IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1339/7/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 30 November 2021

Before:
The Honourable Mrs Justice Falk
Dr William Bishop
Eamonn Doran
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Mark McLaren Class Representative Limited

Applicant/Proposed Class Representative

-v-

MOL (Europe Africa) Ltd and Others

Respondents/Proposed Defendants

A P P E A R AN C E S

Sarah Ford QC and Emma Mockford (On behalf of Mark McClaren Class Representative Limited)
Mark Hoskins QC and David Bailey (On behalf of MOL)
Marie Demetriou QC and Daniel Piccinin (On behalf of NYKK)
Josh Holmes QC and Michael Armitage (On behalf of WWL)
Tony Singla QC and Anneliese Blackwood (On behalf of Kawasaki Kisen Kaisha Ltd)

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Tuesday, 30 November 2021

(10.30 am)

THE CHAIRWOMAN: Good morning.

Submissions by MS DEMETRIOU (continued)

MS DEMETRIOU: Good morning, Madam, members of the Tribunal. I was showing the Tribunal yesterday afternoon by reference to the BMW price list, you will recall in the bundle, how it might well be that the RoRo cartel may have resulted in a higher delivery line item on an invoice and yet not resulted in a customer paying a higher price for their car. Of course, we say, in those circumstances, the customer has simply suffered no loss. The PCR says they have suffered loss because the delivery line item on the invoice is higher, no matter that the price of the car is the same. That is no doubt why they have actually framed their claim for damages by reference to the impact of the cartel on the delivery line item, the delivery charge, and not by reference to what consumers -- potential class members actually paid for their cars.

If we just look at that, please, in the amended claim. If we go to bundle {A/1/3}, paragraph 7, please, you can see there that:

"... the Proposed Collective Proceedings will

combine the claims of consumers and businesses who purchased new cars and light-medium weight commercial vehicles during the Relevant Period ... and were required to pay an unlawfully inflated delivery charge in respect of those vehicles because of the Proposed Defendant's unlawful ... conduct."

So that is their claim for damages. Their claim for damages is that loss has been suffered on the delivery charge. That is also no doubt why they felt constrained, and we saw paragraph 70 of their skeleton argument yesterday, where they simply say that there is no causal link between the cartel and the overall price that the retailer negotiates with a purchaser.

Madam, the reason that I am emphasising this point is that it is a hard-edged point of law between the parties because we say a customer has only suffered loss if they have paid more for their car than they would have done in the counterfactual. That is the only transaction the customer is engaged in. They are not purchasing shipping services; they are buying a car.

We say that a claim -- had an individual claim been commenced in the High Court, an individual claim that relied on an inflated line item in relation to a delivery charge, we say that would have been struck out because the thing that that claim would have been

claiming is not loss, it is not loss at all.

Now, the PCR says that the fact that the car list price may have been set lower in the real world than in the counterfactual -- and you will recall the point I was making yesterday that, if there is an overcharge, then, because of competition in the market, the manufacturer or the retailer may have said, "Well, we are not going to change the bottom line, the on-the-road price for the car", so they may have set the base list price slightly lower than they would have done in the counterfactual to arrive at the same overall price -- so they say -- the PCR says the fact that may have happened or the fact that the customer may have negotiated to the same round figure, the £22,000 point I was making yesterday -- they say those are not points that go to loss. They say they are countervailing benefits that are only relevant if they are causally connected to the cartel.

You will recall that Ms Ford yesterday relied on the *Fulton Shipping* case. We say that is a completely different type of case and I would like to turn it up briefly.

DR BISHOP: Can I just ask? Ms Ford was perhaps making quite a strong, as you say, legal point about causality and you are emphasising it here today. Are you now

saying that the case as pleaded -- let us suppose the evidence we came to -- after hearing more evidence, we came to the conclusion that a delivery charge of 600 typically did result in pass-on of, say, 300 and your point has some force, that some of it is passed on in other kinds of discounts, are you saying that their case as now pleaded, they could not recover anything because their case is only causal and 100%? Is that what you are saying?

MS DEMETRIOU: No, not quite, sir. We are saying that the case as pleaded and the methodology that they have put forward is incapable of investigating the point that you have just put to me, so it may be that --

DR BISHOP: Okay. The method is different. Okay. I just wondered if you were saying that they either have to succeed on this point, this causal point, or they fail entirely?

MS DEMETRIOU: Yes.

DR BISHOP: That is what you are saying?

MS DEMETRIOU: That is what we are saying. I misunderstood your question. That is my fault. We are saying that. So we are saying the way that they have pleaded their case, which is to say the loss comprises the inflation in the delivery charge which is on the invoice, so not all invoices, you will recall -- they say that is the

loss. We say that is just misconceived as a matter of law. That cannot amount to loss because, even if there is an inflation in the delivery line item, that is not what the consumers are buying. It is just unreal to say that the consumers are purchasing RoRo services.

Now, it may well be that what the manufacturers and the retailers are trying to do is that they are trying to pass on the RoRo charge, including any overcharge, and they are trying to do that through the delivery charge, but trying is not enough. They need to show -- they need to demonstrate that they have actually passed it on and they can only do that by examining the prices of cars.

The way that they have pleaded it, as I have just shown you, does not rely on -- they do not say "These consumers have suffered loss because they have paid more for their cars than they would have done in the counterfactual". They make a different case and one which we say is baseless in law. So I am agreeing with you, sir.

DR BISHOP: It was a question, not ...

MS DEMETRIOU: Agreeing with the premise of your question. I am not of course saying that you have reached any view. But I am agreeing with the premise of your question, to put it more accurately, which is that what

they are pleading is just misconceived as a matter of law. We say if an individual pleaded that in the High Court, the claim would be struck out. You have seen that that is why we have mounted our challenge both as a challenge to certification based on the implausibility of the methodology and as a strike-out, for that reason.

We say, for the purposes of my argument, it really comes to the same thing. It is the same point.

THE CHAIRWOMAN: Okay. There is a point of clarification here -- a lot of points here, but one is you have said that the PCR is saying that the fact either that the list price was lower or that the customer negotiates are countervailing benefits. The point in the skeleton that you took us to yesterday I think related to the customer negotiation.

As I see it, there are two quite separate points you are making. One is the extent of customer negotiation and to what extent that impacts on the delivery charge. Quite another point is whether the OEMs or national sales companies, probably, set their list prices in a way that effectively ensured that the OEM or NSC absorbed the excess delivery charge. They are not necessarily -- they do not necessarily result in the same answer legally. You have put them in the same

bucket and I am not sure that is necessarily the case. They are quite different things.

MS DEMETRIOU: Well, Madam, we do rely on both things --

THE CHAIRWOMAN: I realise you rely on both things, but what I am querying is whether the analysis is definitely the same.

MS DEMETRIOU: We say that it is the same, for this reason: we say that it is the same because ultimately those are both ways in the world, in the real world, in which, even if the PCR can show that the delivery charge line item on the invoice was inflated as compared to a counterfactual of no cartel, that the overall price of the car was the same. So they are both factual mechanisms through which the overall price could have been the same. But the conceptual, analytical point in both cases is that, if either of those two things eventuated, such that the list price -- such that the overall price paid by the consumer was the same in the real world as in the counterfactual, then the legal point is that there is no loss. No loss has been suffered, no pass-on has actually occurred. That is the legal point and it is common to both of the factual mechanisms through which this could have occurred.

It is correct that my learned friend, in her skeleton argument, only deals with the negotiation

point, but that is because they have slightly distorted our argument in then responding to it, so they have not fully confronted our argument in responding to it in their skeleton. So, from recollection, they do not deal at all with the first of the factual mechanisms that I have put.

But we do say, Madam, that they are different factual ways in which the same result could eventuate, which is namely that the line item is inflated because of the cartel, but the overall price -- there is no pass-on because the overall price is the same.

THE CHAIRWOMAN: What do you say that the expert evidence that has been adduced addresses? Not that we are getting into a mini-trial, but we cannot ignore the fact that there is some expert evidence.

MS DEMETRIOU: No, and that is really the deficiency. So the expert evidence is deficient because it only addresses the line item that relates to delivery charge so it does not at all propose to look at the prices actually paid for cars. That is why it is deficient, seriously deficient. That is why there is a hard-edged point between us.

Madam, if I may say so, this discussion has -- if I can put it this way -- illuminated the point between the two sides --

THE CHAIRWOMAN: Well, these are the critical points.

MS DEMETRIOU: These are the critical points. Really, what the PCR says is that these mechanisms that we are talking about, whereby the actual price could end up being the same -- so let us take negotiation. They say that that is a countervailing benefit and we are in -type territory. I just wanted to take you to *Fulton Shipping* to show you why it is a different type of case. It is in authorities {AUTH/20/1}, starting at page 1, please. If we could go to page 2 -- I think it is page 3. Sorry. I should have noted it. It is paragraph 1 so I am assuming we are on page 3, {AUTH/20/3}.

So paragraph 1, we can see that it is a claim for damages arising out of the repudiation of a charterparty by charterers of a cruise ship. We can see at paragraph 3, down the page, that there had been an oral agreement between the owners and the charterers to extend the charterparty for two years. What happened was that the charterers breached the agreement. You see there in that paragraph:

"The owners treated the charterers as in anticipatory repudiatory breach ... accepted the breach as terminating the charterparty."

Then the vessel was redelivered to the owners and

the owners sold the vessel for a healthy sum. We see that in paragraph 3.

If we look at paragraph 4 and actually go on to the next page, {AUTH/20/4} -- it is the latter part of paragraph 4 -- we see from that that if the charterparty had run its course, so if there had not been a repudiatory breach, and had the owners then sold the vessel two years later in 2009 rather than in 2007, they would have received much less money for the vessel because, of course, the financial crash had happened in the interim.

We see from paragraph 6 that what was at issue here -- so the charterers argued that the claim for damages, the owners' claim for damages, fell to be reduced to reflect the higher sale price which they in fact achieved because they sold the vessel two years earlier. So that was what was in dispute.

If we go to paragraph 29 of the judgment -- I will just get the page number. I am so sorry -- {AUTH/20/15}. Thank you very much. The EPE operator was ahead of me.

We can see here this is the conclusion of the Supreme Court. So:

"Viewed as a question of principle, most damages issue arise from the default Rules which the law devises

to give effect to the principle of compensation, while recognising that there may be special facts which show that the default Rules will not have that effect in particular cases. On the facts here the fall in value of the vessel was in my opinion irrelevant because the owners' interest in the capital value of the vessel had nothing to do with the interest injured by the charterers' repudiation of the charterparty."

Then what is said at 30 is that the relevant link that one is looking for, the court is looking for, is causation.

Then if we go down to paragraph 32, please, we see the conclusion that:

"That difference or loss was, in my opinion, not on the face of it caused by the repudiation of the charterparty."

So that is what is being examined. In this case, loss had been suffered as a result of an event, the event being the breach of the charterparty by the charterers, and the question was whether damages flowing -- the loss that had been caused, whether damages to compensate the owners for that loss fell to be reduced because of another event which was a separate transaction, namely the sale. The court held not because they were not causally linked.

Now, the PCR says in effect that, if class members paid the same for their cars as they would have done in the counterfactual, this is the type of analysis -- the type of analysis is the type of analysis that needs to take place. So the fact that, as we have put it, the OEM or the retailer priced the car lower in the real world than it would have done in the counterfactual or the fact that negotiations ended up at the same round figure, they say, needs to be characterised by the Tribunal as a benefit and there then needs to be an investigation as to whether that benefit is causally linked to the tort.

We say that is just completely wrong as a matter of analysis because the present case is very different from the *Fulton* type of case. There is only one event or transaction, the purchase of a car. Until that event has been compared with the counterfactual of a purchase of a car with no cartel, then loss cannot be established at all.

So it is not a question, we say, of determining whether some other benefit the purchaser has received is sufficiently causally linked as to offset the loss. You simply do not get to loss in the first place until you have looked at the event in question, which is the purchase of the car, the only event in question.

We say that the present case is no different to any other cost input to the car. This was a point, Madam, that you put to my learned friend yesterday. You saw the Commission guidance, saying that there might be a copper cartel and the copper cartel might result in an increase in the cost of wire harnesses and those might then be bought by car manufacturers and cars might be bought by consumers. What the Commission tells us is that you can only tell if consumers have a claim by looking at the prices they paid for their cars. It makes absolutely no difference, in our respectful submission, that some retailers, like BMW, as we saw, have a line item on the invoice labeled "Delivery charge" because, at the risk of sounding trite, money is fungible and it makes no difference to the contractual obligations or the economic position of either party to the transaction how the line items are described.

Now, of course, as we know and as the PCR accepts, other retailers do not have a delivery -- a separate delivery item on their invoices and we say that this highlights even further the wrong-headed nature of the PCR's methodology because they are proposing to construct a delivery charge line item in circumstances where the only price anyone ever wrote down on paper is the actual price paid by the consumer, the on-the-road

price for the car.

We say that in circumstances where the PCR is not claiming and indeed has disavowed any causal connection between the cartel and the price paid by consumers for their cars, we say that the difference between us is both hard-edged and profound. If we are right, the PCR's methodology cannot establish loss at all and their pleaded claim is simply wrong.

Now, it is instructive to go back to their skeleton argument, if we can, so we are in advocates bundle {AB/1/26}. If we could look at paragraphs 70 to 71 -- so I have already made the point about the first sentence. I said I was going to come back to the rest of the paragraph. So the remainder of the paragraph assumes that we are in territory and that the Tribunal will have to decide whether there is a causal connection between the so-called countervailing benefit and the tort. The remainder of this paragraph and paragraph 71 --

THE CHAIRWOMAN: Well, is that right? Does it assume ? There is still a question -- taking the discounting point, you have still got to compare the real world with the counterfactual and ask yourself whether the price -- let us take your argument as correct and say you are looking at the overall price, but you are still

comparing what that price would be in the real world and the counterfactual --

MS DEMETRIOU: Yes, you are.

THE CHAIRWOMAN: -- does Mr Robinson not take a number of -- make points, as said in the skeleton there, about whether purchasers would react to small price changes? Is that not still directly relevant?

MS DEMETRIOU: Madam, it depends on -- so what is being said, what Mr Robinson says -- and Ms Ford took you to this -- let us just have a quick look at it. Can I make the point on this and then I will come back to Mr Robinson?

THE CHAIRWOMAN: Yes.

MS DEMETRIOU: What is being said here -- in short, what is being said at paragraph 71 is, if the consumer negotiates on the delivery charge, then they say, well, there is no pass-on. What Mr Robinson says, relatedly, is that, well, if a consumer in the real world says "I want £500 off" and in the counterfactual world says "I want £500 off", then you can still demonstrate pass-on. But the point is that they do not have any evidence saying that that is how consumers inevitably negotiate and so --

THE CHAIRWOMAN: Well, no, he is giving expert evidence, is he not, about elasticity, which is relevant to that,

is it not, with the industry expert evidence?

MS DEMETRIOU: Madam, let us look at what he says and what Ms Ford relied on. So if we go to {B/110/32}. We will come back to the skeleton. So Ms Ford relied on paragraph 4.47, and what that says is:

"... to the extent that buyers negotiate to obtain a target amount of discount, an important point to make is that the negotiating characteristics of the parties, such as the purchaser's bargaining power, would be the same in the But-For and Actual scenarios. It is the difference between the attained discount amount in these two scenarios which is of relevance when one is seeking to ascertain what loss the end customer has suffered."

The point is that they say there -- that Mr Robinson says there "to the extent that buyers negotiate to obtain a target amount of discount", so that is looking at circumstances where buyers may say, "Well, we want to achieve a £500 discount", and they would have done the same -- the point being made is they would have done the same in the real world as they would have done in the counterfactual.

But we say that it is equally likely, perhaps more likely, that consumers negotiate with a purchase price in mind. So, going back to my BMW example yesterday, if the overcharge were £5 as a result of the RoRo cartel,

so that the £700 delivery charge item that you saw would have been £695 in the real world, so that has inflated by £5, it is at least equally likely that a consumer would say, "Well, I do not want the on-the-road price to be 22,950" or whatever it was, "I want the car for £22,000", and that they would have alighted on the same round number in both the real world and the counterfactual world.

What Mr Robinson is not saying and what Messrs Goss and Whitehorn do not say at all is consumers never negotiate with round figures in mind. Of course they cannot say that because we all know that they do. It is probably what some of us do. So there is no evidence from the industry experts --

THE CHAIRWOMAN: Well, hang on. We are not at a stage where all the evidence has been filed, are we? We are not making a decision on the evidence.

MS DEMETRIOU: Well, we are not at a stage when all of the evidence has been filed, but we are at the stage where the Tribunal has to assess the methodology to see if it is capable of determining loss. The difficulty is that there is no methodology before the Tribunal which is capable of distinguishing between those situations because they never look at actual prices. That is the fundamental issue. So, Madam, we are not --

THE CHAIRWOMAN: Sorry, I may be being slow here. Can a methodology not be combined with evidence addressing the sorts of points you are making? Why can it not be?

MS DEMETRIOU: Because that is not what they are putting forward. It is actually a very profound difference. We say that you can only look at these points if you look at actual car prices. You need to be able to do that --

THE CHAIRWOMAN: Yes, but you are entitled to say that at trial -- and you would no doubt do that -- and say that their approach and their expert evidence were just essentially that delivery charges do get passed on and do not generally get negotiated away. You would be entitled at trial to challenge that evidence as strongly as you would want to do.

MS DEMETRIOU: Madam, that really calls into question the gatekeeper role of the Tribunal because --

THE CHAIRWOMAN: Well, I agree. You may think that, but we also have to take account of the fact that the methodology that has been put forward is supported by expert evidence that you may disagree with but we cannot assess at this stage.

MS DEMETRIOU: Madam, that is correct, but we can only meet the case that is being put.

THE CHAIRWOMAN: Yes.

MS DEMETRIOU: So what is being put is not a case based on

the total prices of cars; it is a case which is that the loss comprises -- that is why I took you to paragraph 7 -- the loss comprises the inflated line item in the delivery charge. That is the case that is being put to us. We say that that case is misconceived and should be struck out and that we should not incur the cost of adducing expert evidence to say exactly the same thing.

Now, Madam, if they had appeared before the Tribunal saying, "Well, we do propose to look at the delivery charge, this is our methodology but we can see that there is a problem here because, for example, there may be negotiations that take place that arrive at the same round number, so we can see that we will need to look at the total price of cars and this is how we are going to do it", we would be in a different position. But they are disavowing that totally. They are saying there is no causal link between -- no causal link at all, they say at paragraph 70, between the price of cars and the tort. We say that is an open and shut case against them, in our submission, because they are disavowing the very thing which we say they need to prove. So it is not a question of saying, "Well, we can make those points at trial". The claim is bad at the outset, bad in a very fundamental way.

DR BISHOP: Suppose we were to have a trial -- we were to certify and it went to trial and the panel at trial decided that the bold claim -- let me call it that -- based on causality was not good in law but that, on the vast amount of evidence adduced at trial, it was likely that there had indeed been some effect, some pass-on in the final price to the consumer from the conduct that the Commission found to be illegal. Let us suppose it was -- of a £600 charge it was £200, let us say, that had been passed on. Now, you are saying that, because they have pleaded the case or have stated the case as concentrating on those initial invoices and passing on specifically of things from those invoices, because of that are you saying that the Tribunal could not find that the facts were different, there was some pass-on? Is that it?

MS DEMETRIOU: Yes, we are, because there is no claim before the Tribunal. There is no claim at all that is being advanced --

DR BISHOP: But just a moment. I mean, we are certifying here. The pleadings in the final trial presumably would be different or could be changed.

MS DEMETRIOU: They would have to amend -- sir, they would have to amend their claim.

DR BISHOP: Right, they would have to amend --

THE CHAIRWOMAN: But what you are doing is you are very much relying on a point in their skeleton. I mean, you would have to -- you need to make your point by reference to their pleaded case.

MS DEMETRIOU: Madam, it is in the pleading. I will get the reference in the reply -- sorry, that is the reply.

THE CHAIRWOMAN: I am sorry. I may be misreading where you -- okay. So can you take us to the right document?

MS DEMETRIOU: It is {A/17/29}, so it is in the reply.

THE CHAIRWOMAN: Oh, I misunderstood which paragraph 70.

MS DEMETRIOU: It is also paragraph 70 in the skeleton argument, confusingly, so I was taking you to the skeleton arguments and we were on the same page, but Mr Piccinin helpfully has shown me that it is also in the reply in their pleading.

But, Madam, I am not --

THE CHAIRWOMAN: Can you just give me a moment, please?

MS DEMETRIOU: Of course. (Pause)

THE CHAIRWOMAN: Okay.

MS DEMETRIOU: Madam, you can see that it is actually -- they have put it more vehemently in their reply than they have in their skeleton. This is really why we say that it is a fundamental point of law between the parties. It is exactly the kind of point of law that needs to be grappled with upfront because, if we are

right, then all of the expert evidence and so on is just hitting the wrong target. They have not pleaded a claim which is capable of establishing loss and that is why it is exactly the type of point that needs to be grappled with because it is a simple, narrow, hard-edged point of law. If we are right about it, this is a completely wrong-headed approach and money will be wasted going to trial and expert evidence will be targeting the wrong thing.

THE CHAIRWOMAN: It is not -- well, if their point in law were incorrect, I am not yet -- I do not yet fully understand that that necessarily has the consequence that the claim fails in its entirety. So I think that is what I -- because at this stage -- let us say we are applying, for the current purposes, a sort of summary judgment-type test --

MS DEMETRIOU: Yes.

THE CHAIRWOMAN: -- what you are trying to persuade us to conclude is that this claim is so flawed that it would not -- I think you are looking at it in terms of the summary judgment test, no real prospect of success --

MS DEMETRIOU: I am. That is exactly what I am saying, yes.

THE CHAIRWOMAN: -- because it does not engage with the fact that what is paid for is the car --

MS DEMETRIOU: Madam, yes.

THE CHAIRWOMAN: -- despite the fact that there is expert evidence before the court that delivery charges are passed on with a margin and without generally being negotiated.

MS DEMETRIOU: Madam, can I just pause there because that is really the nub of the issue between the parties. The expert evidence does not establish that there is pass-on. All it establishes -- they call it "pass-on". They say they are trying to recover their costs and they do it through the delivery charge and the delivery charge is not negotiated, but that is really the nub of the issue between the parties. We say that they may be trying to pass on the RoRo costs in this way but whether they have actually succeeded in doing so can only be determined by looking at the cost of the car itself.

THE CHAIRWOMAN: Yes. I mean, I understand what you are saying, that the expert evidence does not engage at all or appears not to engage with the list price point. It does engage, to some extent, with the other point that you made about the negotiation --

MS DEMETRIOU: Well, Madam, no, I do not --

THE CHAIRWOMAN: -- at the retailer end, the discount.

MS DEMETRIOU: I do not accept that, as you have just put it, because we say that it does not -- what it says is, well, this negotiation -- the fact of negotiation would

not matter if -- the words Mr Robinson uses are "to the extent that" --

THE CHAIRWOMAN: I am focusing on the industry expert evidence now.

MS DEMETRIOU: Madam, there is nothing in the industry expert evidence which deals with this point.

THE CHAIRWOMAN: I know there is nothing about list price but there is something about delivery charge --

MS DEMETRIOU: But, Madam, not with -- they do not grapple with the question -- what they say is that the delivery charge is rarely negotiated away, but that is not the point. This is the point that I was coming to, if I could take you back to the skeleton argument and show you it in this way, if I may. If we go back to the skeleton, advocates bundle {AB/1/26}. So what paragraph 71 says -- if we can go back a page, please, {AB/1/26}, if we look at the end of 70, they say:

"... Mr Robinson points out in his second report that in both the real world and counterfactual world the negotiating characteristics of the end customer and the retailer selling a new vehicle would be the same ..."

That is the paragraph that I took you to in his second report.

"There is no reason to think purchasers would react to small changes in the overall price of a vehicle ...

by changing their negotiating position.

"Accordingly, the only circumstances in which a purchaser might conceivably achieve a different discount in the factual vs counterfactual world is if they were intent on specifically removing the delivery charge, rather than on obtaining a target discount [by that they mean the £500] on the overall price of the vehicle. However, the evidence of both the industry experts and also Mr Dent (advanced by KK) suggests that this would be a very rare occurrence ..."

In other words, specifically negotiating the delivery charge.

"In those circumstances, it is entirely appropriate for the PCR to focus on the delivery charge as a reasonable measure of the loss caused by the Infringement ... as a whole."

Now, this is relying, in other words -- and this, Madam, to answer your point, is what the industry experts are dealing with -- they are dealing with the point that consumers rarely seek a discount specifically on the delivery charge. Now, I am accepting that for the purposes of this argument. We are not seeking to challenge any of the evidence of the industry experts for the purposes of my argument at all and we say that we can see that it may be very rare for consumers

specifically to negotiate away the delivery charge item on the invoice, if such an item exists.

The consumer is interested in the same thing as the retailer, which is the overall price, but it is important to think about the implications of the PCR's argument here because what it appears to be accepting in this paragraph is that if a customer did specifically obtain a discount on the delivery charge, there would not be pass-on. So they seem to be accepting that if there is evidence in the case that a customer, a member of the class, says, "Well, I do not want to pay the £700 delivery fee, please knock that off", then they accept that there would not be pass-on, but if they obtained exactly the same discount, not linked to the delivery charge, they say, "Ah, well that is a collateral benefit not causally connected to the cartel".

We say that cannot be right because, suppose you have a customer who says, "Well, I would like to pay £22,000 because I do not want to pay the £700 delivery charge", and the dealer agrees, and then another customer says, "I would like to pay £22,000 because that is all I am willing to pay", and the retailer agrees, the two situations are absolutely identical -- absolutely identical. Both purchasers have bought a car for 22,000 instead of the £22,695 that the retailer was

asking for and it makes no difference to anyone at all whether the £695 is knocked off the invoice -- knocked off the delivery charge or any other line item on the invoice.

So in both cases the price paid for the car is exactly the same as it would have been in the counterfactual and we say it is simply absurd to attribute a significant legal consequence, as the PCR does, to the precise form of words used in the negotiation.

So, Madam, in response to your question, yes, the industry experts do deal with negotiations to some extent, but they only deal with them to this extent. They are saying, "Well, we accept it is not pass-on if there is a specific negotiation that takes place in relation to the delivery charge item". But that is all we need to look at because we are not looking at the overall price of the car at all. That is why we say that the methodology is simply not capable of determining loss. They are not looking at the right thing.

DR BISHOP: May I ask another question? If we were to certify and if the claimants were then to make a simple amendment to their pleadings to say something like, "In the alternative, if the above arguments are not

accepted, then we plead that there was a pass-on of some of the inflated delivery charge to the end consumer" -- so, in other words, to add that as an alternative to the argument that you say they are trying to make, would that not solve the problem?

MS DEMETRIOU: Sir, no, because they are not saying there is necessarily 100% pass-on. That is not their case, to be fair to them. They are putting forward a methodology for determining the level of pass-on, but they are only doing it through the delivery charges, by looking at the delivery charges. So if, sir, they were to say, "Well, we see the force of what the respondents are saying here and it may be that actually, even if there was an inflation in the delivery line item that relates -- the line item of the invoice that relates to delivery charge, there was not actually pass-on when you look at the overall prices of the car and so there may be some lesser form of pass-on or less pass-on than we are thinking", if they apply to amend -- they would have to apply to amend -- they would need to present the Tribunal with a methodology capable of establishing that alternative case. The problem is there is no alternative pleading and there is no alternative methodology.

They have had their chance. This is the hearing

where the Tribunal has to decide whether what they have put forward as a matter of law and what they have put forward by way of evidence is sufficient. Now, if you refuse to certify, they could go away and say, "All right, certification has been refused", and they could try to rectify things. I do not know and we would probably have plenty to say about that --

THE CHAIRWOMAN: Well, I am not sure. Apart from anything else, you would say it is outside the limitation period, but okay.

MS DEMETRIOU: That is why we say, in response to Professor Bishop, that it is not good enough to say, "Well, we can try and rectify this afterwards". This is their shot and they have not pleaded such an alternative case and they certainly have not presented that methodology.

THE CHAIRWOMAN: Yes. No one has -- one thing that is striking about this case is that neither side -- well, you are challenging their proposed methodology, as you are certainly entitled to do. They have not said to us, "We have chosen this methodology because others are inappropriate or impractical or anything like that". To what extent, if at all, is it relevant or potentially relevant to us to think about what alternative methodologies might involve? I think I am posing the

question knowing how you are going to answer and I can see a head shaking there, but I wanted to get this point out.

MS DEMETRIOU: No, no, Madam, it is a fair question and I think you have correctly anticipated. We say that really it is not for the Tribunal to speculate. You can see -- if you look at the Commission --

THE CHAIRWOMAN: Let us put cards on the table. It is perfectly obvious to anyone that, as soon as you start doing the exercise that you say should have been done, it becomes an even more complicated -- by far a greater complication than it would be if you were to accept the claimant's methodology. There can be no question about that; far more variables. You are not just looking at delivery charges. You are looking at, for example, you know, post-cartel and during cartel, different car models. All sorts of things have changed beyond the delivery charge and, as to whether it is legally relevant to have regard to this, that is another point. But there is a large elephant that would suggest that what you effectively are implicitly saying is the only way to do it is in fact a much harder thing to do.

MS DEMETRIOU: Madam, in a way I do not shy away from that. If you look at the Commission -- we do not need to turn it up now -- but the Commission guidelines that both

Ms Ford and I took you to, they put forward typical methods -- we are not saying there is only one method to show pass-on and indirect purchaser claims, but they put forward the key methods that are generally used.

The first of them is the comparator method, which basically looks at total prices during the cartel period and compares them to prices in a clean period, usually after the cartel. If you are carrying out a regression to analyse pass-on in those circumstances, then one is obviously having to construct a model which controls for other factors which might be responsible for change. That is not an unusual thing. That happens a lot. Regression analyses are very common in competition damages claims.

If one thinks about the *Merricks* claim, for example, where the methodology, it was common ground, was plausible so there was not any debate about the plausibility of the methodology, it was just whether data were available, the methodology there is not to try and construct some interchange fee. That is an indirect purchaser case. It is to look at the prices of goods and services across the economy over a 16-year period in all of these different sectors. So these claims are not necessarily easy claims. *Merricks* is a paradigm of a difficult claim. That is why Mastercard argued that

the data would not be available to apply that methodology.

There just are some claims, Madam -- again we do not shirk away from this -- where the consumer, the end consumer, is just so far down the supply chain that there may not have been any loss suffered. That is why it is very important to get the methodology right, to see whether in fact loss was suffered that far down the chain. So we are not saying that there is only one way of doing it but we are having to confront the way of doing it which has been presented by the PCR and we say that it is fundamentally flawed for the reasons that I have given.

We also do not say -- so Ms Ford said yesterday -- she said that they have two broad answers to our points on methodology. The first answer is that we have disregarded the qualitative evidence and the second answer, she said, is that we are engaging in a factual dispute. It is very important to emphasise that, for the purposes of my argument, neither of those criticisms is well-founded. We do not disregard the qualitative evidence from Messrs Goss and Whitehorn. We have accepted it at face value for the purposes of our argument. So we accept for these purposes that the cartel may have resulted in an inflated delivery charge

item on the invoice paid by consumers. Our point is that that is not loss.

We are not saying, Madam -- just to come back to the question that you put to me, we are not saying either that qualitative evidence is incapable of establishing pass-on, so let us say that the industry experts had come to the Tribunal and had sought to address the point that we say is the key point by way of qualitative evidence, they could have said --

THE CHAIRWOMAN: Which is the overall price.

MS DEMETRIOU: Yes. They could have said, "Right, so we have got our invoice" -- we are going to look at the inflated delivery charge -- "but we have got evidence to show that actually retailers would never have charged a lower list price in the real world and negotiations engaged in by consumers would never have ended up in the same place in the real world as the counterfactual world", but there is none of that there. In those circumstances, had they provided evidence like that, then the task of the Tribunal would have been a rather different one. It would have been to assess whether that evidence was plausible or likely or realistic, but they simply have not adduced evidence of that type.

So our fundamental point is that the evidence that they have relied on from the industry experts and from

Mr Robinson just simply does not go far enough. It does not establish loss. It is directed. It just does not target the right thing.

DR BISHOP: Ms Demetriou, you have mentioned these econometric studies and it is what I used to do professionally. Here the prospects are rather poor, are they not? We are talking about something like one-tenth of a 1% price increase in one of the costs of the many costs of a car. Trying to see that signal amidst the huge noise of model changes and all kinds of other changes is -- I mean, even in physics where you can control everything, sometimes, you know, that would be a tough signal to see, but in economic studies, where the data are so much poorer and so much more lumpy, the prospects are not very good. It might succeed but it would be enormously expensive.

Now, evidently, the people seeking certification here did not think that that would likely be very successful, I suppose, or at least that is a possibility they thought that. Whatever, they want to prove their case in a different way.

Now, as you know, a Tribunal trying this case is instructed by the Supreme Court, in the circumstances where all the evidence is not very determinative -- the Tribunal is instructed to wield a broad axe. Now,

are you saying no Tribunal is ever -- where it is difficult here, they must plead a method that they think would be useless, I suppose, in order to get to the stage at which the Tribunal could look at all the evidence and wield that broad axe. Your argument is no broad axe because they have not proposed to do something?

MS DEMETRIOU: No. With respect, that is not my argument. So the broad axe, which of course is an important finding in *Merricks* in the Supreme Court -- the broad axe relates to the availability of data. No one is saying that the methodology is -- there is a broad axe methodology. The methodology has to be plausible, plausible to establish the loss.

THE CHAIRWOMAN: Hang on a minute. It is one thing to say that *Merricks* in the Supreme Court concerned the data rather than the methodology; it is another thing to say that all those comments in the Supreme Court about the way these cases should be approached only related to the data rather than the methodology. There are some important statements of principle. I would need some persuading that, for example, the broad axe concept is limited only in the way that you suggest.

MS DEMETRIOU: Madam, Mr Singla is going to come to this in more detail, but can I give you my headline answer? Of

course there are points of principle in the Supreme Court which relate to the legislation generally so I am not seeking to persuade you otherwise. But it is important that in *Merricks* it was common ground that the methodology was plausible and that the issue was whether there was sufficient data -- the availability of data to apply the methodology. That is why, Madam, I took you at the outset to the *Merricks* remittal, where what the Tribunal did was chopped out £2.2 billion worth of damages claim, the compound interest claim, because the methodology was not plausible.

So it is true that --

THE CHAIRWOMAN: Yes, I am well aware of that.

MS DEMETRIOU: But, Madam, that is really important for our argument because one does not look at *Merricks* and say, "Oh, well, anything goes", and Ms Ford came close to that yesterday. She said, "Well, if you can show some nominal loss, access to justice means it all goes through", but that is very much not what the Supreme Court was saying. As I say, Mr Singla will deal with that in more detail.

Just to return to Professor Bishop's question to me, it may be, Professor, and I am not going to take -- I would be very foolish if I were to take issue with what you have said about economics and the

reasonableness of carrying out a regression in these sorts of circumstances. We are not saying that a regression is the only way forward. That is why I said that there may be qualitative evidence which is directed to the overall price that would be useful and the Commission guidelines put forward other alternative methods of looking at pass-through if a comparator method is not available. It may be that Mr Piccinin can show you that when he makes his submissions. I am not sure if he is going to do that. But, anyway, it is there on the face of the guidelines. So we are not saying -- it is no part of our argument to say a regression is the only way forward -- I hope I have made that clear -- but what we do say is that this is not the way forward because it is looking at the wrong thing.

So, Madam, I think you have probably heard enough from me. It is a hard-edged point, as I say, and it is one which we do -- I think it is important to say as well that it is common ground that the Tribunal grapples with this point. So obviously the PCR say we are wrong and they say it is this countervailing benefit and that is the analysis, but nowhere have they said, "Oh, well, if we are wrong on this point, our claim should go forward because the methodology is nonetheless

plausible". So I think it is common ground that the Tribunal should grapple with it. So we say, if we are right, then the claim falls to be struck out or certification refused.

THE CHAIRWOMAN: Okay. Well, we may need to hear from the claimant in reply about what they say is the position were your legal point on *Fulton* to be accepted.

MS DEMETRIOU: Madam, yes. I accept that. There is nothing in their skeleton argument which purports to argue. So they grapple with the point in substance but they do not say anywhere, as I have said, "Well, if we are wrong on all of this and the respondents are right, nonetheless it should be certified".

THE CHAIRWOMAN: You said earlier, well, if they turned up with qualitative evidence that, for example, people just did not negotiate in the way that you speculated they would or that OEMs did not in fact set list prices in the way that you are suggesting they might, in other words reducing the list price to allow for the inflated delivery charge, then that would potentially support this methodology.

MS DEMETRIOU: Well, we say that would be looking at the right thing. Now, there would be a separate question as to whether that evidence were sufficient or were actually realistic, but --

THE CHAIRWOMAN: Yes, but that is a paradigm point for trial, is it not?

MS DEMETRIOU: Madam, the point is that this point has been live from the outset. We raised it in our response and nowhere in their reply pleading have they grappled with it.

THE CHAIRWOMAN: I see. So you say --

MS DEMETRIOU: They just have not done it. So the point has been there from the outset. This is not a point we have dreamt up. It is a point we put front and foremost in our response. It is our first point and nowhere in the reply do they grapple with it. They just double-down and say that there is no causative link between the tort and the price of cars.

THE CHAIRWOMAN: But even if you are right on that, that does not mean that we should not grapple with it.

MS DEMETRIOU: Well, we say you plainly should, in our respectful submission, grapple with it.

THE CHAIRWOMAN: Yes, but what I mean is not only grapple with it in terms of perhaps if you -- let us say we were to accept your point, does it necessarily follow that the claim fails?

MS DEMETRIOU: We say it does necessarily follow, Madam, with respect, because there is simply no evidence or no methodology dealing -- that is capable of establishing

loss before the Tribunal.

THE CHAIRWOMAN: Distinguising methodology from evidence -- just going back to what I said, if there were evidence that addressed the points you made about setting list prices and the way negotiations occur, then that might enable the methodology to survive. But you say that is not open -- I think you are saying that is not open to us.

MS DEMETRIOU: No, I do say that, Madam, because that is not the claim that has been advanced and so -- the claim that has been advanced is a claim that loss is established by looking at the delivery charge. We say that is wrong. You saw that at paragraph 7.

So what would be required would be for them to apply to amend their claim -- so, yes, we do say, with respect, it is not open for the Tribunal to say "Well, you could do your claim this way and you could go away and find some more evidence" because we have been, from the outset, facing a very clear pleaded claim. We clearly put our objection to it. In reply they say we are wrong -- well, that is a point for the Tribunal to decide -- but they have not said, if we are right, "We would like to amend our claim and run an alternative point and here is the evidence to support it". So, yes, with respect, we say it is not open to the Tribunal to

seek to find a good claim for the PCR if we are right on this point.

Madam, unless there are further questions, I will hand over to Mr Piccinin.

It may be a good time to have the transcriber's break if that suits everyone.

THE CHAIRWOMAN: Yes. Can we reconvene just after 25 to?

MS DEMETRIOU: Thank you.

(11.28 am)

(A short break)

(11.42 am)

Submissions by MR PICCININ

MR PICCININ: Madam Chairwoman, members of the Tribunal, I am going to address you today on what we say is another flaw in the PCR's methodology, and that flaw is that the PCR is wrong to seek to measure changes over time during the claim period.

This aspect of the methodology, we say, is flawed irrespective of whether you also accept the submissions that were made by Ms Demetriou this morning and yesterday.

THE CHAIRWOMAN: Sorry, for some reason this has signed out which requires me to remember my password. (Pause).

It will not let me sign in, I am afraid. It is refusing to accept my correct password.

MR PICCININ: That is frustrating.

THE CHAIRWOMAN: Can someone contact the technical team, please, to see if I have been logged out at your end because it should not have logged out like this.

(Pause)

Okay, I have got in now.

Thank you. Apologies.

MR PICCININ: No, not at all. So the point that I am on is that we say the PCR is wrong to measure changes over time and call that "pass-on". As I was saying, that is true that that methodology is flawed whether or not you agree with us that we should be looking at the total price rather than at the delivery charge. So in my submissions this morning I am going to focus on the hypothesis, just to keep things simple, that the PCR is right to be looking at delivery charges because, if you are with us that we need to be looking at actual prices, then it does not matter very much whether you agree with me as well as with Ms Demetriou because, as we say, they have not done that.

Just to foreshadow why I say it is wrong to look at changes over time, there are actually two interrelated problems with that approach. The first is that, even taking the industry experts' evidence at face value, accepting what they say about the price-setting process,

Mr Robinson's methodology is not capable of establishing that delivery charges would have been lower in the absence of the cartel; in other words, his methodology cannot even establish factual or But-For causation. I am going to use those two terms interchangeably. That is the first reason.

The second reason: so even if I am wrong about that and the PCR could prove factual or But-For causation, so they could prove that delivery charges would have been lower in the counterfactual, the way they get there, the PCR's reasoning in getting there, is positively inconsistent with there being legal or proximate causation. I am going to use those two terms interchangeably as well.

So I will explain those two points in turn, but before I do that, I want to show you how the PCR's methodology actually works. I want to do that by looking at some actual numbers from Mr Robinson's report or the appendices to it. I am not doing that because I say that those are precisely the numbers that you are going to see in an expert report at trial. I take Ms Ford's point that that is not the case. These are preliminary numbers that have been put together in a particular way which will cover them.

The reason I want to do it is that Mr Robinson's

methodology is going to have to work with whatever data he finds and these data are as good as any for my purposes to illustrate how it does or does not work. It is sometimes easier, at least for me, to tell a realistic story about how a methodology works or does not work by looking at actual dates and actual numbers from the real world, just -- it can shed some light.

The second reason why I want to do that, though, is that these numbers we are going to look at are not entirely made up. So, as I will explain, they already contain within them some very interesting facts about what was happening in the real world during the claim period or at least Mr Robinson's view or his data's view of what was happening in the real world. I have not looked at the underlying data and we are not accepting today that anything he says is true for the purpose of down the road, but we are just going to take what he has said about it and what he has presented for the Tribunal at face value.

If we could start then by going to {B/9/7}. If we can just blow it up and focus on the top left for the moment -- blow it up a bit further. I think you need to use the zoom function rather than just scrolling in to make the text a bit clearer. We can probably make do if you cannot do that, but if you can go to the very top

left in any event.

THE CHAIRWOMAN: Yes, is it possible to make the ...

MR PICCININ: You cannot. Okay. Can we go to the top left?

THE CHAIRWOMAN: I am afraid on this screen I really cannot see anything. They are clear on some of the other screens.

MR PICCININ: The precise numbers do not measure too much and I can tell you what the relevant ones are, but it is useful to see it.

THE CHAIRWOMAN: Okay.

MR PICCININ: Can we go to the very top left of the page, please? Yes, that is where we want to be.

So what we have in this appendix is some preliminary estimates of overcharge per vehicle for private customers and then we have got business customers over on the next page. The reason I wanted to go to the top of the page here is you have the assumptions that were driving those calculations. You can see there is a bold line that says "Total Shipping Cost per vehicle" in US dollars and it says US $375. There is also, just underneath that, something that says "Overcharge Percentage (%)", and then it says "15%". So those are the assumptions that are driving the numbers that you see in this table.

I do not want to run around through the expert

report, but I will just for your note tell you where they come from. The US $375 figure is a figure that Mr Robinson has taken as an illustrative figure for shipping costs from data that he has seen from another piece of litigation. He tells us that for your reference at footnote 143 of his first report, which, again, without going there, is {B/5/67}. That then cross-refers to what he says is figure 5 of appendix 6 to his report, but it is actually figure 7. Figure 7 is at {B/11/20}. But anyway what it is, is a figure that Mr Robinson takes to be representative as an average of what it costs to ship a car over the deep seas to the UK. That is why he is using it.

The other assumption is the 15% overcharge, and that is just in the middle of the range of assumptions that he makes at this stage. He looks at 10, 15 and 20. He tells us, again without going there, at 7.15 of his first report, which is at {B/5/68}, that he looked at those overcharges, 10, 15 and 20, because they are consistent with the empirical studies that he has seen on the kinds of overcharges that are generally caused by cartels, so they are not like -- they are not said to be plucked out of thin air. These are meant to be realistic. So if you multiply 15% by US $375, you get an overcharge of approximately US $56 for every vehicle

that is actually shipped over the deep seas.

Then I just need to explain how this spreadsheet works. Basically what Mr Robinson has done is he has managed to obtain some data that show which models of car are shipped over the deep seas and which ones are made in Europe and so do not need to use RoRo services. Without moving on the screen yet, just looking at the table that you can see already on the screen, that table contains a series of brands down the left-hand column and then a series of numbers per year. Those numbers per year are just US $56 multiplied by the number of deep sea cars, if I can call them that, cars that have sailed over the deep seas to the UK. That gives a total overcharge per brand.

Now if we could shift over to the right-hand side of the screen, please, there is a table to the right of this one. We do not need to zoom in just now. That will probably do for our purposes. This right-hand side table, what he has done is he has taken the total overcharge and has divided -- for each brand and each year, and he has divided that by the total number of cars of each brand that are sold in the UK irrespective of where they come from.

THE CHAIRWOMAN: That is the averaging across the brand, is it not?

MR PICCININ: These are each brand -- what he is doing is averaging across all of the vehicles in that brand, irrespective of whether they were manufactured in the UK or --

THE CHAIRWOMAN: Yes, but that reflects the way the delivery charge is priced.

MR PICCININ: Madam Chairwoman, I am not making any criticism of any of this, actually. I am just explaining how it works.

THE CHAIRWOMAN: Okay.

MR PICCININ: It is not a criticism.

As you say, the reason he has done that is because Messrs Goss and Whitehorn tell us that that is what happens in the real world. The NSCs average those total costs over the brands.

So if you had a brand that shipped all of their cars over the deep seas, then this right-hand table would be showing US $56 per vehicle in each year -- and he has just converted that into GBP for us -- whereas, if you had a brand that manufactures almost all of their cars in Europe, it will have an overcharge per vehicle that is much, much lower, and you can probably see, just looking at this, that some of them are single digit GBP and some of them are even less than £1 per vehicle. I think Renault is one of them, but it does not really

matter for now.

Now, all of that is just overcharge. To get to pass-on, what we need to do is look at what happened to delivery charges, Mr Robinson tells us. He has not yet managed to find delivery charges for all of these brands. He has only managed to find delivery charges -- I should not say "managed". He has only tried, I think, to find delivery charges for four of them. But he tells us that he chose which brands to look at on the basis that the brands that he was looking at have some of the largest losses by brand, and that is footnote 131 of his first report, which is at {B/5/56}. So I am not being unfair on him by looking at the examples that he has given us. They are his examples, not mine, and he has chosen them because he thinks that they are important ones for this claim.

I am only going to go through one of them because I only need to illustrate the kind of problems that come up and it is one of the ones that he has picked that has the most data and it is also the first one, which is Mercedes. Now, Mercedes is roughly in the middle of the page and I do not know if we can zoom in a little bit more on the centre of the page, the right-hand side, but I have the numbers anyway so I can just tell you what they are. It is a line item that begins with 7.02 and

then it is 3.86 and then it is 3.47 and then it is 4.4, then 3.77, then 2.26, then 1.63, and I am not very interested in it after that for reasons that will become clear. After that it goes back up to £3, then £1 something, then £1.56 in the end.

Those are all pretty small numbers and also they are trending downwards. Do you remember I said at the start the first one in 2006 was £7 and then, by the time you get to 2012, it is £1.63. In fact, other than that first year, they are always less than a fiver. Now, that must be -- why is it? That must be because almost all Mercedes vehicles are made in Europe and, moreover, it is falling --

THE CHAIRWOMAN: So an increasing proportion?

MR PICCININ: An increasing proportion. That was my next point, yes. So it is a small number because almost all of them are made in Europe and it is a falling number because an increasing proportion are being made in Europe. That is exactly right.

Just pausing there, this is what I meant earlier about the data already telling us something interesting about the real world. The fact that almost all Mercedes cars were made in Europe and that the share that were made in Europe was rising over time is not a fact that is going to change between now and trial, when we get

better data, but as this spreadsheet shows, it explains why shipping costs for Mercedes were likely to be falling over the claim period and for anyone else that is in a similar position to Mercedes because, whatever was going on in the cartel, if Mercedes was shipping four times as many vehicles in 2006 as in 2012, then it seems pretty likely that the shipping costs divided by total number of vehicles sold would be lower in 2012 than in 2006. I do not really care whether it is £7 down to £1.63 or it is £12 down to, you know, £3. Whatever it is, it is going to be roughly that sort of order.

So we can be pretty confident that falling shipping costs per vehicle is something that we are going to be having to be grappling with at trial. The methodology needs to be able to deal with it. This is not just hypothetical.

Now, as I say, all of this is overcharge, overcharge per Mercedes vehicle, and I have no quarrel with any of it, but to see what Mr Robinson would say about pass-on, we need to go to another appendix, which is appendix 8, and we find that at {B/13/2}. Here what we have are the delivery charges and other on-the-road additions for the four brands that Mr Robinson has chosen to illustrate for the Tribunal at this hearing. Mercedes is the first

on the left.

Again, although there are some missing rows, actually we can be pretty sure that quite a lot of this is not going to change because the delivery charge is 500 in 2005 and 2006 and 2008 and 2010, so we can be pretty sure that the delivery charge is not changing in the period 2005 to 2010. We do not know what happened in 2011. It is possible that it was 515 in 2011 rather than 2012. We do not know. But the first piece of evidence of any price increase is in 2012, which of course is the last year of the cartel.

So using Mr Robinson's methodology, if these were the data he had, with these gaps in the data which he might still have at trial, he would say that Mercedes have absorbed 100% of any overcharge that there was in the first six years of the claim period; no pass-on at all.

Now, by the time Mercedes increased its delivery charge in 2012, the overcharge on the numbers we have just been looking at was £1.63, and so I accept again of course maybe it is £2.50 instead of £1.63, but it is something on that sort of order. But the increase in price that Mercedes made in 2012 -- and I feel dirty saying "price". It is a line item in an invoice, of course -- but the increase in the delivery line item in

2012 was £15.

Again, just pausing there, that basic point, that the increase in the delivery charge is much larger than the overcharge is not going to change at trial either. It is an inevitable consequence really of the fact that almost all Mercedes cars are manufactured in Europe. Even if the overcharge was much bigger than 15%, you could not conceivably get anywhere near £15 if shipping costs are in the low hundreds of dollars, like he tells us, and if Mercedes makes almost all of its cars in Europe -- almost all of its cars that are sold in the UK.

So on these data, Mr Robinson's methodology would say that, of the £15 increase in 2012, £1.63 is passed on of the RoRo overcharge, which is 100% pass-on in that year, and the rest of the £15 increase in the delivery charge is something else.

THE CHAIRWOMAN: Is it just the overcharge for that year?

MR PICCININ: Yes, it is the overcharge at that point in time because they are not incurring in that year -- when they do their bottom-up cost methodology in 2012 -- I will go through a story like this in a minute -- they look at what their costs are in that year and what they are expected to be in the next year. But let us just take that year to make it easy. They are not trying to

recover in that year costs that they are not incurring -- that, you know, they incurred in the distant past when their profit margins were healthy.

So that is what his methodology would find. He looks at the overcharge in that year and he looks at the delivery charge increase in that year and he takes the smaller of those two numbers. That is what Ms Ford was telling us yesterday, and she is right. That is how the methodology works.

So why does the PCR say that £1.63 of a £15 delivery charge increase in 2012, the last year of the cartel, was caused by the cartel? The answer is in the peculiar theory of harm that the PCR has adopted and put forward in this case. They do not say, like people making a pass-on argument usually say, that delivery charges in each period reflect the costs that are incurred in that period. Instead what they do is they tie their passing-on argument to particular increases in the delivery charge that were made in particular decisions by particular people in particular years. That is how the methodology works. The reason they do that is because of the equally peculiar price-setting process that Ms Ford explained yesterday.

The basic idea is that every year or every however often, someone in the accounts team runs the numbers and

calculates what profit margin they earn on this line item of the invoice. Then, when they are done with that calculation, if they find that the profit margin is too small, then they increase the delivery charge so that it is back up to the fixed margin that they like, and if they run the numbers and find that the profit margin is high, like it is miles above where it is supposed to be, then they do nothing. They just pocket the extra as additional profit.

We have all used different terminology to describe that methodology. I just want to explain what they are and then just pick one because it does not really matter. Mr Robinson calls it "costs-plus". It is not costs-plus, though, because in a costs-plus methodology, if your costs fall, your price falls. Ms Ford calls it "margin maintenance". It is not that either because, if you are maintaining your margin, then your margin should not change, but it does in this because, as we have seen, when your costs fall, your margin increases and you leave it. I think what Ms Ford really means is that the margin never falls below this hard floor which they always make sure that they are earning more than.

I call it "costs-plus with a ratchet" because, if the costs go up, you increase the prices and then there is a ratchet there and you leave them there even if your

costs later fall. Mr Singla calls it "asymmetric costs-plus" for similarly obvious reasons.

So if that is the way that NSC set their prices, according to a rigid costs-plus mechanism with a ratchet, then the PCR can explain to us how it was that the Mercedes price increase in 2012 was caused by the cartel on these numbers. What they would say to us is, "Look, shipping costs for Mercedes were falling over time because it was making more and more of its cars in Europe", but the effect of the cartel was just to make those shipping costs fall by a few pounds less per vehicle in the real world than in the counterfactual. Mercedes made no changes to its delivery charges in the period 2006 to 2011, say, or 2010 and that could only be -- and this relates to the point that you were putting to me before, Madam Chairwoman -- that could only be, on this theory, because in that period Mercedes' profit margin was fine. It was above the minimum threshold, notwithstanding whatever overcharges were sitting there during that period.

Then, in 2012, the PCR tell us in their story, costs increased for totally unrelated reasons. We know it is for reasons that had nothing to do with the cartel because shipping costs were falling. So in the real world Mercedes' margin on delivery services became too

low because of these other increases in cost and they had to increase the delivery charge by £15 to cover those unrelated increased costs. That constitutes pass-on, the PCR tells us, because in the counterfactual in which shipping costs would have fallen by £1.63 more than in the real world, Mercedes would only need to have increased its delivery charge by £13.37 to restore its profit margin. That is what it would have done.

THE CHAIRWOMAN: Yes. That is the way their theory works.

MR PICCININ: That is the way their theory works, exactly. So say they will prove that theory at trial with the evidence of Messrs Goss and Whitehorn.

Now, there are two problems with that story and the first one is the one I said at the start about factual causation, and the problem is that that is not what Messrs Goss and Whitehorn say. It just is not actually. They do not say that the delivery price increases follow a rigid costs-plus mechanism with a ratchet, and when we look at what they do say, you will see that it involves a substantial amount of judgment and it is perfectly possible actually, once you think it through, that an increase in the delivery charge would have been the same in the presence of a RoRo overcharge as it would have been in the counterfactual.

The key piece of evidence on this is one that

Ms Ford took you to yesterday, to be fair to her. It is paragraph 3.10 of Messrs Goss' and Whitehorn's first report, which is at {B/1/19}. So this is where they tell us how NSCs generally set delivery charges. Of course we know from their second report that the word "generally" means "almost always", like essentially in every case.

Now, points (a) to (d) are, to be fair, consistent with what the PCR needs the position to be. (a) to (d) look like a costs-plus sort of methodology. Then we get to point (e), where they benchmark delivery charges, their own ones, against the charges of equivalent brands and consider making an adjustment. Then we have (f), where they add VAT -- fair enough -- and then round up to the nearest £5 or £10.

Now, those last two points are not a rigid costs-plus methodology with a ratchet or without a ratchet. They are reasons why the delivery charge might increase beyond costs plus the margin and they are an exercise of judgment. If we just go on to page 21, {B/1/21}, we can see a little bit more detail about how they say it works in the paragraph at the bottom, 3.23. They say:

"NSCs will continually assess their delivery charges against the published delivery charges of their

competitors. Where an NSC's input costs do not increase but its competitors increase their delivery charges, an NSC will often increase its delivery charge in line with its competitors, sharing the increased profit between the NSC and the dealer network. In these circumstances, an NSC may elect not to adjust its delivery charges in an attempt to gain a competitive advantage."

So, in other words, often they will, sometimes they will not.

"This will be a commercial decision and will depend on the particular NSC's position in the market and overall profitability."

All of which makes sense.

Let us go back to Mercedes and think about the implications of that. If we can just go back to {B/13/2}, what I want to do is just tell you a different story, which is different from the PCR's story but it is consistent with the same data and it does not involve pass-on and it is also consistent with the evidence that we have just seen from Messrs Goss and Whitehorn.

So cast your minds back to 2012. That is where we are. Adam from the accounts team at Mercedes is thinking about what to do with his delivery charges. He puts together a table like this and he thinks about it

and he says, "Gosh, we have not made any changes in the past seven years. What are we going to do now?", and then he goes through exactly the process that Messrs Goss and Whitehorn describe. He starts by running the numbers on costs -- that is (a) to (d) -- then dividing by the vehicles and then adding the sacred fixed margin that must never change and is immutable. He does all of that and at the end of that he gets to £507.50; right? Now, we know then that he has to round that to the nearest 5 or 10, so that is going to be £505 or £510, he has got to choose. I think they say he goes up, so that is £510.

Then he does the competitive benchmarking thing and, as I say, he makes up a table just like Mr Robinson did and he starts to look at it. He says to himself, "Gosh, BMW have increased their delivery charges by £45 over the past few years while I have been sitting down here in accounts at Mercedes doing nothing, and look at Volkswagen, they have increased their delivery charge by more than £50 since 2008". Then he says to himself, "I remember the days when Volkswagen used to sell their cars with delivery charges that were lower than ours, but now look at it, now look, they are selling cars that have delivery charges that are higher than ours. What is that about?"

So then he say, "Look maybe -- rather than rounding down to 505 or up to 510, maybe we should squeeze a bit more out and go to 515 -- why not? -- see what happens, and if that goes well, even though we have done a really good job in my team here in accounts of controlling our costs so we do not have the costs inflation that everyone else has, maybe we can squeeze a bit more out next year or the year after that". Again, we can glance down at the table and see what happened.

It is not an unrealistic story and it is consistent with the evidence that Messrs Goss and Whitehorn have given us about how the process works. If that is what he did, if that is what his process was, then there is no reason at all to think that Mercedes' delivery charges would have been any different in the counterfactual without the cartel. Ms Ford is right that he looked at cost and she is right that he always tries to cover Mercedes' costs. The PCR may also be right that he always succeeded and that the delivery charge line item is always more than the cost by at least the sacred margin, but he does not do that using some kind of rigid costs-plus mechanism with a ratchet. That is not what he does. Instead, as Messrs Goss and Whitehorn actually teach us, he makes a judgment call in light of the competitive conditions and he will round up

or down and then opportunistically try and take a bit more depending on the circumstances.

If those are the data or if the data are anything like that, then whether the Mercedes' shipping costs were lower in 2012 by £1.63 or £2.58 or £3.17 might not have made any difference. Even just rounding to the nearest £5 we are still taken to the same place. Then, when he does the competitive benchmarking, there is no reason at all to think that the nice round number that he alights upon is going to be different just because the costs-plus bit arrived at a different place.

This is the basic issue on my first point. It is that just looking at the way the delivery charges changed over time during the claim period and just looking at the evidence of Messrs Goss and Whitehorn, we do not know and we have no way of knowing whether those changes were caused by the cartel or not.

Meditating on what Messrs Goss and Whitehorn have said alongside a table of delivery charges, just staring at them and another one that has got the overcharge written in it, is not going to tell you whether the true story is the one that the PCR would tell you or the one that I have just told you a moment ago.

Now, I have told you this story with an example where the shipping costs were falling over time and

where the shipping costs were small. That is just the first one that popped up when I looked at the data that Mr Robinson has given us. But-For the avoidance of doubt, exactly the same story applies for a brand where the shipping costs were rising and were substantially larger. There is still going to be rounding and there is still going to be competitive benchmarking. So you cannot assume that if the overcharge was, say, £33, and a delivery charge increase was £40 or £60 or whatever -- say it was £40 -- you cannot assume that in the counterfactual the delivery charge increase would be just £7. Maybe it would have been a £20 overcharge or a £25. It is just impossible to say if all you are doing is staring at a table of delivery charges.

That is the first problem and it is fatal. This methodology cannot establish factual or But-For causation. It just cannot.

The second problem --

THE CHAIRWOMAN: What could? You are saying it is absolutely fatal that there is provision for rounding and benchmarking.

MR PICCININ: Yes.

Madam Chairwoman, I am going to come at the end to the point that Ms Demetriou foreshadowed, which is: how do you do this properly? The reason they have run into

these very unusual problems is they have done something that I have never seen done in a competition case in -- what is it? -- 11 years of practice. Looking at changes over time is not the way you try and find out what happened in the counterfactual and to get there they need the facts to be these extreme rigid facts, which they just are not, even on their own evidence. So this methodology is not how to do it.

I am going to come back at the end to ways in which they could have done it but I think we all know why they have not done it in those ways and it is because -- the truth is that this is one of those cases where the people who have bought cars are just so far down the supply chain that they did not suffer any loss, they did not suffer any measurable loss -- that is what we think.

But ultimately that is an imponderable and it does not matter why the PCR has done it this way. They could have done it this way --

DR BISHOP: This raises an important point. A car typically contains, I am told, I read, something like 30,000 parts and in addition to the 30,000 parts -- sometimes much more, sometimes much less -- there are hundreds or perhaps thousands of services, from cleaning the factory to reprogramming the paint spray routines to... and we are dealing with one of those services here, shipping

costs to final consumer.

Now it is, in general, almost impossible for most of those inputs, those 30,000/40,000 inputs -- impossible to draw a line from a cartelisation or any other increase of one of them to the final consumer, yet we do know that car companies are profitable. They go on year after year. Consumers pay large prices. Even though we cannot draw a line from any of the 30,000-plus to the consumer, causation is still there. We may not be able to -- we may not be able to see its lineaments in great detail, but it is perfectly clear there is causation, at least to the great bulk of it. There might be the occasional one now and then that is not -- you know, there is no effect, although I do not know how one would know that either.

What point are you making? Are you saying that the class representative here has got to be able to show causation at each stage of the chain down to the final consumer? I mean, that is a remarkable claim. I mean, it would be a licence to say -- if that were to become the law, it would be a licence to potential cartelists everywhere, "Oh, go ahead and form your cartel. As long as it is a long chain down to the consumer, you will never have to pay".

MR PICCININ: That last point is not right actually.

DR BISHOP: Okay, then explain why.

MR PICCININ: Because the way it works, if there is no pass-on down to the people at the bottom of the chain, that is not saying there is no loss. It is just saying that the loss resides somewhere else, but higher up. It is notable, actually, that there are OEMs and NSCs that are suing these very defendants and they all say that they did not pass on the cost.

Now, the defendants, to be fair, at least in some of the cases, have pleaded that they did and they then have to have disclosure and expert evidence and see what happened and how, but it is not right that the defendants are left off the hook. It is just about where the loss, in law anyway, resides. Legally, the position is that a claimant has to prove that they suffered loss on the balance of probabilities.

The quantification of it, you can use a broad axe, that is right, and there are lots of different methodologies. It does not have to be a regression analysis. There may be in some cases other ways you can do it. But, equally, there will be cases where drawing that line is just not possible, and indeed it is notable that -- of course the PCR is not purporting to represent the people who are at the very bottom of the chain; right? They are saying that there was no passing-on by

the PCMs at the next stage down. So if someone then sold the car or if some business incurred those costs and then charged higher prices for their own services, their position is going to be that all of that is too remote.

So at some point we do say that, look, you cannot show an effect and so we just stop there. It does not mean the defendants are off the hook at all; it means that the loss resides somewhere else. It may not be the OEMs either, it could be the retailers, but these are the things that need to be explored in a trial. But, to get that far, you need to have a plausible methodology. So the point I have just been making is that this methodology, which does something I have never seen anyone try to do in a case like this at all, ever, just by measuring changes in prices during the claim period and not comparing it to anything else --

THE CHAIRWOMAN: Well, that is not quite the characterisation; it is you start off with the overcharge and you take the lower of the two --

MR PICCININ: That is right. You take the lower of the two, but --

THE CHAIRWOMAN: -- which might be seen -- might be seen -- as the claimants doing their best to ensure that they are not overclaiming.

MR PICCININ: No. Their claim would be patently ridiculous, even more so, if they did not do that; if they tried to say that the £15 price increase that we were just looking at, for a company that is incurring RoRo costs that are a fraction of that, is all pass-on. That just does not make any sense at all.

So they need the both of them -- yes, how could the pass-on be an order of magnitude higher than the overcharge is the point that has just been put to me, and that is obviously right. So Mr Robinson needs to have both limbs of it to have anything at all, but, even then, he is only looking at a change from one moment to another in the claim period and taking part of that change. He is not comparing what happened in the claim period to costs or to what happened in some other period. He does not propose to get any data on costs. So he just says, "We do not need to and the reason we do not need to is because we have this rigid costs-plus mechanism with a ratchet".

They are right that you cannot do this method. It does not measure loss at all, it does not measure even the impact on the delivery charge at all, unless they have that rigid costs-plus mechanism. That is why you do not see it in other cases because in the real world things do not look like that -- even in this industry,

according to Messrs Goss and Whitehorn. So that is the first problem.

The second problem is different. It is a problem of legal causation or proximate causation. This is the point that you made yesterday, Madam Chairwoman, when we were looking at scenarios 2 and 3. In a nutshell, the problem is this: suppose for the moment that we accept that what I have just been saying is wrong and the PCR's evidence and methodology could establish that, But-For the cartel, delivery charges would have been lower -- in the absence of the cartel -- even then their claim is hopeless, we say, because on the reasoning that underpins their methodology, it is actually inconsistent with there being proximate causation. That is because, as I have said, what is unusual about this case is that their methodology ties their claim for damages to particular price increases that happened in the real world, at least some of which were proximately caused by completely unrelated cost pressures that had nothing to do with the cartel. That is not a problem that normally comes up in a passing-on argument because you do not normally tie your case to particular price increases that happened at particular times. So could we just have a look at that together again, picking up just scenario 3, which is at {B/5/51}.

I apologise in advance, Professor Bishop. This one is not an economic point at all. This one is just a legal point, so it is what it is.

So scenario 3, you can see period 1, we start by assuming that the actual and counterfactual are exactly the same. Then over the page, at the top, {B/5/52}, you have got period 2. He says that the actual world stays the same but we assume that shipping costs decrease in the counterfactual -- that is the cartel overcharge right there, that £25 decrease -- but there is no difference between the factual and counterfactual price, the delivery charge, to reflect this. Instead what happens is that the profit margins increase in the counterfactual. Another way of expressing that is to say that the overcharge is absorbed in the real world. That is what they have chosen to do.

Now, in period 3, other costs that have nothing to do with shipping increase by £10. Then, in period 4, which is the next budgeting period, the NSC increases the price in the real world by £10 to reinflate its margin to cover that increase in other costs. The PCR says that that £10 price increase to cover those other costs is pass-through of some of the cartel overcharge in shipping costs that was composed way back in period 2. Going back to Mercedes again for a moment,

that might be five years ago, it might be six years ago. Given that this cartel is alleged to have run since 1997, according to them, it could have been decades ago. We just do not know. At any rate, even just looking at the period from 2006, it could be half a decade ago.

We say that is just not proximate causation. The claim for damages in this scenario is based entirely on the decision that was made by the NSC in period 4 to raise its delivery charge by £10 and that delivery charge increase by £10 was made to reinflate the margins that had been deflated by a £10 increase in completely unrelated costs.

THE CHAIRWOMAN: But the -- maybe this is just restating it the other way -- that increase certainly would not have occurred on this scenario without --

MR PICCININ: That is right. So putting --

THE CHAIRWOMAN: So this is your point, that But-For causation is not enough --

MR PICCININ: Quite.

THE CHAIRWOMAN: -- but --

MR PICCININ: Can I just -- sorry, go on.

THE CHAIRWOMAN: It is not necessarily enough, but that does not mean it is not very important.

MR PICCININ: I accept that absolutely. But what the Tribunal would have to ask itself -- and we can do it

with this scenario -- is: what was the proximate or effective cause of the price increase that we have seen here? As you have just said, it is not enough to say that the cartel was a But-For cause. I accept in this scenario, in the way it has been constructed, it is. But if you want to measure your loss pinning it to that decision to increase prices, then you have got this problem which you do not have in a normal case of indirect purchasers, and again -- so, that, we say, is fatal to the claim in this sort of position.

THE CHAIRWOMAN: Okay, yes. I am not -- I am struggling with that a bit as to -- because you are talking about the immediate trigger and you are saying effectively that breaks the chain of causation.

MR PICCININ: That is another way of putting the same point, yes, because --

THE CHAIRWOMAN: That is not always the case --

MR PICCININ: It is not always the case.

THE CHAIRWOMAN: -- that the immediate trigger will necessarily break the chain of causation.

MR PICCININ: I accept that is right too, but we have to look at it this way: you have the £25 overcharge sitting there in period 2, it is not like it has not been noticed or anything because Messrs Goss and Whitehorn tell us that Adam in accounts is constantly running the

numbers, you know, every year or whatever it is, and is looking at it. He has noticed it. He knows that the shipping costs are what they are and then what has he done about it? Has he absorbed it? Has he increased the prices? He has made a decision in each year as to what the delivery charge is going to be and he has decided not to change it.

THE CHAIRWOMAN: Hang on. Well, when you say "absorbed", we have to be quite careful about the scenario we are talking about.

MR PICCININ: Yes.

THE CHAIRWOMAN: Are we not talking about the scenario where the shipping costs have not fallen?

MR PICCININ: That is right.

THE CHAIRWOMAN: So Adam does not know that there is a -- he does not know that there is a -- we have got to be quite careful about this.

MR PICCININ: Yes.

THE CHAIRWOMAN: He does not know that there has been -- he does not know about the cartel. He does not know that in the counterfactual the shipping costs would have fallen.

MR PICCININ: No. In fact it is not relevant to him what would happen in the counterfactual.

THE CHAIRWOMAN: It is not relevant to him, but it is still

the case that, in this case, the price increase -- subject to your other points and I understand your other points --

MR PICCININ: Yes.

THE CHAIRWOMAN: -- the price increase in scenario 4 --

MR PICCININ: 3.

THE CHAIRWOMAN: -- in period 4 -- I am sorry -- is what it is for reasons related to the overcharge, on this theory.

MR PICCININ: Allow me to put it this way then. It is true that -- if the shipping costs had been lower because of the absence of an overcharge, then that price increase would not have happened, that is true. It is also true that if any other cost involved in delivery, like the much larger ones that had nothing to do with shipping, had been lower, this price increase would not have been --

THE CHAIRWOMAN: But that does not necessarily get you home.

MR PICCININ: No, I know it does not. All I am illustrating is that every element of the cost in period 4 is a But-For cause of the price increase, but the law tells us that we also need to select or make a judgment call as to whether it is a proximate cause or the effective cause. My point is, in this scenario, if this overcharge has been hanging around, you know, for five

years and then something happens, something radical happens like you got a big increase in some other cost item, and you respond to that other cost item by increasing your cost, then you just cannot say that the cartel is the effective cause of --

THE CHAIRWOMAN: But then you are describing -- are you not describing a scenario where in any situation where the effect of the cartel is to maintain the price --

MR PICCININ: No. No.

THE CHAIRWOMAN: -- you cannot capture this pass-on --

MR PICCININ: No, this --

THE CHAIRWOMAN: -- or you are just saying this is the wrong way of doing it?

MR PICCININ: No, neither really. This argument would not fly at all in a normal case involving falling costs and I will explain why. So, in a normal case, the way in which a pass-on argument works is you say -- you put forward fact evidence or industry expert evidence, saying that, "This is a highly competitive market and, because it is highly competitive, then prices in any given period reflect the costs that are incurred in that period. They go up and down as the costs go up and down through a competitive process", and that is how you say that pass-on occurs; not through any particular decision that anyone made to change the prices on any day.

Prices may not have changed at all. Prices could be constant but constantly reflecting the costs that are being incurred in that period.

The way you measure pass-on is in one of two ways. The most common way is with regression analysis that compares the relationship between price and cost and other factors in the claim period to the relationship between price and cost and other factors in a clean period without the cartel, and you show that prices were systematically higher in the claim period after controlling for everything else that was different and --

THE CHAIRWOMAN: So given that your submissions are focusing on the delivery charge, for the reasons you gave earlier, you are saying that regression analysis would look at delivery charges in clean periods versus cartel periods?

MR PICCININ: Again I can hazard a guess as to why they do not want to do that because, if we go back to appendix 8, what we see is the delivery charge increases after the claim period are quite a lot bigger than the delivery charge increases during the claim period, so those facts do not look very good for the PCR. I can well understand why they do not want to look at them -- like much bigger.

THE CHAIRWOMAN: Okay, you say one -- I interrupted you. You said --

MR PICCININ: That is right. That is one way to do it. The other way to do it, which is not as good and is not always acceptable but I think that the Commission tells us it can be done in some cases -- perhaps we should just look at that. If we can go to authorities bundle {AUTH/37/28} and if we could just make it larger. So you can see 5.2, "Other methods"?

THE CHAIRWOMAN: Yes.

MR PICCININ: So this is just after the Commission has finished telling us all about the comparator method, which is usually a regression analysis, which is what we have just been talking about. So now we have got "Other methods". Paragraph 120 tells us that the comparator-based approaches are usually preferable, if you can do them. That is for the sort of obvious reasons, that they corroborate the fact evidence and they show you that prices were systematically different between the cartel period and the clean period where the only difference that you have not controlled for, you hope, is the cartel.

But the Commission acknowledges that sometimes that is difficult or disproportionate because it might be hard to get enough data on the relevant factors that

differ between the cartel period and the clean period. I should say I do not think it can be said that we have got a proportionality problem in this case, given that the claim is said to be worth, you know, 150 million on one of their scenarios, so we are not talking about some small thing that it is not worth going out and buying some data.

Then, in this section, what the Commission does is it goes on and tells us about a different approach, which is the passing-on rate approach. Paragraph 121 tells us how it works. What it says is that, rather than looking specifically at the effect of the cartel on prices paid by the claimant, what we do is we look at how changes in the direct purchaser's costs affected the direct purchaser's prices generally.

You can see there that there is a cross-reference back to the copper cartel that Ms Demetriou was telling you about earlier, that if you could show that a 10-euro increase in the cost of copper generally leads to an increase of 5 euros in the price of wire harnesses, then we say that the pass-on rate is 50%. So then, the argument goes, if the overcharge on copper was actually 2 euros, then we would say that 1 euro of that was passed on. That is the argument.

Now, that is not as good as the comparator method

because, even if wire harness manufacturers generally pass on the costs of copper, they might not have passed on the cartel overcharge for a host of different reasons, maybe because it was too small or maybe because some of them were incurring it and others were not and they had to compete. So there were lots of reasons why they might not and you would need some other evidence to help you. But at least this type of methodology is providing at least some empirical evidence that increased costs cause increased prices and the particular cost items that you are talking about.

We should just also look over the page at 124, {AUTH/37/29}. So the Commission says:

"In most cases the infringement at issue concerns the cost of an input which constitutes just one component of the purchaser's marginal cost. If the input affected by the infringement constitutes only a very small fraction of the marginal cost, even a significant increase in the cost of that input may hardly be detected in the purchaser's price data, even if it is passed on in full. Although an alternative approach may be to estimate the passing-on rate based on changes in costs of more significant inputs [so, for example, here that would be not the shipping costs but something else, like inland freight or something that is

more significant] and not just the cost of the affected less significant input, such an approach comes at the price of an assumption that may go too far, namely that the marginal cost increases are being passed on at an identical rate irrespective of the source for the cost increase. Moreover, if a comparator-based method, i.e. actual price based estimation, finds no statistically significant passing-on this can be considered as evidence supporting the hypothesis that no passing-on actually happened. In other words, the finding that there was no passing-on on the basis of the comparator-based method is neither a valid nor a sufficient argument, as such, to adopt a passing-on [approach]."

So that is another way in which things in principle can be done. What should they have done in this case? What would you expect? I should say, again, as a starting point, as Ms Demetriou did, that it is a perfectly acceptable answer in a case like this to say that it is just not possible to show that consumers this far down the supply chain suffered any loss. That is a perfectly acceptable answer and it does not involve letting the defendants off the hook. It just means that someone else suffered the whole of the loss higher up the chain.

There always is going to come a point where the indirect purchaser is just too distant from the infringement and the overcharge is just too small a fraction and so you are not going to be showing any effect one way or the other. That is actually the way the law is supposed to work. The other point, of course, is, as we have just seen, there are lots of different ways that you can do it. There is no one right way which is the only true way in a particular case.

But with that in mind, what could they have done? They could in principle have gone to get actual car price data or delivery charge data, either from retailers or from class members, and they could then have got cost data from -- I should just pause there on retailers. Of course, Mr Goss tells us that he is the chairman of the fifth-largest network of retailers in the country, with something like 155 different dealers and 24 brands, so maybe he could have provided us with some data.

They could then have got costs data from OEMs and NSCs as well, for example, the ones that must have had the data ready on a plate because they are suing the defendants on this very cartel, and then --

THE CHAIRWOMAN: So you are saying they should take it from

that litigation?

MR PICCININ: That is right. They could seek a third party disclosure order. They could just ask, but, failing that, they could a seek a third party disclosure order, and when you come to assess for proportionality, you have to bear in mind that of course it is sitting there on a plate. Then I would expect to see a regression analysis of some sort. If using the comparator method, you would want to see they are controlling for other factors.

DR BISHOP: A regression analysis of one-tenth of 1% of the price, the data are bound to be rather aggregated at that kind of -- I mean, really, it is not very realistic, is it?

MR PICCININ: That is fine and, of course, the inability to do that, as the Commission has just told us, pointed towards the legal conclusion that we just say, "Sorry, these people do not have a claim".

DR BISHOP: Well, your whole presentation has been based on the assumption that pass-on -- lack of pass-on is frequent. But really, normally, everything is passed on, is it not? I mean, the only source of revenue for a dealer is the sums of money he gets from his customers. He passes that back to the people, the OEM who sold him the car, they pass back money to the people

who have supplied them with this and that. Pass-on is not a rare or odd thing. It is a normal thing.

MR PICCININ: Professor Bishop, I can understand why you say that as an economist. That is a view that one frequently hears and, as a defendant's lawyer, one is frequently thrilled to hear from expert economists. But when we look at what happens in the cases, that is not the way lawyers look at it and the *Sainsbury's* case is a good example of that. A highly competitive market, a common cost that is being incurred by every single competitor in that market and this Tribunal found that there was absolutely zero pass-on, a big fat zero, and that was it. So that is just -- that may be the way that economists are used to thinking about it in terms of the models that you build of competition, but that is not the way the courts analyse it.

DR BISHOP: There is much more one could say, but I will stop.

MR PICCININ: That is fair enough.

Again, just to conclude, we say that this is a fundamental problem with the methodology, the proximate causation problem is, because their methodology builds into it a mechanism which is going to attribute to the cartel things that are actually proximately caused by something else at all. The

methodology just does not discriminate between them.

Again these are fundamental flaws, they are logical flaws, they are legal flaws. They are not disputes of fact; they are not really disputes of economics either. If either Ms Demetriou or I are right about anything that we have said, any of these points, then there is no methodology in front of you for establishing loss at all and it follows a fortiori that there is no plausible methodology and so in those circumstances it is common ground that this claim cannot be certified.

Unless I can help the Tribunal any further?

THE CHAIRWOMAN: Thank you.

Submissions by MR SINGLA

MR SINGLA: Madam, members of the Tribunal, as you know, I appear on behalf of the fourth proposed respondent to this application, which is being referred to as "KK" or "K Line" in the documents.

As you will have seen from our written response in the skeleton argument, we oppose this CPO application principally on the basis that the central issue in this case is the upstream pass-on question. We say the proposed expert methodology does not satisfy the *Pro-Sys* test, and if we are right about that, we say that the commonality requirement in the statute is not satisfied and we also say that is relevant to the suitability

requirement.

Now, in terms of why we say the methodology is fundamentally flawed, we entirely agree with the points made by Ms Demetriou and Mr Piccinin, which are also made in our written materials, and we gratefully adopt their submissions and I will not seek to duplicate.

But we, "K" Line, make an additional point as to why the *Pro-Sys* test is not satisfied. What I propose to do is divide my submissions into four parts. In the first and second parts I will deal with methodology, so in the first part I will address you on the relevant legal principles.

We respectfully submit there is a confusion running throughout the PCR's submissions, both in writing and indeed continued in Ms Ford's submissions orally yesterday. In particular they conflate, we say, the strike-out summary judgment test on the one hand and the *Pro-Sys* test on the other. We submit the distinction is important in the context of the present case, where the PCR's main response to the objections which the respondents raise is to say that they raise triable issues and cannot be determined at this stage.

We say that that is wrong. Ms Demetriou and Mr Piccinin's points in fact proceed on the footing that the industry evidence is correct, so it is wrong for

that reason, but it is also wrong in relation to the additional criticism that I will make, because we say this is a Pro-Sys-type challenge, not a summary judgment point, and we submit that Pro-Sys does require the Tribunal to scrutinise the evidence adduced by the PCR at the certification stage.

My second part of my submissions will be to address you on the substance, so the additional reason why we say the expert methodology fails the Pro-Sys test and, in a nutshell, we say that the proposed methodology of Mr Robinson is entirely premised upon the factual assertions made by the industry witnesses -- and that is obviously common ground and we have heard that -- but we say what this means is that the methodology being put forward could only work at trial if all of the relevant factual assertions made by Messrs Goss and Whitehorn are proven.

We submit that, even on a superficial analysis of the facts, which is entirely permissible and appropriate at the certification stage without this becoming a mini-trial -- we say it can be seen that it is highly unlikely that all of the relevant factual assertions made by the industry witnesses will be proven at trial. They are simply too extreme.

Whilst the PCR seeks to dismiss any exceptions to

the universal Rule -- they say, "Well, do not worry about those. They are just minority cases. They are just at the margins" -- we say -- and I will show you this -- that in fact the Tribunal needs to be cognisant of the idea that there in fact will be a material issue at trial that the universal Rule being put forward does not apply and does not hold good. We say that the fundamental problem with the methodology is that it is simply not capable of dealing with any factual variations, so any differences to how the industry operated compared with how Messrs Goss and Whitehorn say it operated, the methodology falls over.

We do submit that it is not just a case, as perhaps Ms Ford was indicating yesterday, that the PCR has taken a risk, they might win, they might lose, but they should be certified. On the contrary, we submit that the Tribunal, in exercising its screening function, needs to consider what is realistically going to happen at trial. The Tribunal must have an eye on what is going to happen to this methodology if the facts turn out differently, as we say they will. The short answer in this case is that the PCR has not put forward anything that will be capable of assessing loss on a class-wide basis, which obviously is the ultimate objective of the methodology. We say it will not be able to do that reliably, credibly

or plausibly at trial and that is what makes this case so different to other cases, because the methodology simply cannot be adapted or flexed.

Madam, just to pick up a question which you put to Ms Demetriou earlier this morning: to what extent can the Tribunal consider alternative methodologies? The answer is no, you cannot.

THE CHAIRWOMAN: I did anticipate that answer.

MR SINGLA: You did and rightly so, with respect. An example of this point can actually be seen in the compound interest judgment in *Merricks*, where the Tribunal says at paragraph 93 that the -- the PCR in that case, so the *Merricks* team, had said in their submission, "Well, there may be some alternative ways of doing this", and the Tribunal said, "Well, no, you need to put forward a realistic and plausible method now".

THE CHAIRWOMAN: This is the remittal?

MR SINGLA: Exactly. It is paragraph 93. I will not take up time now, but it is simply a demonstration of the wider point that it is not good enough for the PCR to turn up and say, "Well, if you do not think our current methodology satisfies Pro-Sys, there may be a claim out there which we have not pleaded, which we do not have an expert methodology to support, but you should nonetheless certify". It is simply not consistent with

the screening role, we say.

Just finally by way of introduction, what I will do in the third part of my submissions is just to deal very briefly with the costs benefit point. We simply say that the reasoning of the Tribunal in the *Trains* judgment applies equally here and the Tribunal should be concerned, as it was in *Trains*, about certifying an action in which the main beneficiaries are likely in the real world to be the litigation funders.

Fourthly, I will deal with the problem with the class definition. We say on any view there is a disconnect between the way in which they have defined the class and the methodology being put forward in respect of loss.

So if I can turn now to the first of my four topics, the relevant legal principles. It is common ground that the Tribunal should apply *Pro-Sys*. It is also common ground that the principal relevance of *Pro-Sys* is to the commonality requirement, although, as I say, we submit it is also relevant to suitability.

Now, where we part company with the PCR is in relation to their attempt to run together the *Pro-Sys* test and the test for summary judgment and strike-out. We say they are making a clear error of law and they are plainly misreading the *Merricks* Supreme Court judgment.

If I can just give you some references to where in their written materials they make this quite serious error of law. In their reply, paragraphs 37 to 40 and 44.3, they talk about the two tests having been equated, the strike-out and certification tests. In their skeleton, paragraph 5, paragraph 17 and paragraph 45, {AB/1/17}, where they say that the application "need do no more than show the existence of a triable issue on the pleadings".

Ms Ford yesterday said orally, page 22, line [7],11 {Day1/22:7}:

"So there, in my submission, you have the Supreme Court emphasising the importance of not refusing a trial to a class who have a reasonable prospect of establishing that they have suffered some loss from an already established breach of statutory duty."

Ms Demetriou picked her up yesterday afternoon, where she had referred twice to the idea that it is enough for the claimant to show that the class had suffered some nominal loss and they should be waved through on that basis, and we say actually that is a complete misreading of *Merricks*.

THE CHAIRWOMAN: Well, you may need to take us back to *Merricks* because there is quite a lot of discussion in --

MR SINGLA: No, no, exactly. I intend to do that. I am just conscious of time. I wonder whether I could just make some very brief comments before I go into *Merricks* at 2 o'clock perhaps.

Before going to *Merricks*, I was going to say they are obviously wrong in conflating the two tests in the sense that the correct position is that there are two separate routes to opposing a CPO application: one can advance a strike-out summary judgment application and one can challenge the requirements for certification, which obviously include the eligibility requirement, the commonality requirement, suitability and so on.

Now, strike-out summary judgment is all about the merits of a claim, so that can be an issue that is relevant both in the context of an individual claim and in the context of collective proceedings. As you know, a summary judgment application has been brought in this case and it was in the *Trains* case by way of an alternative.

THE CHAIRWOMAN: Sorry, are you saying there has been a summary judgment application?

MR SINGLA: Application.

THE CHAIRWOMAN: In this case?

MR SINGLA: Yes. Yes. So the respondents in this case are proceeding both on the basis that the case --

THE CHAIRWOMAN: Okay, but it has not been formally --

MR SINGLA: Well, there is a procedural point being taken. I am not sure whether that is seriously being --

THE CHAIRWOMAN: I see. You are saying in substance you are taking the point?

MR SINGLA: Absolutely, and just to be very clear about this, Ms Demetriou and Mr Piccinin were making points which accepted everything that PCR's evidence says and they were saying that, on that basis, the case does not meet the certification criteria, and that is very much being put either on a summary judgment basis or on a Pro-Sys basis.

The criticism of the methodology which I will develop later is put purely on *Pro-Sys* and that is why it is important for me to take some time, which I will do after lunch, to explain the difference between the two tests because they are quite different and, with respect, it is quite important to your gatekeeping and screening role when looking at the *Pro-Sys* test in particular because it is simply not right to say, as Ms Ford did repeatedly yesterday, that as long as they can show a triable issue, you cannot get into all of this. It is all premature. That is classic summary judgment material whereas in fact the *Pro-Sys* test requires the Tribunal to undertake a rather different

exercise.

THE CHAIRWOMAN: But you are saying the submissions we heard earlier and late yesterday went to both?

MR SINGLA: Exactly. Yes.

MS DEMETRIOU: Yes, they went to both. I hope I made that clear at the outset.

THE CHAIRWOMAN: Yes. You may well have done, but that may have been lost on me thinking about something else.

MS DEMETRIOU: No, no, Madam, of course. They went to both. There is a procedural objection made in respect of summary judgment and strike-out which we say is of no substance at all. It may be that Mr Singla can just show you the Rules after lunch, but I am not sure if that is being seriously pursued.

THE CHAIRWOMAN: Right. Thank you.

MR SINGLA: No, I do not think it is being seriously pursued but in any event --

MS FORD: It is being pursued.

THE CHAIRWOMAN: Well, we had better look at the Rules.

MR SINGLA: Okay. Just finally by way of introduction, as it were, and then I will leave *Merricks* to 2 o'clock, so strike-out on the one hand -- so strike-out summary judgment is all about the merits of a claim, so that can be an application brought in relation to an individual claim or collective proceedings, whereas *Pro-Sys*, by way

of contrast, is something which is unique to collective proceedings. It is a specific test to be applied by the Tribunal when determining whether there is a credible and plausible methodology which enables, as I indicated earlier, the case to be dealt with on an aggregate basis across the proposed class. So they are two quite different creatures and it is wrong therefore to run them together.

I will now pause because I would like to go to *Merricks* and just show you the Supreme Court's judgment, but I think probably it is better to do that at 2 o'clock.

THE CHAIRWOMAN: Okay. 2 o'clock then. Thank you.

(12.58 pm)

(The short adjournment)

(2.00 pm)

MR SINGLA: Madam, I said I would go to the Supreme Court judgment in *Merricks* so if I could ask you to turn that up. It is authorities {AUTH/25}. Before diving into the individual paragraphs, just to say by way of background -- and Ms Demetriou made this point yesterday -- but it is important to emphasise the context in which these judgments were given. Of course some points touch upon the wider regime and we will look at those, but the context is important and it is very

important, in my submission, to understand that the methodology was proved by the Tribunal at first instance. It was held to be compliant with *Pro-Sys* and certification was refused by the Tribunal on the basis of concerns that the necessary data would not be available.

There was no appeal, importantly, against the finding that the methodology itself was sound, either in the Court of Appeal or in the Supreme Court. Indeed, by the time of the Supreme Court, the only point that was in issue was in fact suitability. We will look at the paragraphs, but, in my submission, the ratio of what Lord Briggs is saying in terms of the case that was before the Supreme Court was that the Tribunal erred in refusing to certify the case in issue because the same evidential or forensic difficulties would have existed whether the claim had proceeded on an individual basis or on a collective basis. We will see the references to "forensic difficulties" and "quantifying the damage".

What Lord Briggs was saying was that, if an individual claim could not be struck out because of forensic difficulties, then that should not be a reason why a collective action should not be certified. That is important context because what he absolutely was not saying was that somehow the test on certification is the

same as strike-out or summary judgment or that *Pro-Sys* has been equated with the strike-out summary judgment tests. On the contrary, Lord Briggs and indeed Lord Sales and Lord Leggatt, in the minority judgment, expressly approved the Tribunal's application of the *Pro-Sys* test. It simply did not feature prominently in the judgment because of the background which I have just given you.

If I could ask you to start at paragraph 4, which is page 5, {AUTH/25/5}, Lord Briggs introduces the appeal by saying:

"The CAT is given an important screening or gatekeeping role over the pursuit of collective proceedings. First, collective proceedings may not be pursued beyond the issue and service of a claim form without the CAT's permission, in the form of a CPO ... the obtaining of a CPO is called certification."

So therein, although he does not spell it out, clearly the PCR needs to satisfy the Tribunal of the eligibility and suitability requirements and so on.

"Secondly, collective proceedings may be terminated by the CAT ... by ... revocation ... Thirdly [a defendant may] strike out collective proceedings ..."

So again, already at this stage of the judgment, a distinction is being drawn between certification

criteria on the one hand and strike-out and summary judgment on the other.

If we move ahead to paragraphs 26 and 27 on page 11, {AUTH/25/11}, fairly obviously, in my submission, Lord Briggs refers to the different Rules, so:

"Rules 41 and 43 provide for the CAT, on the application of a party or of its own initiative, to have power to strike out... or give summary judgment." Then at paragraph 27:

"Rules 75 to 81 make detailed provision for the commencement and certification of collective proceedings."

So, again, it is just completely parallel tracks, as it were.

Then if we move ahead to paragraphs 39 and 40 on page 17, {AUTH/25/17}, Lord Briggs here expressly does refer to *Pro-Sys*. He says that the leading case on the certification of class proceedings in Canada is the decision of the Canadian Supreme Court in *Pro-Sys*, which he then goes on to explain, and at paragraph 40 is the quotation from paragraph 118 of Justice Rothstein's judgment, which we are all familiar with.

So they are clearly recognising that the *Pro-Sys* test is alive and well, albeit not needing to go into it on the application of the particular facts.

Then if we move forward to paragraph 54 on page 21, {AUTH/25/21}, this is the part of the judgment where I think the confusion on the PCR's part starts to arise out of. So:

"There is nothing in the statutory scheme for collective proceedings which suggests, expressly or by implication, that this principle of justice, that claimants who have suffered more than nominal loss by reason of the defendants' breach should have their damages quantified by the court doing the best it can on the available evidence, is in any way watered down in collective proceedings. Nor that the gatekeeping function of the CAT at the certification stage should be an occasion when a case which has not failed the strike out or summary judgment tests should nonetheless not go to trial ..."

Here, I submit these are the key words:

"... because of difficulties in the quantification of damages."

Then at 55, {AUTH/25/22}:

"As Mr Paul Harris QC for Mr Merricks submitted, it is useful to ask whether the forensic difficulties [i.e. the data issues] which the CAT considered made the class claim unsuitable for aggregate damages, would have been any easier for an individual claimant to surmount. His

answer, with which I would agree, was they would not be. The particular difficulties ...", and so on.

Then he says next to D in the margin:

"But an individual consumer would still have to address the same issue ..."

Then he says in the final sentence:

"If that is right why, one asks, should a forensic difficulty in quantifying loss which would not stop an individual consumer's claim going to trial (assuming it disclosed a triable issue) stop a class claim at the certification stage?"

So there -- in my submission, that is the key part of the reasoning, that this was all about data and it was wrong, Lord Briggs said, for the Tribunal not to certify because of the data problems because he said those data problems would be the same whichever way the case was brought. But he was not saying that the only test at certification is whether a claim raises a triable issue or not. He is simply not dealing with the *Pro-Sys* --

THE CHAIRWOMAN: Well, so you are equating forensic difficulty in quantifying loss to absence of data?

MR SINGLA: Yes. Madam, I can take this more slowly by going all the way back to the first instance decision, but --

THE CHAIRWOMAN: Well, no, I realise that is the factual context of this case --

MR SINGLA: Yes, but if, Madam, one looks at the first sentence of 55:

"As Mr Paul Harris QC ... submitted, it is useful to ask whether the forensic difficulties which the CAT considered made the class claim unsuitable for aggregate damages ..."

So it is the issues that the CAT said rendered the case unsuitable for certification, and those are the data issues. That is why I said in my introduction that the references to "forensic difficulties" are all about the particular issues of data that were the reason that the CAT held that they should not certify.

THE CHAIRWOMAN: Okay. Let me try this another way. I appreciate that it was difficulties with data in that case. In this case, if you compare individual with collective proceedings, the same method -- problems with methodology, put another way, could arise in either individual or collective proceedings.

MR SINGLA: With respect, that is a very helpful question because therein lies the fundamental difference because, in the current case, what the Tribunal is being presented with is a proposed methodology for assessing loss on a class-wide basis. So the claim here is for

aggregate damages and that is, with respect, radically different to what happens in an individual claim. So if an individual claimant were to bring a claim --

THE CHAIRWOMAN: Well, no, hang on. Bear with me a moment because, if I was an individual purchaser of a car, let us take a BMW since that was -- was it a Mercedes this morning? I forget which it was.

MR SINGLA: No inferences will be drawn!

THE CHAIRWOMAN: -- I might in theory produce exactly the same method that has been put forward by the claimant in this case to show that my delivery charge was higher.

MR SINGLA: Madam, you might, but, with respect, the procedure by which the claim would be brought would be radically different. So if an individual claimant were to bring a claim, it would obviously need to show that it had suffered loss and it would issue a claim form, particulars of claim. There would not at that stage be any expert methodology accompanying the claim. You would then, as a defendant, have a decision whether to strike out the claim, apply for summary judgment or put a defence in --

THE CHAIRWOMAN: Yes, I would have to plead some sort of causation, some sort of loss.

MR SINGLA: You would.

THE CHAIRWOMAN: Let us just say for the sake of argument

that I had worked out that the delivery charge on my invoice -- a method similar to what has been proposed in this case shows that the delivery charge on my invoice was £5 higher than it would otherwise be or at least that is what I claim, it is still using that --

MR SINGLA: No, so if an individual claimant brought a claim on that basis, the response would be that that is strikable. It is strikable for the reason Ms Demetriou developed, which is actually that they have claimed on the wrong basis, as it were.

THE CHAIRWOMAN: Well, yes, but you are not --

MR SINGLA: I am not advancing that point, no. But the reason it is important to keep this distinction in mind is because what the individual claimant is doing is focusing on its own claim and its own loss. What the PCR is doing is putting forward a methodology in order to show what the loss is on an aggregate or class-wide basis. That is why the *Pro-Sys* test is relevant in the current context but not relevant in the individual context because what the PCR needs to do and what the *Pro-Sys* test is all about is reliably and credibly and plausibly showing loss on a class-wide basis.

That has a difficulty which overlaps with the individual claimant in the sense that one still needs to prove a causal chain, but it has a further difficulty or

a wider issue that it needs to confront, which is that the loss needs to be on a class-wide basis. So what I will come on to later is a submission that in fact what the PCR is doing is overstating loss in the sense that, because they are assuming full pass-on all the way down the chain and they are not taking into account any of the variations on the facts which we say will inevitably arise at trial, there is going to be an overstatement of loss on a class-wide basis.

So we know from *Merricks* that the objective here is for the expert methodology to quantify loss on a class-wide basis. As long as it is compensatory on a class-wide basis, that is okay. We know that from *Merricks*. It does not need to be compensatory on an individual class member basis.

THE CHAIRWOMAN: Yes.

MR SINGLA: But where, in my submission, it is not helpful to compare what would happen in an individual claim is that we simply would not be undertaking this enquiry as to class-wide damages or aggregate damages. It just simply would not be a relevant consideration.

So the points Ms Demetriou has made would be applicable on an individual claim because that is why -- we describe those as "summary judgment points" because if an individual were to claim on the basis of

a delivery charge only, we would say, "You are measuring the wrong thing" or "You are claiming loss in relation to the wrong price. You did not pay a delivery charge, you paid for a vehicle". So that is a point which would be equally applicable both to an individual claim and to these collective proceedings.

But the points that I am developing and the *Pro-Sys* test is aimed at looking at the methodology, whether that can reliably and credibly and plausibly achieve the objective of assessing loss on a class-wide basis, and that is why, in my submission --

THE CHAIRWOMAN: Sorry, I am no doubt being really slow, but a particular methodology might be quite as capable of assessing loss individually and class-wide, you know, going back to my BMW or Mercedes, whatever it was, and the changes in the delivery charge.

MR SINGLA: But, Madam, the PCR makes a virtue of the fact that it does not need to prove compensation on an individual basis so they are fundamentally doing something quite different to the exercise that goes on in an individual case. So Ms Ford, when she took you to Lord Briggs' judgment -- she took you to it yesterday -- says, "Oh, well look at the paragraph which says it does not need to be compensatory on an individual basis", so they are not --

THE CHAIRWOMAN: No, no, of course. It does not have to be, but that does not mean it is a defect if it is.

I want to get back to *Merricks* because you are making -- you are essentially saying that what Lord Briggs was saying was specific to problems with data and can have no application in relation to methodology?

MR SINGLA: No, that is not quite --

THE CHAIRWOMAN: That is what I am hearing. I may be not understanding.

MR SINGLA: Can I take this in stages? What I say about Lord Briggs is, of course, he makes some remarks about the regime as a whole and, of course, therefore it is relevant for the Tribunal. Insofar as he says, for example, that there is a broad axe, well, of course the broad axe applies here. As long as we are talking about compensation on a class-wide basis, that is a principle that still holds good. Where he says that compensation does not need to be by reference to individual claimants, it needs to be to the class, that, of course, is a relevant dictum for our purposes.

But what I am saying about Lord Briggs is that what he does not develop in detail is the *Pro-Sys* enquiry because that had been dealt with by the Tribunal and was not the subject of the appeal. So what one does not get

from Lord Briggs' judgment is a detailed analysis of the *Pro-Sys* test, the application of the test, the gatekeeping role and so on, because in that case the methodology, it was agreed by the time the case had gone to the Supreme Court, that it was sound.

So one needs, in my submission, to read -- the references to strike-out and summary judgment in Lord Briggs' judgment need to be read very carefully because he has effectively parked *Pro-Sys*. When he is talking about strike-out summary judgment, that is in the context of the case that was before him, and the references are there because he is saying, "These cases would not be strikable on the basis of lack of data", and so therefore the forensic difficulties that the CAT said were a fundamental problem for the collective proceedings, he said that that is just not the right way of looking at it because the data issues exist whichever way the claim is brought.

I will carry on going through the judgment, but I think I do need to just further develop the point that I was making because, Madam, when you are considering what methodology would be in an individual claim, I think it is helpful just to work through the stages of an individual claim. So if an individual claim was brought in the current context, as I say, on the summary

judgment basis -- the Ms Demetriou point about vehicle prices -- that would be a point that could be taken at the very outset of the proceedings. If that point were not taken, then the case would move forward and an individual claimant would then need to adduce expert methodology in the usual way.

Now, if that methodology were along the lines that we are dealing with now, we would be saying in that context that that is a flawed methodology. But the enquiry arises (a) at a different time and (b) in a different context because we are (a) at the certification stage now and you therefore have an expert methodology to consider at this stage and (b) it is a different context because we are talking about class-wide damages. So if I make good my submission later that what they are doing will necessarily lead to an overstatement of loss on a class-wide basis, that is a flaw in the methodology and that question just does not arise in the individual context.

THE CHAIRWOMAN: You are saying the methodology in an individual claim would only appear later?

MR SINGLA: Well, it would only appear later, but it would also be quite different in terms of its objective. That is really the key point, that here we are talking about an aggregate damages claim. So in a sense that is why

I say, with respect, it is not really helpful to draw an analogy here with the individual claim versus the collective proceedings. In the Lord Briggs context, the reason that analogy was drawn was because the very same problems existed. He was saying, well, if an individual claimant were to bring this case, there would be data issues; if the PCR brings the case, there are data issues. So that is why, in terms of suitability and relativity and so on, he says the CAT was wrong not to certify.

Here, the proposed methodology that we are attacking, which was not the subject of the attack in the *Merricks* appeal, that methodology would not be put forward in an individual claim. Just to step back, it is quite important, with respect, to have in mind that what this proposed methodology is trying to do is assess loss on a class-wide basis so that every proposed class member who bought a vehicle of the included brands between 2006 to 2015 -- that is what this methodology is seeking to achieve.

We say -- and I will develop this -- we say actually it is hopeless on analysis because when one starts to think about the different factual permutations that might arise at trial, without the Tribunal getting into a mini-trial now but just thinking about realistically

what are the types of evidence and points that will be run at trial -- we say the methodology is fundamentally flawed because it cannot deal -- it does not purport to deal with any heterogeneity across the class. Therefore, when asking the question, "Does this reliably, credibly, plausibly calculate loss on a class-wide basis?", we submit the answer is plainly "No" and we submit it is not helpful for this purpose, for the purpose of this argument, to think about individual claims because there will not be a proposed methodology doing the same thing. We also say it is not helpful to think about strike-out for the purposes of this argument because, again, the Tribunal is undertaking a fundamentally different exercise when it is applying the *Pro-Sys* test.

Can I carry on through the *Merricks* judgment? If one picks it up again at page 26, paragraphs 70 to 71, {AUTH/25/26}. So Lord Briggs says:

"I have set out at length why I regard the suitability test as being best understood in a relative rather than abstract sense. It is clear that the CAT did not make any comparison between collective and individual proceedings when assessing the forensic difficulties lying in the path of the resolution of the merchant pass-on issue."

Just to reiterate, the forensic difficulties here are not methodology. They are the data points.

"In my view it is clear that they would have been equally formidable to a typical individual claimant ... That was Mr Harris' submission, and Mr Hoskins had no cogent answer to it."

"If those difficulties would have been insufficient to deny a trial to an individual claimant who could show an arguable case to have suffered some loss, they should not, in principle, have been sufficient to lead to a denial of certification for collective proceedings."

So, again, that is exactly my point. Mastercard took a data point in opposition to the CPO and Lord Briggs is saying, well, the same point could be made in an individual context and so that is just not the right approach.

At 73 and 74 on page 27, {AUTH/25/27}, one can see this is all about data. He says:

"The fact that data is likely to turn out to be incomplete and difficult to interpret, and that its assembly may involve burdensome and expensive processes of disclosure are not good reasons for a court or Tribunal refusing a trial to an individual or to a large class who have a reasonable prospect of showing they have suffered some loss from an already established

breach of statutory duty."

Again, that is a sentence on which Ms Ford places great reliance, but, again, we say she is reading that quite seriously out of context. If one reads on:

"In the context of suitability for collective proceedings or aggregate damages, it is no answer to say that members of the class can bring individual claims. They would face the same forensic difficulties ..."

Then again at 74:

"The incompleteness of data and the difficulties ..."

So we are just simply in a different world, if I may say so, here because the *Pro-Sys* test has been assumed to be satisfied and Lord Briggs is not engaging in that enquiry.

If one moves to the judgment of Lords Sales and Leggatt, which is not a minority judgment in the respects I am about to show you, paragraph 135, {AUTH/25/41}:

"In considering the expert evidence relied upon by the applicant to seek to satisfy the CAT that the claims were suitable ... the CAT decided that the approach it should adopt ..."

There we seek again Rothstein and *Microsoft*. Then at 136:

"Neither party sought to argue before the CAT that this was not an appropriate approach ..."

So that is the test.

Then at 153 on page 45, {AUTH/25/45}:

"Although it was formulated in a different legislative context, the CAT was in our view entitled to treat the *Microsoft* test as providing an appropriate standard to apply for the purpose of determining the suitability ... not only did the Court of Appeal endorse that approach (at paragraph 40), but it has been common ground between the parties at all levels ... that it was appropriate for the CAT to apply this test. In any event, it seems to us to provide sensible guidance ...", and so on.

Then at 154, which I do place reliance on:

"If the applicant could not show that there was a realistic prospect that his experts' proposed methodology would be capable of application in a reasonable and fair manner across the whole width of the proposed class ..."

Just pausing there, so if it did not satisfy the *Pro-Sys* test.

"... then (i) there would be a significant risk that a claim of this magnitude could unfairly be held over Mastercard's head in terrorem to extract a substantial

1 settlement payment ... (ii) there would be a significant
2 risk that, if carried forward towards trial, the
3 collective proceeding, as framed by the CPO obtained at
4 the outset, would at some stage run into the sand and be
5 found not to be viable, so that it would have given rise
6 to a great waste of expense and resources for no good
7 effect; (iii) the risk referred to ... would not just
8 relate to potential waste of the resources of the
9 defendant, but also ... resources of the CAT ... and
10 (iv) there would be a significant risk that, if the
11 methodology were applied to the class at trial on the
12 basis of inadequate data and unjustified
13 extrapolations from available data sets, the outcome
14 would be unjust ..."
15 So there is a clear statement of the gatekeeping
16 role which the Tribunal has uniquely in collective
17 proceedings.
18 THE CHAIRWOMAN: The initial words there I note are
19 "realistic prospect".
20 MR SINGLA: Yes. Well, to explain the reference to
21 "realistic prospect", if one goes back to -- those are
22 words which actually come out of Justice Rothstein's
23 judgment. So if one goes back to page 41, {AUTH/25/41},
24 this is just a convenient place --
25 THE CHAIRWOMAN: Yes, a plausible -- it is similar to the

plausible point, is it not?

MR SINGLA: Can I just ... so the quote from Justice Rothstein:

> "The expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial ... there is a means by which to demonstrate that it is common to the class ... The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case ..."

Now, in my submission, the reference to "realistic" needs to be read there again with great care and caution because that is not a reference to summary judgment or strike-out. That is Justice Rothstein originally saying that the methodology needs to have a realistic prospect of establishing loss on a class-wide basis at trial.

That follows from the previous sentence, which is "sufficiently credible or plausible to establish some basis in fact". So it is not summary judgment on the merits. We are not talking about summary judgment or strike-out on the merits. We are talking about the expert methodology. Are you satisfied that this is

credible, plausible and realistically going to be applied at trial? That language from Justice Rothstein, obviously that quote appears in the subsequent judgments in this jurisdiction, so in the *Merricks* 2 judgment, if I may call it that, there was no summary judgment application brought.

THE CHAIRWOMAN: Yes.

MR SINGLA: It was purely on the basis of *Pro-Sys*. So, with respect, this needs to be read with great care because "realistic prospect" means there -- it is shorthand --

THE CHAIRWOMAN: We appreciate it does not mean realistic prospects of success in the summary judgment context, but it is still "realistic prospect" rather than "surefire success" or anything like that.

MR SINGLA: No, of course. We are not saying -- no, the test is whether it is credible or plausible, but credible or plausible to achieve its stated objective, which is class-wide damages; compensation to the class as a whole. That is the test which the PCR needs to satisfy you of and we say they fall quite considerably short of the mark here because, leaving aside questions of merits, the expert methodology is fundamentally problematic.

Now, I will show you in a moment a recent Canadian case which I hope will put some flesh on the bones, as

it were, of what the *Pro-Sys* test involves, but if I can just finish on *Merricks*. 158 which is again Lords Sales and Leggatt, at page 46, {AUTH/25/46} -- at 157:

"There seem to us in the Court of Appeal's judgment to be three particular criticisms ..."

"In our view, this criticism is misplaced in that it treats the assessment of whether the claims in question are suitable for an aggregate award of damages as if it were an assessment of whether the claims are of sufficient merit to survive a strike out application. However, as we have emphasised (and understand to be common ground between the parties on this appeal), the eligibility requirements -- including the question of suitability for aggregate damages -- are directed to ascertaining whether it is appropriate to combine individual claims into collective proceedings and not to the question whether the claims are sufficiently arguable as a matter of their substantive merits to be allowed to proceed. In particular, in relation to aggregate damages, the question for the CAT was not whether the claims had a real prospect of success; it was whether the proposed methodology offered a realistic prospect of establishing loss on a class-wide basis. This turned, in the context of this case, on whether there was, or was likely to be, data available to

operate that methodology ... That was the question which the CAT addressed."

Now, again, in my submission, this is an important paragraph because we are talking about two completely different lines of enquiry: one, is the claim strikable, and, two, does the proposed methodology offer a realistic prospect of establishing at trial loss on a class-wide basis?

So on *Merricks*, we do submit that the PCR is misreading the judgment and conflating the tests for summary judgment and strike-out on the one hand and *Pro-Sys* on the other. In fact, we would say their position is completely incoherent because they accept that the *Pro-Sys* test needs to be applied. They accept that is highly relevant to the commonality requirement and yet they say the tests have been equated. Actually, when one stops to think about it, they are just so different in nature that it does not actually make sense, we submit, to think about the *Pro-Sys* test to a strike-out standard or some equation of the two. They are fundamentally different beasts.

Just to pick up a question that I think, Madam, you asked earlier and I think Dr Bishop also asked about the broad axe, well, the broad axe, we submit, is not an answer to *Pro-Sys*. So you cannot say, "Well, the

Supreme Court and Lord Briggs referred repeatedly to the need to wield the broad axe". Yes, of course they did in the specific context, which was the quantification issue.

Now, of course, the broad axe principle does apply equally to collective proceedings and to individual proceedings. That is simply the way in which courts go about assessing compensatory damages, but that simply does not mean that the PCR can say, "Well, do not scrutinise the methodology, do not worry about it, leave it all over to trial because it is all broad axe anyway". If we can demonstrate, which we submit we can -- and I will develop this later -- but if we can demonstrate that they are not properly assessing loss on a class-wide basis, then the broad axe does not save them. So, again, we do submit that one needs to treat the Supreme Court judgment with some care.

Now, moving on to some other cases, so *Merricks* 2 was a straight *Pro-Sys* challenge which was successful in relation to compound interest. We submit that there was no summary judgment strike-out application brought so no room for confusion when reading that judgment. We submit that that is a good example of the Tribunal exercising its screening role and refusing to certify a very substantial damages claim; 2.2 billion, I believe

was the number. So although Ms Ford is correct, technically correct, in saying there has not been a case, a CPO application as a whole, which has been rejected since the Supreme Court in *Merricks*, we submit it is important not to lose sight of the fact that the Tribunal in *Merricks* did find that the methodology for compound interest failed to certify the *Pro-Sys* test. So this gatekeeping role that I keep mentioning is a very important role.

In fact, if I may just show you the reference -- I said I would not, but I will just quickly show you the reference in *Merricks 2*, at paragraph 93 on page {AUTH/28/33}:

"It is true that Mr Merricks' submissions proceed to state, at [paragraph] 48, that 'it may be the case' that alternative approaches are available. However the claim for compound interest is put forward ...", et cetera.

Then if one moves over the page, the final sentence, {AUTH/28/34}:

"Since the Tribunal is being asked to include this issue in the collective proceedings and given that the *Microsoft* test has now been recognised in the context of the UK regime, we expect a plausible or credible methodology to be put forward at this stage ..."

THE CHAIRWOMAN: Yes. None was. I mean, no methodology has

been put forward in relation to the compound interest case.

MR SINGLA: One can debate whether there was or was not a methodology in *Merricks 2*. We certainly submit there was actually no methodology -- if one wants to go down that route, we would submit there is in fact no methodology in the present case in the sense that -- again I will come on to this -- but what we actually have in this case is not BDO putting forward an econometric methodology that one sees in other cases; what BDO are doing is merely computing or calculating mathematically what the loss would be assuming the industry evidence is correct.

Now, we can debate whether that is better or worse than what was in *Merricks 2*, but I am not sure that is a helpful exercise. We simply say that, properly analysed, this is actually not a methodology at all. It is simply BDO saying, "Well, I am going to take as read everything the industry evidence says. If that is right, this is what the numbers look like". So we do in fact submit that this is actually not a proper economist methodology at all.

That is *Merricks 2*, but I just wanted to show you that paragraph for the reference to alternative approaches being available because that again deals,

I hope, with a question, Madam, that you put earlier. We really cannot get into a world in which the PCR is able to obtain certification on the basis of some methodology that is out there but has not yet been advanced. That is not how the regime works. It is also manifestly unfair to the respondents for the case to be certified in circumstances where the Tribunal considers, well, there may have been a different way to do this. That is just simply not the way this works.

The Tribunal therefore has to discharge its gatekeeping role and say, "Well, this is the methodology for what it is worth. Does it satisfy *Pro-Sys* or not?", not "Is there some other methodology that could have satisfied *Pro-Sys*?"

Could I take you back through the *Trains* judgment just to show you that case because again it is easy to get confused by some of the PCR's submissions. The important point about the *Trains* judgment is that, in that case, an application for summary judgment was made, so a bit like the current case, things were done in the alternative. Again, therefore, there is a danger in reading the case as though -- well, the PCR would have you believe the two tests have been equated. Again, what I will show you is that in fact, when one reads through the judgment carefully, what the Tribunal does

is it scrutinises the methodology by reference to *Pro-Sys*, concludes that in that case there was a sound methodology and says, "Well, obviously the summary judgment application fails for the same reasons". I mean, that stands to reason. In one sense, in that case, if it was credible and plausible, the summary judgment application was brought in the alternative, essentially relying on the same points.

But what the CAT was doing was looking at the methodology and scrutinising the credibility and plausibility of it. So if I could ask you to turn up *Trains*, which is {AUTH/30}. If we start at paragraph 7 -- I know the Tribunal will be familiar with the judgment but paragraph 7 on page 5, {AUTH/30/5}:

"The three Respondents all object to the grant of CPOs, arguing on various grounds that the claims are not eligible for inclusion in collective proceedings."

So the "not eligible for inclusion" is where the *Pro-Sys* test comes in.

Paragraph 12 over the page, {AUTH/30/6}, there is emphasis there placed on Lord Briggs' comment in *Merricks*, that:

"The Tribunal is given an important screening or gatekeeping role over the pursuit of collective proceedings."

So it is now well recognised that the Tribunal needs to exercise a screening or gatekeeping role.

If one moves to paragraph 36, on page 16, {AUTH/30/16}, again the legal framework, "two conditions for the grant of a CPO". That is through to paragraph 40.

Then if one looks at paragraph 51 on page 21,8 {AUTH/30/21}:

"Because the eligibility condition does not in general involve a merits test, the Respondents have applied for reverse summary judgment or alternatively to strike out the claims. However, some of the arguments ... overlap ... and so can be considered together."

Again that is important in my submission. On that particular case, the points overlapped and were therefore dealt with together.

At 52 the Tribunal then goes on to consider the well-known principles on summary judgment.

Then if one looks at 100 on page 42, {AUTH/30/42}, that is again the quote from *Microsoft*, Justice Rothstein. Then 107(4), which Ms Ford took you to yesterday, which is on page 46, {AUTH/30/46}:

"The standard to be applied in assessing expert evidence designed to show common issue ..." --

THE CHAIRWOMAN: We need to go on to the next page.

MR SINGLA: I am so sorry. Yes, it is the next page, please.

"the standard to be applied in assessing expert evidence designed to show a common issue is that it must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement and that it is not purely theoretical but grounded in the facts of the particular case ... with some evidence of the availability of the data ..."

So there complete clarity with respect there as to what the *Pro-Sys* test involves. Here we are talking about something completely different to the summary judgment test and the summary judgment application.

Then, when one moves forward to the section of the judgment where the methodology is considered, if we go to 126 on page 55, {AUTH/30/55}, now here you will see the Tribunal says that:

"... the Respondents rely on their submissions regarding causation as a ground for summary judgment and further to contend that certain issues were not common ..."

So, again, overlap in terms of the points. Then they say:

"For example, in their skeleton argument, counsel

... suggested a range of examples where a passenger who was entitled to and aware of the option ... might nonetheless not have purchased one or suffered any loss."

So here the respondents were positing various scenarios in which proposed class members would not have suffered any loss.

What follows in the subsequent paragraphs is the Tribunal scrutinising these hypothetical examples. In many cases it was not satisfied that these were real points and at 129, {AUTH/30/56}, Ms Ford relies on the Tribunal saying:

"We think it would create an unfortunate obstacle to an effective regime for collective proceedings if potential defendants could sustain objections to the eligibility condition based on speculative examples."

Now, in relation to that, we say in the present case the examples I will be relying on are not in fact speculation because we have served two factual witness statements, so we are intending to show the Tribunal the case that will be made at trial and the question then is whether the methodology can or cannot deal with factual variations of that kind. So that is the first point.

The second point is if one then looks at 132 on page 57, {AUTH/30/57}, this was on the basis of the

so-called speculative examples. The Tribunal says:

"However, we do see that there is a significant issue regarding so-called point-to-point fares ..."

So example (iii). In the last sentence of that paragraph:

"Accordingly, we think that Travelcard holders who purchased such point-to-point tickets are in a materially different position from other members of the proposed class."

At 134 they say it is appropriate to exclude those class members.

So, in my submission, what this shows is the Tribunal engaging with the facts and the reality at the certification stage. If Ms Ford was right that all of this is effectively a summary judgment test, obviously the Tribunal would not be doing that, but the Tribunal was doing that as it is entitled to do and required to do in accordance with the *Pro-Sys* test.

One can then see in later paragraphs that the conclusion is that *Pro-Sys* is satisfied because they regarded the methodology before them as detailed and sophisticated. If I show you 138 on page 59, {AUTH/30/59}, they conclude:

"In our judgment, if there is a realistic and plausible method of estimating aggregate damages, that

overcomes the individual aspects of causation ..."

So they dismiss the point that was being made by the respondents.

"For the same reason, we do not see that the claims ... can be struck out or that the Respondents ..."

So there are two quite different enquiries, although overlap in terms of the points being relied on.

Then at 140:

"The *Microsoft* test [again] ... requires the applicant to set out a workable or credible methodology ... with a realistic chance of being applied."

Again, that is not realistic prospect of success. That is, "Wearing our gatekeeper hat, is this something that realistically at trial is going to be applied?" If not, this is going to be a gargantuan waste --

THE CHAIRWOMAN: You say "realistically going to be applied". I do not think the test is that strong.

MR SINGLA: Well, with respect, that must be what the test is.

THE CHAIRWOMAN: It has to be credible and plausible. It surely does not mean we have to conclude that it will definitely stand up at trial, whatever evidence is thrown at it.

MR SINGLA: No, but on what the Tribunal has been presented with, the Tribunal needs to be satisfied that this is

credible and plausible and realistic in terms of assessing damages on a class-wide basis. Now, of course, in the usual case, you may have a methodology where an expert turns up and says, "Well, this is my understanding of the facts. This is my proposed methodology. There will of course be disclosure and evidence and so on and so forth and I will adapt my methodology at trial". So the Tribunal there cannot be determining whether this methodology will be used at trial because there may be some amendments or adaptations that need to be made along the way. But the distinction that we draw and the reason we say this is such an unusual case is that the objection that we raise is not something where the PCR can say, "Well, it is all subject to data and subject to disclosure and subject to evidence", because they have absolutely pinned their colours to a particular mast. So that is why we say the objection that we are making is one which says that there is no realistic world in which this can be applied. So that is the distinction I would draw.

So, Madam, to answer your question, yes, in some cases there is a provisional element to the methodology. Indeed Mr Holt's methodology in the Trains case that we are looking at was provisional. He was going off to do a survey after certification and so on. So it was

provisional but it was realistic. The Tribunal was satisfied that that was a credible, plausible methodology. It was a credible and plausible way of going about the exercise, if I can put it in that way; whereas what we say is going on here is that they have asked themselves the wrong question and they have come up with a methodology that leads to -- necessarily assumes that all of the shipping overcharge was passed on, but they are not actually investigating that question. If it turns out at trial that the facts were different, as I will show you we say they inevitably will be, they cannot deal with that variation in the facts. So, in that respect I would submit that you can -- in this particular case, you can ask yourself and you must ask yourself: what is going to happen at trial?

THE CHAIRWOMAN: Well, are we not allowed to say that one of the possible outcomes at trial is that the industry expert evidence being put forward by the PCR might be accepted in its entirety? I take Ms Demetriou's points, she is making different points that she says, even if you do, that does not meet the test, but you are saying something different.

MR SINGLA: Yes, I am saying something different.

THE CHAIRWOMAN: You are saying we need to make sure that the methodology could cope with that evidence not being

accepted --

MR SINGLA: Absolutely. If I may say so, that really does hit the nail on the head in the sense --

THE CHAIRWOMAN: Well, yes.

MR SINGLA: That is my submission.

THE CHAIRWOMAN: But you are saying "plausible" means that is definitely going to -- it is almost like saying it is definitely going to work, which is not the way it is put.

MR SINGLA: Well, we say two things. We say, on the material which I will show you, there is good reason to think that what the industry evidence says will not be proved at trial. Now, I am not asking the Tribunal to determine any questions about what the facts are.

THE CHAIRWOMAN: It comes very close to it, does it not?

MR SINGLA: With respect, no. With respect, the problem for the PCR, we say, is that all they have done -- because BDO are computing mathematically what the industry evidence tells them is the position, we say the fundamental problem is that the PCR has nowhere to go. The methodology collapses entirely if it turns out that any of the industry evidence is rejected at trial. We say, absolutely, it is incumbent on the Tribunal to ask itself, "Hang on, what if the industry evidence is not accepted at trial?", because otherwise the position is

that the Tribunal is waving through a substantial case on the back of two very short statements from the industry experts or so-called industry experts. We obviously take issue with that.

We submit that the gatekeeping role requires the Tribunal to look at the case holistically and say, "Well, if this methodology only works in one scenario", which we say is a very unlikely scenario for reasons which I will develop -- but if that is their position, that they can only get home and the methodology is only live, as it were, if all of the industry evidence factual assertions are proven, we say that is not good enough. We say it fails the *Pro-Sys* test for that reason.

MR DORAN: So are you saying to us that it is inevitable -- that is your case that it is inevitable that the methodology will fail because I think you have used the word "likely" as well and I was just wondering how strongly you are putting this to us.

MR SINGLA: Let me be clear. It is inevitable on the PCR's case that they will have no methodology if the industry evidence is not accepted in its entirety, so that is -- there is a necessary link there, so they have no methodology unless the factual evidence of the industry witnesses is accepted. So that is inevitable because

BDO are saying -- and I can give you the references but this is common ground that BDO are saying, "On the assumption that all of the Goss and Whitehorn material is correct, we would go about quantifying loss in this way". So there is a necessary link there. They stand or fall together.

The references to "likely", what I was submitting is that the Tribunal needs to be -- needs to have in mind or have an eye on what is going to be the status of the methodology if some of the factual assertions which are being made are not proven at trial. That is the next stage of reasoning. We say at this stage we have given the Tribunal material on the back of which it can consider there is a real chance of that evidence not being accepted. So this is not a theoretical point that I am making or an academic point, "Oh, well, in a different world, if the industry evidence is not accepted at trial" -- we have put forward some material to suggest what we will be saying on the facts at trial.

MR DORAN: What you are saying is that the critique you make means that the test that Ms Ford has to surmount in terms of our gatekeeping role cannot be met --

MR SINGLA: Exactly.

MR DORAN: -- because we are looking at, if you like, opposite sides of the same coin in a sense here. You

are making a case to some standard that Ms Ford cannot make a case to surmount the gatekeeping role that you just described for us.

MR SINGLA: Well, we have presented the Tribunal with a version of events, some limited factual material, to suggest that there are real questions about what the industry evidence is saying.

MR DORAN: That is precisely my point, some limited evidence, to use your words, which means that the gatekeeping role that we are obliged to discharge we cannot properly do so we have to turn down certification. Is that --

MR SINGLA: With respect, no. What we are saying is, in the face of the material which we have put forward, which is necessarily limited because of the stage of the proceedings we are at --

MR DORAN: Of course.

MR SINGLA: In the face of that material, the PCR needs to satisfy the Tribunal that its methodology will be capable of dealing with some variations in the facts. What we are submitting is it is not good enough for the PCR to say, "On our view of life, this is how we are going to quantify damages and the Tribunal should certify in the event that all of that is made good at trial". We are saying, actually, the gatekeeping role

requires the Tribunal to think holistically about how this case is going to move forward, and the respondents at trial are telling you now that they will be saying X, Y, Z, so you should be asking yourself and the PCR the question: well, how will you deal with that? How will your expert cope with factual assumptions being different at trial?

MR DORAN: The reason I asked the question, I thought you were going beyond that. I thought you were saying that it is inevitable that that case cannot be made based on what you are going to submit to us in terms of the facts.

MR SINGLA: Well, we do -- our position is that the facts at trial will not turn out as per the industry evidence.

MR DORAN: Sorry, forgive me. How do we judge that, given the gatekeeping role, which does not require proof now and we should not start to look for proof?

MR SINGLA: No, I understand. That is why I said our position is that none of that will be made good at trial. That is our general position. But-For the purposes of this argument we submit that it is sufficient for us to show the Tribunal the kinds of points that will arise at trial, which is actually a very unambitious task, if I may say. All we are saying is the PCR needs to be able to deal with the case

that it is going to be faced with at trial.

Now, I will show you the evidence. It is very limited. It is in fact very common sense, the points that are being made. All we are really saying is, "Well, this is our position. We are not going to accept the industry evidence at trial. This is what we say happens on the facts. Where is your methodology going ..." --

THE CHAIRWOMAN: But that sounds like a dispute to be heard at trial.

MR SINGLA: With respect, no, because we are not asking you to decide the facts --

THE CHAIRWOMAN: I know that, but you are essentially -- you are saying that you are not asking us to, but implicit in your argument I am concerned that you are effectively asking us not to certify because of the chance that you would succeed in establishing your case at trial.

MR SINGLA: No. Well, with respect, the PCR is asking you to certify on the basis that its industry evidence will be accepted in toto at trial. Now, the PCR bears the burden of satisfying the Tribunal that they have a credible and plausible economic methodology. We submit that at the certification stage, a plausible and credible economic methodology is one that necessarily will need to be able to deal with a different view of

the facts. So we are not asking you to decide anything about the facts; we are just asking you to look at the fact that we will be putting forward a different version of events. If their methodology cannot deal -- I am sorry.

MR DORAN: No, it is all right.

MR SINGLA: If their methodology cannot deal with the version of facts we will be putting forward at trial, the Tribunal should say that that fails the *Pro-Sys* test because it is not a credible or plausible methodology if it only deals with one factual scenario.

MR DORAN: It is just how we establish that for certain now at a stage when we do not have a trial so that we come to the conclusion that it is -- I do not want to put words in your mouth -- that it is implausible and incredible, to put it in the negative, that the case should be certified.

MR SINGLA: But, with respect, there is a distinction between whether it is implausible that the facts will be as per the industry evidence and then implausible in terms of a methodology which cannot cater for any differences in the facts. That really is the fundamental submission that I am making. I am really not asking the Tribunal to decide anything about the facts other than to turn your mind to the idea that the

facts may not be as the industry evidence suggests --

MR DORAN: So actually what you are going to go to, when you deal with the evidence to whatever extent you do, is that the methodology just cannot cope with --

MR SINGLA: Yes, exactly.

MR DORAN: That is the implausibility and incredibility that you advert to?

MR SINGLA: Exactly. Exactly so. In fact, what we say is that the industry evidence says in terms -- of course it has to -- that there may be exceptions to their universal Rule and the PCR in its submissions say, "Yes, but they are just minority cases. Let us just sort of forget about those. Broad axe, broad axe, let us forget about the minority of exceptions".

What we are saying and the purpose of our evidence is really -- it is almost consistent with that. It is saying, "Yes, there are actually cases where the universal Rule does not apply and once that starts to become a material issue, there is no methodology to cater for it".

MR DORAN: But you see the sort of scope and scale question that we have to grapple with, when we hear what you say about whether that deals wholly with "Is there a plausible and credible case on the other side?", as in, without a trial, at what stage do we feel that the

other case falls away, by virtue of whatever you can --

MR SINGLA: I do understand, but, in certain respects, my job is made easier by the fact that the PCR's methodology is so unsophisticated that it cannot go -- it has nowhere to go. It makes a whole series of assumptions which I will go through again, but it needs to be right about all of those assumptions across the whole market, across the whole time period. Assuming all of that is made good, Mr Robinson will get his calculator out and work out what the loss looks like.

So we are saying in a scenario where the PCR is putting forward a methodology that only works in a particular factual context, the Tribunal, wearing its gatekeeper hat, should be saying, "But are we going to allow this whole case to move to trial even though the methodology cannot be adapted to any different facts?". We say that is classic *Pro-Sys* and I will show you this Canadian case that I mentioned earlier because I do understand the natural hesitation to get into these matters and one is coming at this, perhaps, from a background of summary judgment, mini-trials, et cetera, et cetera, but one has to be cognisant of the fact that *Pro-Sys* is a rather different beast and to a certain extent the Tribunal does have to grasp the nettle and say, "Well, is this a plausible and credible

methodology if it only works in one scenario?"; whereas in many cases, as I said earlier, an expert will say, "My instructions at this early stage are that the facts are as follows. Of course, if things turn out differently, I will do XYZ".

That is why I said my job in this case is simple because they are not even purporting to do that. They really have pinned their colours to the industry evidence mast and we say that plainly is not *Pro-Sys*-compliant because you are then going to allow this gargantuan case to move forward even though the methodology only works if all of the industry evidence is accepted.

THE CHAIRWOMAN: Okay. I mean, there is a difference though, is there not, between a methodology that is based in theory and this in context? Let us assume no expert evidence and Mr Robinson has just come up with his theory of pass-on, all your points would be very well made, but there is some industry expert evidence which we are not judging and are not going to compare on the merits with the evidence that has been adduced by -- on behalf of any of the proposed defendants because we are not conducting a mini-trial --

MR SINGLA: With respect --

THE CHAIRWOMAN: Maybe this further Canadian case that you

will show us will assist, but you are putting quite a narrow interpretation on what "plausible" means.

MR SINGLA: With respect, if they came forward without any industry expert evidence, we would not be here. It would be absolutely hopeless, so that --

THE CHAIRWOMAN: I think you are saying it is hopeless anyway.

MR SINGLA: Well, it is. It is because the Tribunal does have an important gatekeeping role. One has to ask oneself: what is it trying to weed out at that stage? We have seen the reference to Lord Briggs saying "important gatekeeping role", we have seen the reference to Lords Sales and Leggatt, saying, "We do need to be careful about allowing these actions to move forward because they can be held in terrorem and so on and so forth".

Now, it follows from that that it is incumbent on the Tribunal to undertake some scrutiny of what is being put forward. If the Tribunal simply says, "Well, they have put forward some industry evidence and if that industry evidence is accepted entirely at trial, they have got Mr Robinson with his calculator". If that is the level of scrutiny that is being applied, we say that falls well short of the gatekeeping role because you are not in fact scrutinising anything. You are saying,

"Well, they got 20 pages from Messrs Goss and Whitehorn and they have BDO on the back of that so that all looks fairly okay". That is not scrutiny. That is not gatekeeping. That is not screening. Uncomfortable as it may be, one does have to undertake the *Pro-Sys* analysis, which is, as it were, getting under the bonnet.

One has to actually look at what they are really doing. It is not good enough to say "Well, it all hangs together on what they say" because one has to have regard to what we are going to say at trial and what is going to happen at trial.

THE CHAIRWOMAN: You say "what is going to happen", which makes an assumption that your evidence or some of it may be accepted.

MR SINGLA: But, with respect, otherwise it becomes --

THE CHAIRWOMAN: We are going to have to move on.

MR SINGLA: Otherwise it becomes completely one- -- you say that it is not open to us to posit what we will be saying at trial, but that is all they are doing. So it becomes completely one-sided and not scrutiny or gatekeeping or screening if you have the PCR's factual evidence and you say, "Well, we have to assume that that may be accepted at trial", but then you are saying that it is not open to respondents to put forward a summary

of their case and say, "We cannot have regard to the possibility that that will be accepted at trial". That is a completely one-sided exercise.

THE CHAIRWOMAN: Okay. Even if we get into the weeds and weigh it up, despite it being a mini-trial, there must be some criteria by which we -- we cannot refuse certification simply because of the possibility that some evidence which we do not accord significant weight to, having had a look at it, would come along at trial and displace the claimants. You have to do better than that, surely.

MR SINGLA: I am sorry to take up time, but this is really rather important. What makes this case so unusual is that normally one has a genuine expert methodology where the economist says, "I am going ..." --

THE CHAIRWOMAN: Just making a decision because a case is unusual does not really get us anywhere. We have got to look at the package and, you know, we also should not draw artificial distinctions between different experts.

MR SINGLA: No, but --

THE CHAIRWOMAN: There is a combination of expert evidence for the PCR.

MR SINGLA: But what we submit is a plausible and credible methodology is one that can be adapted to different factual scenarios. That really is the nub of it. If

one looks -- I still have the *Trains* judgment open, but if we look at, for example, paragraph 154 on page 64, {AUTH/30/64}, the Tribunal says:

"In order to clarify certain aspects of Mr Holt's methodology and explore its sensitivity, we decided... [to ask] questions ..."

That, in my submission, is exactly what we are inviting you to do. We are inviting you to test the sensitivity because it is no good just asking yourself "Does it work?" on the basis of what the PCR has said in its industry evidence.

Then, at 155, they were satisfied that Mr Holt had put forward a detailed and sophisticated methodology and it was all subject to data and information that may or may not become available; quite different to this case where it is not being said, "We are going to do this but if the facts turn out different we will do X, Y, Z".

Can I move on? The other case I just wanted to mention in passing was the *BT* judgment, which Ms Ford spent some time going through. We say that does not help at all because there, there was no *Pro-Sys*-type challenge, so although she says in her skeleton and she said orally it is instructive, it is not instructive at all as regards *Pro-Sys*. It may be of relevance to the summary judgment test but not *Pro-Sys*.

If I can show you the *Jensen* case, which is the Canadian case I mentioned, which hopefully will be of some assistance to show you what the *Pro-Sys* test consists of. It is in authorities bundle {AUTH/32}.

I am conscious of time so I will try and take this reasonably quickly. The background was that there was an application for certification of a proposed class action in which the allegation was that three leading manufacturers of Dynamic Random Access Memory chips had conspired to limit supply and raise the price, contrary to the Canadian Competition Act.

The application was refused and it was refused on two grounds or at least two grounds: one, that there was no reasonable case, so struck out on the merits, and, secondly, the methodology was not compliant with *Pro-Sys*. I just want to show you -- in terms of the principles that were applied, if one can move forward to paragraph 57 on page 26, {AUTH/32/26}:

"It is well established that the onus on a party seeking certification is not an onerous one, and the threshold ... has generally been described as low. That said, a plaintiff must nonetheless come forward with sufficient pleadings and with a sufficient evidentiary basis to support certification. While certification remains a low hurdle, it is nonetheless a hurdle ..."

Then:

"The test to be applied on the first criterion for certification [so this was obviously in the Canadian legislation]... is similar to that applicable ..."

So that was the strike-out aspect of the judgment. Then at 59, if one can go over the page,7 {AUTH/32/27}:

"For the remaining four certification criteria [and this included the commonality requirement], the plaintiffs have the burden of adducing evidence to show 'some basis in fact' that the requirements have been met ... This some-basis-in-fact standard means that, for all certification criteria except the cause of action, some evidentiary foundation is needed to support ..."

Then they say it is a low threshold, but then they say you need to look at it on a case-by-case basis, at the end of that paragraph:

"However, the some-basis-in-fact standard cannot be assessed in a vacuum, and it must rather be examined on a case-by-case basis, in light of the specific facts of each given case ..."

Indeed, if one goes all the way back to *Pro-Sys*, that is actually a point which is made in *Pro-Sys* itself. No one wants to define where the line should be drawn. It is always "It depends on the facts of each

case". So we know what the test is but it is always said that effectively one has to look at the individual circumstances of a particular case.

Then at paragraph 60, {AUTH/32/28}:

"That said, it is important to emphasize that, even though it is a low one, there is still a threshold to be met at the certification stage, and that certification will be denied when there is no viable cause of action or where there is an insufficient evidentiary basis ... While a certification motion is not a merits-based screening intended to determine the actual viability or strength of the contemplated class action, it must nonetheless operate as a 'meaningful screening device' ..."

Then there is a reference to *Pro-Sys*:

"... the [court] expressly stated that the analysis into the sufficiency of the evidence under the some-basis-in-fact standard cannot be so superficial that it would 'amount to nothing more than symbolic scrutiny' of the evidence ... There must be sufficient facts to satisfy the certification judge ..."

Then in the penultimate line:

"... the SCC repeatedly reaffirmed that the authorisation process 'must not be reduced to a mere formality' ..."

Then 61:

"The courts therefore do play an important screening role at the certification stage. This role includes filtering out unfounded and frivolous claims, and ensuring that parties are not being forced to defend themselves against untenable claims and devote substantial resources ... As Justice Kasirer expressed it when he was at the Quebec Court of Appeal, '[a] lack of rigour at authorization can indeed weigh down the courts with ill-conceived claims, creating the perverse outcome ...", and so on.

At 62, {AUTH/32/29}:

"I pause to underline that the overarching objectives of judicial economy and access to justice governing class proceedings cannot be considered from the sole specific of the plaintiffs. True, a key purpose of the certification process is to facilitate access to the courts for plaintiffs, avoid duplication and protect the interests of potential class members ... But the certification process is also there to prevent defendants, even deep-pocketed corporate defendants, from facing groundless suits and being forced to invest significant resources to contest large-scale, time-consuming actions that have no chance of success or do not have the minimal evidentiary foundation required.

Stated differently, preventing baseless class actions from monopolizing the judicial system to the detriment of other litigants' actions is also part of preserving access to justice for all litigants."

So if I can commend those paragraphs to you, that really shows, in my submission, what *Pro-Sys* is doing is ensuring that the certification stage is not entirely one-sided. It is not the plaintiffs turning up and effectively having their case rubber-stamped. The Tribunal does need to do some level of scrutiny and we say that is a helpful passage because it shows that it is very, very different. One has to get out of the mindset of summary judgment, where the burden is on the defendant to say "no real prospect of success". When applying *Pro-Sys* it is actually a fundamentally different enquiry and one should not be certifying cases on the plaintiff's say-so, if I can put it in that way.

Madam, I am conscious of the time. I wonder whether now would be a convenient moment. I have finished my submissions on the law and I was going to develop the substance of the point.

THE CHAIRWOMAN: Yes.

(3.12 pm)

(A short break)

(3.29 pm)

MR SINGLA: I was just going to start my second set of submissions, so this is why we say the *Pro-Sys* test is not met. Obviously we started to get into that a little bit, but I will now show you points that we particularly rely on.

As a preliminary point, we do submit it is critical to understand -- a point I made earlier, but it is critical to understand that the BDO methodology is not in fact seeking to estimate the extent of pass-on. One needs to be very clear about that. This is not a situation where an expert is seeking to quantify the damage or seeking to investigate the extent of pass-on.

As I say, that is what makes this a highly unusual case. Ms Ford described PCR's approach yesterday as being entirely conventional and she referred to the fact that they produced both quantitative and qualitative evidence, but what she entirely glossed over is the fact that normally what one has is qualitative evidence indicating what the effect of a relevant infringement might have been and then expert evidence quantitatively seeking independently to corroborate by assessing empirically whether or not there was an effect on infringement.

Now, you may say it is not of interest what happens in other cases, but we submit actually it should be of

interest and it is very important to understand why this particular case falls short of the *Pro-Sys* standard because all Mr Robinson is doing is computing mathematically the effect of the industry witnesses' evidence, and that is not entirely conventional. It is far from it.

What I would like to do now is just remind the Tribunal what the factual propositions are that are being advanced by the industry witnesses. I will do this quickly, but it is important to understand because if -- particularly if one is taking the view that one has to have regard to what their evidence is and whether it will be made good at trial, it is important that -- and we say one has to have regard to the other side of the coin, which is their evidence may not be accepted, and that is the debate we were having before the break -- but in that context we say it is helpful to remind the tribunal exactly what these factual propositions are.

Now, starting at the top of the supply chain, they are saying that each and every OEM always passed on 100% of the alleged overcharge on vehicles they sold in the UK to the NSCs that they worked with and they say that irrespective of whether the NSCs were subsidiaries of the OEM or not. So the industry witnesses accept in

terms that in fact OEMs and NSCs were not always integrated, but they just ride roughshod over that and they say, "Do not worry about that". So every OEM is always passing on 100% of the alleged overcharge. That is the first step of the supply chain.

Then the second step of the supply chain is every single NSC throughout the whole period always implemented the same rigid pricing strategy, which is the asymmetric costs-plus pricing; always pass on increases, never pass on decreases. That is going on across the market for the whole period, irrespective of market conditions. So the global financial crisis happened during the relevant period, it makes absolutely no difference on the industry witnesses' evidence.

So it is all about -- there is minimum profit margin being religiously protected by every single NSC and never ever that being compromised, whatever the market conditions.

They then say that this is the case for every NSC irrespective of whether they itemised delivery charges or not, so not only do you have this asymmetric costs-plus pricing going on throughout the market, it is going on whether or not delivery charges are itemised. They accept on their current understanding Ford, Nissan and Mitsubishi did not have itemised delivery charges.

Nevertheless they say, "Do not worry about that. Those three entities always conducted their pricing strategy in exactly the same way throughout the whole period".

So that is the next step of the supply chain. Then we get to retailers. Unsurprisingly, what they say here is that each and every retailer throughout the entire relevant period -- so we are talking 2006 to 2012, plus a three-year run-off period that is being alleged -- throughout all of that period, each and every retailer always passed on 100% of the delivery charge.

Then they say that from the perspective of the customer the delivery charge was never negotiated away. That has to be what they are saying. Again, they say this was always the case across the market whether or not the delivery charge was itemised. That is the evidence of the industry witnesses.

So we say that those are extreme factual assumptions and the Tribunal, with respect, needs to be alive to the fact that these are very extreme factual assumptions. What I do want to show you is the claim form because it is important to see how the pleaded claim is put. If one could look at {A/1/3} please. Paragraph 7 of the claim form, halfway down, the sentence starting:

"As the Proposed Representatives' industry experts explain in detail in their joint report, the price which

vehicle manufacturers ... pay for their vehicles to be shipped internationally will always be recouped ..."

So this is why I refer to it as a "universal Rule".

If one moves forward to page 12, please, {A/1/12}, which is paragraph 40(3), in (a) they say:

"As Mr Goss and Mr Whitehorn then explain in the Industry Report, shipping costs are a direct input into the vehicle delivery charges which are set by NSCs. As they further explain, such delivery charges are invariably paid for by the first person to purchase or finance vehicle ..."

Then in (b) they refer to the BDO report and in the second sentence they say:

"These scenarios take into account the evidence given by Mr Goss and Mr Whitehorn to the effect that: (a) OEMs/NSCs always seek to maintain a healthy margin on delivery charges, meaning that margin maintenance is a key driver of OEMs' behaviour; and (b) with that in mind, OEMs/NSCs would certainly have passed on any price increase attributable to the cartel ... but would not necessarily have passed on a decrease ..."

So, in my submission, the claim could not be put on a higher basis. That is really a rather extreme way of formulating the claim. Given the point that the BDO methodology is not empirically trying to investigate the

same question but is just applying the assumptions that are being made, we do submit that it is necessary for the Tribunal to scrutinise those assumptions. We are not suggesting that the Tribunal should conduct some form of mini-trial, but the Tribunal has to have regard to what is going to be the situation and the status of the methodology if the facts turn out to be different in any material respects. We do submit it would be completely wrong to certify just on the basis that all of the industry evidence would be accepted. One has to look at: well, if our evidence is going to be accepted, where does that leave the methodology?

I would just like to make three points as to why we say -- or a summary of some factual variations, some points which the Tribunal should be alive to as to why all of those extreme factual assumptions are perhaps not likely to be proved at trial, so there is another side to the story, as it were. That is really the purpose of the material I am going to show you.

The first point I would like to make is that in fact Messrs Goss and Whitehorn accept -- and this is a point I made earlier -- that their generalised statements do have limits. In their second report, paragraph 4.2, they say, "It is of course not possible for us to state with absolute certainty, there will invariably be

exceptions [as read]". The BDO second report says:

"There will be some instances where the normal processes do not hold but these should be a small minority of cases and therefore overall the aggregate damages will be materially accurate [as read]."

This is paragraphs 4.4, 4.27, 4.32 and 4.60. I hope you will forgive me for not taking you to those paragraphs now in the interests of time. But at reply paragraphs 83 and 84, the PCR says -- they refer to cases at the margins and the odd occasion where the universal practice, as explained by Messrs Goss and Whitehorn, did not apply.

Now, we submit that in fact these exceptions are not going to be minor matters that can simply be dismissed or ignored or overlooked. One cannot simply certify on the basis that, "Well, the PCR says these are just cases at the margins". That would be a totally one-sided perspective. We say in fact this is likely to be a rather more significant problem than the PCR is acknowledging. They say it is a minor issue so they are accepting that the universal Rule does not hold good. In one sense, there is common ground and what we are saying is: well, once you have accepted that -- and we will say in fact that is a much bigger problem -- then where does your methodology end up?

It is in that context that we have served some factual evidence. If I could ask you to look at -- we have served evidence from Mr Dent and Mr Cunningham, and the purpose of that evidence is to show that really -- they explain how things work in the real world and in fact there is reason to believe there is rather likely to be a high degree of heterogeneity and one cannot just assume 100% pass-on throughout the whole period across the market. One has to think about: what is going to be the position at trial?

If I can quickly show you these statements. Mr Cunningham's is at bundle {C/12}. Now, Mr Cunningham worked for Hertz and Hertz purchased approximately 50,000 vehicles per year from several of the large OEMs. He explains this in paragraph 6 on page 3, if we could start there, {C/12/3}. Mr Cunningham says that he directly negotiated with OEMs and, in fact, again this is actually a point where there is common ground because Messrs Goss and Whitehorn accept that large fleet purchasers may negotiate directly with OEMs. So in one sense, again, we are just demonstrating or illustrating a point that the industry witnesses themselves accept.

So if we start at paragraph 6:

"During my time at Hertz, it was one of the world's leading vehicle rental companies and was one of the top

five buyers of rental cars in the UK."

At the end of that paragraph:

"... Hertz purchased approximately 50,000 vehicles each year."

So very, very substantial purchases by Hertz.

Then if we move forward to page 6, {C/12/6}, at paragraph 15 he says:

"The way in which the delivery charge was recorded, if it was recorded at all, varied between OEMs. Certain OEMs, such as Ford, Audi, Mercedes, and Vauxhall, would separate out the delivery charge ... Volvo would include delivery in the overall price and there were no other line items ... Honda and Fiat ... did not charge for delivery. As I recall, many other OEMs, such as Toyota, Volkswagen, Kia, and Skoda, would not include the delivery charge as a separate line item."

So, again, I do emphasise that whether or not the delivery charge is itemised, the industry witnesses are saying every one priced in exactly the same way. That may or may not be right, but we do say that is rather unlikely and therefore the Tribunal should think about where the case will end up.

Paragraph 16:

"Hertz typically negotiated vehicle pricing directly with OEMs."

Paragraph 17, {C/12/7}:

"The style and content of negotiations would vary depending on the OEM ..."

Then in the third sentence:

"The negotiation would typically be for a percentage discount off the list price of each model."

Now, I do not want to get into the debate about -- that the Tribunal had with Ms Demetriou, but one can see there, if one is negotiating on a percentage discount basis, then that actually means the theory the PCR is putting forward does not work because any discount would be applied on the delivery charge plus any overcharge, so that deals with actually their point which assumes a particular form of negotiating. That is not how Hertz was doing it.

In paragraph 18:

"In discussions with OEMs, virtually every cost item was negotiable ... For Hertz, it was not so important how the final price was reached ... all that really mattered was the overall purchase cost ... I cannot recall any party being particularly interested in the delivery charge, but, like other costs, it regularly formed part of the overall arm-wrestle on price. The extent to which the delivery charge was negotiated would depend on the individual negotiations. In certain

circumstances, Hertz would specifically refuse to include the cost of the delivery charge ..."

So just pausing there, in certain circumstances, the delivery charge is specifically negotiated off. In other circumstances, there is an overall arm-wrestle on the overall price but the discounts are on a percentage basis. Now, in those circumstances we say that there is going to be a variation and the universal Rule is not going to apply.

Paragraph 20, over the page, {C/12/8}:

"There were only a few fixed fees that could not be negotiated ... The delivery charge was not a fixed fee nor was it treated as one."

In 21:

"How discounts were shown on the invoice varied between OEMs."

Third sentence:

"The format of the invoice did not necessarily reflect the substance of the negotiations. In other words, the delivery charge line item might remain on the invoice even if the delivery charge had been negotiated down or away."

Paragraph 22, obvious point:

"Negotiations with each OEM would vary significantly. BMW, for [example], was a strong

negotiator."

So, again, variation across the class. One cannot just assume that everything happens in this rigid 100% pass-on way.

Then at 24 he says:

"... Ford did not apply discounts on the delivery charge line item ... However, if there was any increase to the delivery charge from year to year, this formed part of the negotiation to reduce another part of the vehicle cost, to essentially neutralise that price increase."

So, again, if that point is held to be correct at trial, where does that leave the methodology?

Paragraph 26, {C/12/9}:

"Accordingly, Hertz could sometimes negotiate deep discounts on ad hoc vehicle purchases."

Then the third sentence:

"In these circumstances, OEMs would usually offer fleet purchasers bigger discounts ... [Because of their purchasing power]."

Then at 29, {C/12/10}, he says that negotiations are "highly dependent on the relevant rental company and the respective OEM".

Now, all of that, in my submission, demonstrates that one cannot make these broad sweeping assumptions as

to how everything was working across the market and at trial, if any of these points are made good, the methodology is not capable of dealing with them.

So we are not asking you to decide the facts now, but we are saying that one -- in the same way that one has had regard to what the industry witnesses are saying, one has to have regard to what our witnesses will be saying at trial.

If we could look at Mr Dent, who is the next tab, {C/15} -- sorry, it is {C/13}. Mr Dent is giving evidence from a different perspective. He is the retail sales leader at Stratstone BMW, so completely different to the Hertz position.

If we start at paragraph 9 on page 3, {C/13/3}, he says that there is an item called the "delivery charge" included in the OTR charges. Then at paragraph 20 on page 5, {C/13/5}, he says:

"While dealers have target margins ... the price at which dealers sell cars to customers is influenced by numerous factors."

Again an obvious point in my submission.

"These include how the dealership is performing in relation to its quarterly targets. In the last weeks of a quarter, I sometimes sell at lower prices to avoid missing targets or instead of the dealership purchasing

the car itself. NSCs also frequently adjust the prices they charge to dealers."

So that is upstream, as it were. That is what the NSCs do. But he has also referred to what dealers do.

Then he says at 22:

"When negotiating the price of the car, it is not uncommon for customers to focus on particular items ... In practice, the dealer may agree to give a discount ..."

At 23:

"However, the paperwork will always show those items at a standard cost, so the reduction is not shown ...", but it is put in a "Special Allowance" section.

Then at 25, {C/13/6}:

"Any discount negotiated by the customer will therefore always show as a discount on the entire car, even if negotiations have focused on discounts for individual items."

At 26:

"Customers often question the delivery charge and ask for it to be discounted."

Then 27, which I believe we looked at yesterday:

"... ultimately the customer could negotiate discounts far in excess of the delivery charge. I tell customers that the delivery charge is included in the

advertised price and cannot be discounted. However, on a number of occasions ... I have had customers who have specifically focused on that cost ..."

Then he says:

"I could achieve the same effect by putting an additional amount ... in the 'Special Allowance' ..."

So Ms Ford relies on that and says, "Well, it is only a handful of occasions". Again she says, "Do not worry about that". We say that, "Actually there is evidence of specific cases of the delivery charge being negotiated away. How is the methodology going to deal with that point at trial?"

But then he says -- this is paragraphs 30 and 31,14 {C/13/7}:

"The amount of Special Allowance that a retailer is willing to offer will depend on a variety of factors, including achievement targets, the length of time the vehicle has been in stock ...", and so on.

"The Special Allowance offered will essentially boil down to how much profit margin the retailer is willing to sacrifice to make the sale."

Then 31:

"Whatever figure is shown on the invoice as being for 'delivery', the end customer is always free to negotiate a good deal on the total price of the car. In

many cases [they] are able to negotiate substantial discounts regardless of the delivery charge ... appearing on their invoice ... the discount could be considered as having been allocated against any line item on the ... invoice."

So, again, I have taken that quickly, but what we are saying is that these points need to be grappled with by any sensible methodology. One cannot just assume the very extreme assumptions that the PCR's evidence is based on, that all of those will be made good and therefore the BDO methodology is *Pro-Sys* compliant. It is just not -- it is not appropriate for the Tribunal to close its mind to the position that the respondents will be taking at trial.

Now, as I say, Mr Robinson's response is to say, "Well, there may be some exceptions, but as long as the assumptions are true for the significant majority of the class members, the estimated loss will be a reasonable answer that is materially correct overall". That is paragraph 4.60 of his second report. We say, well, first, that is an acknowledgement that there may be some exceptions to the rather extreme universal Rule. Secondly, our position at trial will be these are not minor exceptions. The assumptions will not be true for the significant majority of the class members and the

Tribunal cannot proceed on the basis that that is correct.

So where do we go if we are right about that? The broad axe principle, with respect, does not save them because what they have done, in taking the rather extreme and radical approach of assuming that there was 100% pass-on throughout the period by all OEMs, NSCs, retailers -- what they have done is they have really put their claim in the highest possible way, so they are claiming for everything on the assumption that all of this was passed on by everyone.

Therefore, we submit that if this case moves forward on that basis and we at trial prove that in fact these exceptions or these minority cases are in fact a material part of the class, their methodology will overstate the compensation because they have gone for broke, as it were. Insofar as we show that in fact there are variations in the facts, people did negotiate away the delivery charge, some people did not pass on any shipping costs -- to the extent those points are made good, they have no way of dealing with them and they are just effectively taking a very blinkered view and their methodology only works on this 100% basis, but that will lead to overcompensation of the class.

Now, my second point was just to posit another

factual scenario which we say the methodology cannot deal with. Mr Piccinin addressed you on this so I will not duplicate, but effectively it is the point again that Messrs Goss and Whitehorn accept that sometimes delivery charges were increased for commercial reasons. That is paragraph 3.23 of their first witness statement and 3.12 of their second.

Now, of course, it is entirely unsurprising that an NSC, Mr Piccinin's "Adam in accounts" -- it is entirely unsurprising that NSCs are looking over their shoulders or looking at their competitors and reacting to what they are doing. That is completely unsurprising. But that represents a real problem for the PCR because the methodology cannot deal with that factual variation, so, again, it is just completely blinkered.

The third point is -- again, a point that Ms Demetriou developed so I will not address it in detail -- but another factual issue, a live factual issue, is this point about benchmarking prices by reference to excluded brands. As Ms Demetriou said, the industry witnesses themselves accept the automotive market is very competitive; paragraph 3.17 of their first statement, 2.5 of their second. BDO acknowledge that vehicles manufactured in the UK and Europe would

not have incurred RoRo costs -- so all of this is common ground -- on their own list of excluded brands -- we are looking at brands like Audi, Jaguar, Land Rover, Volvo and Porsche -- but it is being said that none of that had any relevance to the pricing strategy. This asymmetric costs-plus pricing that every single OEM and every single NSC and every single retailer was doing throughout the 15-year relevant period -- sorry, from 2006 to 2015, so it is a nine-year period -- they are saying none of this matters.

Again, we say that is wholly unrealistic, But-For present purposes what matters is: how can your methodology deal with that? Really, if I can just show you what RBB say is the proper approach to a case such as this, that if one is doing a proper exercise of investigating the extent to which any shipping overcharge costs were passed down the chain, RBB lists a whole host of factors that would need to be properly investigated.

This is what we are saying the current methodology is not doing.

So if I could ask you to look at bundle {B/106} and if we could start at page 3, {B/106/3}, what RBB have done is similar to what I have done, which is work through the supply chain. So starting off at section 2,

"Pass-on of overcharge by OEMs to NSCs", they say:

"The PM [proposed methodologies] does not consider the issue of pass-on between OEMs and NSCs, implicitly assuming such pass-on to be 100%.

"This may be reasonable when [they] are 'integrated', i.e. part of the same ultimate firm ... but may not be reasonable when [they] operate with a broad degree of financial separation. How costs are allocated ... may differ ... this is a matter for factual evidence ..."

"Then they say at paragraph 13 -- they actually cross-refer to the concession or acceptance in the industry report that OEMs and NSCs are not always part of the same firm. So RBB are saying that, well, at the very top of the supply chain, that is something that needs to be investigated.

Then they move down the supply chain in section 3, where they look at pass-on of overcharge by NSCs to dealers. I would invite you to read this with the benefit of more time, but paragraph 35 on page 7, {B/106/7}, they say -- Dr Majumdar says:

"In my view, undertaking a suitable analysis of pass-on by NSCs would require significant further investigation. Issues (and evidence) that would need to be considered would include the following, for each NSC:

"How [they] determined the prices at which it sold to dealers or, in the case of prices directly negotiated ... how those final prices were negotiated.

"The factors that determined [their] prices, including how changes in the cost of deep sea vehicle transport influenced those prices.

"How the NSC determined its delivery charges during (and after) the infringement period and how such delivery charges were composed ..."

At (d) over the page, {B/106/8}:

"How the NSC changed its delivery charges in response to changes in the cost of deep sea vehicle transport ... and what factors it considered when doing so.

"(e) the availability of suitable information to assess pass-on."

He says:

"I consider that the [proposed methodology] would likely need to be revised substantially to incorporate this information gathering exercise ..."

Then paragraph 47 on page 10, {B/106/10} -- we are now looking at the end of the supply chain, "... pass-on by dealers to end-consumers", he says at paragraph 46:

"In my view ... [this] would require significant further investigation. The [proposed methodology] would

also need to be adjusted substantially to incorporate the information sought.

"Issues (and evidence) that would need to be considered would include the following ...

"How the dealer determined the prices at which they sell to end-consumers.

"The factors that determined these prices ...

"How the [proposed methodology] would incorporate the information sought."

He says:

"[The] Data required would likely include: the final on the road price ... comprehensive details of the vehicle ..."

Then (d):

"The preceding dataset would assist the investigation of whether and, if so, the extent to which delivery charge ... changes cause changes in the price paid by end consumers."

So it is a substantially more complicated exercise but more realistic exercise that one would undertake if one was genuinely trying to estimate the extent of pass-on; whereas, as I say, they have pitched their case in the highest possible terms and they are asking the Tribunal to certify on the chance -- we say remote chance -- but on the chance that all of their industry

evidence is accepted. We say it is simply not appropriate on a *Pro-Sys* test for you not to scrutinise what they have put forward and ask yourself, "Where does the methodology go if the industry evidence is not accepted?"

So drawing the threads together on our objection to the methodology, what we have is a methodology which is entirely premised upon the factual assertions made by the industry witnesses. As you know, we in fact query whether Messrs Goss and Whitehorn, who during the relevant period only worked for Porsche, I think, in the case of Mr Goss, which is actually an excluded brand -- Mr Whitehorn only worked for Hyundai and Motor UK Limited during the relevant period. So we have raised a question as to whether they can seriously be giving evidence about every single OEM, NSC and dealer over a nine-year period. They are also assuming that all of those entities were doing asymmetric costs-plus pricing.

So it is not just making a sort of realistic assumption which could be extrapolated across the market; it is actually a very idiosyncratic form of pricing which they are saying that they understand every single entity in the market was doing. So we have raised a question about whether they can sensibly speak to those issues.

Even leaving that point to one side and just to wrap up this part of my submissions, it is common ground that this methodology of BDO only works if all of those factual propositions are made good at trial. It is clear therefore, and the Tribunal can proceed on the basis, that if any of the facts turn out differently at trial, the methodology collapses.

We submit that, without this becoming a mini-trial, without any decisions being made on the facts -- we say that the Tribunal now should be saying that the *Pro-Sys* test is not satisfied because it cannot deal with any factual variations and any factual variations will result in the PCR having overcompensated the class because they are shooting for the 100%.

The reason I stress that this problem arises is because BDO are not seeking to investigate whether there was or was not upstream pass-on, and that is what makes this case so different. One normally has an expert at this stage saying, "I will do XYZ on my current understanding of the facts, but if those turn out to be different I will do ABC". That is not this case and it is entirely unorthodox and we say completely wrong-headed in terms of an expert methodology where the *Pro-Sys* test applies.

Now, if I could deal very briefly with my two final

points, which are the costs benefit issue and class definition.

On costs benefits I can be very short. You know what was said about this in the *Trains* judgment, paragraph 165 to 178. Now, ultimately of course, in *Trains*, the CAT went on to certify because it was satisfied that the methodology was sound, but it did hold that this was a factor that weighed against certification. So we say, in addition to our objections to the methodology, this is a further reason why the case is not suitable for certification.

The points we make about this I can deal with very briefly, but the costs estimate of bringing this case to trial I think are something like 18 million and, under the funding agreement -- and I need to be careful here because of confidentiality -- but there is -- if I can give you the bundle reference perhaps, but it can maybe not be brought up on the EPE. I do not know whether the Tribunal is able to bring up documents itself or should I just give you the reference perhaps?

THE CHAIRWOMAN: Just give us the reference.

MR SINGLA: It is bundle {C/11/18-19}. That will give you the figures to which the funder is entitled in the event of undistributed damages, in the event of a collective settlement. One can obviously see in the *Trains*

judgment the like-for-like figure, so this is what the funders stand to -- under the funding agreement, what the funders stand to benefit from the pot if the proposed class members do not come and collect their damages and it is, unsurprisingly, a very, very substantial sum.

So what we say is, in circumstances where, on BDO's report -- we have seen this and I will not go to it again, but it is appendix 4.8 and these figures are also in our skeleton argument -- assuming a 10% alleged overcharge, the amount recoverable by a PCM on a per vehicle basis -- Ms Ford started to say yesterday, "Well, they may in fact distribute differently", but let us just move forward on the basis of the numbers we have been given -- Peugeot on a 10% alleged shipping cost overcharge, 1 cent; Citroen, 2 cents; Vauxhall, 3 cents; Renault, 4 cents; Ford, 25 cents; Honda $1.8; and Mercedes, $1.33.

So assuming a 10% overcharge, excluding any downstream pass-on because we parked that point -- so this is a damages claim on a class member per vehicle basis. We are talking about figures in terms of cents and the highest recoverable amount per vehicle on a 10% charge would be $37.50.

Now, we say -- given those levels of damages, we say

it is inherently unlikely that most proposed class members will come forward and claim any damages award. Ms Ford makes the point, "Well, train tickets are different to people's memories of buying cars". Now, that may be a fair point, but the proposed class members would still need to prove that they purchased this car and the relevant period goes back to 2006 so it cannot be assumed that it would be easy to prove your purchase.

Moreover, at paragraph 168 of the *Gutmann* judgment, the Tribunal did not just rely on the fact that people would not have train tickets, but they said they were moreover very doubtful that many individuals would be incentivised to gather all the information required, given the small amount they would recover. Now, would the purchaser of a Peugeot or Citroen or Vauxhall or Renault or Ford or Honda or Mercedes bother to dig out documentation going from 2006, if they still retain it, to make their claim? We say plainly not.

So we do say, for exactly the same reasons as the Tribunal said in *Gutmann*, that on a costs benefit analysis this is not suitable for certification; that the figures are depressingly small.

Finally, if I can deal with the class definition point, we say that if the Tribunal is otherwise against us and is minded to certify, on any view the class

definition needs to be amended.

For your reference, this is dealt with in KK's response at paragraph 54 to 60 and our skeleton argument, paragraphs 53 to 57. The point is really as follows: the current class definition is -- according to the current definition, the PCR is claiming damages in relation to all persons who purchased or financed a vehicle from a non-excluded brand in the UK throughout the relevant period. We see that in the claim form, paragraph 42. But we also know, because Mr Robinson tells us at paragraph 7.23 of his first report and also paragraphs 2.3 and 4.17 of his second report, that in fact, on his methodology, based on the industry evidence, the loss to the end customer will start on different dates depending on the brand because it is only once the relevant OEM enters into an affected contract. So there is a time lag and then there needs to be an increase in delivery charge, and that is when the loss first arises on their case.

So, on that basis, it follows on that what the PCR is saying, that no class member has suffered loss prior to the first observable delivery charge increase after there is an affected contract. So you have a slug of claimants -- we have called them, I think, in our skeleton, the "first tranche claimants" -- you have

people who were making purchases of Citroens and Renaults, et cetera, but in fact there was not yet an affected contract and still less was there an increase in the delivery charge. So in the early part of the claim there could be claimants or there will inevitably be claimants who fall within the current class definition, but, in fact, on the PCR's own methodology have not suffered any loss.

This is a real point, not a theoretical technical procedural point -- but this is a real point because we know from BDO's appendix 8 that first increases in delivery charges took place at different times and sometimes quite late into the relevant period; so for Volkswagen, for example, 2009, for BMW, 2011 and for Honda and Mercedes, 2012.

So it follows from all of that that there will be a significant number of transactions that fall within the scope of the class definition, as currently formulated, but in relation to which no loss is being claimed.

The PCR makes two points in response to this. They say that -- "Well, this can all be sorted out later" is really their first point at paragraph 91 of the reply, "It is a matter for distribution", and they point to the Guide. But the Guide, with respect, we say, helps us

because paragraph 6.37 of the Guide says that the class should be defined as narrowly as possible. Even if the PCR does not yet know which claimants fall into these buckets, what they do know is that some claimants have not suffered any loss because there is a disconnect between their class definition and the methodology. There is a practical implication, as referred to in the Guide, 6.37, because when you define the class, that goes out into the notice and so proposed class members need to know whether they are in or out of the claim. So the notification -- I just give you the bundle reference. It is {C/8/4} -- the proposed notice that is going to be circulated if this case is certified has the current class definition, but in fact they already know that people who bought the relevant cars in the relevant early time periods will not have suffered any loss.

THE CHAIRWOMAN: They do not know who those people are, do they?

MR SINGLA: No, they do not but they know in principle that if you bought a Volkswagen before 2009 you did not suffer any loss. That is not what their class definition says. The class definition says "all persons who purchased or financed a vehicle from a non-excluded brand", but there is no loss methodology being put

forward for Volkswagen pre-2009 or pre-2011 or pre-2012. So we say they do already know, and they can formulate it not necessarily by reference to particular people but they can certainly explain in their class definition when loss was first suffered. Although they do not know when the affected contracts were entered into, they do know when the delivery charge first observable increase took place.

THE CHAIRWOMAN: Well, I thought the current evidential position was that not all delivery charges -- incomplete information had been gathered on delivery charges and delivery charge increases.

MR SINGLA: They may say it is incomplete information but they are coming to the Tribunal with information about delivery charge increases and they have quantified their claim by reference to that material. So we say there is no basis -- if their own expert methodology is proceeding on a particular basis as to when the first increases in delivery charge took place, then that should be reflected in the class definition. This is important because people will not know whether they are in or out of the class.

Then they say, the second point they make in their reply and Ms Ford I think mentioned this yesterday, she says, "Oh, well do not worry about this for another

reason: because those people", the first tranche claimants as we have called them, "may have suffered loss through some other forms of unlawful conduct". This is what she said yesterday about, I think, bunker adjustments on page 129 of the transcript yesterday, {Day1/129:20}.

Now, we say this is really hopeless because, if that is correct, they want to advance a case that some other theory of harm is applicable, then there is no methodology whatsoever. They have not pleaded a case based on other forms of loss; they have not purported to put forward any methodology that says, "Well, in fact, people did suffer loss before the first observable increase in delivery charges".

My final point is really just to say that in *Gutmann*, at paragraph 188 {AUTH/30/75}, one can see that in fact the Tribunal did require the PCR to amend the definition. So we say that, if the Tribunal is otherwise minded to certify, one should not proceed on the basis of an overbroad class definition which effectively will be misleading.

Now, unless I can assist any further, those are my submissions.

I believe Ms Demetriou was just going to deal with the point that was raised earlier about whether or not

a summary judgment application has been issued correctly as a matter of procedure.

Further submissions by MS DEMETRIOU

MS DEMETRIOU: Madam, if that is all right, if I could just deal with it now. I thought Mr Singla was going to deal with it. I was not sure it was being pursued and I think it might be convenient to just quickly deal with it.

THE CHAIRWOMAN: Yes.

MS DEMETRIOU: If we could turn up bundle {A/14/17}, you see at the bottom of the page paragraph 55. So we have explained all of the reasons at this point why the methodology is misconceived. I am not going to obviously repeat any of those submissions now, but at paragraph 55 we say:

"If necessary, [we] also hereby apply.

"(a) to strike out the claim..."

Then over the page --

THE CHAIRWOMAN: This is in your response.

MS DEMETRIOU: It is in our response, exactly.

What is said in the reply is at {A/17/8} and you see that at paragraph 25, that we have, they say, "purported to make strike out/summary judgment applications" and they say they do not consider that they have been properly made. They say that:

"... they fail to comply with the procedural requirements ... of the Tribunal's Guide ... including that any application ... must be supported by evidence, append a draft of the order ... and include a statement of belief that the other party has no real prospect of succeeding."

So I just want to take you quickly to the Tribunal Rules, so {AUTH/2/26}. Rule 41, you see that the Tribunal may, of course, of its own initiative strike out a claim or on the application of a party. There are no formal requirements in the Rules in terms of the application and we see at page 27 {AUTH/2/27} the analogous Rule in relation to summary judgment. It is in exactly the same terms. So it confers a power on the Tribunal. It can do it of its own initiative or on the application of a party but there is no formal prescription as to how the application must be made.

THE CHAIRWOMAN: So you say you have made an application?

MS DEMETRIOU: We have made an application in the response.

If we go to the Guide, because this is what the PCR rely on, so {AUTH/3/65}, paragraph 5.96, so:

"Rule 41 provides that the Tribunal may strike out in whole or part a claim ..."

Then you see at 5.97:

"Any application ... should be fully reasoned and

supported by evidence."

We say there it has been fully reasoned. We, for our part, do not require evidence because -- this must mean evidence if you are relying on evidence. We do not seek to rely on evidence because we are raising, as I have said, a hard-edged point of law. That is in relation to strike-out.

Then in relation to summary judgment, we see at page 66, {AUTH/3/66}, that is slightly different. 5.106, that does require a draft of the order being sought. Again, reasons. We have given reasons. So where we get to is that we have made an application. It has been fully reasoned.

Sorry?

MS FORD: I just wondered, could you refer to the statement below?

MS DEMETRIOU: I am so sorry, of course. The PCR also relies on the statement of belief that there is "no other reason why the matter should proceed to a final hearing".

Madam, the position is that we have made an application in our response. There is no particular form on which that application needs to be made. There is no requirement as to the procedure. We are not relying on evidence. In relation to the strike-out

Rule, there is no requirement for a draft order. There is such a requirement in relation to the summary judgment Rule. So where we are left is that, at worst, we do not have, in support of our summary judgment application, a draft order which we can --

THE CHAIRWOMAN: Or the statement of belief.

MS DEMETRIOU: Or the statement of belief.

Now, those, we say, are plainly -- plainly the position is that, if we had a belief that -- if we did not comply with that, then we would have said so. If the procedural point is being taken, which I understand it is, then we are quite happy overnight to produce the draft order and the statement of belief. There is no substantive prejudice that has been caused at all by this not having been produced. The reasons have been fully explained at all times in our pleading and they have been engaged with, so we say this really is an empty procedural point and it should not really be pursued.

THE CHAIRWOMAN: The Guide has the status, what, of a practice direction?

MS DEMETRIOU: Of a practice direction.

Madam, that is what we say in relation to the Rules and the Guide, so we say we have complied with the requirements. There is in relation to summary judgment

this additional requirement which we have not formally done but we can do that overnight. There is obviously no substantial prejudice at all to the PCR.

Of course you have got my point that as far as our application is concerned -- sorry? Yes, that is quite right. Mr Piccinin reminds me, as far as the draft order is concerned, we do obviously say in the response what we say the order should be. It is just that it is not on a separate piece of paper.

Of course you have my point that, as far as our argument is concerned, we are not seeking to make a distinction between plausible methodology and the summary judgment test because of the nature of the point that we are making. That is not to cut across anything Mr Singla said but, for our purposes, we say that the flaw can be seen via either route and we do not seek to draw a distinction between them for the purposes of our argument.

Madam, just while I am on my feet, there was just one further case that I wanted to draw to your attention that relates to the submissions or might be thought to relate to the submissions that I made because it does discuss the case in the context of a competition judgment. Can I just show you that? That is {AUTH/24/53}. This is the Supreme Court's judgment in

Sainsbury's v Mastercard.

You will know of course that this was a claim by merchants, by the retailers, for damages against Mastercard in relation to the MIFs. The MIFs were fees paid by the acquiring banks and Sainsbury's argued that the MIFs were too high. The claim was in respect of the inflated MSC, the merchant service charge, which is the charge that the acquiring banks imposed on Sainsbury's.

You see at paragraph 192 at the bottom of the page, there, that:

"The merchants' claims are for the added costs which they have incurred as a result of the MSC ..."

So that is the claim.

Then if we go on to the next page, at the top of the page, so you see in 193 {AUTH/24/54}:

"... the merchants' primary claim of damages is for the pecuniary loss which has resulted directly from the breach of competition law ..."

If we go to 198 at the bottom of the page:

"The question then arises as to whether the merchants are entitled to claim as the prima facie measure of their loss the overcharge in the MSC which results from the MIF. The merchants say they are so entitled because they have had to pay out more than they would have But-For the anti-competitive practices of the

schemes and so have suffered pecuniary loss. On the other hand, Visa ... submits that their claims are for pure economic loss and must be claims for the loss of profit which they would have enjoyed But-For the alleged wrongful act of the defendants."

What is being said there by Visa is that the claim has to be a claim for loss of profits. So where the retailers passed on downstream to their customers the overcharge, that all needs to be set off against the primary loss.

You see at 199, the court is rejecting that saying:

"We are satisfied that the merchants are correct in their submissions that they are entitled to plead as the prima facie measure of their loss the pecuniary loss measured by the overcharge in the MSC and they do not have to plead and prove a consequential loss of profit."

Then you see, and this is really what I want to draw to your attention, at 202 {AUTH/24/55}, discussion of , so you see the case there referred to. At 203:

"The effect of the breach on the overall profitability of the claimant in each case [so including] was not the relevant measure of damages."

Then you see the conclusion at 205 {AUTH/24/56}:

"In the present appeals, the merchants by paying the overcharge ... have lost funds which they could have

used for several purposes."

So what is being said by the court there is that they were entitled to claim, as their primary loss, the claim on the MSC and then the analysis comes in at the later stage. So the question then is, where you have a separate downstream transaction, should that be taken into account to offset the primary loss, and the question is: is there a sufficient causative link?

So this case is, in my submission, fully consistent with our submission because it says that the *Fulton* analysis bites when you have got some separate transaction which might offset the primary loss. But I just raise it because it occurred to me when I was looking at it over lunchtime that they do refer to which we have been arguing about, so I just draw it to your attention so you have it in mind.

Madam, sorry for my intervention. I had not meant to get up again but ...

THE CHAIRWOMAN: Yes, okay.

MR HOSKINS: Madam, I would like to begin with two apologies. One is I am going to address you with a spectacular black eye; I hope it is not too distracting. I would like to tell you it was due to some act of heroism but I got whacked in the eye by a football.

The second apology is I was due to stand up around 3.00 pm. With the best will in the world, I am not going to finish my submissions by 4.30 today.

I think obviously you want to know where we are.

THE CHAIRWOMAN: Yes.

MR HOSKINS: I had anticipated being between an hour and an hour and ten minutes dealing with the opt-in/opt-out issue and Mr Holmes I believe was going to require about 30 minutes -- sorry -- up to an hour to deal with deceased persons and compound interest. So I apologise --

THE CHAIRWOMAN: So we will be most of the morning tomorrow.

MR HOSKINS: I am afraid so. I am sorry. I apologise on behalf of all the defendants for that.

THE CHAIRWOMAN: Okay. It goes without saying we have got to leave sufficient time for reply. The defendants collectively have had a lot of time.

MR HOSKINS: I understand.

THE CHAIRWOMAN: So we will clearly be going into tomorrow afternoon and we need to allow the proposed class representative a commensurate period in which to reply to all the points that have been raised.

MR HOSKINS: I understand. That is why I raise this by way of an apology because it is our fault and obviously it is important that the PCR should not be inconvenienced,

absolutely.

THE CHAIRWOMAN: So, Ms Ford, you have got tomorrow afternoon as you require.

MS FORD: I am grateful, Madam.

THE CHAIRWOMAN: I think in the light of that, probably the best thing is to stop now, unless you disagree, if there is some point you want us to think about.

MR HOSKINS: I think the seven-minute blockbuster is probably beyond me, to be honest! It has been a long day.

THE CHAIRWOMAN: Black eye or not!

MR HOSKINS: Black eye or not, yes.

THE CHAIRWOMAN: So I think we will reconvene at 10.30 tomorrow morning.

(4.24 pm)

(The hearing adjourned until
Wednesday, 1 December 2021 at 10.30 am)

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