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)

Monday 12 July 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 Charlotte Thomas
Barclays	Baker & McKenzie LLP	Mark Hoskins QC
Citibank	Allen & Overy LLP	Max Evans
JPMorgan	Slaughter and May	Sarah Ford QC Daisy Mackersie
NatWest / RBS	Macfarlanes LLP	Tom Pascoe
UBS AG	Gibson, Dunn & Crutcher UK LLP	Brian Kennelly QC Paul Luckhurst Hollie Higgins
Phillip Evans	Hausfeld & Co. LLP	Aidan Robertson QC Victoria Wakefield QC David Baily Aaron Khan
MUFG	Herbert Smith Freehills LLP	Ronit Kreisberger QC

Monday, 12 July 2021

(10.32 am)

THE CHAIRMAN: Well, good morning, everyone. I'm afraid it is not as smooth as simply walking into court, but I have got a few preliminaries before we go into the substantive matters.

Housekeeping

First of all, I just want to establish good lines of communication with, as it were, the three lead advocates involved. So Mr Jowell, I can see you. Can you see and hear me?

MR JOWELL: Yes, I can see and hear you and I hope you can do the same, sir.

THE CHAIRMAN: Yes, thank you very much.

And then Mr Robertson.

MR ROBERTSON: Yes, you are coming through loud and clear. I am here with Ms Wakefield who will also be speaking today.

THE CHAIRMAN: Very good. Thank you both very much.

I am going to call for the respondents on Mr Hoskins and rely on you to act, as it were, as the ring master for the submissions that I understand will be from several of your various teams. So, Mr Hoskins, I can see you.

MR HOSKINS: And hopefully hear me.

THE CHAIRMAN: I can. Thank you very much.

MR HOSKINS: I think when it comes to the different days, each of us are performing different roles. I will happily chivvy everyone along, but hopefully we are all agreed on what we are all going to be doing, so unless something goes wrong, I should not have to whip them into line, but I will happily do that if needs be.

THE CHAIRMAN: I am very grateful, Mr Hoskins. I think we will rely you on as the chief whipper-in for the respondents and that will at least remove that particular burden from me, so thank you very much in advance.

Next, as you all know, these proceedings are being live streamed and many are joining on this platform by way of Microsoft Teams. I make this warning -- or give this warning before every case that I do remotely. Although this is a remote hearing, it is otherwise as if in open court and the rule against transmission, recording, or photographing of these proceedings stands. It is, of course, clear that, at my direction, an official recording is being made of these proceedings and an authorised transcript will be produced, but that is the only exception to the rule against recording, transmission and photography.

The next housekeeping point that I have is really

a refresher of the disclosure that the tribunal made at the first CMC. We identified then various social and professional connections between the panel and the parties or the parties' representatives. We did that at the first CMC. Professor Neuberger, having attended a dinner hosted by Lord Carlisle and himself hosted a dinner at which Professor Neuberger Mr Jowell were present, has quite rightly suggested that we renew the disclosure that we made and I think that is right. As you will know, because we told you last time, Mr Lomas had, when at Freshfields, a limited involvement with FX dealings. I know Lord Carlisle and Sir Christopher Clarke and a number of members of each legal team pretty well. These social interactions, I fear, are likely to be inevitable and they are ones that, as I have just described, do occur. It seems to me better to overtly declare them onto the record and to make it clear to the parties that, whatever happens, there will, of course, be no discussion of the case or matters connected with it by us with anyone that we happen to engage with socially.

So, I do not know if anyone wants us to come back on that. I am not expecting you to, but if you do, please raise your hands and I will hear you.

I am very grateful.

We have got a detailed timetable for the operation of this hearing over the next five days. We are going to begin with the applicants, and I had better just check before we go any further that I have got good communications with Mr O'Higgins and Mr Evans.

Mr O'Higgins, I can see you top left on my screen. Can you see and hear me?

MR O'HIGGINS: I can see and hear you, sir.

THE CHAIRMAN: Very good.

Mr Evans, for some reason Microsoft Teams has relegated you off the nine pictures that I have got. I wonder if you could just make yourself heard so that I can see if your image comes up.

MR O'HIGGINS: Good morning, everyone. I fear I put my camera on late to save you the problem of looking at me for too long, but hopefully I should appear.

THE CHAIRMAN: Very good. No, you appear loud and clear and you are now on my screen, so thank you very much.

Before we begin, I am just going make a few general observations about the -- it is not evidence, but the statements that you are going to make and the questions we are going to ask. I am not going to swear either of you gentlemen. You are not in my view, or in the tribunal's view, witnesses, you are applicants seeking certification as class representatives and we

will receive your statements and the answers to our questions in that light, and it seems to me that swearing is positively not the right way to go.

For similar reasons -- and I will hear Mr Hoskins on this if he wishes to be heard -- but for similar reasons, we are not minded to permit cross-examination of the applicants. It seems to us that we should hear the statements from Mr O'Higgins and Mr Evans, we should ask what questions that arise from us and that should be how we leave it. It just seems to me that cross-examination is not likely to be helpful for us. That said, if there is a point of clarification or detail that, in a more neutral way, arises for the respondents to ask, I will be minded to permit that.

Mr Hoskins, were you champing at the bit to cross-examine either Mr O'Higgins or Mr Evans?

MR HOSKINS: I was not, sir. I am not aware that any of the banks' representatives are. It is certainly not something we have discussed, so as far as I am aware nobody was planning to do that. So, that seems very sensible to us.

THE CHAIRMAN: Well, I am very grateful, Mr Hoskins. Thank you.

We are going to begin, as I have said a couple of times now, with opening statements. Mr O'Higgins, it

will be you first, and Mr Evans, you second.

I appreciate that it is very easy to read too much into orders of persons coming, and the fact is, someone has got to begin and someone has got to go second. We have picked first in time rather than alphabetical. It could easily have been alphabetical rather than first in time. Please do not read anything into that either, but that's the order that we determined on last time.

That will be followed by questions from the tribunal. We are all going to ask you questions. I am going to take the lead simply because I want to avoid a car crash of people piling in with too many people overspeaking. So, I will try and act as a traffic policeman and catch the eyes of the two other members of the tribunal who are in the courtroom with me, if they have got a question, I will try and bring them in so that we do not have people overspeaking, but that is the biggest disadvantage of hearings like this, you do not have the human physical signals of when someone wants to speak. So I will try and conduct proceedings in that way.

We are very much feeling our way in this case. This is the first carriage dispute before a tribunal in the United Kingdom, and what I want to make clear is that we have taken the view that we should ask what

questions interest us and which we think might help, but no one should read too much into what we ask because we are taking the view that it is better to ask the questions that we might very well find is all together irrelevant when we come to consider matters, rather than forego the opportunity of asking a question which might actually be relevant. So we are going to treat our questions this morning as very much ones that occur to us as being potentially helpful, but whether they are or not, who can say.

So, I say that by way of a general warning not to read too much into what we are asking.

Subject to that, I am going to invite the three advocates to address me on any housekeeping issues that may arise and then I will hand over to Mr O'Higgins for your opening statement. So Mr Jowell, anything at all by way of housekeeping?

MR JOWELL: Nothing from us, sir. Nothing. Nothing at all, thank you.

THE CHAIRMAN: Mr Robertson?

MR ROBERTSON: Nothing from us either.

THE CHAIRMAN: And Mr Hoskins and anyone else indeed in your various teams?

MR HOSKINS: Nothing that I am aware of, no, sir.

THE CHAIRMAN: Well, thank you very much. In that case,

Mr O'Higgins, we will hand over to you.

MR O'HIGGINS: Thank you very much.

Opening statement by MR MICHAEL O'HIGGINS

I am Michael O'Higgins, I am sole director of Michael O'Higgins FX Class Representative Ltd, the proposed class representative for this case. I welcome the opportunity to address the tribunal and in this opening statement I will cover my background, my motivation and suitability for acting as class representative, offer an overview of my strategy for pursuing the case, and conclude by outlining the team that I am working with.

I have degrees in economics and in social policy and have spent most of my working life focused on issues in public policy and management. During my early academic career, I had appointments at the London School of Economics, the University of Bath, Harvard University and the Australian National University, before moving to the Organisation for Economic Co-operation and Development in Paris.

That was followed by a business career in management and IT consulting becoming a partner in the government consulting practice at what was then Pricewaterhouse, and then a managing partner and, successfully, head of government and head of IT consulting at PA Consulting

Group.

For the past 15 years, I have had a portfolio of senior positions in the public, private and charitable sectors, including Chairman of the Audit Commission, Chairman of the Pensions Regulator, Chairman of the NHS Confederation, Chairman of the Channel Islands competition and regulatory authorities, and for the last six years, Chairman of the Local Pensions Partnership which manages around £20 billion of assets, mainly on behalf of local government pension schemes.

From 2008 to 2014, I was also a non-executive director at HM Treasury and chaired the Treasury's audit committee.

When Scott+Scott approached me about acting as a class representative in this case, a number of factors immediately made me intrigued and interested. First, my roles at the pension regulator and at the local pensions partnership, at heart, were about helping to ensure that people in this country receive decent pensions. As the regulator, this meant ensuring that the contribution and investment roles were followed by employers and pension schemes. At the LPP that the stewardship of investments provided a good net return at an acceptable level of risk. I had also published articles about pensions during my academic career, so as someone with

a long-standing and significant professional interest in decent pensions, I realised that pension schemes were one of those groups of those who had lost out from this cartel activity and I wanted to help remedy that.

Second, one of the reasons that I accepted the Channel Islands competition role is that I strongly believe that fair competition is essential for responsible capitalism. Free markets must be fair markets and fair competition is essential to that. The cartel behaviour at the heart of this action was not fair competition. The proposed defendants need to be held to account for that and the proposed class compensated.

Thirdly, my time at the Treasury pretty much coincided with the global financial crisis and its aftermath. As I saw those at Her Majesty's treasury working tirelessly to save the banking system, little did I, or they, know that people in some of the major banks were actively engaging in anti-competitive cartel behaviour in the foreign exchange markets. That is, to say the least, disappointing.

Fourthly, I was intrigued, both personally and professionally, by the reforms to collective actions introduced by the Consumer Rights Act 2015. At a personal level, I was one of those shareholders in

the Royal Bank of Scotland who took up the 2008 rights offer to acquire more shares, a decision proven wrong by events, but also, arguably, by the information provided to shareholders at the time. Nonetheless, despite being relatively financially sophisticated, I did not join the subsequent collective action against RBS. It seemed to me then that the arguments against joining any collective action of an opt-in nature were strong: the time and financial costs were uncertain, the early information requirements considerable, and both costs and information retrieval will be incurred with success uncertain. An opt-out regime would have ensured that many more who lost out, like me, would have secured redress.

This was to become clear to me from my discussions with possible class members that there is a major concern about being involved in litigation against large banks, who may indeed be one's own bank. Issues have included previous unsatisfactory opt-in litigation experience -- not everyone understands the new arrangements that have come in -- and indeed, during the webinars for potential class members that I have conducted, I have been asked whether registering interest on our website would mean the banks could find out who was potentially interested in being a member of

the class. An opt-out regime, once understood, is in my view significantly more conducive to facilitating redress to those affected by this cartel behaviour.

Professionally, during my time as Chairman of the Pensions Regulator, one of our major priorities was introducing auto-enrollment for pensions requiring almost all employees to be enrolled in an employment-based pension scheme unless they actively chose to opt-out therefrom. As it has turned out, the opt-out rate was significantly lower than most ex-ante forecasts and has continued to be low, even as the rate of employee contributions has risen. So I have clear experience in another area of public policy of opt-out regimes contributing to the achievement of public policy objectives. Therefore I believe that taking this case on an opt-out basis is similarly likely to benefit those whom public policy wishes to protect.

My professional background is set out in my witness statement and I believe it shows that I am also a suitable person to act as class representative in this case. I have run complex consulting assignments with class budgets in the hundreds of millions of pounds -- client budgets, sorry, in the hundreds of millions of pounds and deliver them on time and budget. For example, I led the assignment to deliver a new global

system, including processes, technology and partners, for the issuing of UK Visas when UK Visas was led by Mark Sedwill, later the cabinet secretary. Lord Triesman, who was then the responsible Foreign Office minister, remarked during a reception to thank the team that it was very unusual to have any IT related project in government delivered on time and under budget. I like to think that this helped Lord Sedwill's later career.

I have chaired or led organisations or groups with staff members ranging from the handfuls to the hundreds. The IT group I led in PA Consulting had an annual budget greater than the total budget I am managing in this case. During the past six years chairing the local pensions partnership, I oversaw the process whereby three local government pension schemes entrusted to LPP the full management of their investments -- as I mentioned earlier, that's now valued at around £20 billion. At the Pensions Regulator, I oversaw the early stages of auto enrollment which, in one year alone, had more than 44,000 letters sent to employers, so I am very experienced in running complex projects with large budgets.

I consider it is my role to seek the maximum recovery reasonably possible for those harmed by

the cartels. In a follow on action confined to the exact parameters of the settlement decisions, I have sought to bring a claim that tracks and covers the conduct described by the European Commission. In particular, we aim to recover damages for losses caused by the cartels in respect of all three types of the trading identified by the commission as having been affected. This is to ensure that compensation is paid to all, and not just some, members of the class, and in respect of all, and not just some, types of the customer orders affected by the cartel behaviour.

The methodology that my experts have designed is intended to capture all three types of trading and harm flowing from the anti-competitive conduct that affected them. In this way the whole class benefits.

My application also puts forward as complete and properly funded a plan as possible at this stage of the litigation, a plan to distribute damages, including borrowing from experience from the FX class action in the United States, and indeed, using the experience of Epiq, who were the claims administrator in that class action.

I have also engaged in a range of ways with class members, both UK domiciled and those elsewhere, who may opt-in. Our website and LinkedIn page is regularly

updated with the progress of the case and we email those who are registered on the website about any significant developments. I have done numerous media interviews and a video about the case as well as speaking recently at an Oxford University conference on collective actions.

I have used my UK pension contacts to let other pension funds know about the claim, including liaising with the chairman of the Pension and Lifetime Saving Association and with colleagues running other local government pension funds. Prior to the pandemic, I used a pension conference in Berlin to speak with a range of European pension funds, and travelled to Ireland with one of my legal team to speak with large pension and investment funds likely to have been affected by the cartels and to alert them to this action.

Since the pandemic, I have hosted webinars setting out the case and its progress and answering questions from webinar attendees. As restrictions are lifted, I look forward to resuming personal engagement with the class members, particularly using my connections in the pensions industry.

In terms of financial oversight of the claim, I have formal quarterly reviews with Scott+Scott, including their deputy finance director, to understand how expenditure is tracking against budget. As I indicated

earlier, I have extensive experience of successfully managing professional service budgets, including amounts well in excess of those in this claim and I am used to regular discussions with clients about budgets.

Based on my interactions with Scott+Scott, including in relation to the revised budget submissions on June 11, I am satisfied that we have a realistic budget going forward, we have been responsive to developments in the claim and, thanks to the reasonable and pragmatic approach taken when planning the claim, we have been able to operate within the existing budget which was designed to allow some headroom as the reallocation process has shown. There is around £14.5 million remaining in the budget which will allow us fully to pursue this claim if it is certified.

But I reiterate a point I made in my evidence. It is not my intention, nor that of my solicitors, to use the entire budget unless that is required to prosecute the claim successfully. The total budget should be seen as a cap, not a target.

I am working with the following people in whom, I have every confidence, are best placed to bring us a successful result for the class: Scott+Scott, the London team have extensive competition litigation experience and are drawing on the experience of the US

colleagues from that action; Daniel Jowell and his team at Brick Court, one of the best teams of competition lawyers; Professors Breedon and Bernheim who have complementary fields of expertise, Francis Breedon in FX microstructures, Doug Bernheim in competition economics; Velador are also providing industry experience. We have £29 million funding from Therium, an ALF member funder with a wealth of experience in litigation finance, including funding collective actions here and in other jurisdictions. I believe I have adequate funding for the claim. We also have £33.5 million in after the event cover. Through these arrangements, I believe that the proposed class representative will be able to pay the defendants' recoverable costs if ordered to do so. I mentioned Epiq as our claims administrator in the United States with Velador also lined up to assist Epiq in both the calculation and distribution of damages.

Finally, I am delighted to be able to call on the expertise and experience of Sir Christopher Clarke, Ian Pearson and Damian Mitchell on my advisory committee.

I believe we have properly scoped the dimensions the claim in terms of both the class and transactions for the benefit of the class. We have budgeted and

organised financing in a way that allows us headroom, that we have properly provided for the necessary quantum of ATE cover, and that we have proper plans for the assessment and distribution of damages to class members.

Finally and for completeness, I do not stand to benefit personally from the outcome of the action and I do not consider there to be any conflict of interest between the class and the PCR, or indeed within the class and me personally.

I am totally committed to acting fairly on behalf of the class and to achieving the best possible outcome for them through this action. Thank you.

THE CHAIRMAN: Well, thank you very much, Mr O'Higgins. Without further ado, Mr Evans, over to you.

Opening statement by MR PHILLIP EVANS

MR EVANS: Good morning, everyone, and thank you for hearing from us today. I think it is a very important part of the process, and thank you to the lawyers for the defendants in not seeking to cross-examine me and get revenge for the time that they have come up against me in the Competition and Markets Authority.

I will try and avoid repeating what we have presented in written evidence and instead speak to what I think are some relevant factors in how I think we have

really dealt with this case and approached the case. As the saying goes, this is in class action, collective action, representative action terms, this is not my first rodeo. I have spent 20-odd years now trying to get a case that can work, going back to the heady days of 1999 which, to those of a certain age, only feels like yesterday, but turns out to, unfortunately, be 22 years ago.

What was very clear in the early days of, in a sense, the heady days of the late 90s and early 2000s, is the competition regime and the conversations around it and the attempts to try and get recompense for those harmed by cartels was out of step I think with where the legal community and where the legal system was. So, having spent many years trying to get class actions, as they were thought of back then, working, I think the issues that were outlined by Mr O'Higgins in terms of opt-out and opt-in are a shared element of our understanding.

Opt-in cases, even with people who are highly motivated, and trust me, Which? members are very highly motivated people who do tend to keep receipts and tend to keep a track of every penny they spend, getting those sort of people engaged in an opt-in case, which in the end got them up to £1,500 per person, was an incredibly

difficult job to do.

What was also notable at the time was just how far away from where the -- in a sense the overall window on legal possibilities, the idea of class actions were.

Back in 2003, I initiated what I hoped was going to be the first real case under the new regime of the Enterprise Act in football shirts. Football shirts was a wonderful, potentially, we thought at the time, foolishly, wonderfully simple case where, given the nature of football shirts, if you had a football shirt with a certain sponsor and a certain design, you knew it could only come from a certain year when a cartel was operating, and football fans tend to be reasonably well motivated people and it was incredibly popular in the press. But even there, it was something that took many years and turned out to not be anywhere near as successful as we hoped.

So this is something which is not -- I would say, is not new. It is something which I have spent the last couple of decades working on.

I think, as far as my understanding or my experience of my legal team, as Hausfeld's London office found to their I think initial discomfort, I have known Michael Hausfeld and had conversations with him for, again, 20-odd years, and so I have known my legal advisers

since before they were born, as it were, as a UK legal centre.

I think in terms of decision-making, I think the decision-making is very much what comes to the centre of this case and every case. It was something which, when I joined the CMA, I initially had difficulty with. It was one of those issues that, you know, you try and explain what do you to your children and simply calling yourself a decision-maker was something which felt rather unusual and trying to describe exactly what it meant was incredibly difficult. But I think the time I had at the CMA, apart from being enormously good fun, taught me an awful lot of lessons around how to make effective decisions, because it was a very interesting process, particularly a very structured legal process, and I think some of the elements of that experience have helped frame the way in which I, as a decision-maker, approach these sorts of issues and these bundles of issues.

The range of sectors I covered at the CMA, I mean it is all there from the public record, but it is remarkable what you end up with in front of you and what you have to bone up on. So everything from highly detailed insurance markets to aggregates ready-mix cement and concrete and all manner of weird and

wonderful sectors that you would not even know existed but for the fact that you had them as cases.

But the key thing I think that ran across them all was how you approach the issue of evidence and how you approach the way in which you make your decisions, and that was something which I was very keen on when I first dealt with Hausfeld and when I was first approached to deal with this case.

So, why collective action, why class action? I mean, I was enormously enthused when I had my first initial conversations about this case. As I said, this has been, in a sense, 20 years in the making and I remember the conversations around the Merricks judgment when it came out, and the legal team were very excited about various aspects of it. To me, the most exciting aspect of it was the first few pages and the description of the class action regime, the representative action regime as an intrinsic part of the UK legal system. That I took as enormously positive, having had many conversations over the years and been to many conferences and given many speeches when enthusiasm for such actions is -- was certainly not top of the -- top of mind amongst the participants and amongst the legal community, so I am delighted we are at that stage now where we are getting real cases and

capable of moving forward.

Another aspect of, I think, my experience which is important is a focus on those who have been harmed. I mean, obviously I have spent a good deal of time working on behalf of UK consumers, but I think one of the aspects of that role was how often it came across that consumers, small businesses, medium sized enterprises actually had very similar decision-making processes and I think that had been supported in my experience at the CMA, that it is -- I think the standard economic model and, as it were, legal model of how companies make decisions is rather out of kilter with how they actually do, and I think we fail to apply some basic principles almost of Keynesian economics to how firms make decisions. It is very clear from my experience of the CMA that there is a very large number of firms who are so busy focused on what they are doing, which is quite a sensible thing for them, that they have no conception of legal systems and they do not really have much of a conception of class actions of the CAT or the CMA. Having had letters from constitutional lawyers in a merger case telling us we had no oversight at all because of some very, very obscure reading of the law, the acceptance and the understanding in the wider business community is not what we would hope, and

I think there is a risk when we are deeply enmeshed in a case that we think that the rest of the world really cares, and actually, I think beyond a relatively small number of players, an awful lot of companies do not really care.

There is also the -- just the issue of appointing people and having to appoint to deal with the case, to monitor the case, you have to employ your lawyers, and the idea of opt-in, I think, is -- works very, very well for very small cases with very small numbers of harmed parties and very small numbers of cartel members, but once you get beyond relatively small numbers, and I am obviously thinking in terms marine hoses here, I think the idea of an opt-in case really does fall apart very, very quickly.

In terms of, I think, the things that I learnt through those decision-making processes really also focus on making the right decisions at the right time. Many times I have seen reports make their way through the CMA process and outside processes, where it is fairly clear that work has been carried out without full knowledge of all the evidence and without full sight of judgments, and there is always a risk that you create hostages for fortune, you create a theory of harm without the full evidence to back that theory of harm

up, and I have always found it becomes noticeable when you read a document that seems to be heading in one direction and then, as if by magic, heads in another direction because the decision-makers have come along and pointed out a failing in the case.

So, we were very keen to make sure that we had everything that we could to make the right decision and I was very keen, partly because I think you should have one best shot to make your case and you can only do that when you have the full evidence, and that is why we took the decision to not go early, as it were. Obviously, reasonable people can disagree, but we took a specific decision to wait until we had the full evidence before us that we could have at this stage before we launched our case, and obviously we've been working on this case for the legal team and we've been working on the case for a very long time, but we took a very clear decision -- I took a very clear decision that we were going to wait until we had everything that we needed to enable us to take this as a one shot.

I think the second aspect -- and this partly speaks to the definition of class -- is never presume that you have -- that the data exists because you hope it does. Many times I have had cases where you assume that firms employ data and store data and carry data in exactly

the way that you want them to, and either that they indicate that they have done and then you find that that data is not recorded in the way that you want it to be recorded, or in one case is actually shipped out of the country on a regular basis so you cannot get access to the data. You know, you need to get as much data as you can possibly get your hands on as early as possible and have a good understanding of the data sources, and that is why we have got as many data sources as we can now to fully understand exactly who the class are and who they may be, and we are confident that we can then supplement that with data under discovery. But I think it is always dangerous to presume there is data before you see it.

Another factor I think is important is that decisions create path. As I said earlier, once you create a theory of harm, there is a human tendency to defend it to the death and reengineer your arguments to support it, and we really didn't want to be in that position.

Another factor which we think is important and we are delighted -- I say we are delighted, this is live streamed, it is a very strange process when we are all in our little video bubbles, and I am sure it is very strange for people watching this, the two or three

journalists who probably are -- but openness and transparency I think is incredibly important. I think, as you yourselves have said, this is early days in a system which is incredibly important. There are very important steps and very important precedents that we will be setting, and openness and transparency is very clear, and we have tried to institute that from Day 1 by taking as much of our documentation out of confidentiality and placing it on our website as early as we possibly could, even when it felt rather strange to do so. When you are used to dealing with confidentiality and you are used to keeping things close, it did initially feel a little nerve-racking to be able to put everything out there. But I think it is the important thing to do; it is important for the class to have as much visibility as they can.

I think recognising the role of this decision and the role of this process in the wider world is important. As I said, I came to this case with a great focus and desire to do right by the people that have been harmed, but also at the same time we need to recognise that whatever decisions we take and whatever processes we move forward will have an impact on the way in which this regime beds down, and there is a wider, I think, very important conversation to be had, and

I have had it in a number of seminars, on getting the regime right so that cases coming forward will have a better position to be able to deal with some of these very peculiar situations, and the carriage dispute is a very peculiar situation for the UK system, and, you know, there are no easy, straightforward, bright lines that we can take on these things. But also, just in terms of the wider regime and potentially the application of this sort of regime to wider issues -- and there are very many social issues out there that I think really could do with a regime such as this -- so keeping an eye on the wider important questions I think is important.

To briefly touch on the theory of harm -- I see time, as always, is against us -- we looked at -- well, I looked at the class definition very much as a -- almost like an old probables versus possibles rugby match, you know, you had the ones that you were fairly confident of, and then the ones that you are less confident of. I am always reminded of Supreme Court Justice Breyer when he was a simple regulatory judge, who reminded us that the last 10% problem that, you know, you tend to have regulations and you tend to have approaches that will solve 90% of your problem and you do that very quickly, and then you spend 90% of your

time focused on the last 10%. When we looked at the class and when we looked at the areas that we had excluded that Mr O'Higgins has not, we looked at what looked like a de minimis group, we looked at a group that was difficult to prove in terms of having winners and losers, and there is a risk when you are dealing with class definitions that you create a 10% problem or in this case, an even smaller per cent problem where you would end up spending a huge amount and a disproportionate amount of time arguing over (inaudible) brief points for a group that may be de minimis when, in fact, you should be focusing on the 90% of the problem.

And so, you know, our class is diverse. I think what is very clear from our own modelling of the class -- and again, we tried to get as much data as possible to look at who the class actually were -- the class is diverse, it has very large financial institutions, yes, but it also has quite a large number of medium-sized and small corporates and large corporates; it is a very diverse group of harmed people and harmed institutions. Having that diversity means we will have to have I think a very cooperative approach in how we reach those people and how we identify the people.

If I can end by talking about distribution. One of

the things that struck me about the process which is rather strange is -- and this is a conversation I had very early on with my lawyers -- is that my interests are not their interests in a way. We have a distribution which will be initially aimed at those harmed and we need to get as much as humanly possible for those harmed, and if our lawyers and our advisers and our very fine legal teams and our refine expert witnesses have chosen to take a risk that they will not be paid if there is not sufficient left over, then, as I said to them at the time, that is their problem. The risk models are very interesting, and they really are very interesting -- I think the whole market for litigation, finance and insurance is an extremely interesting one -- but they have chosen to take a risk and my job -- our job, as we seek to define it, will be to make it as difficult as possible for them to recover the income that they have risked by taking the decisions they have.

So, my job is, as class representative, or would be, is to make sure that we get as good a distribution for those harmed as we possibly can, and I think we have to take as creative and imaginative a view as we can to make that happen, and if there is something left over, then great, and I am sorry, legal team and everyone

else, if you get paid, that is excellent, but if you do not, that is not my concern and it cannot be my concern, because the job is there to make sure that the harmed parties are compensated.

At that point, I think I have hit my 15 minutes, or slightly over, I do apologise if I have, and I will hand the floor back, as it were.

Questions from THE TRIBUNAL

THE CHAIRMAN: Well, thank you very much, Mr Evans.

Just picking up on a point both of you made, which was how you personally came to be involved in these applications. I wonder if you would not mind, each of you, just giving us a little bit more flesh on the bones as to how you did come to be involved, and, following on from that, without disclosing, as it were, too much of the inner workings of your respective teams, just how the shots are called in your respective organisations and teams.

Mr O'Higgins, I will direct that -- or those questions to you first.

MR O'HIGGINS: Thank you very much.

I was approached by a mutual colleague who suggested that there might be some interest in my becoming engaged in this activity and sounded out my level of interest. When I responded positively, I then had an email from

Belinda Hollway at Scott+Scott, introducing herself, outlining the issues and inviting me to a meeting. It happened that email was two days before the first release of the commission decisions was issued, so I was able to see those very rapidly, and as I said in my opening statement, for a range of reasons, I was both interested and intrigued in what was happening.

In terms of who calls the shots, I call the shots in terms of the key decisions about the case. I don't vet every letter that my lawyers send out or exchange with their legal colleagues, but where there are points of principle or strategic issues, they come to me for a view and a decision.

THE CHAIRMAN: Thank you very much, Mr O'Higgins.

Mr Evans, the same questions to you.

MR EVANS: Thank you, yes. I was initially approached by lawyers at Hausfeld. I suppose, being one of the -- I will not say "usual suspects", but one of the names in the competition and class action interested community, which is a depressingly small one. What I made very clear at the time when I had the case outlined to me is obviously I was extremely interested because I see this -- the evolution of this regime as an incredibly important thing, not just for competition law, which is obviously something I have been blathering on about for

20-odd years, but in wider society in the prospects for solving other issues.

I also made very clear to the team that I like to work in a collegial manner and I have my -- I very rudely failed to mention my advisory panel who sit with me to help make decisions, and I picked those people very much on the basis of challenge. So I have Lord Carlisle, who unfortunately was involved in reviewing an administrative law decision on my first ever Competition Commission case, so he has been educating me for 20 years on the law. Philip Marsden, who I sat with at the CMA. Professor Joe Stiglitz, who I first met talking about IP and pharmaceutical issues in 2005, and Mark [sic], who is a specialist in FX and making FX markets properly.

But in terms of decision-making, I basically insist on making every decision that it is possible to make as the respective class representative, because only by reviewing everything that goes out, as it were, you get a sense of the detail of the case, and so I sign off every invoice every month, and read them very carefully because it is an education in the process of how this system is going to evolve, and essentially I have sight of every document as it travels back and forth and make the key decisions.

But having said that, I am not the expert witness, I am not the expert lawyer, so obviously you seek the expert input of those people. But I seek to make every decision possible but in as collegial a manner as I can.

THE CHAIRMAN: Thank you.

Following on from that, you, I think, Mr Evans, made the point that this is a very new and difficult jurisdiction and I think we can all agree on that. In a sense, you both, if you are given certification, are going to be in a position really of the client representative, but the client, you will be, as you have both articulated, making the decisions. How far do you see the regime that you are operating under undermining, as it were, the traditional ability of a client to call the shots? And let me just unpack that a little bit. In an ordinary case, the client bears both the economic burden of running the case, at least in the first instance, but, as the consequence of that, has the ability to make all of the big shots, including, for instance, as to who they want to have representing them and when to throw in their hand, as it were, if they feel it is just not worth, for whatever reason, going forward.

Now, you, gentlemen, clearly do not have the sort of

freedom of manoeuvre that a client, in the ordinary sense, would have, and that is partly because you are not actually footing the financial economic bill and it is partly because you are acting in a representative and not a personal capacity. Do you see these differences as particularly problematic? And if you do, what steps have you taken to ensure the, as it were, integrity of the process so that you can be assured that the class that you are wishing to represent is properly represented?

Sorry, that was a rather long question. I'm going to reverse the usual order and ask Mr Evans to deal with that first, and then, Mr O'Higgins, you can go after him.

Mr Evans.

MR EVANS: Thank you. Yes, it is -- we are in a rather peculiar state. I think this is fairly obvious from the conversations that we are having. We have a new regime. I think any new regime, any new way of trying to deal with things needs to do so in as transparent and open a way as possible and I think it is good that we are doing that.

It is an unusual situation to be in to be as, I have been accused of in the past, working on behalf of someone else. How do you work on behalf of someone else

and how do you define that interest? And I think part of an additional problem is that the class in this case is a very broad one and so it is not simply, as it were, large pension funds or brokerage houses or any of the other entities that may be involved in the market, we also are dealing with large corporates and medium-sized corporates.

I think the answer -- and this is not meant to be a cop out -- is I think we have the expert staff, we have the expert lawyers, is that you have to work on the best modelling and the best advice that you have and then engage in a discursive process. I think it is very important that -- as we move forward, that we have as open a conversation as we can have about how we develop this understanding of what the class representative role is, because it is not -- I think in this case in particular, it is not a simple bright line situation where it is easy to identify the class by a transaction or it is easy to identify them in terms of a locale or a model, as you may get in other cases.

In terms of calling the shots and in terms of the incentives that are created, as I said, I think the incentive model in the evolving class representative system is unusual in the UK system and it is unusual as a working relationship, and as I said, the conversations

that I had early on with my advisory team that, in a sense, the interests of the class representatives to some extent run in conflict with those of the advisers who are taking the risk on their fees with the existence of undistributed damages. But I think as long as you are open and transparent about that and you work with the tribunal in trying to come to a workable solution, then I think it is more a matter of attitude and clarity of decision-making than anything.

THE CHAIRMAN: Well, thank you, Mr Evans.

Mr O'Higgins?

MR O'HIGGINS: It may reflect on my background and on the things I have done, but the question that you asked has not troubled me in the sense that if I felt that the team were not performing to the level that I expected, I would intervene quite actively.

But equally, in terms of which barristers to choose, one relies upon the solicitors who know, if you like, the market in the legal team to make decisions around that and to guide one. But because the regime is new, it probably is a matter of finding one's way, and I haven't yet come up against the obstacles that are implied in your question, and I doubt if I am going to have any difficulty at that stage. Making decisions is not something that I have found difficult in the past.

THE CHAIRMAN: Thank you very much.

Moving on to a related but slightly different point, I can understand and we all do, I think, that you are both actuated by a desire to protect consumers, however defined and broadly defined, from breaches of competition law. I think it is common ground that if we were to certify on an opt-out basis, as you both are seeking, there can be only one, and unpacking the implications of that, my question -- and logically, it goes first to Mr Evans, my question to Mr Evans is this: why, given that Mr O'Higgins had already come in, why did you come in at all? Why not let, as it were, Mr O'Higgins do the heavy lifting and say, "Well, it is great, the consumers are being protected, that is fine, I don't need to do anything"?

And then, just to have a converse question for you, Mr O'Higgins. You, of course, were in first, but my question to you is: why not say, Mr Evans having come in, just say, "Job done, Mr Evans can do the work, the consumers will be protected"? In other words, I am asking, in a very unsubtle way, why didn't you save us the extremely difficult question of choosing between you and make that decision yourselves?

Mr Evans, I think logically you first, and then, Mr O'Higgins, I will hear from you.

MR EVANS: If I can reframe slightly the issue as it emerged. Obviously I was brought in on a case to look at the possibility of launching such an action. I had many detailed conversations about how we would do that and many decisions about when we would do that and what were the necessary steps to do it properly. And I think that my overriding motivation, as it were, in process terms was to do it properly first time, and in my understanding of doing it properly first time, that required getting the confidential versions from the European Commission, and so we did our best to get them in as rapid a time as possible. But as anyone who, I suspect is probably everyone on this call, has had dealings with the European Commission over time, it is not necessarily the fastest process that you would hope and the level of excuse that the Commission is capable of inventing to not deliver documents really is quite wonderful to behold.

I did not want to make a submission until we actually knew where we were, and so the fact that Mr O'Higgins' team had acted, as it were, before getting sight of the confidential documents, in a sense, was by the by, because, from my reading, that wasn't a correct thing to do in terms of decision-making. Now, obviously we can disagree, and we do disagree because we are in

the situation where we timed our bids differently. But I was very clear and in many conversations with my team, we could have filed at any point, but did not think it was a correct thing to do to file without sight of the decisions. As I said, that is essentially the bifurcation, I think, in terms of why the timing issue is an issue. I simply did not think it was the right thing to do. And the fact that we have not had to revisit our submissions an awful lot in terms of the facts of our actual filing, I think, in my mind, certainly justifies our decision of waiting until we got the full judgment before moving.

Yes, so I think that is fundamentally why we chose to act, because we found -- and also when we looked at developing our class definition, there are and there were differences and very significant differences, and obviously we think our class definition is better, obviously Mr O'Higgins will think his class definition is better, and simply allowing something to go forward, elements of which we simply did not agree with, both in factual terms and process terms, was simply not an option.

THE CHAIRMAN: Thank you, Mr Evans.

Mr O'Higgins, the converse question to you.

MR O'HIGGINS: Thank you.

I believe that our claim is more comprehensive and therefore in the better interests of those affected by the cartel behaviour. We have more financing to cover the legal action and we have more financing remaining, for the legal action at the moment. We had -- we have and had more ATE cover and we have a plan for the distribution of damages using the US experience. So, all of those factors made me think that our case was the better case and was more beneficial to the class whom we are seeking to represent.

THE CHAIRMAN: Thank you very much.

MR O'HIGGINS: I will not engage in the discussion on the European Commission, because that was not part of your question, the release of the documents, but I can do, should you wish.

THE CHAIRMAN: Well, I have no desire to cut off anything that you feel properly belongs into your answer. So if you feel that it is relevant to answer my question, then by all means say something, but I don't want to get drawn into, as it were, the by ways and rights and wrongs of waiting or not waiting. I think that is something on which we will certainly be addressed by your legal team in due course.

MR O'HIGGINS: Thank you.

THE CHAIRMAN: So if there is anything you want to say, of

course, we will hear you, but only if you want to.

MR O'HIGGINS: No, I felt that is sufficient. Thank you.

THE CHAIRMAN: Thank you, very much, Mr O'Higgins.

Mr Lomas has a question and I am going to hand over to him.

MR LOMAS: Yes, thank you very much indeed. Both of you have assembled, sort of, eminent boards, if I can put it that way, the non-legal advice team with lots of expertise and great reputations. How do you work with them, without revealing specific internal details, but what is the management structure that you put in place to take advantage of their expertise and how will that impact your conduct of the case? I am happy to stay with the chronological order and start with Mr O'Higgins.

MR O'HIGGINS: Thank you.

The expert teams -- it is actually part of the interest for me in the case at an intellectual level of understanding the nature of the case and the nature of the evidence. So, they are run through the lawyers, who deem what evidence is needed. But in particular on some of the economic issues, I have had some input and some discussions with both Professor Breedon and Professor Bernheim. The advisory community have -- obviously the pandemic has changed the way in which that

worked, so that has been more by phone and email. I conduct those discussions myself because they are advisers to me rather than to the legal team.

MR LOMAS: So how frequently would they occur?

MR O'HIGGINS: Probably, in the -- during the pandemic, probably every couple of months there will be a discussion. Part of that we had intended to meet monthly, sometimes informally, in order to keep up to date. But it also depends slightly on the timescales of the tribunal, because that decision-making cycle is when it becomes more relevant.

MR LOMAS: Without wishing to push too far into this, are we talking about something that will happen in a relatively structured way with agendas, with reports or summaries to consider from your legal team with issues for decision? Is it that type of rather structured board-type process or is it more informal?

MR O'HIGGINS: It is a mixture of both. There are summaries from the legal team of what the state of play is, where we are at, and any key points that may be coming up, but it is also a time for people to chat about things that they might bring to the table that might not have occurred to others.

MR LOMAS: Thank you.

Mr Evans?

MR EVANS: I was very keen on having a panel or an advisory group, as it were, from Day 1, partly because, just for the sake of comfort, it is what I am used to at the CMA, where you have a group of people who have different expertise areas and who have a lack of hindrance in expressing their views, I think would be the best way to describe the eminent people that I have on my group.

The object is very much to work, as I said, in as collegiate a way as possible. I mean, yes, I am the ultimate decision-maker, but I like to run key issues past the group to make sure that we have not missed anything or we have not missed an angle which they may be able to pick up on. And we have also tried to arrange those meetings I think, you know, COVID has had a huge impact on the way which we -- I really do not need to stay that -- we do these things. We initially were, I think, looking at every couple of months. I think we have generally done that except during fallow periods when they were no particular decisions to engage with. I mean, we obviously had a conversation ahead of this session. My initial thoughts, my initial notes were distributed to see what their thoughts were on that and whether we were barking up the wrong tree, because obviously this is an unusual situation for all of us, and knowing what on earth we should say was a bit of

a shot in the dark.

I think what is going to be interesting for me is how the panel, the advisory group evolves post-certification, because I think that is where I think having an expert group is going to prove most beneficial, because when -- I suspect we are going to be dealing with an awful lot of sort of fairly de novo problems in how we understand, I think, particularly distribution -- I am looking way down the line, but distribution, class identification, reach. There are going to be lots of knotty decisions and I will be looking to the panel to be involved very heavily in that, because they will have views that I think we will want to take on board.

MR LOMAS: Thank you.

Can I push that a little bit further, both in relation to the financial side but more widely. I think, Mr O'Higgins, you said you had quarterly budget reviews, but I think Mr Evans is signing off monthly on legal fees. Could you explain to me what flows of financial information you have into you personally to control expenditure and to see what is going on?

And then the second part of a similar question about management information is, to support your advisory panels, what flow of information about the progress of

the case and the issues do you get to inform the discussions of those advisory panels?

MR O'HIGGINS: Sorry, Mr Lomas, was that to me?

MR LOMAS: Yes, I will keep the same order of, sort of, O'Higgins to Evans, if that is all right, but as the chairman said, without anything to be read into that.

MR O'HIGGINS: Indeed, indeed.

I get spreadsheets detailing how we are doing on the budget prior to each quarterly meeting. Obviously, if something arises in between the quarterly meetings, I will get a call or have a meeting with my solicitors to discuss that. So, the quarterly meetings are a formal staging point, but they are not the only point where that gets discussed.

When the carriage dispute began, obviously we had a -- recut the budget to see what work needed to be moved forward, for example, the evidence from Professor Bernheim, so those things will take place in addition to the formal quarterly meetings.

Sorry, and your second question was about?

MR LOMAS: It was about the flow of management information for your advisory group, what do they see and what do they know, because the quality of their advice is obviously dependent on the information they have?

MR O'HIGGINS: They get a summary of the proceedings plus, if they want, a full transcript of proceedings in the competition tribunal. Some, obviously, with a legal background are interested in seeing the full documentation, but the summaries are intended to guide to areas where we think we might benefit from advice, and obviously, depending on particular expertise, if it is about an FX issue, the member of the advisory panel who has got FX expertise will get particular extra information about that.

But it is very much in terms of what do we think they need, but also what do they want.

MR LOMAS: Mr Evans, if I could pose the same two questions to you.

MR EVANS: I -- as I said, I sign off every monthly invoice, mainly because I want to educate myself about how this process works financially, and it has to be said, I asked lots of very stupid questions at the start of the process around litigation finance, and litigation finance is -- has become a -- an area of great interest for me because it really does throw up some extremely interesting models and risk models. Same with the insurance markets. I am finding a sort of crash course in almost a sort of like a market inquiry into litigation finance and insurance industries. I seek to

sign off everything and I do sign off everything on a monthly basis on finance. I seek to interrogate and have oversight of all bills where possible. Thus far, I have only spotted the odd typo and had a few questions about the odd number of hours spent on something, but those are explained very quickly.

But I find it a very useful thing to be able to do, because obviously I think you can -- there is a risk that you cannot see the wood for the trees with sums of money that are quite significant, and so I want to try and keep as tight a lid on it as possible. I have conversations with our funders and I will be, actually in a few weeks, having quite a long conversation with them, and again, that is in large part to obviously keep an eye on the things on behalf of the class, but also to understand better how that market is evolving, because I think how the finance market evolves, how the litigation finance market evolves, and insurance markets, is an important part of -- again, of this case and other early cases.

As to the information flow to the advisory group, I think one of the challenges we have is, obviously at this stage of the process, we wanted to try and engage our panel with our experts as much as possible, but we have to be very careful of the problem of coaching, and

so we worked our way around some of those issues in terms of having bespoke papers, having post conversations about issues, but we generally try to get almost an old CMA panel meeting, where we will circulate papers outlining the key issue of the case, have representatives the team engaging in conversations with the panel, and try and give them what you would call decision points, but they are obviously advisory points to me as a decision-maker, but we try to make the conversation as decision-focused as we can to keep the focus on something that is useful in the process.

As I said, I think that post-certification there will be more room for the panel to play a job which is less circumscribed by some of the issues we have faced in the last few months, but I seek to try and make it as decision-focused and formal as you can, given the circumstances. But again, this is very early days and it is very early steps in a new process, and so we are all finding our way, I think.

MR LOMAS: Just a couple of follow up points on this.

So the flow of information then is, essentially, as you would expect in a normal situation, maybe the corporate model is not perfect, but the lawyers essentially are loosely retained by you as the principal decision-maker and you consult with your board in

the advisory group, they give you views and that flows back down to the lawyers, rather than the members of the advisory group having direct access to the legal team or the expert team; is that the case in both cases?

MR O'HIGGINS: Broadly speaking, that is accurate. But if one of the advisory team wanted more access, I would have no personal difficulty in agreeing to that. Obviously, the advisory group initially were recruited on the basis of the substantive case and the carriage dispute has sort of got in the way of that to some extent. So, the -- as Mr Evans indeed has said, what happens post-certification, should certification be granted, will probably have a slightly different shape than it has had so far.

MR EVANS: Obviously, I was personally involved in the recruitment of a number of the members of the panel and I very much sold it on the basis of: look, this is the opportunity to shape the way in which decisions will be made in this case. It's a peculiar sort of rather hybrid model of an advisory board in the sense that it is an advisory board to the decision-maker with the view that the decision-maker will take significant cognisance of the advice that is received from the panel, even though, strictly, the key relationship is between the -- between myself and the legal team who are advising,

but -- and the advisory panel has a rather peculiar hybrid role. So I think we are all finding our way in how this works and we have tried to -- we tried to set up, as I said earlier, a discussion between the panel and the experts, but that actually ran the risk of coaching, so we scrapped that and had to develop a new model. But the intention was to try and engage them both in terms of their understanding and also to road test ideas and road test approaches from their own considerable experience.

MR LOMAS: So -- and I will stop this because it has been very helpful and if I continue with you, Mr Evans, in relation ...

Just to take an example, if you had a strategic question in the case, like the definition of the class, the theory of harm, something of that nature, that would come to you for decision and that is something that you would expect to discuss with the advisory board? I am putting words in your mouth, but is that the way it flows from what you have just been describing?

MR EVANS: In fact, that was a topic of conversation. I mean, we very early -- I say "very early on", early on in the process we had a -- we were unfortunate enough to have a pre-COVID meeting where the entire Board plus advisers and experts got together and we specifically

discussed how we should be going about defining classes and we had specific conversations about, basically, road testing the model we had with views from the advisory board in that room. So, yes, we had an entire afternoon conversation at that stage precisely on those issues.

MR LOMAS: Thank you.

Mr O'Higgins?

MR O'HIGGINS: The experts had had significant involvement in our decisions on how we defined the class and the various transactions -- the class of transactions that we included in the action, so that did not go to the advisory board because not all members of the advisory board would necessarily have views on that. So I think the -- those issues were more driven by the legal team and the expert team rather than the advisory board.

MR LOMAS: Thank you.

THE CHAIRMAN: Well, thank you both very much.

We have touched on this also, but both applicants and their teams have articulated in some detail their theories of harm and their cases on damages as they presently see them, and that is partly a -- perhaps unfortunate by -- side effect of the carriage dispute that has arisen out of the certification process. Nevertheless, despite all the work that has been done,

we are clearly at an early stage and one of the questions that we will be considering as a tribunal is the extent to which it is relevant for us to place reliance on the merits of the claims as articulated by your legal and economic teams as a basis for determining carriage at all.

It seems to me -- or it seems to us that there is quite a high chance that whoever gets carriage, if anyone, will likely be amending their case quite substantially in the future, at the very least to take account of such disclosure of data and material as is obtained from the respondents. My question to each of you -- and we will carry on with the O'Higgins/Evans order -- but my question to each of you is this, do either of you feel inhibited in dramatically changing tack if that seems appropriate to you in the light of further information? And related to that, going a little bit further, Picasso, I think, said "good artists copy and great artists steal". To what extent would you, or indeed should you be inhibited from taking a leaf out of each other's book were you to be the one to be certified to take the matter forward on an opt-out basis?

Mr O'Higgins, you first, and then Mr Evans.

MR O'HIGGINS: As an ex-academic, I can't really condone

plagiarism, but it has its place in certain situations and this could indeed be one of them.

I would not feel inhibited about changing if the data suggested that it was wise so to do. In fact, I think in Professor Bernheim's teaching, he talked about the virtues of waiting -- on the necessity of seeing the data before you finally define the nature of the model that you are going to be using, and obviously I am not going to disagree with the head of the economics department of Stanford University on that particular point.

THE CHAIRMAN: Mr Evans?

MR EVANS: I fully agree that the carriage issue has, as it were, made everyone lay their cards on the table, probably post-Merricks, considerably in advance of where they may normally do so, and so we are in a very strange position where the defendants have -- well, almost complete sight of our cards as they currently stand, and it is a very strange position to be in.

As I think I tried to explain in terms of the decision-making process -- and again, this is -- I am trying my best not in any way to be disparaging about the O'Higgins claim, because obviously that would be wrong, but I was very determined to make sure that our decision-making process was based on the maximum

amount of information that was available to be able to make a correct assessment of the evidence as it stood. I have seen far too many times, as I have said, in cases where someone has gone too early on a conversation or a theory of harm and they've then found it difficult to step back from that theory of harm because they've invested time and effort in doing so. I am fairly confident in the amount of information and the evidence we have had to date that our evolution of theory of harm and class is as robust as it can be given the evidence we have had. I do not expect a situation to arise where the data that comes through discovery will very significantly alter that, but I am certainly not opposed to it. I think as, I think, both Mr O'Higgins and I would share the view that you follow the data in every circumstance where you can. I just think that in terms of the construction of the case, that we made sure we had the maximum data we could before we set upon the path that we did because of the risk of past dependence, as it were, or theory of harm dependence based on your first effort.

In terms of what can we learn from each other, as it were, we had that conversation, I had that conversation with my legal team, you know, what are we actually dealing with in terms of the construction of cases and

are there different elements that we think may be weaker or stronger, or better or worse. On balance, I was comfortable with what we have got. I mean, I do not think -- I think the major point of disagreement we have is around -- in data terms, is around the definition of the class and the theory of harm that stems from that, and that is a fairly clear bifurcation. I am comfortable where we are. I think the data, through discovery, will only enforce that. But if it shows something very, very different, then absolutely, if that is where the evidence goes, that is where the evidence goes.

But I think the key thing is that when that happens, it is done in as transparent and open a manner as possible, and in as conversational a manner as possible, because if discovery throws up a whole new area of harm that none of us have yet identified, then we really will have to think very hard about how that is incorporated within both the approaches that are proposed.

THE CHAIRMAN: Thank you very much.

Now, both applicants have obviously given careful thought to the difficulties of opt-in as opposed to opt-out proceedings, and if you have not given that careful thought at the first instance, you certainly have done at the prompting of the respondents.

I am going to ask you both about opt-in versus opt-out in a moment, but before I do that, an anterior question. You have both mentioned engagement with potential class members in your opening presentations. Have you given any thought to having persons of the representative class or the representative class involved in a more active way in order to assist in framing your case. Even if you proceeded on an opt-out basis, why not have persons who are involved and part of the class in having input into the way you frame your case? Rhetorically, I ask -- well, not rhetorically, I am expecting an answer -- is that the sort of input, and the disclosure that it would provide from the claimant's side, something of a real advantage, and if it is not, why is it not? And again, we will go O'Higgins, Evans, if that works.

MR O'HIGGINS: Could I just ask you, sir, to clarify that question?

THE CHAIRMAN: Well, what I am getting at is, one of the advantages of an opt-in process is that you have got persons buying into the proceedings in a conscious way and, depending upon what disclosure regime the court imposes, giving disclosure of relevant material to the claim.

Now, that -- and anyone who has read my judgment in

BritNed will know that I am very keen to tether econometric evidence to the facts -- you would get, in this way, a form of data which would be not, as it were, defendants delivered but claimants delivered, and one of the downsides of an opt-out process is that that buy-in by the members of the class does not necessarily have to occur.

So, what I am getting at is, conscious as I am that both of you are pressing for opt-out rather than opt-in, for reasons that we will come to, can you have -- and if you cannot, why not -- the best of all worlds in that you drag in the potentially interested class members, albeit on an opt-out basis, and deploy the information they have got in furtherance of your case. Now, that does not seem to have happened and I was just intrigued as to why, on both sides, that had not happened.

MR O'HIGGINS: Thank you, that is very helpful.

I am, of course, very much interested in the pensions industry and therefore have an interest from that angle, and bring knowledge from that angle, and have discussed it with colleagues in that industry over the last two years since I got involved. We have on the advisory committee a foreign exchange trader who has given us information on how he sees the market and on his perceptions of whether or not he was potentially

affected by the cartel behaviour and surprised to discover the potential impact that it had on his business.

But I think there is a question around complexity and how many extra bodies you attach to the case if we have, in addition to experts, lawyers -- sets of lawyers, I should say -- and an advisory committee, I think you then do have questions about that.

However, in the webinars that I have had, we have had people from the affected groups participating in those webinars and the questions that they have asked have become part of our thinking as we have moved on. So, in that sense, we have had, not to the extent that you suggest, but we have had some input from people who might otherwise have to opt-in.

THE CHAIRMAN: Thank you, Mr O'Higgins.

Mr Evans, the same question to you.

MR EVANS: I think the answer to some extent lies in timing rather than involvement or manner of involvement. I think that as I am sure Mr O'Higgins' team and mine have certainly engaged with precisely the people who would be capable of engaging in an opt-in case. I think what is interesting from that engagement and the engagement that we have had with the industry since is, similar to experience that I have certainly had in CMA cases, that

you can engage with an awful lot of people at the wrong time and timing is really of the essence with a case like this. I think what you may be looking for may not be the right answer, and I suspect -- in terms of the evidence, I think, you know, once, hopefully, we get past certification and we get discovery, we will have a much better picture of exactly the actions, exactly the harmed class and a solid evidence base for the theory of harm.

At that point, I am not entirely sure that an ad hoc group of those harmed would necessarily add -- unless there are gaps, and that, I think, would be a useful role -- but I think further down the line, I think certainly when it comes to issues of distribution, I think there will have to be a very, very solid engagement. I suspect at that point, the engagement process will be considerably easier and more fruitful because there will be a point to that engagement. One thing I have generally found with industry groups, and particularly representative bodies of industry groups, is unless there is a point to the consultation and a point that makes sort of bottom line sense, as it were, actually getting engagement, and useful engagement can really be quite difficult.

So I suspect we will be doing it, either of us will

be doing it, but it will be some way down the line when there is a very specific point and set of questions that need answers.

THE CHAIRMAN: Thank you very much.

Moving on to the question that I promised you, you do not need to retread all of the material that we have read in relation to opt-in versus opt-out, but given the battle lines that have been drawn and given your position very clearly in favour of opt-out rather than opt-in, I think it is right that I ask you both to articulate, to the extent that you have not already made those points explicitly clear in the written submissions and evidence, why you say in this case opt-out is the way to go rather than opt-in. And again, I will ask, Mr O'Higgins, you to deal with that first and Mr Evans second.

MR O'HIGGINS: Thank you, sir. I covered, I think, some of this in my opening statement and so that really is the core of it for me. Partly from personal experience in not having joined a collective action because of the factors I identified as being obstacles to opt-in cases, partly from professional experience with the auto enrollment regime at The Pensions Regulator, itself a product of the popularity of what's called "nudge theory" in government, that I think Lord O'Donnell

introduced when he was cabinet secretary, that sometimes people will do things -- will not do things they should do that are in their own interests unless you opt them in, and then, if they have to opt-out, they may not do so. So I think that experience has convinced me that -- plus my personal experience -- that opt-out is a lot more likely to achieve the objectives of public policy than opt-in in this case.

THE CHAIRMAN: Thank you.

Mr Evans.

MR EVANS: I mean, roughly when I first dealt with the case, opt-in seemed -- I mean, maybe as an article of faith, because I have dealt with a couple of opt-in cases in areas which I thought were fairly straightforward and where opt-in made sense, and they were simply a logistical nightmare to run and they did not work in the manner we hoped, and I think the -- this may trigger a response from the defendants, but they have already said they will not -- but I think some of the arguments that have been made why we should have opt-in, maybe not to make too many references to last night, but rather remind me of Italian defending, they are rather sort of cynical in nature and designed to simply make the class as small as possible to minimise the damages.

So I have not been overly impressed by the arguments

for opt-in. The experience I have had, as I have said, dealing with companies large and small and their willingness and understanding of processes and their willingness to engage underlies, particularly when you are dealing with a very large number of not that large companies -- I mean, we have to remember, this is not just large companies. I think, when we initially think of this case we tend to think of very large corporates and very large financial institutions, but there is actually an awful lot of medium-sized ones out there and, in pure numbers terms, an opt-in case may benefit a very small number of very large, well funded companies. But this regime is not designed to just benefit those who are most capable of defending their rights, in fact, the opposite. It is supposed to be there to help those who are least able and least engaged to defend their rights and to receive recompense for harm.

So, on an ethical, moral and practical basis, I see very little case for opt-in in the circumstances and I think it would be entirely the wrong way to bring a case of this nature forward.

THE CHAIRMAN: Thank you. I am just looking around the room to see if there are any questions arising out of what has gone before and I think I am seeing a shaking of

heads.

MR LOMAS: Just picking up the chairman's question and it may be something we wish to pick up with the legal teams, but there is of course the equivalent of an opt-in action going before the High Court in the Allianz litigation, which involves 100 parties split into 11 groups moving forward on a sort of group litigation order basis. Does not that show that opt-in structures can work?

MR O'HIGGINS: I think it shows that opt-in structures can work for large organisations. I do not think it would cover the long tail of cases in this case. And I think, as Mr Evans indeed said, there are small organisations as well as large organisations. If we are trying to capture the maximum benefit for the class affected, I think opt-out works better.

MR EVANS: I would very much echo Mr O'Higgins' points. I remember when I did the Volvo case and the football shirts case, the thing that struck me as rather quixotic is that we managed to get quite decent sums of money from a very small number of Which members, but nothing for ordinary members of the public who were similarly harmed by the action of a localised cartel, and on a pure systemic basis -- I mean, my view, I share with Mr O'Higgins, that the Allianz case actually shows that

opt-in works very well -- potentially works very well for very large companies that are very well funded and exposed significantly, but simply doesn't work for those who are less engaged, less interested and less well funded. If anything, that is a definition of who -- of what I think the sort of legislative intent of this regime was, which was to protect the wider UK economy, not just those with deep enough pockets and significant -- enough interest to launch their own cases.

THE CHAIRMAN: Well, thank you both very much. That concludes our questions, but I think it is only fair, at the end of this -- speaking for my part, very helpful session, if I extend an invitation, since we have the time, to Mr O'Higgins and Mr Evans to say anything that you would like to say by way of wrap up, given the points that we have discussed in the course of this morning.

One particular point -- and it is slightly unusual for a judge to say this, but this is a new jurisdiction and if you have any points, knowing how we have structured this week, to make as to how the tribunal can best achieve an outcome that -- well, how can I put it -- the loser would feel most happy with, I would be very grateful to hear from you.

So, we will stick to the usual order, which means that Mr O'Higgins' got the first word and Mr Evans will get the last word. So Mr O'Higgins, over to you. If you have anything to say, we will hear you, but do not feel obliged.

MR O'HIGGINS: Thank you very much.

I am not sure that, particularly after last night's events, that sort of the losers necessarily -- it is possible necessarily to make the loser feel any better, but I just want to reiterate the core of the case, which is that we believe that we have a better definition of the class, a definition that will benefit more people in the class, we have a fully funded and well thought through litigation plan, we have significant after the event insurance that has been in place for some time, and we are looking to seek redress for those who have been affected by this cartel behaviour.

Thank you.

THE CHAIRMAN: Well, thank you, Mr O'Higgins.

Mr Evans.

MR EVANS: I think the point I'd like to bring most is really that the role, throughout the next few days, that I see myself with my lawyers, to some extent, and I think we will all have to play, which is of the slave who would travel behind the Roman emperor to remind them

that they are human. I think it is more that we are travelling behind the legal teams and the process to remind them there is a class that have been harmed and they are the focus of this, not us. I think trying to keep that focus has proved problematic throughout this process. I think actually keeping an eye on the prize is an important part of the process that we are going to undergo.

I think in terms of where we are going on this, I think keeping an eye on the class is key, identifying the elements of precedent that we will set is as important, and I think as we move forward, having a cooperative and open and engaged process to help embed this case, but also make sure this case is embedded within a sort of progressive view of how this regime will evolve, is going to be, certainly for me, what I am going to hope we are going to come out with at the end of the process. And thank you, everyone, thank you, Mr O'Higgins, and thank you for listening to us for so much time this morning.

THE CHAIRMAN: Well, no, thank you very much. I am going to -- sorry? Oh, yes, sorry. Mr Lomas, one more point.

MR LOMAS: Yes, sorry, it may seem a bit odd to raise it after your closing comments, which slightly (inaudible). One of the points and it is really a question directed,

I think, at Mr Evans, one of the points that the O'Higgins team make is the fact that they have rather more considerable finance available to prosecute the case. Obviously, if we are looking at this from the point of view of the class, the financial resources available to ensure the case is well run in the interests of the class are one of the key criteria. I would be quite interested to hear from you personally, as the decision-maker and the person therefore who is ultimately responsible for that, how you feel about that difference in the amount of financial fire power that is available.

I realise that you can cut the comparison in different ways and come up with slightly different comparisons, but the point made against you is that the war chest is rather bigger on the O'Higgins side than on the Evans side.

MR EVANS: It is obviously something that has interested me a great deal both in terms of our own finances, but also just in the market for finances, and also what the certification does to that market. I think there is an issue of first mover advantage in financing, which is interesting. I think post-certification, obviously the market becomes a very different beast in terms of insurance and in terms of financing, but I think there

is more of an issue and I think there is a danger that, in essence, if you are trying to drive from here to -- if I were driving from here to my home in Bristol, a Mini would do it, a Rolls Royce would do it, if I wanted to be reasonably comfortable I'd probably have a mid-range saloon. Simply because you own a Rolls Royce doesn't necessarily mean you get from London to Bristol any quicker. So I think there is an element to which financing is -- the question is more, have you got enough to do the job? Have you got enough to do it effectively? I suggest we do and I am quite comfortable with what we have. We also have access to increasing the budget where necessary, and this is not as you say a "war chest", this is not a matter of war chests, this is a matter of have you got the right budget to do the job that you need to do and I am comfortable that we have.

MR LOMAS: Thank you.

THE CHAIRMAN: Mr O'Higgins, I am not sure that you can have anything to say, but I would not want to stop you from saying it.

MR O'HIGGINS: I think I will leave it to my legal team because this issue is going to come up in some of the submissions during the week. We have had questions about how much of the financing of the Evans case has

come from lawyers deferring fees and we found it quite difficult to make the numbers add up, but I will leave that to my legal team.

THE CHAIRMAN: No, indeed. You can take it as read that we will be, with the assistance of both of your legal teams, going through the detail of that. That is really the point of the process, so we will not be asking further detail on that or other topics.

So just looking around the room ... thank you both very much. I will conclude this part of the proceedings with that. So thank you both very much, we are very grateful.

I think that brings us to the question of submissions then from the applicants and we are a little bit ahead of ourselves. What I have in mind is there is one point which we have discussed and I think it is appropriate that we raise it now because it is something which I think is going to feed into the evidence and the questions to be asked of the economists tomorrow. So, with your permission, I will just put that point on the table, but I want to be quite clear, I am not expecting the advocates to address it when we start the submissions.

What I then suggest is we debate whether we, after a short break, commence with Mr Jowell early, or whether

we adjourn to 2 o'clock. But let me first get off my chest the point that really arises out of the Allianz case, and just so that the parties know, we have got and have read the particulars of claim in that case and it has caused us to have some thoughts which I am going to try and articulate now.

Looking at the respondents' skeleton argument, paragraph 53 of those submissions refers to the fact that O'Higgins -- it is specifically in relation to the O'Higgins application, but we think it is true of Evans also -- that both applicants are approaching the damages question with the goal of identifying the class-wide effects of the anti-competitive conduct here in issue as identified by the competition -- by the Commission.

Now, as a broad articulation of where the applicants are going, it seems to me that that is right. But it does beg a number of questions which I think we are going to want some help on, most likely from the experts, and I raise it now so that the experts can not be taken by surprise overnight.

We appreciate that both Commission decisions refer to and find the existence of single and continuous infringements between December 2007 and January 2013 in Three Way Banana Split and December 2009 and

January 2012 in Essex Express. Now, it may be -- but I am not sure that one can necessarily take the single and continuous finding as meaning a constant effect on spread over time. It may mean that, but it seems to us that there is a real risk that that is actually inconsistent with the nature of the unlawful trader conversations reported in the decisions.

Now, that raises the perennial problem of translating an infringements decision by a regulator into the findings of fact that are permissible on a follow-on claim. Now, speaking personally, I am very familiar with these difficulties, having encountered them in Cardiff Bus where they had very hard-edged jurisdictional implications.

Now, I take it that both applicants are agreed that this is a follow-on case. I think it is said in, certainly, one set of submissions; it may be both. But if that is right, it does seem to me that that fact closes down a great deal of the wiggle room that a claimant might otherwise have in bringing a claim based on a regulator's decision. The fact is, combining follow-on and standalone, basing oneself on a decision but augmenting it, does give a certain room for manoeuvre on the part of claimants that doesn't exist in a follow-on action.

If it is the case that when the Commission is referring to a single and continuous infringement it is not saying -- or not necessarily saying that the effect was constant over time, that raises the question of whether specific trader conversations, that unlawful collusion actually affected only very specific trades and that the effects of the anti-competitive conduct was much more tightly focused in terms of precisely what loss was occasioned and who suffered it, and the reason I mentioned Allianz is that that seems to be, on a very quick reading, the way in which the claimants in Allianz are putting it.

Now, in paragraph 126 of the respondents' submissions they quote a typically astute question from Professor Neuberger as to how reliable progression analysis is, and I will not read out the quotation that is in paragraph 126, I am sure you will all be very familiar with it. But it does seem to me that the linkage between the econometric analysis and the facts is, in this case as in all cases, extremely important and I think we have two aspects of concern in relation to this which we raise now because we want to give, as I say, the experts fair warning.

First of all, this is what economists call a "deep market", a thick market, there is a lot of players in it

offering the same or similar products or services. So, lots of competition for similar products. How can we be confident, is our question, that even if there was a continuous effect, that there was a cartel effect on the overall market? We bear in mind, for instance, that the traders were only influencing voice trades and that the linkage between voice trades and electronic trades is one that is not necessarily evident on a completely clear basis.

The other concern that we have got is this: suppose there is an effect but it is patchy. In other words, it is confined to certain specific trades but not others. Now, our question there is, how does that affect a regression analysis carried on if you have got a situation where there are, as it were, pockets of loss rather than a continuous effect? Is that something that one can actually perform a regression analysis on?

In short, I suppose what we are wanting help on and is whether this patchiness actually renders this much less a class action and much more a: I am a specific counterparty, I have myself on the peculiar facts of this case been harmed by the anti-competitive conduct of the traders involved.

Now, that might be an argument deployable and it may well be deployed against certification at all, because

on that basis there just is not a class. On the other hand, it may be said, much as I think was said in BritNed, that the harm is one to the market integrity as a whole. In other words, one has, to reuse the Commission's phrase, a single and continuous infringement which affects anyone in those relevant periods who traded in certain types of transaction.

That brings us very neatly back to the point made in paragraph 53 that the allegation here is one of identifying a class-wide effect, and really the question that we want to put on the table is how far that class-wide effect can be established in this case, and I say that bearing very much in mind that the test for certification is, of course, a low one rather than a high one, and I am fully aware of the fact that we are applying the Merricks test on the question of certification, if not on the question of carriage. But it did seem to me that this was a point that relates not to carriage per se, because here I do not think there is a difference between the applicants, it is one that goes much more fundamentally to the question of what it is that the economic harm alleged actually is.

I am sorry that is rather a long point. It is not something that I want a response to today at all, it is something which we will see where it takes us in

the coming days.

Having got that off my chest, Mr Jowell, do you want to make a start at half past or do you want to adjourn until 2 o'clock?

MR JOWELL: I'd like to make a start at half past because, if possible, I'd be grateful for any extra minutes I can get.

THE CHAIRMAN: That is entirely fair enough. Well, I see my clock says it is 12.22. We will start at 12.30 and we will have an extra half hour, if that works for everyone.

So, if you could either leave the conference and rejoin it or mute your microphones and cameras, I'll see you all at 12.30.

MR JOWELL: Thank you.

THE CHAIRMAN: Thank you very much.

(12.22 pm)

(A short break)

(12.32 pm)

THE CHAIRMAN: Mr Jowell, welcome back. Before you begin, I am just awaiting a signal that the live stream is running, so I will tell you when to go.

MR JOWELL: Thank you.

THE ASSOCIATE: We are live.

THE CHAIRMAN: Mr Jowell, over to you.

Opening submissions by MR JOWELL

MR JOWELL: May it please the tribunal. There are of course two main issues before you. The first of those is whether each of the claims meets the standard for certification as an opt-out claim, and the second issue is which of the two proposed class representatives should be chosen and which is more suitable.

What I would like to do in this brief opening is, first of all, to say a few words by way of headline overview about each of those two issues, and having done so, I would then like to take you to the statute and to the catch rules which form the framework within which you must resolve those two issues, and after that I would like to take you briefly to certain points in the Supreme Court authority of *Mastercard Inc v Merricks*, and finally, and only if time permits, which I fear it may not, I would like to take you to certain parts of the Commission decisions.

So, let me start, if I may, by saying a few words about certification and the opt-in/opt-out issue. Now, in our submission, it is clear that, at least as far as the O'Higgins proposed representative is concerned, we meet the criteria for certification. Indeed, this is not contested by the respondents. What they say instead is that the tribunal is obliged to certify either as

opt-in or opt-out and in this case it should choose opt-in. Now, the obvious and immediate difficulty with that submission is that neither the O'Higgins PCR nor the Evans PCR put themselves forward as representatives for an opt-in class. Nor, so far as we are aware, is there anyone on the horizon or waiting in the wings to act as such. So this is at best a hypothetical choice. Indeed, it would seem to be no choice at all.

Now, I will come back in closing to the proper approach to this position and I will also mention it when I come to the statute, but in essence what we say is that in a situation like this one there must be, on any view, a heavy evidential burden upon the respondents to clearly establish that an opt-in action would be practicable, and we say that the respondents have not come close to establishing that, and if that is correct, then the tribunal should approach this on the basis that this is not a real choice; the only real choice is between certifying on an opt-out basis or not certifying at all.

But even if the respondents could persuade the tribunal that an opt-in claim would, say, on the balance of probabilities, be practicable, that would be at best just one factor amongst many for the tribunal to consider in deciding whether an opt-in claim would be

more suitable. As I will come to, we say that taking all the factors in the round, even if opt-in were practicable, it will still not be the more suitable option; the more suitable option would be to certify this as an opt-out claim.

So let me start with practicability. Now, the objective evidence that is before the tribunal is strongly suggestive that an opt-in claim would be impracticable, and, first of all, one has to look at the sheer size of the class. Now, we do not present to the spurious accuracy of Mr Ramirez's figures that are bandied around by the respondents, but we do say that it is clear that there are going to be thousands, indeed probably tens of thousands of class members.

Now, in order to create an opt-in for a class of that size, a class representative is inevitably going to have to embark upon a very substantial book-building exercise, and the circumstances here make that a particularly challenging task. First of all, one has to identify these numerous class members, but there is no register of persons who have transacted FX with dealers. It is true to say that there may be some counterparties like the large pension funds, large international corporates and the like who are, if you like, the obvious contenders to be within this class.

But the class also consists in a wide and heterogeneous group of business who have transacted with dealers for FX and many of them will be small and medium-sized enterprises, for example small import/export businesses and similar, and very many of the members of this class will be unknown and almost unknowable, and what makes the task of engaging with them and getting them to sign up particularly difficult is that there is no industry body here through which one could identify and communicate to most class members.

Now, in the Trucks litigation that is going on in parallel to this, one had the Royal Haulage Association, the RHA, and that was able to contact its large membership and create a potential opt-in class. But the RHA could easily ascertain, both from its membership and also from the records with the DVLA, who had first registered trucks. But not only here is there no industry body consisting of businesses and persons who have bought FX from dealers, but there is also no central register of the transactions in question. The FX transactions, at the relevant time, were largely over the counter and opaque to the wider market.

Even if it were possible to identify and contact these members, there had been a tremendous task in persuading them to participate. The evidence before you

confirms what is in fact notorious, that many businesses would be averse to suing their own banks for fear of jeopardising their banking relationship. Although the banks vigorously deny this through their lawyers' submissions, it is notable that no factual evidence has been put forward by the banks that participation in an opt-in action would not result in retaliation or would not affect the commercial relationship. But in any event, it is the perception that counts and the perception is very real.

Another important factor that Mr O'Higgins mentioned this morning is that the evidence from the United States claims indicates that there is likely to be a very long tail of claimants within the class with a large number of relatively low value claims, and if that's right, it is going to be particularly hard to overcome both the inertia effect in persuading them, in persuading those claimants with small claims to take the effort to join an opt-in, particularly one that has not yet succeeded, of course, but also hard economically for the class representative to justify spending great resources persuading them to do so.

So, all of these are factors that render an opt-in claim so challenging as to be, in our submission, impracticable, and that is confirmed by the O'Higgins

funders, who say, through Mr Purslow of Therium, that it is unlikely that they would fund an opt-in claim.

Now, as I said, even if, contrary to that, the defendants could establish that an opt-in class would be practicable, that is simply a threshold question, for the tribunal must then decide whether such an opt-in would be more suitable, more desirable, by comparison with an opt-out, and in reaching its decision the tribunal must adopt, under the statute, as I will show you shortly, a multifactorial approach; there is no inherent presumption either way, regardless of whether practicability is established.

Now, one further factor that the statute does mention is the strength of the case, and as the guide makes clear, that must be assessed at a high level and assessed in that way, this is undoubtedly a strong case. It is a follow-on claim, it is based on a settlement decision, and that means -- that is significant because it means, based on the Court of Appeal's judgment in *Volvo v Ryder*, that the findings of the decision -- all of the findings are binding on the defendants in their entirety, or at least, strictly speaking, it would be an abuse of process for the defendants to contest any of the findings, and it is a claim based upon a damages methodology attested to by distinguished experts, and

that suffices to regard this as a strong case and that is a powerful factor in favour of opt-out rather than opt-in.

Another factor is that, even if the tribunal concludes against us that on the balance of probabilities an opt-in claim would be practicable, there must still be a serious risk that it would not be, and that risk is something that the tribunal should take into account, and even if it were practicable, there must be a very strong likelihood that any such claim would have low participation rates and that would be mean incomplete compensation to the class.

There are other factors too that point in favour of opt-out: the suitability of this claim for an aggregate damages award, the need to ensure deterrence, and behavioural modification by defendants.

Now, in the present case, the defendants -- or the respondents will seek to persuade you that this matter should be certified as opt-in, and they've asked for an awfully long time to do that, and as you listen over the course of a day and a half to their no doubt persuasive rhetoric, I would just ask the tribunal not to lose sight of three things.

First of all, the defendants have adduced no evidence. None at all. No factual evidence, no expert

evidence, no documentary evidence. Notwithstanding that, their written submissions -- and we will whether it also applies to their oral submissions -- are full, in our submission, of thinly disguised statements of expert opinion, criticisms of our experts and even factual assertions that seek to undermine the strength of the claims advanced and the practicability of an opt-in claim, and we say that the tribunal should give none of that any weight insofar as it is pure unevidenced assertion.

The second point that we would ask you to bear in mind is that it cannot be seriously gainsaid that even if an opt-in class could be maintained it would inevitably have substantially fewer claimants within its ranks than an opt-out class would. This is not a case when it can be said with a straight face that the vast majority of the class would opt-in. On the contrary, it is bound to be a small proportion of the class, and that will lead to lower aggregate damages, which is of course precisely why the defendants want it.

The third point we would ask you to bear in mind is that when the defendants protest that the claims are without merit, utterly speculative, worthless and so on, it may be worth bearing in mind that in the United States these very same defendants were

prepared between them to pay over $1 billion to settle the very similar claims brought on a class action basis in that jurisdiction.

If I may then turn to the carriage dispute. Now, we say there are essentially five main reasons why the O'Higgins PCR is clearly superior.

First of all, there is the wider scope of the claim and the wider class definition. So as you will see, the Commission decision identifies three types of customer orders affected by the decision: first of all, customer conditional orders, which are usually called resting or limit orders; secondly, benchmark orders to execute at the fix -- typically at the fix; and thirdly, immediate orders.

Now, the O'Higgins PCR seeks to obtain damages for the class arising from the harm occasioned on all three of these types of orders with the subject of the infringing conduct, and connected to this it also seeks to obtain compensation for the harm potentially caused by the coordinated trading, or front-running, that was capable of affecting these orders by moving the midpoint as well as from expanding the effective spread.

Now, in contrast to that, the Evans PCR excludes trades on these resting orders and benchmark orders and

it seeks damages only on the immediate orders, and they also disavow any attempt to claim for harm arising from the coordinated trading.

Now, it is clear from the descriptions given by the EU Commission in its decisions that these conditional and benchmark orders were the object of the infringing conduct, and it is also clear that the coordinated trading would have had the potential at least to harm at least a substantial number of the class members, but only the O'Higgins PCR has the intention to seek to recover compensation for the class stemming from this harm.

Now, of course, it was not easy or obvious to devise a way to measure this kind of harm to the class, but nevertheless the O'Higgins PCRs experts have skillfully identified a means of potentially measuring this and that is the realised spread measure. Now, as Professor Bernheim explained in the teach-in, this is a different measure to the effective spread which was used in the United States proceedings and which will also be used by the O'Higgins experts alongside the realised spread. But as Professor Bernheim explained, and as Professor Breedon also explains in his report, the realised spread is, at least in theory, capable of measuring the harm that is liable to have

arisen on the benchmark trades by affecting the midpoint price, and it is a genuine innovation in these proceedings, and importantly, as I have said, it enables potentially greater levels of compensatory damages to the class from all the forms of infringing conduct and on all of the types of orders affected.

Now, one might have hoped that the Evans PCR would have recognised this and would have sought to improve its proposal by adopting at least the possibility of using realised spreads, but regrettably they have instead sought to aim their fire at this method, thereby in effect doing the respondents' job for them in a way that runs directly counter to the interests of the class. I am not going to seek now to try and rebut the Evans points in detail of course, but I will just put a marker down to say that the arguments are ill-conceived and certainly wrong in law insofar as the respondents suggest that there must be consistent loss to all members of the class, and that is an argument, I know, that is so ill-conceived that not even the respondents are adopting it, or at least certainly not adopting it with any enthusiasm. In our submission, using realised spreads in addition to effective spreads, which is what the O'Higgins experts plan to do, can only realistically assist and tend to increase the damages to

the class.

Now, the second and third most marked difference between the two PCRs relates to their levels of funding and budget, on the one hand, and the level of ATE insurance on the other, so I am going to take these two points, if I may, together. But I should state that Mr Patel will be dealing with this in detail in due course when it comes to our closing submissions.

But way of overview, I should just note now that both the funding and budgetary and ATE position of O'Higgins are unambiguously superior to Evans on all the key parameters. Now, it may have been a little difficult to keep track of some of this. That is partly because they have a moving target due to a few adjustments that have been made by both sides, and it is also, I have to say, in part because there have been some unhelpful occasions, such as paragraph 55 of the Evans skeleton argument, where the figures have been presented in a way that can actually only be described, I'm afraid, as misleading.

Now, what we describe as an objective and up to date summary is provided in paragraph 6 of our supplemental note, and if I could ask -- I do not know if -- I hope the Ring Tel system is working, but if we could perhaps pull up that document, which is in AB/1A/3. We will

have to see if that --

THE CHAIRMAN: Let's see if it works.

MR JOWELL: There we are. Fantastic.

You will see there that we have tried to summarise things in a short table and you will see that the total funding comparison is now 29.4-odd for O'Higgins and 22.5 for Evans, so a substantial difference in O'Higgins' favour of about 6.9 million.

Now, if you then take off that part of the funding that has been actually spent pre-CPO and you also take off the future ATE that will be paid, then the difference going forward, you will see, is in the penultimate column, which is 14.6-odd for O'Higgins and 9.7 million-odd for Evans. So, on any view, O'Higgins has substantially more petrol in the tank, nearly 5 million more in funding going forward.

Just to be clear, and given the Rolls Royce analogy that was made earlier, and as we point out in footnote 3 of this document -- we may need to -- if it is possible for document to show the footnote 3? It does not show on my screen. Well, anyway, let me --

THE CHAIRMAN: We have it.

MR JOWELL: You have it, ah, great, yes.

So, the disparity between the 13.1 million and 6.5 million on pre-CPO expenses, now, that might -- you

might think that that is suggesting that the Evans approach has been leaner and more efficient to date, but that is decidedly not the case and in fact the opposite is true. The reason for the discrepancy is twofold: first of all, O'Higgins has paid for more of its ATE upfront -- well, that is just a -- that is irrelevant; and secondly, Hausfeld has, we have recently discovered, agreed to defer payment from its funders of most of its pre-CPO fees. Now, if you compare recoverable costs up to the CPO, you find a very different picture. The Evans team have to date incurred 11.9 million-odd to the O'Higgins 9.3 million. So, to date, the O'Higgins team have been more efficient.

THE CHAIRMAN: Where do we see those figures, Mr Jowell, just for our note?

MR JOWELL: You will see those in footnote 3.

THE CHAIRMAN: Oh, yes. Yes, sorry.

MR JOWELL: If you click through to the AB/13A/12, you will see where they are.

THE CHAIRMAN: Yes, I have got you, thank you.

NEW SPEAKER: I think it is actually the second appendix to the Evans PCRs amended neutral statement of funding. So it has come from their -- these are their figures, not other figures.

Now, the high levels of incurred costs by the Evans

team to date is -- it is also significant for another reason. The tribunal is going to have to reach its own view on this, but we would suggest that it is exceedingly unlikely that a team that has already incurred costs of an extraordinary 11.9 million pre-CPO is going to be able to prosecute the entire rest of the action for the smaller amount of 9.6 million that it has remaining. That deficiency shows up if the tribunal scrutinises the Evans budget going forward in a bit more detail, because what one sees is that their budget is light in crucial areas, including in particular disclosure and notification, and also, I have to say, at the administration or distribution stage.

They simply -- I mean, they simply don't -- I mean, I think the amount they have for disclosure is about, in lawyers -- for solicitors' fees is about half a million pounds, and yet with that, that is for disclosure and notification, and that is supposed to cover not only looking at all of these transcripts of these very many -- of the many, many transcripts of the chats, but also disclosure of data, which is going to be absolutely the core of the action, and frankly, half a million is not going to nearly get you there. So we say they simply do not have enough in the kitty and their budget is going to be inadequate to the tasks that face them.

THE CHAIRMAN: Mr Jowell, I detected this morning in Mr Evans' points that he felt that, post-certification, the market might change and I got a sense that he was saying, at least by implication, that if he were certified to carry the matter forward, the position might very well change in terms of what was capable of being brought to the table in terms of funding and ATE insurance.

Just to be clear, I will obviously want to hear from Mr Robertson on this, but your position is we cannot do anything more than assess matters on the evidence as it appears to us at the moment, we cannot speculate?

MR JOWELL: Indeed, sir. But I'd add one more point to that, which is that -- which is this, that even if -- suppose that their view is, "Well, we can get more money, we can get more funding in due course if we are certified". That still does not actually justify putting into your -- in an inappropriate and inadequate budget, and really they should not be putting in a budget which puts in only half a million for disclosure and notification, because that is inadequate, and if the position is, "We know we are going to need 5 million", or 1.5 million, let's say, for disclosure -- that might be a more realistic amount -- then you should say that, but say, "We are short that amount in terms of

funding at the moment". That is a more candid way to do it. But in any event, one cannot base it on the hope that funding may turn up in the future.

If one looks -- if one turns then from the amounts -- the sheer funding and looks at ATE, there is another vast difference, because O'Higgins has got 33.5 million of ATE cover to the Evans 23 million. So O'Higgins will have over 10 million more in ATE cover, and that high level of ATE is important for two reasons.

First of all, because it is a statutory requirement that the class representative will be able to pay the defendants' costs if ordered to do so, and that ensures fairness to the defendants in relation to these class claims, which can be expensive to defend.

But secondly, and much more important from our point of view, is that adequate ATE gives security for the class representative to pursue the claim without being concerned about their own exposure, without having to look at their own back and their potential personal insolvency or the insolvency of the company of which they are a director. That is very important, because that higher level of ATE gives the class representative the confidence to pursue the claim fearlessly and in the true interests of the class, and that can mean taking risks if it has to do so.

THE CHAIRMAN: Just to be clear, Mr Jowell, so, one might say at first blush that the level of ATE cover was actually purely and simply a matter for the defendants and they have not, I do not think, made particularly clear whether they prefer one or the other application on that basis, their line is both are unsuitable as opt-out certifications. But I think what you are doing is you are saying that for at least two reasons that is not right, it obviously is an interest for the defendants, but you say in effect the way in which each applicant will conduct itself therefore is something that goes directly to the question that we need to consider as one of the factors going to carriage?

MR JOWELL: That is precisely my point, and from our point of view at least that is the much more important factor. One does not want the class representative to be thinking, "Oh, I have to settle this claim early, because if I don't, then I am going to start to incur potential liability to these defendants -- personal liability for me that is going to exceed the level of my ATE cover". So, it gives the great security to the class representative.

Now, I am conscious it is 1 o'clock. I have got just a couple more points which I could -- the final two

points which I could do now or I could do at 2 o'clock.

THE CHAIRMAN: Mr Jowell, why do you not run to a natural break and we will rise then.

MR JOWELL: So, the fourth point of distinction between the two PCRs. So we do say there are -- we have real advantages in Mr O'Higgins in terms of the expertise of the individuals involved. You have heard from Mr O'Higgins. He has got substantial experience, not only in competition and competition law regulation but also in project management, and critically -- this is the critical point -- he has got a solid background and contacts in the finance industry and in particular with the pensions industry, and you heard him speaking when he mentioned, I think, that he was the chairman of the Pensions Regulator and since he is also the chairman of the Local Pensions Partnership, and that connection would the pensions industry is a pre-existing connection to the class that I have to say Mr Evans simply does not have, and it means that Mr O'Higgins is closer to the class members and better placed to act in their interests.

Now, of course, in amongst -- the experts we have instructed are amongst the most distinguished in their fields in the world and the O'Higgins PCR will also be able to draw on the know-how and experience of

Scott+Scott, which have been the de facto lead counsel in the United States litigation. So we say there are real advantages from that as well.

Fifthly and finally we say it cannot be ignored that the O'Higgins PCR issued its claim on 29 July 2019 whereas the Evans PCR was not issued until almost four and a half months later on 10 December 2019. Now, that is, on any view, a substantial gap.

Now, of course, you have heard Mr Evans say, "Well, we were waiting for the Commission decisions and that was the responsible thing to do". Now, actually, when you look at the press release, it had pretty much the core of everything that was in the Commission decisions. But even leaving that aside and even if one can understand that it was a reasonable thing to do at least, to wait for the Commission decisions, one still cannot get away from the fact that, even after the Commission decisions were received by the Evans team on 1 October, they waited 12 weeks before filing their claim. Now, one might have given them some slack if they'd done it in two weeks or three weeks, but a substantial delay of 12 weeks was simply -- is simply not acceptable. It is well beyond, for example, the 60 days that you have in the Ontario statute.

Now, that substantial -- notwithstanding that

substantial delay and the advantage they had of being able to work off a ready-made template in the form of the O'Higgins class definition, despite that, they have failed, in our submission, to improve on that template in any material respect.

Sir, I think that is a -- that sort of brings to an end my headline points, so if that is a convenient time.

THE CHAIRMAN: Well, it is. Thank you very much, Mr Jowell. We will resume at 2 o'clock.

MR JOWELL: Thank you.

THE CHAIRMAN: Thank you.

(1.04 pm)

(The short adjournment)

(2.01 pm)

THE CHAIRMAN: Good afternoon, Mr Jowell. If we just wait for the green light on the broadcast, then we can resume.

THE ASSOCIATE: We are live.

THE CHAIRMAN: Mr Jowell, over to you.

MR JOWELL: Thank you, good afternoon, sir.

I'd like to turn next, if I may, to the statute and the rules which provide the framework in which the decisions in these proceedings must be taken. If I could start by going to section 47B of the Competition Act, which is in the authorities bundle,

tab 2, page 3. So that is {AUTH/2/3}, and there it is, thank you. And you see in (4) that:

"Collective proceedings may be continued only if the Tribunal makes a collective proceedings order."

Which is what, I think, we colloquially refer to as "certification".

(5) stipulates that the Tribunal can make a collective proceedings order only if two conditions are fulfilled, and we have (a) which is:

"If it considers that the person who brought the proceedings is a person who ... the Tribunal could authorise to act as the representative in accordance with subsection (8)."

If we look down to subsection (8), we see that the tribunal can authorise a person to act as a representative:

"Whether or not [they are] within the class."

That is (a). And (b):

"Only if the tribunal considers that it is just and reasonable for that person to act as a representative in those proceedings."

So that is the just and reasonable representative criterion.

Then, if one goes back up to (5), one sees the other condition which is that must be "in respect of claims",

in and 5(b):

"In respect of claims which are eligible for inclusion in collective proceedings."

Eligibility then itself has two limbs, which are5 in~(6):

"Claims are eligible for inclusion only if the Tribunal considers that they raise the same, similar or related issues of fact or law ..."

And, secondly:

"... are suitable to be brought in collective proceedings."

What Lord Briggs has helpfully clarified in *Merricks* is that suitability, in that section at least, means relative suitability as compared to individual proceedings. So it must be more suitable for them to be collective proceedings than individual proceedings.

We then see in (7) that:

"A collective proceedings order must include the following matters:

"(a) authorisation of the person ... to act as the representative ...

"(b) [a] description of [the] class ... whose claims are eligible ... and

"(c) specification of the proceedings as opt-in ... or opt-out ..."

And then subsections (10) and (11) give the definitions of those terms.

Now, pausing there, interesting to note, the statute says that it must specify whether it is opt-in or opt-out. It says nothing about the basis on which such specification should be made, and it certainly contains no presumption or preference either way in favour of opt-in or opt-out.

Of course, one then has in section (9) an important provision which gives the tribunal the flexibility in the future to vary or revoke a collective proceedings order at any time.

If we can then go forward to I think to 47C, which is on the following page, so that is {AUTH/2/4}, and in subsection (2), we see an important innovation for UK law, which is that:

"The Tribunal may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person."

As I have shown you from *Merricks*, it is important to appreciate the true import of that section because it means that, even in a tort claim where, in theory, one has to have a loss to each and every claimant that is claiming, that section effectively disapplies that at

the level of the individual when one has a collective claim, at least where aggregate damages are claimed, and instead the tribunal looks to assess whether there is loss to the whole class in aggregate.

Could I turn next, if I may, to the rules. Those are in the authorities bundle, tab 82, page 45, so {AUTH/82/45}. Fantastic, thank you.

Now, section 77(1) and section 78 essentially reflect what we have already seen in the statute, but section 78(2) gives a bit more detail about when it is just and reasonable for an applicant to be a representative. So you will see subsection (2) says that:

"In determining whether it is just and reasonable for the applicant to act as the class representative, the Tribunal shall consider whether that person -

"(a) would fairly and adequately act in the interests of the class members."

As I have said, Mr O'Higgins has proximity to the class members, in particular through his pensions work, which makes him well placed to act in their interests.

Then I think (b) is conflict of interest, which does not apply here, nobody has suggested there is any conflict of interest:

"(c) if there is more than one applicant seeking approval to act as the class representative in respect of the same claims, would be the most suitable."

So that is the subsection you will have to apply here in deciding between the two proposed class representatives, which of them is most suitable -- or more suitable.

And (d) is important:

"Will be able to pay the defendant's recoverable costs if ordered to do so ..."

So, it is interesting to note that in deciding whether it is just and reasonable for an applicant to act as a representative it is necessary, or appropriate at least, or possible to consider whether the prospective applicant will be able to pay the defendant's costs. So we infer from that it is also reasonable to suppose that, in comparing the relative suitability of two applicants, that ability to pay the defendant's costs is a relevant consideration.

We then have subsection (3), which permits the tribunal to take into account all of the circumstances in determining whether a class member would:

"... act fairly and adequately in the interests of the class members."

And it notes a number of particular factors. We see in (c) (i) that the tribunal can look at the method of bringing the claim and notifying representative persons. We see in (c) (ii) that it can look at governance and consultation, and we (c) (iii) that it can take into account arrangements for costs fees and disbursements, and those all have obvious relevance in considering again which of the members is -- which of the proposed class representatives is most suitable.

Then, in subsection -- we then see in section 79 -- well, actually, forgive me, before we get to 79, it is interesting to note also 78(4), which is that:

"If the represented persons include a sub-class of persons whose claims raise common issues that are not shared by all the represented persons, the Tribunal may authorise a person who satisfies the criteria for approval ... to act as the class representative for that sub-class."

Now, it is important here that, although Mr Evans does seek to divide its class into class A and class B, effectively creating two sub-classes, Mr Evans is not seeking to give each sub-class separate representation, which he could do under this section. Given that he is not seeking to give them separate representation, it is not entirely clear to us what useful purpose this

notional division into two classes at this stage really serves. They do not have a conflict, so we say, well, what then is really the point of having two classes? At least now, one can see that maybe distribution, there might be some purpose in that. But at this stage we do not see a purpose when they are being represented by the same person.

If one then goes over the page to 79 {AUTH/82/46}, we see that this concerns, "certification of the claims as eligible for inclusion in collective proceedings" and the tribunal must be satisfied of three things here. First that they are -- that there is an identifiable class, secondly, that it raises common issues, and thirdly, that it is suitable, and as we have said, suitability here too must mean relative suitability.

Then, in 79(2), we have got further details on how this relative suitability is to be adjudged.

Just skipping over that, we then come to 79(3), which is really the central provision when it comes to the decision that you must make between opt-in and opt-out, and what this stipulates is that:

"In determining whether collective proceedings should be opt-in or opt-out ... the Tribunal [can] take into account all matters it thinks fit, including the following matters additional to those set out in

paragraph (2)."

And then it mentions:

"(a) the strength of the claims; and

"(b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover."

I would just like, if I may, to draw a few things out of that. First of all, it is clearly a multifactorial assessment. It specifically states that the tribunal can take into account all matters it thinks fit and the tribunal can, in particular -- may, but does not have to, take into account the matters both mentioned in the previous subparagraph (2) and also the two further matters, the strength of the claims and practicability.

Now, if one goes back up to the points mentioned in the previous subparagraph, subparagraph (2), some of them are not really obviously applicable to a comparative exercise between opt-in and opt-out, but two of them are, at least. First of all, the size and nature of the class. That is likely to be relevant to an assessment between opt-in and opt-out, so a smaller class that is more homogeneous and identifiable is going

to be much more likely to be suitable for opt-in than the larger varied class whose precise composition is unknown, as we have here.

Another factor that is likely to be relevant that is mentioned in subsection (2) is the suitability of the claims for an aggregate award of damages, because although you can have I suppose aggregate awards of damages in opt-in classes, they fit much more naturally into opt-out classes because you do not have to, effectively, subtract those who have not opted in in coming to your aggregate award.

The two specific further matters that are mentioned in subsection (3), the strength of the claims and practicability, are -- it is absolutely clear that these are -- first of all, there is no reason to give practicability any more weight and strength than the claims or indeed any more weight intrinsically than the factors that are relevant in subsection (2). But it is clear that the factors are non-exhaustive and that the tribunal can have regard to other relevant considerations or factors. One rather obvious relevant consideration, we say, that should be taken into account is that there is no proposed representative offering to represent an opt-in class that has come to the tribunal. We say that that is a relevant factor, because --

particularly where those representatives that are before the tribunal do not have the funding for an opt-in application.

So, we say, in summary, there is no basis in the statute or the rules for elevating the factor of practicability, if established, above all other factors mentioned in section (2) or (3), and there is certainly no basis for suggesting that provided that an opt-in is practicable, therefore the tribunal should presume or prefer for there to be an opt-in as some sort of default position. So, that is what we seek to draw out of it.

Of course, if an opt-in is impracticable, then of course, in a sense, that is a threshold question, because if it is impracticable, then the only real choice for the tribunal is opt-out or nothing at all. But the mere fact that you establish that it is practicable just means that you have established one factor that may be pointing towards opt-in, but in no sense does it establish any kind of legal presumption or anything coming close.

So, could I turn against that background to the Merricks case which I would like to look at next, and that is in the authorities bundle, tab 34 {AUTH/34/1} --

THE CHAIRMAN: Mr Jowell, just pausing there. It is a sad

reflection of the complexity of the costs rules that apply not just in this type of litigation, but generally, but we, I think, might be assisted in a kind of template as to how incidence of costs and recovery operates depending on whether the claim is successful or not.

Let me unpack why I am asking this now. I mean, you have been articulating why, if this is a process that ought to be certified under 47B, the option really is opt-out and not opt-in. But one of the advantages, looking at it now from the position of those who are incurring costs, is that an opt-out regime enables you to top up whatever you do not recover from the defendants pursuant to the usual costs follow the event regime, and assuming, of course, success, you can top that up by accessing the unrecovered, unclaimed portions of the damages awarded in priority, as it were, to the payment out to charity. That, as it seems to me, is one advantage of opt-out over opt-in when one views it from the position of the recovery of costs, which may not be a hugely relevant fact, indeed it may be a contra-indicator in favour of opt-in rather than opt-out. I do not say anything about that, but ...

So, first of all, it does seem to me that we would like to have just a sort of matrix from the parties as

to the general rules that apply on these outcomes, but also, if there is a difference between the applicants in terms of their reliance on the opt-out fat (?), if I can call it that, then it would be helpful to know. I am not sure that it is, but I raise it now because --

MR JOWELL: I do not -- I think it is important to appreciate that whilst it is true, in theory, that the opt-out -- if you like the surplus costs that are not recovered from the defendants can be obtained out of undistributed damages, that is absolutely right, except that is subject to two things. First of all, there have to be some undistributed damages, and secondly, the tribunal, I believe, has to -- has oversight over that, so has to be satisfied that the -- I do not have -- again, I do not have the provision at my fingertips, but my understanding is that the tribunal has oversight over that process, so if the costs are excessive, then that can be subject to the tribunal's control. But in addition, one has to bear in mind that the opt-in is not a panacea, because in an opt-in scenario, the costs simply come out of the damages that are awarded to each opt-in claimant. So, whilst I can see that the charity may be harmed by the opt-out taking money from the undistributed damages, at least the class is not harmed, whereas in the opt-in process the class is

harmed, and we can certainly -- but the person I think you should be having this discussion with in more detail is Mr Patel, who will be addressing you on the precise mechanics of the costs regime.

THE CHAIRMAN: No, that is very helpful. The reason I raise it is so that these questions can be -- or the answers to these questions can be anticipated, and I entirely take your point. Just to be clear, absolutely understand that this is an aspect of the process under the control of the tribunal. Unpacking it, it raises some very interesting questions, because one might say, one has got a perfectly serviceable costs regime whereby the successful claimant recovers from the unsuccessful defendant, assuming that is the way it goes. Why, after a detailed assessment, should you get anything more and on what basis is, I think, raising a large number of very interesting questions.

I do not know and I am sure we will find out precisely what the parameters are for the recovery of, let us say, contingent elements in fees. That is really why I raise it, because I have a horrible feeling that if I were to try to articulate the rules that govern recoverability of costs in these various different permutations, I would probably get it wrong. So I am quite keen to enlist the assistance of the parties at an

early stage.

Just to be clear, going the other way, you made this morning the point about the importance of ATE insurance and the risk of recoverability of costs against the class representative. Now, as I understand it, on an opt-out regime, the risk of costs against the class themselves is nil, that cannot happen. I am less clear -- and that is my fault, not anyone else's -- about what the position is on an opt-in regime, whether there is any kind of even theoretical exposure of those opting in to costs. Again, that seems to me to be a significant difference, if it arises, between an opt-in and opt-out regime.

I mean, if there is no recovery possibility against the class either which way, then of course, it is a neutral factor. But if there were the risk of a costs order being made after the ATE had been exhausted, against not simply the class representative, but the opting in members of the class, then that would make a big difference between the desirability or otherwise of an opt-in/opt-out process.

MR JOWELL: Yes. Those are very fascinating questions and I do not want to shoot from the hip. I just have two observations, as it were. One is that, as you will be aware, even in a sort of ordinary litigation, if I can

call it that, where one has a claimant and a defendant, the claimant will (inaudible) to say, legal costs if you will recover from the defendant the assessed costs, but then the balance must still be payable by -- (overspeaking) -- it is obvious. So the lawyers will not -- you know, unless it is established that those costs were not properly incurred at all. But typically, people, thankfully, pay their legal costs.

So, the other observation I would have really relates to your point about opt-in and that is -- and whether the class members themselves might be at risk. I mean, I will need to come back to you with chapter and verse on whether that is theoretically possible, whether it is only the class representative that might be subject to an order for costs. But I can see that there might be two possibilities. One is that those opting in might receive an indemnity, either from the representative or the funders. Another is that they actually have no liability at all, but I will need to check that point, I am afraid, and get back to you.

THE CHAIRMAN: No, Mr Jowell, that is really quite understood. I raise these because I am conscious the more I lift the bonnet on these rather multiple permutations the more my own ignorance is becoming exposed. I know we have costs counsel here --

MR JOWELL: Yes.

THE CHAIRMAN: -- and they are here for a reason. I am just articulating it a little bit more precisely.

MR JOWELL: My Lord, I am grateful for that and we will take that away and we will certainly get to the bottom of those points.

MR HOSKINS: Can I just I hope assist by saying my understanding, admittedly from memory, is that the roll-on costs that deals with costs against represented persons, i.e. members of the class is to be found in rule 98 of the tribunal rules. That is my understanding of where the relevant rule is. Sorry, I do not have the electronic bundle reference to hand.

MR JOWELL: 98 is authorities bundle 82, page 57 {AUTH/82/57} and it does -- it says:

"Subject to paragraph (2), costs may be awarded to or against the class representative, but may not be awarded to or against a represented person who is not the class representative, save that ..."

And then it says subsection (2):

"Costs relating to an application made by a class member ... may be awarded to or against that class member."

So I think -- I am very grateful to Mr Hoskins. I think that gives the answer to the second of your

questions.

THE CHAIRMAN: Thank you, Mr Hoskins, that is very helpful, but I think this is, in one sense, a helpful exercise in terms of just flushing out the -- as I say, the permutations that exist, but thank you for answering that particular one, I am very grateful.

MR JOWELL: So, if I may then turn to the *Merricks* case, which is in the authorities bundle at tab 34, page 1 {AUTH/34/1} so -- thank you. Obviously, there is a lot in this case about many aspects of the regime. I am not going to try and take you through all of them, but I just wanted to emphasise three points really for present purposes from this judgment.

The first is that the purposes of the provisions that have been introduced in the collective action regime by the Consumer Rights Act, the purpose was to benefit not just consumers, but also businesses, and particularly, but not exclusively, small businesses that have been harmed by anti-competitive activity, and it aimed to do so, in particular, by the introduction of opt-out proceedings. You see that really if we go to paragraph 20, which starts at page 8 {AUTH/34/8}, so if we can go forward to page 8, please. And we see at the bottom paragraph 20, and we see that Lord Briggs stresses there that part of the background was

the Enterprise Act 2002, which was the first stage of the introduction of the structure for collective proceedings, and you see he notes that that statute only permitted opt-in and was unsuccessful. And if we could go to the next page {AUTH/34/8}, please, you see that that led to the Consumer Rights Act, and you see there from the BIS consultation that he quotes that an important part of the purpose of the Consumer Rights Act was to allow businesses, not just consumers, but also businesses, to collectively bring cases to obtain redress for their losses. We see that in the first indent that one of the aims is being to:

"Increase growth, by empowering small businesses to tackle anti-competitive behaviour that is stifling their business."

And we see in the further indent, further down, we see the observation that:

"... a ... difficulty [of] competition cases is that they may involve large sums but [may] be divided across many businesses or consumers, each of whom has only lost a small amount.

So, when the respondents say that you should lean against an opt-out certification for business claimants, that finds no basis in the purpose of the Act as identified by the Supreme Court. So that is our first

point on *Merricks*.

The second is that the Supreme Court was clear that in determining certification, it was not permissible to embark upon an assessment of the merits save for in two specific circumstances, and we see that in paragraphs 59 to 60 most clearly. That is on page 23 of the bundle {AUTH/34/23}. So if we could go, please, to page 23 of the bundle. Thank you.

We see that in 59, he mentions the fact that there are -- he says in the second sentence that:

"... the Act and the Rules make it clear that, subject to two exceptions, the certification process is not about, and does not involve, a merits test."

The two exceptions that he then goes on to identify are either whether there has been a strike out or a summary judgment application, and secondly, where there is the choice between opt-in and opt-out.

Interestingly, if we can go back to paragraph 29, which is page 13 of the bundle {AUTH/34/13}, so if we could go back to page 13 of the bundle, please. We can see that he quotes, in paragraph 29, the current CAT guidance about how to approach the criteria of strength of the claims in the context of the choice between opt-in and opt-out, and he quotes it -- it is worth, I think, reading in full. He says:

"The proposed ..."

He says that the:

"Strength of the claims (rule 79(3)(a))

"Given the greater complexity, cost and risks of opt-out proceedings, the Tribunal will usually expect the strength of the claims to be more immediately perceptible in an opt-out than in an opt-in case, since in the latter case, the class members have chosen to be part of the proceedings and may be presumed to have conducted their own assessment of the strength of their claim. However, the reference to the 'strength of the claims' does not require the Tribunal to conduct a full merits assessment, and the Tribunal does not expect the parties to make detailed submissions as if that were the case. Rather, the Tribunal will form a high-level view of the strength of the claims based on the collective proceedings claim form. For example, where the claims seek damages for the consequence of an infringement which is covered by a decision of a competition authority (follow-on claims), they will generally be of sufficient strength for the purpose of this criterion."

And it is notable that Lord Briggs quoted that passage from the guide without any hint of disapproval, and of course, it is very much in line with his own

conservative approach to any assessment of the merits at an interlocutory stage, which is, of course, reflective of English law more generally.

Now, the third point that I would like to stress from *Merricks* is that it makes clear that section 47C of the statute, which I have shown you, removes the need to establish that each individual claimant needs to establish that it has suffered loss, and what we are concerned with, as I said earlier, is loss in the aggregate to the class, or at the certification stage, really whether there is a realistic prospect of establishing loss to the class. We see that in paragraph 58 of the judgment, which you will see if we can go forward to page 23 {AUTH/34/23} of the bundle, please. He notes that:

"Another basic feature of the law and procedure for the determination of civil claims for damages is of course the compensatory principle, as the CAT recognised. It is another important element of the background against which the statutory scheme for collective proceedings and aggregate awards of damages has to be understood. But in sharp contrast with the principle that justice requires the court to do what it can with the evidence when quantifying damages, which is unaffected by the new structure, the compensatory

principle is expressly, and radically, modified. Where aggregate damages are to be awarded, section 47C of the Act removes the ordinary requirement for the separate assessment of each claimant's loss in the plainest terms. Nothing in the provisions of the Act or the Rules in relation to the distribution of a collective award among the class puts it back again. The only requirement ..."

Is that distribution must be fair and reasonable.

This point is actually put more clearly -- even more clearly, by Lords Sales and Leggatt in their dissenting judgment, and if I could ask to please go forward to page 32 {AUTH/34/32} where we will see what they say. Perhaps if I could invite -- just invite the tribunal, rather than listening to me droning on, to read paragraphs 94 and 95 -- perhaps even further, 94 to 97, so you will have to indicate -- the tribunal will have to indicate when the --

THE CHAIRMAN: When to turn the page. We will do that, thank you.

(Pause)

Yes, thank you.

MR JOWELL: Now, that is of course a more detailed analysis than that of Lord Briggs, but it is consistent with it. Indeed, the analysis is principally relevant to

the question of distribution and I do not need to ask you to look at it, but if one goes forward in their judgment to 148 to 149 {AUTH/34/44}, we see that this --

MR HOSKINS: I am sorry to be a pain, but I hope it is helpful to do this just briefly now, because I appeared in *Merricks* as did Ms Wakefield, and she will correct me if she has a different view. The point that one finds in the judgments of Lords Sales and Leggatt was not argued before the Supreme Court. It is obviously in the minority judgment, but it was not an issue in the case. The passage in Lord Briggs is dealing with quantum, and what Lord Sales and Lord Leggatt are dealing with is whether one can have a member of the class where that individual himself has not suffered loss, and that is not what the Lord Briggs passage goes to and this point was not argued in that way in *Merricks*. So the Lords Sales and Leggatt point is their view, but was not the subject of debate between the parties.

MR JOWELL: Well, in my submission, I think that what they are saying is entirely consistent with the passage that I showed you in Lord Briggs' judgment, and that is, I am afraid, whether it was argued -- specifically argued or not, it is very clear that they are both saying essentially the same thing.

THE CHAIRMAN: Well, yes, I mean, I am very grateful for Mr Hoskins in making that intervention. I think what he is saying is that we need to tread a little carefully in that it may be -- and obviously we will have to read the decision with that in mind -- it may be that what we have here is an expression, albeit of weight, of a minority view of two justices of the Supreme Court which is not resonating in that of the majority, or it may be otherwise, but clearly we are going to have to look at it with that in mind.

I am not so sure whether it was argued or not is -- it is obviously of some weight, but it does seem to me that it may be causative of the fact that the minority simply took a view which is, as I say, of weight, but no more than two out of five.

Ms Wakefield.

MS WAKEFIELD: Sir, it may be of assistance to know that in the remitted hearing in *Merricks*, this is a live point and our position is that this does form part of the binding judgment of the majority as well. So it may help perhaps if I put in a short note overnight, just a page or two to set out our position. I am afraid I disagree with Mr Hoskins about its binding effect.

THE CHAIRMAN: There is a surprise.

MS WAKEFIELD: I know.

THE CHAIRMAN: But, again, I am grateful that the matter has been fleshed out.

Mr Hoskins, you want to say something more?

MR HOSKINS: Just simply that the remitted hearing took place after the judgment we are looking at. My point is simply that the argument that preceded this judgment did not raise the point. I am not -- if it came up after it had been remitted to, that is something else entirely.

I really did not want to take Mr Jowell -- my only concern actually for this, if I may just explain where I am coming from. I do not want the tribunal to establish the law on the basis of a minority judgment of the Supreme Court without being careful about it. That is simply why I raised the point. It is actually a sort of concern you heard from the PCRs this morning about this as a procedure going forward, and it would be unfortunate if the minority view expressed here, without argument before this judgment was created, became the norm without the tribunal having that knowledge. Of course, the tribunal may agree with the minority and say that view in its judgment.

So I am sorry if I am being overcautious, I am just trying to protect the system a little bit.

THE CHAIRMAN: No, I think that is helpful, and I think, Ms Wakefield, I will take up your offer of a note.

I would not normally it ask for it so quickly, but it seems to me, given the timing we have got, it would be of assistance for Mr Hoskins to have something to push back on, if so advised. But I am grateful for the point being adverted to.

Mr Jowell, back to you.

MR JOWELL: Thank you. Maybe I should just, since this has become so contentious, I was not anticipating that it would be, but I should perhaps go to page 44 of the bundle {AUTH/34/44}, if we could, and you will see just the 148. This is in the minority judgment, but they say:

"It is convenient to deal with the distribution issue first. We can do so briefly, as we agree with Lord Briggs ... on this issue. The dispute is a narrow one, as Mastercard accepts that there is no legal requirement that an award of aggregate damages must be distributed to class members in a way which attempts to compensate them for their individual losses; and the applicant accepts that the CAT is entitled to treat the way in which it is proposed that an award of aggregate damages should be distributed as a relevant factor ..."

And so on. So this was a point on which they were not -- well, on distribution, they did not dissent.

Mr Hoskins may say that as one step in their argument, perhaps they went -- perhaps -- at least I would say they were simply more clear than the majority, and Mr Hoskins may say that they went a little beyond what the majority said.

But for present purposes, I really only want to draw out one point, which is that at the certification stage, it cannot be necessary for an applicant to show that all members of the proposed class have suffered loss, even probably suffered loss, and actually one can see that from *Merricks*, if from nothing else than from the fact that -- from the result of it, and one can see it because in *Merricks* itself it couldn't be said that there was -- it could be established that all members of the class had suffered loss. I mean, there was, to put it at its lowest, a distinct possibility if not a probability in *Merricks* that many members of the class may not only not have been harmed, but may well have benefited from the consequences of the multi-lateral interchange fees that were found to have been an infringement in that case.

Let me just explain why that is so. First of all, one needs to recall the sheer scale of the class in *Merricks*. It is, or was, essentially anyone over 16 in the UK between '92 and 2008, so about 46 -- a little

over 46 million people. You will see that -- we do not need to go to it -- that is in the judgment at paragraphs 125 to 126.

Now, not only is it obviously possible that not all of those 46 million customers will have suffered loss from the multi-lateral interchange fees, but it is also distinctly possible, and some would say positively likely, that at least some of those 46 million will ultimately have benefited from Mastercard's interchange fees. In that regard, it will be recalled that one of the points that Mastercard raised in its defence was that consumers benefit from multi-lateral interchange fees, which are paid by the acquiring bank to the issuing bank, because they are what, it is said, cause the issuing bank to grant cardholders benefits in various kinds, benefits to cardholders in the form of interest free credit, points and other rewards on their cards.

So, it is at least highly plausible that at least a sizeable number of those 46 million class members, those, for example, who took advantage of the interest free credit or the air miles, might have benefited from the infringement.

Now, it is important to note that despite that, despite that potential, that did not for a moment stop

the court from effectively certifying the Merricks class. It sufficed that the applicant had a realistic method of establishing loss overall to the class as a whole. That in itself is sufficient, in our submission, to entirely show that, indeed, if it is seriously submitted, that claims cannot be brought for damages where the activity hasn't affected the class consistently, or may even have benefited some members of the class on some transactions, and therefore that is -- if that is seriously proposed, it is simply impossible to reconcile it with the result of *Merricks*.

THE CHAIRMAN: Ms Wakefield, you have got your hand up.

MS WAKEFIELD: Given my knowledge of the case and indeed Mr Hoskins' knowledge of the case, I think that I should properly correct the position that it absolutely is not the case that *Merricks* is a mixed class of winners and losers. Far from it. It is being argued on the basis that all members of the class would have suffered some loss.

MR JOWELL: Well, it may be argued on that basis, but it was argued by the defence that some members will have benefited -- in fact, all members will have benefited, and one can see that, if we need to -- we can go back to the CAT's original judgment where that defence is absolutely put forward.

So --

MR HOSKINS: If we are going to run -- (overspeaking) -- that point, it does not go that far. It is not that we argued --

THE CHAIRMAN: I do not think -- we have the battle lines. I think I am going to let Mr Jowell continue. He knows that he is walking through a minefield of objections and I have clocked that as well, but I think it would not be right to disrupt Mr Jowell's flow, but I am very grateful for these disagreements to be flagged up, not least because it will ensure that Mr Jowell and his team can address them later on.

So can if I can suggest this, to the extent that there is an anticipated disagreement, if Mr Hoskins, Ms Wakefield, you could just drop Mr Jowell a line saying, "You may have thought you could take this to the bank, but you are wrong", that would be helpful just to manage points going further.

MR HOSKINS: Sir, I have a slight difficulty because I act for Mastercard, it is ongoing. This is not a point my clients are taking in this case. I do not want to get sucked into a sort of dispute that is not in my client's interest in either of these actions just because I am trying to make sure that the tribunal is appraised that these are not necessarily uncontroversial submissions

that they made. I can't, in good conscience, be dragged into this on the part of my client in this case, it just would not be right. I am sorry if that is unhelpful, but --

THE CHAIRMAN: No, I do understand. I think that, to an extent, we are going to be making new law, and one of the things that we will be thinking about when considering our judgment is how far it is desirable to accede to Mr Evans' expressed view, and it is not a surprising one, that we try and put this regime on to a clear footing, not just for this case, but for others. So, that may very well be an approach we will take. I am not saying we will, but if we do, then I think you can take it that we would be deciding these matters either in accordance with binding precedent or in accordance with our own view as to what the law is. I think I am -- speaking entirely for myself -- unlikely to be assisted by unclear arguments about what is going on in a hearing before the CAT in another case when it is, as it were, a decision of a tribunal of identical jurisdiction in circumstances where, unless the point is extremely clear-cut and therefore deserving of appropriate weight, we will obviously try and follow it, but if it is not extremely clear-cut, as clearly it is not, I suspect it is better to argue the matter from

first principles than simply to say, well, this is the position that is going on in *Mastercard* or whatever other case it might be.

I hope that assists you, Mr Jowell, and to an extent puts Mr Hoskins' mind at rest.

MR JOWELL: Yes, well, it does assist me. But I mean, I do say -- and I will come back to it in closing arguments -- that it is clear from the CAT's original judgment in *Merricks* that was subject to this appeal, that the CAT refers to the possibility that members of the class may have benefited in the ways that I have mentioned, through the interest free credit and the points and so on. Therefore, if that possibility of benefit were preclusive, then I say that *Merricks* could not have been certified and the Supreme Court would have had have to come to a different view. So that is my submission and obviously you have to hear from Ms Wakefield and Mr Hoskins, but I will come back to the CAT's original judgment and I will show you where those passages -- where that possibility of collateral benefits from the MIF is referred to.

Now, the -- if I may in the last sort of ten minutes or so I have, I would like if I may briefly to go to the Commission decision, because I think in a sense, when one looks at the Commission decision, it may have

the answer to the question that you posed really to the experts that were posed. I am going to go, if I may, to the confidential version and my understanding is that this version will only appear to members who are in the confidentiality club, and I am going to try not to refer to the content of any of the confidential bits. So that is -- if we could have {MOH-A/25/4}, please. That does not seem right. That may be a bad reference, forgive me. The beginning of the Banana Split -- the Three Way Banana Split decision. I am just getting the correct reference, forgive me.

It is {MOH-A/2A/1}, I am told. There we are. And if we could go I think forward to page 4 {MOH-A/2A/4}. There we are. So this is the beginning of the Three Way Banana Split decision, and if we go over the page, please, to page 5 {MOH-A/2A/5}, we see that recital (1) summarises the infringement, recital (2) sets out the duration, and recital (3) sets out the entities involved, and then recital (4) identifies the currency pairs.

If we can go over the -- forgive me, recital -- yes, if we can go over the page to recital (5), please, {MOH-A/2A/5}, and here we see the distinction between the trading activity of the banks, the market-making activity and the trading on their own account.

THE CHAIRMAN: Yes.

MR JOWELL: We see how -- in recital (6), how in their capacity as market makers, they trade on behalf of customers who include asset managers, hedge funds, corporations and other banks, and we see the reference there that they do so on the basis of a "bid-ask spread".

If we go over the page {MOH-A/2A/7}, please, to page 7 at recital (9) we see the three types of order from market making that are pertinent in this case: customer immediate orders, customer conditional orders, examples of which are stop loss or take profit orders, and then, customer orders to execute at a particular -- at a specific Forex benchmark rate or "fixing". That is important because one sees that we will see as we come to it, the O'Higgins claim covers all three types of orders, the Evans, only, I think, the first.

Then if we can go to page 10 {MOH-A/2A/10}, if we go forward to recital (35). We see there that:

"[The] decision concerns ... conduct ... described as also documented in communications that took place within three private Bloomberg chatrooms."

And over the page, page 11 {MOH-A/2A/11}, we see descriptions of the arrangements reached within the chat

rooms. We see there in (45):

"The relevant individual traders ... participated in nearly daily communications. As part of these communications, they engaged in extensive, recurrent and reciprocal exchange of information, in the ... chat rooms, relating to different aspects of the FX spot trading of G10 currencies ..."

So, what I would --

MR LOMAS: Mr Jowell, just to clarify, that says "daily exchanges", it does not say "daily infringements". Not all exchanges are necessarily infringements.

MR JOWELL: That is true, but I think, when one then comes to the definition of -- I accept that, but I think that one can infer that, at least, that it is at least potentially the case that every daily exchange involved some form of infringement, or might have done. Certainly, what we do see is that the communications are extensive, recurrent and reciprocal.

If one goes over to page 12, {MOH-A/2A/12}, of the same document, we see in recital (47) that the exchanges:

"... took place in accordance with a tacit ... understanding that ... [the] information could be used to the traders' respective benefit ... to identify occasions to coordinate their trading."

So they understood that one of the purposes was to facilitate coordinated trading.

Recital (48) confirms that they did indeed on occasions coordinate their trading.

Recital (49) tells us that the exchanges of the information enabled the traders to:

"... better predict each other's ... conduct ... informed their subsequent decisions ... [and also] allow[ed] for occasional opportunistic coordinated behaviour relating to trading activities."

And we see that:

"Through their participation in nearly daily exchanges, [they] had the expectation of standing a better chance to coordinate behaviour opportunistically."

Just pausing there, the thrust of the respondents' submissions is to suggest that the only possible impact came from these -- or came via these occasional incidents of coordination, and just to be clear, we do not accept that. The recurrent and pervasive daily sharing of information was also able to enable the traders better to predict the others' trading conduct more generally, and that information gave them a crucial advantage in their own trading.

So, it is part of our case that the effect of this

information exchange, this information that they gathered about their competitors' trades and about their competitors' customers' trades was likely to have had a far more pervasive influence on their trading strategies overall, well beyond the occasions when they coordinated. That is an important part of our case and I believe also the Evans case on adverse selection, because it is that -- it is those constant exchanges of information, effectively opening up their order books to each other, that gave them all an informational advantage that leads to the adverse selection effect and the widening -- the potential widening of spreads.

In recital (50), we see the recognition of reciprocity and of monitoring and of at least a form of enforcement whereupon the detection of deviation and apologizes when they depart from the underlying understanding.

If we go over to page 13 {MOH-A/2A/13}, we see -- in fact, we then see an identification of the various types of information exchanged and we see that the Commission identifies that there was an exchange of information of the traders' own open risk position, which was their market exposure, which gives them -- that information provided an insight into each other's hedging conduct and was relevant to their subsequent trading decisions

and enabled them to identify opportunities for coordination.

If we then go over the page once again to page 14 {MOH-A/2A/14}, there we see "Exchange of information on outstanding customers' orders", and we see that the information -- again, we see the information of the different types of customer orders that were shown each to the other, customer conditional orders, benchmark orders and customer immediate orders. It notes there that, if one goes over the page, please, to page 15 {MOH-A/2A/15}, you will see at the bottom, after the third bullet point, we see that the information on customers' immediate orders results in the same consequences as explained regarding the exchange of certain commercially sensitive information on current or planned trading activity, which is then what then follows. In other words, that effectively refers to the collusive front-running of customer orders.

Just in case there is any doubt about how extensive all of this is, I simply invite you to look at the lists of the chats in the footnotes, and bear in mind that these are only examples.

MR LOMAS: Yes, Mr Jowell, I was just going to raise footnote 31 there. Those are identified incidences, but with weeks between them. Obviously, it varies on

the incidents concerned. But your case is nevertheless that there is an ongoing effect, if you like, between those chats?

MR JOWELL: Indeed, partly because we can see this because they are saying these are examples of this, and you saw the opening words in the Commission decision where they talk about it is documented in this -- they say "documented in this decision and in the Bloomberg chats", effectively. So, these are only examples.

One needs to be -- I think that my time is up, but I think I would just observe one other thing, which is that much is made of the fact that the coordinated trading is said to be only on occasion, but if one looks, for example, over the page to page 16 {MOH-A/2A/16}, please, we see in footnote 32, this is a footnote of one of the occasional -- what is called "occasional elements of the infringement", and you see that when the Commission uses the word "on occasion", it certainly does not mean once in a blue moon, and bear in mind these are, as I said, only examples.

THE CHAIRMAN: Yes, in a sense, this underlines the points that I tried to make this morning, which is that there is a big difference between a decision recording, as it were, liability findings -- I appreciate this is going to settlement, but you know what I mean -- where you

do not need to find all of the facts necessary for a quantum determination, and a quantum determination where, if you were doing an assessment of the loss, you would need to identify, as it were, each and every occasion where it actually happened, and then, if you were doing an assessment of individuated losses arising out of that particular infringement, you'd say, well, X bought so many million US dollars and the rate was off the market rate by so many pips and the damages are whatever.

So, this is, of course, a very helpful starting point, but it has that problem. The problem, as it seems to me, is one which is equally prevalent in an econometric way, where you have got to say, well, somehow I have got to proxy in my model that I am regressing some kind of assumption as to what is going on here. Are we talking every day in a consistent way? Are we talking four times a day, or are we talking three times a week? These things, I would anticipate, would make a difference in terms of working out what the effect on the spread was.

So, I do not think we are necessarily at the stage of debating whether there was or was not an effect, I think, for the moment, you can take that to the bank on the basis of the decisions -- maybe Mr Hoskins will

have something to say about that, but we will see. It is more how reliable the analysis of the economists is given the gappy nature of the findings here and the use of the word "example" is, it seems to me, quite telling. I suppose what we are really getting at is how is your and the Evans party's economists going to deal with this point about, yes, these are examples.

MR JOWELL: The economists will, no doubt, put it much better, but let me, in my own clumsy way, try and explain how we see it from a legal point of view.

These defendants effectively opened their books to each other, so they -- in that way they gained -- or this is certainly -- Mr Hoskins is shaking his head, but this is certainly the impression that the Commission decision gives, I am afraid, and they told to each other what their own orders were to be, what their customers' orders were to be, and this gave them an informational advantage that the Commission decision, again, strongly suggests they used, not just by coordinating their trading, but by informing their own trading unilaterally, as it were. That informational advantage is what then gives rise to the adverse selection effect on other non-defendants, and it causes them -- and this is well documented in the finance literature you see in the expert reports -- the adverse selection effect

causes them to widen their effective spreads, because they need to be compensated for the informational disadvantage that they are under. Therefore, when you measure the effective spreads in the clean period by comparison to the cartel period, you will tend to find a widening of the effective spreads by reason of the adverse selection. So, in a sense, whilst you can look at the chats and they are informative and helpful -- will be helpful in terms of giving colour, ultimately the proposal is to quantify the effect of the increased adverse selection, effectively, and any other effects by the defendant banks themselves indirectly colluding on spreads through the expansion in the effective spreads by comparison with the clean period, and their regression analysis will effectively enable you to do that and will enable you to also, at least on a regression analysis that our experts are proposing to do, will enable you to -- show you how those varied over time, and you may, as I think Professor Bernheim indicated, there may be ways of, if you like, testing the hypotheses by looking, for example, at whether, in a particular period where the cartel was effectively particularly effective, you would then see a particular widening of the effective spread.

No doubt, that was simply an example that he thought

of in the spur of the moment, but I think that there are numerous other ways -- potential ways that the experts will tell you by which it may be possible to look at these things together, as it were, against the backdrop of the factual evidence.

But that is essentially, I think, the answer to the question is that it comes in through the adverse selection effect and that then causes the widening -- the effective spread widening. But the experts, I am sure, will put it much better than that.

THE CHAIRMAN: I am sure they will not, but thank you very much, Mr Jowell. I am much obliged.

MR JOWELL: Thank you.

THE CHAIRMAN: Mr Jowell, you've had a lot of interruptions. I would not want to cut you off if there were other points that you felt it appropriate to make, but have you, as it were, done enough given the time limits?

MR JOWELL: I do not wish to intrude on Mr Robertson's time overly. There are other aspects of the decision that are worth also looking at. I think it is interesting to note, for example, that the Commission, when it comes to how it looks at fixing the fine, and that is worth paying some attention to as well, because there is no suggestion that the Commission looked at this as only in some way applying to some part of the defendants'

trading or any suggestion that it only affected, you know, a small slice, as I think has been suggested by the respondents in their submissions. But I don't want to go over into Mr Robertson's time, and I am very grateful for the time -- extra time I have received, so thank you very much.

THE CHAIRMAN: No, thank you. If you want to give us a list of paragraphs or recital numbers that we ought to look at in the decisions, we will gladly read those, but --

MR JOWELL: I am grateful.

THE CHAIRMAN: Thank you. Thank you very much, Mr Jowell.

Mr Robertson, I suggest we rise for five minutes and then start at 3.20, but do not worry, you will get your hour and a half, we will be running beyond 4.30, I think, clearly. So until 20 past.

MR ROBERTSON: Thank you.

THE CHAIRMAN: Thank you.

(3.13 pm)

(A short break)

(3.20 pm)

THE CHAIRMAN: Mr Robertson, if you just wait until the live stream catches up with us, I will tell you when we are ready to go.

THE ASSOCIATE: We are live.

THE CHAIRMAN: Mr Robertson, over to you.

MR ROBERTSON: Sir, well, good afternoon.

Picking up on the point that you were discussing with Mr Jowell, the concept of a gappy infringement, it is not something that has found its way into European law yet, probably contrary to the idea of a single continuous infringement, but just to direct the tribunal to where Evans' case on the effect of the infringement, how that actually had an impact, because that is set out in the neutral statement on the merits and this is to be found in advocate's bundle, tab 17, page 12, {AB/17/12}. That is the authorities bundle that has been turned up there, I am asking for the advocates' bundle. So we have currently got on the screen the authorities bundle. We need the advocates' bundle.

THE CHAIRMAN: It is {AB/17}.

MR ROBERTSON: {AB/17/12} paragraphs 14, 15, and 16 {AB/17/13} and, over the page, 17 {AB/17/14}, set out how Professor Dagfinn Rime explained the concept of direct harm flowing from the infringing conduct identified in the decision.

Now, it is different from that which Mr Jowell has explained to you. It is not adverse selection, it is short term initial impact -- that is paragraph 15(a). Paragraph 15(b), {AB/17/13}:

"... longer-term impact resulting from cumulative

effects of sharing information on bid-ask spreads on multiple occasions."

Now, rather than me take the tribunal through this neutral statement, you have got Professor Rime as a witness tomorrow morning, and it may well be that the tribunal will direct questions to him just to tease this out.

THE CHAIRMAN: Yes.

MR ROBERTSON: Sir, Mr Jowell's five headline points on carriage, two of them addressed funding and ATE. We had, in fact, reached agreement through our respective solicitors that funding issues, including ATE issues, would be dealt with by costs counsel and they are appearing -- both side's costs counsel are appearing on Thursday and Friday of this week. So when I get to carriage, I will not address those points.

I will say at this point, however, that Mr Jowell has made a very serious allegation that paragraph 55 of our skeleton argument is misleading, and it is not. But those are reasons that will be explained to the tribunal by Mr Ben Williams QC and Mr Jamie Carpenter QC, who will be appearing on Thursday and will start our closing addressing funding and ATE points.

Now, Ms Wakefield and I have divvied up the submissions between us. I have carriage of

carriage, she has carriage of certification. So without more ado, I shall pass you on to Ms Wakefield to deal with certification first.

THE CHAIRMAN: Yes, Ms Wakefield.

Opening submissions by MS WAKEFIELD

MS WAKEFIELD: May it please the tribunal. I hope that the tribunal will not think it disrespectful if I focus in my opening submissions on the specific objection raised by the proposed defendants, namely the rule 79(3), opt-in/opt-out point. I am, of course, happy to address you on any of the other aspects of the certification decision, if that would be of assistance.

Starting then with the legal framework for 79(3). You have our detailed submissions on the legal regime and I do not propose to spend time in opening rehearsing those arguments, I will return to them in closing, if I may. I would make just three points now. Firstly, I would ask the tribunal to be alive to the contradictions and the tensions in the proposed defendants' position. They say, in essence, in much of their legal submissions as to the regime that the purpose of opt-out collective proceedings is to protect SMEs and consumers. So when Lord Briggs spoke of the vindication of rights and of disincentivising

wrongdoing, he was thinking of the little guy, so to speak, of so many Davids against some wrongdoing Goliaths. That is their legal case. But then when it comes to applying the law to the facts, they urge on this tribunal an approach which is the polar opposite of that legal case. They leave the SMEs out in the cold and they focus on the position of the largest FX customers, those with the highest losses, with the most sophistication, the most incentivised to opt-in, and they therefore disregard the position of the little guy, the SME, who they say should be at the very heart of the regime.

Secondly, that pulls into sharp relief one of the points made in their skeleton argument. So they say that practicability in proceedings does not mean a hundred per cent participation, full participation. That is in paragraph 33(c) of their skeleton. But plainly, in my submission, the tribunal does need to consider the position of all class members. I say that it cannot be right for the tribunal to vindicate the rights of some class members in an opt-in action if that happens at the expense of others who will not opt-in or bring their own action. I say that in particular because Lord Briggs told us that every claimant who brings a claim which passes the strike out

test and, if necessary, the summary judgment test has an entitlement to a trial. That is in paragraphs 46 and 47 of *Merricks*. He told us as well that that applies in exactly the same way in collective proceedings in paragraph 54. So, all members of the proposed classes have that entitlement to a trial and this tribunal, in my submission, should not deprive many of those claimants of redress simply because a small fraction can opt-in.

Thirdly, and my final point as to the legal regime. Although much labour has been expended on both sides -- on all sides, I should say, over the niceties of the correct legal tests which apply, ultimately, I fear that it all may be something of an irrelevance. I say that because, even assuming that everything is against me as to the law, so assuming that in every case, the tribunal must determine whether collective proceedings should be opt-in or opt-out, and even assuming against me that if proceedings on an opt-in basis are practicable, there is a general preference for them, the facts are such that I still win. This is not a case where burden of proof or a general presumption would make any difference, and that is because opt-in proceedings are obviously not practicable, in my submission.

As I will move on to in a moment, we have estimated -- and it is only an estimate at this stage -- 42,000 class members, of whom we also estimate -- it is only an estimate -- that tens of thousands of them have claims worth an average of £3,500. The class is diverse because a range of persons may trade FX and they are far from straightforward to contact, and we say as well the claims are follow-on claims which are plainly sufficiently strong. So I say that we obviously get home on the facts whichever of us is right as to the legal regime.

Turning then away from the legal regime points to practicability. The starting point, what is meant by "practicability". Mr Jowell earlier opened up 79(3)(b), in which we have {AUTH/82/46}:

"... practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances ..."

And then we have one particular factor drawn out:

"... including the estimated amount of damages that individual class members may recover."

So that is in the rule. Then we have the guide in paragraph 6.39, and Mr Jowell read out that passage from the guide that we find in the Supreme Court's judgment in *Merricks*. There we see again that you look at

the estimated amount of damages that individual class members may recover and we see, in the last sentence {AUTH/83/86}:

"Indicators that an opt-in approach could be both workable and in the interests of justice might include the fact that the class is small but the loss suffered by each class member is high ... [so number of class, size of claim] ... or the fact that this is straightforward to identify and contact the class members."

So those are the considerations that we see in the rules and the guide.

Applying them to the case, our class size, we have the estimate of Mr Ramirez and he estimates there is likely to be around 42,000 class members of whom around 18,000 are financial institutions and around 24,000 are non-financial institutions. Now, sir, you will find that in table 4 of Ramirez 1. I do not need to turn it up, but just for your note, which is at Evans, tab 10, page 30 {EV/10/30}.

Mr Jowell says the estimates are spuriously accurate in his opening. Of course, rule 75(3)(c) of the tribunal rules require applicants to provide their best possible estimates of the class and that is something which we have done, and Mr Ramirez sets out in

some detail how he arrived at those numbers {EV/10/31}.

Turning to claim value, again, Mr Ramirez did his best to estimate average potential claim values across those 42,000, and we see some of the starkest figures are contained in table 4 of Ramirez 3. It may be worthwhile our getting that up, I think. So that is at {C/10/4}.

That may be a bad reference. It is 14. I apologise. {C/10/14}. I am sorry to whoever's working the system.

So, you see there table 4, at the top of the page. So, for financial class members, we have 15,684 class members of the smallest amount of annual turnover with an average claim value of some 15,900, so around £16,000. Then, in the next block, underneath "non-financial class members", 18,274 with the average claim of £3,409. So over 30,000 members of the class are in that lowest value row and we have 18,000 class members, or non-financial class members with average claims of £3,400, and our submission is that those are not significant sums of money when one's thinking of incentivisation to an opt-in claim.

Now pausing there, of course, I do accept the point against me made by the proposed defendants that if one works down the rows in that table the numbers get pretty

big, and towards the end they are significant numbers, but they are a clear minority of class members: 342 class members in the bottom row, 338 in the row above it. So even if opting in might make sense to them -- and I will return shortly to whether it may or may not make sense even for them -- but even if they do have the financial incentivisation, I say we cannot focus on the position of those 700,000 class members perhaps to the exclusion of what the O'Higgins claim refers to as "the long tail". I would say it is not even a tail, it is the vast majority of the class who have the significantly lower value claims.

So we have class size, large, we have claim value, predominantly small, already we have those two indicators from the guide which are directly contrary to opt-in proceedings being practicable.

I will turn now to the diversity of the class membership because that is relevant to ease of contacting the class, one of the other factors in the guide. Now, given the number and wide range of persons that enter into FX transactions for different reasons, necessarily, the proposed classes will be diverse. They will be financial institutions trading large amounts of FX frequently and also smaller corporates who trade smaller amounts infrequently.

Now, we have done our absolute best in our evidence to identify that full diversity. Necessarily, it is somewhat approximate, but we have done as much as we can.

So, in respect of financial institutions, our FX expert, Mr Richard Knight, sets out in paragraph 148 of his first witness statement, which is in {EV/8/51} -- again, I do not think we need to go there, but for your note -- by reference to the bank of international settlements reporting guidelines, that one would have asset managers, smaller commercial banks, investment banks and securities houses, mutual funds, pension funds, hedge funds, currency funds, money market funds, building societies, leasing companies, insurance companies, other financial subsidiaries of corporate firms and central banks, that is what the BIS say.

Then, for non-financial customers, they will comprise corporate customers, non-financial government entities and private individuals, that is what Mr Ramirez sets out in paragraph 172 of Ramirez 1. {EV/10/76}

As to corporate customers, again, we can look at the bank of international settlements reporting guidelines and they speak of the entities whose principal activity is the production of market goods or

non-financial services, and from that Mr Ramirez and Mr Knight went on to specify the different activities which those entities might engage in, typically trading FX to purchase imports or to liquidate export proceeds, and also to facilitate cross-border investments and risk management. Again we can see that in 173 of Ramirez 1 and in Mr Knight's evidence.

So we say a diversity of class members, not a class where one has a database somewhere, a list, one can contact them, one knows what the membership is, far broader and more mixed than that.

As to their size -- and one will have seen this already from table 4 and those claim values -- Mr Ramirez's view is that most class members would be small and medium-sized. For the non-financial institutions, at least 76.6% have fewer than 250 employees, and we see that in the right-hand column and the page that should be still up on your screens, {C/10/14}, and for financial institutions, it is 99.5% of them have that lower headcount.

Headcount having been criticised, in his later reports, Mr Ramirez also looked at annual turnover for financial institutions and we have that in -- I will give you the various references I have, these are all in our skeleton arguments. Table 1 in Ramirez 2, {C/7/8},

and table 1 in Ramirez 3, which is {C/10/8}, page 8. We do not need to go there now, as I say, but one sees immediately that the bulk of these entities are small or medium-sized enterprises.

Now, the proposed defendants take issue with the use of headcount and turnover, although, of course, those are the generally accepted indicators of being an SME, but more importantly perhaps, they run their sophistication point. Now, in paragraph 37 of their skeleton for this hearing, {AB/5/15}, they say, "Oh, they do not mean sophistication in terms of being sophisticated at trading FX" and instead they mean:

"... having the commercial awareness and ability to readily understand and take action to appropriate one's own rational financial interests (with legal support if necessary)."

That is in paragraph 37. But plainly, that category as articulated is one of enormous scope. It might be said that it could apply to any business, but of course businesses, we know, are not excluded from the opt-out regime. If the proposed defendants mean, "Oh no, we do not mean all businesses, we just mean there is a sliding scale of sophistication, with the bigger businesses more able to take that sort of sophisticated decision and smaller businesses less able to do so",

well, then again, we come up against the contradiction to which I referred at the beginning of my submissions that that is a construction of the regime which runs directly contrary to the statutory purpose of facilitating access to justice for those who are least sophisticated, because were you not to certify our claims on an opt-out basis and were there to be any conceivable opt-in claim on an attenuated small basis, it would not be the unsophisticated class members who would opt-in, and that flows from the very argument that they are running, it would only be the sophisticated ones. In any event, we have Mr Maton's evidence, which I will come on to shortly, in respect of even those sophisticated entities opting in.

Turning then to ease of contacting those class members, the other factor identified in the guide. It will be plain from my explanation of the competition of the class that it is far from straightforward to contact them. The proposed defendants say in paragraph 48 of their skeleton that the starting point for answering this question should be distribution, and so they say, {AB/5/21}, that if members of the class are:

"... sufficiently identifiable and contactable for distribution purposes, [necessarily] they are sufficiently identifiable and contactable following

certification."

I say that's obviously a bad point. All applications for opt-out proceedings have to satisfy the tribunal that the class can be properly made aware of proceedings, both at the opt-in/opt-out stage and at the distribution stage. Of course we have had to say and we will be able to -- have to say that we can distribute to all members of the class, and that is, of course, our intention and Mr Evans' firm intention, but that is a materially different exercise to that needed when book building. Also, plainly logically, it makes no sense to rely on the fulfilment of a criterion to bring an opt-out claim to say, ah, well necessarily that disentitles you from bringing an opt-out claim and you have to bring an opt-in claim. It doesn't work logically to align distribution in that way.

Turning to witness evidence in respect of practicability. Well, of course, you heard Mr Evans this morning talk about his own experience of the opt-in claim as it stood up until the 2015 Act, and we have the evidence of Mr Maton in the bundle, and in particular Maton 4, which is in {D/9}, in which he sets out his first-hand experience of the sheer difficulties inherent in trying to encourage multiple claimants to bring claims for FX misconduct. I will purport to

summarise it for you now rather than take you through it paragraph by paragraph, but in short, he contacted, along with other members of his firm, a diverse range of organisations, ranging from large financial institutions to multinational corporations and UK domestic corporates, all of whom traded FX in large volumes, 321 of them in total, and of course the intention was to get the big boys, if I can put it that way, the ones with the biggest claims.

There was a very significant investment in terms of hours and, as he sets out in paragraph 19, only a fraction of those approached were interested, and he sets out their various concerns: one key and understandable concern was that they did not want to engage in a major legal fight with the banks; another concern was that even damages in the single digit millions were insufficient -- perceived to be insufficiently large; another concern was a reluctance to spend internal management time; another concern confidential information; and a final concern, gathering the trading records was off putting, was disincentivising, unsurprisingly so. As he sets out in his witness statement -- and I would -- I am sure you have already read it, but I would ask you to read Maton 4 in some detail -- he drew from that experience

the lesson that it is extremely difficult to book build in respect of these so-called sophisticated core big value claimants in FX. Of course, you also have the evidence from our funder, Mr Adrian Chopin, saying that, as we know, there is currently no funding package on the table for any opt-in proceedings and there is no certainty that there ever would be one.

So, my conclusions on practicability, in a sense, are pretty straightforward because I say that every single indicator in the rules and guide is in my favour. I say we have a claim -- claimant class or classes which are highly diverse, difficult to contact, difficult to identify, there are many of them, and for many of them their claim size is small, around £3,500 on our best estimate.

If I turn then to strength of the claims, which is, of course, the factor in 79(3)(a), Mr Jowell read to you earlier the passage in the guide in paragraph 6.39, {AUTH/83/86}, in relation to the high-level view of the strength of the claim to be based on the collective proceedings claim form, and the example given in the guide of a follow-on claim.

Now, sir, you asked this morning whether both of our applications are follow-on claims. They are both follow-on claims, not just, I think, through choice, but

my understanding is that they have to be follow-on claims because the events arose before October 2015, so we have no choice and it is jurisdictional.

THE CHAIRMAN: Yes.

MS WAKEFIELD: So it is common ground between us and the proposed defendants that the review should be high level and you will see that in paragraph 69 of their skeleton argument. We say that the exercise which the proposed defendants have embarked upon, and which they will doubtless develop at some length over Wednesday and Thursday morning, strays well beyond a high-level merits review. They subject the claims to close analysis, far too much detail, and it is entirely inconsistent with the proper task, if I can put it that way, of the tribunal at this stage. They make three categories of complaint in respect of strength of the claims which I will address as briefly as I can in turn.

So, the first category of complaint is what they call mismatch, mismatch between the proposed claims and the decisions. That was put initially as a follow-on point, they said the class members' alleged losses do not follow-on from the decisions, that is title C1 in the joint CPO rejoinder. It now seems to be slightly toned down as a point, and so, in their skeleton argument, they say there is a mismatch and that this is

a factor which the tribunal may take into account in determining whether the proceedings should be opt-in or opt-out. So I take from that that it is not -- these are not follow-on claims points any more. Were it to be, as I say, it would be jurisdictional and it would be grounds for strike out on whichever element goes too far and so it is something softer.

So, against that backdrop, if I might just start with the law, at the risk of telling you something that you know very well already, if I might just get out your judgment in BritNed, sir, which is in authorities volume 2, tab 26 {AUTH/2/26}.

THE CHAIRMAN: I think the Ring Tel is catching up, Ms Wakefield. Ah, here we are.

MS WAKEFIELD: So it is {AUTH/26/25}. So, we see at the bottom of that page, sir, you set out the law regarding the bindingness of decisions, of a decision of the European Commission.

If we go over the page, please {AUTH/26/26}, you will see at subparagraph (5), you address the meaning of the word "decision", which you saw has a central ambiguity. It may have a narrow meaning or a broad meaning, and you say that the narrow meaning is the correct one, namely that we look only at those parts of the instrument which can produce legal effects.

In subparagraph (6) just below it, you say that:

"It follows that an instrument may contain three different types of provision."

First of all:

"A decision ... [which] is binding on its addressees."

If we could go over the page, please, {AUTH/26/27}, and then in (b) we have:

"A recital constituting part of the essential basis for a decision."

So, you have operative part, essential basis recital.

And then in (c) we have:

"A recital not constituting part of the essential basis for a decision."

Of course, those recitals are not binding on the court or tribunal and it functions solely as one part of the evidential picture, and we have the well known words of Lord Hoffmann in that regard.

If we turnover the page again please to {AUTH/26/28} get to paragraph 71. There you say in terms that you are inclined to be cautious in relation to the weight that you attach to non-binding recitals in a decision, and the statements by the Commission may well be justifiable, but on those points you are the determiner

of facts, sir. And you say that you are only prepared to accept a non-binding statement by the European Commission where it seems to you that a finding can be properly made on the evidence viewed as a whole.

So I have taken us through that very well known statement of the law, if I can put it that way, because my understanding is that all of the proposed defendants' objections are third category objections, they are to non-essential recitals. So statements of the Commission, which will form part of the evidential picture at trial, if we are certified and we get carriage and we are fighting at some future point, post-disclosure, post-witness evidence, post-everything else, you may take into account as part of the picture the fact that the Commission has said, "would" or "could" or "may", or that the Commission has said "narrowing" or "tightening" -- or "widening", sorry, of spreads. You can take those statements into account at that stage, but only as part of the evidential picture.

So although my learned friends address these mismatch points separately from their causation points when they are challenging the strength of the claims, I think I might -- in fact, they are essentially just causation points. They are, how likely is it that you are right? And they go no further than that.

Against that backdrop and because I am coming up against time, I will quickly canter through them just so you have them in mind, sir.

So the first point they make is in respect of information exchange facilitating tacit coordination, and there they say that Professor Rime's view that the information exchanges would have facilitated collusion -- tacit collusion is inconsistent with the decision's finding that it could or may do so. Well, again, I say the decision is not binding in that regard, and actually it is pretty helpful that it says "could" or "may". That is a strong part of the evidential picture for us when we get that far.

They say that, so far as tacit coordination resulting in widening spreads is concerned, that that is not supported by recital (89), which says "may result in tightening or widening the spread quote". Well, again, you have got much evidence from our experts, and you will hear more tomorrow, as to why we believe that that is what would have happened. But again, to the extent that there is any inconsistency at all, presumably with the presence in that sentence of the word "tightening", that is just part of the evidential picture which you will take into account in due course, it is nothing more than that.

They then move on to address the non-participating banks widening their spreads -- this is the third of their so-called mismatch points {AB/5/36} -- and in this regard their proposed defendants say:

"The decisions make no findings as to either anticompetitive conduct or effects on spreads in the interdealer market."

But as to that I say, I am afraid, well, so what? That is what we are going to prove, and we say we do have good ways of proving that and you have seen our expert evidence in that regard.

As to the extent of the infringing conduct itself, there is no particular mismatch identified, and of course, we can have a fight in due course as to the proper characterisation of the infringing conduct and we will have seen the underlying chats, by that point, as per Peugeot.

Then, as to the distinction between the two separate findings of infringement, the two different decisions -- that is their fifth point, which we are criticised for not having addressed more fully at this stage -- I am not quite sure where that fits into the mismatch point, but in any event our position is that it is just too early for us to suggest the precise way of separating out the causal effects of the two cartels based on

the findings in the settlement decisions, but plainly as the proceedings move forward and we have produced a plan to obtain disclosure and we have got the better understanding of the precise nature and extent and function of the chat rooms, we will be better placed to consider that issue and to make a concrete proposal in that regard. But certainly we view it as doable, if I can put it that way.

So my conclusion on these mismatch points is that they are hopeless, if I can put it in those terms. These are just non-binding parts of certain recitals that have been picked out and we have convincing evidence to the contrary.

The second bucket of strength of the claim challenges are allegations that our case on causation is weak. Now we say that those are plainly inappropriate in a sort of high-level review. So, sir, if there had genuinely been follow-on points, you know, the claim is not really a follow-on, one could see how that would fall under the high-level strength of the claims review, and indeed we see in the guide, the guide is saying, well, if it is a follow-on claim, it is presumptively strong enough. But these sorts of dredging through the detail points we say are entirely inappropriate for the exercise at hand. Given also the granularity with

which the points are expressed and with which they, doubtless, will go on to be expressed over the coming days, I will make just three points at present.

Firstly, so far as tacit conclusion is concerned, they run a host of arguments, similar to those in respect of mismatch with the decision, but you have the evidence of Professor Rime and of Mr Knight explaining how, in Professor Rime's opinion relying on the expertise of Mr Knight, it is plausible that the exchange of bid-ask spread information would have facilitated tacit coordination and that would have caused wider spreads. There is an abundance of material in the bundle setting out why that is his view and my submission is that must be enough for now and to go to trial.

Secondly, so far as adverse selection risk is concerned, first of all, just because I hope this may assist the proposed defendants, I think they still do not understand our case. So, our case is that adverse selection risk arises as a consequence of all of their unlawful information exchanges, not just the bid-ask spread information exchange, and we have tried to set them right on that a couple of times, most recently in our response of 11 June and paragraph 54(a). But, again, we see in the skeleton argument that they

understand that each of our theories of harm is built one upon the other, but that is not the case. We have tacit collusion and then lessening of competitive conditions, those two are linked, but then we have the adverse selection risk. The first two flow from bid-ask spread information; adverse selection risk flows from everything. So, I hope that will assist the proposed defendants in preparing their submissions for the rest of the week, and I hope as well it will help them see why our case is as strong as it is in that regard.

Thirdly, they criticise the spill over effects on e-commerce transactions, but it is a question of fact whether algorithms used in electronic trading use prices that were observed on the interdealer market, and you have our evidence, in particular, in Rime 2, paragraphs 98 to 102, in which he sets out why it would be extremely difficult to have, in his view, an algorithm which made no such reference, and he relies on the evidence of Mr Knight in that regard. Of course, what has happened now is the proposed defendants now accept that there is a relationship between voice trades and electronic trades, the battle has shifted to how close and direct that relationship is. So in my submission that is a critical point: if it is common

ground that there is at least some relationship between the two, in my submission, that is enough to satisfy the threshold as to the plausibility of our causation case at present.

So that is what I say about their causation criticisms.

Finally, under the strength of the claim category, we have a generalised allegation that the proposed methodologies will face inevitable difficulties. So, in their submissions on the issue, they cast generalised doubt on the proposed use of regression models. They say that regression models are not a panacea, that a reliable regression analysis must be well specified and that the choice of which explanatory variable to include in a regression model is important. So that is all fine. But we say we have clearly done as much as we reasonably could be expected to do for the purposes of certification and for the strength of claim element of rule 79(3)(a) assessment. And, in particular, I would direct your attention if I could to Mr Ramirez's work in this regard. So having cautioned that it is too early to seek to identify precise variables that best explain and predict changes in the half spread, which is in Ramirez 1, paragraph 112, Mr Ramirez goes on and identifies, diligently, I may say, the potential

variables which might be included and we see that in section 6.1.4 of his first report, {EV/10/51}.

In fact, as the tribunal will see when you go there, he has conducted a very detailed survey of the academic literature to support and inform that approach.

Then, in response to the proposed defendants putting forward further proposed factors, you will see how he has gone further still and tried to accommodate them in table 9 of his second report, which is in {C/7/33}. So we say that we have plainly done enough at this stage to show that use of a regression model is sufficiently appropriate for the strength of the claim requirements.

The final limb to the arguments against me by the proposed defendants which they rely on in support of the hypothetical opt-in claim, which is not, in fact, on the table in any event is -- and their arguments as to data availability.

Now, data availability features nowhere in the rules or the guide. Now, of course, I fully accept this is a multifactorial assessment, you can take account of all factors which are appropriate within the general legislative scheme, but I do say it is of some significance that it is not a consideration which features in the rules and guide.

Turning to the complaints themselves -- and they are

detailed, so I can't address them in any granularity now but I make just three points.

So, firstly, in paragraph 52 of the proposed defendants' joint CPO response, you will see that they make it clear that they are not arguing that certification should be refused on the basis that the PCRs have failed to identify adequate data to operate the methodologies. So they accept that we have done enough on a class wide necessarily opt-out basis because opt-out is the basis for our methodologies. But rather they submit that inherent limitations in the data they hold is a factor that weighs in favour of opt-in rather than opt-out, essentially since class members would provide their trading records.

Now, I say, unsurprisingly -- I would say this -- that the proposed defendants are right to concede that our experts have identified adequate data to operate the methodologies, methodologies for opt-out proceedings. For each of the points raised in section B of the joint CPO response we have a way of addressing those issues collectively, and I can, if everyone will bear it, in due course go through them in painstaking detail at the end of the week. But we do have those good robust ways of the tribunal going about the task at hand on an opt-out basis.

So, my second point is that, echoing something which Mr Jowell said earlier, although the proposed defendants are free with their criticisms as to data availability, they are strikingly coy and vague as to the nature of the inherent data limitations in their own data which they rely upon, and you see, for example, sir, that they rely on the Schofield judgment in the US and adopt it, but we know that the Schofield judgment, even assuming it is of any read across, in terms of data availability, to what we have here refers to certain banks having something, certain banks not having something, and we do not know what each of them has, none of them have put forward any information as to the data they hold, the trading records they hold, first-hand evidential information rather than assertion in witness statements and a cross-reference to the US judgment. So I say that too is a reason to treat this argument with a degree of scepticism.

My third point -- and this may explain why we do not see this consideration in the matrix set out in the rules and the guide -- is that what the proposed defendants are in effect doing is setting out a counsel of perfection and also something which runs contrary to and risks undermining the availability of opt-out proceedings, because what they want to say is -- what

they are saying is, "Sure, you have got class-wide methodologies, you have got adequate data sources to the process standard, but would it not be great if you just had normal claimants and you could get disclosure from them as well"? Well, one only needs to articulate it that way to see really that that's just an argument against opt-out collective proceedings. You do not get disclosure from the claimant side in opt-out collective proceedings, and if one were regularly to look at this question as a factor, it would build in a bias against opt-out collective proceedings and one that we see nowhere on the face of the rules, and if anything the contrary, that the novelty of this regime and the purpose which it serves is best served by opt-out not opt-in proceedings.

Secondly, I say that that observation, "Oh would it not be great to have claimant data as well", is just profoundly unreal, because the choice is not between 42,000 claims on an opt-out basis and 42,000 claims on an opt-in basis with marginally better data, the choice is between 42,000 claims on an opt-out basis and some dramatically smaller number, possibly zero, on an opt-in basis, because of course they will have been yet further put off by the chilling effect of having to provide all of this disclosure. So, again, I say that cuts directly

against the regime.

So, to conclude on data, I submit that if the tribunal should pay the factor any weight at all, it must be doubted. We have good granular answers to each of the points.

In conclusion then, pulling all of those factors together, if I may, in the rules and the guide we have class size, 42,000, our best guest; claim size, 3,500 for the vast majority of them, in small amounts; we have the uphill struggle that you have to convince anyone, the most sophisticated class member to opt-in, see Mr Maton; you have the fact that these are and are, as I understand it, accepted to be follow-on claims in the jurisdictional sense -- there are arguments to strength of causation but they are follow-on claims, and that should satisfy the strength of the claims assessment; and I say that, sir, you should be sceptical in the extreme as to the data arguments.

Unless I can assist you any further, I would hand over to Mr Robertson, but I realise I have not given you any time to speak at all, so ...

THE CHAIRMAN: Not at all. I am sure we would have interrupted if we had a question. But I do have some points arising out of your causation point -- I think it is the causation point.

So, let us start with the usefulness of claimant's data, and I have on board your point about it being a chilling effect, you do not need to help me on that. But can I just explore what its use would be in the nature of the claim that you are bringing. I mean, what would -- if you had, aspirationally speaking, 42,000 claimants providing disclosure, what would it go to? Would it actually assist in the way in which you are choosing to put your case?

MS WAKEFIELD: No, sir, it would not. So, the ways in which the point is put against us are many and various, and I will address them in detail, if I may, at the end of the week, because not least I would like to hear what the proposed defendants have to say about it. We do not accept that any of these would be better served --

THE CHAIRMAN: No, I mean --

MS WAKEFIELD: -- by having the claimant's data.

THE CHAIRMAN: -- to be clear, what I am doing is I am sort of setting up some thoughts for Mr Hoskins' benefit in due course.

So, exploring why this data might not be of assistance, what it would show, one would assume, is that class member A effected certain trades on certain days in the relevant period. That is really what it would go to.

MS WAKEFIELD: Yes.

THE CHAIRMAN: So, it would be capable of supporting a -- an individuated loss in relation to certain particular trades that had been adversely affected by the unlawful conversations that we see referenced in the decision; would that be right?

MS WAKEFIELD: That is right, sir. So, they do say it would help essentially establish VOC, in particular for trades which are not with the proposed defendants, so trades where they do not directly hold the trading records. Now, we have other ways of calculating that VOC, but that is one of the ways in which they say they need data.

THE CHAIRMAN: Yes, I think, though, one might say that if you were seeking to establish your case in that way, i.e. class member A suffered a loss because on a Friday afternoon that class member bought US$10 million in exchange for Euros or whatever, you would be actually constructing an individual claim, and really what I am exploring is the reason this data is not helpful is because that is not the case you are making.

MS WAKEFIELD: Certainly, sir. We are not making a trade-by-trade case.

THE CHAIRMAN: No.

So, moving one step on, if one looks at

the individuated case, you would have some instances, I expect, where a claimant might, through fortuity, not have suffered a loss but in fact gained. I mean, it might be that the particular transaction that that entity entered into was not causative of loss but actually resulted in a good deal because you have transactions going every which way and one might say that this particular trade on the Friday afternoon that I am hypothesising actually did not cause a loss at all. That is quite possible, is it not?

MS WAKEFIELD: Sir, as you know, we have sought to exclude from our class those sorts of trades where there would be an upside and a downside, so winners and losers in the class, so I think my answer would be no so far as the Evans CPO is concerned, because we are not suing for them.

THE CHAIRMAN: But I think what I am groping towards is that you are excluding matters on an altogether more broad brush basis. Looking at the individual elements of a cause of action of class member A, actually that claim would be eliminated for altogether different reasons in that you would not be able to establish a necessary element of your claim for breach of statutory duty, you would actually just not be able to meet the actionable damage requirement.

MS WAKEFIELD: Yes, that is right.
THE CHAIRMAN: Now, you are obviously seeking to achieve that on an altogether broader basis.
MS WAKEFIELD: Quite.
THE CHAIRMAN: And presumably you would not go so far as to say that your broad-brush basis is going to eliminate or exclude every class member who, fortuitously, has not suffered a loss. I mean, you are trying to do that, but you are going to be doing this on a much more broad-brush basis than my class member by class member approach that I am hypothesising. Would that be fair?
MS WAKEFIELD: I do not want to stray out of an area with which I am most familiar and into the domain of the experts --
THE CHAIRMAN: Okay, fair enough.
MS WAKEFIELD: -- but our intention is to capture only -- our theory of harm is that the unlawful conduct would have caused a widening of the spreads and so all class members would have suffered loss as a consequence of that widening. So, that is the fundamental theory. So, I am not inclined to accept the point against me that it could be that I am wrong to be so robust.
THE CHAIRMAN: I suppose what I am trying to articulate is how important is the dispute that was highlighted in the discussion we had about *Merricks*, which is that if

you are looking at the class as a whole, you need really only consider liability, including the requirement for actionable loss at, as it were, a class level than at an individual class member level. That is why I am exploring this case theory, because it seems that it may be your experts will say tomorrow, "Yes, we can actually say hand on heart through our regression analysis that every single member of the class has suffered a loss and that the only variance is as to degree of loss". I have to say, speaking from a position of considerable ignorance, I find that a little surprising, but maybe that is right.

MS WAKEFIELD: I am grateful for the indication, sir.

THE CHAIRMAN: But my reason for asking it is does it matter, because if you are right about Merricks, then you are looking at a framing of a cause of action at a level of generality much higher than the individual case. So, what I am really trying to get a feel for is how far does the, what Mr Hoskins would say, minority view in Merricks actually matter, and at the moment it seems that it may do, but it may be that you will be running a two line argument of first of all saying it does not matter because your economists will exclude any putative member of the class that does not suffer a loss, and you may also say that it does not matter

either because you are right on Merricks and Mr Hoskins is wrong -- I can't remember which way round it was, but anyway that is the --

MR HOSKINS: I did not make the submission on Merricks, sir. I --

THE CHAIRMAN: You merely pointed out a potential mismatch between the majority and the minority. That is quite fair, Mr Hoskins.

MS WAKEFIELD: Sir, would it be acceptable if I return to that in closing rather than address your observations now?

THE CHAIRMAN: That is entirely fair. I am laying it out really because what I am groping towards is that we are talking about a very peculiar form of cause of action here, I think, if you are right on, as it were, the wide view of Merricks, in that one does not simply talk about the aggregation -- the necessary aggregation of individuated causes of action which are all good in their own right, one is I think talking about something which may be the case but it need not necessarily be so, and it seems to me -- and that is why I am raising it now -- potentially mattering in terms of both what you have to prove full stop, which of course affects whether you meet the admittedly very low threshold for a certified claim, but also is it not relevant to those

facts which we are drawing out of the follow-on action which you are both saying you are running? Because again, the fact is the Commission have found a form of liability on a non-individuated basis, if I can call it that, and one might say that there will be some difficulty in extracting from the limits of the Commission decision an individuated case. So, it may matter from the limitation point that I think is forming your follow-on articulation.

So, I did have questions on these, but I think will stop, as it were, framing the points. I think you have my interest in how this cause of action is actually framed in mind, and if you want to park those, and indeed I will positively invite you to park those to your closing, but if you have anything more to say, I will let you hand over to Mr Robertson after you have said it.

MS WAKEFIELD: Nothing more to say, sir. I will hand over.

THE CHAIRMAN: Thank you very much.

MS WAKEFIELD: Thank you.

Opening submissions by MR ROBERTSON

MR ROBERTSON: Sir, opening carriage in 20 minutes. Here goes.

Sir, I am not going to address you on the legal principles applicable to determining a carriage dispute,

you have got all of our submissions in writing, I want to concentrate on the substance. This is a beauty parade familiar to those of us in the legal world. For those of us who also take part in the academic world, it is a bit like a PhD qualifying test where you take the candidate's original first stab at the word, their first chapter, and then consider the plan for the next stage of the research to see if it's a viable project where a PhD or a DPhil. So, the key question for the tribunal is who is better placed to bring a claim in the interests of the proposed class, or on our case classes.

You asked a question as to -- or the question was asked as to why there are two classes, class A and class B. The explanation for that is given in paragraph 75 of our amended claim form. I do not suggest we take time turning that up at the minute; it is quite straightforward. It flows from the different theories of harm which flow from direct harm and indirect harm as established by Professor Rime, from whom you are going to be hearing tomorrow morning.

Now, in our submission, dealing with the first of the three outstanding points that Mr Jowell opened, expertise of the teams. In our submission, we are the better team, both as lawyers and experts and as

proposed class representative. You have spoken with the proposed class representatives this morning. Mr O'Higgins, sheltering behind his SPV, is a pensions expert. As you have heard from Ms Wakefield this afternoon, our classes are way, way broader and more diverse than just pension funds, so the idea that he has got some unique connection with the totality of the classes just does not withstand scrutiny.

Mr Evans' experience is directly relevant. He has got a deep commitment to making collective redress work, he has run investigations and claims in his previous capacity at the CMA Competition Commission and as an advocate for Which? So, you know, it is telling, in our submission, that Mr Evans was talking to Michael Hausfeld about collective redress in the UK before my instructing solicitors were even a gleam in Michael Hausfeld's eye. Dealing -- and if you look at the case so far, Mr Evans has taken -- his claims are stronger, the case theory/quantum methodology are soundly and robustly based, they are more comprehensive -- when you start looking at Mr Ramirez's report you will see the depth of research that has already gone into preparing the case -- and Mr Evans takes better decisions. He took the decision to wait to see the Commission decision and then used that to

articulate his claim.

I will deal with the timing point here, which is the second of Mr Jowell's points. First to file, which -- he started off this case leading with it. It has slipped progressively down the batting order and it is now his tail end argument. We want to make it clear that this ...

Sorry, I gather Mr Hoskins couldn't see me.

Can you see me now, Mr Hoskins?

MR HOSKINS: It wasn't for my convenience. I was just, worried, I could only see your shoulder on the screen and I just wanted to make sure that the tribunal could see you. I was trying to do it discretely. Sorry to~...

THE CHAIRMAN: It does not matter. You are front and centre, though, Mr Robertson, so --

MR ROBERTSON: I was going to check that you can see -- I was going to say "the full Monty", but that is not the right expression.

THE CHAIRMAN: But it would be very relevant to a beauty parade, though. If I could only see your shoulder, then I think you would be in some great trouble.

MR ROBERTSON: I would have definitely lost if that were the case.

So, on filing, our application was complete when we

filed it in December 2019. The later amendments, which are pretty minor, were made principally because we had been given access to the confidential version of the decision, but that was not something that was in our gift, it did not materially change the substance of our application. The O'Higgins SPV application was not complete -- far from it -- when they filed it, and that is maybe because they took the decision to go in on the press release, they do not appear to have pursued an access to documents regulation request for the decisions, which is how we got them. So when they did get access to the non-confidential version the decisions they ended up having to make substantial amendments to their application and they ended up serving their amended application, which is the version they are now working off, at the end of January 2020, about a month and a half after we had filed our application.

Now, the amendments that they had to make can be seen by going to file {MOH-A/0.1/20}, which sets out their definition of their proposed class at paragraph 33, and then on to page {MOH-A/0.1/21}, paragraph approximate 33E, "'Relevant currency pair' ...", and you will see that the struck through language there "one/two of the following" refers to the G10

currencies, and it was not clear -- as they themselves said, it was not clear whether the infringements concerned trading in just one of those currencies or in pairs of those currencies. That only became evident from the actual decision itself.

We then turn on -- so that means that at the time they filed their application their proposed class was indeterminate, the scope of it was uncertain. Yes, it included G10 currency pairs, but it was unclear whether that also included trading in foreign currency where only one of the currencies being traded was a G10 currency.

If we move on through the pleading to page {MOH-A/0.1/53}, you will see there that whole swathes -- if we turn from 53 to {MOH-A/0.1/59}, whole swathes of the original pleading on findings of other regulatory authorities have been removed

MR LOMAS: I think Ring Tel is behind you at the moment.

MR ROBERTSON: Sorry, ours has gone down.

MR LOMAS: It is still on page 21.

MR ROBERTSON: So we should be on page {MOH-A/0.1/53} now, can I just check?

THE CHAIRMAN: We are now.

MR ROBERTSON: Good.

MR LOMAS: It has just come on, thank you.

MR ROBERTSON: So if you go from page 53 {MOH-A/0.1/53}, 54 {MOH-A/0.1/54} through to 59 {MOH-A/0.1/59), you will see whole swathes of the original pleading deleted, and those were based upon findings of other regulatory authorities so they have taken out, although the decisions are still annexed to the pleading for some reason, and it has been replaced with whole swathes of new pleading which starts at page 62 {MOH-A/0.1/62}, and I am not going to take the tribunal through each of this, but this is pleading the follow-on claim and it goes through to page 73 {MOH-A/0.1/73}.

So the original pleadings were simply inconsistent with the follow-on nature of the claim and that was a point that the proposed defendants made in a letter from Gibson Dunn of 28 October 2019 where they pointed out that {H/83/2}:

"... the Proposed Defendants' position is that the Settlement Decisions are inconsistent with, and do not support, the follow-on claims as currently set out in the ... [O'Higgins] application."

For the tribunal's reference, but no need to turn it up, that is in {H/83/2}. So, they make great play of first to file, but their original application was defectively pleaded, and it tells you two things, in our submission. The first is a general point, the second is

a specific point.

The general point is that first to file is a poor approach because it leads to rushed and ill-prepared pleadings which then later have to be substantially amended and that is not an approach that this tribunal has ever favoured. I recall the early days of damages litigation in this tribunal under section 47A. I think Mr Lomas may recall the first case as well, because I acted for claimant BCL in the first such damages claim and one of the defendants was represented by his then firm, Roche, and one of the striking things about that claim was that we put in our expert evidence and our factual evidence along with the claim for damages, it is all front-loaded. Now, obviously the CPO application procedure is not exactly that, but it does demonstrate that the tribunal favours an approach that leads to proper preparation in advance, not banging in a claim and hoping you can make it up later.

The second and specific point to this case is that this demonstrates that Mr Evans and his team take decisions which are thought through and methodical. He is careful and considered, he does not rush in, and that preparation pays dividends like a more comprehensive class definition, a better formulated list of relevant financial institutions, ours is longer and more

inclusive, and so this is another demonstration of Mr Evans being a better class representative.

So, what about the rest of the team? He has got a stronger consultative panel or advisory panel. It is chaired by Lord Carlisle, former chairman of this tribunal, so it benefits from Lord Carlisle's knowledge of the workings of the tribunal, and of course he was also sat as a part-time judge for 28 years. We have a Nobel laureate economist, Professor Joe Stiglitz, on the team with whom, as you heard, Mr Evans has already been in discussions. We have an FX trading expert, Mr David Woolcock. I think Mr Evans mistakenly referred to him as "Mark" this morning; it is David Woolcock. He is senior in the FX industry, so much so that he is a member of the Bank of International Settlements Market Practitioners Group, which launched the FX Global Code in 2017. You do not get much more senior than that in this industry. Then the final member is Professor Philip Marsden, who, besides being a professor of law economics at the College of Europe in Bruges, is an enforcement case decision-maker of various entities including the Bank of England and the Financial Conduct Authority. So, our consultative panel is stronger and deeper.

When it comes to experts, that is also stronger and

deeper. First of all, there is Professor Rime, who explains the theory of harm and why it is appropriate to have separate proposed classes to capture direct and indirect harm. Now, I notice that the O'Higgins PCR has not sought to denigrate Professor Rime in any of their pleadings. Obviously not. He is one of the leading experts in the world in FX market microstructure. It is notable that every other party in these proceedings has cited his publications in their pleadings. Indeed Scott+Scott, O'Higgins PCR's solicitors, wrote on Saturday seeking to put another couple of academic articles into the bundle. I do not know exactly what has happened to them, but when I looked at them, both articles, surprise surprise, cited Professor Rime, did not cite Professor Breedon. So in our submission, all roads lead to Rime in FX market microstructure.

Then there is Mr John Ramirez, who the O'Higgins PCR do seek to denigrate, and that is totally unjustifiable, in our submission. I think this comes out worst, probably, in Professor Bernheim's third report where he adopts what, in our submission, is an inappropriately scornful approach to Mr Ramirez's evidence. Now, a point taken by O'Higgins PCR, both in its skeleton argument and in its merits annotation, is that Mr Ramirez does not have a graduate degree in economics

and does not have peer reviewed academic publications to his name. Well, let us have a look at his CV. It is in bundle EV --

THE CHAIRMAN: Well, Mr Robertson, can I pause you there and, before we get down to relative CVs, try and articulate what the tribunal's approach is on these questions, and I do that because I think it is likely and I hope it will assist both applicants in this carriage question.

You began by seeking an analogy for this process and you said beauty parade versus -- or alternatively academic approval for a PhD. I do not think that the academic approval analogy is necessarily a good one, because in a sense those questions relate to approving a specific thesis going forward without actually meaning that another thesis cannot go forward, but the beauty parade analogy, it seems to me, is actually a very helpful one, if I may say so, because it means you are picking someone over and above someone else, so someone is excluded, and that is, I think, the question that we have before us today.

Now, the trouble with beauty parades -- this is why it is such a helpful analogy -- is that the client has before it paraded the solicitors, the experts, the barristers, whoever they may be, and reaches a more

or less subjective view as to who to pick, and that is fine, because in that case it is the clients' money and their direct interests at stake, and they are of course free to make a decision on whatever basis they choose. The problem is that we are not -- the tribunal are not in a position to adopt so subjective a route. We cannot say because for a brief instance on some screens we only saw your shoulder and not your face we are going to penalise you because you cannot run your IT properly, if I can take an absurd example.

Equally, we are not going to reach a view -- I mean, I know Lord Carlisle, I know Sir Christopher Clarke. We are not particularly inclined to say, well, actually, one knows far more about competition than the other. It is a very dangerous path that we are treading. Using your beauty parade analogy, it is perfectly fine if I am the client to say, "Well, I liked him, I did not like her and therefore I am going with him", that is fine.

So, the question that I have really got -- and again, I am not expecting an answer, I am posing the question -- is how do we approach these questions of really subjective merit? I am drawn to my own analogy, which is, how far is this actually going to be informed by what I would call questions of quality. How, when one is looking at a foreign jurisdiction, one treads

quite warily about suggesting that the foreign jurisdiction is worse or better than ours, because there are sensitivities and differences which one needs to respect and one only takes into account, as it were, a jurisdictional inferiority if it really is in your face that that jurisdiction is inferior.

Now, when we are weighing the -- let us take your boards, your respective boards. When we are weighing the merits of the skills there, is it really right that we should be drawn into "A is better than B", or "let us have a look at the CV of this particular expert" when, frankly, it seems to us that we are talking, if I may so, about two very well put together applications and that, in a sense, is the difficulty. If we had one that was a Mickey Mouse application and one that was outstandingly put together, the job would be easy. The reason it is hard is because on the face of it does not appear to be capable of differentiating between the applications in that way.

So, what approach is it that we are going to take? Should we actually take a line on the merits and say "Yes, actually, we prefer Hausfeld over Scott+Scott, or Scott+Scott over Hausfeld because, looking at the decision-making process, one is better than the other", or do we just say, "Actually, a reasonable

client conducting a beauty parade could pick either"? How are we to articulate the undoubtedly very broad discretion that we have?

Now, by all means tell me what the answer is, but equally, if you want to take it away and think about it, that is fine.

MR ROBERTSON: Okay, I will give you the big picture answer and we will give a more detailed answer in closing, but it is an objective assessment of the proposed methodologies for pursuing the claims on behalf of the proposed class or classes. So it comes down to methodologies and who is conducting those methodologies.

I was taking you to Mr Ramirez's CV to counter the suggestion by O'Higgins that he is just not an expert. In American terms he is not a -- does not mean the Daubert standard of a testifying expert, which I think the point they are making, and I was just dealing with that by pointing out that he does have relevant expertise built up over many years, so that is a non-point.

But standing back it is objectively whose methodology, objectively assessed, seems at this stage to be better suited to deliver success for the proposed class while being fair to the defendants, and we say that there are some fundamental flaws in their

methodology, and I will briefly touch on that before I finish my opening, if I may.

THE CHAIRMAN: Yes, of course.

MR ROBERTSON: But if I can just come back to the experts, I will just invite the tribunal to have a look at Mr Ramirez's CV before he appears tomorrow morning. It is in {EV/10/93-97}, and the point is made that he does not have a masters in economics. No, he has got a masters in applied and computational mathematics from the Johns Hopkins University, a well known university in the United States.

But there is a glaring hole in the O'Higgins PCR methodology and that is because they haven't put before the tribunal any expert on FX trading. We have put before the tribunal Mr Richard Knight, and Mr Ramirez and Professor Rime both draw upon his expertise, and he has got some 25 years of experience in various roles in FX sales between 1998 and 2013, so absolutely bang on the cartel period. All O'Higgins' PCR can say is he was on the FX sales side. Well, he has got relevant expertise, and again, the tribunal can form its judgment when Mr Knight is cross-examined tomorrow, but he plainly, in our submission, does have the expertise. O'Higgins PCR do not put before the tribunal an FX expert.

Now, Professors Breedon and Bernheim say they will draw on the expertise of a Mr Reto Feller, but as Professor Bernheim confirmed, he is not a testifying expert. That is what he said at the teach in. So you do not have Mr Feller's CV, still less a witness statement or opinion, you do not have the opportunity to put questions to him tomorrow, and so we say that is a very significant defect in their line up. It is, if you like, being asked to take on trust a race horse recommended by a trainer without having a look at the blood line or the form, just the trainer saying, "Trust me, this is a good horse". As a former -- as a member of the former Brick Court Chambers racehorse syndicate, now disbanded when Bon Enfant ran lame in his first race, I can testify that is not a good approach.

On methodologies -- and this is the third point --

THE CHAIRMAN: Sorry, Mr Robertson, it is really the converse of the point that I put to Mr Jowell this morning about how far we could take into account the potential for future changes in funding and ATE insurance. I am not putting that point to you, though I am sure we will come to it. I suggested to both applicants this morning that they might borrow or amend their cases in the future. Presumably your answer to that potentiality is the same as Mr Jowell's this

morning, that I must look -- we must look at the theory of harm and the expert evidence as it stands at the moment and we cannot really judge what may or may not happen in the future.

MR ROBERTSON: You have got to judge the applications on what is before you now.

THE CHAIRMAN: Yes.

MR ROBERTSON: On methodologies -- and this is a very brief point, we will deal with this in detail in closing, but it is to respond to Mr Jowell's point about, "Well, we include benchmark trades, resting/limit orders", and, again, this is just to give the tribunal a reference to where we have set out our response to that, why we have excluded them, and that is in the neutral merits statement, the annotated version, which is in the advocates' bundle at tab 11 {AB/11} and the relevant paragraphs are 5A to 5B {AB/11/6-7}, 6A to 6B {AB/11/8-9}, 7A to 7C {AB/11/10}. That is where we respond and explain why we have excluded those.

Mr Evans touched on it this morning. If you remember, he said, "I want to go for the 90% and I am not going to spend 90% of my money chasing the hard to get 10%".

THE CHAIRMAN: Yes.

MR ROBERTSON: And we say that 10% of actually benchmark

trades, resting orders, limit orders would be a lot less than 10%.

We say that their proposed methodology for doing that, which is the use of the realised spread, is both conceptually and practically flawed. It is conceptually flawed because it does not estimate the overcharge to customers, it estimates dealer net revenue, and as we said in our skeleton, that then runs into problems with this starting to look like a disgorgement remedy and not a compensatory claim in damages. It is conceptually flawed because it does not measure the but for cost of front-running, and that is something that Professor Breedon agrees with Professor Rime about this, and that is in Breedon's third statement, paragraph 4.26, which is at {C/3/38}.

It is practically flawed, because Professor Bernheim [sic] says that you consider the post-trade market-wide midpoint in a window after a trade, but he does not say what the window is. He says -- he said he will consider a series of windows between one to 30 minutes and then choose the right one, i.e. long enough to estimate impact and account for booking errors but not too long after to introduce noise. Sorry, I said "Professor Bernheim", I mean Professor Breedon, and that is Breedon's third report, paragraph 4.34 {C/3/42}. But

the problem with that is that Professor Breedon does not explain how he will pick one window over another. What is it, one minute, 30 minutes, 27 minutes?

We have set out our response on that in a bit more detail, if you would like to look that up before the experts tomorrow. That is in the annotation of the O'Higgins neutral statement at paragraphs 22D to F. That is at {AB/9/26-27}. In our submission, there is no workable or even potentially workable methodology if the O'Higgins PCR cannot identify a plausible time window. It is simply an impracticable methodology and therefore that falls down and we say that is something that the tribunal can objectively take a view on.

MR LOMAS: Mr Robertson, before you move on, you have referred to the 10:90 split, a sort of Pareto assessment in relation to fixed and limit trades. I apologise if I have missed it, but is there any evidence in there of that 10% level, and if so, can you point us to it so as we could have a look, or is it a sort of generic description?

MR ROBERTSON: There is. If you bear with us, Mr Khan is just seeing if he can lay his --

MR LOMAS: We can wait for it. You can carry on and just give it to us at the end.

MR ROBERTSON: I had reached the end of my submissions in

fact.

PROFESSOR NEUBERGER: Can I maybe help a bit? As I understand it, the resting trades and fix orders were estimated at around 8% of the total. That was by volume.

MR ROBERTSON: That was the thing I had in mind.

PROFESSOR NEUBERGER: Yes, but surely a relevant issue is the amount of damage done by the cartel to users of the market, and I am just wondering have you any idea what proportion of the damage done would be accounted for by these orders, because that is likely to be very different from the percentage of orders. I am just wondering how much of the damage caused by the cartel is at stake in the difference between the two cases.

MR ROBERTSON: I think Mr Ramirez's second report may assist with this. So -- well, that is -- the source of your 8% figure is Mr Ramirez's second report, which is {C/7/64}, paragraph 169. We have not done the calculation, we have not asked Mr Ramirez to do the calculation. We will see if we can address the point, it is obviously not part of our case, because we are not including those trades, so that is why we have not done the calculation, but we will see if we can put a figure on it.

PROFESSOR NEUBERGER: Thank you.

MR LOMAS: You are on mute.

THE CHAIRMAN: I muted myself because of the feedback. I do apologise.

Mr Robertson, if there is anything more, we will hear you, otherwise we will close for the evening and resume again tomorrow.

MR ROBERTSON: Nothing more from me.

Housekeeping

MR HOSKINS: Can I just raise a housekeeping thing, which I hope is helpful. There is a degree of flux amongst the respondents on who is going to be cross-examining and on what. Obviously it is fairly well advanced, I do not want to scare you, but it may well be we need less than an hour each of our allotted hours and I think it is only fair that I raise that now so that the tribunal is not taken by surprise, and equally, if either of the PCRs feel they need more time, they may well have it. I can't be more specific than that, but I hope helpful and fair.

THE CHAIRMAN: Well, that is helpful, Mr Hoskins. I think we are approaching this on the basis that the experts on each side will be called simultaneously. Now, that has with it, particularly in a remote hearing, the potentiality for an enormous car crash. What I am minded to do is, first of all, invite each side to identify the lead person in their expert team to whom

all questions will be directed and that person can then either choose to answer the question or, as it were, allocate the person within the team who is best qualified to deal with that. It seems to me that rather than oblige the cross-examiner to identify who the question should be directed to, we should follow that process.

I am not going to stop a party insisting that a certain person respond on a particular point, but it seems to me that that sort of allocation approach is best left to the team in question, so I would be quite grateful if you could identify the lead person on each side and provide the other side with the name of that person, and the tribunal, so we know, as it were, who to speak to in the first instance.

MR HOSKINS: Sir, can I -- sorry -- raise a point on that, because obviously I am aware of the car crash issue and that is why I have prepared my cross-examination on the basis of a set of questions for particular witnesses and I do not want to have a situation where I want to put a particular question and I want an answer, for example, on a microstructure issue as opposed to a pure econometric methodology issue and I find I'm getting the wrong answer and I'm having to ask the question twice.

So if -- if you will bear with me, if the parties have particular sets of questions that go to, for example, microstructure or methodology, certainly I would prefer to say, "I have got a set of questions for X", and then I will ask those questions to X. Now, obviously I completely understand if a witness thinks, "Well, actually, that is not for me, I want to move it on", that is fine. But I think we can also manage the car crash the other way round, if you are happy for that to happen.

THE CHAIRMAN: No, it seems to me that we as a tribunal need to defer to the parties on this, and if that is the way you have prepared your cross-examination, then of course proceed on that basis and we will only intervene if it is needed. But to the extent that anyone preparing their cross-examination has a more -- approach structured around issues rather than persons, though there is obviously a linkage between the two, then I float the traffic policeman idea as a way of hopefully addressing that. But we will be sensitive to just ensuring that the witnesses have the best opportunity to respond in a fair and coherent way. So, these things have a tendency for going wrong on remote hearings and I am keen to minimise the chance of that happening.

The other thing is if you could just provide how

the witnesses want to be sworn in advance, whether they are swearing or affirming or whatever, that would be helpful and we can be ready for that in due course.

Otherwise -- yes, Mr Jowell.

MR JOWELL: Just one point, if I may, and maybe in a way this goes without saying, but I am assuming that we are not obliged to, as it were, put our entire case to the relevant expert, because, I mean, there are many differences and it would take me rather longer than an hour to cross-examine Professor Rime and so on all of the points of difference.

THE CHAIRMAN: Well, that does go without saying, but I think I am very grateful for you to raise it nonetheless, because I think it underlines what the point of this process is. I mean, clearly -- and it does go without saying, but nevertheless it is worth saying -- we are not deciding the substance of this matter, we are in the very foothills of a long process and all we are doing is green-lighting one or other or neither of these applications.

So, what we would want is a form of questioning that enables us to, if it exists, find clear blue water between the parties, and obviously there is clear blue water in the sense that you are doing things differently, that is clear blue water, if I may say so,

I am not very interested in. What I am interested in is the sort of clear blue water that goes to Mr Robertson's test of an objective difference between the two applicants' cases such that we can, on objective grounds, say one is better than the other.

So, I hope that assists, but we are almost certainly interested in the broadest of broad brushes rather than in your putting why -- I am sure it would not be, but in excruciating detail why one is better than the other.

MR JOWELL: No indeed. Well, that is all understood.

I suppose on Mr Hoskins' point about putting points to individuals rather than to the group, as it were, I am grateful for that as well, because I would also intend to put some individual questions. But I think I would also -- I do acknowledge, I think, that in this area there is some overlap between the various experts. There is not exactly a clean dividing line, there is a grey area between them, and therefore one would expect that it may be that whilst one expert may have something to say, others may chip in, and for my part that would seem to be what I would be expecting.

THE CHAIRMAN: Well, I think we will adopt, clearly, the parties' approach to putting questions to specific witnesses. That seems to be the general approach. But I would like all of the witnesses to understand that

they should feel free both to defer and supplement the answers that are being made and I will do my best to ensure that we do not get overspeaking in that regard. But it does seem to me that your point about overlap is well made and that there may well be instances where the person being questioned will want to defer to someone else or will want to make an answer and then have it supplemented by someone else and I hope we can ensure that that takes place.

Equally, I do not want simply parrot-like repetition of, "I agree with my colleague". That seems to me to be as unhelpful as too many answers.

Well, thank you very much. That has been very helpful. We will adjourn then until 10.30 tomorrow.

MR JOWELL: Thank you.

THE CHAIRMAN: Thank you.

(5.00 pm)

(The hearing adjourned until 10.30 am on Tuesday, 13 July 2021)

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