IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1329/7/7/19
1336/7/7/19

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Friday 15th January 2021

Before:
THE HONOURABLE MR JUSTICE MARCUS SMITH
(Chairman)
PAUL LOMAS
PROFESSOR ANTHONY NEUBERGER

(Sitting as a Tribunal in England and Wales)

BETWEEN:

MICHAEL O'HIGGINS FX CLASS REPRESENTATIVE LIMITED
Applicant/Proposed Class Representative

v

(1) BARCLAYS BANK PLC
(2) BARCLAYS CAPITAL INC.
(3) BARCLAYS EXECUTION SERVICES LIMITED
(4) BARCLAYS PLC
(5) CITIBANK, N.A.
(6) CITIGROUP INC.
(7) JPMORGAN CHASE & CO.
(8) JP MORGAN CHASE BANK, NATIONAL ASSOCIATION
(9) J.P. MORGAN EUROPE LIMITED
(10) J.P. MORGAN LIMITED
(11) NATWEST MARKETS PLC
(12) THE ROYAL BANK OF SCOTLAND GROUP PLC
(13) UBS AG
Respondents/Proposed Defendants

AND

AND BETWEEN:

PHILLIP EVANS
Applicant/Proposed Class Representative

- v -

(1) BARCLAYS BANK PLC

(2) BARCLAYS CAPITAL INC.
(3) BARCLAYS PLC
(4) BARCLAYS EXECUTION SERVICES LIMITED
(5) CITIBANK, N.A.
(6) CITIGROUP INC.
(7) MUFG BANK, LTD
(8) MITSUBISHI UFJ FINANCIAL GROUP, INC.
(9) J.P. MORGAN EUROPE LIMITED
(10) J.P. MORGAN LIMITED
(11) JPMORGAN CHASE BANK, N.A.
(12) JPMORGAN CHASE & CO
(13) NATWEST MARKETS PLC
(14) THE ROYAL BANK OF SCOTLAND GROUP PLC
(15) UBS AG

Respondents/ Proposed Defendants

A P P E A R A N C E S

Michael O'Higgins FX Class Representative Limited	Scott+Scott UK LLP	Daniel Jowell QC Gerard Rothschild
Barclays	Baker & McKenzie LLP	Rosalind Phelps QC David Heaton
Citibank	Allen & Overy LLP	Max Evans
JPMorgan	Slaughter and May	Sarah Ford QC
NatWest / RBS	Macfarlanes LLP	Josh Holmes QC Sarah Love
UBS AG	Gibson, Dunn & Crutcher UK LLP	Paul Luckhurst
Phillip Evans	Hausfeld & Co. LLP	Victoria Wakefield QC Aaron Khan
MUFG	Herbert Smith Freehills LLP	Ronit Kreisberger QC

Friday, 15 January 2021

(10.30 am)

(Proceedings delayed)

(10.42 am)

Case management conference

THE CLERK OF THE COURT: Ready to proceed.

MR JUSTICE MARCUS SMITH: Thank you very much.

Good morning, everybody. Can I first of all do an audio check and a visual check. I hope that everyone can see and hear me. At the risk of having a cacophony of yeses, can I have a cacophony of yeses?

MR JOWELL: Yes, Sir, you are loud and clear.

MR JUSTICE MARCUS SMITH: Very good.

I am conscious that to say "speak up if you cannot hear me" would be a bad question.

Welcome to this hearing. This is a remote hearing but the usual rules regarding such hearings take place, you are in a virtual emanation of the Competition Appeal Tribunal courtroom and I know I don't have to say this, but I say it ahead of every hearing that I do remotely, there is to be no recording or photographing beyond the record that is being taken by the Tribunal centrally.

Welcome, we have read the written submissions and the correspondence and a substantial part of the other materials that you have submitted and you will be able to make your submissions on the basis of significant pre-reading by the parties and by the Tribunal.

In terms of structuring this hearing, we have given some thought to that. What we would like to do is to go through matters on a fairly rigid agenda because we see one topic feeding

into and informing the next.

The order that we are going to run through things is this.

We are going to start with the date for the certification and carriage hearing.

We are then going to move on to the hearing structure.

The reason we are going to go on to the hearing structure rather than the order in which evidence is to be served is because we consider that the structure of the hearing is going to be hugely informative and probably determinative of the way in which evidence is served. Let me unpack that a little bit for the benefit of the advocates.

You will have seen in the correspondence from the Tribunal and indeed in the responses from the parties that we see the hearing that will take place is dealing with two matters which arguably, and I think we made clear that we have a provisional view that they are distinct, and that is the question of certification and the question of carriage.

Now, if one were to regard the two aspects of the hearing as separate, in other words the Tribunal would consider first do either or both of the applicants meet the certification criteria, one might say that there ought to be a provisional or indeed final tick box of saying "Yes, you pass the Merricks test, you are either capable of being certified or you are in fact certified", and at that point the defendants move out of the hearing and one moves to the question of carriage.

Carriage would then be determined simply as between the two applicants on the basis that the respondents, the defendants, have nothing to say and thus no reason to be present in the debate as to simply who is going to be running a claim that will inevitably be run.

I have been looking at the rules and you will obviously want to address me on how far that is or is not possible. And we can have a debate in due course. We, of course, have in mind the point made by Ms Phelps in her written submissions, that there is an Al Rawi question, there is of course an Al Rawi question, you don't need to take us to the law in this area, that was very fully traversed in a decision that I made a few years back in the

context of merger debates and that is the Eurotunnel merger case, where the whole Al Rawi thing was gone into in a great deal of detail.

Please feel free, though I don't think you need to address us on the law. What I would like to hear on is the extent to which we are wrong in our provisional view that there is no interest in the respondents in participating in a pure carriage dispute. I stress the word "pure". That is I think critical to an understanding of whether one can achieve the sort of bifurcation that I am thinking about.

Related to that, the theoretical question of bifurcation is whether it is actually worth the candle and that is something I think the applicants will need to address us on. I notice that the question of bifurcation has not loomed large in the applicant's submissions, but I think we will be assisted by the extent to which there are or might be aspects of the applicant's applications in relation to carriage which are sufficiently sensitive that they would not want to have the respondents hear it.

I appreciate that we cannot today determine what is and what is not relevant to carriage. So on the assumption that everything could be, it may very well be that we would need to reach a view on each applicant's robustness in terms of, let us say, merits or in terms of how their claim is going to be advanced and funded, which would be matters that are highly confidential to the progression of the case and its success, and which, on the face of it, the respondents ought not to hear.

If the applicants tell me, tell the Tribunal, that they are just not worried, we can ask anything and they can disclose anything and the respondents can see and hear it and there is no problem, then we don't need to discuss bifurcation further, but I would want to be satisfied that the applicants are aware that we are not minded to exclude at this stage really quite probing questions on matters that the applicants might regard as highly sensitive and confidential. I am not saying that those would be determinative, I am saying that we cannot reach a view today that they would be or wouldn't be.

That, as we see it, is the pivot on which the order for evidence service -- which is the third topic for discussion -- operates. Assuming a bifurcated split between certification and carriage, we would want to have the evidence served differentiated as between evidence going to carriage and evidence going to certification.

Our view would be, and again this is something which is hugely dependent upon the hearing structure, but assuming there is a bifurcation, we would provisionally think that the applicants have done enough to show that they are certifiable and that it is time to hear from the respondents on that point with the applicants obviously having an ability to reply on the question of certification.

On the question of carriage, we consider that there ought to be a separate strand of evidence, assuming the hearing structure operates the way I am suggesting, the separate strand of evidence going solely to carriage, where, given the state at the time, each applicant puts in what further evidence they consider they want to and then there is an ability to reply and kick the tyres of the evidence that has been served, as it were, in support of why each particular applicant is the one that ought to be given carriage of this case.

That obviously would affect the sort of timetable to the hearing, after that there will be the nuts and bolts in terms of specific dates, bundles, the need for a further CMC or PTR, however you want to call it. Those I think are matters which can be dealt with relatively quickly at the end, once we have decided the bigger points.

What I am going to propose before I hand over to counsel is to say that we would be minded to rise for however long it takes to debate what orders we are minded to make at the end of each stage and then come back into the hearing, tell you what we have decided and move on to the next phase.

I am sorry that has been a rather long introduction to how we see it, before I hand over to Mr Jowell -- I think, Mr Jowell, you go first and Ms Wakefield you go second and then in the order they wish I will hear from the respondents. I think Mr Holmes, you may be

taking the lead -- I may be wrong about that.

MR HOLMES: That's correct, Sir.

MR JUSTICE MARCUS SMITH: In that case, that is the order in which I will hear from you.

Before I hand over, do any of my fellow Tribunal members have anything to add? Professor Neuberger? Mr Lomas?

PROFESSOR NEUBERGER: No.

MR LOMAS: No.

MR JUSTICE MARCUS SMITH: In that case, Mr Jowell, the floor is yours.

MR JOWELL: I am grateful, Sir, can I just confirm -- you mentioned two points on the agenda, the date of the hearing and then the hearing structure. Do you wish me to deal with those compendiously or separately?

MR JUSTICE MARCUS SMITH: Let's deal with the date as a separate point. I would like to think, given the indications we have given that is something we can probably handle very quickly, but I don't want anyone to feel that they are being unduly bulldozed and obviously diaries are a problem here and we know 12 July is not convenient to everyone, but we as a Tribunal were very keen to have this on before the summer rather than after it and I am afraid our diaries then came into play, so there is a degree of firmness behind that date but we obviously don't want to make a decision on that without hearing anyone who has an issue with it.

MR JOWELL: On that point we agree with the July date and we also agree with the provisional hearing length of five days, which we (Inaudible), and we think it is sensible, Sir, to set aside the full five days and it may well be necessary to use those five days, but we certainly don't think that ten days is necessary. In our skeleton argument we proposed seven days, we are content with five days and we are certainly content with the date.

As I understand the position, there is no date until at least December that is convenient to all counsel. Most counsel can certainly do the July hearing and we think it is sufficiently far away, six months, that it is entirely fair and sensible to list it for that date.

Unless I can assist further on that issue, that is all we have to say.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Jowell.

You came across -- I got everything you said but it was not great quality. Can I just check whether the problem is at my end or whether it is, as I am rather hoping it is your end, Mr Jowell.

Ms Wakefield, could you just say a few sentences so I can assess the position?

You need to unmute, I think.

MR HOLMES: Sir, if it assists, I could hear you very clearly, but I had real trouble with Mr Jowell's feed.

MR JUSTICE MARCUS SMITH: I hesitate to say excellent, but excellent. Mr Jowell is fine but Mr Holmes you are coming through loud and clear and I am glad that we are.

Mr Jowell, we will obviously say if we cannot understand what is going on and then we will have to address it but I am more than happy to proceed on the basis of poor quality rather than incomprehensible quality, so thank you.

Ms Wakefield?

MS WAKEFIELD: I am so sorry.

MR JUSTICE MARCUS SMITH: Not at all.

Do you need to dial in and out, Ms Wakefield?

MS WAKEFIELD: I think I may do.

MR JUSTICE MARCUS SMITH: Do you want to take five minutes to do that. These things happen and if it does not happen -- well, we can have a side bet on how many times it happens but I reckon it will be about five times in the course of the morning.

MS WAKEFIELD: Can you hear me now? It says that I am unmuted on my screen.

MR JUSTICE MARCUS SMITH: I can certainly hear you, loud and clear.

MS WAKEFIELD: My video now has gone strange, I see.

May I dial back in again, I am so sorry for this.

MR JUSTICE MARCUS SMITH: You are coming from a different angle, but do dial in.

MS WAKEFIELD: Thank you very much. **(Pause)**

I hope this is working now.

MR JUSTICE MARCUS SMITH: Yes, Ms Wakefield. Loud and clear. Somewhat disconcertingly you jump around the matrix on my screen, which is like counsel rearranging themselves in the rows at lightning speed, but I can see and hear you loud and clear, so do proceed.

MS WAKEFIELD: Thank you very much.

As to the date, of course we agree with 12 July, it was our primary position in our skeleton argument and we entirely agree that the primary concern must be getting these applications on as soon as possible.

As to the duration of the hearing, I am afraid that respectfully I do depart from the proposed length of five days. Now, of course, that is very closely allied to the second question on the Tribunal's agenda, namely the structure of the hearing. So it may make sense to return to duration perhaps after that second issue.

Certainly, as far as we are concerned at this preliminary point in the agenda, as it were, we would say that treating certification as the first issue, if one looks at the other applications for certification, which are imminently to come before the CAT, then in the Merricks case, for example, that is listed for two days, and of course that is a matter with which the Tribunal is extremely familiar, in that matter, and then the Gutmann application is on for four days, three days with one in reserve, and of course there are two applications there that as I understand the abuse is essentially identical between the two and it is the same PCR. So for these two applications for certification, one might

think three days or four days, for that part of the hearing.

Then for carriage -- of course now we really are coming into the second item on the agenda, so I apologise for trespassing over that -- one might imagine that there could be a significant amount of exploration of the expert evidence. One might also think that perhaps in a case such as the present it may be helpful for the Tribunal to have something like a teach-in, as you did, Sir, in BritNed because of the complexity of some of the issues and by the time one has allowed for that and the legal submissions and the various factual matters as well that fall to be considered, it may well be that one again is at two, three, four days even.

I am also mindful, Sir, as I am sure you will be as well, there are so many unknowns at present, one key unknown is of course whether there are any class members or other parties with an interest who may wish to participate in the hearing.

Experience indicates of course that that is relatively unlikely, but nevertheless it would be wrong in my submission to list the hearing on the basis that such participation was precluded, that there was not sensible time for that.

On my calculation, one comes out at well over five days, more like six, seven, eight days perhaps. Of course underlying a prudent, if I could put it that way, approach to duration, is the fact that with all of our diaries being the way they are, as soon as we lose that second week in the provisional listing, we are all going to get too busy again and then if the hearing does go over five days, then the applications will go part heard, which is obviously entirely undesirable.

For these reasons respectfully I would urge the Tribunal to list for longer than five days and instead for seven or eight days perhaps.

MR JUSTICE MARCUS SMITH: Thank you.

Before, Mr Holmes, you come back on that, I think I should make clear that not only did we make an informed view as to five days, but also the following week is not available and

that is not because of counsels' diaries but because of the Tribunal's.

So if one needs to have a two-week slot for the avoidance of doubt, it is not going to be before the summer. What I am going to suggest, and we may have to retire to consider this further, but what I am going to suggest is that subject to what Mr Holmes has to say, we stick with 12 July and a five-day reserved period, but we retain a degree of flexibility in terms of how one handles the issues that come in. It may be that you are wrong, Ms Wakefield, and we can do it in five, everything.

It may be -- respectfully, if I may say so, you could well be right, it may be that five days is insufficient but I would hope that one could for instance have the teach-in separated from those five days and perhaps done beforehand. Equally, one might deal with certification but not carriage and park that to a separate issue after the week of 12 July.

I think we will have to keep an eye on this as the hearing develops because, as you have rightly said, how we determine bifurcation may affect that approach but, subject to my fellow Tribunal members having a problem with that, that is how I am minded to deal with it.

What we will do is I will hear Mr Holmes, I will hear anyone else on the respondent's side and then we will retire for five minutes to consider the appropriate course.

Mr Holmes.

MR HOLMES: Sir, as respects the date, we are conscious that there is no perfect date for listing this hearing. We have also heard what you have to say about the Tribunal's availability and the Tribunal's fairly firm view that a date in July would be preferable and with those points in mind, we are not going to attempt to persuade you to delay the hearing until September because there is better availability for some of the banks than for others in that month.

As regards the period that will be required for the hearing, I am not sure that I can speak on behalf of all of the banks here because this is not a point that has been canvassed in

detail between us, but my initial reaction based on what I have heard is that it is very difficult at this stage of the proceedings to be confident as to the time that is required. It would obviously be preferable to set aside sufficient time to avoid this going part heard if that were possible. We do have sympathy -- here I speak as counsel for NatWest Markets, RBS -- with some of the points that were made by Ms Wakefield in relation to the time that may be needed, but we appreciate that there are also availability issues that make it difficult to extend the period and so the Tribunal will need to take a view and we can see that five days may be sufficient, depending on how matters pan out.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Holmes.

Is there anyone else on the respondent side who wishes to speak? I am going to go through the appearances list.

Ms Phelps?

MS PHELPS: No, Sir.

MR JUSTICE MARCUS SMITH: Mr Evans?

MR EVANS: No, Sir.

MR JUSTICE MARCUS SMITH: Ms Ford?

MS FORD: No, Sir.

MR JUSTICE MARCUS SMITH: Mr Luckhurst?

MR LUCKHURST: No, Sir.

MR JUSTICE MARCUS SMITH: Ms Kreisberger?

MS KREISBERGER: No, Sir.

MR JUSTICE MARCUS SMITH: Very good.

Mr Jowell, do you have anything to add?

MR JOWELL: Only (Inaudible) clearly, but just one point which is on the duration of the hearing, I do note that in the Trucks litigation where there are two representatives

applying for a CPO and many defendants, as in this case, the Tribunal has listed the matter for four days with one day in reserve, so I think that is very closely comparable to your estimate of five days.

MR JUSTICE MARCUS SMITH: Well, thank you very much, Mr Jowell.

Ms Wakefield, I probably should have called on you before Mr Jowell because reverse order would apply, but if you have anything to add then by all means do so?

MS WAKEFIELD: I don't, Sir, thank you.

MR JUSTICE MARCUS SMITH: Right, we are now going to stress test our remote hearing room. If I can invite Professor Neuberger and Mr Lomas to hit the resume on the hearing room button, we will be back I hope in less than five minutes.

(11.08 am)

(A short break)

(11.13 am)

MR JUSTICE MARCUS SMITH: Thank you.

Well, very grateful for the submissions. What we have decided is that it will be, somewhat unsurprisingly, 12 July for five days. However, we want to give one or two indications.

First, we think there is a positive benefit in having a teach-in in advance of those five days, and not to be included in it. Naturally, when that would be and what it would involve is a matter for debate and I don't propose to waste any time debating it but we think it is actually better not part of the five days. We are mindful of Ms Wakefield's Cassandra-like warnings and it was of course Cassandra's fate not to be listened to, so it is going to be five days. We do have an ability to case manage things differently and obviously, if in the light of the evidence to come and the way the issues develop, we will keep a very close eye on the need for time.

I don't believe it will be possible, though diaries change, to stretch the five days in July but if we take the view that Cassandra ought to be listened to, then we will of course look to

find more days some time later in the year but we would be pretty reluctant to scrap the five days that we have found and so we would have inevitably a splitting of issues which may or may not be undesirable.

That is the first point of business dealt with.

Mr Jowell, I received a message that you might want to try to improve your audio feed. I am very happy to rise for five or ten minutes to enable you to do that because I am conscious we are coming on to the harder part. Let's see how the quality is while you respond to that suggestion?

MR JOWELL: Sir, I am in chambers, in my room in chambers, and there are very few support staff available, so I am not sure whether in five minutes I would be able to improve my audio. Am I audible, however?

MR JUSTICE MARCUS SMITH: You are comprehensible, but it is an effort and I think your quality of feed is significantly below that of the others who have addressed me but I think you are right, let's proceed.

MR JOWELL: Might it be possible for me to try to dial back in? That might work?

MR JUSTICE MARCUS SMITH: That is what I had in mind. It worked for Ms Wakefield so it may work for you.

In that case, do dial out and we will wait for you to come back in.

MR JOWELL: I am very grateful, thank you.

MR HOLMES: Sir, may I just raise one housekeeping point. My junior tells me that she is in the waiting room for the hearing but is unable to gain access and she is not in the same location as I am. Would it be possible for a member of the Tribunal's staff to let her back in, please.

THE CLERK OF THE COURT: That is sorted now.

MR HOLMES: I am grateful.

MR JUSTICE MARCUS SMITH: I am very glad you were not asking me that, because that

is well beyond my competence in managing this courtroom.

Good. We will wait for Mr Jowell to return. **(Pause)**

MR JOWELL: Can I be heard now?

MR JUSTICE MARCUS SMITH: That is much better, Mr Jowell. So that was well worth the delay. Thank you.

Mr Jowell, we are on to the second question, which is hearing structure and I think you would best assist on two questions, can we do it and should we from the point of view of the applicants do it?

The same two questions will apply to Ms Wakefield.

I will then hear from Ms Phelps and again the question for her will be can we do it and should we from point of view of the respondents do it. Of course the points that she will address will be rather different to the points you will have raised. If Ms Phelps could then also reply to any points you make as to the desirability of bifurcation, I will leave you, Mr Jowell and you Ms Wakefield to respond to any points that Ms Phelps makes against bifurcation. I think that way we can have the points explored most appropriately.

So, Mr Jowell, you first and then Ms Wakefield.

MR JOWELL: I am very grateful, Sir.

It seems to us that there are two distinct points.

There is the question of the structure of the hearing.

Then there is the question of the exclusion of the defendants from the second part of it.

As regards the structure of the hearing, we entirely agree that it is sensible, at least provisionally, to assume that the hearing will be structured in two halves.

The first half will consider certification of each proposed class representative in turn, or if there are common issues, jointly.

Then, the second part would consider the question of the carriage dispute. That is not to say

that it is not in a way all one question of certification. It is, legally, all one question of certification but nevertheless we think it is very sensible to split it in that way. Indeed, if the Tribunal were to conclude that one of the two representatives was not suitable, then of course that would in a way obviate the need for the second half.

We certainly think that structurally that is likely, very likely, to be the best approach.

As regards excluding the defendants, we think we agree, certainly, that the defendants have a very small, if any, role to play in the carriage dispute. There is the question, however, of fairness to the defendants that Ms Phelps raises, which is an element in the traditional test in Canada and according to the Tribunal guide one of the elements which is relevant to the question of carriage, but it is very important not to confuse fairness to the defendants with benefits to the defendants, because with benefits of course, it benefits the defendants to have the weaker representative going forwards, and that of course is not in the interests of the class.

But fairness to the defendants is something rather different, and really what that is concerned with is the extent of ATE insurance to ensure that if the claim fails there are sufficient funds there to ensure the defendants are not out of pocket. That is an element, it seems to us and according to the Canadian jurisprudence, to be one of the questions in determining carriage, the level of ATE insurance. We can see that, at least on that narrow issue, it would be fair to give the defendants an opportunity at least to make submissions, albeit that they may well not wish to take up that opportunity.

In terms of the other questions that you indicated may be under consideration in relation to carriage, the relative merits and the probing questions that you intend to ask, we find ourselves in somewhat of a dilemma for two reasons.

First, because we do take the view that in light of the Supreme Court's judgment in Merricks, it is very difficult to see that it would be appropriate on a certification hearing to go into the merits, other than the two exceptions that are identified by the Supreme Court,

I think it is in paragraph 59 of its judgment, which are where you are comparing opt-in or opt-out or where there is a summary judgment application or a strike-out, but that nevertheless, we of course are very happy to consider the merits, the relative merits on the carriage dispute and to have that debate and it appears that the Tribunal wishes to continue to hear that evidence and to do so.

MR JUSTICE MARCUS SMITH: Let me explain, Mr Jowell, why we take the view that that is the case. It does seem to me that Merricks is something, self-evidently, that we are obliged to follow, but Merricks was, with all due respect to the Supreme Court, a one-horse race and whilst I can see that there is obviously an obligation on this Tribunal to read what was said in Merricks across to the carriage part of the dispute, I don't see how one can say automatically as a matter of precedent that is binding on the Tribunal that the manner in which carriage is to be resolved has been resolved by Merricks.

It may very well be that you are right and it has been, but I don't see that that can be a point for argument today and if that is right, then it seems to me we need to be in a position to address the point in July having the benefit then of the legal arguments all being made, but if we are against you on what you have put forward as a provisional argument -- I have no idea whether you will be arguing that in July or not, but someone may be -- then we want to have the evidence in play so that we can appropriately take it into account if that is appropriate.

Unless you want to push back on that, I think we have to proceed on the basis that the merits may be relevant, and if I may, while I am interrupting you, you made the point entirely rightly that ATE insurance is a matter that every respondent will be acutely concerned by, but my question for you is that will obviously be addressed in the context of certification, and were it to be the case that the ATE insurance was in some way insufficient, then that would be a seriously militating factor against certifying in the

first place, but if one were satisfied that the ATE cover in both cases was such that certification should be granted to both, but one couldn't because they were both opt-out proposals, then my question is how far does ATE then feature at stage 2, the carriage dispute? That obviously does have a bearing on the extent to which Ms Phelps wants to be involved, and of course not just Ms Phelps but she is taking the lead on this.

If I may, it probably is best if on the ATE question you respond to what Ms Phelps has to say because I can see that she will have material points to make.

What I think I would be assisted on though is the extent to which you are relaxed about an absence of bifurcation, given the indication I have made that these things are matters we are going to have to go into, because if you are saying, "Look, ask what you like, we really don't mind who on the respondent's side sees it, whatever the question, we will be full and frank and it will be there", then that is obviously a factor we will bear in mind; it is just that our thinking is that we may well be going into areas which might well be regarded as the crown jewels in terms of litigation strategy, the way in which you win the case if you get certified, which you don't mind the other applicants seeing, because they are in the same position as you but you would have great difficulties in the respondents seeing.

If you say "don't worry" (inaudible) raised this here for no particular reason, but it did seem to me important to raise it just so that I can see what the applicants' response is.

MR JOWELL: Sir, I think our answer to that -- well, let me go through the points you have raised if I may.

The first point in relation to the Supreme Court and Merricks, we do say that actually the Supreme Court is very clear that on a certification hearing the merits only come into it on those two exceptions and, with respect, the Tribunal is bound by that and we do say that it shouldn't be going beyond that, including in relation to a carriage dispute which is, as I indicated, part of the certification process, so we do respectfully say that the

Tribunal is bound by that.

But we appreciate, of course, and we take no objection to, a Tribunal on a precautionary basis also hearing evidence in relation to the merits in case that takes a different view -- we have absolutely no objection to that at all, albeit that of course I have to lay down a marker as to that submission.

In relation to the ATE insurance, we do say that there is of course the threshold question of whether you have sufficient ATE insurance to merit certification. There is also then I think some weight should be given to the levels of ATE insurance beyond that in relation to the question of fairness to the defendants, in the question of the relative question of carriage but I can come back to that.

I have some sympathy for Ms Phelps's idea that at least on that issue the defendants should not be shut out from making submissions, albeit as I said, beyond that it is difficult to see what relevance the defendants' submissions the defendants could have to make.

On the question then of whether we are relaxed about the presence of the defendants, the answer is that on the basis of the present evidence, on the present issues, we are relaxed about the defendants' presence, they have seen the material that we have put forward, they have seen the material that Evans have put forward, but of course we don't know what probing questions this Tribunal is going to ask and of course the Tribunal cannot ask questions that go to matters that are covered by legal professional privilege, but you adverted to questions of litigation strategy and it is possible to imagine that you may be seeking answers in the future to questions about, I don't know, settlement strategy, for example, on which we wouldn't wish the defendants to be present if we were to give an answer. So it is a difficult question to answer in the abstract, if I may say so.

Therefore, we would have to reserve our position on that but on the basis of the evidence as presently constituted we are relaxed, and certainly we would be very content for Professors Bernheim and Breedon to give live evidence if that would assist the Tribunal

and we would be grateful to have an indication today whether that might be helpful, because we should make provision to ensure that they are available on at least one of the days and of course we would be very content for them to be probed by the Tribunal on their theories and their methodology but, it is very difficult to say, in the abstract, whether any question that the Tribunal might pose is one that we would be content to answer in the presence of the defendants, without knowledge of those questions.

MR JUSTICE MARCUS SMITH: Of course, but the trouble is we are not in a position to articulate what those questions might be, except in this general sense.

Let us put the general question quite baldly. We, on one view of the purpose of this whole regime, are deciding who can best represent a class of claimant who is not before the court. So we need to, on one view at least, do more than simply make sure that you are going to do a job on the claim, but that we give carriage to the person best equipped to win.

You may say that the question is actually wrongly framed, that I and my fellow Tribunal members need to be satisfied to a rather lower standard in terms of determining carriage. You may say:

"Yes, follow Merricks, take a low level merits test, make sure that all the other boxes are ticked in terms of the criteria that you both have very helpfully listed in your matrices, and if they are broadly equivalent, then decide it on a first in time basis."

I can certainly see why, Mr Jowell, you would take that point, because you were first in time and that may be the way to do it and one doesn't really get into the detailed probing on who, almost in a trustee-like way, who is best.

The problem I think that I have is that at this stage the Tribunal is not prepared to give that sort of indication in terms of what is relevant. That is because this is the first case in this jurisdiction where there is a carriage dispute. It may well be when one gets to the second, third, fourth cases, matters are much easier and this sort of question doesn't

have to be debated, but I think you need to proceed on the basis that Professor Neuberger will have difficult questions to ask on the merits, on the economic theory that you are advancing, and that Mr Lomas, who knows a thing or two about how these things are put together on funding, will have difficult questions to ask about how you are going to win this case.

On that basis, I want to test the level of your relaxation, if I may put it that way, because what I am not going to have happen is a situation where two months down the road you say, "Gee, bifurcation is a jolly good idea, I wish we had asked for that". Because if we decide today not to bifurcate, and it is a difficult question because Ms Phelps makes some very good points about the respondents' involvement, but if you are saying that you are relaxed, given the warning that I am flagging, then to a significant extent you are going to be stuck with that. That is why we raised it now. It may be possible, of course, to adjust things going down, but as I indicated in opening, we are minded, if we in theory bifurcate, to bifurcate the strands of evidence that go to each side of the matter. It may be, of course, that ATE will be, rightly so, in the certification and not the carriage side and it may be that in the carriage debate, there is provision for the respondents to be present to say:

"From our point of view we do need to address you on the relative merits of ATE, and we appreciate they both are certifiable, but we do need to say we would rather have in the interests of recovering costs, if we win, we do want to have (a) rather than (b)."

That is possible, but we are at a significant delta here and it does affect, as I say, how we structure the evidence going forward.

I am sorry, that was a rather long intervention but --

MR JOWELL: I understand.

MR JUSTICE MARCUS SMITH: -- we cannot give you the comfort you want, I don't think.

MR JOWELL: I understand.

May I make one further remark and then propose a possible way forward.

The one remark is this, that whilst I appreciate, and acknowledge and accept entirely the entitlement of the Tribunal to continue to go down this merits evaluation route, we would of course just remind the Tribunal of the many warnings in -- the many reams of authority which caution against taking views on the merits in any context in an interlocutory situation.

Of course perhaps the most clear of those, the most recent one, is Merricks itself, where the courts are very clear about the impermissibility on an interlocutory hearing of taking views on the merits, because one just doesn't know how a case is going to pan out in due course and at trial. I would just put down that marker.

In terms of a way forward, perhaps we could agree this, that we have no objection to the defendants making submissions at the second stage on the question of matters that go to fairness to them, and the only one we have thus far identified really is ATE insurance.

Insofar as other matters are concerned, perhaps what might be helpful is if we had -- perhaps further down the line, once the evidence has been served -- an indication from the Tribunal of the topics which you would wish to probe further. At that stage a decision -- perhaps at the PTR a decision can be made as to whether, for those parts of the evidence that are responsive to those further probing questions, it would be appropriate and lawful to exclude the defendants.

Would that be a possible way forward? It really does I think place myself and I am sure Ms Wakefield as well in a very difficult situation to answer these questions in the abstract.

MR JUSTICE MARCUS SMITH: I entirely understand that. It may be that we do it this way, we say that the question of bifurcation should be preserved as a possibility and that at the PTR we debate the extent to which the respondents should participate in the

question of carriage, but pending the PTR, the evidence of the applicants in relation to certification and in relation to class should be split and we essentially invite the applicants to, if I may be colloquial, carve pieces out of each other so that we can see which one is the best.

They may take that invitation up or they may not. If they do and in doing so raise matters which in order to respond brings you and Ms Wakefield into areas where you are having to lift the lid on matters which are confidential, then that would inform the question of bifurcation, but we could at the very least have in the first instance separate streams. I am not saying that the respondents would never see the evidence regarding the question of carriage, but that you could proceed on the basis that you could be as frank as you liked during the evidence stage, with a view to debating at the PTR whether bifurcation was or was not appropriate, because you may say that at the end of the day, when the evidence has come together, your relaxed position holds good and we will be in a position in the light of the evidence to say, well, actually, we want to probe the following matters, because I don't see how we could possibly come up with questions at this stage, because we are all in the same boat of not having the material to hand.

MR JOWELL: If I might suggest, perhaps the way forward would be to afford us each the opportunity to designate certain reply materials as confidential as between the class representatives, if we so choose to do so, and then have that debate at the PTR, about bifurcation, as you put it.

MR JUSTICE MARCUS SMITH: Thank you, Mr Jowell.

Is there anything more you want to say before I pass to Ms Wakefield?

MR JOWELL: No, Sir, I am grateful.

MR JUSTICE MARCUS SMITH: Mr Jowell, I am grateful also.

Ms Wakefield.

MS WAKEFIELD: Thank you, Sir. I hope I am unmuted, I have sought to keep myself off mute, although I know it is rather irritating, so I hope I don't have the same difficulties as last time.

MR JUSTICE MARCUS SMITH: You are loud and clear, Ms Wakefield.

MS WAKEFIELD: Perfect.

First of all then on the question of bifurcation in principle, we entirely agree that they are distinct legal tests and that it makes sense therefore to address certification first and then to move on to carriage second.

I don't want to waste everyone's time today as to the content of the legal test for carriage but, as you know, Sir, our position is that Merricks does not preclude a consideration of merits at this stage, quite the contrary. The facilitative access to justice thrust of Merricks takes us to the point of certification and then, very naturally, a class member knowing that a claim is going to be certified would be interested to know which one is more likely to win. We say that is an entirely common sense approach.

The second legal test point, which I will make very quickly is, of course that we don't agree with any kind of first-to-file approach.

MR JUSTICE MARCUS SMITH: There is a surprise.

MS WAKEFIELD: As set out in our submissions.

Moving to the practicalities of whether one could have a clean bifurcation between the two hearings, in my submission, there is the issue of expert evidence, in particular that following the majority decision of the Supreme Court in Merricks we know that exceptionally the Tribunal could decide that it wished to hear from the experts even in the certification hearing. Were the Tribunal to take that approach, then it might be thought unsatisfactory to call the experts once in certification and once again in carriage, so that needs to be determined I think up front before there is a clean bifurcation between the two hearings.

The third point I would make relates to the locus of the defendants to make submissions. On that issue, I think that I agree with everything said by Mr Jowell, inasmuch as the defendants have a very limited locus on carriage. The only obvious one is ATE but as you will have seen from my decision matrix, we would say that normally that would be neutral, because normally, if the defendants have adequate coverage, which should be the litmus test for certification, then it should fall away at the carriage stage. We do see they may have locus to come and make submissions on matters which fall properly within the rubric of fairness to the defendants, that would be very linked to this.

Turning then to whether there are matters that should be secret, whether there is evidence which the proposed defendants should not see. In my submission perhaps the more important question, is whether there should be matters which the members of the class shouldn't see. The idea that in a hearing in which the core consideration is best interests of the class, there should be elements of the evidence and elements presumably of the hearing, which should be conducted in secret, excluding those members of the class. Our general approach on the Mr Evans side has been to try to put as much as possible in the public domain. It is for that reason we put a lot of our funding materials in the public domain early on. We would, respectfully, be concerned with an approach which had anything and still less anything significant held back from the class, that goes of course as well to the defendants, and have any part of this hearing in secret. At present we don't see there would be a need for any of it to be in secret. As Mr Jowell said plainly it would be inappropriate for us to be asked to reveal anything privileged. As to the prospects of success, that would be fought out in the conventional way, it would be adversarial. I would say I am more likely to win and Mr Jowell would say he is more likely to win and you will take a view.

Of course in due course perhaps a question will arise such as might arise in respect of settlement, perhaps, where naturally one would normally exclude defendants and

necessarily for the same reason would have to be class members, but I would urge against that course being taken respectfully, and of course the Tribunal may ask what it wants to ask but in my submission that would be unfortunate. In any event of course we can cross that bridge in due course.

Those I think, Sir, were all the points I sought to make.

MR JUSTICE MARCUS SMITH: Thank you.

Before I invite Ms Phelps to say her part, and I will have a few words to say by way of introduction, I wonder if either of my fellow Tribunal members have any questions to ask about material that they might want to see on matters which could stray into areas of sensitivity.

I appreciate that we are talking at a high degree of generality here, and we have only seen part of the evidence, but I think if there is anything by way of concrete question or query that they have, it is probably right that you have an opportunity to deal with it.

Professor Neuberger, is there anything that you have to ask before I move to Mr Lomas?

PROFESSOR NEUBERGER: No, I mean I think insofar as one needs to get into questions of the merits of the economic case and the methods of calculations and so on, I can't see that there would be any issue there of confidential information at all. No, I don't see that.

MR JUSTICE MARCUS SMITH: Mr Lomas?

MR LOMAS: I think we have had a brief discussion about the defendants' interests in understanding the ATE position and there is no point in opening that up again, but I think in making the carriage determination we are obviously going to need to understand in really some detail what is likely to be in the overall financial interests of the class. That will involve understanding precisely the way in which the funding package operates both for lawyers and for funders, the extent to which the assumptions have been made around the undistributed element of the damages and the extent to

which that operates as a cap on the payments back to the lawyers and funders and perhaps most importantly the incentives that that sets for the decision makers in relation to the two teams.

I would struggle with how we can properly discharge the responsibility of looking after the interests of the class that Ms Wakefield was just referring to without understanding quite clearly the incentive structure and how it will play out, both through settlement or through trial and success in terms of arguments made and concessions made, for example in relation to the distribution mechanism of the proceeds of any successful action, and what that is likely to say about the undistributed element which would be the pot for the fees.

I think we are going to need to unpick and have evidence on those types of issues and you may both be entirely comfortable that that is stuff that you are happy to have discussed *en clair*, available to the public, available to the class and available to the defendants. That would make the process, obviously, easier, but I do think we are going to need to understand it.

MR JUSTICE MARCUS SMITH: Mr Jowell, I will let you respond to that in reply, if I may. Ms Wakefield, if you want to come back now, then please do.

MS WAKEFIELD: Yes, absolutely.

For our part we see entirely that all of those considerations should be canvassed as part of the carriage question, and -- unless I am shouted at via WhatsApp -- our position will be the same as it always has been, namely that we have those arguments in public, as the class knows, because it is the interests of the class not our interests at stake.

MR JUSTICE MARCUS SMITH: Thank you very much.

Ms Phelps, I am going to call on you next because you put in written submissions on this point and that was very helpful. Can I cut back the extent to which you need to address me and shadow the following point, which really is built on what Mr Jowell said. We

don't really know what we are dealing with here, and that is really why the Tribunal wrote the letter that it did.

It seems that both applicants, whilst understandably reserving their position, are more relaxed than I for one am about the respondent attendance at the carriage stage. If that is right, then as Mr Lomas says, things are much simpler and it really is a question not so much of the respondents being present or not but controlling the extent to which they make submissions, which is a very different question.

It does seem to me, however, that we ought not to ignore the concern that I have raised, even if it is moving into the more theoretical, and what I would be minded -- we will obviously discuss this before we make any order in private, but what I for myself would be inclined to direct is that any evidence that the applicants wanted, at least initially, to designate as applicant only, they should have the facility to do, because I want to encourage rather than discourage the presentation of material that would assist the Tribunal in reaching a difficult question in terms of resolving which applicant, assuming they both are certifiable, goes forward to actually have carriage in a situation where their merits arguments are really very similar, we heard Professor Neuberger on his view there, and where, in terms of ATE and other differentiating factors, they may also be very similar.

It may be that the answer is first in time, we don't need to worry about it, and that is of course a perfectly feasible way of seeing it, it is just one cannot say now that that is the right answer.

I want to have a framework where the applicants are not in any way constrained by a concern that they would be disclosing material that they just don't want the respondents to see to the Tribunal and to the applicants. That position, if we were to order it, would be reviewed at the PTR, which would have to be relatively early, in order to enable the question of confidentiality to be lifted. It may be that it is an empty set, that both

applicants simply don't avail themselves of this opportunity and it is a cards-on-the-table approach throughout, as Ms Wakefield suggested, in which case fine. But I think I would be grateful for your assistance on the affording to the applicants of that facility and whether you maintain that even that limited form of confidentiality is something that you are suggesting is an order that the Tribunal should not make *pro tem* until the PTR.

MS PHELPS: Thank you, Sir. Can I just investigate exactly what you mean by that? Are you suggesting that there should be a split of the evidence with the respondents not seeing any of the evidence going to carriage in the first instance?

MR JUSTICE MARCUS SMITH: No. I have in mind a rather messier split. What I would say is that, at first instance, everything should be filed with the Tribunal and with all the other parties in the usual way but that if there is an aspect of evidence, by definition it would have to relate to carriage only, but to only part of the carriage dispute, then there would be a facility to withhold that from the respondents.

So you would get to see everything, including material going to carriage, except to the extent that the applicants considered a veil should be drawn. That way at the very least frankness is encouraged and the Tribunal would obviously take a view, but after seeing the material, whether a hearing could fairly be run on that basis but at that stage the applicant in question would be given a choice of either withdrawing the material and not relying on it or disclosing it to your clients, so we would deal with the Al Rawi question at that later stage.

I hope that answers your question, what you would have is essentially we discussed point (a) in the open material and we have an addendum to point (a) which we would like the respondents not to see, here is what it says and we acknowledge that it is *pro tem* being kept under wraps but that position may change. That is how I see it.

MS PHELPS: That is very helpful, thank you.

In fact, I was going to start by saying that I think certainly for my part, I would adopt the solution proposed by Mr Jowell about essentially making this a matter of sensible case management down the line. At the moment it seems slightly like a solution in search of a problem in that everybody seems reasonably relaxed about whether this is really going to be a problem. I am speaking without instructions, obviously, but it seems to me that the appropriate way forward would be almost along the lines of what you have just suggested, but that it should be for the applicants to have to apply if they want to keep something from the respondents.

So it should be really a case of the applicants justifying why there is material that we shouldn't see, so there is a slight difference of emphasis from what you have just suggested, but it seems to me that that is the appropriate way forward.

It certainly wouldn't be right, and it seems that nobody really wants this either, to talk about formally bifurcating the hearing and it seems that the Tribunal is not minded to do that. The expression "bifurcation" is being used and we would characterise it rather as exclusion, because I think that is how the respondents would see it and you have seen my submissions on whether that is open to the Tribunal, but it seems as if that is a question that we are going to be resolving further down the line.

It certainly seems to me at least that the appropriate way forward is to proceed on the basis that all evidence should be served on all parties, but if, contrary to what they currently anticipate, there are matters which we shouldn't see, then there should be liberty to apply at a later date. Of course the problem is that if we get to the PTR and these issues are sought to be resolved, in a sense, there may well be unknown unknowns in terms of evidence. From the perspective of the respondents, it is difficult to see how we could make submissions when we are in the dark because of the way things have proceeded up to that point.

That would be my submission just on that narrow question of the way to handle the evidence

going forward.

Could I just make a couple more submissions in relation to fairness to the defendants?

MR JUSTICE MARCUS SMITH: Of course.

MS PHELPS: Which is of course something which appears in the guide. It is something which the applicants accept, I think, that the respondents have a proper interest in addressing the Tribunal on. Of course although the respondents accept that they do have a limited interest in carriage, it is clear that they do have some kind of an interest and that appears very clearly from this criterion of fairness to the defendants.

The other point I would make at this point is that, as the Tribunal has accepted, this is still very much a novel point that has yet to be decided in this jurisdiction, it is an open question, as you said, and so the Tribunal certainly shouldn't tie its hands in advance and in a sense deciding to shut the respondents out of any part of the carriage question does that in a way, because it implicitly accords a weight or no weight to the fairness of the defendants' criterion.

So we say that you should avoid doing that in circumstances where, as you said, it is very much an open question.

Now, the applicants accept that we should have the right to make submissions as regards the ATE insurance, but it seems to us, and this is just by way of example, that the question of fairness to the defendants might come up in other ways as well. If we look at the decision matrix that has been served by Mr Evans on page 7 --

MR JUSTICE MARCUS SMITH: Yes.

MS PHELPS: -- the ATE insurance appears at the bottom of the page, but the previous criterion, which is one of the amber criteria, is funding arrangements. It says there:

"It is of limited relevance to the interests of the proposed class since the costs will be met by the defendants or by the undistributed damages, but the factor may be of indirect relevance since the relative cost effectiveness of the competing claims may be

indicative of efficient conduct of the litigation."

We would say that is another point which may well go to fairness to the defendants. The ATE insurance of course is predicated on the basis that the claims fail. If the claims were to succeed and the defendants were to be liable for the relevant applicant's costs, then the extent to which an applicant intends to run the litigation in a more or less cost efficient way, all other things being equal, that is something that might be relevant to the fairness criterion.

That is just an example, but it shows --

MR JUSTICE MARCUS SMITH: Ms Phelps, if I may give an indicator as to how we have viewed the very helpful matrices provided by both applicants, we found them as lists extremely helpful. They may not be complete but they looked pretty complete to us and we saw them as extremely helpful as checklists for what might have to be covered. On the other hand, we saw there was significant room for debate in terms of the colouring of the lists and unless you want to, you don't need to address us on that, because we regard the designation of the importance of the items on the list as a matter not for today and really as a matter that we actually have to grapple with later down the line in, I hope, July.

That of course is precisely the problem, no one, neither the parties nor the Tribunal, can actually provide an effective steer on what is and what is not relevant, and that is why -- it may be out of an overabundance of caution -- we are having this debate about keeping matters under wraps or not, because I do not have, I don't think anyone has, a very clear appreciation of where we are going to end up.

MS PHELPS: That is very helpful, Sir. That is almost exactly the point I am making. It is that in circumstances where it is -- it is a sort of preliminary point I am making, in circumstances where the question of the weight to be attributed to those factors is up for grabs, as it were, that is in itself something the defendants would like to have input

into, so that is another reason why not only the defendants would want to address you on the substance of those points about costs and funding and there may be others, but that we shouldn't be shut out of any part of the debate, at least not at this stage, when everything is still very much to be decided.

MR JUSTICE MARCUS SMITH: Yes, thank you very much.

MS PHELPS: I think any questions about Al Rawi are obviously for further down the line and in a sense our submissions were by way of that awful expression 'laying down a marker', so I will not say anything else about that, because it doesn't seem as if the point arises today.

MR JUSTICE MARCUS SMITH: No, not today, but I think to put down my own marker, there is a surprisingly interesting amount of law on closed process, most of which of course goes your way in terms of not excluding parties. The reason I say "most of it", is because I had exactly this question in Concordia and I took exactly the line that you took, and are advocating for, in that I said, if you want to rely on this material, it goes to both sides. I wasn't actually overruled in the Supreme Court, but I was certainly corrected and the position is that where it is necessary for the functioning of a jurisdiction, even by way of implication out of a statute, then I am afraid we run a closed material process and that is exactly what I ended up doing in Concordia. I am bound to say I did not enjoy the process and it underlined the very unsatisfactory way in which these materials can operate.

You can take it that I am very unkeen on closed material processes, but the Al Rawi decision has I think been significantly qualified by what the Supreme Court said in Haralambous, where the Concordia case came in and that in a sense is a matter on which I suspect I am going to require the parties' assistance, but that assistance is I think best rendered in the context of material that someone is saying is so sensitive that it should be withheld, and that is why my mind is to park it for the future, because

these submissions are best made when someone, be that Ms Wakefield or Mr Jowell but when someone is saying, "Look, we want you to see it, you must see it, it is relevant, but they cannot see it". "They" being the respondents.

I am more than happy to leave the matter there. I think the most difficult point is the question of whether one requires the applicants to apply to put something under wraps or whether they serve it on the understanding that the decision matrix that I laid out in Concordia will apply, in other words at a PTR, my having seen and the other members of the Tribunal having seen the material, there is then a debate about: does it get excluded, does it get produced for everyone to see as the price of advancing it or does it get run in a closed material process? Those being the choices, but my sense is that that is a debate that is best had with at least the Tribunal seeing the material -- of course it implies that you don't, although it may be that counsel can provided the in-house lawyers and the clients don't, those are all matters for debate but that, as it seems to me, is a matter for the future but that I think is the wrinkle where we are I think going to have to have a debate.

MS PHELPS: Yes, that is very helpful.

Just two points.

On Haralambous, we are not going into it today but we would say that is a very different case involving a search warrant and you can well see why there has been limited exception to Al Rawi in relation to that (Inaudible) revealing an informant type PII problem. This we would say is completely different, but anyway we can have that interesting discussion another time.

MR JUSTICE MARCUS SMITH: Yes.

MS PHELPS: In relation to the liberty to apply, I agree that that is the key issue for today. We would say that in a sense you have indicated the appropriate thing to do is to leave that for discussion for another day. The way to do that is to follow the course that

I have suggested, which is to say there should be liberty to apply. Because that is the way to preserve the status quo, the Al Rawi starting point, as it were, and not -- essentially, if there is a right on the applicants to withhold material without doing anything else, then that in a sense has put in place pre-emptively a sort of closed procedure, which is what we say is so objectionable.

We would say that the correct way to proceed, in order to properly put off the Al Rawi question to another day when it can be debated as against the background of the substantive documents and the information that we are really talking about, the correct way to do that is to say everyone should see everything unless an application is made to the contrary, because otherwise to some extent you are prejudging the question.

MR JUSTICE MARCUS SMITH: You would envisage the application being made in the absence of the material, the subject of the application, being seen by anybody?

MS PHELPS: Well, I think there would then be questions about how you conducted the application for permission and it may be that you would have a counsel-only procedure at that point, or something like that, but cross that bridge when you come to it. That right not to serve the evidence on the respondents needs to be established further down the line, not sort of as a general presumption today. That is really the point.

MR JUSTICE MARCUS SMITH: No, I understand that. I have more in mind the practical question. We are here, middle of January, we will be in the blinking of an eye in the middle of July. Obviously we will have a PTR put down to determine matters but I can see that we would be building into the timeframe a stage that might be quite difficult, if one positively had to apply and debate what it is that was being seen within and before the PTR, because that is how it would have to happen.

There obviously is no question of a presumption but I don't think this Tribunal has any difficulty in seeing material that the applicants might want to put in under protection and then if that protection is removed, putting it out of their minds. That is something

that judges do every day of the week.

There is no question of our saying if you serve material that is under wraps, that it will remain under wraps; it seems to me the election will be exactly the same whether the material is closed to the Tribunal and quite possibly to limited counsel on the respondents' side, that will be a matter for debate, but at the end of the day, the question will be exactly the same: does one withdraw the material because it has to be disclosed openly? Does one disclose it openly? Which is a question purely for the applicants or, the question for the court, do the applicants get to have their cake and eat it? Which is massively undesirable, take that as read, but do they get to have their cake and eat it in that the Tribunal sees this material, rely upon it without your clients having the opportunity to address it?

That is, as you say, undesirable even if it is legally permissible and may be legally impermissible, depending on how one construes what Lord Mance said in Haralambous. We will obviously have to take away and debate, but that I think is the slight difference between us.

MS PHELPS: Yes. It may be that as a matter of practicality, if there does need to be debate well in time for the PTR, that that militates in favour of the relative merits, the carriage evidence, coming in sooner rather than later so that there is time to resolve these problems.

MR JUSTICE MARCUS SMITH: Yes, that may be right.

Thank you very much, Ms Phelps, is there anything more you want to say now on this point.

MS PHELPS: No, I don't think so. Only just to add of course that I am talking completely off the cuff in terms of suggesting counsel-only procedures and so on, I do not have instructions to suggest that or to agree to that, I am just responding to the Tribunal's questions.

MR JUSTICE MARCUS SMITH: Ms Phelps, there is no question you are making any

concessions here. You are advocating a position and we will make a determination based upon your submissions and the fact that you are advocating in a particular way, we are not going to take as it were concessions that you aren't making as part of it, we are going to decide this on the principle of how this process goes forward and nothing else.

MS PHELPS: I am grateful for that, it may be some of the other banks want to follow me.

MR JUSTICE MARCUS SMITH: Don't worry, I took you out of order, simply because you were the one who put pen to paper on this point and so it seemed appropriate to ask you to deal with matters first.

Before we move to the other counsel, Professor Neuberger, Mr Lomas, do you have anything to ask of Ms Phelps?

MR LOMAS: Nothing further to add on that.

PROFESSOR NEUBERGER: No.

MR JUSTICE MARCUS SMITH: Very grateful. In that case, simply going through my appearance list again, Mr Evans.

MR EVANS: Yes, good morning, Sir. We endorse Barclays' submission and Ms Phelps's submissions that you should not rule today that the proposed respondents are shut out at this stage from seeing let alone making submissions on materials relating to the carriage dispute. I don't have any more submissions to make about secret hearings and a closed process and I adopt what Ms Phelps said in that regard.

On evidence and directions going forward, I echo the comments made by all three of the colleagues who have addressed you so far, that it is rather difficult to make these submissions in the abstract. What the Tribunal has done very clearly in its letter of 12 January and in its indications today is laid down a marker to the PCRs that in order to win carriage of this case, the Tribunal's current view may be that they have to put in some highly confidential information and despite the Tribunal's very best efforts neither

PCR has yet taken you up on that and either applied for a private hearing or committed to putting in confidential evidence, although Mr Jowell of course is reserving his rights to do so.

The right course to take, we say, is that if the PCRs want to address you on confidential information in due course, that will be their application and we will respond to it when it is made. No doubt they have been listening to Mr Lomas, but it is with the greatest of respect, Sir, for the PCRs to decide whether they want to give you that evidence, either at all and if so whether they want it to be public or private. Of course if they refuse to give it, that may have its own consequences.

In effect what the Tribunal has done is ask the question of the PCRs. It is for them to answer it in due course by making any application that they feel appropriate and if they do then we will reply in due course.

MR JUSTICE MARCUS SMITH: Thank you very much. I am very grateful for that, Mr Evans.

Ms Ford.

MS FORD: Sir, I gratefully adopt the submissions that have been made by those that have gone before.

I do have one practical point to make, which is that as Ms Phelps alluded to, when we come to the PTR, insofar as the one or more of the applicants have availed themselves of the possibility of identifying material that they wish to withhold from the respondents, the respondents may be in some difficulty in contributing to a debate about whether or not that is actually a justifiable position or not, given that we will not potentially have seen the material in question. My suggestion is that should the applicants seek to make that application, they should at the very least give a generic explanation of the nature of the material they are seeking to withhold and the justification for it and that would at least enable us to engage at a general level with whether or not that is justified or not.

MR JUSTICE MARCUS SMITH: I am grateful. Thank you very much, Ms Ford.

Mr Holmes.

MR HOLMES: Sir, I also gratefully adopt the submissions of those who have gone before. Like Ms Ford, we are concerned that if an application is brought to withhold material, leaving it for determination at the PTR will be too late and any application must be reasoned and must explain in broad terms the subject matter of the material that is being withheld.

Without wishing to overfreight the timetable, it may be worth saving a day just in case either of the PCRs on further reflection does decide to make an application to withhold certain material and serves evidence on that basis. It is obviously difficult to find time in everyone's diaries but we could perhaps consider a provisional listing of a further CMC at which this could be considered if necessary during the course of March.

MR JUSTICE MARCUS SMITH: On that basis, when would you suggest the PTR -- as I am inaccurately calling it -- should take place?

MR HOLMES: You have seen, Sir, the timetable that Mr Evans and the proposed defendants are largely agreed upon and that suggests for the pre-hearing review 21 June 2021. It is always a difficult art knowing at what point the issues will have crystallised sufficiently ahead of the hearing, but we think that is a good compromise solution in terms of the timing of the PTR, but that is obviously very late on the issue of this particular principle, if it is required to be determined. That is why it seems advisable to try to find a date on which a sufficient number of the parties would be able to attend and make submissions.

MR JUSTICE MARCUS SMITH: Thank you, Mr Holmes, that is very helpful.

Mr Luckhurst.

MR LUCKHURST: Sir, I gratefully adopt Barclays' written submissions on the Al Rawi issue and the oral submissions of those who have gone before. I don't have anything

1 further to add on this point.
2 MR JUSTICE MARCUS SMITH: Thank you very much.
3 I think, Ms Kreisberger, you are the last person in my list.
4 MS KREISBERGER: I am grateful, Sir.
5 Sir, I also adopt the submissions of my fellow respondents that an application is the right way
6 to go. I just want to add this point and then I will develop it, if I may, just very briefly,
7 which is, Sir, if you are not with us on an application being required, then in any event
8 Ms Ford's point is an important one, which is, if there is to be some presumptive right
9 to put in evidence, which we don't agree is the right way to go, then nonetheless it is
10 important that the respondents are given notice of the topic to which the evidence goes,
11 so that we can meaningfully engage with it.
12 Sir, I don't want to dwell on the point but I think just to explain why we do consider that is
13 important, the PCRs have submitted to you today that they accept that fairness to the
14 defendants is relevant but that it is a very narrow form of participation and that may be
15 relevant to your analysis of evidence and what can go into the secret box of evidence.
16 All I would simply like to do is lay down a marker that it would be wrong to take
17 an overly narrow approach at this stage when we are in the dark, and do so in abstract.
18 In saying that, I want to make two points.
19 One is to develop the submission of Ms Phelps. Ms Phelps gave you the example of the
20 efficient conduct of litigation. All I wish to add to what she said is that it is important
21 to bear in mind that carriage is going to be a highly fact-sensitive assessment in this
22 multifactorial balancing that the Tribunal will be called upon to assess.
23 If we look at the Canadian authorities, such as **Wong v Marriott** which the Tribunal referred
24 to in its judgment on the timing of carriage. Sir, as you pointed out, although a long list
25 of factors was considered by the court there, the overwhelming majority of those
26 factors proved to be neutral in the court's assessment and ultimately there was a specific

issue about the interrelationship of different class actions in more than one jurisdiction that held sway, which one assumes couldn't have been predicted at the outset. It is for that reason we say, just taking the efficient conduct of litigation, by way of illustration purely -- we are certainly not making submissions on which criteria might prove to be determinative, the point is the opposite, we simply don't know.

Let's say that, like in Wong, most factors proved to be neutral, there wasn't much to choose between the remainder of the list. In those circumstances, a point like the efficient conduct of litigation, which applies equally to defendants as it does to claimants, might acquire far greater weight, and could be determinative. After all efficient conduct of litigation is one of the Tribunal's governing principles, that proceedings should be run at proportionate cost.

We would just caution that even in determining what evidence might be kept away from the defendants, it is important not to take an overly narrow approach precipitously, at this stage.

Then I would just make one final point, which is a specific one, it is unique to my client, MUFG. It is just really to remind the Tribunal to bear in mind that MUFG is in a unique position, since we are a proposed defendant to only one of the PCRs' claims, and this is in itself a potentially disputed issue for carriage. Evans gives the matter of selection of defendants the amber rating, the amber traffic light. They say:

the matter of selection of defendants will ensure complete vindication of the class member's rights and importantly increases the availability of data to calculate damages, O'Higgins disagrees.

And there is some Canadian authority to support O'Higgins on this.

We really just want to flag that the specific issue of whether MUFG's data is capable of advancing the litigation is a factual question on which MUFG will want to respond, so it is simply to flag again that in looking at the categories of evidence that we say should

presumptively be open, the defendants have an important part to play and to see that evidence.

Sir, that was all I was going to say on those points, unless I can assist you further?

MR JUSTICE MARCUS SMITH: No, thank you very much, Ms Kreisberger.

We will go in reverse order, as I should have done first time round.

Ms Wakefield, your reply first and then we will conclude with Mr Jowell.

You are on mute, Ms Wakefield. **(Pause)**

Can you unmute yourself, Ms Wakefield? It seems you are having difficulty. Can anyone who is operating the platform unmute Ms Wakefield, since she seems to be unable to.

THE CLERK OF THE COURT: I am afraid from our end we cannot unmute, we can only mute for some reason.

If Ms Wakefield, if you leave and come back in again, that should fix the issue, unfortunately.

MR JUSTICE MARCUS SMITH: Let's do that, Ms Wakefield. If you exit and come back in. **(Pause)**

MS WAKEFIELD: Can you hear me?

MR JUSTICE MARCUS SMITH: Ms Wakefield, yes, we can.

MS WAKEFIELD: I am sorry about this, I will use the short adjournment to try to fix whatever is going on at my end.

MR JUSTICE MARCUS SMITH: Not at all, do proceed.

MS WAKEFIELD: Thank you.

My fundamental reaction, listening to the very helpful submissions of the other parties is that this issue, important as it may be, should not be allowed to affect the timetable for carriage evidence and submissions in general. Given that it is an issue which may not arise at all, I would be particularly loathe for it to have the consequence suggested by Ms Phelps I think, that other evidence going to relative merits should be pushed

forward or should be expedited to accommodate it, because it may well simply never arise. That is my core reaction.

Turning to what we should do if we do think that there is some evidence which there may be a basis for withholding from the defendants and of course from the class members, in a sense, I am ambivalent as between the two options, because it seems to me what we would have to do is draft out that evidence, provide a gist as is conventional, that is disclosable to those that are excluded and we would have to put in submissions at some point to the Tribunal, setting out why we would say, under the principles in Haralambous we were able to withhold that information and the Tribunal would have to rule on it and the respondents would make whatever submissions they could by reference to the gisted summary. In a sense, whether one puts that as a presumptive entitlement to adduce that evidence and then have the legitimacy of that approach resolved, doesn't really make much difference in my view. We certainly wouldn't say that the question of whether we are even allowed to do it, substantively to do it under Haralambous, should be resolved today, which I think is common ground.

It is really just I suppose whether the evidence has "draft" written on it at the time at which we provide it to the Tribunal and Mr Jowell or not. Not much different from that.

Reasoning by reference to the Investigatory Powers Tribunal, which is a tribunal in which I appear, of course in that regime, Sir, the approach is that one provides all material which one says is closed and then subsequently there is an opening-up hearing. If one loses the opening-up hearing, at that point one elects either to pull the material or to concede the point. So that perhaps is a useful guide but it is not a question on which I have particularly strong views, if I could put it like that, unhelpfully.

MR JUSTICE MARCUS SMITH: I am grateful, Ms Wakefield, thank you very much. Mr Jowell.

MR JOWELL: I have two provisional comments and then I will get to the meat of it.

First, in relation to Mr Lomas' concerns about the financial package and what happens to the undistributed damages and so on. It should be borne in mind that both us and Evans have already provided the funding agreement, the budget and I think at least in our case we also have a witness statement from the funder. So there is a good deal of that which is already with the Tribunal. The Tribunal has not been troubled with it because effectively the defendants have accepted that that aspect of the certification process has been satisfied, that the funding and so on is all acceptable and that you may recall that Mr Bacon QC addressed you very briefly at the last hearing just stating, really recording that fact. That may be why the Tribunal has not really had occasion to look at that material, because it hasn't been controversial but it is all there and should be available.

I think that really we are still hopeful that this question of whether there needs to be any confidential material will never, we hope, arise and the materials before you should be sufficient for those issues to be fully ventilated.

We are a little concerned with some of the defendants' interest in the questions of funding, because when they talk about efficient conduct of the litigation, I think that may be another way of saying that we rather prefer the applicant that is less well funded, but of course that is a matter that we can traverse in due course.

We certainly don't *a priori* seek to shut them out from making submissions on that front but of course there is a clear conflict of interest for those defendants in relation to the selection of the carriage issue.

Just with those provisional remarks, I very much also take a very similar view to that of Ms Wakefield, that we don't think that it should be necessary for us to make a formal application, but we have no difficulty at all in identifying the gist of the evidence and notifying the defendants of that and then if necessary arguing the point at a PTR. We don't think really that an application should be necessary but it is just really a question

of form over substance.

Unless I can be of any further assistance, those are the only points I wish to make.

MR JUSTICE MARCUS SMITH: No, thank you very much, Mr Jowell. I don't have any points for either you or Ms Wakefield.

I don't know if my fellow Tribunal members do?

MR LOMAS: No.

MR JUSTICE MARCUS SMITH: And not from Professor Neuberger, thank you.

In that case we will retire, I hope for not very long, and we will give a short ruling on how we propose to deal with this part of the process before the short adjournment at 1.00. It may be we will be able to give you some sort of indicator as to how we see the evidence unfurling for the future, to give the parties something to think about and chew over over the short adjournment. We will move into the private room that we have online and we will come back before 1.00.

If, Mr Lomas and Professor Neuberger, we could move into the retiring room, we will do that now. Thank you.

(12.42 pm)

(A short break)

(12.58 pm)

Ruling

MR JUSTICE MARCUS SMITH: We have before us certain matters dealing with the onward process of this certification question. If I may begin by articulating how we, for the moment, see the questions of certification and carriage. I would like to stress on behalf of the Tribunal that we continue to see these points as separate matters on which we strongly suspect it would be helpful for the parties, come the hearing, on 12 July, to address us separately.

However, we have made that point entirely *de bene esse*, and without making any form of direction. It seems to us that this is a matter best debated at the pre-hearing review, how precisely the time that we have for the hearing is allocated.

In terms of preparing for the five-day hearing, we are going to mark out 21 June as a hearing date in this matter. Whether that is the date for the pre-hearing review or whether that is the date for any teach-in, we leave for further debate. We also are of the view that there ought to be a further hearing before 21 June to deal with other matters that may be pre-hearing matters or it may be related questions of confidentiality, to which I will come in a moment, but we consider that the parties should give some further thought to a further date to be put in the diary and to be removed if it is not necessary.

We should also say that we are minded to have a teach-in without prejudice to what is, at the end of the day, actually relevant to the question of certification or carriage. We have made clear in the course of submissions that we regard all of these questions as open questions and indeed that the borderline of where issues relevant to certification end, and issues relevant to carriage begin is itself a matter for debate. It seems to us that it is important to have a teach-in to the extent that the parties want to teach us something because it is conceivable that what is there taught will have relevance to the questions we are dealing with on 12 July and in the days that follow. The point has been made, and it is a helpful point, that in any event understanding the economics behind matters, will, unless certification is refused altogether, be helpful at some point in these matters, no matter what, so it will not be time that is wasted, we consider.

Moving then on to the question of how the hearing is to be structured, we are not persuaded that there is any need to make any kind of order as to the participation of the respondents in any parts of the hearing in July. It seems to us that the question of participation by the respondents in pure carriage questions is a matter that should be reserved for direction at the pre-hearing review when matters will be clearer, because

we will at that point have, one would hope, all of the evidence that is going to be adduced.

We are also not going to order the kind of bifurcated evidence that has been floated by the Tribunal in correspondence with the parties. We consider that the evidence that the parties propose to rely upon should be adduced in accordance with a timetable that we will discuss but should be adduced as open evidence. That is subject to the ability -- I know that both applicants will tread carefully here -- to label material as protected material or closed material.

I want to be clear that we are not, given the submissions made by both applicants, expecting such material and I am simply making this direction for the avoidance of doubt. It may be that in the course of submitting evidence the applicants take the view that isolated elements of what they want to have before the Tribunal should be protected. In that case, if it arises, that material should be clearly labelled, it should be as limited as possible and it should be filed with the Tribunal but not with the respondents. However, it should be accompanied by a very clear explanation of why it is that this material need be protected. That would include an explanation of how it relates to the applications that the Tribunal will hear in July and the matter will be dealt with at a hearing either at the 21 June hearing or at the earlier hearing that I have debated but that is how, if the matter arises, and given what Mr Jowell and Ms Wakefield said it seems to us it will not, but if it arises that is how we will deal with it.

To be clear, that is essentially the process that Ms Wakefield outlined in her submissions. It is also the process that I followed in Concordia. Essentially there will be an election if the material is not protected by way of closed process, there will be an election on the parties to treat it as open material or to withdraw it and that is how we will propose to move forward.

Mr Holmes, I see you have your hand raised.

MR HOLMES: Sir, I have one question of clarification, that is extremely helpful and I am grateful to the Tribunal for that.

It was simply to clarify that the schedule explaining the reasons for the redaction of particular material, am I right in supposing that that will be prepared in a form that may be shared with the respondents so that they can make submissions in relation to it?

MR JUSTICE MARCUS SMITH: I obviously wasn't clear enough.

Yes, the material if it exists will form two parts.

It will be the material itself, which will be seen by the Tribunal and the other applicant only.

There will be the -- I hesitate to call it an application, but effectively it will be a justification, which will be an open document as to why it is that the material should be subject to a Haralambous form of process, with that decision to be made at a later date and everything that of course Ms Phelps and the other respondents have said regarding the use of such materials will be for discussion then and not now. But, yes, the respondents ought to see as full an explanation as possible, as by way of further rider it may well be that even the material kept under wraps can be disclosed to limited persons on the respondents' side. That will be a matter for debate and no doubt for submission in the covering material. It may well be said, yes, this material is sensitive, it shouldn't be published but Mr Holmes and the other leading counsel for the respondents can see it and other named persons.

We are talking about a rather refined confidentiality ring, more than anything else, and that I know you are all very familiar with.

That is the process we propose to adopt if it should be necessary and I have no doubt that you will be able to draw up some form of order that makes clear what the process should be if it needs to be triggered.

We propose to rise now -- I see the time -- but before we do, we thought we would give some indication as to our sense of what should happen in terms of the evidential timetable

going forwards, to give the parties something to think about over the short adjournment.

Our present sense is that we would like in the first instance to hear from the respondents. It seems to us that the work that has been done by the applicants, particularly in the light of what has been said in the Supreme Court in Merricks, means that it is hard to identify what more ought to be produced by way of assistance on certification at this stage.

That is not to say that there may not be more, but it seems to us that what additional evidence ought to be produced by the applicants is best seen through the prism of what the respondents have to say regarding that material. We will obviously want to hear from all of the parties on this, but our thinking is that that would be the appropriate next step. We would therefore leave it to the applicants to adduce further evidence by way of a further round after the respondents have had their say.

That is our preliminary view. I float it now to inform consideration over the short adjournment. Of course everyone should feel at liberty to push back on that and, as I say, it has only been raised to be of assistance rather than otherwise.

With that in mind, I see the time, we will resume in open court at 2.05.

If I could ask for direction from those running this show, do we the Tribunal members now depart to the retiring room that we have electronically or do we simply switch off our microphones?

THE CLERK OF THE COURT: You can depart to the retiring room.

MR JUSTICE MARCUS SMITH: In that case, 2.05 and we will resume then.

Professor Neuberger and Mr Lomas, I will see you in the retiring room.

Thank you very much.

(1.10 pm)

(The lunch break)

(2.05 pm)

MR JUSTICE MARCUS SMITH: Thank you very much. The continuation of this morning's CMC, Mr Jowell, over to you.

Discussion re timetable

MR JOWELL: I am grateful, Sir, for the indication that you gave before the short adjournment, that the next step, the next substantive step in these proceedings should be the service of evidence by the defendants and that is something with which we very heartily agree. If I may, I think perhaps the easiest would be on that basis to go through a proposed slightly revised timetable that we would propose and the Evans claimant has helpfully provided an annex with all the parties' proposed directions. It may be helpful to take it from there or I can simply give you the dates in any event.

MR JUSTICE MARCUS SMITH: I think we will get it up.

MR JOWELL: It was sent late last night, with the updated ...

MR JUSTICE MARCUS SMITH: That's right. Let me get hold of it, and then you can give us the dates and we will be able to read through it.

I have it, let's just give my fellow members time to get it up and then ...

MR LOMAS: I have it.

MR JUSTICE MARCUS SMITH: Good, why don't you proceed, Mr Jowell, and we will keep up.

MR JOWELL: Thank you.

The first stage then, which is something that everyone agrees on, remarkably, is that on 29 January 2021 the PCRs should submit a joint publicity notice for approval.

The second step, according to the Tribunal's indication and as I said we agree, should, we think, be for the proposed defendants and the proposed objectors, to file and serve responses to the CPO applications. They have had these for over a year. They have

had the Bernheim report for almost four months now. They are incredibly well resourced and no doubt well prepared and we think that it is important that they should serve this material soon. They have thus far given no indication as to what their grounds of objections are and so we propose that that should be by 12 February 2021.

MR JUSTICE MARCUS SMITH: Yes.

MR JOWELL: I appreciate that there is this issue that the Evans claimant is very keen to respond to the Bernheim report and we think that that can be entirely accommodated within the timetable that I am going to continue to propose and that everybody can be, we think, made happy. The defendants think that somehow they should see that response, the Evans claimants' response to Bernheim, before they put in their objections, there is actually nothing in that because insofar as it pertains to the carriage dispute, it is really not something that should concern them.

The next step after 12 February, we say, is then that on 23 April, which is ten weeks thereafter, the two claimants, O'Higgins and Evans, should be entitled to put in responses to the defendants and the grounds of objection. On that occasion the Evans claimant will be able to make any points it wishes as well regarding the Bernheim report and there can also be a first round of submissions as between them on the carriage dispute.

There is then the question of this confidentiality hearing, potentially, that the Tribunal mentioned and I think we can leave that for now but clearly that would have to be at some point after 23 April.

MR JUSTICE MARCUS SMITH: Yes.

MR JOWELL: Probably one would think in the month of May would seem to be a convenient time for that, if it proves to be necessary.

The next step is we would say on 4 May should be the deadline for persons to object to the CPO applications and to apply to make submissions. That is what is currently the

fourth item in the Evans table. Of course those are people who currently we are -- one is unaware of, who might object, but members of the public might wish, and others, might wish to come forward and bring objections and we suggest 4 May is a convenient date to do that.

We then suggest that there should then be a further round of evidence as between the two claimants and that that should be on 4 June. So the PCRs would serve replies to each other's submissions on the carriage dispute. So that way everyone is happy, the Evans claimant has their opportunity and we have an opportunity also to reply.

Then the remaining directions would very much follow what is there now, which is we have in the table 14 June there would be filed a joint hearing bundle.

On 21 June you have already ordered that there should be a pre-hearing review, which may also constitute a teach-in, which if I may say so seems a very sensible proposal in our respectful view.

On that, I should just mention in passing, as a matter of courtesy, I am currently going to be unavailable for 21 June. That doesn't matter, of course. What may matter is whether the teachers are available for a teach-in on that day. What we may ask is simply liberty to apply to come back to you should it turn out that the 21st is impossible for our teachers, who are of course Professor Breedon and Professor Bernheim, because they are the people who, it seems to us, are the ones who should be doing the teach-in.

MR JUSTICE MARCUS SMITH: Yes, if I could interrupt there, Mr Jowell, that seems sensible.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: I should have said it also this morning, but without in any way committing to hearing the experts at the substantive hearing, we think the parties should take steps to ensure that they have booked at least some time in that week for their respective experts, but on the point you have just raised, we will put in 21 June

and be flexible about whether we move that date or move the teach-in part of that hearing to another date depending on availability, that is obviously sensible.

MR JOWELL: I am very grateful for that indication.

Then we have 28 June, that is when we propose to file and exchange skeleton arguments. Again, this a rare moment of unanimity.

And, of course, the filing of the joint authorities on 5 July.

Those are our proposals.

I anticipate that the defendants may say, well, they don't get a chance to respond. I am not sure that the defendants should get a chance to respond but of course there is time between after 23 April and the hearing, if there is something on which they felt urgently compelled to have a right to respond to, no doubt they could make an application, but we don't think that it is appropriate to have that built into the timetable ourselves.

Sir, those are our submissions on the timetable, unless I can be of further assistance.

MR JUSTICE MARCUS SMITH: Thank you, Mr Jowell.

Just before I hear from Ms Wakefield and then the respondents, let me push back on a couple of points that I think the respondents may raise.

One is the date of 12 February to respond. One could, and it rather depends on how one sees your 23 April date for your submissions, one could I suppose adjust the February date by a week or so, which varies the pressure, as it were, but I think your point is that assuming the applicants serve nothing more and that the response to Bernheim comes in on 23 April, they have ample time to respond by 12 February, but I do think that that would imply a last word and the law of diminishing returns sets in here. I have no difficulty, speaking for myself, to say there should be perhaps two weeks after 4 June a respondents' response.

MR JOWELL: I would have thought -- bear in mind, the PCRs will have put in evidence on

23 April.

MR JUSTICE MARCUS SMITH: Yes.

MR JOWELL: 4 June is what I had in mind really for just being as between the PCRs.

MR JUSTICE MARCUS SMITH: I know.

MR JOWELL: I would have thought that the time for -- of course ... would be some time perhaps two weeks after 23 April, perhaps, would be ...

MR JUSTICE MARCUS SMITH: Yes.

MR JOWELL: If one were to insist on it.

MR JUSTICE MARCUS SMITH: It is a question of who has the last word on these matters.

MR JOWELL: Yes.

MR JUSTICE MARCUS SMITH: I think what I am perhaps saying is that I am --

MR JOWELL: It would normally be the claimant.

MR JUSTICE MARCUS SMITH: I entirely understand that, I entirely understand that. Okay, so we have two potential dates for, as it were, respondent intervention and I will hear what they have to say about that and no doubt other things but thank you for that. Professor Neuberger, Mr Lomas, do you have anything that you want to press Mr Jowell on before we hear from Ms Wakefield?

MR LOMAS: No, that is fine by me.

PROFESSOR NEUBERGER: No, thank you.

MR JUSTICE MARCUS SMITH: Ms Wakefield, do you have anything by way of refinements, or indeed wholesale disagreement, I don't know?

MS WAKEFIELD: Sir, I certainly don't have wholesale disagreement. You will have been aware from my written submissions and in particular the note on Bernheim that one of our concerns was that the O'Higgins PCR had submitted part of its carriage dispute evidence, served it on the proposed defendants and done so at this stage before we have heard anything from the proposed defendants. It did seem to us

that in a perfect world we would then have the opportunity to do likewise, so that to use your colourful expression from this morning, Sir, we could both be tearing chunks off each other, rather than so far I have had chunks torn off me but I have torn chunks off no one.

That said, it is not a perfect world and we need to agree a timetable moving forward. For our part we are essentially happy with proposals set out by Mr Jowell, subject to a couple of qualifications and clarifications.

The first of those is that for the 23 April date, which is our responses and our replies, could it be clarified perhaps that Mr Jowell's intention is to put in the entirety of his carriage dispute case at that point, such that in the next round all I am doing is replying. We do need, if there is to be another report from Professor Breedon in particular, that report also to go in on 23 April, just in the same way that I will put in the entirety of my evidence in support of my position in the carriage dispute, my positive evidence that I intend to rely upon. That will not just be a reply to Professor Bernheim, it will be a reply to Professor Breedon's report. Then I would anticipate that in the 4 June replies that would be a conventional reply, a reply just to the matters that I have raised.

What I would object to -- it will not surprise you to hear -- is a position in which I put in my evidence on 23 April, the O'Higgins PCR doesn't put in the totality of their evidence and, instead, on 4 June we see evidence that goes beyond strict reply --

MR JUSTICE MARCUS SMITH: I don't think that was Mr Jowell's intention, it is certainly not how I read him.

MR JOWELL: I entirely agree that 4 June would be reply evidence, but of course, you know, reply evidence does entitle you to reply, so insofar as --

MR JUSTICE MARCUS SMITH: The Tribunal will take a fairly dim view of saving points in reserve which could have been made earlier. I know that everyone in this room will understand that late points are usually treated by judges with a high degree of

scepticism, whereas early points are treated as early points befitting the weight that early thinking deserves.

I mean what we are really talking about is your clients simply sacrificing the ability to put in further evidence now, but it would be simply by way of staying their hand and the only reason I like the idea is because it enables a very neat process.

At the end of the day, Ms Wakefield, your clients catch up and what matters is not how the position appears in February, April or May, but how it appears on 12 July and this process ensures that you are in the same position by that date, which to my mind is the important date when the evidence is actually considered.

Do you have a view about where the respondents fit in terms of their reply evidence? I must say my thinking is that there ought to be provision for that, because it does I think help to have an ability, for instance, to comment -- if one doesn't build it in, the respondent banks will be responding to Bernheim but not, as it were, to your Bernheim equivalent. That I think would be wrong.

We could either do it after the 23 April date or, as I mooted, after the 4 June date.

MS WAKEFIELD: After the 4 June date might be the best time, because then we will have set out the entirety of our cases.

I have to say, were it not for the Bernheim infelicity, conventionally they wouldn't have a further opportunity, of course, because it is our application, they put in their response and we will have replied and that would normally be the end of the process, but because of the disjunctive nature of when things have happened it perhaps does make sense for them to have a final go, but if so it would come at the end of the process after 4 June. I appreciate that things then are getting pretty tight, especially if we are looking at a teach-in on the 21st.

MR JUSTICE MARCUS SMITH: Yes, but if we kept the bank or respondent reply very tightly after 4 June, no more than a week, that would ensure that they were essentially

responding to the evidence that came in before your 4 June point. Naturally they could take that into account, but it would I think enable reply where reply was absolutely necessary to your 4 June points but they could then take into account any points about your Bernheim equivalent. If we said, just provisionally speaking, and I am getting my diary up and looking at June. The 4th is a Friday, if we said the 11th -- just playing with dates at the moment -- that might work but I will obviously hear from the respondents and from Mr Jowell in reply before anything is set in stone.

Do you have anything more, Ms Wakefield, beyond that?

MS WAKEFIELD: I don't, Sir, and I have just had confirmation through that we are happy with 11 June and the defendants having that limited opportunity, so thank you very much.

MR JUSTICE MARCUS SMITH: Thank you, Ms Wakefield.

Mr Holmes, are you leading for the respondents on this, shall I call on you?

MR HOLMES: I am, Sir, but I have no doubt that the other banks will also have points that they will wish to make.

MR JUSTICE MARCUS SMITH: It goes without saying I will call on everybody, but I can either do it by way of the somewhat random order that I have on my appearances list or I can call on you first.

MR HOLMES: I am very happy to kick off, if that suits the Tribunal.

MR JUSTICE MARCUS SMITH: Yes.

MR HOLMES: We were also grateful for your indication of your thinking. As you have seen, it rather cuts across what the parties had all previously been proceeding on the basis of, which was an understanding that the next step was for Mr Evans, at least, to bring forward his first round relative merits evidence and for the response to follow.

We continue to think that there are sound reasons for that approach and that it is both more efficient and fairer as an approach to case management.

On this point I must try to persuade you to revert to the approach that the parties had all been taking hitherto.

The first point to make is that this approach would enable the respondents to address all of the PCRs' first-round evidence, including evidence going to carriage, as well as certification in a single response or set of responses. That would avoid the need for further responsive submissions subsequently. It would also be fairer and more orthodox. As we see it, because of the way in which the O'Higgins PCR chose to bring forward material early, he has served his first round evidence on the question of carriage but Mr Evans has not yet and it was recognised this morning that the respondents have an interest to consider matters going to carriage and to be heard in relation to carriage, so there is both efficiency and fairness wrapped up in that.

Secondly, it is very difficult in my submission to draw a tidy distinction between matters going to carriage and matters going to certification and this makes it all the more important that we see the entirety of the PCRs' case in formulating our response. There are two strands to this.

One is a practical strand and the other relates to the case that we will be advancing before the Tribunal in relation to certification.

Beginning with the practical strand, it is very easy to see how evidence going to relative merits will tend also to touch on and to elaborate on evidence relevant to certification. It is a paper-thin line between saying on the one hand that the proposed approach of a given PCR is well-founded and on the other hand saying that the proposed approach is better than the approach proposed by the other PCR. Indeed, one sees that if one looks at the evidence of Professor Bernheim, which spends a considerable amount of time, in fact, commenting on and expanding effectively upon the material relevant to certification which had been put forward by Professor Breedon. We would anticipate that Mr Evans will encounter exactly the same difficulty in seeking to formulate

relative merits evidence which does not also touch on matters relevant to certification. Indeed, the O'Higgins PCR makes this point quite crisply in its first round submissions for this CMC, if we could just briefly turn those up, if you have them to hand. They were the submissions served on 11 January. Do you have those, Sir, they were loose, so they are not in the bundles?

MR JUSTICE MARCUS SMITH: I have O'Higgins first round.

MR HOLMES: Yes, indeed.

MR JUSTICE MARCUS SMITH: I have it. Let's give my colleagues a moment. Which paragraph do you want us to look at?

MR HOLMES: Paragraph 27, Sir.

MR LOMAS: I have it too, no problem.

MR JUSTICE MARCUS SMITH: Let's find 27, and we will quickly read that. **(Pause)** Yes.

MR HOLMES: Of course the point is being made in a different context, Sir, the concern being expressed is about fairness between the PCRs, but we do pray in aid the underlying point. We fully agree that issues relating to certification and to the carriage dispute are likely to be intertwined in both the evidence of the PCRs and in the responsive materials submitted by the respondent banks. This militates strongly in favour of the entirety of the case of the PCRs in relation to both certification and carriage being brought forward. We have yet to see Mr Evans's case on the carriage dispute. That has still to be brought forward and we say it should come, as all of the parties recognised prior to this, before we reach the stage of responses.

The other point going to the difficulties of disentangling carriage and certification, relates to the case that the respondent banks intend to advance. Mr Jowell referred this morning to the two exceptions to the principle that the merits are generally not relevant at the stage of certification and they were highlighted by Lord Briggs, as the Tribunal will

have seen, in his majority judgment in the Supreme Court. One of those two strands relates to the question of whether the proceedings should be certified to proceed as opt-out proceedings, as both of the PCRs have sought.

This will be an important point in our response and the Tribunal's rules make clear that in assessing whether to allow proceedings to go forward on an opt-in basis, it is relevant to consider among other matters, the strength of the claims. Our submission will be that in assessing the strength of the claims, it is relevant to consider matters of causation and methodology and our evidence and submissions will therefore likely consider the strength of the claims.

That is a matter that is clearly related to the carriage dispute and the relative merits evidence which Mr Evans has still to be brought forward, so we say we should see that first round material before we put in our case, so that, you know, we can see the entirety of the applicants' case.

For those reasons, we say it is very difficult to disentangle, we should see the whole of the case from the PCRs before we put in our response.

A further point, a practical one arising out of this morning, there is the possibility, which neither of the PCRs have suggested may not arise, that they will seek to put in closed material and there will need to be sufficient time to deal with this important question of principle. Having the PCRs bring forward their evidence first, Mr Evans and if there is any further evidence that the O'Higgins PCR has in mind to serve going to the question of relative merits, that material too. It will enable that issue to be flushed out sooner rather than later and it will enable a hearing to be organised at which all parties can make submissions. We say that also favours sticking with the orthodox order which the parties have so far been proceeding on the basis of.

Those are my submissions on the question of order.

As regards the timetable that Mr Jowell proposed, I think it is now the fourth iteration of

timetable that has been brought forward by the O'Higgins PCR in the run-up to this CMC. We do say that it is manifestly unfair and it does not allow us sufficient time in which to prepare, it departs radically from the timetable that all of the parties were considering in advance of this hearing and it does not give enough time, we say, for us to be able to prepare our case.

It is true that we have had some of the PCRs' evidence for some time. The Bernheim report of course came later, but importantly it was only at the end of the Michaelmas term that we received clarification from the Supreme Court about exactly how the case should be run. We need time to adjust our plans in the light of that and we also need time in which to be able to liaise effectively across six legal teams in order to ensure that we avoid duplication and that we submit as coordinated as possible a response. The challenges that that poses should not be underestimated and as matters stand I am afraid -- the other banks will say their piece, but it seems impracticable given the position that we are in to be prepared and ready to go on 12 February, which is much earlier than the dates that were being discussed for Mr Evans's evidence, so --

MR JUSTICE MARCUS SMITH: If I could interrupt there, though, that is the point, isn't it? The way I am seeing it is that you would not have any further material from the Evans applicants at all until after 12 February, so the applicants' position is, as it were, *pro tem*, frozen in aspic and you have had that material for some time. I recognise that you will not have had the Supreme Court's decision for as long because of the reasons it was handed down when it was.

But it seems to me that we shouldn't be on this basis characterising this timetable as Mr Jowell's fourth iteration rather than his first iteration in response to the indication the Tribunal gave before the short adjournment. Assuming that we would be minded to give you an ability to reply at some point in June, then that makes -- I would have thought, but I want to hear from you -- 12 February a rather more doable date, because

you know what material you have to deal with.

MR HOLMES: I certainly take your point regarding Mr Jowell's iteration, that was perhaps an unfair dig, but the difficulty remains that we had been on a timeline and preparing on the basis of understandings in relation to the timing of our responses, which were quite radically different from those which are now being proposed and simply -- apart from anything else, we are very alive to and mindful of the Tribunal's indication in its letter of last week that it is going to expect the respondents, insofar as possible, to liaise, coordinate, avoid duplication and to offer as unified a voice as they can. The Tribunal is likely to be best assisted by the document that we produce if we are given time in order to do that.

With that in mind, we would say that if the Tribunal were to switch its timetable, it certainly would not be fair or appropriate to consider a date before the date which was being proposed by Mr Evans and the proposed defendants at least for Mr Evans's first round evidence going to relative merits, but you have my point --

MR JUSTICE MARCUS SMITH: What date was that, remind me?

MR HOLMES: That was 26 February.

MR JUSTICE MARCUS SMITH: 26 February, I see, thank you.

Thank you very much, yes, thank you, Mr Holmes.

Looking at my appearances list, Ms Phelps?

MS PHELPS: Thank you, Sir, just a couple of points. I absolutely adopt everything that Mr Holmes has just said. It seems to us that, in fact, the order in which we propose to do things was likely to be of more assistance to the Tribunal and in fact in many ways simpler because, if indeed the Evans applicants get to respond to Bernheim, so that we see all of the PCRs' evidence at once before we respond, then of course there is not a need for that 11 June date, which is very close to the hearing. It comes only a week after Mr Jowell's date for responses on the carriage dispute, which I accept is a slightly

different work stream, but it's still a week which, in this sort of litigation, is a very, very short period of time. It removes that extra layer by as it were frontloading the process, which we say makes obvious sense.

Then the second point is just to reinforce what Mr Holmes said about the challenges in corralling a defendant group of this size in a case of this complexity. The point that he made about -- it is the Oscar Wilde point about "*I didn't have time to write a shorter letter*". The longer that the defendants have to consider and to appropriately organise their responses and target their responses, the more likely it is, Sir, that you are going to have something which is of the most use to the Tribunal.

That is an important consideration, 12 February as Mr Holmes has said is much sooner than this defendant group had been working towards and does raise real logistical challenges.

MR JUSTICE MARCUS SMITH: Thank you very much, Ms Phelps.

Mr Evans?

MR EVANS: Thank you.

On behalf of Citi we would just adopt what Mr Holmes and Ms Phelps said and we don't have anything to add.

MR JUSTICE MARCUS SMITH: I am very grateful.

Ms Ford.

MS FORD: Sir, I would simply echo the concern that has been expressed by those before about the somewhat abrupt curtailment of the time that has previously been contemplated for the respondents' response. We originally sought 23 April.

Mr Evans's previous position was 16 April and Mr O'Higgins's revised position coming into this CMC was 26 March, and the date now proposed is 12 February, so that really is quite a fundamental shift in position. In our submission that really is not satisfactory.

We strongly adopt what was said by Mr Holmes and Ms Phelps. Merricks was only

handed down just before Christmas and there is, as others have emphasised, a necessity for us to liaise amongst ourselves to ensure there is not duplication. It is for those reasons we originally sought 23 April for the date for our response.

The fact that the Evans PCR may not adduce any further evidence in that period, in my submission, really does not alter the core reasons why it is necessary for a longer period for us to have an ability to respond. So in my submission it will be preferable to include the period that the parties appeared collectively to envisage before the CMC at the very least.

MR JUSTICE MARCUS SMITH: Yes. **(Pause)**

MR LOMAS: Have we rather graphically lost the chairman of the Tribunal for the time being?

He is back.

MR JUSTICE MARCUS SMITH: That was definitely me. Can you all hear me now that I am back?

MR LOMAS: We can.

MR JUSTICE MARCUS SMITH: I am grateful.

I will call on Mr Luckhurst. If you didn't ... (Inaudible)

MR LUCKHURST: Sir, can you see and hear me?

MR LOMAS: You are glitching again.

MR JUSTICE MARCUS SMITH: I can now. I am being told that I have very poor network quality. Perhaps we will just take a moment to see why that should be.

I am slightly hesitant to do this, but I am going to just try and change my connection. If you bear with me one moment, Mr Luckhurst, I will possibly disappear for a moment but I hope I will be back with a better connection.

Mr Luckhurst, do you want to try addressing me now and we will see how we go?

We are onto our fourth glitch, which makes my prediction of five a very good one.

Mr Luckhurst.

MR LUCKHURST: Sir, I adopt Mr Holmes's submissions on ordering, if however the Tribunal is against us on that, I would strongly emphasise that 12 February is not a sensible date to impose on the respondents for the response. Allowing a good amount of time for the respondents to prepare their responses is likely ultimately to assist in the efficient resolution of the applications, because it will promote a more targeted and concise submission. As Ms Phelps said, sometimes it takes longer to produce a shorter and more focused document. It will enable better coordination between the legal teams of the six defendants.

The defendants are conscious that it assists the Tribunal if they can avoid duplication, but with so many defendants and representatives that does take a significant amount of time, much longer than it would take for a single defendant to focus only on its own submissions. I am also reminded by those instructing me that there is quite a heavy strike-out application that this defendant group is working towards in February in some parallel proceedings in the --

MR JUSTICE MARCUS SMITH: Sorry, Mr Luckhurst, I faded out again. This is most unsatisfactory, I know.

You were mentioning, Mr Luckhurst, with so many defendants and that is when I lost you.

MR LUCKHURST: With so many defendants, it is quite difficult to coordinate, it takes time and certainly it takes longer to produce a coordinated and non-duplicative approach than it does to produce a single submission for a single defendant.

Finally, I am reminded by those instructing me that this group of defendants is preparing for a heavy strike-out application listed for three days in the High Court on 15 to 17 February. Obviously that is not something that should entirely disrupt this timetable, but it is an indication that the defendant group is working on very substantial litigation which does take time to coordinate.

MR JUSTICE MARCUS SMITH: I understand. Thank you very much, Mr Luckhurst. Ms Kreisberger.

MS KREISBERGER: Thank you, Sir. I am grateful.

I am in the fortunate position of coming last, so I can gratefully adopt and endorse what my fellow respondents have said, so I will keep it brief.

I would just like to reiterate one point that Mr Holmes addressed you on, which is that the existing timetable and the proposal being made today was designed with the Merricks test in mind and the threshold on merits which Merricks sets, whereas, as Mr Holmes explained, the focus of the respondents' response is going to be on the question of whether these proceedings are properly brought as opt-out proceedings and as Mr Holmes took you to, that engages questions of merits. It is that which militates very strongly in favour of the respondent banks seeing all of the evidence before putting in their response on certification. That is because it is impossible to bifurcate, Sir, as you said effectively between certification issues and carriage issues on merits, so it would be more streamlined and more cost effective to have one response from the respondent banks having had sight of the PCRs' evidence, both as to certification and relative merits.

So we firmly prefer the earlier timetable which allows for that.

MR HOLMES: Sir, I hesitate to interrupt. If Ms Kreisberger has finished, a couple of points have been drawn to my attention by those instructing me and before we move to reply, I wonder if I might briefly detain the Tribunal with them.

MR JUSTICE MARCUS SMITH: Of course.

MR HOLMES: The first point is to note that the consequence of the change of order and the insertion of reply submissions is that one has an extremely bunched-up and congested timetable in June, in which we will be formulating a reply only shortly after the further round of evidence from the PCRs, in the time period when we might also be preparing

for and participating in the teach-in and during a period when we would otherwise be turning to preparation of our skeleton arguments.

This, we say, reinforces the greater efficiency of reverting to the order originally proposed, which will reduce the number of rounds of material which need to be put in.

That is the first point.

The second point goes to the timetable proposal of Mr Jowell, which Ms Wakefield adopted. In relation to that, we would simply note that the evidence on relative merits will not of course be responsive to anything that we say in the response. It will be addressing other matters. It should presumably already have been in train. There is therefore no reason that we can see for the very lengthy gap which is allowed on Mr Jowell's proposals between our response to the PCRs at some point in February and theirs, which is left until 23 April.

Given that that is not responsive, the reason why 23 April was selected of course was because at that time we thought we would be responding to material from the PCRs. That does not apply to the PCRs' material on relative merits, so a fairer allocation of the time between now and the hearing would be to give us more time for our PCR responses, so that we are not squeezed and we can produce a more considered document for the Tribunal's benefit.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Holmes, we are grateful.

Before I invite responses, Professor Neuberger and Mr Lomas, do you have any questions for any of the respondent teams, otherwise we will move on to Ms Wakefield?

PROFESSOR NEUBERGER: No.

MR LOMAS: Nothing further at this stage.

MR JUSTICE MARCUS SMITH: Thank you.

In that case, Ms Wakefield, anything by way of reply?

MS WAKEFIELD: Thank you, Sir, just two points.

The first is that on the timetable as previously discussed, which had our going next, I should make clear that that evidence was not simply responsive to Bernheim, it was going to be the entirety of our expert evidence on carriage, but it was not going to include factual evidence going to the carriage dispute, nor submissions on carriage. So it has never been the suggestion, I think, that the entirety of the carriage submissions and evidence in the sense of factual evidence should come next, so that is clarification number 1.

Then, point number 2, just relates to the submissions of the respondents that the date of 12 February would give them insufficient time, which we do listen to and acknowledge. For our part at least we could adopt the date of 26 February, which was the date to which we were going to be working, for their responses to the CPO applications. Then we would follow with our own submissions on the 23rd as per the timetable set out by Mr Jowell, so giving them an extra two weeks.

Those are the submissions I wanted to make.

MR JUSTICE MARCUS SMITH: Thank you very much, Ms Wakefield.

Mr Jowell, you have the last word.

MR JOWELL: Thank you.

The first point that Mr Holmes made was that -- and others too -- it was desirable that the entirety of the evidence on the carriage dispute should be before them before they responded. And allied to that that the carriage dispute issues on the merits and the issues for the defendants on the merits were intertwined.

We fully accept that the issues are intertwined, but precisely for that reason it is simply impossible to say that all of the evidence on the carriage dispute can be in front of them before they put in their submissions, because for one thing, it would never be the case until we had had an opportunity to respond to the new Evans evidence. Indeed, it may be that it goes the other way, that material that we put in that is responsive to the

defendants, again, kicks up an issue in relation to carriage, which then again ricochets back to issues that may concern certification.

It has to be an iterative process, unless of course one had resolved the carriage dispute entirely in advance. That has not been done and we are where we are. We are now in a process where they have to be resolved at the same time and the best way to do that is through an iterative process of exchange of evidence, without putting everything in advance so that the defendants have the advantage of necessarily seeing absolutely everything, which is an impossibility as I have said.

The second point that was raised relates to opt-in and opt-out. I am not sure really where that goes in relation to this particular debate. I mean as far as we are concerned, that only arises where you have a choice between an opt-in representative and an opt-out representative, but that no doubt will be a matter for debate down the line.

The third point relates to the confidentiality regime. Again, I don't see where that goes. It is perfectly possible to accommodate that hearing on the timetable that I mentioned.

The other suggestion is that the defendants simply don't have enough time to put in their evidence by 12 February. I must say, I find this really a remarkable submission. We set out in our skeleton argument the numbers of lawyers that are working on this case on the defendants; side, which one can see from the confidentiality regime. JP Morgan for example have 37 individual external lawyers. NatWest has 22 external lawyers. These are immensely well-resourced defendants. They have had these applications for over a year and they have had the Bernheim report for over three and a half months. True it is that the Merricks judgment has come more recently, but that is simply going to or should simply simplify matters, because it sets effectively a lower standard. So it should be simply a question of deleting what they already have.

We say that it should really be entirely easy for them to be able to meet a 12 February deadline and certainly there is no reason to give them any great further indulgence.

The position from our point of view, they say Mr Holmes said by way of his supplementary submissions that somehow it was unfair that we would have until 23 April to respond. As to that, I mean the first indication of even the basis of their objections has come at this hearing and really only in the most incredible very, very high-level outline of gesturing towards this opt-in/opt-out point. We cannot simply assume that these very talented and very well-resourced lawyers are not going to come up with some formidable objections that we will not have to give very careful consideration to. We cannot simply assume and effectively -- be conceited that we can assume that because of the Merricks test that certification will be a foregone conclusion. Really to give us 10 weeks to respond to that is not a great deal of time, particularly when that straddles the Easter break and given the difficulties of communications in the present circumstances.

We say that that is entirely legitimate.

In terms of the June proposal for their reply, we do say that actually the natural juncture for the defendants to have a response shouldn't be after 4 June but should be really after we have put in our material in response to the defendants on 23 April. It is much more desirable that we see their responses much earlier than 11 June, because that is very close to the deadline for skeleton arguments. The real risk is there that we will get hit by a mountain of further evidence, very, very hard up against the hearing and we will not have an opportunity to take it on board and consider it, or certainly not respond to it. We do say that, really, the much more desirable juncture is to have it after 23 April, perhaps in early May or mid-May, or, if that is not preferable to the Tribunal, at least we would then I think prefer that the 4 June date should be brought forward a week so that we then have their material at least on 4 June rather than on 11 June, because 11 June is, as others have pointed out, rightly, it is very close to the hearing date and to the date for exchange of skeleton arguments.

Those are my further submissions, unless I can assist further.

MR JUSTICE MARCUS SMITH: No, thank you very much, Mr Jowell.

Professor Neuberger and Mr Lomas, any points? No.

We will take time to consider those submissions, I hope not too long but we will return when we are done, so if Professor Neuberger and Mr Lomas, you could join me in our virtual retiring room, we will be back shortly, thank you very much.

(3.02 pm)

(A short break)

(3.13 pm)

Decision re timetable

MR JUSTICE MARCUS SMITH: Thank you very much, and thank you for bearing with us.

Before I go to the nuts and bolts of the dates, I think it is appropriate to set out how we see the process going forward in general terms, because that has very much informed our approach on the specific dates.

It is fair to say that -- this is nobody's fault, it is simply the history of matters -- if one were starting with a blank sheet of paper, this is not how we would be starting. It is a little bit of a mess and that is no one's fault, but we have to recognise that we are where we are and find the most appropriate timetable that works, given where we are now.

With that in mind, our focus is really on achieving a fair process to everyone when viewed at the end of the process. In other words, it is an error to try and see what is fair in the course of the evidential process. What we need to be satisfied with is that when this process ends, and the evidential process will end on 11 June, viewing it at that point in time, whether the parties have had a fair opportunity and an ample opportunity to bring out the points they want to bring, they have enough time to digest matters for their written submissions and we the Tribunal have enough time both to digest the evidence

and to digest those submissions.

We have very much looked at the end point rather than the process itself. The process must serve the end point.

Thirdly, we are very conscious that it is undoubtedly an error in terms of the evidential process to seek to draw any kind of distinction between the carriage aspects and the certification aspects of the process. It may very well be that that distinction can be drawn and should be drawn for purposes of the hearing itself and for purposes of the written submissions. But in terms of the evidence, given that we are feeling our way, we consider that seeking to draw any kind of distinction would be an error.

The fourth point is that, in terms of crystallising what may or what may not matter in terms of the factors that go into both certification and carriage, we are firmly of the view that a degree of creative tension is required. At the moment the problem, as we see it, is that we don't want the applicants engaged in, as it were, an evidential bidding war against themselves. That was the basis for our suggestion that the banks make the next move. We consider that there is going to be real value in seeing just what points the respondents consider it is appropriate to take in response to the evidence as it stands at the moment.

So we are sticking with what we floated before the short adjournment, namely that the respondents' evidence should come in next.

Moving from the abstract to the general, the parties are agreed that the joint publicity notice be filed on 29 January and that date stands.

We have had regard to the points made by the respondents regarding the date of their evidence in response and we are not minded to stick with the 12 February articulated by Mr Jowell, instead we will go for 26 February as the date on which a round of evidence from the respondents is to be served. That, of course, is on the basis that there is nothing coming in new from the applicants at all. That will occur on 23 April of this

year, when there will be a full response on the basis that, subject only to reply submissions, the applicants put in everything that they propose to say, including what I will call the closed material and including the covering application justifying that closed material, should it need to be served.

I will not specify a date for dealing with that closed material but the parties can rest assured that, if it becomes an issue, this Tribunal will ensure that the matter is dealt with expeditiously.

That brings us to 4 May for the third party objections, if any, to the applications that have been made. That date is as proposed and should stand.

We then come to the final two dates, which we have chosen to invert. It seems to us that on 4 June the respondent banks should put in their material in response. That, we bear in mind, will be responsive to material essentially produced on 23 April and we consider that there is a great deal of time, more than enough, for a proper and full response to be produced to that material by the respondent banks, but we think that the last word on 11 June comes from the applicants. 11 June will give them some opportunity, but not very much, to respond to what the banks have to say. That we think is right, but it does give them ample time themselves to respond to the carriage material, which we think will be the main area of debate in their 11 June evidence, which of course will have come in on 23 April.

That leaves, in terms of remaining critical dates, 21 June for the pre-hearing review and teach-in, if so advised. That date we consider should stand. However, we consider that more time should be given for the submission of written submissions and we consider that instead of 28 June, which was the date mooted by the parties as common ground, we should instead move the date to Friday, 2 July.

Those were our conclusions in terms of timeframe. We hope that that has dealt with, albeit not in the way that the parties anticipated, the two points that the respondents made,

namely the importance of their speaking with a unified voice and the Oscar Wilde point that one needs time to create something that is short rather than verbose. We hope that we have squared the circle and if we haven't then we will have to reap the consequences and there we are. But that is the timeframe that we will order.

There are a number of dates that we have not addressed. We can of course address those now if the parties wish, but it may be better if the parties put their heads together to frame an order, slot in the dates that they think work and we will review those as and when, but we are in your hands on that.

If there are any points that you anticipate may be controversial and would benefit from our attention, then of course we will hear you.

I think we will go through the usual order, Mr Jowell first, Ms Wakefield, Mr Holmes and then anyone else who wants to have a word.

Mr Jowell?

MR JOWELL: Sir, I am very grateful for that. We have nothing to add or that we wish the Tribunal to resolve beyond that. Thank you.

MR JUSTICE MARCUS SMITH: Thank you.

Ms Wakefield?

MS WAKEFIELD: Nothing from our end either, thank you, Sir.

MR JUSTICE MARCUS SMITH: Mr Holmes?

MR HOLMES: No, we think the best approach now is for the parties to go away and with good will on all sides we hope to be able to submit an agreed order. If there were any issues which arose, then they could be dealt with I am sure on the basis of short written submissions.

MR JUSTICE MARCUS SMITH: Thank you very much.

Anyone else? I will throw the floor open to any other respondent if there is anything that I have missed.

Thank you very much. Can I say on behalf of myself and my colleagues, how grateful we are for the help we have received today. This has not been a straightforward application and we have benefited very considerably from your outstanding advocacy, so thank you and your teams very much, we are very grateful.

Unless there is anything more, I will end the hearing now and perhaps, Professor Neuberger and Mr Lomas, we will have a brief word in the retiring room but we will leave the courtroom now. Thank you very much.

MR JOWELL: Thank you, Sir.

(3.24 pm)

(The hearing concluded)