett's statement, it is clear that there is no basis to conclude that there is any reason to doubt that the Second Deposit Premium would be paid as and when it falls due. In fact, on 3 November 2025, the PCR subsequently confirmed to the Tribunal that the necessary funds had been received by his agent, Charles Lyndon Limited.

278. In respect of the first factor, we accept that the content of the LCM 2025 Statement does highlight issues in respect of LCM Ltd's financial position which both merited careful consideration by the PCR and will require to be kept under review both by him and by the Tribunal. However, overall, we are not persuaded that, at this stage, there is any reason to consider that, in light of the LCM 2025 Statement, the PCR would be unable to act fairly and adequately in the interests of the class members. We have reached this conclusion for a number of reasons.

279. First, we consider that it is important to bear in mind that the Tribunal does not require, at the stage of certification, to determine the PCR's likely costs to the end of trial and be satisfied that the PCR has secured sufficient funding to cover those costs (see *Trucks CPO Funding* at [75], referred to above). To impose such a requirement at the stage of certification would fall foul of Lord Briggs' approach to the collective proceedings regime in *Merricks SC*. Rather, the Tribunal requires to consider the estimates and arrangements which the PCR has made and then to consider whether those arrangements will enable the PCR to act fairly and adequately in the interests of the class members.

280. Second, although within the LCM 2025 Statement, the directors of LCM Ltd set out their concerns as to its ongoing financial position, they nonetheless explain that:

> "The Directors have a reasonable expectation, based on current discussions, that LCM will continue to receive the necessary support from its lender to

> allow it to continue in operational existence for the foreseeable future." (LCM 2025 Statement at page 39)

We see no reason to doubt this statement.

281. Third, we consider that, contrary to what was submitted by the Proposed Defendants, the way in which the PCR's funding is structured is a relevant factor. In our view, the fact that up to 75% of the funding has been committed by third party investors and would remain available irrespective of whether LCM's funding ceased is of significance in this regard.

282. Fourth, we agree with the submissions made on behalf of the PCR that, in the circumstances, the Proposed Defendants' invitation to the Tribunal either to scrutinise the LCM Ltd's funding arrangements with Northleaf or to interrogate the assumptions made in LCM Ltd's audited accounts as to its net asset position go beyond what is required for the purposes of rule 78. The fact remains, as was submitted during the hearing, that LCM Ltd is a long established global litigation funding business with an established track record of funding proceedings, including collective proceedings.

283. Finally, we note from Mr Burnett's statement that, even if some issue were to arise in the future which would prevent LCM Ltd from continuing to provide funding to the PCR, it is reasonable to anticipate that alternative funding arrangements could be put in place with a period of three to five months.

284. In light of the foregoing, viewing the matter as a whole, we are satisfied that, at this stage, the present arrangements which the PCR has made will enable him to act fairly and adequately in the interests of the class members. However, we stress that this is a matter which we will keep under review. Accordingly, as we set out below, we direct that (1) the PCR shall inform the Tribunal and the Proposed Defendants of any material development in respect of his funding arrangements as soon as reasonably practicable; and, (2) in any event, the PCR shall file a summary updating the Tribunal and the Proposed Defendants of his funding position in advance of the next case management conference.

285. In respect of the remaining factors relating to authorisation set out in rule 78(2), we have considered the two witness statements prepared by the PCR himself and confirm that, in our view, it is just and reasonable for the PCR to act as such.

F. CONCLUSION AND DISPOSAL

286. The First Period Application is granted and claims for damages arising before 1 October 2015 in the Vodafone, EE, Three and O2 Proceedings are struck out.

287. The Second Period Application is refused.

288. The Tribunal is satisfied that the Eligibility and Authorisation Conditions are met, and therefore grants the PCR's CPO Applications in the Vodafone, EE, Three and O2 Proceedings.

289. The Tribunal further directs:

(1) the PCR is required to inform the Tribunal and the Proposed Defendants immediately of any material development in respect of his funding arrangements; and

(2) in advance of the next case management conference, the PCR is required to provide an update to the Tribunal and Proposed Defendants in respect of his current funding position.

290. This Judgment is unanimous.

The Honourable Lord Richardson
Chair

John Alty

William Bishop

Charles Dhanowa C.B.E., K.C. (*Hon*)
Registrar

Date: 14 November 2025