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5 **IN THE COMPETITION**

Case No. : 1266/7/7/16

6 **APPEAL**

7 **TRIBUNAL**

8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP

12 14 January 2022

13
14 Before:
15 The Honourable Mr Justice Roth
16 Jane Burgess
17 Professor Michael Waterson
18 (Sitting as a Tribunal in England and Wales)

19
20
21 BETWEEN:

22
23 **WALTER HUGH MERRICKS CBE**

Applicant

24
25 v

26
27 **MASTERCARD INCORPORATED AND OTHERS**

Respondent

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33
34 **A P P E A R A N C E S**

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36
37 Paul Harris QC, Anneliese Blackwood and Allan Cerim (instructed by Willkie Farr &
38 Gallagher (UK) LLP appeared on behalf of Walter Hugh Merricks CBE)

39
40 Mark Hoskins QC, Matthew Cook QC and Hugo Leith (instructed by Freshfields
41 Bruckhaus Deringer LLP appeared on behalf of Mastercard Incorporated and Others)

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1 **Friday, 14 January 2022**

2 **(10.30 am)**

3 **(Proceedings delayed)**

4 **(10.37 am)**

5 **MR JUSTICE ROTH:** Good morning, everyone. I start with the customary warning
6 that these proceedings are being heard remotely and live-streamed, but they
7 are of course as much tribunal proceedings as if everyone was present
8 physically in the courtroom in Salisbury Square House where I'm sitting.
9 An official recording and transcript of the proceedings is being made, but it is
10 strictly prohibited for anyone else to make any recording or take any images
11 of the proceedings. To do so in breach of that prohibition constitutes
12 a contempt of court and is punishable as such.

13 We thank the parties for their skeleton arguments from counsel, which of course we
14 have read. We have an agenda. I think the first item is the provision of the
15 undertaking from Innsworth Capital.

16 Has that been satisfactorily complied with, are you content with that, Mr Hoskins?

17 **MR HOSKINS:** We are, sir, yes.

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

19 Then we think that it's probably more sensible to deal with the domicile question
20 before the amendment question, because the amendment question is affected
21 by that. It's a question of whether the domicile date should be the date when
22 the claim form was issued, which I think is in this case 6 September 2016, or
23 whether it should be, as Mastercard contends, the date of what I'll call the
24 remittal judgment, when the Tribunal decided that the CPO should be granted,
25 which is 18 August 2021. That, as we understand it, is the issue between the
26 parties.

1 So I think, Mr Harris, it's for you to start.

2 **Submissions by MR HARRIS**

3 **MR HARRIS:** Thank you, sir. Thank you, members of the Tribunal.

4 There are really two rival interpretations to the claim form. I make these by way of
5 introductory remarks and then I'll take some of the sub-issues in more detail.
6 On our approach, all people who have died since the date of the claim form
7 are included in the claim; but on Mastercard's view, all such people are
8 excluded. And it makes a big difference because, although I don't need to
9 turn it up, in our skeleton argument, if you would consider paragraph 11(b),
10 the different domicile date is a question worth millions of pounds. So the
11 scope of the issue is significant.

12 We say, in introductory and in broad terms, the people who were alive at the date of
13 the claim form had a perfectly good cause of action when the proceedings
14 were commenced and should be allowed to pursue it. We also say that the
15 claim form can and should be read so as to include them. So again, in
16 introductory terms, they are original parties.

17 To be clear, we say that they are original parties both in principle and on the wording
18 of the claim form, and I will deal, obviously, with both of those two points in
19 due course.

20 So critical to today then is the actual date, as you just said, sir, that is decided upon
21 by the Tribunal for domicile date. Should it be 6 September 2016 or
22 18 August 2021? So approximately five years of difference. But it's worth
23 noting at the outset that the domicile date is not part of the cause of action. It
24 is an administrative date that is decided upon by the CAT and it concerns the
25 territorial jurisdiction of the CAT. Obviously I will come back to that.

26 But if Mastercard's interpretation of the claim form is correct -- which I don't accept --

1 then people who have died since the date of the claim form, who had
2 a perfectly good cause of action on the date of the claim form, will be
3 excluded from the claim, even though this is a follow-on claim in which
4 an infringement has already been established against Mastercard and in
5 respect of those people, the only question is the amount of the loss.
6 I appreciate there are issues to do with that, but nevertheless that's the only
7 question. They had a perfectly good cause of action and the infringement has
8 already been established.

9 So the question for today is therefore fundamentally different to that which was
10 addressed at the remittal hearing a year or so ago. The fundamental
11 objection back then was that people who were dead at the time of the claim
12 form, who died up to the date of the claim form, they could not bring claims in
13 their own names at all as a matter of UK law.

14 Of course that issue doesn't arise today because we're now only arguing about
15 people who were not dead as at the date of the claim form. And although
16 they died at some later date, in our submission, in broad terms, in these
17 introductory broad terms, there's no reason why a cause of action that was
18 perfectly coherent and properly established as at that date cannot now
19 perfectly sensibly be pursued, to the extent any action is actually needed, by
20 the personal/authorised representatives, in the manner that is explained in the
21 evidence and with which there doesn't appear to be any particular issue
22 taken.

23 So one asks oneself the question rhetorically: why should people who have perfectly
24 good causes of action be denied justice, or even the chance of achieving
25 justice, on the basis of a domicile date that is set well over five years after the
26 claim form? And certainly why should that happen in this case, where there

1 has been a great big delay between the claim form and the date upon which
2 the domicile date is going to be set, which delay, whatever else one says
3 about it, is not the making of either the people who have died since the date of
4 claim form or indeed of Mr Merricks, who seeks now to represent them.

5 Yet Mastercard effectively proceeds on the basis that the domicile date has to be at
6 or after the date that the CPO is granted, as if that's the way that the
7 legislation must work. That's the thrust of their submission. But it's to be
8 noted that neither the legislation nor the rules actually say that. To the
9 contrary, there is complete discretion in the hands of the Tribunal to set the
10 domicile date, this administrative date to do with jurisdiction; and we say, in
11 the exercise of that discretion, it should be done so as to do best justice on
12 the facts of any particular given case.

13 That's also why Mastercard's appeal to the outcomes in the Gutmann case and in
14 the Le Patourel case against BT is neither here nor there. The facts of those
15 cases were different. And I shall very briefly expand upon the relevant
16 distinguishing differences on those two cases. So that's how I set the scene,
17 if you like, by way of introductory remarks.

18 Then what I'd like to begin with is just a short exposition of what the domicile date is,
19 why it's there, what it's for.

20 **MR JUSTICE ROTH:** Yes.

21 **MR HARRIS:** The domicile date, we say, has just a single administrative purpose:
22 it's to provide the date upon which the domicile of individual class members is
23 determined in order to ascertain which people in the class have to either opt in
24 or can opt out. It is in place so as to give simply administrative certainty to the
25 jurisdiction of the Tribunal.

26 **MR JUSTICE ROTH:** Why is it -- if I can interrupt you. What do you say is the

1 purpose behind the provision in the legislation that people who are not
2 domiciled, who are not in the UK on the domicile date, have to opt in? Why is
3 that?

4 **MR HARRIS:** It's because there needs to be a line somewhere in the sand so as to
5 give a definition to the, if you like, automatic jurisdictional scope of
6 the Tribunal. So the line in the sand is drawn, and this is the argument today:
7 where should the line in the sand be drawn? But once it's drawn, after that
8 it's, if you like, deemed that those people are outside the jurisdiction, such that
9 if they want to participate, they need to take an active step: they need --

10 **MR JUSTICE ROTH:** Yes, I'm not sure I expressed my question very well. Why
11 have this? Why do you need this concept of domicile? What was the
12 legislative purpose of putting it in? Why not just say: this is the class,
13 everyone's in it, and it's an opt-out action, so everyone in the class, wherever
14 they are living, is included, unless they opt out? Why --

15 **MR HARRIS:** I understand the question. My understanding of that -- my clear
16 understanding of that -- is that it was considered in collective action regimes
17 that could be large numbers of people, many of whom may be spread out
18 around the world, that there was a concern about overreaching,
19 extraterritoriality of reach of the jurisdiction of a given tribunal in a given legal
20 jurisdiction. And in order to temper the effects of just saying: well, anybody
21 everywhere -- especially in an opt-out, where people, with respect, might not
22 know, no matter how good the noticing provisions are, they might not know
23 what's going on in their names. And it was said: right, well, there has to be
24 a line in the sand.

25 But let's be quite clear: it is just a line in the sand and it is just for that purpose. It's
26 just for jurisdiction and it simply has to be set somewhere, if you subscribe to

1 the view that there has to be a jurisdiction line. And the legislature has taken
2 a view that there has to be a jurisdiction line. But critically, it's because that is
3 the purpose and the reason that it has absolutely nothing to do with the cause
4 of action. It's nothing to do with breach of statutory duty or the tort in English
5 law.

6 **MR JUSTICE ROTH:** Yes. I was just wondering whether that purpose -- and it
7 seems to me you may well be right; it sounds very persuasive that that's the
8 reason for doing this, and not simply having opt-out without any reference to
9 domicile -- might be of some assistance in thinking: well, what is the
10 appropriate domicile date?

11 **MR HARRIS:** I think the way I put it is this: it could have been the case that the
12 legislature could have chosen to draw the line in the sand at a specific point in
13 every case. For instance, it could have said that the domicile date -- or use
14 some other terminology, if you like -- is the date of the claim form. It could
15 have said that, in which case we wouldn't be having this argument. It could
16 have mandated that. There would have been absolutely no problem with that
17 because it's just a line in the sand to determine territoriality and jurisdiction.

18 Equally, it could have said what Mr Hoskins wants it to say. It could have said: oh, it
19 has to be the date of the CPO, or at any rate no earlier than the date of the
20 CPO, when eventually ...

21 **MR JUSTICE ROTH:** Yes.

22 **MR HARRIS:** But it doesn't say that either. And in my respectful submission, it's
23 deliberate. It gives the entire and complete unfettered discretion to the
24 Tribunal to set the domicile date in respect of the facts of the given case.

25 Now, I accept that in many cases -- and indeed Le Patourel and Gutmann, which are
26 the only other two currently certified -- the issue hasn't been a live issue and

1 there's no particular reason for anyone to have argued about it and no
2 particular reason for anyone to be bothered whether the domicile date is at
3 the date of the claim or at the date of the CPO. And I explain that in this way.

4 First of all, there are no limitation issues in those other cases. It just doesn't arise.

5 BT, you will recall, was a specified period of I think three years from 2015 to
6 2018, and it came to an end and that's it. It's a discrete period by reference to
7 the allegation of regulatory and abuse of dominance breach. And in Gutmann
8 it doesn't arise, there are no limitation issues there either, because, as you will
9 recall, in that case the allegation is breaches from the moment of the CPO
10 regime coming into force and indeed ongoing.

11 **MR JUSTICE ROTH:** Although limitation would affect the earlier part of the period.

12 **MR HARRIS:** It could have done, had there been any particular issue about dead
13 people or anything like that. But since it's a much more recent case, and
14 indeed said to be ongoing, these concerns don't arise and they're not acute; in
15 sharp contrast to the potentially hundreds of millions of pounds at stake on the
16 decision in this case.

17 **MR JUSTICE ROTH:** I think in Le Patourel in fact it was amended, the claim form,
18 to include the estates within the class.

19 **MR HARRIS:** Yes.

20 **MR JUSTICE ROTH:** And that wasn't a problem because the limitation period hadn't
21 expired.

22 **MR HARRIS:** Absolutely so. And indeed I have a point on that, which is that
23 a similar thing has just happened by order of Mrs Justice Bacon in the Which?
24 v Qualcomm case, an amendment so as to add estates back to maximum
25 permitted extent of the limitation period.

26 So what has happened, with respect -- and understandably so -- is that other cases

1 have learned from this case. This was in practice the first case -- I appreciate
2 there was Mobility Scooters that didn't proceed the whole way -- and it was
3 certainly the first case in which deceased persons became an issue. But
4 I pray that in aid, my Lord, for this reason: that what has happened in this
5 case, just because it happens to have been, if you like, a ground-breaker at
6 least on this point, is that because of the decision after the remittal hearing
7 that claim form had been drafted in such way that people who died before the
8 claim form was issued are excluded, a large number of people who
9 prima facie have suffered damage at the hands of this proven infringer are not
10 in the claim. There's no criticism there; that was the decision, that was the
11 way the claim form was issued, that has happened.

12 What I do submit, however, is that against that background, it would be unfortunate if
13 the Tribunal were, by picking a domicile date later than the claim form, let
14 alone five years later than the claim form, also by dint of that administrative
15 decision -- well, judicial decision, technically, but by reference to
16 an administrative point -- excludes another five years' worth of people who
17 have died since then; indeed, more than five years, getting well into the sixth
18 year. So I do pray that in aid.

19 But I think the key point for present purposes is that there's nothing in the CAT Rules
20 or the CAT Guidance which specifies when the domicile date should be, and
21 therefore it's entirely open to you to adopt the date that we urge upon you,
22 though I accept it's open to you to adopt the date that Mr Hoskins urges upon
23 you. But what I do say is that by reference to the fact that there is no bar to it
24 and you have a complete discretion, you should certainly, in my respectful
25 submission, exercise the jurisdiction in such a way to do the best justice on
26 the facts of this case. And Le Patourel and Gutmann are different, so they

1 have no particular relevance.

2 I also draw the Tribunal's attention to this point: that it's nothing to the point which
3 I think I have drawn out of Mr Hoskins' skeleton that the actual election to opt
4 in or opt out, so that decision, the act of electing, doesn't take place until after
5 certification. I mean, obviously it doesn't take place until after certification
6 because there would be no point in doing it if the claim weren't certified.

7 **MR JUSTICE ROTH:** Yes.

8 **MR HARRIS:** The reason there is nothing in that point is that there is never a total
9 coincidence between the domicile date and the actual act of electing. They
10 never happen on the same day, or it's extremely unlikely they would happen
11 on literally the same day. To the contrary, there will always be a gap in time.
12 And that's a consequence of allowing a period of time between the domicile
13 date and the close of the period in which people can either opt in or opt out by
14 right.

15 So to the extent Mr Hoskins says: well, yes, but there is an act of electing and that
16 has to be done by personal representatives and they may be domiciled
17 somewhere else, we say: well, so what? It doesn't make any difference.

18 I also draw to your attention the fact that there is this period where people can opt in
19 and opt out by right, and people have been talking about sort of six, eight, ten,
20 twelve weeks, or several months, for that period, and that all seems perfectly
21 reasonable. But strictly speaking, it doesn't even end there, because the
22 Tribunal does have the discretion to enable people to opt in at a much later
23 date; they just have to get permission. In other words, there could be years of
24 divorce in any case between the date of domicile and the act of electing by
25 whomsoever is the person who acts, whether it be an individual or a personal
26 representative.

1 **MR JUSTICE ROTH:** Just for the benefit of the Tribunal, the opting in later, is it
2 under the rules?

3 **MR HARRIS:** Yes. Maybe the best way to deal with that is I'll ask somebody who is
4 assisting me to come up with that reference and I will give it to you in
5 a moment, because I haven't jotted it down, I'm afraid.

6 **MR JUSTICE ROTH:** Yes. I know you are correct in that. So it's not disputed; it's
7 just a reference would be --

8 **MR HARRIS:** We will provide that.

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

10 **MR HARRIS:** And then --

11 **MR HOSKINS:** It's rule 82, if that assists.

12 **MR JUSTICE ROTH:** Sorry?

13 **MR HARRIS:** I'm very grateful.

14 **MR HOSKINS:** It's rule 82, if that assists.

15 **MR JUSTICE ROTH:** 82, thank you.

16 **MR HOSKINS:** 82(2) and (3).

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

18 **MR HARRIS:** Thank you, Mr Hoskins.

19 One other point just to deal with quickly is that the domicile date is not a matter for
20 the parties; it is a matter for the Tribunal. We have always been clear on that.
21 And I will come on to the other documents that Mr Hoskins has cited in his
22 skeleton where we have suggested other dates than the one we're now
23 suggesting. But with respect, they're neither here nor there because the date
24 is for the Tribunal, no matter what we've said, and indeed we've always said
25 very clearly in our pleadings that it's a matter for the Tribunal.

26 But this point alone, although I have some other points on this, also disposes of

1 Mr Hoskins' submission that we are somehow "back-dating" the domicile date.
2 We're obviously not back-dating the domicile date because it hasn't been set
3 and it's not our job to set it. So in the absence of a date to back-date, there
4 can't be any back-dating.

5 Moving on then to the next issue, why do we propose the domicile date we do? It's
6 suggested against us that this is done for some, if you like, nefarious purpose
7 about trying to bring in people who wouldn't otherwise be included. But
8 actually that's just wrong. It's just wrong on the facts. We're not doing it for
9 that reason at all. We say, properly construed, the claim form is in our favour
10 in any event, and I will come on to that in due course. But let me be quite
11 clear why we are seeking a domicile date on 6 September 2016 and not
12 a later date.

13 It is because it will simplify the process of determining the domicile date of the
14 various class members. There's no magic to this submission. We say that if
15 the domicile date is the one we propose of 6 September 2016, then all the
16 class members would have been alive on that date -- I mean, that is the point
17 of doing it -- and therefore all the class members will fall to have their domicile
18 date determined in the same way, ie by the place that the wronged individual,
19 him- or herself, lived as at that date. Every one will be done in the same way.

20 We say that that's of great benefit because if the domicile date were to be any later,
21 whether that be Mr Hoskins' date or somewhere in between, then Mr Merricks
22 and indeed the Tribunal would have to deal with the additional complexities of
23 determining the domicile of deceased persons represented by their personal
24 and/or authorised representative. There would suddenly be two ways of
25 looking at domicile: either the actual individual, or you have to look at the
26 personal representative and ask yourself the question: what's the domicile of

1 the personal representative, that person being the person in the class, if the
2 amended definition is accepted.

3 But let me give you an example. There could be, for instance, a corporate personal
4 representative -- there are plenty of companies who do this, administration of
5 estates -- and they could be based overseas. Indeed, one might imagine
6 easily a situation in which somebody who is dealing in trusts, wills, probate
7 and financial matters is based in some more favourable tax jurisdiction
8 overseas. Companies of that ilk tend to be in -- or could easily be. And yet
9 they might well, of course, if they are dealing with UK estates, have offices in
10 the UK, and of course they would be taking administration steps in the UK
11 because it's a UK estate, on this hypothesis, or an estate in the UK of
12 somebody who was resident in the UK but has since died.

13 Then one has to ask oneself the question: well, quite what is the domicile of the
14 personal representative in that case? And we say there's just no point. What
15 is the point, we respectfully ask rhetorically, of introducing any further
16 complexity over the question of the domicile of the personal representative,
17 given that --

18 **MR JUSTICE ROTH:** Can I understand this. Suppose we take 6 September 2016
19 as the domicile date. Some people, therefore, within that class have since
20 died. The class member of people who've died, you would then seek the
21 amendment to allow claims of the class to extend to the personal
22 representatives, wouldn't you?

23 **MR HARRIS:** That's right.

24 **MR JUSTICE ROTH:** And they would be the class members. And so --

25 **MR HARRIS:** They would.

26 **MR JUSTICE ROTH:** And therefore it would be their domicile, because it's the

1 domicile of the class member that determines under the statute, I think,
2 whether you have to opt in or out.

3 So we can't escape looking, it seems to me, whichever domicile date we have, at the
4 domicile of the personal representatives, if they are the ones who have to opt
5 in or out.

6 **MR HARRIS:** With respect, we say no, sir. The way the legislation is constructed is
7 if the domicile date is set as at 6 September 2016, and by definition that
8 person is alive on that day -- that's the whole point -- then that is the domicile
9 that is then set for that person. It doesn't change later at any stage. You've
10 set the date: they're either --

11 **MR JUSTICE ROTH:** No, the domicile date doesn't change.

12 **MR HARRIS:** Yes.

13 **MR JUSTICE ROTH:** But if the person has since died, who is then the class
14 member?

15 **MR HARRIS:** The class member, when they die, becomes the personal
16 representative. But the critical point is that since the domicile question has
17 already been determined, you don't then have to ask yourself either the
18 different question or another new question by reference to the domicile of the
19 personal representative.

20 I do accept, of course, that the issue of the act of electing to opt in or opt out -- and
21 who knows, maybe there is some other involvement of the personal
22 representative, for example, at the distribution stage; or maybe there's some
23 need to correspond with some class members and it's relevant to direct some
24 correspondence or noticing to personal representatives. But those are distinct
25 and separate questions from the issue of what was the domicile of the class
26 member as at the domicile date.

1 To put that another way, all of the domicile, on our approach, will have been
2 determined at a time when every single class member was alive, and then it's
3 set.

4 **MR JUSTICE ROTH:** Could you just help me, because I don't find this very easy,
5 I confess. But if I look at section 47B(11) in the Act... just take a few
6 moments to find it. Is it in --

7 **MR HARRIS:** It's in tab 3 of the authorities bundle, if that helps.

8 **MR JUSTICE ROTH:** I think that will help a lot. I've got it in the book. No, tab 3 is
9 the Judgments Act.

10 **MR HARRIS:** My tab 3 is Competition Act 1988, of the authorities bundle for today.

11 **MR JUSTICE ROTH:** Oh, I'm sorry. Yes.

12 If you look at 47B(11):

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

15 "(a) any class member who opts out by notifying the representative, in a manner and
16 by a time specified ..."

17 Time specified is something we'll set. And then:

18 "(b) any class member who --

19 "(i) is not domiciled in the United Kingdom at a time specified ..."

20 And that's the domicile date. That's the time specified.

21 So any class member who is not domiciled in the UK at the domicile date. And if the
22 class member does not opt in -- so if the class member is the personal
23 representative, someone who's died, isn't it the personal representative to
24 whom one has to ask: was he or she domiciled in the UK at whatever the
25 domicile date is?

26 **MR HARRIS:** Well, we say no, sir, for the reasons that I've already given: the way

1 we construe this, and if you adopt our date of 6 September 2016, is that all
2 the class members, the individuals, are all going to be alive on that date.

3 **MR JUSTICE ROTH:** Yes.

4 **MR HARRIS:** And if you adopt our date, if you set that as the domicile date, then
5 every single one of those people was alive at that date, and that is it for the
6 question of domicile. And then I accept you have to go on and set the period
7 within which people can either opt in or opt out.

8 All that happens in our case, in our submission, is that after the date of
9 6 September 2016, some people will die. Some people have died, because
10 we're obviously five or six years later.

11 **MR JUSTICE ROTH:** Yes.

12 **MR HARRIS:** But all that happens for those people, just like in any other claim, is
13 that the cause of action, and frankly everything else in their estate, transfers,
14 under the laws of probate and what have you, for relevant purposes, they go
15 to what's compendiously described in our amendments as the
16 personal/authorised representatives of the estate, as explained in
17 Mr Bronfentrinker's second witness statement. We obviously haven't put all
18 the detail.

19 Then all that those people do, they are, if you like, then the class members, but that's
20 only because the estate has come into existence on the death of the other
21 person. But critically, the domicile was set at a time when those individuals
22 were still alive. So they are in the class.

23 **MR JUSTICE ROTH:** So the class member for the purposes of (b)(i) was the
24 individual who has died; but then for the purpose of (b)(ii) of that Act then the
25 personal representative is now the class member, wherever they are. That's
26 how it then works?

1 **MR HARRIS:** Yes, that's right, sir.

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

3 **MR HARRIS:** Yes. So that's how we construct the legislation and it fits in with how
4 we've put forward our proposed amendments to the claim form. As I said
5 before, it gives rise to the distinct benefit, in our respectful submission, of both
6 doing justice in the manner I've described, because these are perfectly
7 coherent and full causes of action as at the date that we put forward, and by
8 a proven wrongdoer and in respect of a -- well, as I say, proven wrongdoer.

9 And on top of that -- so that's not only one aspect of the justice but, in our
10 submission, it's a unified approach that is simpler, quicker and cheaper. It
11 doesn't give rise to any difficult or detailed disputes about the domicile of the
12 personal representative, such as the one that I've drawn to your attention, or
13 there could be others, no doubt. A motivated and resourced defendant could
14 think of all manner of others. And of course almost any others give rise to
15 a deterrent effect. Any amount of difficulty or trouble or expense is, in our
16 submission, bound to deter the act of opting in by a personal representative.

17 Then there is a third point as to the facts of this particular case, a third and fourth
18 point.

19 The third, if you like, point is that the period at issue in this case is, as it happens,
20 very long: it's well into its sixth year. That delay, if we're wrong on the
21 domicile date and Mr Hoskins is right, will exclude, inevitably, a lot of people,
22 but the delay is not the responsibility of the people who had a perfectly good
23 cause of action in 2016. So in our respectful submission, it shouldn't be held
24 against them in a manner that effectively excludes them. That would be
25 wrong as matter of basic justice.

26 But then there is a fourth point on the facts of this particular case. At the Tribunal's

1 sensible suggestion, we did make a contact with the public trustee, who, as
2 you know, is the person in whom would reside the seemingly large number or
3 potentially large number of estates that are intestate, relatively small estates,
4 in this country, and she has said quite clearly, as is, she says, her right, she
5 doesn't want to participate. She's not going to have anything to do with it one
6 way or the other.

7 Now, that's the way it's panned out. But it has this effect: the effect is that if the
8 domicile date were to be later -- and that's subject to the point about original
9 parties, which I'll come back to -- but if the domicile date were to be later and
10 therefore the onus is upon personal representatives to actually opt in because
11 the domicile date is later, then on the facts of this case, it seems like it's not
12 going to happen in respect of the largest share, because she says she doesn't
13 have the obligation to do anything and she's not going to do anything.

14 That, we say, would be unfortunate. That's the evidence and the materials before
15 the Tribunal. And of course Mastercard doubtless knows --

16 **MR JUSTICE ROTH:** I'm sorry, you've lost me. If the domicile date is later, the
17 opting in is only as regards people outside the UK. So it wouldn't be for the
18 public trustee to -- you say insofar as there are people outside the UK, she
19 wouldn't be opting in. I mean, most of the people who died would be in
20 the UK. If the domicile date is later -- it's only people who've left the UK, isn't
21 it, that there's any question of opting in?

22 **MR HARRIS:** That's right, yes. I think the kernel of the point is just that if there's
23 more onus upon the public trustee --

24 **MR JUSTICE ROTH:** I'm not sure she even is the -- if they've left the UK and died
25 abroad, I wouldn't have thought the public trustee has any role for them
26 whatsoever. Suppose you had an Italian working in Britain who, say, left the

1 UK after Brexit and then died in Italy intestate, I can't imagine that the public
2 trustee is, pursuant to statute, the personal representative of that person who
3 died in Italy.

4 **MR HARRIS:** Well, I'm not sure I can answer it --

5 **MR JUSTICE ROTH:** That would be extraordinary. It would be a question of
6 whatever happens under the law of Italy. If necessary, we can look at the
7 legislation. It can only be, surely, for people who die in the UK intestate.

8 **MR HARRIS:** Well, sir, I'm not in a position to delve into the niceties of the estates
9 law, but there will be a category of people -- it seems as though she will be, if
10 you like, responsible as the personal representative under the legislation that
11 we went through on the last occasion --

12 **MR JUSTICE ROTH:** Mm-hm.

13 **MR HARRIS:** -- for a fair number of estates, because they are small estates that go
14 intestate.

15 **MR JUSTICE ROTH:** Yes, I see that. But I just think that it won't be a question of
16 them opting in, will it? They just won't be subject to the amendment, they
17 won't be in the claim.

18 **MR HARRIS:** Yes, I think that's probably right, sir, yes.

19 **MR JUSTICE ROTH:** Yes.

20 **MR HARRIS:** But there is a different point, which is Mr -- I understand why he does
21 this, but Mr Hoskins suggests that actually we're somehow seeking to
22 "increase" the size of the class by choosing an earlier domicile date, as if it
23 were already determined what the correct size should be by reference to
24 domicile date. But that's --

25 **MR JUSTICE ROTH:** No, and you say that this is the size that you had in the claim
26 form --

1 **MR HARRIS:** Yes.

2 **MR JUSTICE ROTH:** -- when it was issued.

3 **MR HARRIS:** Yes.

4 **MR JUSTICE ROTH:** Unlike the previous application that we heard on the remittal
5 hearing, where, on our interpretation, you were seeking to expand the size of
6 the class, whereas here in fact you're trying to preserve the size of the class --

7 **MR HARRIS:** Precisely.

8 **MR JUSTICE ROTH:** -- and avoid it being reduced.

9 **MR HARRIS:** Precisely. I will come to the terms of the claim, obviously, in due
10 course; I'm not going to leave them to one side.

11 But in other words, it's wrong to use the verb "increase" and that begs the very
12 question that we're here to argue. It would only be an increase if we were
13 wrong on domicile date, and subject to the other points I have on the claim
14 form. I mean, for instance, I could just as well say that Mastercard is
15 advocating for a decrease in the size of the claim, and it would be equally
16 meaningless.

17 But at least our submission has the dual benefits of being consistent with the justice
18 of the case, as I've just described, and not elevating the administrative
19 requirement to do with jurisdiction into a substantive hurdle that has the effect
20 of denying perfectly good causes of action from their ability to proceed. So it
21 has those dual benefits.

22 What's more, though I don't overstate this point, it's also consistent with what
23 Mastercard itself said at the remittal hearing that we cite in our skeleton at
24 paragraph 13. From the transcript we recorded that Mr Hoskins said that that
25 would be permissible. You asked the question whether or not we could do
26 what we're now trying to do, and Mr Hoskins said:

1 "That would be permissible if they are alive when the claim form is issued so they
2 were an original party."

3 Then --

4 **MR JUSTICE ROTH:** Yes, I mean, I know you've referred to that and I think
5 Mastercard seeks to rely on something that maybe Ms Wakefield said. I don't
6 think it's --

7 **MR HARRIS:** Exactly.

8 **MR JUSTICE ROTH:** -- appropriate to place too much on the sort of off-the-cuff
9 response of counsel. Nobody was really focusing on this in a positive way.

10 **MR HARRIS:** Precisely so, my Lord. That is exactly my submission. It's not
11 dispositive in my favour, what Mr Hoskins said; it's not dispositive against me
12 what Ms Wakefield said at the same hearing.

13 **MR JUSTICE ROTH:** No.

14 **MR HARRIS:** It wasn't in issue.

15 But as you will have seen, and when we come to the claim form in due course you
16 will see again, that we have never definitively submitted what the domicile
17 date would be, we've never had this argument, and we have definitively
18 submitted that it's a matter for you.

19 So I can move on then to the next point. But before I do -- and I'm afraid this may
20 seem slightly out of order, and now that I look at it, it appears to me to be
21 slightly out of order, but so I don't lose the point, I will say it now anyway.

22 If you're against me -- I have some more arguments why you shouldn't be -- but if
23 you're against me on the domicile date being 6 September 2016, then strictly
24 in the alternative, what we say is that there's no reason to put the domicile
25 date as late as 18 August 2021. That's the date preferred by Mastercard.
26 That has the maximum exclusionary effect for people who had good causes of

1 action as at the date of the claim form, whereas, as you know, ours has no
2 such effect. But Mastercard puts its case as to why 18 August 2021 should
3 be the date as saying: well, that's the date upon which the CAT decided to
4 grant a CPO, as if somehow that's the justice of the matter.

5 But on that logic, we would respectfully contend in this alternative submission that if
6 that's the logic, then in the alternative, the date should be the date of the
7 original CPO hearing, or perhaps shortly afterwards when a judgment was
8 issued. Because what we now know is, after years of legal argument, that is
9 the date upon which the CPO should have been granted. I accept,
10 Mastercard could always have made their points that have been proven to be
11 good points about deceased persons and interest. But nevertheless, if they
12 had only taken those points originally, then the CPO would have been granted
13 either at the original hearing or shortly afterwards, or only after a small period
14 of time when we had further argument about deceased persons and interest.

15 So that's the alternative submission. And of course it has the benefit -- you can see
16 why I make the submission. Any date that's after 6 September 2016, on
17 Mr Hoskins' case about them therefore not being original parties, is going to
18 simply exclude those people altogether. And if it's 18 August 2021, that's
19 five-years-plus worth of people and they're just simply excluded, even though
20 they had those causes of action; whereas at least in the alternative, if it goes
21 back to the date of the original CPO hearing, then it excludes fewer people
22 and does better justice.

23 The way I put it is Mr Hoskins prays in aid: oh, it should be related to the CPO date.
24 We disagree with that for the reasons I've already given. But if it should be
25 related to the CPO date, then we should wind back to what would have
26 happened if what eventually turned out to be established as the law had been

1 expanded in that manner in the first CPO judgment.

2 So that's how I put that point. And I'm sorry that that does appear to have come
3 slightly --

4 **MR JUSTICE ROTH:** No, it's --

5 **MR HARRIS:** -- out of order. At least I hope it's clear.

6 **MR JUSTICE ROTH:** We have the point.

7 **MR HARRIS:** Good.

8 What I'm going to do now is come back to the ways in which back-dating is put and
9 then deal with the specific objections on domicile date in my learned friend's
10 skeleton argument, and then wrap up. So it won't take much longer.

11 The only other point on back-dating -- because I've already made the point that you
12 can't back-date a date that isn't there -- is that Mr Hoskins suggests that: oh,
13 well, we previously put forward a date in other supporting documents. I think
14 we've dealt with that one: I mean, that's not dispositive either way.

15 But I would just draw the Tribunal's attention to the fact that it's not surprising that we
16 put the dates in our original supporting documents and submissions in the
17 way that we did, by reference to the CPO, because at that time -- so back in
18 September 2016 -- we were anticipating, and indeed obtained, a CPO hearing
19 only a few months later. You'll recall, sir, that the hearing took place in
20 February 2017.

21 **MR JUSTICE ROTH:** Yes.

22 **MR HARRIS:** Therefore the issue that has now achieved such massive prominence,
23 worth probably hundreds of millions of pounds, would have been of minimal
24 impact and therefore it probably wouldn't have arisen. It's just that because
25 there has been, in setting the groundwork for this new regime, five years of
26 appeals and judgments, instead of there being an anticipated gap of five to

1 six months or so from the claim form being issued to date of the CPO, it has
2 turned out to be five or six years.

3 **MR JUSTICE ROTH:** I think you could always anticipate that there would be
4 appeals and that it might not have been granted. That's always something
5 one would recognise in cases of this size, and particularly when it's
6 a pioneering case in a new regime. So you could never have been confident
7 that it would have been granted in 2017.

8 **MR HARRIS:** That's not quite how I put the point. I take your point and that's a fair
9 point. That's not quite how I'm putting it.

10 I'm saying it's perfectly reasonable for us to have proceeded on that basis at the
11 beginning, and it turns out that things have then moved in a five-year different
12 direction. I'm not suggesting that we would have been somehow precluded
13 four years ago from seeking to amend so as to preserve some of this point.
14 It's just that it hasn't arisen, lots of other points have arisen, and it has arisen
15 now. That's all I'm saying. It is perfectly reasonable and explicable how it has
16 come to pass that remarks were made at an earlier stage in these
17 proceedings by us or our team about tying the domicile date -- not tying it, but
18 having it related to the CPO date. That's all I'm saying.

19 But as I think we have perhaps -- well, not so much agreed, but we've debated in
20 argument, it's not dispositive either way.

21 Then my learned friend -- so these are the specific objections on this point in his
22 skeleton, at least as we understand them -- Mr Hoskins complains that
23 Mr Merricks' proposed domicile date would result in some individuals being
24 included in the class even though they are no longer resident in the UK and
25 excludes others from the class who are now resident in the UK.

26 But, with respect, we say that's simply the way the legislation works. No matter

1 where you draw the line in the sand, you are going to be capable of having
2 inside the domicile date some individuals who are no longer resident in
3 the UK, and the other way round.

4 **MR JUSTICE ROTH:** I think the point that's being made is again looking to the
5 purpose of: why have this domicile date? As you say, it's an administrative
6 function: it determines who has to opt in and who has to opt out.

7 If the notice telling people, "You need to opt in or you can opt out if you want to", is
8 going to come out now, early 2022, if there were a lot of people who -- and
9 that's when people will become aware of it. It will reach public consciousness
10 with all of the publicity which you've described. So that if there are quite a lot
11 of people who were resident here back in 2016 and have subsequently left,
12 then those people are all going to have to -- their right to opt out, they've got
13 to learn about it. And equally, there might be quite a lot of people who weren't
14 here in 2016, because they were working abroad for some years, and have
15 come back, and they're then all going to have to -- but we're living here right
16 through the claim period -- they're all going to have to opt in.

17 **MR HARRIS:** We agree. That is how it's put. I deal with that in this way --

18 **MR JUSTICE ROTH:** You say that's a sort of an administrative complication for
19 class members.

20 **MR HARRIS:** Yes.

21 **MR JUSTICE ROTH:** Whereas if it's done now -- and then they're going to have to
22 establish whether they were living in the UK as at a date six years ago, as
23 opposed to a few months ago.

24 **MR HARRIS:** Well, I will deal with both of those.

25 The answer to the first point is that no matter when the domicile date is set, there
26 has to be proper and adequate noticing. This Tribunal polices that. And

1 indeed you have the notice as amended in the bundle and it's one of
2 the issues for today.

3 It is no obstacle to our domicile date to say that because on the justice of the case it
4 should be 2016, you can't do that because it might require more or different
5 noticing. The answer to that problem, if it's a real problem, is: amend and
6 update and adjust the noticing. The reason that that must be right is because
7 whenever the domicile date is, there has to be noticing, precisely because
8 somebody could have left the UK the very day after the domicile date,
9 whenever it is.

10 Let's say the period within which the opt-in/opt-out has to take place is six months or
11 twelve months -- or in some case, for some particular sets of facts, it might be,
12 say, two years. I mean, who knows? There might be some particular reason
13 why it's a lengthy period. Again, one gets into the same issue. If somebody
14 has left for six weeks, do they require slightly different noticing? What about if
15 somebody has left for six months, or maybe it's eighteen months? The
16 answer always is noticing, because they are no longer in the jurisdiction.

17 The same is true for the other people. If they had been abroad in 2016 but they've
18 come back, then they are going to see the noticing for the people who are
19 now in this country, given that the CPO, we respectfully contend, is going to
20 be granted, or certainly will be granted on some given date. If there's a need
21 in the noticing, for instance -- I'm not suggesting there is, but for instance -- to
22 say to somebody, a particular paragraph dealing with somebody who was
23 here during the claim period but then left for a bit and then came back, they
24 have to be particularly careful or there's some particular means of trying to
25 notify them, then so be it. That can be done. It can all be dealt with by
26 noticing.

1 I add to that the following point, which is that it is inevitable that in opt-out
2 proceedings, which are perfectly permitted by the legislation, there might be
3 some class members who don't know, who don't get notified or don't
4 understand the notice. That is an inevitable corollary of opt-out proceedings,
5 and yet Parliament has seen fit to adopt them.

6 So I think that, with respect, is the answer to that first objection. It's no reason to
7 oppose the earlier domicile date that we suggest.

8 Then in my learned friend's skeleton at the similar or same place -- this is
9 paragraphs 9 and 10 of his skeleton -- what he suggests is that the domicile
10 date should, if you like, therefore, or perhaps in any event, always be the date
11 of the CPO. But that begs the very question that we are now debating.

12 He proceeds -- I understand why he does this -- he proceeds on the basis that it's, if
13 you like, kind of obvious or it's inevitable, or this is the way it always should or
14 does work, or this is the way it's set out in the legislation, that you should have
15 the domicile date no earlier than the CPO. But as I say, that begs the very
16 question. And when one actually goes through the rules and the guidance, it
17 doesn't say that. And perhaps more pertinently, if that were the case, the
18 legislature or the rule-maker could easily have said that, but simply doesn't
19 say that. It expressly, on our reading, leaves it open to the full and complete
20 discretion of the Tribunal when the domicile date should be.

21 The second objection that I want to deal with is *Le Patourel* and *Gutmann*. But just
22 scanning my notes, I think I've really dealt with those earlier and there's no
23 more to say about them. They are certainly not dispositive; they are different
24 facts.

25 I've dealt with the further objection that somehow the opt-in/opt-out act of
26 decision-making has to be made by the PRs, so their domicile is said to be

1 relevant. But I've dealt with that point already.

2 Then my learned friend -- and this will take me on to the claim form, which is
3 obviously an important part of these submissions -- essentially just says: well,
4 this is really just a ploy to circumvent limitation; that must be why they're doing
5 it. That breaks down into three points.

6 The first one I've already dealt with: that's in fact not why we're doing it. We're doing
7 it for reasons of administrative simplicity and convenience and so as not to
8 create difficulties in the ongoing progress of this claim.

9 But it's wrong for two other reasons and I'll deal with them in turn. The first is: on the
10 proper reading of the claim form, these people are already in the claim. And
11 secondly, in any event, they are original parties as a matter of principle.
12 Those are the two points I'm now going to deal with.

13 So if one were to turn up -- there is a copy of the claim form in its amended form, so
14 that one can therefore see the original as well, in tab 5 of the first bundle D for
15 the CMC today. It's exhibited to Mr Bronfentrinker's second witness
16 statement. The relevant page in the bundle is D/58, which is internal page 8
17 of the claim form.

18 I'm going to deal with the points in the order I just said: the true meaning of the claim
19 form and then the reasons in principle why this is correct as well.

20 So just picking up paragraph 22, under the heading "Description of the class".
21 There's the italicised words in the original and then there is the addition of the
22 personal representatives, which I don't need to deal with right now, is the
23 subject of the amendment application. Then it says the following, or it did say
24 the following pre-proposed amendment:

25 "All individuals who are living in the United Kingdom as at the domicile date, to be
26 determined by the Tribunal in the CPO, and who meet this definition are

1 included within the proposed class."

2 So the critical words for these purposes there, in the original, are "All individuals who
3 are living in the United Kingdom as at the domicile date, to be determined by
4 the Tribunal in the CPO". So on any sensible reading of those words, if the
5 domicile date is now the date that we propose, 6 September 2016, then those
6 people are in this class definition. It's as simple as that.

7 **MR JUSTICE ROTH:** Yes.

8 **MR HARRIS:** The only way you can get out of that is if we lose on the date of the
9 domicile date. But that is the very question that is in issue.

10 **MR JUSTICE ROTH:** Just pausing there. If, looking at that amendment, "together
11 with the personal/authorised representatives" and so on, if that had been
12 there originally, then it wouldn't matter really whether the domicile date was
13 2021 or 2016 because people who were alive in 2016, their claims wouldn't
14 drop out.

15 **MR HARRIS:** It wouldn't matter in that sense, I 100 per cent agree. It would only
16 matter in the possibly lesser sense that there might be administrative
17 headaches about determining the domicile of personal/authorised
18 representatives; so, for example, the corporate overseas company that
19 I mentioned before.

20 **MR JUSTICE ROTH:** Mm-hm.

21 **MR HARRIS:** But I accept in the fundamental sense it wouldn't have mattered. But
22 it's because we lost on that point that we obviously -- that the words --

23 **MR JUSTICE ROTH:** You haven't lost on that point because we haven't --

24 **MR HARRIS:** No, sorry, because we lost on the point that claims of dead people
25 weren't in the claim form as originally drafted, that we had to obviously add in
26 the words in red at the end of the class definition. That's all I'm saying.

1 **MR JUSTICE ROTH:** No, no, no. Surely they are two quite separate points. This
2 isn't going to bring back the claims of people who died before --

3 **MR HARRIS:** No, it won't do that.

4 **MR JUSTICE ROTH:** -- September 2016.

5 **MR HARRIS:** No.

6 **MR JUSTICE ROTH:** That was the application that was made --

7 **MR HARRIS:** Yes.

8 **MR JUSTICE ROTH:** -- and failed. This would deal with -- if the domicile date is
9 2021, this deals with the people who died between 2016 and 2021, and
10 indeed people who are alive today but die next week or in three months' time.

11 **MR HARRIS:** You're quite right, sir. That's completely right.

12 **MR JUSTICE ROTH:** That's why I say: if it had been drafted -- no doubt no one was
13 thinking about this at the time, perhaps. But if it had been there originally,
14 then there would be no excluding or people dropping out who were alive in
15 2016, because you already have their personal representatives there.

16 **MR HARRIS:** That's right. That's right.

17 But whilst I agree with that, the critical point for today, of course, as you've already
18 recognised, is that it says, "living in the United Kingdom as at the domicile
19 date, to be determined by the Tribunal" --

20 **MR JUSTICE ROTH:** Yes.

21 **MR HARRIS:** -- and that's the very question that we are debating. So if we're right
22 that it's 6 September 2016, then nobody's excluded: they're already there.

23 Let's say on my alternative that I sort of raised a little bit out of order, let's say the
24 date is February 2017, or even April, when --

25 **MR JUSTICE ROTH:** Yes.

26 **MR HARRIS:** Then only those people who weren't alive as at that date wouldn't be

1 included, but everybody after that date would be included.

2 **MR JUSTICE ROTH:** So your basic point is: this was left open in the claim form --

3 **MR HARRIS:** Yes.

4 **MR JUSTICE ROTH:** -- and it's entirely in the discretion of the Tribunal; it's not
5 fettered by the legislation. And the justice of the case is such that we should
6 exercise that discretion, in the circumstances of this case, to make it 2016,
7 whatever might have been done in other cases --

8 **MR HARRIS:** Yes.

9 **MR JUSTICE ROTH:** -- because if we don't, unless you get that amendment, which
10 might have limitation problems, a lot of people who were alive when the claim
11 started and have prima facie good claims will drop out.

12 **MR HARRIS:** Yes, and against the background of this being a claim where a lot of
13 people who did have prima facie good claims have dropped out because the
14 claim form wasn't drafted in such a way as to include them. And we have to
15 hold our hands up to that: you have ruled against us on that, and that's what
16 happened.

17 **MR JUSTICE ROTH:** Yes.

18 **MR HARRIS:** So that's right.

19 The critical thing here is I don't want to lose sight of the words after the comma: "to
20 be determined by the Tribunal". It was definitely left open, no matter whatever
21 other remarks may have been said on later dates, and in the pleaded claim
22 form it's left open.

23 The same essentially is true about the other paragraph upon which my learned friend
24 relies, which is two pages further over, in 23(d) of the claim form. That used
25 to read:

26 "The proposed class representative is aware that this class definition excludes some

1 individuals ..."

2 And the relevant one is (iii), about eight lines down. Excludes the claims of:

3 "(iii) the estates of individuals who meet the proposed class definition ..."

4 But then the critical words there are:

5 "... but who passed away ..."

6 The original words:

7 "... before the domicile date."

8 So the domicile date hadn't been set and it's being pleaded to be decided by
9 the Tribunal. So the only way in which that could be construed as excluding
10 some of the people we're now arguing about is if you'd already answered the
11 very question that we're debating, which is that the domicile date is later than
12 the one that we advocate.

13 So it's entirely circular, in other words. Mr Hoskins can only properly read the claim
14 form so as to exclude these people as original parties if he's right on domicile
15 date. But we say he's wrong on domicile date, in which case there are no
16 issues about the construction.

17 **MR JUSTICE ROTH:** Yes. No, I have the point.

18 **MR HARRIS:** Simple as that.

19 **MR JUSTICE ROTH:** Yes.

20 **MR HARRIS:** Therefore the second way of answering this is even shorter, which is:
21 as a matter of principle, a person who had a proper, fully formed tortious
22 cause of action as at the date of the claim form ought to be regarded as
23 an "original party", just like that person would be regarded as an original party
24 in, frankly, any other claim that you might care to bring.

25 Let me put that point in two ways. Let's imagine -- we know from the Supreme Court
26 judgment, and probably in any event, that section 47B collective proceedings

1 are just an amalgamation of individual proceedings that can proceed in any
2 event; it's just that they don't, for all kinds of practical reasons. But they are
3 nevertheless individual tortious causes of action that are collected together
4 into these collective proceedings.

5 These proceedings as at the date of the claim form, for anyone who was alive as at
6 that date, are perfectly good, if you like, if viewed individually, as section 47A
7 claims of exactly the same nature. There's no basis upon which it could be
8 said that the individual who was alive as at that date and had a 47A claim
9 wasn't an original party to that claim, even if they died the very next day.

10 Therefore, we say as a matter of principle the same approach should be taken to the
11 47B claims, which are just a collection of these 47A claims. They were
12 an original party if they had done it individually; they are still an original party
13 even though it was sought to be done by way of a collection of those
14 individual claims through the means of Mr Merricks acting as --

15 **MR JUSTICE ROTH:** Doesn't that argument suffer from the same objection that
16 you've just made to the Mastercard argument on the claim form, namely
17 whether they were original parties depends on what's the domicile date,
18 because that's how the parties were defined? So it's also circular, you see.

19 **MR HARRIS:** I'm trying to distinguish between two points. I do accept that if you're
20 only are looking at the claim form and the wording of the claim form, it would
21 suffer from the same flaw. But it doesn't, for the reasons I've given. I'm right
22 on that, I say. But I'm now trying to distinguish and to say that, if you like,
23 further support as a matter of principle ought to be given to my construction of
24 the claim form --

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

26 **MR HARRIS:** -- for the reasons that I've just given. That's how I put that.

1 So those are the points that I have on the domicile date, which is the key point, we
2 respectfully contend, on the question of the amendment as well.

3 Unless I can assist further on that point.

4 **MR JUSTICE ROTH:** No, I think that's very helpful.

5 We usually, as you know, take a short break, mid-morning. We would normally take
6 it slightly later but maybe it's sensible to just take five minutes now, before
7 turning to Mr Hoskins. So we will come back at 11.45. It's a short point, but
8 it's obviously a very important one and it's not altogether straightforward.

9 So 11.45.

10 **MR HARRIS:** Thanks.

11 **(11.40 am)**

12 **(A short break)**

13 **(11.50 am)**

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

15 **Submissions by MR HOSKINS**

16 **MR HOSKINS:** Thank you.

17 I think as has become obvious both from Mr Harris' submissions and the questions
18 from the Tribunal, the issue about the relevant domicile date and indeed the
19 amendment application, they are intertwined. And whilst, as the Chairman
20 observed, it is a short point, they are actually quite difficult to unpick from
21 each other, and that's what I'll endeavour to do through my submissions. So,
22 like Mr Harris, obviously addressing the domicile date as requested, but
23 necessarily also dealing with the amendment point.

24 Can I start with the legislative framework and just try and tease out some of the
25 definitions and distinctions that appear in the legislation.

26 First of all, the legislation distinguishes between "the class" and "represented

1 persons". If I can start with the rules, and if you are using the Purple Book, if
2 I could ask you to turn to -- I have the 27th edition, which I believe is the most
3 recent edition, and it's page 3354 and it's rule 75. Rule 75(3)(a) provides:

4 "The collective proceedings claim form shall contain a description of the proposed
5 class."

6 So when an application is being made for certification, the PCR must put forward
7 a description of the proposed class.

8 Then going to the end of the certification process, if you can go to rule 80(1)(c):

9 If the Tribunal decides to certify, then the collective proceedings order must
10 "describe or otherwise identify the class."

11 Now, once certification has been decided, once the order has been made, one then
12 gets to the stage of those who can opt out and those who have to opt in. I'm
13 going to come back to the Purple Book, so you might want to keep that open.
14 I'm going to next go to the Act. We've already looked at this this morning.
15 Authorities tab 3. This is the Competition Act and I would like to go back to
16 section 47B(11). We saw this earlier this morning:

17 "Opt-out collective proceedings" are collective proceedings which are brought on
18 behalf of each class member except --

19 "(a) any class member who opts out by notifying the representative, in a manner and
20 by a time specified, that the claim should not be included in the collective
21 proceedings, and

22 "(b) any class member who --

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

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

25 Now, in our submission, in (b) the reference to a class member must be the same
26 class member for (i) and (ii). That's clear on the face of the legislation. And

1 as the Chairman put to Mr Harris, in relation to people who are deceased, for
2 reasons explained in the remittal judgment, the class member is the personal
3 representative, not the deceased person. So in relation to section 47B(11), in
4 relation to a deceased person, any class member is the personal
5 representative, not the deceased person him or herself.

6 If we could go back to the rules. I'd like to go to rule 82(1)(b). 82(1) in the rules
7 reflects and gives effect to section 47B(11). 82(1)(b) is opt-out proceedings.
8 Basically, if you are a class member who is domiciled in the UK, you can opt
9 out; and if you're a class member who is not domiciled in the UK, you can opt
10 in.

11 Just to, therefore, clarify some of the concepts and terms used in the legislation, if
12 you can go to rule 73(2), you see that's a definition section. You have
13 a definition of "class member", and that means:

14 "A person falling within the class described in the collective proceedings order."

15 You have a definition of "domicile date", and that means:

16 "The date specified in a collective proceedings order ... for the purposes of
17 determining whether a person is domiciled in the United Kingdom."

18 And you have a definition of "represented person". You will see the definition. For
19 our purposes, we are obviously concerned with opt-out. It means:

20 "A class member who, in accordance with rule 82- ... (b) was domiciled in the
21 United Kingdom on the domicile date and has not opted out of collective
22 proceedings or has opted into opt-out collective proceedings."

23 So you see the relationship between the class members, or the definition of the
24 class, and the domicile date which is fixed by the Tribunal in the collective
25 proceedings order. Then what happens is you have rule 82, the
26 section 47B(11) process; and at the end of that process, you are left with the

1 represented persons, ie the relevant people who have not opted out and the
2 relevant people who have opted in.

3 So just to sum that up, what that means is the Tribunal decides the class of persons
4 who are entitled to participate in the collective proceedings and records that in
5 the collective proceedings order. The represented persons are those persons
6 who are within the class definition domiciled in the UK on the domicile date
7 who do not opt out of the collective proceedings and also those persons who
8 are domiciled outside of the UK within the class definition -- and domicile is by
9 reference to the domicile date -- who opt into the collective proceedings.

10 So that's the difference between "class member" and "represented persons".

11 Therefore, under the legislation, the concept of the domicile date is relevant to
12 the identification of represented persons after the CPO has been granted but
13 it is not relevant to the definition of the class. That's the position under the
14 legislation.

15 However, as we have seen and as Mr Harris has explained to you, in the present
16 case the domicile date is relevant also to the identification of the class. But
17 the reason why that's the case is not anything to do with the legislation; it's
18 because in his original claim form the class representative defined his
19 proposed class by reference to the domicile date. And that's where these
20 issues become intertwined. It's purely because of the drafting in the original
21 claim form.

22 If we can look at the original claim form: that's at bundle A, tab 1, and if you could
23 turn to page 7. You'll see here it's the drafting of the proposed class by
24 reference to the domicile date that means we have this intertwining.

25 **MR JUSTICE ROTH:** Sorry, which page?

26 **MR HOSKINS:** Page A/7. Sorry, bundle A, tab 1, and I have it at page 7 or A/7. It's

1 the original from the remittal hearing bundles.

2 **MR JUSTICE ROTH:** Yes, sorry. I was looking at the one we had before. Yes.

3 **MR HOSKINS:** Obviously in the remittal judgment this Tribunal said: you must look
4 at all the relevant paragraphs together. And at paragraph 22 you have the
5 proposed class: people who made purchases between a certain date. And
6 the class includes "all individuals who are living in the United Kingdom as at
7 the domicile date". The final sentence, it includes "all individuals who are
8 living outside the United Kingdom at the domicile date". So it's the drafting
9 that brings the domicile date into the proposed class definition.

10 You see --

11 **MR JUSTICE ROTH:** so if the language after the italics was not there, then that
12 would not be the case, because it would just be defined, the proposed class,
13 according to the claim period.

14 **MR HOSKINS:** I agree. It's because the class definition is not limited to the italics, it
15 also included the further two sentences of paragraph 22, which is consistent --
16 the submission I've just made is consistent with the interpretation the Tribunal
17 adopted in its remittal judgment.

18 The other thing though is that if you were to just say -- if it was just the italics, we
19 wouldn't be here today. You would also have to remove paragraph 23(d)(iii),
20 because that's part of the class definition as well and has a specific exclusion
21 for the estates of individuals who meet the proposed class definition but who
22 passed away before the domicile date, which was obviously the subject of the
23 previous remittal hearing.

24 **MR JUSTICE ROTH:** Yes.

25 **MR HOSKINS:** But if one were to have a class definition absent any reference to
26 domicile date, you would need to remove the last two sentences of

1 paragraph 22 and the express exclusion of paragraph 23(d)(iii). But they are
2 there. That was the original class definition.

3 **MR JUSTICE ROTH:** Yes. What about paragraph 25?

4 **MR HOSKINS:** Well, 25 was an assessment of the class as at the date the claim
5 form was drafted, which I accept was assuming that certification -- you see
6 that from the proposed legislative timetable, et cetera -- it was put forward on
7 the basis that there wouldn't be any appeals.

8 **MR JUSTICE ROTH:** Well, I don't know if that was done. It just is the estimated
9 class size, calculated on the basis of -- and it's excluding people who have
10 died before the claim is issued.

11 **MR HOSKINS:** Mm-hm.

12 **MR JUSTICE ROTH:** The point we relied on, you may recall, last time.

13 **MR HOSKINS:** Yes.

14 **MR JUSTICE ROTH:** But it's not excluding people who died, clearly, after it's been
15 issued.

16 **MR HOSKINS:** It doesn't take account -- I take Mr Harris's point: when this was
17 drafted, you can see from their proposed legislative timetable they were
18 anticipating that the CPO would be granted in 2016. So paragraph 25 doesn't
19 tell you anything.

20 Certainly my submission would be that the fact that you have an estimate based on
21 a proposed legislative timetable which assumes certification in 2016 and,
22 following the normal practice, a domicile date in 2016, cannot overcome --
23 sorry.

24 **MR JUSTICE ROTH:** But as I said to Mr Harris, you can always anticipate appeals;
25 you couldn't prejudge how the Tribunal might deal with this application. And
26 this is not just that they volunteered this; they have an obligation to estimate

1 the size of the class in the claim form under the rule --

2 **MR HOSKINS:** Yes.

3 **MR JUSTICE ROTH:** -- and they've done that.

4 **MR HOSKINS:** Yes.

5 **MR JUSTICE ROTH:** They haven't said: well, this is on the assumption that
6 certification is very rapid. They've just said: well, that's based on the way
7 we've put the case, that's the number of people we think come in the class.

8 **MR HOSKINS:** But, sir, that's premised on a domicile date of 2016. That must be
9 the case because of what is said in 22 and 23(d).

10 So what you have is if you construe 22 and 23(d), it doesn't take much construction:
11 there's an express reference to the domicile date. And then what you have is:
12 to provide an estimate on the basis of the class they've put forward, they have
13 to, for those purposes, assume a domicile date. And we know from their
14 legislative timetable that they were assuming a date of around 2016.

15 But what has happened is you can't read back from an estimate made of
16 an assumed domicile date as at this time in 2016 to remove the express
17 drafting in paragraphs 22 and 23 defining the class by reference to the
18 domicile date. That would be the tail wagging the dog. Because the wording
19 is clear in 22 and 23(d): the class is defined by reference to the domicile date.

20 **MR JUSTICE ROTH:** Yes.

21 **MR HOSKINS:** I'll come back to the construction of this shortly. At the moment
22 I just want to show you why, when we're talking -- you said: let's start with
23 domicile date, Mr Harris's domicile date and the effect of the application to
24 amend on this point. And this is why we get there. This is why they're
25 intertwined.

26 Just to set the scene on the application to amend, the class representative is seeking

1 permission to amend the class definition to include personal or authorised
2 representatives of the estates or members of the class who were alive when
3 the claim form was issued on 6 September 2016 but have since died, or do
4 die in the course of the proceedings. I take that from the second
5 Bronfentrinker, paragraph 13. That's a fair summary of what the application
6 is.

7 **MR JUSTICE ROTH:** Yes.

8 **MR HOSKINS:** Mr Bronfentrinker also tells us that the application is made under
9 rule 38(7)(c), which is in the Purple Book at page 3343. Of course, this is the
10 rule that the Tribunal said was the relevant rule in its remittal judgment for
11 an application of this sort.

12 So 38(6):

13 "After the expiry of a relevant period of limitation ..."

14 And the relevant period of limitation has expired in this case:

15 "... the Tribunal may add or substitute a party only if (a) that limitation period was
16 current when the proceedings were started; and (b) the addition or
17 substitution is necessary."

18 Addition or substitution of a new party, as the case may be, is necessary for
19 purposes of paragraph (6)(b) only if the Tribunal is satisfied that: ...

20 "(c) the original party has died ... and its interest has passed to the new party."

21 So what we are focused on is whether persons who were alive when the claim form
22 was issued on 6 September 2016, but who died before the domicile date, to
23 be determined by the Tribunal, were original parties to the proceedings.
24 Because if they were not original parties to the proceedings, ie if they were
25 not in the class definition in the original claim form, then it's easy: the Tribunal
26 simply doesn't have power to grant the amendment sought. And again, that's

1 what was held in the remittal judgment.

2 Let me set out Mastercard's position. Our submission is that it is necessary to
3 distinguish three different periods.

4 First period: claims on behalf of individuals who had died before the claim form was
5 issued on 6 September 2016. Now, we already know, because the Tribunal
6 has ruled, that this period cannot be included in the claim form. So that's the
7 first period.

8 The second period relates to claims by personal representatives on behalf of
9 individuals who were alive when the claim form was issued on
10 6 September 2016, but who died before the domicile date set by the Tribunal.

11 There are two possibilities there before you today. Mastercard submits that the
12 appropriate domicile date is 18 August 2021, which is the date of
13 the Tribunal's remittal judgment in which it decided to grant the CPO. If
14 the Tribunal adopts this domicile date, our submission is that the Tribunal
15 does not have power, under rule 38(7)(c), to permit the amendment sought.
16 I will make more detailed submissions on that; I'm just setting the scene at the
17 moment. But if the Tribunal adopts 6 September 2016 as the domicile date,
18 then on the proper construction of the claim form the amendment sought by
19 the class representative will fall within the scope of rule 38(7)(c).

20 **MR JUSTICE ROTH:** There is a slight qualification needed, is there not, to that
21 submission, in that, as I understand it, Mr Hoskins, you accept that even if the
22 domicile date is the date which you seek, namely 2021, the amendment can
23 be made for those who die after the domicile date, so in the course of the
24 proceedings?

25 **MR HOSKINS:** Correct. That's the third period. I said there were three periods.

26 **MR JUSTICE ROTH:** Yes. I'm sorry.

1 **MR HOSKINS:** No, that's absolutely fine. We are on the same wavelength.
2 The third period is claims by the personal representatives of individuals who were
3 alive at the domicile date, but who died thereafter. We would not oppose
4 such an application. They would still need an amendment to bring the
5 personal representatives in, but we wouldn't oppose such an application. But
6 there is no such application for the third period currently before the Tribunal.

7 **MR JUSTICE ROTH:** Isn't it covered by the language?

8 **MR HOSKINS:** Well --

9 **MR JUSTICE ROTH:** It's people who meet that description, were alive, but
10 subsequently died. I mean, you would say it shouldn't then be 6 September, it
11 should be on the domicile date, but subsequently died. I think that's the basis
12 of the --

13 **MR HOSKINS:** The current application covers periods 2 and 3 and the wording
14 covers periods 2 and 3. So the Tribunal could certainly, working through this,
15 say: we refuse permission in relation to period 2, we grant it in relation to
16 period 3, but the wording would have to be tidied up.

17 **MR JUSTICE ROTH:** Yes.

18 **MR HOSKINS:** I'm simply making that point. I'm not saying: aha, they can't do
19 anything because it's not in the application. That's not the submission I'm
20 making. It could be tidied up with drafting. But our submission is the
21 amendment shouldn't be made in relation to period 2.

22 **MR JUSTICE ROTH:** Yes.

23 **MR HOSKINS:** Our position, which I will develop in more detail, is, just in summary,
24 first of all, on the proper construction of the original claim form, persons who
25 were alive when the claim form was issued, but who died prior to the domicile
26 date, were not included in the original class definition; secondly, they were

1 therefore not original parties to these proceedings; and thirdly, the Tribunal
2 therefore does not have power to permit the amendment sought pursuant to
3 rule 38(7)(c).

4 That then leads me to the construction of the original claim form. I have already
5 shown you that and I've effectively made my submissions. But if you go back
6 to bundle A, tab 1, page 7, you have my points. Paragraph 22 makes it clear
7 that only individuals living in the United Kingdom as at the domicile date come
8 within the class; and paragraph 23 makes it clear that individuals who passed
9 away before the domicile date did not come within the class. We therefore
10 say it's clear on its face that individuals who died before the domicile date
11 were therefore not original parties to the claim for the purposes of
12 rule 38(7)(c).

13 **MR JUSTICE ROTH:** Yes. So that's the amendment point. We haven't actually
14 heard Mr Harris directly on that. But you say therefore that determines how
15 the amendment application would have to be resolved.

16 **MR HOSKINS:** Sir, there's one other aspect of -- because I can deal with all of it, I'd
17 rather deal with all of this now in one piece. I am going to show you some
18 other documents that go to the construction of the claim form, then I'm coming
19 straight back to the domicile date.

20 What I wanted to show you is -- sorry.

21 **MR JUSTICE ROTH:** I mean, I say that -- I'm sorry to interrupt you again -- because
22 I think Mr Harris accepted that on the true construction, people who died
23 before the domicile date were not included within the claim form, but he's
24 saying that begs the question of what the domicile date is. So you're on the
25 same page on the reading of the claim form. And he accepts that therefore, if
26 the domicile date is the one that you are seeking, he could only get them in,

1 those who died previously, by way of an amendment. That's why the focus is:
2 what is the domicile date?

3 **MR HOSKINS:** If that is the --

4 **MR JUSTICE ROTH:** I think that's a summary of the way Mr Harris is putting it.
5 I hope I haven't misrepresented him.

6 **MR HARRIS:** That is a fair summary, subject only to the point that I have this
7 subsidiary or supplementary submission that as a matter of principle, people
8 who had the good cause of action as at the date of the claim form should be
9 regarded as original parties. But you're perfectly right on the principal or
10 primary submission.

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

12 **MR HOSKINS:** In relation to the alternative point, of course for the purposes of
13 limitation, that can only be judged by the claim that was brought, and that was
14 a collective claim. It can't be judged on the basis of individual claims that
15 were not brought.

16 So that alternative submission should be given short shrift. Limitation doesn't work
17 like that. It doesn't work on: well, if someone else had brought a claim, the
18 limitation point wouldn't arise. You would have to look at claims that had been
19 brought, not claims that might have been brought.

20 If you needed it for your note, the interpretation of the claim form -- it sounds like it's
21 not in issue anymore -- is absolutely confirmed in terms by the draft CPO
22 notice that was provided with the original claim form, and that is in the same
23 bundle, A, tab 8. It begins at page 401. So this is the draft CPO notice. It's
24 put forward with the original claim form.

25 If you turn to page 404, you'll see section 6, the heading "What is the class?", and it's
26 the second paragraph.

1 **MR JUSTICE ROTH:** Just a moment.

2 **MR HOSKINS:** Too fast?

3 **MR JUSTICE ROTH:** Yes. We're in a different -- it's our bundle A2, I think.

4 **MR HOSKINS:** Ah, sorry. That's A, tab 8, page 404.

5 So this is looking forward, imagining certification has been granted and the proposed
6 notice to be published in this case:

7 "The Tribunal has decided that the class that can claim against Mastercard is all
8 individuals who are living in the UK at the domicile date ..."

9 And then goes on to the further criteria. But there is absolutely no doubt whatsoever
10 as to what the construction of the original claim form was: you had to be living
11 at the domicile date to be a member of the class.

12 **MR JUSTICE ROTH:** Yes.

13 **MR HOSKINS:** I'll come on to make submissions on domicile date. But it is very
14 important, I think, to note therefore that the position in this case doesn't really
15 have, as such, general ramifications for the collective proceedings regime. It
16 arises solely from the class representative's decision to exclude claims on
17 behalf of certain deceased persons from the original claim form. That's why
18 we're here today. It's because, when the original claim form was drafted,
19 a conscious decision was taken by the class representative to exclude claims
20 on behalf of all persons who died before the domicile date.

21 The reason given in the original claim form was for reasons of practicality and
22 simplicity, and it's only because the class representative has changed his
23 mind on that that we are here today. But it stems solely from the conscious
24 decision as to how to draft the original class definition and who to exclude.

25 Let me turn to domicile date. You have the two candidates: the class representative
26 proposes 6 September 2016, that is the date when the claim form was

1 originally filed; and Mastercard's submission is that the domicile date should
2 be 18 August 2021, ie the date of the Tribunal's remittal judgment in which it
3 decided to grant a CPO. We say you should prefer our submission for
4 a number of reasons.

5 First of all, under the legislation the need to opt out or opt into proceedings only
6 arises when certification has been granted, not from the claim as originally
7 filed. We say as a starting point the domicile date set by the Tribunal, which
8 under the legislation is only relevant to the post-certification opt-in/opt-out
9 procedure under rule 81, should be set by reference to the date of the
10 decision to certify, not the date of filing the claim. There is a natural link with
11 the decision to certify.

12 The second point is that under the legislation a person who is not domiciled in the
13 United Kingdom at the domicile date will not be a represented person unless
14 they expressly opt in to opt-out proceedings.

15 Now, adopting a domicile date --

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

17 **MR HOSKINS:** Sorry.

18 **MR JUSTICE ROTH:** A person who is not resident ...

19 **MR HOSKINS:** Is not domiciled in the United Kingdom at the domicile date.

20 **MR JUSTICE ROTH:** Yes, not resident on the domicile date.

21 **MR HOSKINS:** Sorry.

22 **MR JUSTICE ROTH:** Will not be a --

23 **MR HOSKINS:** Will not be a represented person unless they expressly opt in.

24 **MR JUSTICE ROTH:** Yes.

25 **MR HOSKINS:** So what that means for this case is that adopting a domicile date of
26 6 September 2016 would include as represented persons individuals who

1 were domiciled in the United Kingdom on 6 September 2016, but who have
2 subsequently ceased to be domiciled in the United Kingdom. That's the
3 practical effect of what has been proposed by the class representative.

4 In our submission, that would turn the legislation on its head because persons who
5 have not lived in the United Kingdom for several years will automatically be
6 represented parties in these proceedings and indeed will be bound by them
7 without expressly opting in. That's clearly not how the legislation is supposed
8 to work. If you are not domiciled in the UK, you should only be an automatic
9 participant and bound by the proceedings if you expressly opt in.

10 Sir, you asked Mr Harris questions about: well, what's the purpose of the legislation?

11 Well, in our submission, there's clearly a material risk that persons who have
12 been domiciled outside the United Kingdom for several years will not be
13 aware that certification has been granted. However good the notification
14 suggestions, clearly they're going to be focused on the United Kingdom and
15 not on every country other than the United Kingdom.

16 That's why our submission is consistent with the purpose of the legislation but the
17 class representative's suggestion is not. It's crucial always to remember that
18 a represented person will be an automatic participant and will be bound by the
19 proceedings. That's why it's so important that those who are domiciled
20 outside of the UK when certification is granted should only be bound if they
21 decide to opt in.

22 **MR JUSTICE ROTH:** There will always be people, of course, given that the
23 proceedings once they get going, are going to take several years, with any
24 large class, that people, even if they are living here at the time of the CPO,
25 they might then move abroad --

26 **MR HOSKINS:** Yes.

1 **MR JUSTICE ROTH:** -- and might not be aware of matters that arise, offers of
2 settlement or whatever, that aren't being communicated that might affect
3 them.

4 **MR HOSKINS:** Well, if you are domiciled in the UK at the time of certification, then
5 the way the legislation works is it presumes that you have notice of those
6 proceedings and that's why you are automatically a represented person. So
7 on this basis, a person who is domiciled in the UK at the certification date will
8 be aware of this; and then when they move abroad, if they are interested, they
9 can keep up with proceedings or not. But the point is that a person who is not
10 domiciled in the UK at the time of certification is less likely to be aware.

11 Sir, I certainly wouldn't suggest that the legislation is going to be a work of precision
12 in terms of achieving its legislative purpose in relation to every member of the
13 class, particularly a class of this size. But for the purposes of giving effect to
14 it, one has to try and work out: what did the legislature intend by virtue of
15 having these requirements distinguishing, if you like, between represented
16 persons and the members of the class? Because clearly there is a distinction
17 to be drawn there.

18 **MR JUSTICE ROTH:** Yes.

19 **MR HOSKINS:** The third point is that under the legislation a person who is
20 domiciled in the UK will automatically be a represented person unless they
21 expressly opt out. This is a point, sir, you put to Mr Harris this morning.

22 Again, on the class representative's position, adopting a domicile date of
23 September 2016 would exclude as represented persons those who made
24 relevant purchases between May 1992 and June 2008, but who were not
25 resident in the UK on 6 September 2016, even if they were resident in the
26 United Kingdom when the Tribunal decided to grant a CPO. On the class

1 representative's suggestion for domicile date, those persons would only be
2 represented persons who will be party to the proceedings if they opted in.

3 Again, we say that would turn the legislation on its head, because the need to opt out
4 of proceedings only arises after certification has been granted, not when the
5 claim is originally filed. Therefore, class members who are domiciled in the
6 United Kingdom when the Tribunal decides to grant certification should
7 automatically qualify as represented persons without having to opt in.

8 The fourth point is that our position, Mastercard's position, is consistent with the
9 approach adopted by the Tribunal in both Gutmann and Le Patourel. In both
10 those cases, the domicile date was set as the date of the judgment granting
11 the CPO. We say certainly the decision to do that was right, because of the
12 reasons I've already given you and ones I'll go on to give.

13 Effectively what you have in this case is a plea for some special treatment by the
14 class representative in this case.

15 **MR JUSTICE ROTH:** The point wasn't argued in those cases; it didn't matter.

16 **MR HOSKINS:** That's correct.

17 **MR JUSTICE ROTH:** Well, it might have mattered. But in Le Patourel, because
18 there was no limitation problem, as I understand it, the claim form could be
19 amended to make the amendment which you say could not be made here for
20 limitation reasons. So this therefore wasn't in issue.

21 In Gutmann, I think there was not that concern particularly about the problem of
22 those who died, because there was also quite a long delay between the claim
23 form being issued in Gutmann and the CPO hearing; also because of the
24 same reason as Merricks really, because of the Merricks appeals. So there
25 was a period of some two and a half years. So some, no doubt, significant
26 number or a not insignificant number of people will have died in those two and

1 a half years, and they've just therefore dropped out, and there wasn't the
2 argument to try and keep them in.

3 **MR HOSKINS:** Sir, I accept that the point wasn't argued in the way we're arguing it
4 now. Let me put the point, therefore, another way.

5 The position in Gutmann and Le Patourel will be the position in the normal
6 run-of-the-mill case. So what is being asked for in this case is an exception to
7 what will almost certainly be the general rule going forward for the Tribunal.

8 **MR JUSTICE ROTH:** Yes.

9 **MR HOSKINS:** The reason why that exception is asked for is because of the
10 pleading problem, quite simply, because originally the class representative in
11 this case chose to exclude persons who had died before the domicile date.
12 That's what's being asked for in this case. It's a special pleading. But what is
13 being asked for is a departure from the norm.

14 **MR JUSTICE ROTH:** Yes.

15 **MR HOSKINS:** The fifth point is that prior to December 2021, so prior to the end of
16 last year, the class representative in this case had consistently indicated that
17 the domicile date should be on or shortly after the Tribunal's decision to grant
18 a CPO. I've heard, sir, what you've said about how much weight should be
19 given to that. We've set it out in our skeleton argument.

20 I'd just like to show you one of those documents: it's the PCR's skeleton argument
21 for the original CPO hearing. That's bundle A, tab 25.

22 **MR JUSTICE ROTH:** That's our A3, I think. A3, yes.

23 **MR HOSKINS:** So A/25, page 824.

24 **MR JUSTICE ROTH:** Yes. Give us a moment.

25 **MR HOSKINS:** Of course. **(Pause)**

26 **MR JUSTICE ROTH:** You say it's tab 25?

1 **MR HOSKINS:** It's page 824 of the bundle, page 6 in the internal numbering of the
2 skeleton, paragraph 41.

3 I don't put this forward as some sort of estoppel; I just say what the class
4 representative is saying there is clearly right. What the class representative
5 said there is:

6 "The Applicant suggests that the date on which the CPO is granted should be used
7 as the domicile date, as this is point at which there is an actual claim that is
8 proceeding before the Tribunal in which the class members are included."

9 We say: absolutely right. It was right then and it's right now.

10 **MR JUSTICE ROTH:** So that really is -- you say they are agreeing with your first
11 point about the natural link?

12 **MR HOSKINS:** Correct. Correct.

13 **MR JUSTICE ROTH:** Yes.

14 **MR HOSKINS:** Sir, the next point is: well, what about this plea for special pleading?
15 Rather than adopting what would be the natural domicile date under the
16 legislation, given the purpose of the domicile date, it suggests: ignore those
17 purposes, actually do something that is detrimental to those purposes, in
18 order to facilitate the class representative's attempts to go back on the drafting
19 of the original claim form.

20 That's really what you're being asked to do. Because make no bones about it: if you
21 adopt a domicile date of September 2016, that will have the negative effects
22 I have identified in the submissions I made a few minutes ago and it will go
23 against the purpose of the legislation. So you're being asked to go behind the
24 purposes of the legislation because the class representative has had
25 a change of heart in relation to the definition of the class that he originally put
26 forward.

1 Our submission is clearly you should not accede to that plea. One should not do
2 violence to the purpose of the legislation simply to facilitate that change of
3 heart. To put it another way, it would not be appropriate to adopt a plainly
4 inappropriate domicile date in order to sidestep the clear wording of the
5 original claim form and the consequences that has for the class
6 representative.

7 I think I'm up to my sixth point. Can we go to the draft amended claim form, which is
8 at D1, tab 5, page 58.

9 **MR JUSTICE ROTH:** The original claim form?

10 **MR HOSKINS:** I'm going now to the amended claim form.

11 **MR JUSTICE ROTH:** Right, yes.

12 **MR HOSKINS:** D1, tab 5, page 58. You will see the proposed amendments in
13 paragraph 22.

14 **MR JUSTICE ROTH:** Just a moment. Pause a moment. Yes, thank you.

15 **MR HOSKINS:** It's the final sentence. You see the application was an application to
16 add a sentence, which says:

17 "On the basis that the domicile date is 6 September 2016, that domicile location is
18 determined by reference to the consumers, not (in the case of those who
19 subsequently die) by reference to the domicile of the representatives of their
20 estates."

21 That's how they seek to, if you like, explain and justify 6 September 2016, because
22 it's said that by referring back to the domicile of consumers as at that date, as
23 though that will somehow simplify matters. But, with respect, that cannot be
24 right, because the sole legal purpose of the domicile date is to allow persons
25 to decide whether or not to opt out or to opt in to collective proceedings once
26 those proceedings have been certified.

1 In respect of persons who are now dead, the decision to opt out or opt in is
2 a decision that can only be taken by their personal representatives. Dead
3 people cannot make decisions. It's therefore the domicile of the personal
4 representative, not of the deceased person, that is relevant for the purposes
5 of rule 81 and section 47B(11).

6 The seventh point is that the justification put forward by the class representative to
7 justify his suggested domicile date should be given short shrift not just for the
8 reason I've just described, but it was suggested that --

9 **MR JUSTICE ROTH:** I'm just trying to understand that point.

10 **MR HOSKINS:** Certainly.

11 **MR JUSTICE ROTH:** Forget about the last sentence as such; suppose that's not
12 there. There will always be people, with a large class, who die between the
13 domicile date and the deadline for opting in or opting out, even if it's only
14 12 weeks. If we say the domicile date is today and you have 12 weeks for
15 opting in or opting out, there will be some people who die in those 12 weeks.
16 If we took the date you're suggesting of August 2021 and it's 12 weeks from
17 today, or when we give judgment, to exercise the opt-in/opt-out decision, even
18 more people will have died, because you're looking at six months plus.

19 So you'll be determining who is automatically included in the class by reference to
20 the domicile date and who is not included again by reference to the domicile
21 date, and then there will be some of those who die. You're doing it by
22 reference to people alive on the domicile date, but then some of them will die,
23 and the decision of whether to opt in will have to be taken then by their
24 personal representatives.

25 **MR HOSKINS:** Yes.

26 **MR JUSTICE ROTH:** So there will have to be, sometimes, that disconnect.

1 **MR HOSKINS:** There will, and it's a question of whether, under the legislation -- as
2 I say, the legislation is not going to work perfectly, because of the need to
3 adopt a CPO and then to allow a notice period for people to opt in and opt out.
4 Absolutely, it would probably arise -- you can't escape it in any case.

5 **MR JUSTICE ROTH:** That's what I'm saying. So it's a matter of degree.

6 **MR HOSKINS:** That's right.

7 **MR JUSTICE ROTH:** But the problem is just there --

8 **MR HOSKINS:** Yes.

9 **MR JUSTICE ROTH:** -- and it will always be. So if we take your date, and someone
10 who was alive in August but has since died, then, going back to that rule that
11 you took us to at the outset, there will be a difference between the person who
12 is determining whether it's a class member and determining the opt-in/opt-out.

13 **MR HOSKINS:** Under the legislation, there will be. But the question is then, as
14 I said, given the purpose of the legislation, that problem will be minimised and
15 limited if one adopts a domicile date at the date of certification. What you're
16 being asked here is a special pleading, to grant a domicile date that is
17 six years before certification, with the extreme exacerbation of the problems
18 that I've identified and the undermining of the legislation.

19 **MR JUSTICE ROTH:** Yes.

20 **MR HOSKINS:** I'm not saying that you are legally precluded from adopting
21 September 2016. Mr Harris occasionally suggests it as if it was some sort of
22 binary legal choice. Clearly the Tribunal has a discretion under the legislation
23 as to which period to adopt.

24 Our submission is that September 2016 is not appropriate because of the violence it
25 will do to the purposes that underpin this legislation. You have a discretion,
26 but you should exercise that discretion insofar as possible in accordance with

1 the objectives of the legislation and insofar as possible to minimise the
2 violence that is done to those objectives; even if there will be some examples
3 where the sort of problems you put to me will necessarily arise, because that
4 is inherent in the legislation because there has to be a period between
5 certification and people being able to opt in or opt out.

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

7 **MR HOSKINS:** I was just making some final points on the justification put forward
8 by the class representative to justify his proposed date. It was suggested it
9 was simpler to look at the domicile of all represented persons as at
10 September 2016.

11 But, with respect, that's not right, because if you're looking now -- so we're here in
12 2022 -- is it easier to look at the domicile of all represented persons, ie those
13 who are alive and their personal representatives who are alive, as at
14 effectively today's date -- well, that's easy -- or, adopting the class
15 representative's approach, do you have to look at where people were
16 domiciled six years ago? Particularly in relation to people who are now dead.

17 Because on their approach, whilst it's a common date -- but it is for us as well. It's
18 a question of whether you have a common date six years ago or a common
19 date today for looking at where people are domiciled. And in relation to
20 people who have died since September 2016, there clearly is a chain of
21 enquiry to confirm where they were domiciled in 2016; whereas for people
22 now, it's pretty easy to show where you're domiciled. You can produce
23 a bank statement if anyone has any doubt.

24 **MR JUSTICE ROTH:** I'm not sure a bank statement would show where a person is
25 domiciled.

26 **MR HOSKINS:** You understand -- I am following(?) my point and falling into the

1 hole.

2 **MR JUSTICE ROTH:** Yes.

3 **MR HOSKINS:** But you have the point. Clearly it's easier to check domicile as at
4 today's date than six years ago, particularly in relation to people who have
5 died.

6 I think the final point I need to put is: Mr Harris put forward today an alternative date.

7 If you don't go for September 2016, it was suggested you should adopt the
8 date of the original Tribunal hearing, because if there hadn't been the original
9 decision, et cetera, then certification would have been granted then.

10 But it's exactly the same submission I make to you: that simply ignores the purpose
11 of the domicile date under the legislation. To adopt the fiction he asks of you
12 does the same violence to the objectives of the legislation I've identified for
13 the September 2016 date.

14 Sir, I apologise, because I know you said at the outset: let's deal with domicile date.

15 But obviously Mr Harris -- I understand why -- had to intertwine the two, and
16 I hope by intertwining the two and then trying to unpick them, that assists on
17 both domicile date and indeed in relation to the amendment.

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

19 Mr Harris.

20 **Submissions in reply by MR HARRIS**

21 **MR HARRIS:** Sir, I can deal with these before the short adjournment by way of reply
22 submissions -- unless you have any further points for me, which I will happily
23 address -- in the order in which they arose.

24 We do rely, for the reasons that you gave, sir, to Mr Hoskins, in debate with
25 Mr Hoskins, upon the terms of paragraph 25 of the claim form. That didn't
26 exclude people after 2016; it therefore supports the position that we adopt

1 now that such people should not be excluded.

2 Then there's a submission that I make now by reference to -- and it recurs repeatedly
3 throughout my learned friend's way of putting his case. It is that, with the
4 greatest of respect, most of what he says begs the very question which is in
5 issue. He suggests, for instance, that it undermines the purposes of the
6 legislation. But that begs the issue of what should be the correct domicile
7 date, bearing in mind that you have a complete discretion, and we say you
8 should exercise it in order to do justice in this case.

9 So a lot of the arguments beg the question and/or are bootstraps argument. If you
10 assume what he asserts is the purpose of the legislation in how you set the
11 domicile date, then of course it makes sense to submit that it shouldn't be
12 done. But that's assuming the answer to the question. And we don't accept
13 that, for the reasons that I gave that I don't need to repeat.

14 It's an administrative function here to do with territoriality and there's absolutely
15 nothing in the legislation that suggests that you would have to do it at the
16 CPO date or after. To the contrary, you have a complete discretion. This
17 point that it begs the question applies to the vast bulk of my learned friend's
18 submission. He assumes what he wants to prove, so that he can then say:
19 oh, well, it doesn't meet those purposes.

20 On a slightly more detailed point of reply, you put to him -- we got at the end to,
21 essentially, one of the key points. You put to Mr Hoskins: but there will
22 always be people who will die between the domicile date and the end of the
23 period in which they have to opt in or opt out. And then you said, and
24 I respectfully adopt: it is a question of degree.

25 Well, that is precisely my point. It is a question of degree that you should therefore
26 determine by reference to the justice of the facts of the particular case before

1 you. There's no hard-edged line. It thoroughly undermines Mr Hoskins'
2 submissions about what he says is the purposes of the legislation when you
3 accept that it is a question of degree that's inevitably going to happen anyway.
4 If it's inevitably going to happen anyway, it can't possibly be that there's
5 a hard-edged purpose underpinning the legislation to preclude that
6 happening.

7 Once you recognise that it's a question of degree -- which it is, because I was
8 making that submission when I made the application: it's inevitably going to
9 happen anyway -- then you have to ask yourself the question: well, what
10 should I do on the justice of this case? I can put it anywhere I like. It's
11 a question of degree. It can be forward, it can be backward. What should
12 I do in this case?

13 What we haven't heard from Mr Hoskins is any good reason, other than the
14 bootstraps or the begging the question submissions, as to why I was wrong
15 when I made submissions about the justice of the case.

16 We haven't heard, for instance, any argument to the effect that there wasn't a proper
17 cause of action in the hands of these people as at September 2016, and we
18 haven't heard anything about that because he hasn't got anything on it,
19 because there were perfectly good causes of action.

20 We haven't heard anything about how somehow it would be unjust for his client,
21 a proven infringer in respect of those people who were alive on that claim
22 date, not to be allowed to pursue their claims. We haven't heard anything
23 about that because there's nothing to say in his favour on that.

24 We haven't heard anything about why it would somehow be unjust for Mastercard, by
25 dint of the drafting of the claim form, to be let off the hook for what is probably
26 hundreds of millions of further pounds, having already, by dint of the way the

1 claim form was drafted, escaped the liability for the wrongdoing that they
2 caused to people who died before the claim form. And why haven't we heard
3 anything? Because he doesn't have anything to say upon that.

4 Then we come back to the claim form itself. Well, you've heard me on that. I mean,
5 again, Mr Hoskins' submissions, with great respect to him, again all
6 completely beg the question. It all hinges on the fact that in the claim form it
7 uses "as at the domicile date", both at 22 and 23(d)(iii). That doesn't take one
8 anywhere because if we're right on domicile date, there's absolutely no
9 problem on the drafting; and if he's right on domicile date, well, there is
10 a problem on the drafting. So it simply doesn't take one anywhere at all.

11 I should just draw your attention to two parts -- you raised with Mr Hoskins -- or the
12 issue of notification he raised. But the answer to that is -- he submitted at
13 12.24 that if it works in the way that I propose, then these people overseas
14 are "less likely to know". Well, leaving aside that there's no evidential basis
15 for that submission, the answer in any event is notification, that I submitted in
16 opening. And no issue has ever been taken by Mastercard with the manner in
17 which we propose to notify everyone. There's no issue about any of that.

18 On top of that, in paragraph 92 -- you can turn it up if you'd like to, but I can read it
19 out. It's the Supreme Court judgment --

20 **MR JUSTICE ROTH:** Well, it wouldn't really be for them to get involved in how you
21 notify.

22 **MR HARRIS:** No.

23 **MR JUSTICE ROTH:** It's a matter for us.

24 His point was that people -- we have no idea how many there are -- two sides of it.

25 One was that people abroad -- then it goes back to the extraterritorial point --
26 probably a not insignificant number, particularly in view of the fact that this

1 period spans Brexit and a lot of people leaving the UK to go back to their own
2 country, now will be automatically included without having to opt in, although
3 they live abroad, are now abroad, and that that is sort of contrary to the
4 purpose of avoiding an extraterritorial reach, which was the purpose you
5 outlined.

6 I think that was one of his two points. The other one was about the people who are
7 here having to opt in even if they live here, if they weren't here in 2016. Well,
8 the people who are here having to opt in, you will say: well, they should hear
9 about it because it's going to be publicised in the UK.

10 **MR HARRIS:** Yes.

11 **MR JUSTICE ROTH:** But the people who are now abroad, and have been for
12 several years, who are inherently less likely to hear about it, in any event are
13 just being automatically swept in.

14 **MR HARRIS:** I understand the point.

15 **MR JUSTICE ROTH:** But that is somewhat contrary to the thrust of the approach of
16 saying: people living abroad should not be automatically included, generally.

17 **MR HARRIS:** But again, the answer to the question is all: it's a question of degree
18 on the facts of the particular case.

19 As you've rightly pointed out, even on Mr Hoskins' view of the world, and that of his
20 client, he will take August last year as the domicile date. And here we are in
21 January, so we're already five months later. And if we have to take time for
22 the judgment and then there's -- for lack of a better phrase -- a noticing period
23 of, let's say, three months, before you know it, you're up to nine months or so.

24 Somebody could have left the UK on 19 August 2021 and gone to Timbuktu, and yet
25 that person will be automatically in on Mr Hoskins' approach, despite the fact
26 that that person won't know about it, even with the most reasonable -- even,

1 indeed, with unreasonably high levels of expenditure on notification. But that
2 is simply a function of the legislation.

3 In paragraph 92 of the Supreme Court judgment -- which, if you wanted to turn it up,
4 it's in tab 9 of authorities bundle for today -- in the leading judgment of the
5 Supreme Court, it says as follows:

6 "This means that a person may become a claimant in collective proceedings without
7 taking any affirmative step and, potentially, without even knowing of the
8 existence of the proceedings and the fact that he or she is a claimant in
9 them."

10 This is just a function of the legislation. And I reiterate that whilst I understand these
11 issues about extraterritoriality, in this case one has to weigh that against the
12 justice factors that I have addressed and that haven't been counted at all.
13 And that's where you should come down in the exercise of your discretion.

14 I also, of course -- it won't surprise you -- pray in aid those paragraphs right at the
15 beginning of the Supreme Court judgment in which it states that the regime as
16 a whole is intended to enable whole classes of consumers to vindicate their
17 rights to compensation -- and I paraphrase -- that they wouldn't otherwise be
18 able to do. And further:

19 "... to act as a disincentive to unlawful anti-competitive behaviour of the type likely to
20 harm consumers generally."

21 Well, Mr Hoskins doesn't have any answers to any of that. And yet he would obtain,
22 essentially, a massive additional windfall benefit because he is inviting you to
23 say that the domicile date on the drafting of my claim form should be at
24 a much later date than the one for which we now contend.

25 Interestingly, in that regard he said, and I noted down and I'm perfectly happy to
26 adopt -- this was in response to his submissions on paragraph 25 of the claim

1 form -- "Well, that was their intention at the time. Their intention at the time
2 was to have a domicile date at 2016". Well, probably it would have been in
3 2017, but in any event within a few months of 2016. Well, again, that's a point
4 in my favour. That is how it was always intended to be. So it's little surprise
5 that we come here today and say that's what it should be. That's what it was
6 always intended to be.

7 Then just picking up a few miscellaneous points. I don't want to repeat myself, so ...

8 A couple of times my learned friend said: "oh, well, it turns the legislation on its
9 head", or: "in my submission, these people should automatically qualify and
10 these people shouldn't automatically qualify". But again, these are the very
11 submissions that beg the question. It's only possible to use the normative
12 phrase "should" if he's right on the purpose of the legislation to begin with.

13 But we say he's not.

14 **MR JUSTICE ROTH:** Yes.

15 **MR HARRIS:** And in any event, in the exercise of your discretion, you shouldn't go
16 with that.

17 He said that my approach wasn't consistent with Gutmann and Le Patourel. The
18 only additional point I make in reply on that is: you've heard why I distinguish
19 them, but our approach is consistent with the remittal judgment in this case of
20 August 2021, because that remittal judgment expressly did not deal with the
21 question of whether people who were still alive as at the date of the claim
22 form should be capable of being able to pursue their case through personal
23 representatives and it did not deal with the domicile date. We say we are
24 trying to facilitate the very thing that was left open. I appreciate it wasn't
25 decided, but it was left open in that.

26 So when Mr Hoskins says, as he said at 12.39, our proposal gives rise to "negative

1 effect" or gives rise to something that is "contrary to the purpose of the
2 legislation", we just don't accept that. It's not a negative effect; indeed, it's
3 a positive effect. It's not contrary to the purposes of the legislation; to the
4 contrary, it gives effect to the purposes of the legislation, as expressed in
5 paragraphs 1 and 2 of the Supreme Court in Merricks.

6 Then he was driven to submit -- and I noted this with some care -- in response to
7 questions from you, sir, that, "The legislation period is not going to work
8 perfectly". Well, I agree. That's another way of putting the point that it's
9 a question of degree. What he's now saying to you is: well, I know it doesn't
10 work perfectly and it's a question of degree, but it has to be right that you can't
11 do it in this case, have the domicile date as an earlier date. Well, why? It's
12 not right.

13 Then he referred -- this was his, as I noted it down, the sort of point number 7, just at
14 12.35, about: we say that the amendments is for the purposes of
15 simplification. And then he said that the decision as to opt in and opt out can
16 only be made by the personal representative for somebody who is now dead,
17 because a person who is dead can't make a decision.

18 I accept that the decision as to opt-in/opt-out, if somebody has now died, has to be
19 made by the personal representative, but that is a completely separate
20 question from what the domicile date should be for the purposes of the
21 territoriality considerations. The two are just simply not related. And the proof
22 of that is in the pudding. Because let's say we adopt Mr Hoskins' date of
23 18 August 2021 and the person dies on 19 August 2021, well it's completely
24 common ground that the domicile for territoriality purposes of that person
25 would be determined on 18 August, but it turns out the very next day that
26 person dies, and yet the personal representative is the one who actually has

1 to make decisions going forward in the case. But so what? That's just
2 a function of the fact that the poor chap has died.

3 Then finally, my learned friend attacked what we put forward as being the
4 justifications, and he says: we were saying, as you know, that it would be
5 simpler and less complex; and he says no. Well, I mean, that's not a reason
6 for denying the approach that we put forward. He asserts: oh well, it would be
7 simpler to deal with the domicile of somebody in 2022 if they are either still
8 alive or if their personal representative is still alive. But there's no foundation
9 for that. No particular difficulty in determining where somebody would have
10 been resident in 2016, bearing in mind that this is a case in which anybody
11 who is a class member will have to do something in due course, no doubt, like
12 self-certify that they were in fact in the original class to begin with, and that
13 would be back in 1992 -- 1992 or 1996. But in any event a long time ago.

14 **MR JUSTICE ROTH:** No, you are right, 1992.

15 **MR HARRIS:** 1992. So this is a case in which in order to in due course claim, say,
16 distribution, these people are going, whether themselves or through their
17 class representatives, to have to somehow acknowledge or assert that they in
18 fact purchased goods beginning possibly after 22 May 1992. Well, there's no
19 particular difficulty with that. We simply don't see the difficulty in somebody
20 saying: well actually, here's a piece of paper; or, here's a self-certification or
21 an attestation that the person was resident in the UK on 6 September 2016.

22 And in fact what Mr Hoskins didn't deal with was the point that I actually put forward
23 as an example of a difficulty which was where you have a corporate personal
24 representative who is based in, for the sake of argument, the Caymans, and
25 yet has offices here and actually conducts the business here, but might be
26 said for corporate law purposes, possibly under the law of the Cayman

1 Islands, to be domiciled over there. All of those problems are dealt with by my
2 proposal but he didn't deal with them.

3 Unless I can assist further those are -- I take it that you don't need any more
4 submissions from me about the proposed amendments in red on this topic.

5 **MR JUSTICE ROTH:** It depends what you mean. What Mr Hoskins submitted is
6 that if we are with Mastercard on the domicile date, then the amendment that
7 you propose to bring in personal representatives cannot be made for anyone
8 who died before 2021 because of the limitation.

9 **MR HARRIS:** Yes.

10 **MR JUSTICE ROTH:** And he made his submission on that.

11 **MR HARRIS:** That's right.

12 **MR JUSTICE ROTH:** If you accept that then of course there's nothing more for you
13 to say on it. Equally, he accepts that if you are right, or succeed on the
14 domicile date of 2016, then that amendment can be made.

15 **MR HARRIS:** That's right, and if you were --

16 **MR JUSTICE ROTH:** And if you agree with that then there's nothing more to say but
17 if you want to say it could be made even if the domicile date is 2021, then we
18 haven't heard you on that.

19 **MR HARRIS:** Well, I have only two short things to say upon that. You have my
20 subsidiary submission that in any event as a matter of principle the people
21 who had a good cause of action -- sir, you will either agree with that or not,
22 but it doesn't make a difference to the drafting. But if on the primary point, if
23 you are against me and the date is not 6 September 2016 but it's
24 18 August 2021, then the only change that would need to be made to the
25 red -- well, throughout, but in particular in italics at the end of the class
26 definition in paragraph 22, it would have to read "and who was alive on

1 18 August 2021", as opposed to "and who was alive on 6 September 2016."

2 **MR JUSTICE ROTH:** Yes, and I think Mr Hoskins has not contested that. And you
3 are agreed on that, so that's the limitation point.

4 **MR HARRIS:** Yes.

5 **MR JUSTICE ROTH:** Well no, I think that's then covered it, and very nicely at just
6 a few minutes past 1.00. So we will return at 2.05. The significant other
7 matter is costs, I think, and there are a few bits and pieces.

8 **MR HARRIS:** Yes. Thank you.

9 **MR JUSTICE ROTH:** Thank you very much. 2.05.

10 **(1.04 pm)**

11 **(The short adjournment)**

12 **(2.10 pm)**

13 **Questions from THE TRIBUNAL**

14 **MR JUSTICE ROTH:** We have been discussing this, looking at some of the points
15 raised over the adjournment, and there is one matter we'd like to raise and
16 have clarified please.

17 If you could go to the proposed amendment in D/58. As we understand it, if we say
18 the domicile date is 6 September 2016, then the amendment to bring in
19 "together with the personal/authorised representative of the estate of
20 an individual who meets that who was alive on 6 September 2016 but
21 subsequently died" is not opposed. We will come back to the last sentence.

22 Equally, if we say, contrary to Mr Merricks' submission, that the domicile date is
23 18 August 2021, then Mastercard would not oppose a slightly logically
24 changed version of that so it reads "together with the personal/authorised
25 representative of the estate of an individual who was alive on 18 August 2021
26 but subsequently died". That was our understanding. I take it from the nods

1 that that's correct.

2 The point that we're trying to understand is this: that means that for somebody who
3 dies after whatever date it is, the personal representative of their estate
4 becomes a class member, and the significance of there being a class member
5 is what we wanted to understand. Because the question for the purposes of
6 opting in and opting out under section 47B(11) is that opt-out proceedings are
7 proceedings brought by each class member except a class member who's not
8 domiciled in the UK at the relevant time and does not, in a manner specified,
9 opt in or opt out.

10 But is the domicile of the personal representative then of any relevance, given that it
11 is he or she that is the class member at the time of the decision to opt in or
12 out? You understand our question.

13 **MR HARRIS:** Our response to that is: no, it has no relevance. The personal
14 representative does become the class member, but that's because he steps
15 into the shoes of class member that existed as at the date of the claim form by
16 dint of the probate laws. But critically, the domicile date has already been
17 determined, if you are with me on the date.

18 **MR JUSTICE ROTH:** Yes. So to apply section 47B(11)(b)(i) "any class member
19 who is not domiciled in the United Kingdom at a time specified", for that
20 purpose, the class member that one looks at is the deceased who was alive
21 on the domiciled date?

22 **MR HARRIS:** Yes.

23 **MR JUSTICE ROTH:** But for the purpose of subsection 47B(11)(b)(ii), any class
24 member who doesn't opt in or opt out, as it were, the relevant class member is
25 then the personal representative?

26 **MR HARRIS:** Yes, and that's because the phrase between the commas in (b)(ii),

1 "does not, in a manner and by a time specified", as you rightly pointed out
2 when we were going through the legislation, that is a subsequent time: it's the
3 opt-in/opt-out time that post-dates the domicile date. And therefore, on this
4 hypothesis, if that person happens to have died -- which they would have
5 done if you go with my date -- then the class member, in that time specified,
6 will have become the personal representative.

7 **MR JUSTICE ROTH:** Yes. I think this applies, subject obviously to the point about
8 degree, to whichever date we choose, to any person who dies between the
9 domicile date and the end of the opt-in/opt-out period.

10 **MR HARRIS:** It does, and that is precisely why there's no logical or coherence
11 problem with what I submit.

12 **MR JUSTICE ROTH:** Well, that's a separate thing.

13 **MR HARRIS:** Yes.

14 **MR JUSTICE ROTH:** We just wanted to understand the way it was going to work
15 and how it fits with the legislation. Yes, that was the way we thought it was
16 intended to work.

17 That's why you say, in the final sentence, on the basis that -- well, it wouldn't
18 matter -- on the basis that the domicile -- you could substitute for that
19 18 August 2021 -- the domicile location is:

20 "... determined by reference to the consumer, not in the case of those who
21 subsequently die by reference to the domicile of the representative of their
22 estate."

23 It would be the same whichever date you used.

24 **MR HARRIS:** It would be precisely the same whichever date you use.

25 **MR JUSTICE ROTH:** Yes.

26 Mr Hoskins, is there anything you want to add on that?

1 **MR HOSKINS:** I'm not sure I agree. But let me tell you what I think the position is.
2 It's not always easy to tiptoe through.

3 We know that any claim on behalf of an individual who is dead is a nullity. So the
4 class membership, in order to include deceased persons, has to include both
5 individuals who are alive and their personal representatives in case they are
6 dead or die by the relevant date. So when it says "any class member", that
7 must include living individuals but also the personal representatives of those
8 who are dead.

9 **MR JUSTICE ROTH:** I mean, just to interrupt you, it's not a nullity if they are alive at
10 the time the claim is brought.

11 **MR HOSKINS:** No, but it becomes a nullity as soon as they die. So if you bring
12 a claim form on behalf -- Mr Harris is shaking his head, but he's wrong. If you
13 bring a claim on behalf of a live person -- forget a collective action. If you
14 bring a claim in the name of a live person, that person dies, from that date the
15 claim cannot continue. It falls away unless and until the personal
16 representative steps in, and then the claim is brought in the name of the
17 personal representative on behalf of the dead person, but it is not brought by
18 that dead person. So "any class member" must be living people and personal
19 representatives of dead people.

20 **MR JUSTICE ROTH:** Yes.

21 **MR HOSKINS:** So any personal representative who is not domiciled in the
22 United Kingdom at the domicile date and does not opt in is not a represented
23 person. In our submission, there's no reason to give "class member" one
24 meaning in (i) and another meaning in (ii), because once one understands the
25 class member is an individual whilst alive, personal representative while dead,
26 then you don't need to do any violence to the wording.

1 **MR JUSTICE ROTH:** But doesn't that also mean that if they're alive on the date the
2 claim is brought, and that is said to be then -- well, let's take your date, for
3 simplicity, to avoid the contentious aspect of it. If one says 18 August 2021,
4 then that's the domicile date. So if they're alive on that date, they're clearly
5 the class member.

6 **MR HOSKINS:** Yes.

7 **MR JUSTICE ROTH:** Suppose they die three weeks later: then they can't exercise
8 the opt-in/opt-out option, obviously.

9 **MR HOSKINS:** Yes.

10 **MR JUSTICE ROTH:** Then doesn't their personal representative -- the action would
11 come to an end, but doesn't this amendment mean that the personal
12 representative automatically takes over as the class member?

13 **MR HOSKINS:** If the drafting of the claim form allows it in, yes. And I think for that
14 inter-period between certification, domicile date being specified, in the
15 particular circumstances you describe, I think that would make sense with the
16 legislation.

17 **MR JUSTICE ROTH:** So if here it said 18 August 2021, that's covered by the first
18 sentence; and then the last sentence, on the basis the domicile date is
19 18 August 2021, the domicile is determined by reference to consumers, not by
20 reference to the domicile of the representatives of their estates. That would
21 be right?

22 **MR HOSKINS:** Yes, in the limited circumstance you describe: person alive when
23 claim form issued, covered by the definition of a class, but who dies between
24 the domicile date and the expiry of the notice period.

25 **MR JUSTICE ROTH:** Yes. So that shouldn't be any different if the date is
26 6 September 2016 or 18 August 2021. One thing you couldn't do, you

1 couldn't have a date earlier than the issue of the claim form. That wouldn't
2 work. But --

3 **MR HOSKINS:** In my submission, if the date is 18 August 2021, then I'm with you
4 on the final sentence. If the date were to be as the --

5 **MR JUSTICE ROTH:** September 2016.

6 **MR HOSKINS:** -- September 2016, then insofar as -- I'm just trying to think of the
7 situation. If someone is alive on 6 September 2016 but dies on 6
8 October 2016, but the domicile date is specified as 6 September 2016 -- yes,
9 I think that makes sense to me. I'm sorry, I'm being slow.

10 **MR JUSTICE ROTH:** So it would work either way, yes.

11 **MR HOSKINS:** It works either way on that basis, yes.

12 **MR JUSTICE ROTH:** Yes, thank you. That's what we thought, but we wanted to
13 make sure we were correct. So we're not concerned with the domicile of the
14 personal representatives. Yes, good.

15 **MR HOSKINS:** Well, save insofar, sir, where a person had died before the relevant
16 date, obviously it's the personal representative's domicile. So the personal
17 representative's domicile can be relevant.

18 **MR JUSTICE ROTH:** But only if they've died before the domicile date.

19 **MR HOSKINS:** Yes, that's right. But then it would be the personal representative's
20 domicile that would be relevant.

21 **MR JUSTICE ROTH:** Yes.

22 Right. Sticking with the amendment to the claim form, I think the two other lesser
23 points -- I say "lesser" because I think there is less to say about them, not that
24 they're unimportant -- the first was the interest claim. I think that's -- if we
25 go -- is it paragraph 112(g)? One really has to start --

26 **MR HARRIS:** Yes.

1 **MR JUSTICE ROTH:** -- at paragraph 112 of the particulars of loss and damage, and
2 there's a case that is pleaded of how interest should be determined. But this
3 is a claim for simple interest, as I understand it, and the actual interest
4 claimed is at paragraph 116.

5 **MR HARRIS:** Sir, that's right.

6 **MR JUSTICE ROTH:** Then on the basis that is urged at 112(g), that has been
7 calculated, and one finds the resulting mathematical figure in
8 paragraph 120(b) on page D/99.

9

10 **Submissions by MR HARRIS**

11 **MR HARRIS:** That's right.

12 So in short submissions, you will see that it is completely clear now that the claim for
13 compound interest has been deleted away, in accordance with the remittal
14 judgment, and there remains only a claim for simple interest. You can pick
15 that up from the words at the beginning of 116 and also from the prayer at
16 120(b). "Compound" is deleted altogether; it's only simple.

17 **MR JUSTICE ROTH:** Yes.

18 **MR HARRIS:** Then what has happened is that, based upon further reflection and
19 research, when we were told, "Oh, you can only have simple interest", further
20 consideration was given to: what would that be, or what might that be, for
21 argument at trial in a case such as the present? And what we have pleaded
22 by way of amendment is that at trial, therefore, on the basis of -- you see five
23 lines down in 112(g), what will therefore be the subject of evidence and legal
24 submission, we say, at trial will be the amount of the interest rate.

25 **MR JUSTICE ROTH:** Yes.

26 **MR HARRIS:** We have some support for the proposition that in a case like this, you

1 have to have regard to the objective categorisation of the class as a whole,
2 taking account of the fact in particular that class members are consumers.
3 That is derived from the case -- just so that you know what the foundation for
4 it is -- that you now find at tab 10 of the authorities bundle. I'm sorry that one
5 came late, but that was by oversight. But you should have it. A very, very
6 short case. Mr Justice Owen in the case of *Attrill & Others v Kleinwort*
7 *Benson*.

8 Again, this was a dispute between employers and employees, so big guy and little
9 guy. I'm not saying this is 100 per cent on all fours, but this is the foundation
10 for why we want to argue this at trial. And the key paragraph is paragraph 3:

11 "The claimants ..."

12 So they were the employees:

13 "... contend for an interest rate of 5 ..."

14 This is a simple interest claim:

15 "... contend for an interest rate of 5 per cent of Barclays' base rate from the time [X to
16 Y]. It is submitted on their behalf that such a rate reflects the cost of
17 borrowing for a private individual over the relevant period, arguing that whilst
18 the base rate fell significantly ..."

19 Et cetera. Then various evidence was put forward by Mr Tozzi. Then there was
20 a counterargument by Mr Linden QC in paragraph 4 that that wouldn't be
21 a fair rate. This essentially was the judgment on the trial of that issue, and the
22 learned judge said at paragraph 5:

23 "I am satisfied that the appropriate rate at which to compensate the claimants for
24 being kept out of their money is the cost of unsecured borrowing by
25 individuals. There will therefore be an order for interest on damages at the
26 rate of 5 per cent above Barclays Bank base rate."

1 And then further support in some of the other cases about objective categorisation of
2 the class looked at as a whole, as opposed to the situation in a compound
3 interest claim, where the court has to have particular regard to the evidence
4 and the specific circumstances of the individuals who are advancing interest
5 as an individual head of damage.

6 But for present purposes, the only question for the Tribunal on an application to
7 amend is whether we should somehow, for reasons that are not clear to me,
8 be precluded from even arguing at trial on the basis of further evidence and
9 legal submission --

10 **MR JUSTICE ROTH:** Yes. No, we have the point. Sorry to interrupt you, but just to
11 be quick.

12 Are you opposing this amendment, Mr Hoskins, and on what basis? As we
13 understand it, it's a simple interest claim. The rate of interest under the
14 statute is a matter for the Tribunal. And they have pleaded, they say, this
15 should be the rate, for reasons you've heard. You will no doubt argue it
16 should not be the rate, it should be a lower rate. But why should they not be
17 allowed to advance the claim?

18

19 **Submissions by MR HOSKINS**

20 **MR HOSKINS:** The reason is because of rule 75(3)(i)(1). If you go to the
21 Purple Book at 3354, rule 75(3):

22 "The collective proceedings claim form shall contain ..."

23 And then (i):

24 "... the relief sought in the proceedings, including: (1) where applicable, an estimate
25 of the amount claimed in damages, supported by an explanation of how that
26 amount has been calculated ..."

1 **MR JUSTICE ROTH:** Yes.

2 **MR HOSKINS:** So it's not simply a case here that they want to plead something,
3 they want to argue it at trial, we're not trying to strike out that substantive point
4 at this stage. But what we do say is they do have to comply with
5 rule 75(3)(i)(1).

6 Now, the relevant part we're looking at, which is 112(g) of the amended claim form,
7 forms part of the bit in the claim form -- you will see the heading on page 94 --
8 "Particulars of loss and damage". So this is part of the estimate of the amount
9 claimed in damages and the explanation of how that amount has been
10 calculated.

11 We say that given that there is a legal requirement for the claim form to contain
12 an estimate of damages, the Tribunal can and should refuse permission to
13 make amendments which are unreasonable or unjustifiable. So there's
14 an interest at the present stage to make sure the claim form is reasonable and
15 justifiable.

16 And this matters. The reason why we're are concerned about this, sir, is that, as we
17 explained in paragraph 30 of our skeleton argument, the class
18 representative's lawyers have given a number of statements and interviews to
19 the press in which they emphasise the total value of the claim. Given the size
20 of the sums involved, in the billions, you'll understand that such statements, if
21 inflated, have deleterious implications for Mastercard.

22 That's why, going beyond simply the legal requirement in rule 75(3)(i)(1), there is
23 also a practical reason why we are concerned about this.

24 **MR JUSTICE ROTH:** When you say unreasonable or unjustifiable, are you saying
25 this is a different test from the strikeout test? Because normally
26 an amendment is allowed unless it could be the subject of a strikeout or of

1 a summary judgment.

2 **MR HOSKINS:** Sir, you have a discretion to permit any amendment. A party can
3 oppose an amendment on the basis that it should be struck out. But here
4 we're slightly in an odd situation because this is an odd requirement in
5 a pleading one doesn't find, for example, in the High Court, because here it is
6 the Tribunal rules that require an estimate to be given and an explanation to
7 be given. So I say, without having to put it as a formal strikeout, as part of
8 your discretion you can take care to make sure that rule 75 is complied with in
9 an appropriate way.

10 I would like to show you why the basis in (g), the explanation which is given for the
11 increase -- because you will note at (g) the original claim is for 2 per cent; it's
12 now been put up to 5 per cent. The value of a 5 per cent compound interest
13 claim is more than £9 billion.

14 **MR JUSTICE ROTH:** It's not compound, it's simple.

15 **MR HOSKINS:** Sorry, simple interest. 5 per cent simple interest claim is £9 billion.
16 You see that because you have the figure in the box at (g): you will see
17 "Total", new figure, 16,731. That's the total of the overcharge plus the
18 5 per cent simple interest. If you compare that to the figure at page 94 under
19 A, which is the figure of the loss excluding interest, you see the total is
20 £7 billion-odd. So we're talking about a difference in the estimate of £9 billion.

21 **MR JUSTICE ROTH:** Just a minute. Are we? If you look back at page 96, the
22 2 per cent, which is the original claim, unamended, it's 11.6.

23 **MR HOSKINS:** Sorry, so --

24 **MR JUSTICE ROTH:** So the difference is 5, not 9.

25 **MR HOSKINS:** Indeed. I'm saying the total interest claim at 5 per cent adds
26 9 billion. And you're absolutely right: the difference between the previously

1 pleaded case is still 5 billion.

2 **MR JUSTICE ROTH:** Well, that's the change.

3 **MR HOSKINS:** That's right. I'm just showing you --

4 **MR JUSTICE ROTH:** That was significant interest in the first place, yes.

5 **PROFESSOR WATERSON:** Could I just interject a minute.

6 Are you asking, Mr Hoskins, for the rate of 5 per cent above the prevailing
7 Bank of England base rate to be subject to some explanation in the text as to
8 why it's 5 per cent, along the lines of the brief explanation that Mr Harris has
9 given, or are you asking for something else?

10 **MR HOSKINS:** I'm asking for an estimate which is reasonable and an explanation
11 which is reasonable. Can I show you why the explanation which is currently
12 given is not reasonable? Then you will see our points and our concern.

13 Mr Harris referred you to the case of Attrill, which was a High Court case; if
14 I remember correctly, it was in 2012. In Attrill -- you have been shown it --
15 there was no argument about whether the borrowing rate was relevant or not;
16 the only argument was whether the borrowing rate for undertakings for
17 businesses was appropriate or whether it was the borrowing rate for
18 individuals that was appropriate. But the point about whether the borrowing
19 rate was itself appropriate wasn't even debated in that High Court case.

20 With respect, Attrill is not the current state of the law. The current state of the law is
21 in the case of Carrasco v Johnson, which is a Court of Appeal authority. That
22 is in bundle D2, tab 9.6.

23 **PROFESSOR WATERSON:** Yes.

24 **MR HOSKINS:** You will see this is a judgment of the Court of Appeal. You will see
25 it post-dates Attrill: it's 2018. If I can ask you to look at paragraph 16 on
26 page 512, you'll see the heading "The relevant principles":

1 "In relation to the exercise of the court's discretion, we have been referred to the
2 commentary in the White Book. We have also been referred to and have
3 considered various cases."

4 If you look down, you will see the various cases including Attrill.

5 Then the Court of Appeal says:

6 "The guidance to be derived from these cases includes the following ..."

7 And if I could ask you to read paragraphs 17(3) and (4). **(Pause)**

8 The Court of Appeal says that while simple interest based on an assumption of
9 borrowing is appropriate for commercial claimants, it's not appropriate as
10 a general presumption for non-business claimants, in this context in relation to
11 personal injury.

12 So with all due respect to the class representative, the proposed amendment in
13 112(g) does not reflect the current state of the law.

14 **MR JUSTICE ROTH:** Sorry to interrupt you. We need to read 5 as well. 4 is
15 personal injury claims. 5:

16 "Many claimants will not fall clearly into the category of those who would have
17 borrowed and those who would have put money on deposit and a fair rate for
18 them may often fall somewhere between those two rates."

19 **MR HOSKINS:** Indeed. In your remittal judgment you were asked to deal with that
20 consideration in the context of this case in relation to compound interest, and
21 you rejected that as a factual basis for compound interest because it wasn't
22 appropriate for consumers to assume that, given the rates of the overcharge
23 here, they would have borrowed or saved, because, as I put it colloquially and
24 as reflected more elegantly in the judgment, they might just have gone to the
25 pub and had an extra bag of crisps that week.

26 **MR HARRIS:** I'm so sorry to interrupt. I'm told that live link has gone down. I'm so

1 sorry, Mr Hoskins.

2 **MR JUSTICE ROTH:** Yes. Let's pause a moment. Not as far as we can see. But
3 let's just pause a minute. **(Pause)**

4 **MR HARRIS:** People on my team tell me that they can't access the live-stream
5 through the website and other people on our side have lost the link too.

6 **MR JUSTICE ROTH:** Yes, thank you. I think we need to investigate that, so we'll
7 metaphorically rise for a few minutes. Thank you for alerting us to that.

8 **(2.44 pm)**

9 **(A short pause to fix a technical issue)**

10 **(2.47 pm)**

11 **MR HOSKINS:** Sir, can I just conclude on this point by saying: if, either in the
12 original claim form or in a proposed amendment, the class representative
13 comes along and says, "I'm claiming 20 per cent simple interest and the claim
14 is worth £50 billion", because of the requirement in rule 75(3), you would say,
15 "I'm sorry, that's not permissible. I want you to amend that to put forward
16 a reasonable assessment and claim for simple interest", and the reason why
17 you would do that is of course that to allow an inflated claim misleads class
18 members and is unfair on Mastercard.

19 Now, here, in our submission, the estimate that is given is inflated to the tune of
20 about £5 billion. And that is not nothing. That is misleading to class members
21 and it is unfair to Mastercard.

22 That is why we say that the class representatives should not be permitted this
23 amendment and should, if it's felt necessary over what's already in there --
24 a claim for simple interest in general terms and a suggested level of
25 2 per cent, in our submission that's perfectly sufficient. If they want to come
26 back with another try, then they can. But what they shouldn't be allowed to do

1 is put in this exaggerated and inflated estimate at this stage. That's the point,
2 sir.

3 **MR JUSTICE ROTH:** I am a bit concerned, Mr Hoskins, at the suggestion that this
4 rule somehow requires more than the ordinary rule for amendment, in terms
5 of that it's a higher hurdle than the claim that could be struck out. It asks for
6 a better explanation, which isn't the case in ordinary High Court pleadings:
7 you can say it's with interest at the rate of X, without explanation. Here there
8 has to be an explanation, that's the additional requirement. But to say it could
9 go beyond that, and that even if it cannot be struck out, it should not be
10 allowed because the rule requires an explanation seems to me putting in a lot
11 more on that rule than it's intended to achieve.

12 Now, if somebody said "interest at 20 per cent", you would say that's wholly
13 unsustainable and it could be struck out. And that would be the basis on
14 which the Tribunal, if so persuaded -- and it probably would be -- would say:
15 no, you can't have that amendment.

16 Now, you may be right or not that the claim for 5 per cent, for the reason given, could
17 be struck out. But to apply some other test of what you said, unreasonable or
18 unjustifiable, a rather vague test, under the standard which we are going to
19 have to develop, seems to me to be inviting trouble, and that it is a question of
20 whether this is an impermissible basis of putting an interest claim, in which
21 case it should be refused on the basis it could be struck out, or it's
22 a permissible basis even if the court might not be persuaded or the Tribunal
23 here might not be persuaded that it's right.

24 **MR HOSKINS:** Sir, I think you've effectively given a ruling. I'm not going to --

25 **MR JUSTICE ROTH:** Well, I haven't -- **[overspeaking]** --

26 **MR HOSKINS:** Sorry, I'm being (inaudible) to you --

1 **MR JUSTICE ROTH:** There are three of us, and I haven't spoken to my colleagues.

2 But --

3 **MR HOSKINS:** I understand.

4 **MR JUSTICE ROTH:** -- it would have to be ...

5 **MR HOSKINS:** Sir, you have the point, you have made clear your intentions.

6 Unless either of the panel members want to dissuade you, I'm not going to
7 take the point further. You have the point, you've understood it, you've made
8 your position clear.

9 **MR JUSTICE ROTH:** Yes. I mean, you have made your submissions. One sees
10 what happens in that case. And one notes the conclusion in the case, that the
11 3 per cent was allowed in that case, and the Court of Appeal said: we don't
12 enquire into the detail of financial position of the claimant but look at the
13 matter in general terms and how it might apply across the class.

14 Yes. We'll just take a moment.

15

16 **Submissions in reply by MR HARRIS**

17 **MR HARRIS:** Sir, may I just add, just because you have a query about the --

18 **MR JUSTICE ROTH:** Yes.

19 **MR HARRIS:** There is a complete answer to the 75(3)(i)(1) point, which is that it
20 requires, under the rules, an explanation of how that amount has been
21 calculated, but that applies only to an estimate of the amount claimed in
22 damages.

23 But this is not a claim in damages; this is a claim in discretionary simple interest
24 under the statute. And we know that that's absolutely key because it makes
25 all the difference between compound interest and simple interest. We weren't
26 allowed compound interest because we couldn't meet the requirements for

1 a claim in damages for compound interest, but we do have a claim in simple
2 interest.

3 That's a complete answer to this, in addition to the points that you've already
4 debated with Mr Hoskins.

5 **MR JUSTICE ROTH:** Yes. I'm not sure I am persuaded by that because I think your
6 interest is included in the aggregate award of damages, if one looks at 120.

7 I don't think we need to debate that further. We'll just take a moment.

8 **(2.53 pm)**

9 **(A short break)**

10 **(2.54 pm)**

11 **RULING(extracted)**

12 Then there is a point on another bit of the amendment. I don't know if it's a similar
13 point about -- is it 112?

14 **MR HOSKINS:** 112(h), sir, on page 96. Does it help if I explain the point and then --

15 **MR JUSTICE ROTH:** Yes.

16 **MR HOSKINS:** I don't want to steal Mr Harris' thunder, but then he can tilt at a real
17 windmill rather than a hypothetical one.

18 **MR JUSTICE ROTH:** Yes.

19

20 **Submissions by MR HOSKINS**

21 **MR HOSKINS:** What is said under 112(h) -- so again, this is in the part of the claim
22 form which gives the estimate of damages claimed. It's said:

23 "The class representative's experts will make adjustments to the aggregate damages
24 sought to reflect: (i) individuals who suffered the relevant loss but who died
25 before the collective proceedings were issued and so whose losses are not
26 included within the claim ..."

1 | le current estimate includes claims from persons who died before the claim was
2 | issued; and as we know from the remittal judgment, those persons are no
3 | longer in the claim and therefore damages can't be claimed on their behalf.

4 | So the issue here is whether, in giving an estimate in the claim form, it's sufficient for
5 | Mr Merricks to say, "We'll come to this later, we'll make that deduction later";
6 | or whether, in order not to mislead the class members in giving an estimate,
7 | they should give an estimate of the deduction to the claim now.

8 | In our submission, they should put forward an estimate now that excludes that
9 | category of person, because they're perfectly capable of doing so.

10 | If I can give you an example, just to show that this is fairly easy to do: it's just
11 | an estimate. It's bundle D1, tab 50 – sorry that's the wrong reference, it's
12 | going to be D2, tab 50, sorry, at page 618.

13 | **MR JUSTICE ROTH:** Yes.

14 | **MR HOSKINS:** You'll see this is an article published on Law.com International. You
15 | see the date amongst some pictures: 19 August 2021.

16 | At the top of page 620 there's a quote from the class representative's lawyer and
17 | he's talking about the amount that would need to be removed from the
18 | estimate in order to take account of the Tribunal's remittal judgment dealing
19 | with persons who died before the claim form was issued. You'll see he says:

20 | "The amount of deceased estates that will need to be removed from the claim value
21 | is around 20 per cent of the total class size."

22 | So what we are suggesting is that given that the Tribunal has ruled that those people
23 | are no longer in the claim and therefore the estimate is inflated to that extent,
24 | given that it is going to be straightforward to come up with an accurate
25 | estimate that takes account of the remittal judgment, then the class
26 | representative should do that now, before the claim form is finalised, and it's

1 not enough to say simply, "We will do it at some time in the future". The
2 actual value of the claim in terms of estimated amount does matter, and the
3 remittal judgment should be given effect now in the estimate.

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

5 Mr Harris, in fact, as I recall, the experts' report for the initial application for the CPO
6 was indeed based on the supposition that the class will only include people
7 still alive at the time the claim form was issued. That's how you got that
8 calculation we looked at earlier of the number of people in the class.

9 I also recall, but I haven't checked, and my memory may be at fault, that the experts
10 say in their report dealing with quantum that the quantum has not been
11 adjusted to deal with the people who've died, but it can be adjusted; or
12 alternatively, the claim could be amended to bring in people who died. Well,
13 you tried to amend to bring in people who died, but that failed.

14 So really one is going back to say that the adjustment should be made which your
15 experts said right from the beginning could be made, and that that ought
16 sensibly to be done now that the claim form has been amended, and not left
17 open.

18
19 **Submissions by MR HARRIS**

20 **MR HARRIS:** Sir, yes. There are two real points and they are both set out in the
21 pleading, in the amendment, at 112(h).

22 The first of them is that we respectfully contend there is no point in doing this
23 amendment now, when, no matter what your judgment is on domicile date,
24 there is shortly hereafter going to be an opt-in/opt-out period, and one
25 assumes that some people will opt in and some people will opt out, and that
26 also makes, potentially, a difference to the damages calculation. Potentially;

1 one doesn't know. It hasn't happened yet, but it will happen shortly.

2 **MR JUSTICE ROTH:** Yes.

3 **MR HARRIS:** We respectfully say that this litigation costs enough as it is, and has
4 generated enough controversy as it is, that it seems pointless, in our
5 respectful submission, to amend on one aspect of quantum by reference to
6 the size of the class when it's about to change again. So that's one of the two
7 points.

8 But the second of the two points is also in the red. It's the final sentence:

9 "The means by which this adjustment will be done are a matter for expert evidence."

10 Just pause there. That seems to be entirely common ground. That's the point that
11 you just put to me, and we respectfully agree: it is a matter for expert
12 evidence, and it will be done by experts but it hasn't yet been done. They
13 haven't settled upon the precise means by which it should be done. It still
14 needs to be considered. In our respectful submission, it would be more
15 cost-effective for it to be considered in the round with the other point that I've
16 just made, opt-in/opt-out during the relevant opt-in/opt-out period, and there is
17 no need for it to be done right now.

18 **MR JUSTICE ROTH:** Mr Harris, can I interrupt you. I have some sympathy myself
19 for your first point. What I think there is concern on my part to avoid is that
20 this is all left over to full expert reports of the kind that will be produced for
21 trial.

22 If we were to direct that Mr Merricks will seek to make this amendment within
23 a specified period of the end of the opt-in/opt-out date, covering both points, is
24 that something that you will be content to accept?

25 **MR HARRIS:** Yes, sir, provided the period is reasonable in the context of this
26 litigation and the need for it to be done by the experts. You will have seen

1 from I believe it's Mr Merricks' statement, possibly Mr Bronfentrinker's
2 statement, that the experts have recently changed.

3 **MR JUSTICE ROTH:** Yes, I saw that.

4 **MR HARRIS:** So provided it's a generous reasonable period, then yes, absolutely,
5 we can deal with it in that way.

6 **MR JUSTICE ROTH:** Would a reasonable period be two months after the end of the
7 date for opting in/opting out?

8 **MR HARRIS:** Well, since there doesn't appear to be any imminence of the matter
9 going to trial with the preliminary issues that have been mooted, could we
10 please ask for six months from the date of the end of the opting out --

11 **MR JUSTICE ROTH:** No, the relevance is that it's right that a company, however
12 large the company is, facing a massive claim should have a clear
13 understanding of the maximum size of the claim. And that's irrespective of
14 any preliminary issues. So it's a reasonable period for your experts to do the
15 calculation, irrespective of the progress of the litigation.

16 **MR HARRIS:** Well, I accept that, sir. But there is quite a lot of data and it moves
17 around quite a lot. So I would respectfully urge a noticeable period more than
18 two months. We ask for six, but it may be slightly less than that.

19 **MR JUSTICE ROTH:** Don't forget the opt-in/opt-out period is itself, I think,
20 suggested to be 12 weeks, which seems reasonable. I don't think it's fair that
21 Mastercard could ask for any less. So there is a period already of
22 three months --

23 **MR HARRIS:** That's true. But the hypothesis of this proposal is that the experts
24 also take account of that.

25 **MR JUSTICE ROTH:** Yes, but the methodology is what they have to work on; they
26 then just get the figures with the numbers opted in or opted out.

1 **MR HARRIS:** No, I accept that, sir. But you've heard what I have to say in the
2 context of this litigation.

3 **MR JUSTICE ROTH:** Yes.

4 **MR HARRIS:** There's another answer to the point about Mastercard, it being fair for
5 them to know what they face, and there are two subpoints to this.

6 The first is: they can put out any publicity they want -- and they do -- about the size
7 of the claim. Indeed, what was generated at tab whatever it was that we
8 looked at, Mr Bronfentrinker's -- what was reported as he having said in
9 law.com was itself prompted by what Mastercard had said had been the
10 outcome --

11 **MR JUSTICE ROTH:** We're not interested in the publicity. It's just that the
12 defendant should know the size of the claim.

13 **MR HARRIS:** Yes. Well there's another reason that they can protect themselves in
14 the interim. They can put in their defence and say: it's bound to be lowered by
15 at least x, y and z amount. There's absolutely no reason why they can't do
16 that. There's absolutely no reason why they can't start publicising that now, if
17 that's what they see fit to do.

18 There's bound to be an argument about it. So it's not as though when we put in what
19 we say is the size of the class, that then Mastercard are going to say: oh, yes,
20 no problem.

21 **MR JUSTICE ROTH:** It puts a ceiling, it puts a cap.

22 Mr Hoskins, if we were to direct that, so that we can have -- as I think one should
23 have for the purpose of this CPO notice -- a pleading, and we were to make
24 an order that Mr Merricks shall, within a period of x months, specify the
25 adjustment to be made under paragraph 112(h), would that satisfy?

26 **MR HOSKINS:** Yes, that seems like a very sensible way through it. Two months,

1 yes; six months, we would oppose. If you want to hear me on that --

2 **MR JUSTICE ROTH:** Yes. This would be two months after the end of --

3 **MR HOSKINS:** I understand.

4 **MR JUSTICE ROTH:** -- the opt-out. Yes.

5 **MR HOSKINS:** So they would have five months to do this.

6 **MR JUSTICE ROTH:** Yes. We will just confer briefly.

7 **(3.10 pm)**

8 **(A short break)**

9 **(3.15 pm)**

10 **RULING(Extracted)**

11

12 **MR JUSTICE ROTH:** While looking at the pleading, just turning on to D/98, a small
13 point, Mr Harris, but I think the heading there, "Observations on the
14 questions", which part of the UK and so on, that heading should probably be
15 deleted as well, because you're not now making observations; you're just
16 stating that it's going to be in England and Wales as ordered.

17 **MR HARRIS:** Yes, sir, we will do that.

18 **MR JUSTICE ROTH:** Are there any other points, Mr Hoskins, on the proposed
19 amendment?

20 **MR HOSKINS:** There's just one. I don't think it will be controversial. On page 99,
21 paragraph 120(b), the interest claim currently still reads:

22 "There is also a further claim for damages in the form of interest."

23 And of course "damages in the form of interest" is a reference to compound interest,
24 which it is established it is not. So I think simply the words "for damages"
25 should be removed. It's just a tidying point.

26 **MR HARRIS:** Yes, agreed.

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

2 Very well. Then subject to that, we give permission to amend. But depending on the
3 ruling on the domicile point, that might affect the size of the claim and so it
4 may be that some further revisions may be required, but that is not something
5 we can deal with today. We are, as you gather, going to reserve our
6 judgment on the domicile point.

7 Then there is the question of the supporting documents.

8 **MR HOSKINS:** Sir, shall I just point out the sort of relatively self-contained points?
9 Again, does it help if I just run through them point by point?

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

11

12 **Submissions by MR HOSKINS**

13 **MR HOSKINS:** There's one point on the draft collective proceedings order, which is
14 at D1, tab 5, page 103. That's paragraph 3.3. We go back to the definition of
15 "the class".

16 **MR JUSTICE ROTH:** Yes.

17 **MR HOSKINS:** You see it there.

18 Our concern is that as drafted, even with the amendment, that doesn't make it clear
19 on its face that claims in respect of individuals who died before the
20 6 September 2016, or indeed their personal representatives or administrators,
21 are not included in the collective proceedings, which of course is the effect of
22 the remittal judgment.

23 We think that is important because whilst we all know what the Tribunal decided in
24 its remittal judgment, the outside world wouldn't necessarily be aware of the
25 details of these proceedings. In our submission, the scope of the clash
26 should be clear on the face of the collective proceedings order.

1 At the moment, the way paragraph 3.3 is drafted, there is room for confusion on the
2 part of consumers as to whether they're in the class or not, or their personal
3 representatives. We simply suggest that a sentence is added to reflect the
4 effect of the remittal judgment as to who is not in the class, even although
5 they made purchases between May 1992 and June 2008.

6 **MR JUSTICE ROTH:** Yes.

7 **MR HOSKINS:** Sir, that's one point on the order.

8 In relation to --

9 **MR HARRIS:** Shall I deal with them seriatim?

10 **MR HOSKINS:** It's up to you.

11 **MR JUSTICE ROTH:** Yes, I think that's probably helpful.

12

13 **Submissions by MR HARRIS**

14 **MR HARRIS:** Sir, we don't see this as being necessary because it's clear in the
15 other documents and anybody who would be confused about the minutiae is
16 likely to be the sort of person who I think only looks at the other documents, is
17 not going to be going through the claim form or the CPO order in any detail.

18 It is perfectly clear, if one follows what's been going on in the case and one follows
19 the claim form, that people who died prior to the date of the claim form are not
20 included; indeed, there has been masses of litigation about that. So we don't
21 see it as being necessary.

22 But if you're against me on that, it could be simply a footnote to paragraph 3.3 which
23 says:

24 "For the avoidance of doubt, people who died before the issuance of the claim form
25 are excluded."

26 But ... yes. It's perfectly clear in the notice of the proceedings, which are the

1 documents that --

2 **MR JUSTICE ROTH:** Yes, I think Mr Hoskins is right: there are the other
3 documents. But this is the Tribunal's order, which is the primary document
4 that has legal force. So I think it ought to be clear on the face of this
5 document.

6 **MR HARRIS:** Sir, may I suggest then that the way to do it is if you were to turn up
7 the CPO notice in draft amended form, where there is a sentence that says
8 exactly this, we could just repeat the sentence in a footnote of paragraph 3.3
9 of the CPO order. So if you were to turn up D/118.

10 **MR JUSTICE ROTH:** Well, we are not going to say "unfortunately are not included".

11 **MR HARRIS:** No.

12 **MR JUSTICE ROTH:** Isn't it simply this:

13 "The class of persons whose claims are to be included in the collective proceedings
14 shall be individuals who were alive on ..."

15 And then you insert the domicile date:

16 "... and who, between ..."

17 Et cetera:

18 "... together with the personal/authorised representative of the estate who otherwise
19 meets that description but died after ..."

20 The domicile date, whatever it is.

21 **MR HARRIS:** Sir, I would suggest that the easiest way of doing it is leave 3.3 as it
22 is, but then either -- because there's a sentence in that then goes on, or
23 because there's a footnote and it would just simply say:

24 "People who died before [whatever domicile date that you determine] are not
25 included."

26 **MR JUSTICE ROTH:** Yes. That's fine, I think. That would meet Mr Hoskins' point.

1 **MR HARRIS:** Yes. Okay. Well, we can do that, no problem. We'll do that.

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

3 Next point, Mr Hoskins.

4 **MR HOSKINS:** Onto the notice, which is --

5 **MR JUSTICE ROTH:** Nothing else on the order?

6 **MR HOSKINS:** Nothing else on the order from us.

7 **MR JUSTICE ROTH:** So the date and --

8 **MR HOSKINS:** Sorry, that's subject --

9 **MR JUSTICE ROTH:** It's going to be a date that is what's suggested. It says

10 8 April, but the idea is it's 12 weeks as a period for opting in or opting out; is

11 that right?

12 **MR HOSKINS:** We're happy with 12 weeks. I should say obviously the domicile

13 date will have to be amended if we are successful on that point.

14 **MR JUSTICE ROTH:** Yes.

15 **MR HOSKINS:** I'm not giving up that point at this ...

16 **MR JUSTICE ROTH:** No, no. I understand that. It means the order can't be made

17 today.

18 **MR HARRIS:** Yes.

19 **MR JUSTICE ROTH:** It will be a date 12 weeks after the date of the making of

20 the order.

21 **MR HARRIS:** Yes. Just to introduce a brief moment of levity, I'm delighted to hear

22 that Mr Hoskins doesn't oppose the costs order in paragraph 11 of the ...

23 **MR HOSKINS:** Well ...

24 **MR JUSTICE ROTH:** Yes.

25 **MR HARRIS:** Don't worry, simply a joke.

26 **MR HOSKINS:** I accept everything that I don't comment on, except for all the things

1 we have made detailed submissions on in our skeleton argument and on
2 which the Tribunal will rule. Thank you, Paul.

3 **MR JUSTICE ROTH:** Right, the notice.

4
5 **Submissions by MR HOSKINS**

6 **MR HOSKINS:** So the notice, sorry. It's at page 106.

7 What we would suggest is appropriate is to add a bullet to this effect, because
8 there's currently no indication that Mastercard disputes liability. What you
9 have, you will see the current fourth bullet:

10 "No money is available now and there is no guarantee that money will be available in
11 the future."

12 Which is somewhat coy. But we do dispute liability and it's important that the class is
13 made aware of this.

14 What we simply suggest is that there is a new bullet point that should be added
15 between the existing third and fourth bullets, and that new bullet point should
16 say:

17 "Mastercard disputes the claim and denies its liability."

18 Which is accurate. And it's hard to see why that is being opposed by the class
19 representative because this is the notice to the class.

20 **MR JUSTICE ROTH:** Yes, Mr Harris?

21
22 **Submissions by MR HARRIS**

23 **MR HARRIS:** Sir, the answer to this is that this part of the notice has been there
24 since, I think, five and a half years ago or thereabouts and this point has
25 never been made before, and that's because it was not necessary. The
26 notices in the unamended form have already been approved by the Tribunal

1 without this point.

2 On top of that, Mastercard can of course say whenever and however and to
3 whomever and as many times as it likes that it denies that it has any liability to
4 pay any damages. These are notices from us to the class members and it
5 doesn't require this point, sir, that Mr Hoskins now seeks to introduce at the
6 eleventh hour.

7 **MR JUSTICE ROTH:** Well, just a minute. When you say this has previously been
8 approved by the Tribunal, when did we approve the notice?

9 **MR HARRIS:** Previously approved not in the formal sense, but in the sense that
10 there was no objection raised, whether by the Tribunal or by Mastercard, to
11 these forms of notice.

12 **MR JUSTICE ROTH:** Well, we weren't considering it because we refused to make
13 a CPO.

14 **MR HARRIS:** Well, let me rephrase it, my Lord.

15 Nothing was ever said at the time of the original CPO when this was put forward as
16 to the defective nature of this notice. Instead we were told Mastercard has
17 put forward all the points with which it takes issue, and they included
18 deceased persons and interest and then the two points that were overturned
19 in Supreme Court, and there were no points such as this.

20 So I will rephrase that. I stand corrected.

21 **MR JUSTICE ROTH:** Well, I really don't think we should take up more time about
22 this. The notice has to be approved by the Tribunal. The reason for that is
23 that it has to be clear, fair and effectively communicating the position.

24 I don't think, if we can cut through this, it needs a separate bullet. But I think after
25 the sentence which is, "No money is available ... no guarantee money will be
26 available in the future", just insert an additional sentence: "Mastercard

1 disputes the claims and these claims will have to be proved".

2 **MR HARRIS:** Yes. We will do that, sir.

3 **MR JUSTICE ROTH:** And that will deal with both of your points.

4 Yes, next, Mr Hoskins.

5

6 **Submissions by MR HOSKINS**

7 **MR HOSKINS:** Sir, next, I'm still in the notice, it's page 111.

8 **MR JUSTICE ROTH:** Yes.

9 **MR HOSKINS:** It's just the difference in the mechanism by which one opts in and
10 opts out.

11 So at the bottom of page 111, you will see the heading "How to opt-out or opt-in".

12 Section 18 is for those who are domiciled in the UK and want to come out of
13 the class, and in order to do so, they have to send a letter to the address on
14 the following page. So the mechanism for opting out is a letter.

15 Then section 19 is for those who want to opt in, and there are two ways you can opt
16 in. One is by a letter. You see that in the third paragraph:

17 "If you prefer, you may also opt in by post."

18 But:

19 "You may also do so by completing the opt-in form on the website."

20 You will see that --

21 **MR JUSTICE ROTH:** Yes. And you'd like an equivalent option?

22 **MR HOSKINS:** Well, we do. We say it should be an equivalent because in this day
23 and age, requiring class members to write a letter to opt out is outdated and
24 it's actually a significant disincentive to those who want to opt out. They
25 should be able to do it on the claims website.

26 **MR JUSTICE ROTH:** Yes. Mr Harris, is there any objection to that? We've all

1 noticed that people write far fewer letters these days, especially since the
2 events of the last 18 months.

3
4 **Submissions by MR HARRIS**

5 **MR HARRIS:** Sir, yes, we do object. This has arisen at the last minute and is the
6 subject of some correspondence. The best I can do is take you to that
7 correspondence, because it's dealt with in some detail.

8 **MR JUSTICE ROTH:** Can you not just explain why they can't do it via email?

9 **MR HARRIS:** I can do my best, sir, but it has to be by reference to the letter,
10 because this only came to my attention in the short adjournment because the
11 correspondence is so very recent.

12 **MR JUSTICE ROTH:** Where's the correspondence?

13 **MR HARRIS:** It's so recent that this one hasn't even found its way into the bundle.
14 So let me just try to summarise.

15 "As to the disparity between being able to opt in by email but opt out by post ..."

16 So the very point:

17 "... this is deliberate, as Mr Merricks considers that because of the significance of
18 a decision to opt out, class members should give such a notification in the
19 most secure way, which is by post rather than email. This point is further
20 elaborated on and explained at paragraph 7.2 of the Epiq/Hilsoft plan forming
21 part of the litigation plan filed on 6 September 2016: that where an online
22 option is provided for class members to opt out, class members may attempt
23 to both opt in and opt out of a claim or opt out and then attempt to file a claim
24 for a share of damages without realising what they had done."

25 You will recall that submissions at the time were Epiq/Hilsoft are very experienced
26 North American providers --

1 **MR JUSTICE ROTH:** Yes.

2 **MR HARRIS:** -- and this is what they were telling us, and that is therefore the advice
3 that we took.

4 This letter goes on to say:

5 "As explained in our second letter of 10 January, the Tribunal did not require
6 Mr Merricks to make any amendments to the Epiq/Hilsoft plan, nor has
7 Mastercard previously raised any objection to this part of the Epiq/Hilsoft
8 plan."

9 So these are the two points, the second one being rather less important than the
10 first. It hasn't been raised before. But if you put that to one side, it was based
11 upon particular advice from Epiq/Hilsoft based on their experience and about
12 the significance of the decision to opt out. So that's why there is a distinction
13 and that's why we therefore oppose the suggestion Mr Hoskins has just made.

14 **MR JUSTICE ROTH:** Yes.

15 Mr Hoskins, do you want to ...

16

17 **Submissions in reply by MR HOSKINS**

18 **MR HOSKINS:** Simply this: if someone has decided to opt out, has gone to the
19 bother of looking at it and deciding, they should be able to do so by going to
20 website, not by writing a letter. It's just antediluvian, this approach. I'm sorry.

21 **MR JUSTICE ROTH:** Yes, we will take a moment. Before we do that, I think
22 Ms Burgess had a point about how the whole thing is presented to people.

23 **MS BURGESS:** Yes, I was just going to ask for consideration of the claims website
24 including some flowcharts that go through the criteria of whether you're
25 automatically in or you need to opt in or opt out. So start with, "Did you make
26 purchases?", "Are you aged over 16? Yes/no", just so that it makes it easier

1 for individuals to understand whether they need to take any action.

2 Thank you.

3 **MR JUSTICE ROTH:** I think that could be tied in with the questions about who is in
4 the class and how to opt in or opt out. There could be a cross-reference to
5 the flowchart that will be on the website, for those who would find it easier and
6 user-friendly to work through the flowchart rather than working through a lot of
7 text.

8 I'm sure that's something, Mr Harris, that your clients can arrange.

9
10 **Submissions by MR HARRIS**

11 **MR HARRIS:** Well, sir, our stance is that we've been guided throughout by the
12 experts who have the decades of experience, including Epiq/Hilsoft, and they
13 have not suggested that we do that, and we have spent a lot of money with
14 them and on these documents.

15 So while we are not conceptually averse to going away with this idea at all -- and
16 with respect, we say it seems a perfectly sensible suggestion, if I can put it
17 like this -- but it doesn't seem, in our respectful submission, that it's sensible
18 to hold up the granting of the CPO whilst this is then taken to the experts to
19 see what they say. For all I know, they may say, "Yes, the problem with
20 flowcharts is this", or, "If you do it, you have to organise it in a certain way
21 because actually it confuses more people", I don't know. If they were to come
22 back and say, "Well, our experience of this is it's fine, but only if you do it in
23 this way", then that's the way that we should do it.

24 So what I respectfully suggest is: can we please take away these sensible
25 suggestions, confer with our experts and report back to the Tribunal in due
26 course, and if there needs to be a supplement to the notice or an addition to

1 the website so as to make it more user-friendly in that way, then we can do
2 that.

3 **MR JUSTICE ROTH:** Well, if you can respond -- it's not a major intellectual
4 exercise -- within a week, by next Friday, as to whether you're content to do
5 a flowchart, and it's not a difficult flowchart for anyone to draw up, I think that
6 will deal with the point.

7 We will just confer -- you may even be able to take instruction on that while we're
8 doing it, but maybe not -- for a moment about the point about the email for
9 opting out. We will return shortly.

10 **(3.33 pm)**

11 **(A short break)**

12 **(3.36 pm)**

13 **RULING(Extracted)**

14 **MR HARRIS:** Yes, sir.

15 We haven't been able in those few minutes to take instructions on the other point, so
16 we will revert within seven days, as you suggested, on the flowcharts.

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

18 Anything else, Mr Hoskins?

19 **MR HOSKINS:** Sir, just the observation, of course, that depending on your findings
20 on the domicile date and/or amendment issues, that may trigger further
21 amendments to --

22 **MR JUSTICE ROTH:** Yes, of course. Absolutely.

23 Yes. Any other supporting documents to deal with?

24 **MR HOSKINS:** Not from us.

25 **RULING(Extracted)**

26 **Submissions by MR HARRIS**

1 **MR HARRIS:** Sir, on this precise topic, I don't have the paper reference to hand, but
2 in the original Epiq/Hilsoft plan at paragraph 6.30, by reference to a pie chart
3 showing the preponderance of emigration, I accept as at that date, but
4 including France, Germany and Spain in particular, it reads as follows:

5 "Major media outlets will be targeted in the top four to five countries, with specific
6 titles to be determined based on the state of the media at the time of the CPO
7 notice."

8 So what you've just said is already part of the proposal.

9 Now, I do accept that what we could say is: "can you please check" -- I mean, it does
10 say "at the time of the CPO notice", but: "can you please check the figures are
11 up to date that you are using". Then that will, in particular, have regard to
12 your point about Brexit.

13 **MR JUSTICE ROTH:** Yes. Well, that would be perfectly adequate. You may find
14 that countries like Poland, for example, feature more than they did at that
15 time.

16 That's fine. We have nothing else, I think, on the ... no, nothing else on the notice or
17 the publicity.

18 Anything else? Any other supporting documents anybody wants to raise? No.

19 Do we then come to the question of costs?

20 **MR HOSKINS:** Sir, I think we probably come to the question of directions before we
21 come to costs, because there's actually quite an important issue about the
22 CMC, particularly given there's going to be an application by us for preliminary
23 issue or split trial.

24 **MR JUSTICE ROTH:** Yes. I thought on the question of the CMC that it's common
25 ground that it should be after the pleadings have closed. That was my
26 understanding from the skeletons.

1 **MR HOSKINS:** Correct. That's correct, yes.

2 **MR JUSTICE ROTH:** Therefore it's a question of the defence and whether it should
3 be two months from the date of this hearing or two months from the service of
4 the amended claim form.

5 Well, I think it should be two months from the date of the delivery of our -- not this
6 hearing, but of our ruling on the domicile date issue. I would have thought
7 once that ruling is provided, the claim form can be rapidly finalised and
8 served.

9 **MR HOSKINS:** Sir, I'm happy as long as there is also a direction for the claim form
10 to be served within a short period of time. My worry is we have two months
11 from the date of your judgment and we don't get an amended claim form for
12 four or five weeks. You can just see the inconvenience. But if the class
13 representative, following your judgment, does it quickly, they suffer no harm
14 and we avoid this problem of us not having an amended claim form during our
15 work.

16 So I'm perfectly happy --

17 **MR JUSTICE ROTH:** Yes. If we say that the amended claim form is to be served
18 within two weeks of our ruling and the defence within two months after service
19 of the amended claim form, and then reply to be two months thereafter,
20 Mr Harris, would that be --

21 **MR HOSKINS:** It was six weeks in the original order. The gap was two months and
22 six weeks.

23 **MR JUSTICE ROTH:** Well, I'll say -- I don't know how, without taking a calendar and
24 working out what's happening with Easter -- let's say seven weeks after the
25 defence.

26 Then a CMC. We can't fix the date for the CMC now, obviously. It will be a different

1 Tribunal. But after the service and reply, on the first available date from what,
2 one month thereafter? Is that enough? Or ...

3 **MR HOSKINS:** Sir, two points.

4 **MR HARRIS:** Yes, please.

5 **MR HOSKINS:** Sorry. I'd suggest six weeks, just because once the pleadings
6 close, it would be sensible to allow the parties to actually have some
7 discussions about the possibility of a split trial or preliminary issues.

8 **MR JUSTICE ROTH:** Yes. I think six weeks, yes, six weeks is sensible. So the --

9 **MR HOSKINS:** Then the other -- sorry, sir.

10 **MR JUSTICE ROTH:** And it would be a CMC, I would have thought -- well, you can
11 consider in due course how long is needed. Certainly a day, but I would hope
12 no more. But you will have a much clearer idea at that stage whether you
13 need two days.

14 **MR HOSKINS:** Sir, can I address you on what tribunal the CMC should be in front
15 of, because I'm going to submit it should be the current formulation of
16 the Tribunal. I'd like to address you on that briefly.

17 **MR JUSTICE ROTH:** Yes.

18

19 **Submissions by MR HOSKINS**

20 **MR HOSKINS:** So there are two options: either the CMC comes before you, ie this
21 Tribunal, or the trial tribunal.

22 Now, the guide deals with this. If you go to the Purple Book at page 3406.

23 **MR JUSTICE ROTH:** Can you give me a paragraph number?

24 **MR HOSKINS:** It's paragraph 6.07.

25 **MR JUSTICE ROTH:** Yes.

26 **MR HOSKINS:** Perhaps I can just ask you to read 6.07.

1 **MR JUSTICE ROTH:** Yes, it's at an appropriate stage.

2 **MR HOSKINS:** Exactly. So it says:

3 "Accordingly, if the proceedings are certified as opt-out collective proceedings, the
4 panel conducting the case management (the case management tribunal) will,
5 at an appropriate stage prior to the trial, determine that the proceedings
6 should thereafter be heard by a separate panel."

7 So the first point is: it's not the case that automatically upon certification --

8 **MR JUSTICE ROTH:** No, that's true.

9 **MR HOSKINS:** -- the tribunal should change.

10 Now, what we are asking, what we are both agreed should happen is there should
11 be a case management conference, and you are the case management
12 tribunal. The main item at that case management conference I imagine will
13 be our application for a split trial or preliminary issues. In our submission, the
14 CMC should therefore take place before this Tribunal rather than a completely
15 new panel.

16 We say that is particularly important in deciding on preliminary issue/split trial
17 because this Tribunal has a good knowledge in particular of the causation
18 issues involved in this case and indeed of the pass-on issues in this case,
19 because you've heard evidence on it, you've heard argument on it; you've
20 even --

21 **MR JUSTICE ROTH:** Well, I have. But as you know, the other two members --

22 **MR HOSKINS:** Definitely.

23 **MR JUSTICE ROTH:** -- of this Tribunal have changed since 2017.

24 **MR HOSKINS:** Certainly, sir. But the choice is between a panel with you on it, and
25 all the knowledge you have gained, or a completely fresh one. And in our
26 submission, we think your knowledge will actually be very valuable in coming

1 to a sensible conclusion on preliminary issue or split trial, rather than
2 a completely fresh tribunal. We therefore submit that it is not yet
3 an appropriate stage for this case management Tribunal to drop out.

4 **MR JUSTICE ROTH:** Is this something we need to decide today?

5 **MR HOSKINS:** We're in your hands on that. We'd like to make submissions on it.

6 Mr Harris for the class representative in his skeleton argument has suggested
7 it should go to the trial tribunal. So there is an issue between us on this and
8 it's up to you whether you want to decide it today or leave it over. You have
9 our submissions.

10 **MR JUSTICE ROTH:** The logic of that is that if it's decisions about the form of trial,
11 that should be taken by the tribunal that will hear the trial, rather like a PTR,
12 ideally, in the High Court being heard by the judge who is then going to
13 conduct the trial, so that it's shaping the trial and it should be the tribunal that
14 will hear the trial. So that I don't, despite the kind things you've just said,
15 decide that: yes, there should be a preliminary issue, and then it goes to
16 another tribunal and they say, "Why on earth did Roth decide that? What
17 a ridiculous idea".

18 So having that continuity does have some benefits, in my experience. You're
19 absolutely right, it's not automatic and it can be tailored to suit the case. But --

20 **MR HOSKINS:** Sir, in my submission -- sorry, I didn't mean to interrupt. I'm sorry.

21 With respect, the decision to order a split trial or not doesn't usually arise at the PTR.

22 By definition, you decide whether you want a split trial or not and then you
23 have the PTR for the first part of the split trial.

24 But there is merit, obviously, in what you say that the trial judge himself should have
25 a say in what the trial looks like. But against that, it is perfectly common for
26 an application to be made for a split trial to be heard by one judge, but for that

1 judge not to be the trial judge.

2 The question for you then, sir, is whether you think the benefit of the trial judge
3 himself, with the tribunal, the trial tribunal, deciding whether to split the trial or
4 not outweighs the benefit of your knowledge in terms of what's involved in the
5 case and what would be involved. And our submission is that there is greater
6 benefit in you making that decision, with your knowledge, than someone
7 fresh. That's the submission, sir.

8 **MR JUSTICE ROTH:** I suggest that we leave that for me to consider. I am also a bit
9 concerned that at the moment I am hearing a very -- there's no immediate
10 prospect of that changing -- a long trial starting in mid-May.

11 **MR HOSKINS:** Sir, I think you have the misfortune to have me in front of you in that
12 trial, so I'm in the same --

13 **MR JUSTICE ROTH:** I'd forgotten. But you may then not do this CMC, because of
14 course there are others representing Mastercard. And it won't be delayed till
15 the autumn, I can assure you, because you are not available. But I won't be
16 available. So I have that concern as well.

17 I suggest we don't decide and don't specify in the order which tribunal will hear it,
18 and then I shall reflect on what you've said.

19 **MR HOSKINS:** Certainly. I would be very happy with that. Thank you, sir.

20 **MR JUSTICE ROTH:** I would like to move on.

21 **MR HARRIS:** Sir, we're also content with that, but we do strongly echo the point that
22 you made about, quintessentially, matters about trial management, such as
23 whether the trial should be split --

24 **MR JUSTICE ROTH:** When I said "PTR", I misspoke. I meant if there is a docketed
25 judge, is the position I was really thinking about.

26 Right, we need to move on to costs. We need also to allow, for the benefit of our

1 transcriber, a short break. We will then resume at 4.00 and we will hear you
2 on costs.

3 **MR HOSKINS:** Sir, given there's only half an hour left in the day, do you want to
4 divide the time up between us? That will hold our feet to the fire and might
5 make for a more efficient process. But that's up to you, sir.

6 **MR JUSTICE ROTH:** I think there are two periods covered by the application. One
7 is as, I understand it, up to -- is it 23 November 2017, when the final order
8 before the appeals were made, for which Mr Merricks is seeking an order; and
9 then there is the period after remittal by the Supreme Court on
10 11 December 2020, where I think you are both seeking an order but primarily
11 it's Mastercard seeking an order.

12 So if we say that Mr Harris has ten minutes to make his application for the first part
13 and you have ten minutes to make your application for the second part, and
14 then we will hear responses. And I will see and speak to my colleagues as to
15 whether we can sit for an additional 15 minutes.

16 **MR HARRIS:** Sir, I'm content to do ten minutes. It is fair to say that I seek an order
17 for both periods, but I can do what I have to say in ten minutes, Mr Hoskins
18 has ten minutes, and there is a short reply as necessary from both of us.

19 **MR JUSTICE ROTH:** And you have put in quite a bit in writing about this.

20 **MR HARRIS:** Yes.

21 **MR JUSTICE ROTH:** Yes, very well. 4.00.

22 **(3.54 pm)**

23 **(A short break)**

24 **(4.00 pm)**

25 **MR JUSTICE ROTH:** Yes, on costs, we have had a chance between us to consider
26 what you said on costs.

1 On the first period, that is to say the period up to 23 November 2017, it is of course
2 the case that the preparation of the claim form, the experts' report, all the
3 material attached, building the case and the Epiq report, would have had to
4 have been done in any event, even if Mastercard had agreed, or rather not
5 opposed when served.

6 Therefore, the approach that has been taken in, I think, the two other cases of
7 collective actions where CPOs have been granted, both Le Patourel and
8 Gutmann, is that the costs up to the filing of the claim form should be costs in
9 the case and the liability of the respondent for costs of the CPO that is
10 decided now, if they oppose the CPO, should start from the date of the
11 service of the claim form.

12 So, Mr Harris, we are not clear on what basis we should take a different view.

13 **MR HARRIS:** Sir, would you like me to structure my submissions on all costs points
14 and deal with that within ten minutes, or just respond to the points that you
15 have put to me?

16 **MR JUSTICE ROTH:** We would like you to deal with the first period.

17 **MR HARRIS:** That one?

18 **MR JUSTICE ROTH:** Yes. So that's this point. And then clearly it's accepted by
19 Mastercard thereafter you will get a proportion of your costs, and then it's just
20 a question of what proportion. So those are the points.

21 **Submissions on costs by MR HARRIS**

22 **MR HARRIS:** That's right.

23 We don't agree, with great respect, with the nature of the rulings in Gutmann and
24 Le Patourel on the basis that you have just put forward, and I will, in brief
25 terms, endeavour to persuade you why that's wrong and why a different
26 approach should be taken.

1 We say -- it's very short -- that this application for a CPO should be treated like any
2 other application against a party in litigation. We made an application,
3 Mastercard opposed it, and we've now won. If they had said at the outset --
4 as they should, in our submission -- "We don't oppose your application save
5 for deceased persons and interests", then the costs would have been
6 dramatically less, very dramatically less, for the entire application.

7 **MR JUSTICE ROTH:** What we don't understand is this: the costs -- you have to
8 persuade the Tribunal, unlike ordinary litigation, to allow it to continue. And
9 preparing the claim form, putting in an experts' report showing how you'll
10 quantify it, complying with all the requirements for an application for a CPO,
11 you will have to do that anyway.

12 **MR HARRIS:** That's right. But my submission is that there is a difference in kind
13 where one receives, as we did, an acknowledgement of service saying, "We
14 oppose your application", and then having to fight a determined and
15 well-resourced defendant, on the one hand, versus, on the other hand,
16 a defendant who, with respect, we say should have said, "We accept your
17 application subject to deceased persons and interest", and the volume and
18 the quantum of the costs have been dramatically greater from the beginning
19 because of the opposition of Mastercard.

20 That's my submission. I do accept it's not the same.

21 **MR JUSTICE ROTH:** You've lost me. You say: if Mastercard had acknowledged
22 service and said, "We're not opposing", but that's my point, which is: up to the
23 point at which they've been served, your costs are costs in the case; they are
24 not caused by anything that Mastercard has done.

25 **MR HARRIS:** Well, sir, I hear the logic of that submission. But what we -- I mean,
26 I won't labour this at length. But what we say is: there is no reason in this

1 context to treat this in a different way to the way in which one would treat
2 an interlocutory application in other forms of litigation.

3 To take the date of the service of the CPO claim form and materials is, with respect,
4 we say, a random date. It gives right to an arbitrariness. It's arbitrary in this
5 sense: that there could have been some work before the claim form was
6 issued and served that was done on issues that Mastercard opposed. There
7 could have been. Or there could have been --

8 **MR JUSTICE ROTH:** How did they oppose anything before they were served?

9 **MR HARRIS:** No, no, that they turned out to oppose. But equally, there could have
10 been some work -- and there would have been, on the facts of any given
11 case, including this one -- done on issues that they didn't oppose. So that
12 particular date is a fairly random date.

13 The same is true after the date. After the date there was some work done on issues
14 that they did oppose, and after the date there was some work done on issues
15 that they didn't oppose.

16 So all we're saying is that hitherto the approach has been taken that there should be
17 a line in the sand prior to which there should be no costs in favour of the
18 successful CPO applicant, but they should all be costs in the case; and after
19 that, it's up for grabs.

20 All I'm saying is conceptually, in my respectful submission, the approach should be
21 that you should treat it in the same way as any other application and what you
22 should say is: in the round, look, these are the costs that you have incurred in
23 the course of your application, and then they should be discounted by
24 reference to the amount of cost that was generated because of Mastercard's
25 objections, as compared to what wasn't; not by reference to a date.

26 That's the issue. It shouldn't be by reference to that date. There should be

1 a discount. It should be calibrated by reference to the amount of opposition,
2 as opposed to the -- not the amount of opposition. But that date is not the
3 date to set. It should be done by reference to a global consideration of: what
4 did they oppose and what they did not oppose.

5 Just on the acknowledgement of service point, in this case there's a letter before
6 action, so therefore before the claim form was issued and served, and there
7 wasn't a response saying, "Don't worry, we accept that it's perfectly sensible
8 to have a CPO, but not for deceased persons and not in a compound interest
9 sense". I don't want to over-labour the point, but that is part of the same
10 thing.

11 So that is, on the first point, what I have to say.

12 **MR JUSTICE ROTH:** Then the question is -- well, the proportion of costs will
13 obviously vary according to which period it is; I can see that. I think it would
14 be sensible for us to consider that, therefore, because it will affect the next
15 part of your submissions. So we will take a moment.

16 **(4.09 pm)**

17 **(A short break)**

18 **(4.11 pm)**

19
20 **RULING(Extracted)**

21 **PROFESSOR WATERSON:** Sorry, just to interject, I think you said "Mr Hoskins" at
22 the beginning; you meant Mr Harris.

23 **MR JUSTICE ROTH:** I did. Thank you very much Professor Waterson. Yes,
24 Mr Harris. Apologies.

25 We are then dealing with -- and that was served, as I think we know from the earlier
26 discussion, on 6 September 2016. So it's the costs thereafter.

1 **MR HOSKINS:** Sorry, sir, the response, Mastercard's response, was
2 30 November 2016.

3 **MR JUSTICE ROTH:** You were saying the date of your response. Why should it not
4 be the date of service? Because there was quite possibly some
5 correspondence before the response.

6 **MR HOSKINS:** Sir, both in Le Patourel and Gutmann, it was the date of the
7 defendant's response that was the trigger date, because it was assumed for
8 practical purposes that up until that date there was no opposition, so there
9 can't be any specific costs incurred. So I think in both of those cases, unless
10 I've misunderstood them, it is the defendant's response that was relevant.

11 **MR JUSTICE ROTH:** Is that right? That's right, is it?

12 **MR HARRIS:** It is right, sir. But we, in the same way, would seek to persuade you
13 that the logic of the position is the date of the claim form, which is what you've
14 just said and that is the logic we agree with. So if I fail on my primary point,
15 then it should be anything after that, bearing in mind that Mastercard was
16 opposing after that, is up for grabs. And it should take the September 2016
17 date.

18 **MR JUSTICE ROTH:** Is it of great significance, those two months?

19 **MR HARRIS:** I don't know, sir, but it's the question of principle that counts.

20 **MR JUSTICE ROTH:** Yes. Well, degree of argument. This is all about costs.

21 What we were seeking to do is to take the same approach, but it may be that I had
22 misremembered the approach that has been taken just now in Gutmann, even
23 though I've just finalised the order. Is it -- you say, Mr Hoskins, that in -- well,
24 Mr Harris will know better. In Gutmann, is it from the date of the claim form?

25 **MR HARRIS:** Yes, Mr Hoskins is right: it was from the date of the response in both
26 cases. And you've heard why I don't say that's wrong.

1 **MR JUSTICE ROTH:** Yes. No, it should be the same date, the date of the
2 response. And I doubt it's much practical difference.

3 So then we are dealing from effectively a year, but of course a very important year
4 because it had the hearing of the CPO application before the Tribunal. The
5 cost order we had previously made has obviously been set aside. It seems
6 clear that Mr Merricks should get the bulk of his costs of that period. We note
7 that Mastercard says 65 per cent, drawing on what happened in Gutmann,
8 I think, in particular. But in the case of Mr Merricks there was opposition,
9 I think, both on the funding side and of course on the eligibility.

10 We would have had to have a hearing in any event. And drawing on my memory,
11 which is quite clear about this, we would have wished to hear in this case the
12 economists in any event, because on paper we did not feel that there was
13 a credible method. We didn't quite understand it. But once it was explored
14 through questioning, we were persuaded that there was a credible method
15 that made sense.

16 So there would have been certain costs from Mr Merricks in any event. So there will
17 be some discount, and it's a question of what that should be.

18 So, Mr Harris, what do you say is the proportion you should recover?
19

20 **Further submissions on costs by MR HARRIS**

21 **MR HARRIS:** Well, sir, bearing in mind that quite a high proportion of the costs will
22 never be recoverable -- well, they are costs in the case, so they are not going
23 to be -- we say that should be taken into account in the exercise of
24 the Tribunal's discretion on the further discount. We have ended up the
25 winner.

26 We are going to have in a moment the separate argument about deceased persons

1 and interest, and what discount -- either discount or cross-order -- should be
2 made in respect of them. That's a separate argument. So we respectfully
3 contend that given that that's separate, and a lot of costs are only costs in the
4 case, it should be a 10 per cent deduction to reflect the fact that we would
5 have had to come in any event in order to persuade you on some matters.

6 **MR JUSTICE ROTH:** Yes.

7 So, Mr Hoskins, can you respond on that point.

8
9 **Submissions on costs by MR HOSKINS**

10 **MR HOSKINS:** Our submission is that 10 per cent is plainly inadequate for these
11 reasons.

12 Even in the absence of any opposition from Mastercard, the class representative
13 would have had to take the Tribunal in detail through its application to satisfy
14 the Tribunal that the relevant criteria were satisfied. In a case of this size and
15 complexity, that would inevitably, regardless of any opposition from
16 Mastercard, have included detailed consideration of such issues as
17 methodology, sir, as you've referred to, and also funding. Opposition, to
18 a certain extent, just puts a focus on certain issues that would have to be
19 dealt with in any event. But certainly methodology and funding would have
20 taken up a material amount of time before the Tribunal in any event,
21 regardless of Mastercard's position.

22 In our submission, it is relevant that this was the first large case, so the Tribunal was
23 going to be particularly careful in relation to methodology and the approach to
24 it; it was going to be particularly careful to go through the funding and to take
25 a position on that. That's not Mastercard's fault. Mastercard shouldn't be
26 penalised for that. So therefore, even if Mastercard hadn't been there, this

1 would have been a substantial hearing and the Tribunal would have to have
2 gone into a lot of detail.

3 The second factor I would ask you to take account of is this, which wasn't raised,
4 I believe, in Le Patourel or Gutmann, which is: regardless of the nature of
5 Mastercard's opposition, Mastercard would have had to incur certain costs in
6 any event itself. Because when a proposed defendant is served with a claim,
7 there are certain activities that have to take place even before you decide
8 what opposition points you are going to take, if any.

9 So, for example, any proposed defendant would have to look carefully at the
10 proposed methodology, at the funding, et cetera, just to familiarise oneself
11 with the claim, before one even gets to opposition. That's a factor that isn't
12 expressly taken account of in Le Patourel and Gutmann, and we simply say it
13 is a factor, therefore, the Tribunal can take into account when it considers
14 what the appropriate percentage is of the costs post-response.

15 We have suggested 65 per cent. If you're against me on that, certainly we say
16 10 per cent is far too low. I think something in the region of 65 to 75 per cent
17 would fairly represent what actually occurred and what would have occurred
18 in any event in this case.

19 **MR HARRIS:** Sir, can I give one short point of reply on this last point of Mr Hoskins?

20 **MR JUSTICE ROTH:** Yes.

21
22 **Submissions in reply by MR HARRIS**

23 **MR HARRIS:** Obviously we are a long way apart in terms of the percentages, but
24 you have heard us on that. But Mr Hoskins then says you should take into
25 account, in the exercise of your discretion, the fact that his client has to spend
26 some costs on other matters in any event.

1 Firstly, in my respectful submission, that's novel. One doesn't normally take that into
2 account. But if it were correct, whether generally or on the facts of this case,
3 then what's sauce for the goose is sauce for the gander. Because when we
4 attended the CPO hearing, a series of points that turned out to be wrong, at
5 considerable expense, were run by Mastercard against us, including most
6 notably authorisation and funding issues, together with the instruction of not
7 one but I think two costs specialist counsel, which was so egregious that the
8 Tribunal specifically disallowed them, and yet of course they generated
9 considerable costs on our behalf in respect of points that we won.

10 So if it's right to take into account those sorts of costs, then the costs that we've
11 incurred more than outweighed the costs that Mr Hoskins throws into the
12 balance.

13 **MR JUSTICE ROTH:** Yes. Can you remind me: how long was the 20 --

14 **MR HARRIS:** It was two and a half days. The last part of the second day and all of
15 the half of the third day, which I think ended up being a tiny bit more than that,
16 were specialist costs issues, upon which we won on all points. I accept there
17 were some amendment adjustments, but the wholesale opposition that was
18 taken was not accepted and Mr Merricks was authorised with some
19 amendments to the documents.

20 **MR JUSTICE ROTH:** Yes, thank you. We will withdraw for a moment.

21 **(4.22 pm)**

22 **(A short break)**

23 **(4.23 pm)**

24 **RULING(Extracted)**

25 **MR HARRIS:** Sir, that leaves just the issue of what to do on the costs of the remittal
26 period. As you've pointed out, we make a costs application, as does

1 Mr Hoskins. If I could set the scene --

2 **MR HOSKINS:** Sorry --

3 **MR JUSTICE ROTH:** I think Mr Hoskins has a point on the previous --

4 **MR HARRIS:** Oh, I beg your pardon.

5 **MR HOSKINS:** I thought I was getting ten minutes on my application on remittal.

6 **MR JUSTICE ROTH:** Yes, I think that's right. I think that's the second period and

7 Mr Hoskins to make his application. We can sit an extra 15 minutes.

8 Yes, Mr Hoskins.

9

10 **Further submissions on costs by MR HOSKINS**

11 **MR HOSKINS:** In relation to the remittal proceedings, first of all, you have the

12 statement in Gutmann at paragraph 47, which reflects the general approach

13 to costs:

14 "Moreover, when a party has been successful on a discrete and substantial matter in

15 the course of what will be lengthy proceedings, it is generally appropriate that

16 it should recover the costs involved."

17 That's just confirming that the Tribunal will tend to take an issues-based approach.

18 But we are actually in a stronger position on that in relation to the remittal hearing. If

19 I can take you back to your own remittal judgment, which is in D2 at tab 9.1,

20 page 380.

21 **MR JUSTICE ROTH:** What paragraph?

22 **MR HOSKINS:** Paragraph 8.

23 **MR JUSTICE ROTH:** Yes.

24 **MR HOSKINS:** There the Tribunal recorded that Mastercard did not oppose

25 certification and the only outstanding disputes were the deceased persons

26 issue and the compound interest issue.

1 That's what the remittal hearing was about: the deceased persons issue and the
2 compound interest issue. And the Tribunal found for Mastercard on both of
3 those issues.

4 The other issues in the hearing were minor. Mr Stocks' objection and the new
5 funding agreement took up very little time, and indeed Mastercard didn't
6 engage with those issues, we didn't put any opposition on those issues, save
7 to ask for an undertaking from the new funder, which again we were
8 successful on.

9 So actually, in terms of the remittal hearing, we were entirely successful on all of the
10 points we took, and those were the majority of the points at the hearing.
11 Therefore, it's on that basis that we say we should have our costs in relation
12 to the remittal, by which I mean all the costs incurred following the remittal of
13 the application to the Tribunal by the Supreme Court on 11 December 2020.

14 **MR JUSTICE ROTH:** Yes, can I ask you this: there would have had to be, even if
15 those two points had not arisen, a remittal hearing for the Tribunal to look at
16 the funding and indeed to consider the objection of Mr Stocks, though
17 possibly that could have been done in writing. So there have been some
18 costs of Mr Merricks. Would it not be appropriate for that proportion of
19 Mr Merricks' costs to be costs in the case?

20 **MR HOSKINS:** I think as a matter of principle and the funding, I understand the
21 argument. But my submission would be: it would have to be a vanishingly
22 small percentage, given that it just didn't take up any time.

23 **MR JUSTICE ROTH:** It didn't take up time at the hearing. But they did some work
24 on it, they obtained a new funding arrangement: all of that has costs.

25 **MR HOSKINS:** Sir, the only reason why they incurred those costs is because the
26 previous funder, for whatever reason, they weren't continuing with. Why

1 should Mastercard be paying their costs of a switch of funder?

2 **MR JUSTICE ROTH:** Well, whether it's reasonable would be something that one
3 could look at on assessment if Mr Merricks succeeds on the outcome of the
4 case as a whole. That's why I say it would be costs in the case. I don't know
5 why there was a change of funder; we have no idea. We're not going to
6 explore it now.

7 All I'm saying is that if there would be some work that would have to be done
8 following the remittal order of the Supreme Court in bringing the matter back
9 to the Tribunal, and if the funder withdrew for reasons wholly for which
10 Mr Merricks is not to blame, it's quite reasonable for him to seek substitute
11 funding and that is then a reasonable part of his costs of the case.

12 **MR HOSKINS:** Sir, I accept as a matter of principle what you're putting to me, and
13 you have my submission that the proportion should be vanishingly small.

14 **MR JUSTICE ROTH:** Yes, it will be a proportion of Mr Merricks' costs, but you say
15 a very small proportion, and you agree this should be costs in the case.

16 **MR HOSKINS:** Correct.

17 **MR JUSTICE ROTH:** Yes.

18 Right, Mr Harris.

19
20 **Further submissions on costs by MR HARRIS**

21 **MR HARRIS:** Sir, we see this rather differently, as you might expect.

22 Mr Hoskins says he should somehow be entitled to an order in his favour for the
23 remittal hearing even though we won the CPO hearing and the remittal
24 hearing was part of this ongoing hearing of getting a CPO, which we have
25 now succeeded on. So we say the lens through which to look at this is that
26 we sought a CPO and we have obtained it; and in the course of that, the

1 myriad of issues that have arisen during the course of what was ultimately
2 a successful application for us, upon which we are the winner, there have
3 been certain issues upon which they have succeeded.

4 Now, that is identical to what happened in the CPO original ruling on costs back in
5 February 2017. Can I just take you to that. That's to be found in the
6 authorities bundle at tab 6. You only need to have a look at paragraphs 21
7 and 22.

8 The submission was there made by us -- the boot was on the other foot, because
9 Mastercard had won after that hearing, and we said, "Well, hang on a minute.
10 There are some discrete and separate issues about authorisation, we won
11 those, Mastercard have lost those, so we want a costs order in our favour on
12 those". So it's an exact parallel, but the boot is on the other foot.

13 What the Tribunal held was, at 21:

14 "Since the authorisation of the Applicant was an entirely separate issue from the
15 question of certification of the claims ..."

16 And then the ruling was:

17 "... we consider it is appropriate to disallow a part of the Respondent's costs."

18 And that, with respect, is exactly what should happen here. We have been
19 unsuccessful on an entirely separate issue, namely compound interest, and
20 then ultimately on deceased persons, though I have one other remark to
21 make about deceased persons. And the approach of the Tribunal in this very
22 case, on the very topic of what should be the costs of the CPO, has been: no,
23 you can't have a cross-order in your favour, but what can happen is
24 a successful party has an amount disallowed.

25 Indeed, you went on to say, with your then colleagues:

26 "Moreover, we consider that the Applicant would be entitled to recover a part of his

1 costs of meeting the unsuccessful arguments raised against him on that
2 issue."

3 So that was when the boot was on the other foot.

4 "Rather than making cross-orders, the better approach is to reflect the overall
5 position in a single deduction from the respondent's overall costs."

6 That, we say, would be unfair and wrong in principle if a wholly different approach
7 were taken now, when the position is directly analogous, in the very same
8 case on the CPO costs.

9 Over the page, with respect, we say the same approach should be adopted, because
10 at 22 the Tribunal held that it should be done adopting a broad brush
11 approach. What you did do, with your colleagues, was to deduct some
12 particular amounts that had been felt to be unjustified and unreasonable,
13 namely specialist costs counsel. But after that, you didn't make a cross-order
14 and you did adopt a broad brush approach and you awarded the successful
15 party its costs, discounted by whatever were the relevant facts at that stage.

16 That's exactly what you should do here, with respect. Because as I said, we are the
17 overall winner, but what's happened is that at one particular hearing there
18 have been some issues about compound interest and some issues about
19 deceased persons where Mastercard was the winner on those discrete
20 issues, but in the context of being overall the loser. Therefore, you should
21 discount to reflect a reasonable amount that they were successful on those
22 issues.

23 The point I come back to on deceased persons is: it's not a fair characterisation for
24 Mr Hoskins to say that they were 100 per cent successful on deceased
25 persons as at that remittal hearing, when one looks at what has happened
26 today. We have had further argument about deceased persons, so it's been

1 an ongoing issue, and in fact --

2 **MR JUSTICE ROTH:** Isn't today's issue entirely different? I mean, today's issues --

3 we haven't dealt with the costs of today; we won't until we give a ruling. But

4 the issue then was about people who died before the claim form, so they were

5 a claim for dead people. It's a wholly different issue --

6 **MR HARRIS:** It was --

7 **MR JUSTICE ROTH:** -- and that's what we are concerned with the costs of. We are

8 not dealing with the costs of today's hearing.

9 **MR HARRIS:** Not quite so, in my respectful submission. There was an issue about

10 whether dead persons could form any part of collective proceedings at all.

11 And what ultimately happened was we succeeded in persuading the Tribunal

12 that they could, albeit with an amendment, and they could when the

13 amendment related to personal/authorised representatives, which is where we

14 reached at the end of today's hearing.

15 So I don't want to overstress or overstate the point, but it nevertheless was, "Oh, you

16 can't have any of these people because they're dead", and it turned out that

17 Mastercard was wrong on that. It turns out you can have them, provided you

18 have the right form of amendment and it's personal or authorised

19 representatives.

20 So all I'm saying is it's not quite as clear-cut on deceased persons as Mr Hoskins

21 would have it.

22 But the other point is the one that you put to him, sir, with respect. This is another

23 example. Just like we have to have today's hearing because there are certain

24 matters that the Tribunal has to be satisfied of, and you've already made the

25 point by reference to costs in the case prior to 30 November that my job is to

26 come and satisfy the Tribunal of certain matters, irrespective of what

1 Mastercard says, the same is true at that remittal hearing.

2 There had to be a hearing in any event. There had to be a hearing in any event
3 because we had to deal with Mr Stocks and his objection, and we did
4 successfully deal with Mr Stocks and his objection.

5 There had to be a hearing in any event at that stage because there were disputes
6 about the form of the litigation funding agreement, and that was successfully
7 dealt with by us. We have got, or are about to get, a CPO on the back of
8 an updated litigation funding agreement.

9 In addition, we had to have a remittal hearing for two more reasons. First of all, that
10 was the order of the Supreme Court, so it had to happen. And secondly,
11 because at that hearing I appreciate we then had to deal with deceased
12 persons and with litigation funding and with compound interest. But had those
13 been capable of being finally resolved on that day -- as it happens, they
14 weren't. But had they been, we would have also had to have the same
15 conversation that we've just had today about the notices and the form of the
16 CPO order and the domicile date and the length of the period to opt in and opt
17 out. All of that would have had to happen in any event.

18 So all I'm saying is the correct characterisation really is that that's a hearing that
19 would have happened in any event, entirely consistently with how you've
20 approached the other cost rulings from today. And in fact, it's true, we didn't
21 succeed on some of the main points that arose in that hearing, but that should
22 be approached in same way as it was done at the original CPO costs ruling.

23 Then finally, for the sake of good order, the fall-back position that was -- if I can
24 politely put it like that -- put to Mr Hoskins, which I think ultimately he didn't
25 disagree with, was that if I am wrong and he's right, should there nevertheless
26 not be at least a proportion of my clients' costs that should be costs in the

1 case? And Mr Hoskins eventually said: well, yes, but they would be tiny.

2 But we say that that wouldn't be wrong in principle for the principal reasons that I've
3 given, for the prime reasons that I have given. But in addition to that, there
4 were some of these costs -- it's not a fair assumption that these would be,
5 necessarily, particularly minor.

6 The example that was raised in argument was the litigation funding agreement.

7 What happened on that particular point was that we had said in the Court of
8 Appeal, when we won by the unanimous judgment of the Court of Appeal, you
9 should grant the CPO order, subject to deceased persons and compound
10 interest. So that would have gone off (inaudible). And what Mr Hoskins' client
11 said at the time was: no, no, you've changed funder, and that all now has to
12 be dealt with by the remittal Tribunal when it goes back for remittal. In other
13 words --

14 **MR HOSKINS:** We hadn't seen the funding agreement in the Court of Appeal, this is
15 all very misleading. We simply hadn't seen the new funding agreement.

16 **MR HARRIS:** Well, I'm not sure that it was misleading.

17 **MR JUSTICE ROTH:** I'm not sure that's terribly relevant to us at the moment
18 anyway.

19 **MR HARRIS:** Be that as it may, it was a live point that had to be dealt with, including
20 at the urging of Mastercard. And that just reinforces my point that this is a
21 hearing that would have had to take place in any event. Some matters we
22 were successful on and some important matters we weren't successful on.
23 The proper course is to discount. That is the proper order.

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

25 We've heard enough, Mr Hoskins. I think we can withdraw for a moment.

26 **(4.39 pm)**

1 (A short break)

2 (4.43 pm)

3 **RULING(Extracted)**

4 **MR HOSKINS:** Sir, can I just clarify one point on the order, I'm sorry.

5 **MR JUSTICE ROTH:** Yes.

6 **MR HOSKINS:** Which is, as I understand it the order is Mr Merricks is to pay
7 85 per cent of Mastercard's costs of the remittal, I use that shorthand in the
8 way you have described remittal. Then is it 15 per cent of the costs of the
9 remittal are in the case? Or is it 15 per cent of Mr Merricks' costs of the
10 remittal are in the case? I just wanted to clarify that.

11 **MR JUSTICE ROTH:** No, of the remittal Mr Merricks is to pay Mastercard's costs.

12 **MR HOSKINS:** Is to pay Mastercard's costs.

13 **MR JUSTICE ROTH:** In full. And as regards Mr Merricks' costs of that period,
14 15 per cent of his costs are costs in the case.

15 **MR HOSKINS:** Thank you, that's very helpful.

16 **MR JUSTICE ROTH:** Is there anything else? We hope to issue our ruling as quickly
17 as possible so that at long last the CPO can be finalised and the case will get
18 going.

19 **MR HARRIS:** Sir, just for the benefit of the transcript and because we are on video,
20 you did say, I think, that Mr Merricks' proportion of costs in the case of the
21 remittal hearing should be 5-0 per cent, not 1-5 per cent.

22 **MR JUSTICE ROTH:** No, 1-5 per cent.

23 **MR HARRIS:** 1-5, there we go. I wish I hadn't said that. Thank you very much.

24 **MR JUSTICE ROTH:** Thank you all.

25 That concludes this hearing. Have a good weekend.

26 **MR HARRIS:** Thank you.

1 | **(4.50 pm)**

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(The hearing was concluded)

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?