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6 **IN THE COMPETITION**
7 **APPEAL TRIBUNAL**
8

Case No. : 1266/7/7/16

9
10 Salisbury Square House
11 8 Salisbury Square
12 London EC4Y 8AP
13 (Remote Hearing)
14

Friday 26th March 2021

15
16 Before:
17 The Honourable Mr Justice Roth
18 Jane Burgess
19 Professor Michael Waterson
20 (Sitting as a Tribunal in England and Wales)
21

22
23 **BETWEEN:**
24

25
26 Water Hugh Merricks CBE
27

28 -v-
29

30 Mastercard Incorporated and Others
31
32
33
34

35 **A P P E A R A N C E S**
36

37 Maria Demetriou QC and Victoria Wakefield QC (On behalf of Merricks)
38 Mark Hoskins QC, Matthew Cook QC, Hugo Leith and Jon Lawrence (On behalf of
39 Mastercard)
40
41
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(10.30 am)

(Proceedings delayed)

(10.50 am)

MR JUSTICE ROTH: Good morning, I'm sorry to keep you waiting but the reason is we were looking at some of the material and discussing the material that we received overnight.

First of all, as regards the funding agreement and the proposed amendments that have been agreed with the funder, we think that it satisfactorily takes care of the concern that we had raised, and we are grateful for that being addressed and put in place.

Secondly, we have received some notification about directions that it is proposed we would make. We are not going to deal with that at this hearing. After judgment, we can receive written proposals of directions that the Tribunal should order.

And you will appreciate, as explained in the Tribunal's guide, that this Tribunal, being as it were the authorisation Tribunal, will not be the trial Tribunal and will not then be responsible for the directions going forward to trial because if at any time the parties, that is to say the class representative and the defendant, should wish to agree a settlement, that has to be put before the Tribunal.

That will involve looking at privileged material almost certainly, such as counsel's advice as to why the settlement is reasonable and why it should be approved.

So that cannot go to the trial Tribunal in case it is not approved and that would come back to us.

So that is the way the scheme has been set up to divide it. So directions will be a matter for the trial Tribunal, which will be appointed promptly.

1 We have seen the claim form, we did want to clarify one thing with counsel for
2 Mr Merricks.

3 If one looks at the notice that went out about this application, which I think is in
4 bundle B, at tab 1.3, we think there is nothing, as we can see it, in that notice
5 to alert readers to the fact that this proposed class includes people who are
6 deceased, and to opt out or to, at this stage, not opt out but to make
7 representations, you can do so if you are the representative of someone who
8 is deceased or, as you now suggest, the next of kin. It seems to us any
9 reader of this notice, particularly the third bullet on the first page, indicates it is
10 addressed to people who are alive. And on the second page, any proposed
11 class member may apply to the Tribunal for permission to make written -- well,
12 obviously you can't do that if you're dead. That is self-evident.

13 And we believe the claim form was also on the website to which the reader is
14 directed. Is that correct?

15 **MS WAKEFIELD:** That is correct, sir.

16 **MR JUSTICE ROTH:** Of course anybody looking at the claim form would see it says
17 in terms that deceased persons are excluded.

18 **MS WAKEFIELD:** That is correct, sir. Of course the other documents are also on
19 the website, so the skeleton arguments for the hearing back in 2017, our reply
20 at the time, and it may be --

21 **MR JUSTICE ROTH:** Yes, you are assuming a certain degree of sophistication and
22 enthusiasm from masses of next of kin to read through a lot of what to them
23 are probably rather legalistic documents.

24 Yes. Well, we are not sure that people were really alerted to this possibility.
25 However, there it is.

26 **MS WAKEFIELD:** There it is, sir. It is true that were we to have our time again we

1 might have drafted that notice rather differently, however the substance of the
2 message will have been communicated to all people in the UK, that is the
3 intention of the notice, everyone should know that they had an entitlement to
4 make these representations or to lodge objections.

5 Of course we only received the objection of Mr Stocks, which was discussed
6 yesterday.

7 And as a second point perhaps, this noticing exercise, although of course
8 an important one, is one which we has been developed, I think I am right in
9 saying, through the Tribunal's case law more than via the rule. The rules, of
10 course, impose the notification requirement under rule 81 once the order has
11 been made, and that is the critical notice that we need to get right, and this
12 perhaps is of a slightly secondary nature. So I hope that the substantive
13 message was conveyed but I agree it could have been better drafted in
14 retrospect.

15 **MR JUSTICE ROTH:** Yes, it may become actually more important if we consider,
16 having read your note, that actually it is not deceased individuals but it is their
17 personal representatives who would be the class members, and you point out
18 there are many deceased individuals without personal representatives, the
19 public trustee, because the public trustee would certainly not have got the
20 impression from this notice that this might involve, I think it is her at the
21 moment, isn't it, and she may well have wished to have made representations
22 because if really she is going to be in a position to have to consider as a class
23 in this claim for several million people, that is not insignificant.

24 **MS WAKEFIELD:** That is not insignificant.

25 **MR JUSTICE ROTH:** I think our present feeling is we would be very loathe to make
26 any order including the public trustee and the class without her having been

1 given an opportunity to make representations.

2 **MS WAKEFIELD:** Quite so, I do see that point. If you're minded to go down the
3 course of including the public trustee in the class or as the representative of
4 the deceased persons or their estate, it may well be sensible to allow the
5 Trustee to contact us -- her name is Sarah Castle at the moment, it is the
6 same lady who is the official solicitor -- to make contact with her and ask for
7 her views.

8 **MR JUSTICE ROTH:** I think we might possibly have to have a further hearing.
9 Unless she says she doesn't wish to make any observations.

10 But there we are. It is a consideration that came out of consideration and discussion
11 we have had of your note.

12 **MS WAKEFIELD:** Quite, sir.

13 **MR JUSTICE ROTH:** Right. You have provided the claim form, which is clear. That
14 is on the basis it is the individuals, not personal representatives or public
15 trustee.

16 **MS WAKEFIELD:** It is, sir, yes. If you take a different view of the class definition --
17 of course it will need some further amending or some further revision, but
18 hopefully it makes clear the fundamental proposition, which is that the claim
19 seeks to include the claims of individuals now deceased.

20 **MR JUSTICE ROTH:** Yes.

21 Your primary application is to make that amendment but do I understand you are
22 saying that if we think it is not appropriate or admissible for deceased persons
23 to be in a class, are you then applying an alternative to amend to include the
24 personal representatives and, insofar as there are none, the public trustee?

25 **MS WAKEFIELD:** Yes, sir, yes I am. One could view that as alternative
26 applications to amend, or as this application to amend to meet the limitation

1 point and to make it clear to a person reading the claim form that the claims of
2 persons now deceased have been brought, have been sought to be included
3 in this claim, and then instead the second stage would be a rather more
4 conventional exercise of the Tribunal's discretion to order a different class
5 definition, because the class definition was underinclusive or overinclusive or
6 needs tweaking whichever way is appropriate.

7 **MR JUSTICE ROTH:** I'm not sure -- if it is not legally permissible, contrary to your
8 submission, for deceased persons to be in a class, then we couldn't allow this
9 amendment, we would have to -- could we? That would be just -- yes, okay.

10 Right. I think that has clarified the position.

11 Mr Hoskins.

12
13 **Submissions by MR HOSKINS**

14 **MR HOSKINS:** Good morning, sir, and good morning, members of the Tribunal.

15 If I could just pick up from the exchange that has just occurred. This is a very
16 serious claim for my complaint, said to be worth over £14 billion. Let's also be
17 clear that whilst it is a claim in the public interest, the way in which the
18 legislation works is that particularly solicitors' firms and funders are
19 encouraged to bring these claims in the public interest, on the basis that they
20 themselves will make money out of these proceedings.

21 Now, I have made it a bit of a song and dance yesterday about wanting to know what
22 was being proposed by the applicant in terms of the definition of the class,
23 and you directed that they should provide that amendment by 6.30 yesterday,
24 which they did.

25 The amendment -- we will come to look at the detail and I will make submissions on
26 it -- was limited to individuals, including deceased individuals.

1 We then, at around 9.30 last night, got the note, which itself didn't make
2 an alternative application to amend. If we can turn to the note, which is at
3 C24.4.

4 **MR JUSTICE ROTH:** Yes, just a moment. I have it loose, yes.

5 **MR HOSKINS:** I want to pick up two points on it. The first was at paragraph 2:

6 "The purpose of this note is to ensure that the Tribunal is aware of the correct factual
7 legal position when considering taking such a course, ie naming personal
8 representatives in the class."

9 It is not for the Tribunal to make the application. What the representative must do,
10 along with his advisors, is put forward what he or she suggests the class
11 should be.

12 Sir, you made certain observations yesterday about the difficulties that might arise if
13 the class were limited to deceased persons and even faced with those
14 indications, this is what the representative intended to put forward. But
15 ultimately the onus is on the applicant to satisfy the Tribunal, not the other
16 way around, if I can put it like that.

17 **MR JUSTICE ROTH:** Well, if your concern arises out of the exchange I have just
18 had, this is the application we have and that is the application we will decide.
19 If we were to refuse it -- I don't know if we will or not -- it may be, I don't know,
20 that Mr Merricks and his advisors would choose then to make an alternative
21 or, rather, subsequent application, including the public trustee. That cannot
22 be heard now because, as I have just made clear and I think Ms Wakefield
23 realistically saw the force of that, that would have to be brought to the
24 attention of the public trustee.

25 We cannot address that application now. So I think the application that you need to
26 address is this one. And as you say, it is not for us to draft an alternative, we

1 can make observations, but you face only this application.

2 **MR HOSKINS:** That is fair. You understand, both in terms of not just my own
3 convenience as an advocate, I need to know what you are addressing, but
4 also fairness to my client.

5 **MR JUSTICE ROTH:** Sure. It is relevant because there is the point made by
6 Ms Wakefield at the outset of her submissions that the class of -- one can use
7 the term "victims", it is a bit emotive, but those who may suffer loss and claim
8 from a violation of competition law in general terms, not specifically in this
9 case, can be quite large for collective proceedings.

10 The infringement may have ceased long before and if you are dealing with
11 consumers many of them may have died, and there is a policy question of: is
12 the legislation to really apply in such a way that their interests cannot be
13 pursued?

14 So that is why one got into the question of: well, there is another way they could be
15 pursued, which is the personal representative. So I think it does come in to,
16 as it were, the consideration of this case.

17 **MR HOSKINS:** Sir, absolutely. Our case is not that deceased persons suitably
18 represented can never feature in a class. That has never been our case.

19 **MR JUSTICE ROTH:** Yes.

20 **MR HOSKINS:** But the problem we have is the nature of the application that has
21 been put originally by the applicant and the way in which it is now put.

22 I would have submissions obviously I would want to make myself about the
23 implications if it was sought to add personal representatives and/or the public
24 trustee and obviously that is why I wanted to raise it now, sir, because
25 I wanted to make sure whether I had to make those submissions and if
26 I would be prejudiced in any way if I didn't now. That is why I'm very grateful

1 for the indication.

2 Before we leave the note, can we look at paragraph 6, please, the final paragraph.

3 **MR JUSTICE ROTH:** Yes.

4 **MR HOSKINS:** Because what is said there is:

5 "In the circumstances Mr Merricks' preferred position remains as at the hearing
6 today, namely that the class should include individuals, including those since
7 deceased, with the claims of the deceased individuals being represented by
8 their executor, administrator or next of kin as appropriate."

9 Again just to be absolutely clear, I think it was accepted by Ms Wakefield when you
10 asked her the question, we will come to it in a minute, but the amended claim
11 form itself limits the proposed class definition to individuals living or deceased.
12 It does not include executors, administrators, next of kin or the public trustee
13 in the class definition.

14 I think it is important to clarify that for reasons that will become apparent when
15 I come to make my submissions.

16 **MR JUSTICE ROTH:** That is my understanding.

17 **MR HOSKINS:** And mine too.

18 **MR JUSTICE ROTH:** And paragraph 6 is really just expressing what we were told
19 yesterday, how would it work, and saying it is like a child who can be in the
20 class, not this class -- but take someone who is in this class, someone with
21 mental incapacities over 16, they would be represented by their next friend or
22 litigation friend or whatever. And I think that is all that is being said in
23 paragraph 6.

24 **MR HOSKINS:** That is --

25 **MR JUSTICE ROTH:** Ms Wakefield is nodding so I take that to confirm that my
26 understanding is correct.

1 **MR HOSKINS:** So the class definition does not include executors, personal
2 representatives, next of kin or the public trustee and that is common ground
3 between us all.

4 **MR JUSTICE ROTH:** Yes.

5 **MR HOSKINS:** Let me turn then to the pleadings and let's start with the original
6 claim form. I can take it quickly because we looked at it yesterday.

7 But first of all, just to orient ourselves, let's go to the Tribunal Rules, let's go to Purple
8 Book 6.83. This is rule 75(1) of the Tribunal Rules.

9 Now, that provides that an application to commence collective proceedings must be
10 made by filing a claim form. That, of course, serves a number of purposes but
11 one of the purposes, of course, is in terms of limitation.

12 The relevant date for determining whether an application is in time is when the claim
13 form is issued.

14 And as we saw yesterday, rule 75(3)(a) requires the claim form to contain
15 a description of the proposed class, and we saw that yesterday.

16 So let's go to the original claim form, which is at bundle A, tab 1. Again, we saw that
17 yesterday, A, tab 1, page 7, it is paragraph 22.

18 **MR JUSTICE ROTH:** Yes.

19 **MR HOSKINS:** Again, I think it is common ground between us all that that
20 description of the class excludes deceased persons. And in particular, the
21 reason it does that is because after the italicised passage, sir, as you pointed
22 out yesterday, it says:

23 "All individuals who are living in the United Kingdom as at the domicile date are
24 proposed to be included within a proposed class."

25 **MR JUSTICE ROTH:** Yes.

26 **MR HOSKINS:** So my understanding of the claim form is that it expressly excludes

1 deceased persons.

2 **MR JUSTICE ROTH:** Yes, I think that there is no question about that. That was
3 accepted when I pointed that out to Ms Wakefield, and it is explained of
4 course in (d) of the next paragraph.

5 **MR HOSKINS:** That is right. We go on to 23(d) and it explains that:

6 "The class definition excludes some individuals who might have good claims ... (3)
7 including the estates of individuals who meet the proposed class definition but
8 who passed away before the domicile date."

9 So the original class --

10 **MS WAKEFIELD:** Sorry.

11 **MR JUSTICE ROTH:** Yes, Ms Wakefield?

12 **MS WAKEFIELD:** I don't want us to go down the wrong course. We don't accept
13 that the class definition excludes persons now deceased and that was
14 common ground between Mr Hoskins and me, namely that such deceased
15 people --

16 **MR HOSKINS:** No, it wasn't common ground between us. We can't put it on that
17 basis.

18 **MR JUSTICE ROTH:** I'm sorry, when you say it does not exclude people who are
19 deceased before the domicile date, subparagraph (d) says: this definition
20 excludes some individuals, and (iii): the estates of individuals who passed
21 away.

22 So it explains and it actually says it excludes them. I mean, whether Mr Hoskins
23 agreed with that or not, that is what it says.

24 **MS WAKEFIELD:** My Lord, as I sought to set out yesterday, our intention was the
25 words in italics includes persons subsequently deceased, and we overlaid on
26 to that our understanding at the time of the legal position in respect of the

1 domicile date, which is --

2 **MR JUSTICE ROTH:** Yes, but this is the description of the class. This section is
3 your compliance with 75(3)(a) and 75(3)(c) you have to state the number and
4 you state the number, excluding those you have calculated have died.

5 So if --

6 **MS WAKEFIELD:** My Lord --

7 **MR JUSTICE ROTH:** Isn't that right?

8 **MS WAKEFIELD:** That is right. We understood that those people were excluded on
9 the basis of the operation of the domicile date. And that was the position
10 which we set out in the skeleton of the hearing back in 2017.

11 **MR JUSTICE ROTH:** Whatever basis you thought they were excluded, it is said that
12 they are excluded because that is how you have estimated the class size.

13 **MS WAKEFIELD:** I quite take that point, but we understood that they were excluded
14 essentially by operation of law. And then when our approach to the legal
15 question of domicile changed, as it did, we said if the law doesn't demand that
16 those people are excluded they are within the italicised words of the class
17 definition. And that was agreed between -- I understood it to be agreed and --

18 **MR HOSKINS:** It wasn't agreed.

19 **MR JUSTICE ROTH:** I don't think there is any finding, anybody is estopped from
20 making arguments today as to whether it is within domicile or not. You can
21 argue that point. But the explanation for the exclusion is not that they can't be
22 in the class; it is that this is more proportionate, and that it is including them
23 causes complications now you have thought about that further and actually
24 you think this exclusion is not causing complications, I understand that. But
25 I don't think anyone reading that claim form, and I mean, your intention at that
26 time was to exclude people who have deceased, and you made it very clear --

1 let's look, if you're really taking this point, which I find rather surprising,
2 Ms Wakefield, shall we look at the notice that you put out at the time. We
3 have it in bundle, is it A2?

4 **MS WAKEFIELD:** This point I'm taking, and (**audio interference**) you're against
5 me, but the assertion by Mr Hoskins is that (**audio interference**) that the
6 class definition, the words in italics excludes --

7 **MR JUSTICE ROTH:** Is the only point you're making -- perhaps I have
8 misunderstood you -- that the italicised words, you don't accept that those
9 words, before you read anything else, would exclude people who are
10 deceased?

11 **MS WAKEFIELD:** That is all I wanted to say. I see that I have made the point
12 spectacularly badly.

13 **MR JUSTICE ROTH:** It may be that I misunderstood you, but I can tell you that if
14 you look at the notice that you published before the previous hearing about
15 the claim form you were putting forward, it is not only clear, it is highlighted
16 and in bold that it is for people who are living.

17 **MS WAKEFIELD:** My Lord, you know that I say that means living in the domicile
18 sense, but --

19 **MR JUSTICE ROTH:** Not to a reader of that notice it isn't. It is a notice to the
20 public. You can have a look at it in your own time.

21 Yes, I think all that is being said, Mr Hoskins, is, if this had stopped after the italics
22 and if the numbers in the class, that in itself, those words, would not have
23 been sufficient to exclude people who are deceased. That is the only point
24 that is being made.

25 **MR HOSKINS:** That's fine, but we are into semantics really, because I was looking
26 at what is the proposed class definition and one has to look at paragraph 22 in

1 its entirety and paragraph 23.

2 **MR JUSTICE ROTH:** Yes.

3 **MR HOSKINS:** I proceed in making submissions --

4 **MR JUSTICE ROTH:** Yes.

5 **MR HOSKINS:** -- on the basis that the proposed class definition in the original claim
6 form included consumers who were alive at the domicile date, but did not
7 include consumers who were deceased or indeed their estates.

8 Now, that means, it follows that in order to include deceased consumers, or indeed
9 any of their representatives, which is the point that I don't need to tilt at today,
10 but in order to add to the class deceased consumers in any way, it would be
11 necessary to amend the claim form.

12 So that takes us to the proposed amendment. It has been put in the bundle, into
13 bundle C at 24.3.

14 If we can pick it up -- my numbers are chopped off, I'm looking at page 7 in the
15 document at paragraph 22.

16 **MR JUSTICE ROTH:** Yes.

17 **MR HOSKINS:** The effect of the deletions and additions can really be seen in
18 paragraph 23(b)(i):

19 "This class definition contains the following criteria, all of which must be met in order
20 for the claimant to fall within the class. Members of the class must be
21 individuals, ie natural persons, including persons who have since died."

22 So that is the addition to the class. It is individuals, ie natural persons who have
23 since died.

24 **MR JUSTICE ROTH:** Yes.

25 **MR HOSKINS:** And there is no attempt to add to the class definition executors,
26 personal representatives, next of kin, the public trustee.

1 The class definition is in terms of individuals who purchased, that is what is left in
2 paragraph 22.

3 **MR JUSTICE ROTH:** Yes.

4 **MR HOSKINS:** And just to make good the point, in order to include, for example,
5 estates or personal representatives in the proposed class, it would be
6 necessary to do so expressly. I think that is obvious but let me show you
7 an example of where it was done in a Canadian case. Authorities bundle 2,
8 tab 32.

9 It is the Dennis v Ontario Lottery case. Sir, I think you saw this in the rail fares CPO
10 last week. For the detail I want to show you how the proposed claim was put
11 there by the applicant.

12 If you could quickly read paragraphs 1 and 2.

13 **(Pause).**

14 **MR JUSTICE ROTH:** Yes, or their estates ...

15 **MR HOSKINS:** Exactly. And clearly for reasons, I think some of them are
16 highlighted in your observation, sir, this morning, if one is going to say that the
17 executors et cetera are included in the class, it is absolutely vital that is stated
18 expressly because that then leads to what has to go in the notice, who can
19 make observations or objections et cetera. It can't be done sub silentio or by
20 sleight of hand, it would have to be expressly stated.

21 And the application you have before you quite clearly does not make any such
22 express inclusion in the class.

23 **MR JUSTICE ROTH:** Do you know, you have taken us to one case which is
24 probably put in the bundle for other reasons. Is this indeed common in
25 Canadian and US claims to say "or their estates"? Because with large
26 classes, and the time-lag, there may often be a number who have died. It is

1 not in the Microsoft case I think.

2 **MR HOSKINS:** Sir, I don't.

3 **MR JUSTICE ROTH:** You don't know.

4 **MR HOSKINS:** It would be wrong of me to speculate. I have obviously seen some
5 materials that relate to the position in Canada and the US, but it would
6 dangerous, a little knowledge would be dangerous I think if I started
7 speculating on the limited materials I have seen. I wouldn't want to do that.

8 I simply bring it to your attention as a drafting example --

9 **MR JUSTICE ROTH:** Yes.

10 **MR HOSKINS:** -- rather than as a point of Canadian law or US law, this is how you
11 do it. You have to draft them expressly into the class definition.

12 Sir, we are facing an amendment which proposes to add deceased individuals to the
13 class definition. And we say that that application to amend should be refused
14 on two independent bases.

15 So if you are with me on either of these, then the application should be refused. First
16 of all, claims brought in the name of deceased persons are a nullity. And
17 alternatively, secondly or alternatively, there is no power under the rules to
18 make such an amendment after limitation has expired.

19 Let will me deal with the first of those arguments, claims in the names of deceased
20 persons are a nullity.

21 Our submission is that claims brought in the name of deceased persons are a nullity
22 and therefore a deceased person cannot form part of a class.

23 I would like to begin with the legislation, the 1998 Act. You'll find it in the authorities
24 bundle 1, at tab 7. Section 47B. It is at page 30 of the bundle. This is well
25 trodden ground.

26 Section 47B(1):

1 "... proceedings may be brought before the Tribunal combining two or more claims to
2 which section 47A applies."

3 So the collective proceedings are actually a bundle of individual claims. That is the
4 nature of it. And then if one goes back to section 47A, which is on the
5 preceding page, sub (2):

6 "This section applies to a claim of a kind specified in subsection (3) which a person
7 who has suffered loss or damage may make in civil proceedings ... in respect
8 of an infringement decision ..."

9 And that includes prohibition in Article 101(1).

10 That is the way in which collective proceedings are set up. It is a bundle of claims
11 which could otherwise be made individually in civil proceedings.

12 I would next like to go to tab 2 of this bundle, which is the Law Reform
13 (Miscellaneous Provisions) Act 1934, section 1(1):

14 "The effect of death on certain causes of action.

15 "Subject to the provisions of this section, on the death of any person after the
16 commencement of this Act all causes of action ... vested in him shall survive
17 ... for the benefit of, his estate."

18 And then the rest are exceptions which are not applicable.

19 So on the death of any person all causes of action vested in him survive for the
20 benefit of his estate.

21 I would next like to go to a case. It is this bundle, tab 24. It is the case of *Kimathi v*
22 *Foreign & Commonwealth Office*, number 2. It is the judgment of Mr Justice
23 Stewart.

24 If I could ask you please to read the headnote, so what is just by (c) and (d) on the
25 first page.

26 **(Pause)**

1 And the principle I say follows from this case is that a claim cannot be brought in the
2 name of a deceased person. And a claim brought in the name of a deceased
3 person or purporting to be brought in the name of a deceased person is
4 a nullity.

5 And just to show you the relevant parts then of the judgment, can we begin at page
6 451. You will see near the top of the page a heading in bold "Application".

7 That sets out the facts of this case. Nothing particular turns on it but it will set it in
8 context, I will ask you quickly to look at that.

9 **(Pause).**

10 And then if we pick it up at paragraph 5 of page 453. I will ask you to read
11 paragraph 5 to yourselves, please.

12 **(Pause)**

13 And you will see there the twin propositions:

14 "A claim cannot be brought in the name of a deceased person."

15 And then, at the end of that paragraph:

16 "It is well established that proceedings are a nullity if the plaintiff is dead."

17 And then paragraph 16(i) on page 456, simply the judge in this case reflecting the
18 established law that a claim cannot be brought in the name of a deceased
19 person.

20 So that is the position for deceased persons, so that is the difference, again as was
21 made clear in the exchange between yourself and counsel for the applicant
22 yesterday, between deceased persons and children.

23 The applicant referred to and sought to draw a comparison with rule 77 of the
24 Tribunal Rules. But the position for deceased persons is different from that of
25 children. In relation to children, the cause of action is in the child and a claim
26 brought in the name of a child is not a nullity. For a deceased person it is

1 simply a nullity.

2 And because a claim brought in the name a deceased person is a nullity, because
3 collective proceedings are simply a bundle of individual claims, the suggestion
4 that the class definition can include deceased individuals is not legally
5 possible.

6 The application to amend which is before you should be rejected on that basis.

7 There is then a second and independent ground, which is our submission that there
8 is actually no power in the circumstances of this case to add new class
9 members after the expiry of the limitation period.

10 Now, I am aiming at the proposed amendment but I do make it clear that this
11 argument would apply equally to an attempt to add executors, personal
12 representatives, the public trustee, next of kin, whoever it would be. This
13 point applies across the board. It is not specific to this amendment.

14 Let me deal first of all with the limitation position. This is a follow-on claim for
15 damages. It relies on the Commission's Mastercard decision. I do
16 understand from the submissions made yesterday on behalf of the applicant
17 that it is common ground that the limitation period for bringing such claims has
18 now expired.

19 Ms Wakefield accepted that yesterday.

20 The claim is in relation to --

21 **MR JUSTICE ROTH:** Before you move on, when did it expire?

22 **MR HOSKINS:** I'm going to come to that.

23 **MR JUSTICE ROTH:** Okay.

24 **MR HOSKINS:** The claim is in relation to the period from 22 May 1992 until 21 June
25 2008. Since it is common ground I won't take you through the technicalities of
26 the rules but will identify that the limitation rules which are applicable are

1 found in rules 119(2) and (3) of the 2015 Tribunal Rules. That is Purple Book
2 6.127. Those rules state that rules 31(1) to (3) of the 2003 Tribunal Rules
3 shall apply to determine limitation to a case of this sort.

4 Rules 31(1) to (3) of the 2003 Tribunal Rules you can find at authorities 1, tab 7.2,
5 page 36.4. Again, I'm not suggesting we turn --

6 **MR JUSTICE ROTH:** It is quite tortuous but it is common ground, it is because of
7 the transitional arrangements that relate back to the old rules.

8 **MR HOSKINS:** Correct. That is why I'm just giving you the references, sir.

9 **MR JUSTICE ROTH:** Yes, that is helpful.

10 **MR HOSKINS:** It is also set out in our skeleton argument as well, the narrative is
11 there.

12 Those rules, the 2003 rules cross-refer to Section 47A(8) of the 1998 Act. That has
13 subsequently been amended but we put in the authorities bundle the relevant
14 version of sub (8) of Section 47A and you will find that at authorities 1, tab 7.1
15 at page 36.1.

16 But the bottom line, once one has pieced those together is the following: the Courts
17 of Justice gave judgment in the Mastercard case on 11 September 2014. The
18 limitation period for bringing proceedings based on that Commission
19 infringement decision expired two years after that judgment, on 11 September
20 2016. And the claim form in this case was filed on 8 September 2016, for
21 a few days before the expiry of the limitation period.

22 So that is the limitation position.

23 **MR JUSTICE ROTH:** Yes.

24 **MR HOSKINS:** Let me turn then to the powers to amend and let's see what potential
25 powers the Tribunal might have.

26 If we can pick up the Purple Book, if you go to page 3461 or Section 6.81 --

1 whichever is easiest, it is the same thing -- you will see the heading, two thirds
2 of the way down that page "Part 5 collective proceedings and collective
3 settlements."

4 Within that part 5, one then has rule 74. And you were shown this yesterday. Rule
5 74(1):

6 "Part 4 of these Rules applies to collective proceedings in accordance with this
7 rule..."

8 And then (2):

9 "References in Part 4 to 'claim form' and 'claimant' are to be read respectively as
10 'collective proceedings claim form' and 'class representative'."

11 So there is some help in terms of how one is to read part 4 rules and part 5. But as
12 we will see, it doesn't give us all the answers.

13 Now, if I go then to page 3434, which is an index to the rules, you will see at part 4,
14 "Claims under 47A of the 1998 Act", that begins with rule 29. And within part
15 4, you will find rule 32, "Amendments to claim form", you will also find rule 38,
16 "Additional parties".

17 **MR JUSTICE ROTH:** Yes.

18 **MR HOSKINS:** So both those rules which apply in claims by individuals are also to
19 apply to collective proceedings by virtue of the provisions I have shown you.

20 Let's go to rule 32, "Amendments to claim form". You find that in the Purple Book at
21 6.40:

22 "A claim form may only be amended-

23 (a) with the written consent of all the parties; or.

24 (b) with the permission of the Tribunal."

25 And I understand it is 32(2)(a) that is relied upon by the applicant for its application to
26 amend:

1 "Where any relevant period of limitation has expired, the Tribunal may permit
2 an amendment-

3 (a) to add or substitute a new claim, but only if the new claim arises out of the same
4 facts or substantially the same facts as a claim in respect of which the party
5 applying for permission has already claimed a remedy in the proceedings."

6 So, in other words, the person applying for permission to add a new claim must
7 already have a claim in the proceedings.

8 And that, of course, is not the case here, because the amendment is seeking to add
9 new parties who do not have existing claims in these proceedings.

10 So this rule is simply inapplicable.

11 **MR JUSTICE ROTH:** You say it is inapplicable. So you can never add a new claim
12 in a class action, collective proceedings. Suppose Mr Merricks -- well, step
13 away from this case. Suppose it is a follow-on claim for another breach of the
14 chapter 1 prohibition, and then the class representative thinks, well, the same
15 facts actually give rise to a breach of the chapter 2 prohibition. They don't
16 need any new facts, or if they are new, they are not substantially new. You're
17 saying the class representative could not say: I want to amend to say that I'm
18 not changing the number of class members like this case, but I want to say
19 there is a breach of the chapter 2 prohibition as well as the chapter 1
20 prohibition. You say they can't do it because, unless the class -- well, they
21 can't do it because they are not the claimants?

22 **MR HOSKINS:** I say that they can do it pursuant to section 32(1), provided the
23 limitation period hasn't expired.

24 **MR JUSTICE ROTH:** Yes, well obviously once the limitation period has expired so
25 they are handicapped in a way that an individual claimant wouldn't be.

26 **MR HOSKINS:** Sir, if you look at it from the perspective of, let's assume -- so I'm

1 looking at this through the optic of when you're talking about new claims
2 you're looking at it through the optic of the individual claims, and that is the
3 basis of the submission I have just made to you.

4 Potentially another way of looking at it is to say that the claim is the claim by the
5 personal representative. If that is the proper way in which 32(2)(a) is to be
6 looked at then again it cannot be satisfied in this case, because unlike the
7 example you just gave me, which is the addition of a new cause of action
8 where the class remains the same, what the applicant is applying to do in this
9 case is to add claims by new parties, and whilst there is a certain overlap
10 between the claims of all the different members of the class in these
11 proceedings, they do not all arise out of the same facts or substantially the
12 same facts.

13 I say that because insofar as -- sir, if you and I were not excluded, if one looks at
14 your claim for damages in this case that was brought individually and you
15 looked at my claim, they would not arise out of the same facts. Each
16 individual's claim is different. There is certainly commonality in certain
17 aspects but they are not claims that arise out of the same facts because our
18 personal circumstances are different.

19 So whichever way one interprets section 32(2)(a), whether the claim --

20 **MR JUSTICE ROTH:** Rule 32.

21 **MR HOSKINS:** Sorry, rule 32(2)(a), whether one is looking at it from the perspective
22 that the claim is made and you have to imagine that an application has been
23 made on behalf of each individual, it doesn't work, but equally if you look at it,
24 it is an application made by the PCR it doesn't work because it is still
25 gathering together a number of claims --

26 **MR JUSTICE ROTH:** On this point about -- sorry, I interrupted you.

1 **MR HOSKINS:** I was going to finish: and each of those claims do not arise out of
2 the same facts or substantially the same facts.

3 **MR JUSTICE ROTH:** Can I ask you about subrule 2(c). There is another aspect
4 which has not been alluded to in which of course people have died, which is
5 this claim was issued, as you have just pointed out, in September 2016, we
6 are now in March 2021, so of the estimated 46 million in the class as at
7 September 2016, quite a number of those will have died since the claim was
8 issued.

9 **MR HOSKINS:** Yes.

10 **MR JUSTICE ROTH:** Now, normally what happens there is you would, if there has
11 been a death in an individual claim, you alter the capacity by substituting the
12 personal representatives, and that is what 2(c) is dealing with.

13 **MR HOSKINS:** Yes.

14 **MR JUSTICE ROTH:** Are you saying that that cannot be done in this case? And so
15 in fact it is no longer a claim for 46 million because, however many, and it will
16 be not insignificant over this period, out of that number have since died, we
17 can't rely on rule 32(2)(c) to substitute their personal representatives?

18 **MR HOSKINS:** No, I'm not saying that, sir. I'm saying that you have to distinguish
19 between persons who die before and after filing of the application.

20 **MR JUSTICE ROTH:** Yes --

21 **MR HOSKINS:** So ...

22 **MR JUSTICE ROTH:** -- I understand that, but just looking at the language, the
23 limitation period has expired, as you pointed out. That would be
24 an application to alter the capacity in which a party claims but it is not
25 Mr Merricks whose capacity is being altered --

26 **MR HOSKINS:** That is right.

1 **MR JUSTICE ROTH:** -- it is certain class members. So if that rule is to apply, don't
2 we have to read "party" there, for the purpose of applying this rule to collective
3 proceedings, as meaning "the class member"?

4 **MR HOSKINS:** In that case, if a class member is alive when the claim form is filed,
5 the proceedings are not a nullity, so they are a valid member of the class.

6 **MR JUSTICE ROTH:** Yes, I understand your first objection doesn't --

7 **MR HOSKINS:** I'm going to deal with this one, sir, you will tell me if I'm not meeting
8 the point.

9 In this instance, we are imagining a situation therefore where someone is alive at the
10 time the claim form is filed but dies before judgment.

11 **MR JUSTICE ROTH:** Yes.

12 **MR HOSKINS:** And in that case, because they were an original party but they die
13 and the claim passes to their personal representatives, to use that shorthand,
14 then it would be possible for the personal representatives to become -- I don't
15 know the best way to put it. The best way to do this, what should happen is at
16 the outset the class should include personal representatives and then we just
17 don't have any of these problems. The reason we are having this debate now
18 and the reason it is a pleading point is because the applicant chose not to
19 include deceased persons at all at the outset and has now sought to make
20 an application which doesn't include any form of personal representatives.

21 **MR JUSTICE ROTH:** Forgive me, I think that is a rather different point. You couldn't
22 include, at the outset, personal representatives of people who are alive. They
23 haven't got personal representatives.

24 **MR HOSKINS:** No. You could have --

25 **MR JUSTICE ROTH:** The people who have died since 2016 who were in the class,
26 if it is an individual claim for an individual under section 47A, the individual

1 dies, very simple: the limitation period may have expired by the date of death,
2 there is an application to substitute the estate or the personal representative,
3 I would have thought, is there not; and would that not come under 2(c)?

4 **MR HOSKINS:** Yes, it would.

5 **MR JUSTICE ROTH:** And if that is true of an individual claim, it ought to be also
6 applicable to that individual claim that has been bundled, as you put it, into the
7 collective proceedings.

8 **MR HOSKINS:** Yes, because --

9 **MR JUSTICE ROTH:** One has to read "party" in 2(c) not in accordance with the
10 deeming provision, as it were, that you took us to in part 5. In other words,
11 saying the party is in part 4 of the rules is to mean the class representative.

12 **MR HOSKINS:** Rule 74(4) doesn't say party means class representative. It doesn't
13 contain a definition of "party".

14 **MR JUSTICE ROTH:** It is just claimant.

15 **MR HOSKINS:** That's right. So --

16 **MR JUSTICE ROTH:** So the party is the class member for this purpose.

17 **MR HOSKINS:** That's correct. That is the way I put my submission on rule 32(2)(a)
18 as well. That was my primary submission in relation to that.

19 **MR JUSTICE ROTH:** Yes.

20 **MR HOSKINS:** I accept there is inevitably a degree of friction when one is trying to
21 read the part 4 rules into part 5 because understandably the draftsman has
22 not gone to try and cover down every avenue, so one must make some
23 allowances for the language.

24 But in my submission what is quite clear is that 32(2)(a) cannot support this
25 amendment regardless of whether one looks at the claim or the party on the
26 basis of a bundle of individual claims, or whether one looks at it as the claim is

1 everything bundled together, ie the aggregate.

2 **MR JUSTICE ROTH:** Can one not say that under 2(a) -- yes, I see, I think

3 I understand your submission, yes.

4 It has to be an existing claimant.

5 **MR HOSKINS:** That is right, that is the point there. The party applying for

6 permission, ie the individual claimant, has to have already claimed a remedy

7 in the proceedings, but because the individual is dead and therefore any claim

8 in the original claim form is a nullity, they do not have a remedy in the original

9 claim form. They cannot, because any purported attempt to bring a claim in

10 their name is a nullity.

11 **MR JUSTICE ROTH:** Yes.

12 **MR HOSKINS:** So we say rule 32 cannot give the power to make the amendment

13 that the applicant seeks.

14 Another possibility is rule 38. That is Purple Book 6.46. That is an express power to

15 add parties:

16 "The Tribunal may grant permission to ... add ... a party in the proceedings."

17 There is then the service requirement, which I will deal with at the end, the point that

18 Ms Wakefield drew your attention to yesterday.

19 Now, if we go to rule 38(6):

20 "After the expiry of a relevant period of limitation, the Tribunal may add ... a party

21 only if-

22 (a) that limitation period was current when the proceedings were started; and

23 (b) the addition or substitution is necessary."

24 So pausing there, the relevant period of limitation has expired. That is why this is the

25 relevant rule. And the limitation period was current when the proceedings

26 were started.

1 So this is the right rule, the question is: does the applicant satisfy the conditions that
2 this rule sets down? And, in particular, is the addition necessary? And one
3 finds the definition of "necessity" in sub (7):

4 "The addition ... of a new party ... is necessary for the purpose of paragraph 6(b) only
5 if the Tribunal is satisfied that- ..."

6 And at (c), which is potentially relevant here:

7 "The original party has died ... and its interest ... has passed to the new party."

8 **MR JUSTICE ROTH:** Well, I think I may have misinterpreted rule 32. I think it is
9 probably this one that leads one to deal with people who die after the claim
10 has started.

11 **MR HOSKINS:** That is true. This is more specific.

12 **MR JUSTICE ROTH:** Yes. And while we are looking at that, would you have --
13 perhaps I shouldn't assume -- any objection if, on it becoming apparent that
14 some members of the class, as defined and explained and described when
15 the claim form was issued, has since died, there is an application to substitute
16 for those people who have died during the course of the proceedings, their
17 personal representatives?

18 **MR HOSKINS:** That would be permissible if they are alive when the claim form is
19 issued, so they were an "original party", then this rule would apply.

20 **MR JUSTICE ROTH:** Yes, and this is a discretion, I think, under subrule (6). So if
21 there were such an application, would it be something that Mastercard would
22 oppose or would you accept that would be proper if they were in the class at
23 the time within --

24 **MR HOSKINS:** Living at the time and --

25 **MR JUSTICE ROTH:** Living at the time, yes.

26 **MR HOSKINS:** I can't speculate. There is the power there to do it, what we would

1 do in those circumstances, again, I think without instructions I couldn't say.

2 **MR JUSTICE ROTH:** But that would be the normal thing to happen.

3 **MR HOSKINS:** Yes, absolutely.

4 **MR JUSTICE ROTH:** If a claimant dies, it would enable the action to continue for his
5 estate or her estate, yes.

6 **MR HOSKINS:** Yes. So this is the power to deal with the issue we are actually
7 looking at and we are looking at people who were deceased when the claim
8 form was issued.

9 **MR JUSTICE ROTH:** Yes.

10 **MR HOSKINS:** The reason why the applicant can't rely on this power in this case in
11 relation to that example, people who are deceased at the time the claim form
12 was issued, is because the amendment doesn't seek to add parties to whom
13 an interest or liability has passed. The amendment is seeking to add the
14 deceased persons themselves, not their personal representatives.

15 **MR JUSTICE ROTH:** Well, not sure how it would work if it was the personal
16 representatives either.

17 **MR HOSKINS:** I'm sorry, I'm using that as shorthand for executors or administrators
18 or the public trustee.

19 **MR JUSTICE ROTH:** How would that make a difference? The problem would still
20 arise, wouldn't it?

21 **MR HOSKINS:** The question I'm looking at is whether -- so I have made the
22 submission that rule 38(6) is the relevant power --

23 **MR JUSTICE ROTH:** Yes.

24 **MR HOSKINS:** -- and I'm now looking at whether the specific criteria that must be
25 fulfilled in rule 7(c) are satisfied or could be satisfied in this case. My point is
26 that what this gives the Tribunal power to do is to add a party where the

1 original party has died and its interest has passed to the new party, and the
2 new party would be the executor, the administrator or the public trustee.

3 **MR JUSTICE ROTH:** Yes.

4 **MR HOSKINS:** My point is that the amendment you have before you does not seek
5 to add the executor, administrator or public trustee to the class.

6 **MR JUSTICE ROTH:** But this isn't a case -- I thought you were saying where the
7 original party has died?

8 **MR HOSKINS:** That is another point.

9 **MR JUSTICE ROTH:** Isn't that your point?

10 **MR HOSKINS:** There are two reasons why the conditions in rule, subrule 7(c) can't
11 be met. There is the one I have just made, just on its wording, that is not what
12 is being asked for in this case. But absolutely, there is a second point, which
13 is: this subsection couldn't be used to add executors et cetera as parties
14 because in this case persons who are deceased when the claim was filed
15 were not original parties to the proceedings.

16 **MR JUSTICE ROTH:** Yes. And that is why, as I understand it, Ms Wakefield is not
17 relying on rule 38, she was relying on rule 32.

18 **MR HOSKINS:** Yes. So, you have my submission that rule 32 is not applicable and
19 cannot be relied upon. There is another potential, the Tribunal has
20 an express power to add parties, and that is why I think it is important I draw
21 that to your attention. Having done so, my submission is, for the two reasons
22 I have given you, that doesn't avail the applicant in this case either.

23 **MR JUSTICE ROTH:** But it would be in the power there to substitute the estate or
24 the personal representatives for any of the living members of the class in
25 September 2016 who have subsequently died?

26 **MR HOSKINS:** Yes. There are two candidates for that function, I'm going to come

1 to the second one because again I need to draw your attention to another
2 potential source of power. I have a professional obligation obviously to show
3 you all the ones that I think might be relevant, even if it has not been raised by
4 the applicant, and that is where I'm going to turn to next.

5 Certainly this is one of the ways in which the situation you have described to me, sir,
6 can be dealt with.

7 Just to deal with the rule 38(2) point that was made on behalf of the applicant:

8 "An application for permission under this rule shall be served on the parties to the
9 proceedings ..."

10 The point that is made is: if the parties are each of the class members, then this rule
11 would require an application to be served on, in this case, the tens of millions
12 of class members.

13 The point I make in relation to this, as I averred to earlier, is that there will not be
14 a perfect fit between part 4 and part 5 but there is clearly a way in which
15 service can be affected without personal service on 40 or 50-odd million
16 people. What would happen is the applicant for the amendment would serve
17 the class representative and ask the Tribunal to direct that service and class
18 members be carried out by publication on the claims website. So if you like,
19 service would take place on the representative and the representative would
20 be used as a postbox for the remaining class members by publication on the
21 website. That would be entirely in keeping with the way class members are
22 generally informed of what is going on in the proceedings, but that would be
23 a valid form of service that the Tribunal could make to deal with rule 38(2).

24 **MR JUSTICE ROTH:** Yes.

25 **MR HOSKINS:** As I said, I believe I'm under a professional obligation not just to
26 deal with the case that is put against me by the applicant, but under

1 an obligation to point out anything that might be relevant or the answer to this
2 problem, and therefore I need to show you rule 85, which is Purple Book 6.93.

3 This is headed "Stay of proceedings and variation or revocation of the collective
4 proceedings order":

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

8 So the power to vary.

9 Now, we know that one of the things that the CPO must do is describe the class.

10 That is rule 80(1)(c), Purple Book 6.88.

11 Therefore, it follows, that the Tribunal has power to vary the class under rule 85.

12 Our submission is that that part cannot be used to grant the application made in this
13 case for the following reasons.

14 **MR JUSTICE ROTH:** Before you go into those, one notes 85(4) expressly
15 recognises it can be varied to alter the description of class members.

16 **MR HOSKINS:** That's right. That is why I bring this to your attention, sir, it would be
17 a breach of my professional obligation if I hadn't done so just because it hasn't
18 been put before you by the applicant.

19 **MR JUSTICE ROTH:** Yes.

20 **MR HOSKINS:** My submission is that part cannot be used in the present case for
21 the following reasons. You have the point that under section 47B of the Act
22 collective proceedings may combine two or more claims to which section 47A
23 applies. You have the point that section 47A applies to claims that may be
24 made in civil proceedings.

25 The first point is that a claim by a deceased person can never be brought, therefore
26 the collective proceedings order cannot be varied so as to include deceased

1 persons in the class.

2 If an individual claim by a deceased person or in the name of a deceased person
3 would be a nullity, then you have my previous submissions to a similar effect,
4 they cannot be a member of the class because their claim cannot be
5 combined in the collective proceedings. It is a nullity.

6 But there is a second and further reason which is: any claim, whether -- one gets into
7 the realm of unreality at this stage because it is a claim now by a deceased
8 person, by definition they can't make a claim now, so we are going to have to
9 imagine a claim brought on behalf of a deceased person by the executor,
10 administrator whatever. But whoever brings it, that claim would be time
11 barred.

12 It would be time barred whether it was brought in the High Court under section 2 of
13 the Limitation Act 1980 or whether it was now brought in the Tribunal, time
14 barred under section 47E of the 1998 Act, which applies the Limitation Act to
15 the Tribunal claims.

16 So whichever way it was brought it would be time barred.

17 And our submission is that the general power to vary collective proceedings orders
18 cannot be used so as to vary the class definition to include claims that are
19 time barred.

20 To put it another way: a general power to vary cannot be used to take away
21 a defendant's accrued limitation rights.

22 Sir, you and I had the pleasure of an incredibly technical case which was similar but
23 not the same as this but raised a similar issue, DSG Retail Limited v
24 Mastercard. I won't go into the facts of this case because I looked at them
25 again and it caused me to break out into a cold sweat, such was the intricacy
26 of them, but I would like to show you one paragraph in the judgment of the

1 Court of Appeal to show you the nature of the general principle that I'm
2 seeking to rely upon. It has been added to the authorities bundle, I hope you
3 have it. It should be in authorities bundle 2 at tab 35.

4 I filed it somewhere safe and not where I thought it was. Can I have a moment
5 please, I'm sorry.

6 **(Pause)**

7 I will give you the reference and you can look at it while I'm trying to find my copy. It
8 is paragraph 13 in the judgment of Sir Geoffrey Vos.

9 **MR JUSTICE ROTH:** Yes, this was the case where they said, the Court of Appeal
10 said: we got the right answer for the wrong reasons, isn't it?

11 **MR HOSKINS:** That is the short summary, yes.

12 So paragraph 13. I'm so sorry, I'm going to come back to this if I may, sir, when
13 I find it. I have filed it away and I have put it --

14 **MR JUSTICE ROTH:** Don't worry. We haven't taken a break, we started slightly
15 late. Would this be a sensible moment to take a break and that will give you
16 time to --

17 **MR HOSKINS:** That would be sensible, I would be very grateful.

18 **MR JUSTICE ROTH:** You're coming to a conclusion, I would imagine, from the
19 nature of the submissions we have heard on this point?

20 **MR HOSKINS:** I am. This is the last point on amendment. Then I need to deal
21 briefly with the date of domicile point.

22 **MR JUSTICE ROTH:** Yes.

23 **MR HOSKINS:** But if we are just dealing with deceased persons it becomes a much
24 shorter point.

25 **MR JUSTICE ROTH:** Yes. We will come back at 12.20.

26 **MR HOSKINS:** Thank you, sir.

1 (12.10 pm)

2 (A short break)

3 (12.20 pm)

4 **MR JUSTICE ROTH:** Yes, Mr Hoskins.

5 **MR HOSKINS:** Thank you, sir.

6 Sir, I was in DSG Retail. Authorities bundle 2, tab 35 and I asked you to look at
7 paragraph 13, which simply cites section 61 of the Interpretation Act, which
8 provides that:

9 "... where an Act repeals an enactment, the repeal does not, unless the contrary
10 intention savings appears-

11 (b) affect the previous operation of the enactment repealed or anything duly done or
12 suffered under that enactment;

13 (c) affect any right, privilege, obligation or liability acquired, accrued or incurred
14 under that enactment."

15 The reason that was relevant in the present case is because the Court of Appeal
16 found that that section, therefore, prevented the revocation or the taking away
17 of accrued limitation rights without express wording being used.

18 And again, I don't want to go into the details of this because it is horribly obtuse, but
19 paragraph 60 in the Chancellor's judgment is where you see the application of
20 that principle.

21 The point I make is a simple one: if that is the position for legislation when it is
22 revoked, the position must be even stronger here where the relevant limitation
23 periods have not been repealed. It is still on the statute book.

24 So when one looks at the scope of a general power to amend or vary, our
25 submission is: it can't be used to take away accrued limitation rights. That is
26 why rule 85 is not the hook for the application to amend.

1 As I say, those, the submissions I have made, maybe not all but certainly some
2 would apply not just to the application before the Tribunal to add deceased
3 persons as individuals, they would also apply to block an amendment, were it
4 to be allowed and attempted, in relation to executors et cetera, and clearly if
5 that is the Tribunal's view, before the applicant rushes to make any sort of
6 application it would be very useful for the Tribunal to make it clear whether
7 any such application would have a prospect of success, because if it is time
8 barred, then there is no point in us all coming back to deal with a new
9 application.

10 There is another aspect, a smaller one, but it raises exactly the same issues in terms
11 of the attempt to add new members to the class.

12 If I can ask you to go to the amended claim form --

13 **MR JUSTICE ROTH:** We can put away DSG?

14 **MR HOSKINS:** We can put away DSG. So the amended claim form, which is in
15 bundle C at tab 24.2, if I can ask you to turn to paragraph 23(d), which is the
16 one we have looked at before.

17 You will see the red-lining, so "3" has been red-lined, but in the original claim form
18 the class excluded not just those who were deceased at the time the claim
19 form was filed, but it excluded from the class those who were living when the
20 claim form was filed but who had passed away before the domicile date.

21 So a different subclass of those deceased between filing, those who died between
22 filing and the domicile date.

23 The amendment seeks to bring them into the class, and whilst the nullity point does
24 not apply in relation to that subcategory, the limitation points do.

25 So, in our submission, that particular amendment is also unacceptable for the
26 limitation reason.

1 Can I deal with what has been called the general points of law, the opt in/opt out
2 point. Sir, you're happy for me to move on?

3 **MR JUSTICE ROTH:** Yes.

4 **MR HOSKINS:** It does become a rather strange point given the amendment that
5 has been put, because the only amendment before the Tribunal is to include
6 deceased persons in the class.

7 The short point we made is that: deceased persons cannot satisfy the domicile
8 requirement. So this arises, if you're against me, so far, and you say that
9 deceased persons can be included in the class, and that the amendment to
10 include them is not out of time, then we are asking ourselves the
11 question: how can deceased persons take part in the collective proceedings?

12 You were shown the provisions by Ms Wakefield so I can take them quickly.

13 Authorities 1, tab 7, please. Section 47B(11).:

14 "'Opt-out collective proceedings' are collective proceedings which are brought on
15 behalf of each class member except- ...

16 (b) any class member who-

17 (i) is not domiciled in the United Kingdom at a time specified, and

18 (ii) does not ... opt in ..."

19 And you were shown also section 59(1)(b), which is at page 35 of the bundle, which
20 gives us the definition of "domicile" for the purpose of section 47B(11). And it
21 tells us that the definition of "domicile" is that which is found in the Civil
22 Jurisdiction and Judgments Act.

23 And when one goes to the Civil Jurisdiction and Judgments Act, again you were
24 shown this, tab 3. (2):

25 "An individual is domiciled in the United Kingdom if and only if-

26 (a) he is resident in the United Kingdom."

1 The short point we make is that a person who is deceased on the domiciled date
2 cannot be resident in the United Kingdom because "resident" means living
3 somewhere.

4 Now, this then becomes very odd because what that would mean is that in order to
5 take part in opt-out proceedings deceased persons would have to opt in.
6 Deceased persons are dead, they can't opt in. That is why I anticipate that
7 you came to the answer to this which is if you actually name, for example, the
8 executor or the administrator et cetera in the class, and if those individuals are
9 themselves resident in the United Kingdom and domiciled, then this issue
10 doesn't arise.

11 But of course until -- well, it still hasn't been put that way by the applicant. The way it
12 was put in the hearing was: deceased persons in the class, there was some
13 reference to estates but we now know where the position lies. So I think I can
14 take this point shortly for that reason. Because the application only relates to
15 deceased persons, it runs into this problem. It is not really going to take us
16 much further I don't think in terms of our analysis.

17 **MR JUSTICE ROTH:** Yes.

18 There isn't, is there, a definition of "resident" in the 1982 Act?

19 **MR HOSKINS:** I don't believe so, no.

20 But the submission that has been put to you, the way it was put for Mr Merricks
21 yesterday was that: residence is fixed at death and that you can continue to
22 be relevantly resident in the United Kingdom after your death and remains so
23 for all purposes.

24 **MR JUSTICE ROTH:** Yes.

25 **MR HOSKINS:** But with respect, putting the word "relatively" before "resident"
26 doesn't cure the problem. It doesn't make any sense. Residence, in our

1 submission, clearly connotes living somewhere and, indeed, the applicant has
2 never suggested otherwise. That is the position they accepted way back
3 when they did the claim form and that is why they did it in the way that they
4 did, as Ms Wakefield explained.

5 That is what I needed to say in relation to the application to amend. So unless you
6 have any further questions, there are two very quick points about compound
7 interest that I wanted to pick up on before I finish, but it will literally take
8 a matter of minutes.

9 First point is that I promised you a reference, which was I said that within the
10 Sainsbury's v Visa and Mastercard case, the Supreme Court analysed the
11 nature of the primary loss. That is at paragraph 119 of the Sainsbury's v Visa
12 and Mastercard case, and we have added it to the bundle at authorities tab
13 34. I don't need for you to turn to it, I said I would give you the reference and
14 provide the authority.

15 **MR JUSTICE ROTH:** That deals with what, sorry?

16 **MR HOSKINS:** The nature of the primary loss in terms of what primary loss does
17 the infringement cause for those who pay an increased overcharge. And the
18 answer is, it is the difference between the actual overcharge and the lawful
19 overcharge.

20 **MR JUSTICE ROTH:** In Sainsbury's v Mastercard in the Tribunal, this Tribunal, did
21 Sainsbury's recover compound interest?

22 **MR HOSKINS:** Well, that judgment has been annulled.

23 **MR JUSTICE ROTH:** Well --

24 **MR HOSKINS:** So --

25 **MR JUSTICE ROTH:** -- not for all purposes.

26 **MR HOSKINS:** Not for all purposes, no.

1 **MR JUSTICE ROTH:** But I'm wondering -- you were in that case, weren't you?

2 **MR HOSKINS:** I was, but like you, my memory fails me sometimes. I will bet good
3 money that Mr Cook remembers though, I hope I am not putting him on the
4 spot.

5 **MR JUSTICE ROTH:** It will be easy to look into it.

6 **MR COOK:** I can, if I can interject, answer that: compound interest was awarded in
7 the Sainsbury's case and that part of the judgment was not challenged. And
8 we have accepted in the context of the remittal proceedings that once all the
9 other aspects of the calculation are definitively determined, then the Tribunal's
10 findings on compound interest will simply apply on top of those, and there is
11 a point -- in practical terms, the compound interest addition is actually offset
12 by a point in relation to corporation tax.

13 But nonetheless there is an award of compound interest.

14 **MR JUSTICE ROTH:** Yes, thank you.

15 **MR HOSKINS:** I should add that compound interest is based on a specifically
16 pleaded and proven case, so there was specific evidence that went to the
17 nature and extent of Sainsbury's' compound interest loss. It complied fully
18 with Sempra Metals.

19 **MR JUSTICE ROTH:** Yes.

20 **MR HOSKINS:** The second point I wanted to make, again I will take it very briefly, is
21 obviously we have had a look at the British Household Panel Survey that
22 Professor Waterson referred to. We see it does contain some data as to
23 borrowing and saving in terms of the households that form part of the survey.

24 As far as we can see, it doesn't inform us as to what those people would do if they
25 had had extra money in their pocket, which we say, of course, is the correct
26 question, and indeed it is the way Ms Demetriou put it in her submissions, as

1 a question to be asked for assessing whether compound interest losses have
2 been suffered: what would each individual have done if they had had extra
3 money in their pocket because the overcharge would have been lower; would
4 they have borrowed less, would they have saved more and/or would they
5 have spent more?

6 And the British Household Panel Survey doesn't address that issue as far as we are
7 aware.

8 Those were the only quick points I wanted to wrap up on compound interest.

9 Unless you have any further questions for me I will hand over to Mr Cook to deal with
10 the undertaking point.

11 **MR JUSTICE ROTH:** No, I don't think we have any further questions, thank you.

12 **MR HOSKINS:** Thank you very much.

13 **MR JUSTICE ROTH:** Yes, Mr Cook.

14
15 **Submissions by MR COOK**

16 **MR COOK:** Thank you, sir.

17 Just one point to come back on in relation to the compound interest, having
18 reminded myself. As Mr Hoskins rightly said, that was a case which was
19 specifically proved and pleaded and one part of the Tribunal's ultimate
20 findings was effectively that there would only be compound interest on
21 50 per cent of the claim. The specifics of exactly why the Tribunal got to that
22 need not worry this Tribunal for present purposes, but it is simply shows the
23 illustration of why the specific facts of a particular party's case may result in
24 there being in that case no compound interest, because the conclusion
25 essentially was, by analogy of these proceedings, that Sainsbury's was
26 a spender not a saver or borrower in relation to that part of the putative loss --

1 **MR JUSTICE ROTH:** Yes.

2 **MR COOK:** -- or part of the actual loss.

3 Turning to the point I'm meant to be addressing, which is the issue of the
4 undertaking, and you heard from me briefly on this but I can certainly wrap it
5 up before lunch.

6 The starting point is: in the first instance, any costs award in favour of Mastercard in
7 these proceedings will be made against Mr Merricks personally, as the class
8 representative.

9 Now, Mr Merricks has £15 million of funding through the funding agreement in
10 relation to that personal exposure to a cost order in relation to Mastercard's
11 costs.

12 That funding agreement is a bilateral agreement between Mr Merricks personally
13 and Innsworth Capital, and Innsworth Capital is an offshore company based in
14 Jersey. As a non-party, Mastercard has no right to enforce that funding
15 agreement, which includes the usual third party rights exclusion that one often
16 finds in contracts.

17 In any event, you wouldn't normally expect a non-party to be able to enforce
18 a contract.

19 What Mastercard is seeking is an undertaking from the funder to the Tribunal, and
20 there is a draft of the undertaking that we are seeking in the bundle at
21 bundle C, page 134. I don't need to take the Tribunal to it particularly, unless
22 you wish to see it, sir?

23 **MR JUSTICE ROTH:** That would be helpful, yes.

24 **MR COOK:** Certainly, sir.

25 **MR JUSTICE ROTH:** Bundle C?

26 **MR COOK:** It is page 134, sir.

1 **MR JUSTICE ROTH:** 134. It is with a letter, is it, from Freshfields?

2 **MR COOK:** Tab 15. That's the problem with using the electronics, I'm using it
3 without tabs.

4 So page 134. That is the draft undertaking.

5 Sir, it is a relatively short document, as you can see. It is simply a single page and it
6 records that, or the proposal is that it is a cost undertaking given by the funder
7 Innsworth Capital to the Tribunal in respect of the collective proceedings
8 against Mastercard. The critical paragraph is paragraph 2, which provides
9 that the funder unconditionally undertakes the Tribunal to pay to Mastercard
10 any money up to the sum of £15 million, which is the amount in the funding
11 agreement which either the proposed class representative or the funder itself
12 is legally liable to pay in respect of any Mastercard costs.

13 That reflects the fact, sir, as I said, that Mr Merricks is the person who, in the first
14 instance, a costs award would be made in relation to. But there is also the
15 possibility of non-party costs awards being sought against somebody who
16 funds litigation, so it might ultimately be an order being made against
17 Innsworth if we had to take that second step in terms of trying to enforce,
18 which obviously makes it a bit more difficult and expensive if we had to do
19 that.

20 So it simply requires an undertaking to pay up to £15 million, but in relation to
21 paragraph (c), Innsworth is entitled to withdraw the undertaking with
22 immediate effect by notice if it terminates its funding but it can't escape
23 adverse costs incurred before such withdrawal. So it is allowed to terminate
24 the accrual of liability for costs at a certain point in time but not escape the
25 historic position.

26 What that essentially does is it is ensuring that the funder is given an undertaking

1 with all the force that comes with an undertaking, that it will make a direct
2 payment to Mastercard to the extent that there is a requirement to pay
3 Mastercard's costs in these proceedings either by Mr Merricks or by the
4 funder.

5 We say the reason for wanting a funding agreement is, with respect to
6 Ms Demetriou, obvious: the funder is the party with the money, and certainly
7 on a personal level Mr Merricks doesn't appear to have anything like the funds
8 required to meet the kind of costs we are talking about in this litigation of up to
9 £15 million. The issue with the existing structure that is put in place, which is
10 that bilateral agreement to which Mastercard is not a party, is without direct
11 rights against the funder, Mastercard is dependent on the money coming
12 through Mr Merricks, and we say there is a risk that the sums provided to
13 Mr Merricks by the funder might be dissipated on other liabilities rather than
14 being used to discharge the costs order in Mastercard's favour.

15 We are not imputing any sort of wrongdoing by Mr Merricks personally, but likely the
16 situation in which that might arise would be in the event of Mr Merricks'
17 personal insolvency, which might mean there would be a legal requirement for
18 any money that Mr Merricks receives from the funder to be divided among his
19 many creditors at that stage, of which Mastercard would simply be one, and
20 that might well result -- that would certainly result in Mastercard not being
21 paid.

22 We don't want to be in a position as well, sir -- it is a further point -- of potentially
23 seeking to enforce a third party costs award overseas against an offshore
24 company, and a direct undertaking is likely, in practice, to avoid the need to
25 seek third party cost orders, avoid a situation in which the funder doesn't
26 meet, you know, an obligation to pay its funding promptly, and it would also

1 avoid, if we did get to the situation where you were trying to enforce a costs
2 award overseas, potential arguments that the funder might make to try and
3 resist enforcement.

4 There are certain matters, we say, which amplify these concerns. And simply the
5 amount of money in question is the reason why Mastercard, we say, simply
6 shouldn't have to take any unnecessary risk in this regard.

7 But certain recent matters or matters associated with these proceedings do amplify
8 the general concerns, and it will be helpful to take these points by showing the
9 Tribunal just one letter from the correspondence on these issues. That is in
10 bundle C, page 158.

11 **MR JUSTICE ROTH:** Bundle C, yes.

12 **MR COOK:** Tab 22, sir. And that is going to be a letter I hope from my solicitors,
13 Freshfields Bruckhaus Deringer to QE of 23 March. It is paragraph 3 I want to
14 take you to in relation to this, sir. That is a letter I hope which makes good my
15 surprise yesterday at Ms Demetriou's suggestion that she didn't know the
16 basis on which she was seeking the undertaking, and that explains some of
17 the factors that lead to the application.

18 Firstly, that the projected costs of these proceedings are not only extremely large but
19 appear to be escalating, Mr Merricks having obtained an additional 30 million
20 of funding, and there were a number of issues to date in these proceedings
21 concerning Mr Merricks' litigating funding arrangements.

22 If I could ask you, sir, to read subparagraphs (a) and (b) there rather than me
23 reading them out.

24 **MR JUSTICE ROTH:** Yes, we will do that if you pause.

25 **(Pause).**

26 Yes.

1 **MR COOK:** Sir, we say simply those those points emphasise why Mastercard, with
2 respect, simply doesn't consider it should be the party taking any risk arising
3 from Mr Merricks' funding arrangements.

4 What do Mr Merricks and the funder say in response? They say essentially nothing,
5 despite multiple letters on this issue, which have essentially all refused to give
6 the undertaking sought. There has never been any explanation at all for that
7 refusal. I have to say, sir, that the funder's refusal to give what we see as
8 a fairly conventional undertaking without any explanation at all does rather set
9 alarm bells ringing.

10 It suggests that this is a funder which doesn't mind there being a little wriggle room
11 when it comes time to pay, and that, of course, is exactly what we are
12 concerned about.

13 As I have said, sir, we do see this request for a direct undertaking as being a very
14 conventional suggestion. That is exactly the same kind of undertaking that
15 the funder in the proposed rail tickets collective proceedings gave without any
16 objection at all.

17 And, sir, you referred me yesterday to whether this was a point which arose in the
18 Trucks litigation. Sir, a similar point did indeed arise there, although it was in
19 relation to an ATE insurance policy. So the point was a slightly different one
20 or at least there was some bells and whistles on it compared to this.

21 And what was sought by the defendants in that case, and was ultimately agreed to
22 by the insurer and the various parties associated with funding the
23 proceedings, were: certain restrictions on an insurer's normal right of
24 avoidance of an insurance policy -- which is very different, of course, given
25 the particular rights, abilities to avoid insurance policies; and also, that the
26 defendants in that case should have a direct right of enforcement against the

1 insurer.

2 That was something that was dealt with by agreement. And what was Tribunal was
3 being asked to consider is: in the light of that package of measures, had
4 enough been done by the funder and the insurer to satisfy any realistic or
5 reasonable concerns?

6 And one difference in that case was, because they were dealing with an insurance
7 policy, there was potential for the third party rights against Insurers Act 2010
8 to apply, which gives defendants, or gives parties in these kind of situations
9 directly enforceable rights against an insurer, if the insurer -- insured company
10 went bust. Although in that case the insured was based in Guernsey so the
11 Act may not have applied.

12 **MR JUSTICE ROTH:** I think what happened -- I also had a look at it -- as in this
13 case there was an exclusion of the rights against third party's act in there, as
14 you say, and in the insurance contract, not in the funding agreement, and they
15 agreed to reword it to allow these statutory rights for third parties to apply to
16 the insurance policy.

17 I think that is what happened.

18 **MR COOK:** Yes. That is certainly as I read the judgment. Although it is, yes,
19 without having been involved so I don't have the benefit of your direct
20 knowledge of the case.

21 **MR JUSTICE ROTH:** So a similar point was raised that, what happens if a person
22 has to make the claim, in that case goes into liquidation.

23 They are then one of the -- could leave the defendant high and dry, or with a claim in
24 a liquidation with unresolved creditors, which is the same point you raised.

25 **MR COOK:** Absolutely sir.

26 Yes, I mean the specifics of much of the judgment don't take matters much further,

1 sir, because you were considering very specific points associated with those
2 particular funding and insurance arrangements.

3 One or two little points that do help. Firstly, sir, you and your colleagues in that case
4 concluded that authorities regarding security for costs provide a helpful
5 analogy for some of the considerations which are relevant, but they are not
6 automatically applicable. And we do pray in aid the established practice of
7 litigation funders providing security for costs under CPR2514. And there were
8 various examples of that in place.

9 What we are seeking is far less onerous than security for costs. The funder doesn't
10 need to put any money up, we are not suggesting that is necessary, or a bank
11 guarantee. It is simply giving an undertaking to allow us to short circuit
12 otherwise an uncertain process.

13 The other matter was, there was an argument raised in the Trucks litigation on behalf
14 of the applicant about whether that was something that should be addressed,
15 whether the issue of the sufficiency of the funding package, in terms of
16 protecting the defendant, should be addressed as part of the CPO process or
17 left to be dealt with at a later stage when the defendant has made
18 an application for security for costs. And that is a point which has been made
19 in the correspondence on behalf of Mr Merricks in this case. And the Tribunal
20 there rejected that wait-and-see approach, concluding that the funding
21 position should be resolved as part of determining whether -- in that case it
22 was UKTC -- could be authorised, or should be authorised, as the class
23 representative.

24 So it rejected the wait-and-see approach.

25 There is a slight wrinkle on that which matters not at all here, and the wrinkle
26 was: the Tribunal said that it was sufficient that the new package or the

1 amendments were put in place once the CPO appeal process, if any, had
2 been completed. So it didn't need to be done in advance. But it did need to
3 be done, you know, the need for that package to be put in place should be
4 determined as part of the CPO, and then put in place as soon as the litigation
5 was going to proceed. And that was because there were substantial costs
6 associated with that package of measures. I think 10 per cent was going to
7 increase the cost of the insurance by 10 per cent.

8 So we say, again, the wait-and-see approach that was urged on the Tribunal there,
9 and has been implicitly urged by Mr Merricks, again is simply wrong here.
10 That, you know, the Tribunal should grasp the nettle now and ensure that
11 there is an effective package of security -- effective package of funding in
12 place, which protects the interests of the defendant, in the context of a claim
13 that may ultimately fail. And we say, will ultimately fail.

14 **MR JUSTICE ROTH:** Yes.

15 I think we set out the required endorsement to the insurance policy in the judgment.

16 **MR COOK:** You did in that case, sir, but it was on the table so it was a draft, yes, it
17 wasn't --

18 **MR JUSTICE ROTH:** No, we didn't draft it, no. We made it a requirement at the
19 appropriate time.

20 **MR COOK:** Absolutely.

21 It has been suggested in correspondence as well that there is nothing in the CAT's
22 rules which makes provision for funders to give undertakings to the Tribunal.
23 And the reality, sir, is that the rules don't, quite rightly, try and make specific
24 provision for every situation that might arise.

25 We see from Trucks that the Tribunal is more than -- more than capable, more than
26 entitled to put certain restrictions in place in the context of funding, to say

1 that: authorisation is dependent upon either a package being in place or being
2 conditional on certain additional steps being taken before the proceedings
3 continue.

4 So standing back, sir, we simply can't see any good reason why this funder is
5 refusing to provide an undertaking to the Tribunal, and none has been
6 suggested either in correspondence or Ms Demetriou yesterday.

7 And if there is a bad reason for the refusal to give an undertaking then that merely
8 reinforces the need for one.

9 So we say simply, sir, that any CPO should be made conditional on the undertaking
10 being given by the funder and if the funder doesn't wish to do so these
11 proceedings simply won't continue.

12 **MR JUSTICE ROTH:** Yes. Thank you.

13 **MR COOK:** That was all the submissions I wanted to make, sir.

14 **MR JUSTICE ROTH:** I think we are happily ahead of schedule. You have
15 concluded I think, therefore, the submissions for the respondent.

16 So we can continue at 2.00 with reply for Mr Merricks. 2.00.

17 **MR COOK:** Thank you, sir.

18 **(12.58 pm)**

19 **(The short adjournment)**

20 **(2.00 pm)**

21 **(Technical difficulties)**

22 **(2.07 pm)**

23 **MR JUSTICE ROTH:** Yes, I don't know who goes first?

24 **MS DEMETRIOU:** Sir, I was going to go first on compound interest and then I will
25 deal briefly with Mr Cook's point about the undertaking and then over to
26 Ms Wakefield on estates, if that is acceptable.

1 **MR JUSTICE ROTH:** Yes, of course.

2

3 **Submissions by MS DEMETRIOU**

4 **MS DEMETRIOU:** Mastercard's case on compound interest is put, as Mr Hoskins
5 made clear at the outset of his submissions, on the basis of commonality and
6 not on the basis of suitability. So we can take it therefore that Mastercard
7 accepts that the compound interest claim is suitable for inclusion in collective
8 proceedings.

9 But Mastercard says that there is no common issue because the position of every
10 consumer is different. So as he put it, some may be borrowers, some may be
11 spenders, some may be both, some may be savers, and their position will
12 vary in different ways over time.

13 And, sir, members of the Tribunal, my short answer to that is that it ignores the fact
14 that we propose to seek an aggregate award in respect of the interest losses
15 to the class as a whole.

16 Mastercard made the same argument about lack of commonality in respect of the
17 principal loss in advance of the last CPO hearing, and of course the Tribunal
18 will know that the Tribunal agreed with Mastercard that pass-on was not
19 a common issue. And if I could just remind you of where the Tribunal said
20 that, so going back to the authorities behind tab 22. So it is authorities 1,
21 tab 22, paragraphs 63 and 66, pages 407 and 408.

22 You, sir --

23 **MR JUSTICE ROTH:** One moment, please.

24 **MS DEMETRIOU:** It is the pagination that says "Authorities 407".

25 **MR JUSTICE ROTH:** Yes, I understand.

26 **MS DEMETRIOU:** So, sir, you will recall at paragraph 63, the Tribunal held that as

1 regards pass-through, the experts in their oral evidence accepted that there is
2 likely to be significant variation not only as between different types of goods
3 and services but also different kinds of retail outlet. And then there is some
4 discussion about that.

5 The conclusion is over the page at paragraph 66: "therefore pass-through cannot be
6 described as a common issue in any meaningful sense".

7 And "we therefore reject the assertion in the applicant's pleaded reply that the
8 individual claims are largely identical save in purely theoretical terms. At
9 a high level of generality that is far from the case."

10 Now, sir, of course as the Tribunal knows, the Court of Appeal and the Supreme
11 Court reached a different conclusion on that point. And just to recall what
12 they found, so we have the Court of Appeal behind tab 26 and it is page 519.
13 Sir, you saw some of these passages yesterday, but picking up paragraph 45
14 which, as you pointed out yesterday, starts with a critical issue, and if we look
15 at that paragraph, the second part of that paragraph:

16 "Although the expert evidence must obviously provide a means of calculating the
17 level of pass-on of the MIFs from merchants to consumers via price, there is
18 some controversy as to whether that is sufficient to make the global loss
19 suffered by consumers a common issue absent being able to show that each
20 member of the class was in some way adversely affected in their own
21 purchases during the infringement period."

22 Then, sir, if I can just pick up a further point -- I have missed the first sentence but
23 I want to emphasise a point there for later purposes and this is a point about
24 causation. So if I just ask you to read the first sentence, too.

25 **MR JUSTICE ROTH:** Yes.

26 **MS DEMETRIOU:** And you can see that the point about causation is that the

1 question that the Court of Appeal was looking at was whether each member --
2 the critical issue was whether it was necessary to show that each member of
3 the proposed class has in fact suffered some loss due to the alleged
4 infringement.

5 Moving on to paragraph 46, we see, at the end of the paragraph:

6 "Although the purpose of such proceedings is to combine into a single action what
7 would otherwise be individual follow-on claims and that to be eligible for
8 inclusion in collective proceedings they must raise common issues of fact or
9 law, the issue of whether the MIF overcharge was passed on to consumers
10 generally and in what amounts is an issue common to all such individual
11 claims as a necessary step in establishing loss by the class as a whole."

12 That is the critical part of these paragraphs.

13 What the Court of Appeal is finding there is that because pass-on, because
14 an aggregate award of damages was being sought, and because pass-on
15 was being approached on a class-wide basis rather than an individual basis,
16 that was sufficient to make the issue a common issue.

17 Sir, one can quite see the logic, with respect, because the manner of proving
18 pass-on was to prove it on a class-wide basis.

19 And then we see that the Supreme Court finds that that is correct. So that was not
20 the subject, that finding was not the subject of any appeal by Mastercard, as
21 the Supreme Court noted. But the Supreme Court endorsed that reasoning
22 and we see that at paragraph 64 through to 66. So we are behind tab 28.1
23 and we are on page 568.32 of the bundle.

24 So if the Tribunal has that page, 64 sets out the ways in which the majority found
25 that the Tribunal committed errors of law, and (a) is the pertinent one. So "the
26 CAT got the common issue question wrong in relation to the merchant

1 pass-on issue” and should have held that that was a common issue.

2 And then you see at 65, under the heading "Common issues", "at the beginning of
3 this passage", so it is looking back at paragraph 67 of the Tribunal's judgment:
4 "The CAT correctly addresses the common issues requirement as a certification
5 hurdle but it had already correctly concluded that there was nonetheless
6 another common issue, the overcharge issue, sufficient to surmount that
7 hurdle. It then treated the assertion, which it later rejected, that the case was
8 suitable for aggregate damages as a sort of substitute for Mr Merricks' failure
9 to show that the merchant pass-on issue was a common issue. Had the CAT
10 concluded, as the Court of Appeal held and is not appealed, that the merchant
11 pass-on issue was a common issue, this would or should have been
12 a powerful factor in favour of certification."

13 So that is where it has been left, and you see my point, that the Court of Appeal's
14 reasoning is that because this is an aggregate award of damages that is being
15 sought, and because pass-on is being approached on a class-wide basis, that
16 makes it a common issue. And we say precisely the same applies in respect
17 of the compound interest claim.

18 **MR JUSTICE ROTH:** Are they going that far? That would mean any issue, if you
19 were seeking an aggregate award, just by seeking that award, any issue is
20 a common issue. They are not going as far as that, are they?

21 **MS DEMETRIOU:** Sir, of course you have to show that an aggregate award is
22 suitable in any case. So you have to show --

23 **MR JUSTICE ROTH:** That is a separate limb.

24 **MS DEMETRIOU:** That is separate point. It may well be that one is seeking
25 an aggregate award of damages and that that there are issues associated
26 with the claim which are not common issues. Of course I'm not saying that

1 simply by seeking an aggregate award all issues become common issues,
2 that is not what the Court of Appeal --

3 **MR JUSTICE ROTH:** Yes.

4 **MS DEMETRIOU:** The point here is that there is a direct analogy between what it
5 did hold and the compound interest claim.

6 **MR JUSTICE ROTH:** If we start from that point, that just because it is an aggregate
7 award not all issues are common issues, then that begs the question: right,
8 within an aggregate award how does one decide whether something is
9 a common issue or not?

10 **MS DEMETRIOU:** Yes.

11 **MR JUSTICE ROTH:** And are they not saying that because it is an issue of whether
12 the MIF was passed on to consumers generally, so it applies to all
13 consumers, the question of the pass-on? All would suffer some pass-on,
14 there would be a variety in extent, but they are all subject to pass-on,
15 therefore it is an issue common to all of them. Is that what --

16 **MS DEMETRIOU:** I don't think they can be saying that. Of course it is impossible to
17 say now that all consumers in the class will be subject to pass-on. It is your
18 care home point, sir, so it may or may -- let's say that this claim goes horribly
19 badly for us and very well for Mr Hoskins's clients and actually we don't
20 succeed in showing pass-on for various sectors of the economy. That is of
21 course Mr Hoskins's case.

22 Then in those circumstances, one has to look at who has purchased -- there may
23 well be class members who haven't suffered loss. So that is a necessary
24 premise for all of this discussion. So nobody is saying, least of all the Court of
25 Appeal or Supreme Court, that we are capable of demonstrating now, at the
26 certification stage, that every member of the class will inevitably have suffered

1 loss. That can't be right.

2 But what they are saying, in our respectful submission, if you look at paragraph 46 of
3 the Court of Appeal, 45 and 46, is that it is legitimate, in this case, in seeking
4 an aggregate award in the way that we do, to show that loss has been
5 suffered by the class, so by members of the class, loss has reached the class
6 level, and that by approaching it in that way, that converts the pass-on issue
7 into a common issue. And it makes complete sense because the way that we
8 are seeking to prove the case is on a class-wide basis, a top-down basis.

9 So by doing that one is not in the business of starting with the loss of each individual,
10 and aggregating it up upwards; one is starting from the top and working
11 downwards. And once that has been proposed as a methodology in support
12 of the aggregate award, then it is a common issue because one is deciding it
13 in a common way.

14 So, sir, the point is that, going back to the question you put to me, does having
15 an aggregate award necessarily mean that the issue is common, it doesn't
16 necessarily mean it, but if your methodology in seeking the aggregate award
17 is to approach loss on a class-wide basis, a top-down basis, then yes, we say
18 at that stage the commonality criterion is fulfilled.

19 That really is the basis for the Court of Appeal and the Supreme Court's ruling, and
20 one sees that, as I say, from those paragraphs in the Court of Appeal's
21 judgment, clearly.

22 We say that the same applies in respect of the compound interest claim.

23 **MR JUSTICE ROTH:** Just pause a moment.

24 **MS DEMETRIOU:** Yes.

25 **MR JUSTICE ROTH:** (Pause).

26 **MS DEMETRIOU:** Perhaps we can go back to the Court of Appeal --

1 **MR JUSTICE ROTH:** I'm looking at the Court of Appeal, because that is the way the
2 explanation --

3 **MS DEMETRIOU:** Sir, if you look at the part I didn't read. So in 46, we say -- first of
4 all they look at the Microsoft case, you see that.

5 **MR JUSTICE ROTH:** Yes.

6 **MS DEMETRIOU:** They say:

7 "There is no requirement under section 47C(2) to approach the assessment of
8 an aggregate award through the medium of a calculation of individual loss and
9 the appellant's experts have not attempted to do so. In that they have the
10 support of the Canadian authorities, which, in cases like Microsoft, have
11 approved a top-down method of calculation on the basis that the level of
12 pass-on to the class as a whole will be a common issue for all individual
13 claimants."

14 **MR JUSTICE ROTH:** Yes, just that sentence.

15 **MS DEMETRIOU:** And then --

16 **MR JUSTICE ROTH:** It has been pointed out that that is possibly not correct on the
17 Canadian cases, but it doesn't matter. But they go on to the next sentence --

18 **MS DEMETRIOU:** Yes, that the same approach should be adopted in relation to
19 collective proceedings under section 47B:

20 "Although the purpose of such proceedings is to combine into a single action what
21 would otherwise be individual follow-on claims and that to be eligible for
22 inclusion in collective proceedings they must raise common issues of fact or
23 law, the issue of whether the MIF overcharge was passed on to consumers
24 generally and in what amounts is an issue common to all such individual
25 claims as a necessary step in establishing loss by the class as a whole."

26 So, sir, in my respectful submission what they are doing is acknowledging that the

1 methodology proposed by Mr Merricks' experts in this case is a top-down
2 methodology which does not start from the point of view of individual loss. So
3 that is not what we are doing in this case. It is not our proposal.

4 **MR JUSTICE ROTH:** Yes.

5 **MS DEMETRIOU:** Once that is the methodology, once what you are saying is: we
6 are not going to calculate individual loss at all, we are going to look at the loss
7 caused to the class as a whole, then that is sufficient, in my submission, to
8 make it a common issue.

9 And we say that makes sense because if that is the methodology, then plainly it
10 follows that it is common to the class because that is the only way you can do
11 it is by adopting a class-wide method.

12 **MR JUSTICE ROTH:** Yes. I mean, the definition of "common issue" in the statute is
13 in section 47B.

14 **MS DEMETRIOU:** Yes.

15 It is at (6), so 47B(6), which is --

16 **MR JUSTICE ROTH:** It is actually in the same:

17 "... they [that is the claims] raise the same, similar or related issues of fact ..."

18 And common issue is actually a sort of shorthand, I don't think the word "common"
19 actually appears in the statute.

20 **MS DEMETRIOU:** It doesn't.

21 **MR JUSTICE ROTH:** So the individual claims as between them must raise the
22 same, similar or related issues of fact for the issue to be what we have called
23 "common".

24 So are they not saying: whether the MIF overcharge was passed on and in what
25 amounts, that is something that is raised in the same way or similar way -- it
26 may not be identical because of different levels of spend, as you say, in

1 different sectors -- as between all members of the class.

2 **MS DEMETRIOU:** Sir, I don't think they are saying that. In fact my submission is
3 that they are not saying that. Because of course it is not right to say that it is
4 raised in the same way. In fact that is the basis; it is because it is not right
5 that the Tribunal found it wasn't a common issue, because spending between
6 individuals will vary very dramatically as between sectors and over time.

7 So it was on that basis that the Tribunal found, applying that approach, the Tribunal
8 found that it wasn't a common issue, and so there is nowhere in this
9 reasoning, the Court of Appeal is not saying: that is not right because actually
10 even though individuals spent differently it is all more or less the same; there
11 is no reasoning along those lines. What they are saying is, and this is the
12 point about Microsoft and the following sentence, they are saying that in this
13 case, in pursuing an aggregate award, what is proposed is a top-down
14 method of calculation.

15 So, in bundling the individual claims together for the purposes of the collective
16 proceedings, in bundling those claims together, the loss to the class as
17 a whole is going to be proven on this top-down approach, by this top-down
18 approach, which doesn't look at things on an individual level, so that means
19 that it is a common issue between those claims.

20 That is --

21 **MR JUSTICE ROTH:** It seems a bit circular. I thought -- because they are
22 recognising, they refer to section 47B(6): to be eligible for inclusion in
23 collective proceedings, they -- that is what otherwise would be individual
24 claims -- they must raise common issues of law and fact. The issue of
25 whether MIF overcharge was passed on to consumers generally and in what
26 amounts is an issue common to all such individual claims.

1 **MS DEMETRIOU:** Yes, but then as a necessary step in establishing loss by the
2 class as a whole.

3 **MR JUSTICE ROTH:** Yes, you then go on to do it that way, that is how do you it.

4 **MS DEMETRIOU:** But, sir, it is because you do it that way that the issue is common.

5 So, if one were doing it differently, so if one were saying: we are not going to
6 take a top-down approach -- perhaps I can put it this way -- we are going to
7 take a bottom-up approach and we are going to prove every single individual's
8 loss separately by looking at their individual spending and pass-on in those
9 sectors and at those times, then I think I would be in great difficulty in trying to
10 persuade the Tribunal that this was a common issue.

11 Because plainly there would be an individual assessment to be made in each case,
12 but it is because we are not doing that, that is not our proposal, that actually
13 what, if you were doing it on a bottom-up way, would not be common issues
14 become common issues, because the methodology being used, we are not
15 calculating, we are saying: we are entitled under section 47C(2) to not go
16 down the individual assessment route and to seek an aggregate award. If we
17 do it in that way, that means that these individual claims which are bundled
18 raise common issues, because the purpose of the commonality requirement,
19 in my submission, is a gatekeeper purpose, and it is for the Tribunal -- the
20 reason it is there is that the Tribunal must satisfy itself that collective
21 proceedings is an appropriate way of determining the claims, and so if in fact
22 the methodology calls on the Tribunal to assess the loss to the class, not by
23 reference to the individual facts of each case but by reference to the loss as
24 a class, then that does mean that these individual bundled claims have
25 common issues, which is sufficient to justify certification.

26 That, in my submission, is really what the Court of Appeal is saying here. There is

1 no attempt here by the Court of Appeal to grapple with the points made by the
2 Tribunal about varying spending patterns between individuals, they are really
3 focusing on the top-down approach.

4 So we say that the same applies in respect of the compound interest claim. And so
5 if one were seeking, if one were seeking an award of compound interest in
6 these proceedings, if the methodology that we were proposing involved
7 looking at each individual, then I would be in a different position. But we are
8 not doing that. We're seeking an aggregate award in respect of the interest
9 losses to the class as a whole. And the methodology we proposed is on that
10 basis.

11 **MR JUSTICE ROTH:** Yes, we will come to the methodology in a minute.

12 Of course you don't need to seek aggregate damages in a collective action.

13 **MS DEMETRIOU:** No.

14 **MR JUSTICE ROTH:** But do you need to have common issues.

15 **MS DEMETRIOU:** You do. You do need --

16 **MR JUSTICE ROTH:** So you can have common issues without seeking
17 an aggregate award.

18 **MS DEMETRIOU:** You can. That is right. But we are seeking an aggregate award
19 in respect of the interest losses.

20 **MR JUSTICE ROTH:** No, what you're saying is -- maybe that is what they are
21 saying. So if you hadn't sought an aggregate award, or in a case where
22 an aggregate award is not sought, then in deciding whether or not something
23 is a common issue you look at the nature of the kind of claims that each
24 individual member would have to make and see if you can approach them in
25 common --

26 **MS DEMETRIOU:** Yes.

1 **MR JUSTICE ROTH:** -- even though you're not going to end up with an aggregate
2 award.

3 **MS DEMETRIOU:** Exactly.

4 **MR JUSTICE ROTH:** But if you are seeking an aggregate award, then because you
5 don't have to look at them individually at all, it becomes a common issue.

6 **MS DEMETRIOU:** Exactly.

7 **MR JUSTICE ROTH:** That is the point that you're making, is it?

8 **MS DEMETRIOU:** That is exactly the point I'm making.

9 Sir, I also make the point that that fits with the purpose of having commonality
10 requirements. Because if one is seeking in collective proceedings an award
11 which is not aggregate, then of course the Tribunal will need to be assured
12 that it is efficient to have collective proceedings even though you're seeking
13 an award based on individual claims. So it is only if there are sufficient
14 common issues that that would be appropriate.

15 But where actually you're seeking an aggregate award, where you're not even
16 attempting to calculate the loss caused to each individual but you're seeking
17 to calculate and prove the loss caused to the class as a whole, then that
18 means that there is a common issue because it is being approached in
19 a common way.

20 So I think you have my point. That is where we say that Mr Hoskins's approach is
21 wrong. Because in this case, just as with the primary loss, we are seeking
22 an aggregate award in respect of the interest losses to the class as a whole.

23 What Mr Hoskins says is: well no, you haven't satisfied the commonality requirement
24 in respect of that claim, of the aggregate claim, because if you look at each
25 individual person, they will be wildly different: some will be borrowers, some
26 will be spenders, some will be both. They will spend different amounts over

1 time and have varying spending habits. He says that means you can't
2 surmount the commonality requirement.

3 But we say, with respect, that that is a wholly artificial way of looking at it because
4 that is not what we are doing. And indeed if Mr Hoskins were right, you could
5 never have an aggregate award for compound interest because it would never
6 be able to satisfy the commonality requirement, because of course claims for
7 compound interest are liable to be different. That is Mr Hoskins's whole point.

8 **MR JUSTICE ROTH:** Well, that is one point. His other point of course is to say: you
9 haven't a methodology, a sound methodology of doing it --

10 **MS DEMETRIOU:** I'm going to come to that.

11 **MR JUSTICE ROTH:** -- which you haven't come to yet. So if one goes back to the
12 CAT, because I do, to be completely frank, find this a bit difficult myself --

13 **MS DEMETRIOU:** Yes.

14 **MR JUSTICE ROTH:** -- if we go back, because the explanation is a little bit
15 succinct in the Court of Appeal --

16 **MS DEMETRIOU:** It is.

17 **MR JUSTICE ROTH:** -- judgment. If we go back to the CAT judgment, which is --
18 you took us to it a moment ago.

19 **MS DEMETRIOU:** It is behind tab 22.

20 **MR JUSTICE ROTH:** 22, thank you. Just to make sure I understand your
21 submission.

22 Are you in fact saying that 66 is wrong, it is a common issue even though there is
23 obviously a great variety, and what is said in 67 -- which we haven't looked
24 at -- here in the middle of the paragraph:

25 "Here the applicant seeks to address the problem of pass-through but submitting the
26 Tribunal can arrive at an aggregate award of damages which would then be

1 distributed."

2 And that because, if they are able to arrive at an aggregate award through a suitable
3 methodology which deals with pass-through, that then makes it a common
4 issue. So while the Tribunal thought, we thought it is not a common issue but
5 it does not matter because you can get an aggregate award through
6 a suitable methodology, and we found it was suitable, what the Court of
7 Appeal is saying is that the second step really answers the first step. It makes
8 it a common issue. So it is not overcoming the fact that it is a common issue,
9 it actually makes a common issue. Is that --

10 **MS DEMETRIOU:** That is precisely my submission.

11 **MR JUSTICE ROTH:** Yes, I see.

12 **MS DEMETRIOU:** And one can see that the Tribunal saw how closely related those
13 things were, because the Tribunal found that it wasn't a common issue
14 because it looked at the claims from an individual level. But then, in 67, it
15 says that might not matter because you're seeking an aggregate award. So
16 the Tribunal was addressing my statutory purpose point, which is: it does not
17 matter because you're not actually pursuing these as individual claims.

18 That is where we say that Mr Hoskins's submission is wrong, because it is very
19 artificial. He is saying: well, none of these individual claims for compound
20 interest raise common issues. But our point is that we are not pursuing
21 individual claims. We are pursuing an aggregate award of the interest losses
22 to the class as a whole.

23 **MR JUSTICE ROTH:** Yes.

24 **MS DEMETRIOU:** So, sir, where I have got to then, we say: if it is permissible, if it is
25 permissible for Mr Merricks to seek an aggregate award on behalf of the class
26 in respect of the class's interest losses, then in accordance with the

1 submissions I have just been making, common compound interest is
2 a common issue.

3 So the question then is: well, is it permissible for Mr Merricks to seek an aggregate
4 award in respect of compound interest? And Mr Hoskins says it is not
5 permissible for Mr Merricks to seek an aggregate award and he has two
6 arguments. I'm going to address them each in turn.

7 His first argument is that it would be inconsistent with Sempra Metals. He said that
8 Sempra Metals requires individual assessment of loss and causation.

9 And his second argument is the one that you have averted to already, which is that
10 we haven't proposed a plausible methodology. And yesterday he focused on
11 the overlap point, so we have said that we can identify borrowers and savers
12 but at the moment we can't see data to help us work out how many are in
13 both.

14 **MR JUSTICE ROTH:** I think two points, the overlap point and the fact that to qualify
15 for the award you need to show not just that you have a mortgage, but that
16 you would have some basis for saying that you would have used the money to
17 reduce it.

18 **MS DEMETRIOU:** That's right.

19 **MR JUSTICE ROTH:** The counterfactual point.

20 **MS DEMETRIOU:** Yes. So taking these in turn, so dealing with Sempra Metals first,
21 Mr Hoskins relies on Sempra Metals, as you have heard, for the proposition
22 that anyone who wishes to recover compound interest must on an individual
23 basis establish that they have been caused such losses and what their
24 quantum is.

25 We say that that is contrary to section 47C(2) and the availability of an aggregate
26 award of damages.

1 To which Mr Hoskins said: well, 47C(2) is only about quantification and it doesn't
2 enable causation to be proven on a class-wide basis.

3 So he accepts, we take from that, that the principles in Sempra Metals are displaced
4 at least to some extent by 47C(2), but he accepts, as he must in the face of
5 section 47C(2), that the principle in Sempra Metals which says that each
6 individual needs to quantify their individual loss has to give way, has to yield.
7 So the difference between us is whether section 47C(2) also permits
8 causation to be established on a class-wide basis. And we say that it does.

9 As you have seen, Lord Sales and Lord Leggatt address the point explicitly in their
10 judgment. And of course Mr Hoskins invites the Tribunal to find that they
11 were wrong in finding --

12 **MR JUSTICE ROTH:** That is the critical question, isn't it, on the causation, are they
13 right or wrong?

14 **MS DEMETRIOU:** It is a critical question.

15 Mr Hoskins had various points he made, but really the key point that I want to
16 address is he said that it is inconsistent with what the majority or at least -- he
17 couldn't find anything expressed in the majority, but he said it is inconsistent
18 with the tenor of the majority judgment.

19 We say precisely the opposite. We say that what Lord Sales and Lord Leggatt said
20 explicitly was the necessary basis for the majority's conclusion. And, again,
21 just to recapitulate, the majority held that in respect of the principle loss, that it
22 is permissible for Mr Merricks to seek an aggregate award in respect of the
23 loss suffered by the class as a whole and to distribute that award on an equal
24 basis to class members.

25 Now, we say they plainly did not have in mind, in light of that -- so in light of: well,
26 you can do this on a class-wide basis, you don't need to worry about

1 individual compensation when it comes to distribution -- in light of that, we say
2 they plainly did not have in mind that Mr Merricks would also have to prove
3 causation for every individual member of the class. That would have
4 completely undercut their conclusion and we say that had they thought that,
5 they would have said so.

6 We say that obviously the majority proceeded on the basis that causation too would
7 be demonstrated on a class-wide basis. And, sir, you have the point that
8 I made in opening, that the Court of Appeal found in our favour on that point.
9 You have seen that in the Court of Appeal's judgment.

10 **MR JUSTICE ROTH:** Yes. That is what you just showed. So you say that it follows
11 from what the Court of Appeal said about pass-on being a common issue that
12 they are accepting causation?

13 **MS DEMETRIOU:** Yes, and --

14 **MR JUSTICE ROTH:** And that was upheld by the majority as well as the minority.
15 Is that what you're saying?

16 **MS DEMETRIOU:** That is what I'm saying. And there is also the paragraph that
17 I didn't go back to just now but can we quickly turn it up so you have the
18 complete submission. We are again behind tab 26 and there is also the
19 point --I failed to take you, I should have taken you also to paragraph 47. We
20 are at page 519, this is the relevant passage. We have the point where they
21 set out the critical issue. They set that out in terms, the first sentence of
22 paragraph 45, the issue that you're now --

23 **MR JUSTICE ROTH:** Yes.

24 **MS DEMETRIOU:** The Lord Sales and Lord Leggatt issue.

25 And then you see at 47:

26 "To require each individual claimant to establish loss in relation to his or her own

1 spending ... would ... run counter to the provisions of section 47C(2)."

2 And the last sentence:

3 "Pass-on to consumers generally satisfies the test of commonality of issue
4 necessary for certification."

5 That, in my submission, is clear. And what Mr Hoskins's argument amounted to in
6 terms of the majority, the Lord Briggs judgment, was that he said that
7 Lord Briggs was equating individual actions with collective actions and that
8 that must mean, he said, that he disagreed with Lord Leggatt and Lord Sales
9 on the causation point.

10 But, my Lord, sir, the passages that Mr Hoskins took you to were addressing
11 a different issue. Lord Briggs was making the point in those passages that
12 the collective actions regime can't make it more difficult for the class as
13 a whole to establish their claim than it would be for an individual claimant.
14 That was all in the context of the broad axe point you will recall.

15 **MR JUSTICE ROTH:** Yes.

16 **MS DEMETRIOU:** So he certainly didn't say anywhere that all of the constituent
17 parts of an individual claim would need to be proven in a claim for
18 an aggregate award, short of quantification.

19 So if the Tribunal is with me on that, then the question is, the question for the
20 Tribunal in this case is whether there is a relevant difference between
21 causation in respect of the principal loss and causation in respect of
22 compound interest.

23 Now, Mr Hoskins sought to suggest that there was, and do you have the transcript?

24 **MR JUSTICE ROTH:** I'm not sure I do. Do I have it electronically?

25 **MS DEMETRIOU:** I think you should have been sent it by the transcribers but I don't
26 know if you have a hard copy.

1 **MR JUSTICE ROTH:** I'm told I do. Very helpful. Do my colleagues have it as well?
2 I think they may have it electronically. Is it a long extract?

3 **MS DEMETRIOU:** It is not a long extract. I can read it out.

4 **MR JUSTICE ROTH:** That would be sensible, yes.

5 **MS DEMETRIOU:** Sir, because you have it, sir, could you turn to page 98 and it is
6 the bottom of the page. So this is where Mr Hoskins seeks to say that there is
7 a difference in terms of causation as regards the primary loss and as regards
8 compound interest.
9 It is from line 19 onwards. He says:
10 "So in terms of causation in relation to primary loss one asks: did the infringement
11 cause an overcharge?"
12 So an overcharge in general.
13 "As I have said, Sainsbury's found that that is the level of the primary loss, how much
14 excess overcharge did one pay over what would have been the lawful
15 amount. In relation to compound interest, the causation question is this, did
16 the infringement cause the individual to borrow more and/or did it cause the
17 individual to save less and/or did it cause the individual to spend less, ie if
18 they had the extra money, would they have simply spent more? Of course
19 that head is not recoverable as compound interest."
20 Over the page:
21 "But again the questions one has to ask in relation to causation are different when
22 one is looking at primary loss as opposed to compound interest."
23 What he appears to be saying there is that, well, the reason why the case proceeded
24 as it did in relation to the primary loss is all you need to show is that the
25 infringement caused an overcharge.
26 But pausing there, sir, the claim for primary loss is a claim for breach of statutory

1 duty. And of course an essential ingredient of liability for the tort of breach of
2 statutory duty is proof of damage, proof that the breach has caused the
3 claimant to suffer loss.

4 So if one were pursuing a breach of statutory duty case as an individual, you would
5 need to show as an individual that you had been caused loss.

6 But as I say, that isn't the basis on which the majority, or Lord Leggatt and
7 Lord Sales, proceeded where you are seeing an aggregate award. You don't
8 have to show that each individual has been caused loss even though, if you
9 had an individual claim, you would.

10 So we say there is no relevant distinction in that sense between the primary loss for
11 damage for breach of statutory duty or the compound interest head of loss. In
12 each case, if you're pursuing it as an individual in a claim under section 47A,
13 you would need to show as part of liability that you had been caused loss.

14 And just as the Supreme Court found that where you're pursuing an aggregate claim
15 on behalf of the class, you then don't need to go through and demonstrate on
16 the facts that each individual member of the class has been caused loss, so
17 too the same must apply in respect of compound interest.

18 **MR JUSTICE ROTH:** It is very similar to the other point, isn't it?

19 **MS DEMETRIOU:** Very similar to the other point. Sir, it is.

20 But really we are saying there is no relevant distinction in terms of the analysis of
21 any of this between the primary loss and the compound interest claim.

22 Now, the second argument is the plausible methodology argument and it is that that
23 I'm going to turn to now.

24 You have seen -- I showed you in opening -- that our proposed methodology entails
25 utilising data about the population, about the population at large, data about
26 borrowing and saving and spending patterns of the population in order to

1 calculate the compound interest losses to the class as a whole.

2 And sir, you have pointed to two criticisms that Mastercard have made about that.

3 They say that we haven't yet identified a data source to estimate the overlap
4 between borrowers and savers. And secondly, we haven't got any evidence
5 yet as to consumer habits, if I can put it that way. So if you're a borrower
6 would you have used extra money to pay down your loan or would you have
7 spent it?

8 Mr Hoskins made a supplemental point today about the British Household Panel
9 Survey data and we too, like he has -- it was a very helpful suggestion that
10 Mr Waterson made yesterday, and we too have asked our experts about it
11 overnight, and these data are not publicly available but you can pay to get
12 them. And having considered the matter overnight, our experts tell us that
13 whereas what is published is aggregate data, that aggregate data is based on
14 individual responses which can be analysed to estimate the overlap point, so
15 to estimate how much households have both borrowings and savings.

16 **MR JUSTICE ROTH:** Yes.

17 **MS DEMETRIOU:** And, sir, in relation to the other point, which is consumer
18 spending habits, obviously we would say that we have to adduce evidence of
19 that. One can see that we may, for example, need a report from a -- we may
20 need a behavioural economist to look at how consumers behave when they
21 have extra money.

22 So if or --

23 **MR JUSTICE ROTH:** You're talking about -- just to try to put some flesh on it.
24 I think there was a calculation, you planned to distribute it per capita, forget
25 about the deceased persons, stick with the 46 million --

26 **MS DEMETRIOU:** Yes.

1 **MR JUSTICE ROTH:** -- that it would be something like, if you get the full amount
2 claimed, £300 each.

3 **MS DEMETRIOU:** Yes.

4 **MR JUSTICE ROTH:** So what actually is the difference on that £300 between
5 simple interest and compound interest?

6 **MS DEMETRIOU:** I don't have that figure at my fingertips. Can I come back to you
7 on that. I think we have somewhere some kind of estimate about that.
8 So I will come back to that point.

9 **MR JUSTICE ROTH:** We have seen an aggregate estimate so one can divide it out,
10 but we are not talking about thousands, clearly.

11 **MS DEMETRIOU:** No.

12 **MR JUSTICE ROTH:** We are talking about a couple of hundred or whatever, spread
13 over years.

14 **MS DEMETRIOU:** Well, I think you're asking me, of the £300, how much of that is
15 compound interest?

16 **MR JUSTICE ROTH:** No, I think £300 is before compound interest. That was on
17 the previous --

18 **MS DEMETRIOU:** No, the £300 includes compound interest. So the £300 estimate
19 includes the compound interest claim.

20 **MR JUSTICE ROTH:** Oh, I see, includes compound interest.

21 **MS DEMETRIOU:** It does.

22 **MR JUSTICE ROTH:** Right. So the compound interest is not large. But in terms of
23 consumer spending habits, you have to have some way of saying, of
24 estimating, broad axe, broad brush and all the rest of it, to what extent is the
25 class, looking at it as a whole, likely to use those relatively small amounts,
26 especially if it is spread over that period of 16 years, to reduce borrowing or

1 increase saving.

2 **MS DEMETRIOU:** Sir, yes.

3 **PROFESSOR WATERSON:** Can I just interject here, I think you're quite right, the
4 behavioural economists have looked at the issue, and often these involve
5 experiments where they actually give people small amounts of money and
6 see what they do with it. And so I think you're on the right track. I'm not going
7 to go further than that.

8 **MS DEMETRIOU:** Sir, that is very helpful, thank you, Professor Waterson.

9 So yes, that is a potential way forward. And, sir, in relation to your point about the
10 small amounts, the small amounts at stake, of course this is what the Tribunal
11 is faced with very often in terms of pass-through, where you have a potentially
12 a very small overcharge on something which is much more valuable and there
13 is an argument as to what happens to the extra penny in the pound, so is it
14 pass-through? And, of course, money is fungible, so one is not tracing the
15 particular amounts, one is asking: if over a period of time somebody were in
16 a counterfactual world slightly better off, then what would have happened to
17 that money? And we do say that we are likely to derive assistance from
18 studies conducted by behavioural economists.

19 And so --

20 **MR JUSTICE ROTH:** I'm a bit surprised I have to say, given when you put in an
21 expert's report last time showing a methodology, it was then rather refined in
22 when your expert gave evidence.

23 **MS DEMETRIOU:** Yes.

24 **MR JUSTICE ROTH:** This compound interest claim is very significant financially,
25 hugely significant, as opposed to simple interest, because of the long period
26 and how long ago it was and so on, that we haven't really had -- all the

1 method has been coming from, frankly, Professor Waterson, not from your
2 expert.

3 I mean, he has pointed to the data source, he has now talked about how you can
4 deal with spending. There is very little effort, considering that this is
5 a massive claim, to produce some evidence of what the methodology would
6 be.

7 **MS DEMETRIOU:** Sir, we are of course just at the certification stage. And of course
8 when it came to examination of our expert evidence by the Court of Appeal
9 and Supreme Court, they were satisfied, wielding the broad axe, that we had
10 done enough in relation to pass-through. Sir, the point really here is that --

11 **MR JUSTICE ROTH:** Yes, so were we on that point, so was the Tribunal. We were
12 quite satisfied with the methodology on pass-through because it was
13 explained.

14 You have a good method of calculating an aggregate award and the only issue was
15 whether the data was there, but the method was quite clear and well worked
16 out.

17 **MS DEMETRIOU:** Well, sir, I don't think the method is really in doubt. The issues
18 raised by Mr Hoskins relate to data. So he says: well, where is the data? He
19 alighted on something in our skeleton argument where we said we haven't yet
20 been able to identify a data source for the overlap, that's a data question. The
21 spending habits issue, that is equally a data question rather than
22 a methodology question.

23 So, sir, just as the methodology in relation to pass-through was a simple one, the
24 methodology here would be a simple one. It is a question of availability of
25 data, and we say that there is going to be data available and that we are, of
26 course, facing much a much lesser challenge in relation to data in relation to

1 the compound interest losses than we are in relation to pass-through in
2 respect of all of the various sectors.

3 And of course, the Supreme Court and the Court of Appeal found that essentially we
4 didn't have to do very much. So, sir, I think on that basis, it would be -- we
5 say that there is enough to certify the compound interest claim as a common
6 issue. We say that if the Tribunal had any doubts about data availability, then
7 the appropriate course isn't to exclude the compound interest claim, but to
8 defer the question. So as you were canvassing yesterday, sir, to defer the
9 question of whether it may be determined as a common issue to the Tribunal
10 hearing the trial. So give us the opportunity to adduce our expert evidence
11 first.

12 So if the Tribunal is not with me on my primary submission, which is that we do invite
13 you to certify this as a common issue, then we say that rather than shut it out,
14 what you should do is certify the proceedings including the claim, you don't
15 have to decide now whether it is a common issue or not; allow us to adduce
16 our expert evidence; and the Tribunal hearing the trial can then take a view as
17 to whether our methodology and data are sufficiently robust for this to proceed
18 in aggregate form.

19 Now, Mr Hoskins said that if compound interest isn't decided as an aggregate claim
20 then each individual member of the class can bring their own claim. We say
21 that would be completely impossible and the reason why it would be
22 impossible, the reason why an aggregate award is the only means through
23 which this class would be able to recover compound interest losses, is the
24 reason I gave in opening: that is because in order for an individual to make
25 a claim for his or her own interest losses, they would need to prove first how
26 much of the principle loss they bore. So they would need to show much of the

1 overcharge they personally suffered, because it is in relation to that amount
2 that one -- that is the starting point for the compound interest claim of each
3 individual.

4 In that sense I was completely right in opening to say that the compound interest
5 claim is parasitic on the claim for principal loss.

6 Mr Hoskins said it is not parasitic because they are different heads of loss. Of
7 course they are heads of loss, but that wasn't my point. My point is that in
8 order for claimant A to work out the interest loss that claimant A has suffered,
9 you will need to know what overcharge claimant A paid. Not the class, not
10 a per capital share of what the class overcharge is. Because if claimant A
11 paid only £10 by way of overcharge over 16 years, then their compound
12 interest losses are going to be very different to somebody who paid £50,000
13 of overcharge over 16 years or over one year.

14 In these proceedings that question, that question: what is the amount of overcharge
15 that each individual member of the class has paid, will never, ever be
16 determined. That is the point of our claim, of our aggregate claim.

17 So it follows that each individual never could establish their individual compound
18 interest losses. It would be an impossibility. And so what you can't do, what
19 you certainly can't do is take the £300, if that is what is distributed to everyone
20 at the end or if that is what everyone's share is, and say: well, you look at
21 each individual spending and borrowing and work out interest on that £300.
22 That is not their individual interest loss. And it wouldn't be an individual
23 assessment at all. So we say for that reason it is aggregate award or nothing
24 when it comes to compound interest.

25 That is why, if the Tribunal is not happy with availability of data, what you should do
26 and what you have the power to do is what you, sir, were canvassing with

1 Mr Hoskins yesterday, which is certify these proceedings, including the
2 compound interest claim, and leave it to the trial Tribunal to determine
3 whether we are right to say that it can be pursued as a common issue, once it
4 has seen our expert evidence.

5 Sir, in terms of the Tribunal's powers, you went through this yesterday, but it is clear,
6 you saw yesterday that it is clear that the Tribunal can certify collective
7 proceedings even if not every issue is common. That is plain.

8 And there is nothing in the legislation, and you looked at rule 80 yesterday, there is
9 nothing in the legislation that requires the Tribunal to specify now, in respect
10 of each and every issue of the proceedings, whether it is common or whether
11 it is not. Sir, we would accordingly urge the Tribunal to permit the compound
12 interest claim to proceed and not to exclude it from certification, as
13 Mastercard argues.

14 We say you have our primary submission that you can and should indicate now that
15 the aggregate claim for compound interest raises common issues and is
16 suitable for determination in these proceedings. Of course Mastercard
17 doesn't contest suitability and we say as an alternative submission, if the
18 Tribunal has any doubts about commonality, it would be wrong to rule against
19 us at this stage and effectively shut out the claim before we have had the
20 opportunity to adduce any expert evidence, and it should go forward to the
21 trial Tribunal.

22 So, sir, that is what I wanted to say about compound interest.

23 You asked me about the amounts. You see in the claim form that -- this is in
24 bundle A, page 46, paragraph 120.

25 **MR JUSTICE ROTH:** Yes.

26 **MS DEMETRIOU:** You can see there the amount in damages is estimated at A, and

1 then you have, at B, an amount which is the interest amount.

2 **MR JUSTICE ROTH:** That is compound.

3 **MS DEMETRIOU:** That is compound.

4 **MR JUSTICE ROTH:** But we don't know what it would be if simple.

5 **MS DEMETRIOU:** I have just been given updated figures.

6 **MR JUSTICE ROTH:** Just in broad ballpark figures.

7 **MS DEMETHOD:** The updated estimated figures, if it was compound interest, then

8 as at January 2021 it is 16 billion, and if it is simple interest then it all depends

9 on what the rate is that is being used. Obviously there would be a debate

10 about that.

11 **MR JUSTICE ROTH:** That is true of compound as well I suppose, what rate.

12 **MS DEMETRIOU:** That is, of course that is true.

13 And using a commercial rate for simple interest, then the estimate is 13.8 billion.

14 **MR JUSTICE ROTH:** Yes, that is all I wanted to understand, the degree of

15 difference. So we are talking about over £2 billion difference.

16 **MS DEMETRIOU:** Yes. Sir, unless there are any questions on compound interest,

17 those are my submissions in reply.

18 I have a few submissions to make about the undertaking point before I hand over to

19 Ms Wakefield but I will pause.

20 **MR JUSTICE ROTH:** Yes, let's take just a five-minute break, until 3.10.

21 **(3.05 pm)**

22 **(A short break)**

23 **(3.15 pm)**

24 **MR JUSTICE ROTH:** I think Ms Burgess has a question?

25 **MS BURGESS:** Thank you.

26 Sir, this is the question about primary loss and the compound interest that we have

1 been discussing.

2 When I look at the claim form, the description of the class is around the purchase of
3 goods and services. So my understanding of that is that every individual in
4 the class will have made a purchase of goods or services in the period of time
5 that the claim is for.

6 So every individual in the class will have suffered a primary loss.

7 But if you go to the compound interest point, that would not automatically apply to
8 every individual in the class, on the basis that your claim form says the people
9 in the class are those that have purchased goods or services.

10 **MS DEMETRIOU:** So the answer to that question is that: yes, you're of course
11 correct that the class is defined and is concerned with people that have made
12 purchases during the relevant period, but it doesn't follow from the fact that
13 somebody has made a purchase that they have suffered loss.

14 Because in order to have suffered loss, it is not enough that you have made
15 a purchase, the overcharge has to have been passed on from the retailer to
16 the member of the class.

17 That is going to be an issue whether or not there was pass-on, in which sector and
18 for how long, is going to be an issue in the litigation.

19 So it is possible that -- take, for example, a sector like sales of petrol, so somebody
20 fills up their car on numerous occasions during a particular period of time in
21 which they were members of the class. There will have to be a trial. The trial
22 will have to include the question as to whether the overcharge, which is borne
23 initially by the retailer, by the petrol station, by the company, stops there or
24 whether they bear it or whether they pass on that overcharge, or part of it, to
25 the consumer.

26 So if we don't manage to show that pass-on happened in the petrol sector, then the

1 consumer will not have suffered loss. So even though it is true that we think
2 that most members of the class will have suffered some loss, we can't
3 demonstrate that now and it may be that there are members of the class who
4 have not suffered loss, for example because they are in the class for a year
5 and were living in a care home at the beginning -- so you have the 16-year
6 claim period, let's say you have somebody who was living in a care home, the
7 example given by the President, for part of that period or for all of that period,
8 and didn't make any relevant purchases or made only purchases from one
9 particular sector and we don't establish pass-through in that sector.

10 So the short answer is: the fact of purchase doesn't equate to loss. If it did we would
11 be delighted but it doesn't.

12 **MS BURGESS:** Thank you.

13 **MS DEMETRIOU:** Is there anything else on compound interest or may I deal briefly
14 -- I will deal briefly with the undertaking.

15 **MR JUSTICE ROTH:** Yes.

16 **MS DEMETRIOU:** So Mr Cook repeatedly said that the funder is refusing to give
17 an undertaking and I do need to clarify at the outset that that is not, absolutely
18 not the position. So the funder has not refused to give an undertaking, so
19 Mr Cook can dismiss his conspiracy theory behind that. So there is no
20 refusal.

21 Mr Merricks, on the other hand, is concerned with the question of principle, and let
22 me just explain what the question of principle is.

23 Mr Cook says that the Tribunal has a power to require an undertaking of this type,
24 and he refers to the provisions in the rules relating to security for costs. Now,
25 assuming that there is a power, and I'm quite happy to assume that the
26 Tribunal does have a power --

1 **MR JUSTICE ROTH:** Well, the power can be exercised, as we did in the Trucks
2 case, saying: we will authorise if -- we have to be satisfied with the funding
3 arrangements --

4 **MS DEMETRIOU:** Of course.

5 **MR JUSTICE ROTH:** -- and we can say: we will only be satisfied if this is done. It
6 can clearly be done.

7 **MS DEMETRIOU:** Of course. I accept there is a power, but the point it is a power
8 and not a default rule.

9 So everything that had been put to us up until now in the correspondence, up until
10 today, were points which could apply in most collective proceedings. So while
11 these are large proceedings, the funder is not a party to litigation, it was done
12 in Gutmann. With respect, those are not good reasons to exercise the power
13 unless the Tribunal is going to take the view that in all collective actions which
14 are funded by a third party, it is appropriate to give an undertaking of this sort.

15 Now, today Mr Cook, for the first time, said: what it really comes down to is that
16 Mr Merricks might become insolvent and there might be competing demands
17 on the £15 million which has been set aside. Really in relation to that, it is the
18 first time that point has been made.

19 There has, of course, been a substantial costs order already in Mastercard's favour
20 in this case, which Mr Merricks satisfied promptly, there was absolutely no
21 issue with that, and Mastercard --

22 **MR JUSTICE ROTH:** Ms Demetriou, we don't need the whole history. You have
23 heard the reasoning, what is the position now? Is the funder prepared to give
24 the undertaking or not?

25 **MS DEMETRIOU:** Sir, if the Tribunal were to rule in the exercise of your discretion
26 that you think this is appropriate, then of course the funder is prepared to give

1 it. But the point is that Mr Cook relies by analogy on the security for costs
2 provisions and there is no evidence in this case that there is any risk of
3 Mr Merricks' insolvency.

4 If, despite that --

5 **MR JUSTICE ROTH:** It is not about having to show he is likely to be insolvent, it is
6 just covering against a remote risk. It is like when you insure your house
7 against fire, it is not because you have an expectation that it is going to burn
8 down, but the financial consequences if it did burn down are so great that you
9 want that assurance of having an insurance policy of you have a third party
10 funder who is not in the jurisdiction, which is not every case, so it is not in
11 every case, there are other funders in the jurisdiction; you have an individual
12 class representative, not a well-established trade association which might
13 have significant funds like the Road Haulage Association did. So it is not
14 an absolute default position. You have an individual who clearly and
15 understandably is not personally able to meet this sort of costs order and
16 there is always, therefore, at the back of anyone's mind, what if something
17 were to happen to Mr Merricks? Suppose he fell under the proverbial bus.
18 This is a personal agreement, there would then have to be a new class
19 representative, they would have to be approved by the Tribunal, they would
20 have to have the agreement assigned to them. There are always these
21 contingencies. It is no reflection on Mr Merricks personally at all.

22 **MS DEMETRIOU:** Sir, if that is the position, if the Tribunal considers for those
23 reasons that it is appropriate, the funder has no objection at all. It was the
24 point of principle, and we had not understood why this case is said to be
25 different given that there is not a default rule.

26 I think on the wording, if the undertaking is to be given, there will need to be some

1 work on paragraph 2 because at least to me it looks like the 28-day
2 requirement needs to be consistent with any contrary provision made in the
3 court order. Because there may be --

4 **MR JUSTICE ROTH:** We wouldn't specify the wording if it is not agreed.

5 **MS DEMETRIOU:** No.

6 **MR JUSTICE ROTH:** We would ask the parties then to seek agreement and if they
7 cannot, we would then resolve it. I imagine that once we approach it in that
8 way they can come to an agreement, but if not, it can always be referred to
9 us. So we won't get in to sort of drafting the thing now.

10 But that is the background to it and that is why, particularly I think with individual
11 class representatives, which is, as I say, not always the case, or offshore
12 entities, which was again what happened in Trucks, because I think there was
13 also a Jersey entity there, the insurers in that case, there is the jurisdictional
14 concern.

15 **MS DEMETRIOU:** Sir, very well. We hear what you say.

16 **MR JUSTICE ROTH:** Yes. You want to be satisfied, you would like us to indicate
17 why, but the funder and Mr Merricks are not actively opposing it, is that the
18 position?

19 **MS DEMETRIOU:** That's correct, yes.

20 **MR JUSTICE ROTH:** Thank you.

21 Ms Wakefield, is it?

22
23 **Submissions by MS WAKEFIELD**

24 **MS WAKEFIELD:** In respect of deceased persons, we put our primary case in the
25 way that we have advanced in our amendment application, as you know, sir.

26 But as we made clear yesterday and also I hope this morning, if that application fails,

1 we would seek to advance the Tribunal's proposed alternative route, and that
2 plainly would require us to consult first with the public trustees since it would
3 not be responsible for us to pursue such a course without doing so. So if
4 you're against me on the amendment application today, then we will seek
5 directions respectfully to consult with the public trustee and, if so advised,
6 make a further application to amend.

7 If I start then with the power to make the amendment which I propose today, and this
8 power of course may also be relevant, or will also be relevant to any
9 subsequent application which I make if you're against me on the application
10 today. We do rely, as you know, sir, on rule 32(2)(a).

11 So first of all we say, as you know, that parties means relevantly the claimant, and
12 the claimant is the class representative. And I took you yesterday to rule 74,
13 which makes that point expressly. We say that the regime as a whole and its
14 treatment of opt-out class members, and indeed the novelty of the regime and
15 the purpose of the regime is the opt-out class members are not conventional
16 parties, they do not function in the same way as conventional parties, they
17 don't have the same obligations, the same duties and the same entitlements,
18 they can be entirely absent from the cradle to the grave, so to speak,
19 hopefully emerging at the end to claim their distribution, so it would be entirely
20 inappropriate, in my submission, to treat them as parties.

21 I use, just by way of example because we were in those rules, the requirement in
22 rule 38 that an application for permission shall be served on the parties. And
23 Mr Hoskins made the point: oh well, it is service, you could probably get
24 around it by publication because one needs to inform the class members of
25 something.

26 If I pick another example, the other rule that we are looking at, rule 32, and 32(1):

1 "A claim form may only be amended-
2 (a) with the written consent of all the parties." Again, we see the word "parties" being
3 used in these rules in a way which one would need to positively elicit the
4 consent of many millions of people.

5 **MR JUSTICE ROTH:** Or B.

6 **MS WAKEFIELD:** Or B. But we see the rules use the word "parties" on the basis
7 that one can contact the parties and gain their views.

8 So, my submission is that that isn't apt to encompass a class member.

9 I also say that the nature of collective proceedings is that they are brought by the
10 class representative -- we see the language of bringing class and collective
11 proceedings in the statute in section 47B -- and that it is obviously the class
12 representative who makes this sort of application.

13 And in collective proceedings, where what one is trying to do is litigate collectively
14 claims which benefit from that procedure, and where one is in particular
15 looking for an aggregate damages award and one is seeking to assess loss to
16 the class as a whole, it is particularly useful and particularly furthering of the
17 purpose of those provisions in that regime, if one can say: well, in fact the
18 class is slightly bigger than I initially thought it was.

19 So I would like to make an application to the Tribunal to bring in those extra class
20 members to properly further that full vindication of rights which is furthered by
21 the regime and, of course, the subsidiary purpose, the disincentivising of
22 unlawful conduct, and those twin purposes, we see in Lord Briggs's judgment
23 at paragraphs 52 and 53.

24 So it makes particular sense, in my submission, that rule 32(2)(a) applies here.

25 In the present claim, as I addressed you on yesterday, there is an absolute identity
26 between the claims which are bring brought on behalf of the deceased

1 persons and those who are otherwise in the claim. Mr Hoskins sought to say
2 that in fact they don't arise from the same or substantially similar facts. But it
3 is the same infringement, it is the same --

4 **MR JUSTICE ROTH:** Yes, they clearly do.

5 **MS WAKEFIELD:** They clearly do.

6 **MR JUSTICE ROTH:** Well, I mean it is still a discretion of course under subrule (2),
7 as you recognised.

8 **MS WAKEFIELD:** Absolutely.

9 **MR JUSTICE ROTH:** You say the party is the class representative?

10 **MS WAKEFIELD:** Yes.

11 **MR JUSTICE ROTH:** Yes.

12 **MS WAKEFIELD:** Absolutely, this is just the jurisdictional question. And of course if
13 you answer the power question, the jurisdictional question no, then that has
14 obvious ramifications for the regime going forward and other applications.

15 I do say, for all the reasons I advanced yesterday, that having established that the
16 power exists, in this case it should be exercised in my favour. And I relied on
17 the various discretionary factors: delay, total lack of prejudice, the fact that the
18 quantum is there already, but your Lordship made the point to me that none of
19 that matters if actually there is a separate legal prohibition on my doing what
20 I want to do, which is namely the claims are a nullity, that claims can't be
21 brought, claims of deceased persons. But that --

22 **MR JUSTICE ROTH:** On the party point, before you get to that, if you look at rule
23 38, and 38(7)(c), because clearly there ought to be facility if a class member
24 dies during the currency of the proceedings to substitute their estate, just as
25 you could in any individual proceedings. It must be possible for collective
26 proceedings.

1 **MS WAKEFIELD:** It must --

2 **MR JUSTICE ROTH:** You say it is not necessary because they continue as a dead
3 class member.

4 But if we were against you on that, then it would be 38(7)(c). You can do that after
5 the limitation period just as you can for an individual claim.

6 **MS WAKEFIELD:** Sir, you can but I have to say in collective proceedings, and in
7 particular in opt-out proceedings, it is extremely unlikely that that mechanism
8 would be a mechanism that would work. Even leaving to one side my
9 objection to that interpretation of the word "party", we don't know who the
10 class members are. We have no contact with them, we don't know whether
11 they are alive or dead. You can't make a person-by-person or even a group
12 of 50-by-group of 50 application, so instead what one would do, I apprehend,
13 is include that in the class definition in the first place.

14 If one hadn't done that, in this claim if you are against me, for example, on my
15 primary application, then it fits still best under rule 32 rather than rule 38 just
16 because --

17 **MR JUSTICE ROTH:** It would fit under 38 and you would say, apply that insofar as
18 any class members have died, there should be substituted their estate, or the
19 representatives of their estate, whether it is executor, administrator or public
20 trustee.

21 **MS WAKEFIELD:** I'm just going to take instructions for one moment.

22 **MR JUSTICE ROTH:** Yes.

23 **(Pause).**

24 **MS WAKEFIELD:** Sorry, sir.

25 My only concern with the use of 38(7)(c) in that way is the use of the word "party".

26 **MR JUSTICE ROTH:** Yes.

1 **MS WAKEFIELD:** But one could perhaps do an amendment en masse and put
2 "purposive interpretation of that provision" to meet that particular situation that
3 applies in respect of those who are alive when their claim is issued but then
4 die in the currency of the claim.

5 I have to say for my part I find it slightly surprising that that death would give rise to
6 a limitation issue, but it may be that I don't quite understand the limitation
7 rules in that regard. If the claim has been issued validly in the name of
8 a deceased person and then those rights were to transfer automatically on
9 death, as we know they do, it doesn't un-issue and become a chose in action
10 again that there needs to be issued again. So I do find it a little bit of
11 a strange rule in any event. If I were to be right that limitation doesn't work in
12 that way when a claim has been validly brought on behalf of a person who is
13 alive, then the rule we would be looking at is a rule 85, to which my learned
14 friend took you earlier, but (4), which is a change in the class definition.

15 **MR JUSTICE ROTH:** Yes, which we saw, yes.

16 **MS WAKEFIELD:** Yes.

17 Sir, that is all I wanted to say about the powers.

18 As to Mr Hoskins's other point, the legal bar point that claims are brought in the
19 name of deceased persons are a nullity, of course I accepted yesterday that
20 a section 47A claim can't be brought in the name of a deceased person. But
21 I say that that stricture does not apply in the same way to a section 47B claim.
22 I start by saying that I think it is uncontroversial that some of the procedural
23 requirements, or constitutional requirements if I can put it that way, for
24 a section 47A claim, in order for that claim to be litigated, don't apply in
25 section 47B, and one example is children.

26 Now I fully take the point that -- as you put to me yesterday, sir -- there is

1 a difference between my case and the case of children, but nevertheless we
2 know that children can be included in the class, and that directions as to, for
3 example, a litigation friend, are made at the CPO stage, not at the time at
4 which they are class members. That is a distinction between the combining of
5 the claims at the beginning of the procedures in section 47B, and under
6 section 47A.

7 And that fits, in my respectful submission, with the language of 47B, to which I took
8 you yesterday.

9 **MR JUSTICE ROTH:** Would we need a litigation friend where you have a class
10 representative? I mean, we are not being asked to order litigation friends.

11 **MS WAKEFIELD:** No, to opt out, sir. I think a class member who was a child would
12 need to have a way of effectively opting out of litigation and that is presumably
13 why the indication is why you would consider it, sir, when giving directions at
14 the time of giving the CPO.

15 **MR JUSTICE ROTH:** Of how people -- they could do it through, well you have of
16 course people lacking capacity in the class.

17 **MS WAKEFIELD:** Yes, sir.

18 **MR JUSTICE ROTH:** Yes. They could do it through their representative, yes.

19 **MS WAKEFIELD:** Yes.

20 **MR JUSTICE ROTH:** But you say the nullity point doesn't apply once it is a 47B
21 claim?

22 **MS WAKEFIELD:** Yes, sir. That fits with the language of 47B. As I took you to
23 yesterday, I won't repeat myself because I shouldn't, but the language of
24 section 47B of course is that it combines claims to which section 47A applies,
25 not claims that could be brought under section 47A.

26 So I say that is a primarily a descriptive function and it applies to those tortious

1 claims, the breach of the competition rules, which result in damages and for
2 which you can sue in damages or other sums of money or seek an injunction.

3 So the relevant question today, of course, is whether the formal vesting of the cause
4 of action upon the death of the person who hitherto held the cause of action
5 means that the only proper class member is the person in whom the cause of
6 action vests, whether that particular requirement applies to 47B proceedings
7 in the way it does apply to 47A proceedings. I accept that only an executor or
8 an administrator or the public trustee -- although my understanding is that she
9 doesn't in fact do this, it is not her practice to do it, but she could bring a claim
10 on behalf of the estate.

11 Now, I say that the reality is that for the many millions of people who die intestate
12 and who do not have an administrator appointed, their low-value assets are
13 dealt with after their death, not by the person who has the legal entitlement to
14 do so, the public trustee, but rather by their next of kin.

15 And we put the example in our submissions of the form from HSBC, if you saw that,
16 and high street banks routinely paying out low-value amounts to next of kin.
17 By "next of kin" of course what we mean is: the person who, in the laws of
18 intestacy, stands to inherit, to have the beneficial interest and who, under the
19 rules which apply to their appointment of an administrator, is in that same
20 position of priority were they to apply to court and seek letters of
21 administration.

22 So they have the beneficial interest, and they are the person who, on application,
23 would have the legal interest, but they don't, in fact, have the legal interest.
24 They have not made the application to court.

25 We say that that is the real world factual background against which the regime
26 should be made to work and also against which Parliament's intention should

1 be, that it should work.

2 We are I think in agreement that deceased persons' claim should be included in the
3 claim. And if we were to reach a position in which millions of them, many
4 millions of them might be de facto excluded because of a requirement that in
5 fact claims vest only in an executor or administrator relevantly, and a next of
6 kin isn't good enough -- even though next of kin works for all other purposes --
7 then that would de facto exclude swathes of the claim.

8 For that reason we say that the describing of the claims that are brought together in
9 collective proceedings, that class definition, works very well by identifying the
10 individuals who suffered the tort in the infringement period, who suffered the
11 loss, including when they are since deceased, and then those class members
12 are represented for all necessary purposes in the claim -- opting out at the
13 distribution stage -- by executor, administrator, or by next of kin. Because the
14 next of kin is the person who will remember the person, the deceased person;
15 the person who stands to inherit; the person who is otherwise managing their
16 affairs. We say that that is the construction which better furthers the purpose
17 of the regime.

18 **MR JUSTICE ROTH:** And that would be wherever they live? Because your next of
19 kin might be in Canada.

20 **MS WAKEFIELD:** It would, sir, yes. And the domicile is set by reference -- as I said
21 yesterday -- to the facts leading up to the date of death. So fixed at the date
22 of date, continuing for all relevant purposes.

23 **MR JUSTICE ROTH:** Yes.

24 **MS WAKEFIELD:** I have nothing further which I would like to say in reply. I don't
25 know if you have any more questions for me?

26 **MR JUSTICE ROTH:** Let me ask my colleagues.

1 **MR WATERSON:** No, I don't have any further questions.

2 **MS BURGESS:** Nor me, thank you.

3 **MR JUSTICE ROTH:** Only this. We haven't actually been taken to the orders of the
4 Supreme Court and the Court of Appeal, but as my understanding is, it was
5 simply a remittal of the case to the Tribunal with no further directions. But
6 I don't know if the actual order that brings this case before us is in one of
7 these bundles.

8 **MS WAKEFIELD:** I don't think it is, sir. I don't recollect it being there.

9 **MR JUSTICE ROTH:** Yes, my understanding is -- because sometimes the orders on
10 remittal go a bit further. But I think in this case the Supreme Court simply
11 dismissed the appeal and the Court of Appeal simply remitted it, the case, to
12 the Tribunal. But if that is wrong, perhaps parties can check afterwards and
13 let us know. That is, in a sense, the starting point rather than the end point.
14 But beyond that --

15 **MS WAKEFIELD:** We will check.

16 **MR JUSTICE ROTH:** Yes, you can check and we can check.

17 We have no further questions. Thank you all very much for your full and helpful
18 submissions which we shall consider carefully and you will be notified in the
19 usual way when a judgment is ready.

20 Thank you, have a good weekend.

21 **MR HOSKINS:** Thank you very much.

22 **MR COOK:** Thank you very much.

23 **MS WAKEFIELD:** Thank you very much.

24 **(3.48 pm)**

25 **(The hearing concluded)**

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