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)

Thursday 15 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 Thomas Sebastian

Thursday, 15 July 2021

(10.30 am)

(Proceedings delayed)

(10.36 am)

THE ASSOCIATE: We are now live and ready to go.

THE CHAIRMAN: Can you hear me now? Okay, good. Sorry, technical difficulties. I do not think we are yet onstream. We are? Very good.

I apologise for my headphones.

Ms Kreisberger, can you hear me?

MS KREISBERGER: I can. I can hear you loud and clear.

THE CHAIRMAN: Right, okay. All right. We have a potential problem here, but it seems that we can overcome it.

Ms Kreisberger, I will begin with my usual warning -- I am so sorry, do wait there.

(Pause)

Right, I think we have overcome our issues.

Before we begin, Ms Kreisberger, my usual injunction that the live stream is there for watching and not for recording, photographing or onward transmission, but Ms Kreisberger, over to you now.

MS KREISBERGER: Thank you, sir.

Submissions by MS KREISBERGER (continued)

Sir, I will pick up where I left off yesterday, so that leaves the second two parts of my submissions today

to briefly summarise the PCRs' cases on causation, and then I will turn to my overriding submission that each of their cases on causation is weak and I will address the various topics under that heading.

So, to start with, the brief summary. Each of the PCRs adopts a different traffic route from infringement to class. The Evans route is as follows. If one imagines a line that takes you from infringements to Class A, that line would be called tacit coordination of spreads, so that is the only theory that joins infringements to Class A. So that is the basis for the Class A claims.

Then there is a further line that one would draw from Class A to Class B. We call that line -- they call that line "umbrella effects". So, those are umbrella effects which depend on the former line tacit coordination.

THE CHAIRMAN: All right. So there is a definite chain in that if the link to Class A fails, then Class B inevitably must fail?

MS KREISBERGER: Ms Wakefield is shaking her head. If I may deal with that.

THE CHAIRMAN: No, of course.

MS KREISBERGER: So, the umbrella effects part of the claim to Class B sales, they then have a further line. So if

tacit coordination fails, umbrella effects consequent on tacit coordination fail, there is then a further line -- I am encouraged by Ms Wakefield's nodding her head. There is a further line that takes one from infringements straight to Class B and that is the line they call ASR. So that is not consequent upon tacit coordination. But that is nonetheless -- I said it takes you straight there, it is a scenic route because it posits effects on the interdealer market and then Evans claims that those effects filter through to customers, so it is two tiers.

THE CHAIRMAN: Yes.

MS KREISBERGER: So that is the sort of graphic depiction of the Evans theory.

The O'Higgins PCR takes a different route and the line looks like this. One goes from infringements along a line called ASR to non-respondent banks widening their spreads on the interdealer market. So that is the first point of arrival, shall we say. Then on to the customer market, and then there is a line which goes back to the respondent banks -- I say "back", but that is the first line that takes you to the respondent banks on the O'Higgins theory, leading to them widening spreads to their customers. So, O'Higgins does not take you from infringements to respondent banks, you have to

go via the non-respondent widening and so on.

MR JOWELL: Forgive me, but, again, that is not correct, and we have pointed out that that is not correct more than once, actually. It is a question of emphasis, not a question of profound difference. We also rely upon, and indeed complaint is made that we overstate, the nature of the tacit collusion that has been going on. We heard Ms Ford earlier referring to the fact that Professor Breedon had overstated it by saying that there were agreements on spreads.

We, of course, also rely upon those effects on the -- that are felt on spreads through the effect on the defendants, but the difference is one of emphasis, that we think that -- our experts think the principal primary effect is felt through adverse selection. So, forgive me for correcting that, but I think it does need to be.

MS KREISBERGER: I think it is correct to say that if one goes to the O'Higgins pleaded case, for instance, there is no widespread -- allegation of widespread tacit coordination leading directly to Class A, the equivalent Class A. So I will move on.

Now, Ms Wakefield -- sorry, and then there is a final step that I must not skate over and that is that each of the PCRs then go completely off piste to

the Siberian hinterlands of algorithmic trades, and that is a further step in the chain.

Now, Ms Wakefield criticises the respondent banks for subjecting the Evans claims, the claims, to too close analysis, too much detail. That criticism is not well made because, as you said yesterday, sir, it is the PCRs who rely on what you called a peculiarly complex causative chain to join the dots between the infringements and all the spreads that they have put in their basket. So it is perfectly proper to subject that chain of reasoning to scrutiny.

But I want to tease out three distinct issues with the chain of reasoning. The first is that they are circuitous, and that is the remark that you made, sir. You have also commented on their speculative nature. We describe them in written submissions as "Micawberist" essentially uncertain, but made in the hope that something might turn.

But there is a further, third, profound issue with the claims which is that the abstract theories relied on do not work on these facts. And when I say "these facts", I am talking about the facts of infringements and the facts of the market, FX market realities. So they are not just speculative, they are ineffective, because they do not establish effects on the basis of

these facts. In other words, the claims are not just speculative, they are weak. It is a different aspect, and I am going to draw this out for you, it is a theme I will draw out for you today.

So, you have my overarching submission that the weakness of the claims is a matter which should be given serious weight in your assessment.

THE CHAIRMAN: Let me -- because the other term of abuse that you have not mentioned that I have used is "opaque", but using the Evans two theories of harm as an instance, because I think one can treat, at least for purposes of the point I am about to make, O'Higgins' theory as having the same strengths and weaknesses as Evans' indirect harm case. Let me articulate, again, why "opaque" is actually perhaps quite a good description, rather than "speculative".

So, starting with the direct harm case. It seems to us that that there is a point to be made in relation to the direct harm case that is, on the face of it, difficult to explain, which is this: if you have got banks which are not presumed to be dominant in a market, in that they cannot set price independently of other market participants, we find it very difficult to understand how a player in the market can safely widen the bid-ask spread, because if they did so, given

the nature of this market, they would lose so much business that it would not be worthwhile. Now, that seems to us to be a point of weakness that can be addressed and is not to do with opacity, it is just something which, given this sort of market where one would expect demand to be highly elastic, where one has got sophisticated people with a choice of who they buy or sell their currency to or from, a few pips here and there make a real difference.

So, we think that there is something to be debated about the formulation of the direct harm case in 2(c)(1) {AB/20/1} of the Evans note.

Moving on to the indirect harm case, it does seem to me that opacity is a good phrase, because what one is postulating is something going on by reason of the traders' wrongful behaviour which causes some prices in some transactions -- not all of them, but large transactions of a limited nature -- to be at something other than the market rate. Now, whether that is because the rate is adjusted or the spread is not the market spread, I am not sure particularly matters. What you have got is something which is not the price that the market determines because you have got this collusion.

One can say -- and we know that this is the way

markets work -- that they react to all kinds of stimuli in an utterly unpredictable way. I mean, you can say, for instance, that a certain event, if it occurs, will affect the prices on the stock exchange or on the currency markets. You will not be able to say how it will be affected, or to what degree, but you can say, basically, when something happens, the markets react.

Now, it may be that that is all that the indirect case is. They are saying that there is something that has occurred which is causing the context within which the people in this market are operating to be distorted -- not that they know it, but to be distorted in a way that affects price in a way that cannot be described and can only be assessed, if it can be assessed, by way of econometric analysis. You look at the before and after and you try and work out what is going on.

So, it seems to me that there is a difference between the direct harm case and the indirect harm case, in that the first seems to me to have some questions that we need answering; the second one is -- well, it is opaque, but it may be opaque for a very good reason. So, I mean, I say that more to assist the applicants in persuading us to remove the labels "speculative", "weak" or "opaque", but it is probably best that we articulate it for you to address also.

MS KREISBERGER: Sir, if I may say so, that is particularly helpful for me as well and I will take account of those observations as I work through.

Your first point, essentially, pre-empts the meat of my submissions on tacit coordination far more eloquently than I am about to put them, so I hope you will bear with me --

THE CHAIRMAN: No, no, of course.

MS KREISBERGER: -- but that is essentially my approach.

The second point, I will come to, in relation to ASR, and what I hope to do is persuade you that it is not right that one has to wait for the model to do its work before expressing a view as to weakness, because there are some fundamental failings. In fact, the core issue is the one you just articulated, which is the absence of market power, and that is relevant to ASR just as it is relevant to tacit coordination. All roads lead to lack of market power, if I may say so. So I will take those on board as I go through --

THE CHAIRMAN: Thank you. That would be very helpful, thank you.

MS KREISBERGER: So, starting then -- so the four topics are -- I think they are clear now -- tacit conclusion for Evans; umbrella effects consequent on tacit conclusion for Evans; ASR, which applies to both;

e-commerce transactions. They are the four topics, e-commerce applies to both.

I will, sir, be revisiting certain points which were addressed by Ms Ford yesterday in terms of sort of broad topics, but I am addressing them through the lens of causation and facts extraneous to the decisions, so I will not be repeating her submissions.

Now, tacit coordination. Evans' case -- and it is probably worth noting, it is set out at paragraph 249 {EV/1/108} of their claim form -- we do not need to go to it, but there they plead that the exchange of information on bid-ask spreads -- so it is the occasional bid-ask exchanges -- facilitated tacit coordination on spreads charged to members of Class A. So in other words, the occasional spreads exchanges take you to the whole of Class A. That is the pleaded allegation. That, we know, is based on Professor Rime's opinion that the occasional exchanges allowed traders to discern each other's baseline spreads and tacitly coordinate across the board.

It is noteworthy that he expresses his opinion in categorial terms. He says "alleged tacit coordination would have caused customers by respondent banks to receive widened spreads". It "would" have happened. Now, in my submission, that is a very weak allegation.

As well as having no basis in the decisions, it suffers from these two key defects.

The first is that the three essential conditions for tacit coordination are not present, and we know that now.

Secondly, any spread widening, as alleged, would not be bank-wide. So that is defect 1 and defect 2. I will deal with them in turn, if I may.

Defect 1. So, tacit coordination is achieved where competitors are able to align their behaviour through implicit understandings rather than actually agreeing with each other. That is why there have to be a very particular set of market conditions in place for tacit coordination to be sustainable without communication between rivals. Those conditions are, as a minimum, first, market power, on the part of the coordinating firm, so that is your point, sir; secondly, sufficient transparency to monitor and detect deviations; thirdly, a retaliation mechanism to punish deviations. Those conditions are well established in the case law, cases such as *Airtours*, just for your note that is at {AUTH/42}. Happily, we need not go there because Evans agrees that they are conditions which must be met, that is Evans' reply, paragraph 293.

Now, Professor Rime's first report which advances

this theory of tacit coordination does not make any mention of these conditions. He comes to it in subsequent reports. My key point today is that it is abundantly clear that the FX market is fundamentally inapt for tacit coordination because not one of the conditions are met. I will go through them as crisply as I can.

Market power. Tacit coordination is usually identified in highly concentrated markets, so the tacit coordinators must have collective market power. The CMA makes this point in their merger assessment guidelines. It is in the CPO response. Just so you have it, it is footnote 191 of the response, and the CMA says coordination will only be sustainable if the outside competitive constraints on the coordinating entities are relatively limited. It is a basic proposition.

It is not right to say, as you observed, sir, that in the context of these FX markets that external competitive constraints on the participants in the chatroom were weak or that they exercised market power, and there are three reasons for this.

The first is that Professor Rime wrongly based his opinion that there was market power on the overall shares of the banks. That cannot be an indication of

the market power of the individual traders in the chatroom, so it is not the relevant metric, overall bank share. I am going to come back to that point when I deal with the bank-wide spreads issue.

Also, those overall shares account for large volumes of e-commerce transactions. I am going to flesh out for you a little later the volumes involved. So those are trades which, by definition, are concluded without any human trader involvement, so those sales cannot tell you anything about the market power of the traders in the chatroom.

Secondly, and in any event, bank-wide market shares are not a good proxy for market power in FX markets. Professor Rime is wrong about that. That is at Rime 2, paragraph 65(a)(i) {C/6/34}. That is because, in the context of FX markets, competition fundamentally derives from the large number of rival traders out there which have the ability and the incentive to transact with customers to attract liquidity and to attract order flow. Now, the FX market is characterised by market makers with no capacity constraints who, as the Commission said itself, stand ready to trade on behalf of customers. That is paragraph (6) of the Essex Express decision {EV/3B/6}.

So what that means is that banks with small market

shares can service large trades and so they operate as effective rivals just as banks with large market shares do.

Now, you heard on Tuesday that the number of non-respondent banks, the RFIs excluded from the classes, is somewhere between 39 and 55. There is a dispute between the PCRs about the precise number, but either way that is a lot of banks and a very large number of traders operating in this market. So it is simply not the kind of highly concentrated market that is apt for tacit coordination.

Sir, as you observed on Monday, the market is thick and deep, so it would be totally unfeasible for a few participating traders to tacitly -- tacitly control the market and cause this alleged widespread coordination of spreads.

Thirdly --

THE CHAIRMAN: Let us be clear, Ms Kreisberger, even in a concentrated market like, let us say, supermarkets or petrol filling stations, you are likely to observe, without collusion, a tracking of prices because demand is so elastic. I mean, it is an odd thing that, viewing externally the fluctuations of price of, let us say, petrol stations, they will go up and down in almost exactly the same way, but that is not necessarily an

indicator of anti-competitive conduct. I mean, it is a necessary condition in a sense, but it is equally --

MS KREISBERGER: Sorry, sir, we lost you there. The picture just went. I think we are back.

THE CHAIRMAN: Right, sorry.

MS KREISBERGER: Sorry, sir.

THE CHAIRMAN: Your picture has now gone. I will wait for you to emerge. I have got your initials.

MS KREISBERGER: Ah.

THE CHAIRMAN: Okay. Well, we will proceed.

MS KREISBERGER: Can you --

THE CHAIRMAN: I can hear you but I cannot see you.

MS KREISBERGER: I do not think the problem is our end, is it? I can see you, sir.

THE CHAIRMAN: Okay, well, hopefully it will rectify itself.

MR JOWELL: I also cannot see Ms Kreisberger so I suspect the problem is system-wide, as it were.

MS KREISBERGER: Should we take a couple of minutes and see if we can ...

THE CHAIRMAN: Why do you not try and dial out and dial back in.

MS KREISBERGER: Shall we do that? Yes, I am grateful for that, sir.

THE CHAIRMAN: We will see whether that helps.

MS KREISBERGER: Thank you. I will do that now.

THE CHAIRMAN: Very good.

(Pause)

MS KREISBERGER: Sir, can you see me now? I can see some --

THE CHAIRMAN: Yes, you are back.

MS KREISBERGER: Oh good, great. Okay, perfect. Thank you. That is a relief.

THE CHAIRMAN: So, yes, all I was making the point was, in a concentrated market, parallel movement of prices may simply be a reflection of highly elastic demand rather than anything else. It is a fairly trite point, but ...

MS KREISBERGER: Thank you, sir, I am grateful. So the converse is the issue for Evans here, it is just not that kind of market, so the notion that these banks would align and have the ability to align with the degree of competition in this market is not a plausible allegation.

My last point then, just briefly, on market power, is even if we accept Professor Rime's position, which is that bank-wide shares were the relevant metric, I think you have the point, even then, he does not hit the target of market power, the shares fluctuated over time, in some years the respondent banks across both chatrooms accounted for less than a quarter of the market, always less than half, so even on their terms, what I would say is tacit coordination is just

a theory. It is a theory that cannot be shoehorned into these facts, because this group of traders could not control this liquid and competitive market.

So moving on then to --

MR LOMAS: Sorry, Ms Kreisberger, before you do, this issue came up factually yesterday and obviously nobody -- counsel cannot give evidence on it, but is there anywhere in the papers any estimate of what fraction of each bank's trading was accounted for by the individual traders who were in the chatroom?

MS KREISBERGER: No, we do not have that. What we can say is, look, it would be vanishingly small, because each bank has a number of trading desks, usually in a number of territories, different jurisdictions, so you have a number of desks with a number of traders on the voice desks. So once one gets down to that level of granularity, the shares are very small.

MR LOMAS: Although these were senior traders doing major transactions.

MS KREISBERGER: Some -- some were.

MR LOMAS: Okay, thank you.

PROFESSOR NEUBERGER: Can I just ask one further question? Is the argument that tacit collusion on spreads was not possible, does that imply that active collusion on spreads was not possible, because it seems to be

precisely what is contained in the Commission decision? I agree it is on an occasional basis. I would be grateful for comments on that.

MS KREISBERGER: Sir, yes. So we are not contesting the concrete finding in the decision that there was explicit coordination on specific live trades. That is accepted. What we dispute -- insofar as those are found in the infringement decision, and those were the occasional spread exchanges.

What we challenge is the notion that you can get from occasional spread exchanges to a handful -- between a handful of traders to tacit coordination of all spreads by those traders to -- a further step which I am about to address you on -- tacit coordination of all spreads by those banks, not just those traders. So it is a far cry -- it is far removed from the finding in the decision, the kernel of actual exchanges.

THE CHAIRMAN: I mean, Ms Kreisberger, what you are saying, I think, is that, just as in the theory of perfect competition, each participant in that market is entitled to set their price where they wish and that will have an effect on their individual demand curve. The point about perfect competition is that there are so many other competitors that what they do about their price cannot affect the market price. In other words, they

are incapable of effecting what the combination of supply and demand achieves by way of price, because they are so tiny and insignificant in the market.

Now, that, of course, is a theory and something that is never achieved, but I think what you are saying is that here we have a market that is, on the whole, competitive. It may be that you can move the price away from the market price in an individual case and that may be by varying the rate or the spread, but effects of that on the wider market are not going to happen because, if you shift the price away from the market price, your demand will go elsewhere.

MS KREISBERGER: Correct. Thank you, sir. But can I unpack two further elements to that just so that my submission is clear, and I am sorry if it has not been thus far.

First of all, I think I misspoke. The finding in the decision is that of occasional exchanges of information about particular spreads, specific live trades. So it is not agreements, these are not price fixing agreements, these are information exchanges, they were occasional.

I, of course, absolutely endorse what you say about the market, sir, but there is -- I do not want to lose sight of the further step that we also say is implausible. What Professor Rime is saying is he takes

the occasional spread exchanges about specific live trades and his first step on this particular chain is that would allow the participating traders to somehow infer each other's spreads on every transaction, even that first step. So we do not get to the market, even that first step is improbable because they cannot tacitly align, because you do not have the market conditions, (a) for those four traders -- four/five traders to align, and then (b) for the whole of the banks for which they work to align. So that is why I say there are -- and that is before you get to the wider market, and that is where I am going, but that is umbrella.

THE CHAIRMAN: Okay.

MS KREISBERGER: So -- yes, so, I was going to then move on to the second *Airtours* condition, which is transparency. So, you need market power, you also need transparency. I do not think I need dwell long on this, because essentially it is common ground.

So, Professor Rime's hypothesis is that, as I say, the respondent banks could align without explicit coordination. Obviously, you need high levels of transparency for rivals to align without actually communicating with each other, bearing in mind we are talking about all spreads. So, the Evans case on harm

to Class A depends on each of the banks -- the respondent banks being able to monitor the spreads offered by the other banks in a routine and systematic and comprehensive way. But the reality of these FX markets, the customer markets, is the antithesis of that picture of transparency, but Professor Rime and the other experts have been at pains to point that out. Professor Rime placed great emphasis on the opacity of this market, the fact that customers and dealers alike do not have visibility of the spreads being offered across the market and by whom, customers only know the spreads which are quoted to them, and the same goes for dealers. Essentially, Professor Rime said at the teach-in, it is only the two parties to a spread quote that know where that quote sits.

Now, when this contradiction in his evidence was pointed out to him, Professor Rime suggested that: well, you know, perhaps the participants could have received ad hoc disclosures by customers about spreads. I mean, apart from that being pure supposition, that would not come close to injecting the requisite level of transparency to monitor this entire coordination of rival spreads. You would need the customer to tell you who offered the spread for a start. But given the pace of FX markets, you would need an enormous volume of

ad hoc disclosures for this to serve as an effective spread monitoring mechanism across the banks. Professor Rime pointed out that there is also huge price dispersion both within a bank for different types of customers and across banks, so this is a very muddy picture.

So that is all I was going to stay on transparency. Ms Ford addressed you on the need for a retaliatory mechanism. It is not there, it is not in the decision so that is -- no basis for that.

So with an eye on the time, I am keen to move on to the umbrella effects case consequent on -- ah, sorry, I have got one more observation on tacit coordination. This is the point that Professor Rime postulates spreads across the banks and not just by the participants, tacit coordination across the banks, and he relies on Mr Knight's evidence to say, well, the trading desk is a collegial environment, the participants were senior, other traders would have been incentivised to follow suit because these traders would have widened spreads and made great profits. None of these points are within his knowledge.

But more importantly, even if one were to accept these factual assertions, they do not come close to explaining how a few participating traders could achieve

complete alignment of all spreads by all traders at the respondent banks without any other form of communication between them, and it is worth noting, these banks, as I said, have FX trading desks around the world, around the EEA, around the world, so it is implausible. So, that link in the chain is too weak, for those reasons.

Then I move on to tacit coordination, umbrella effect. I think I can deal with this briefly, because that is your point, sir, the market will not allow for it. So, obviously this fails, in any event, if the line leading up to tacit coordination fails, but it also suffers from the same flaw as tacit coordination, it assumes -- the umbrella effects assumes weak competitive constraints outside the chatrooms, because the phenomenon of umbrella pricing by non-cartelists, in general terms, depends on competitive pressures on non-cartelists being so weak that they can just price up to the cartel. As I explained, that is simply not true of the FX market; it is a daily trillion dollar market with a proliferation of traders ready to trade on any given day. So this aspect is also implausible.

I then turn to ASR. So, returning to the route map, we have the two tier mechanism. The first step is magnifying ASR for non-respondent banks on

the interdealer market in a way which is detectable, causing spread widening, and then the banks responding by widening their spreads to customers. I am going to set out the flaws in each tier.

Professor Rime's hypothesis depends on two core, related assumptions: again, first, that the participants have market power sufficient to put the other banks at an information disadvantage; and secondly, that that informational disadvantage causes them to suffer what he calls "small but persistent losses".

Professor Bernheim, in a similar vein, says the information exchanges magnified ASR, raising non-respondent costs in the interdealer market, and he says that would cause them to experience reduced profitability or even lose money.

There are two key problems with the logic. First, they must have sufficient -- so, sir, I am coming back here to your question: is this something that can only be tested when we get to the econometric evidence? No. My submission is we can see now the problem, and the problem is, in order to have the capacity to inflict this harm across the interdealer market, frequent and persistent losses on every other bank, they must have market power, and I have laid out to you that they do not. Without market power they could not inflict

that degree of harm. So, the ASR theory is based here on a misconception of market power.

Sir, Professor Bernheim tells us that the participants were sharks in a swimming pool. I would say that metaphor is inapt. I am not going to quarrel about whether they were sharks or not, but they were swimming in an ocean of great liquidity alongside many, many others. Any occasional bite left few ripples, quickly overtaken by other currents. So, even if -- and even if market shares were a reliable guide, which we say they are not, consider the case of *Deutsche Bank* with a share of up to 19% relative to the combined share of the respondent banks which at times was around 22%. The theory does not fit with the facts of the market. It is not plausible that Deutsche Bank would suffer this kind of sufficient disadvantage, persistent losses across the board. That is the first problem.

The second problem with the theory, based on these facts, is that the interdealer trading level is ridden with daily information asymmetries, which emerge in the ordinary course of business. Dealers routinely have access to differing levels of public and private information depending on their own particular order flow. Dealers are adversely affected -- sorry,

adversely selected all the time for a host of reasons. It is an inherently noisy and asymmetric market, and even the Commission found, as Ms Ford pointed out, that there are perfectly legitimate exchanges of information as well within the chatrooms.

Now, we learnt from Professor Rime this week that the alleged information advantage arose only out of exchanges, he said, about immediate orders. He said that was the information advantage. But that is the epitome of short-lived information. The participants knew on particular occasions something about who was about to buy and sell. They lost in the ocean. Any information advantage gained would be ephemeral.

So the PCRs' allegations that those exchanges could have moved the dial in the way they allege is not credible. In this noisy, trillion dollar market, these handful of exchanges could not realistically inflict the necessary level of persistent losses detectable by every other bank in the interdealer market. Again, with 39 or more banks transacting with each other, it stands to reason that the non-respondent banks are transacting with each other multiple times, trades that do not involve the respondent banks at all.

Now, again, aware of the time, I am keen to move to

the next tier, sir, which you referred to as pass-through. The PCRs need to make out the further link in the chain that the cost is borne by customers otherwise no harm gets through to the class, and Professor Rime again puts this in really categorial terms. He says wider spreads in the interdealer market necessarily imply wider customer spreads, and Professor Bernheim says, well, look, when cost goes up, price goes up.

My submission is the notion that the cost of the customer trade is the price paid in the interdealer market and that there is a direct correlation between the two is wide of the mark. There are two flaws with that.

The first is there are strong incentives for banks to offer narrow spreads to customers, even in the face of a cost increase; and secondly, it is wrong to say -- to assume that all customer trades are sourced in the interdealer market.

So, dealing with the first problem, the spread setting. How to set any given spread is a commercial decision and a whole host of considerations will impinge on that decision. As Mr Lomas observed at the teach-in, both margins and volume are determinants of profitability. So a bank may accept a lower level of

profitability on a particular trade precisely in order to attract greater volume. So the PCRs are wrong to assume that a bank would not keep spreads narrow to drive volumes rather than seeking to maximise margins on every trade.

Then we get to the particular features of FX markets that incentivise banks to prioritise volume as a driver of profitability, and that is that FX trading, both voice and e-commerce, is characterised by a high proportion of fixed costs and low incremental costs -- that has been accepted by the PCRs. Secondly, unlike a market for widgets, order flow is particularly prized given the opacity of the FX market. All the experts emphasise, information is the jewel in the crown. So the incentives to attract order flow is particularly strong for sophisticated customers, financial customers who bring valuable information to the table, so there is a strong incentive to narrow to them. That is precisely why, as Professor Rime explained, spreads are highly differentiated between customers, because spread setting is bespoke.

There is also a further drive to capture volume to internalise trades and I am going to come back to that.

Secondly, there are often benefits of entering an FX transaction which go beyond the return on the individual

trade. As Mr Knight observes -- that is at paragraph 44(a), {C/5/14}, just for your note -- FX trading services might be offered to customers who are valuable for the purposes of a broader client relationship. Those are the customers that are likely to receive bespoke treatment, including narrower spreads, so a narrower spread might win over a new customer. Now, if Professor Rime is right that customers do not switch banking relationships very often, as he observed at the teach-in, then the margin on the trade might be far less important than winning a new customer that you can sell different services to outside of FX.

So, if I could sum up my contention here, the relationship between spreads, competition, order flow and volume is a complex one. The simplistic hypothesis that a rise in costs invariably leads to high prices is not a useful guide to predicting spreads offered to any given customer. So this is a further reason why the theories do not fit the facts.

Now, the second defect I referred to, the interdealer spreads, are assumed by the experts to be a cost of every customer transaction. That is incorrect. I am going to take you, if I may, to {B/29/11}. That is CPO bundle B.

Now, this is an article from the 2016 BIS quarterly review, and I just thought it would be helpful -- I certainly found it helpful -- as an explanation of internalisation. So, if you look at the very first sentence on that page:

"Internalisation refers to the process whereby dealers seek to match staggered offsetting client flows on their books instead of immediately hedging them in the interdealer market."

So that is the conduct, the practice.

Then at the very bottom of that page -- which I do not think is currently appearing, it is not on my Ring Tail screen, I will read out that paragraph, I am not sure if you can see it -- the authors observed:

"It is not surprising that, according to the Triennial, internalisation ratios are highest for spot, at 63% ..."

Then they go on:

"However, these aggregate figures mask a high degree of heterogeneity across banks and jurisdictions. Internalisers with a large e-FX business can have much larger internalisation ratios (even above 90% in some major currency pairs)."

So this is a very significant practice.

So in other words, banks can net off their own

customer trades and avoid the costs associated with transacting in the interdealer tier.

So this practice breaks the chain of causation between customer spreads and the interdealer market. That is a big problem for the PCRs, because the assumption of pass-through is not a safe one. As I mentioned, internalisation is a further incentive to compete to attract volume, because of course, where a bank internalises, it profits on both customer transactions and it avoids the cost of paying a spread on the interdealer market, so it is a win-win.

So really, even if one accepts the PCRs' position that there is interdealer spread widening, that simply shows a transfer of cost between the banks, it does not make out the second necessary link in the alleged chain of causation, which is automatically wider spreads. It does not necessarily imply that.

I am now going to my final point, you will be pleased to hear, on e-commerce transactions. Now, I just wanted to give you an indication of their magnitude. I have described e-commerce transactions as the frozen hinterlands of the PCRs' claims. They are also an extension of huge significance.

Just so we are clear, the Commission describes them -- defines them as trades on "the relevant bank's

proprietary electronic trading platforms or computer algorithms", they are "transactions [that] take place without the intervention of any trader". So that is the definition. Just so you have it, it is footnote 6 of the decision {EV/3B/6}. It is essentially referring to algorithmic trades. It excludes voice trades effected over electronic platforms, like EBS. So our objection relates to the same category as the Commission.

If I could ask you to turn to {A/1/54} -- this is the CPO response -- footnote 186. Now, I just wanted to turn this up to give you a sense of the numbers. We have given an indication in that footnote of the BIS data, but I am afraid we have to do the maths. So, electronic transactions accounted for over 40% of the FX spot market turnover in 2008, going up to 70% by 2013, but that is all electronic trades.

As far as algorithmic trades are concerned, that is the second set of numbers, they accounted for 25% of 40% in 2007. So doing the maths, that is 10% of overall trades. By 2013, they were 70% of the 70% of electronic trades, so they were around 50%. So over the claim period, we move from, for algorithmic trades, from 10% to half the market.

So, look, it is the sheer volume of e-commerce

transactions within the scope of these claims that means the PCRs do have to satisfy you now, on the basis of the materials they have brought forward, that the spill over effects are not weak -- the argument that underlies them is not weak. So otherwise, the inclusion of the entirety of the e-commerce segment is completely disproportionate given the additional burden and complexity it adds to the litigation, not least in relation to third party disclosure from electronic platforms, and as I said yesterday, it would mean that algorithmic customers should not be in the class at all.

I am going to cover three points briefly on e-commerce, a brief explanation of the differences between these transactions and voice, a short summary of the PCRs' reasons for including them, and why their reasons are weak.

So in terms of the differences, they are different beasts. Voice traders provide a bespoke service to clients who receive feedback from human traders. Algorithmic trades do not give feedback, as Mr Knight broadly accepts, they are an identikit service. Transaction sizes tend to be radically different again, as Mr Knight accepts broadly. Valuable customers receive bespoke pricing which is not available over algorithms. The costs of electronic trades are much

lower as Mr Ramirez observes in his amended report at paragraph 114(b) {EV/10/53}. He says:

"Trades involving a human carry a greater cost than electronic orders."

So this is common ground, we have made the point in our submissions, it is not disputed. So lower costs, lower spreads for e-commerce.

In terms of -- well, given that, what do the PCRs say about this? Professor Breedon, one must observe, doesn't say much. He simply asserts that electronic trading, he says, is likely to be affected by the infringements, but he candidly says, look, I want to test my hypothesis in due course, and he does not take the opportunity to illuminate his position in subsequent reports, save to say -- his wording, "it is a core insight of the literature that ASR causes spreads to widen", {MOH-B/0/49}. Well, here we are again. That is an entirely abstract proposition. It completely fails to engage with the specific proposition here by the PCRs that e-commerce spreads would widen as a result of these infringements between a few voice traders.

So, my submission is the O'Higgins PCR just has not done enough to persuade you that it should be permitted to bring opt-out proceedings with all e-commerce trades in their basket. They have not made any serious attempt

to meet the requirement to show that this part of their claim is show.

Evans does put forward reasons, so I just want to spend a moment looking at them. In the skeleton -- and the wording is interesting -- the Evans PCR says to the extent that interdealer spreads are an input into the computer algorithms, then they would affect electronic spreads, and the PCR relies on Professor Rime's view that the principle of equilibrium will operate to bring electronic and voice spreads into line. Neither one is right.

First of all, the contention, of course, depends on everything else about the ASR theory. So if that falls, this falls necessarily. You have my submissions on that.

Then, if they get that far, Professor Rime originally positively asserted that algorithms use the interdealer price, he said, as the starting point, and he said to that is added an appropriate markup by way of the bid-ask spread to set the prices charged to customers. Professor Rime now accepts that he did not, in fact, know that to be the case. It is a factual question and he has retracted it.

Mr Knight also accepts that he does not know what data or input feeds go into any given bank's algorithm.

He ventures a more moderated opinion. He says: well, it makes sense for them to have as many data inputs as possible.

So, look, on the state of their own evidence, there is no firm basis for the assumption that they feed through to algorithms; it is guesswork.

But there is a more troubling problem here. The contention from Professor Rime that voice and electronic exist in a state of equilibrium is not persuasive for two important reasons. The first is, as I said, e-commerce spreads are narrower than voice because they are subject to different pressures: the low incremental costs that I mentioned, lower overall costs compared to voice trades, the corresponding incentive on banks to compete for volume in e-commerce trades, and fifth, competition between algorithms and the drive to use algorithmic trading to internalise and avoid the interdealer market. So that is one point.

But in any event, at the end of the chain of Professor Rime's abstract reasoning, we actually find a fatal error. He assumes that if voice spreads widened, it would increase demand for electronic trades which would indicate to the banks that wider algorithmic spreads could be charged without losing customers. But that turns matters on their heads, because it is a basic

feature of FX markets that liquidity keeps spreads narrow, and Professor Breedon explains that to be the case -- just so you have it, that is at Breedon 1, paragraph 5.9(a)(i) {MOH-B/0/50}. So, even if Professor Rime was right that wider voice spreads would drive demand to electronic platforms, then that increased liquidity would cause the electronic spreads to narrow, not to widen, so that defeats his theory of causation all together.

So that takes us --

MR LOMAS: Ms Kreisberger, can I just test that because we are really into quite complicated territory here, but usually, if you have increased demand, you would expect there to be upward pressure on prices. I find it slightly difficult to see why, on your argument about very efficient, transparent, deep Forex markets, which I understand, you would have a situation whereby the competitive forces did not mean that there is some correlation between voice spreads and algorithmic or electronic platform spreads, such that if the complainants could establish that spreads had increased, you would expect, directionally at least, spreads to be moving in the same direction on electronic platforms, just because that is what the market dynamics would respect.

MS KREISBERGER: So can I make two answers to that?

My first one, which I hope is compelling in its own terms, is that you have the evidence from Professor Breedon in front of you that greater liquidity leads to narrow spreads. So, we accept and endorse that point in the PCRs' evidence. That is -- he says, it is a basic feature of the FX markets. So, if he is right that widened spreads in voice do lead customers to divert to algorithmic trades, if that is right, then the necessary consequence of that is a narrowing of e-commerce spreads.

Now, then my second point, to take that a little further, as I understand it --

MR LOMAS: Is that not a confusion between demand and liquidity?

MS KREISBERGER: I do not think that is right. I think it is because of the way in which these markets work, because everyone is trading in the same pool of liquidity. So it is not like a market for widgets, which is one directional, where you have suppliers and buyers and so an increase in demand might lead to higher prices. Here you have a pool of liquidity. If that pool increases, everyone is trading more, and that is what narrows --

THE CHAIRMAN: Yes, I suppose what you are assuming,

Ms Kreisberger, you are assuming that the increase in trading is neutral as regards currency. If you had a dramatic increase in demand for, let us say, dollars, then you would find that the price would be affected, because you would have everyone selling to buy dollars and you would have that directional flow, as in the case of widgets. But if you are saying it is just everyone is buying and selling more currencies generally, then you have higher demand, greater liquidity, but no particular effect on price.

MS KREISBERGER: I think that is right, sir. I am just going to take instructions so that I do not miss a nuance here. I think it is an important point.

THE CHAIRMAN: Absolutely.

(Pause)

MS KREISBERGER: I am told that was an accurate account, so I can leave that there.

Sir, there is one point I needed to correct. I made submissions in response to Mr Lomas' question about the proportion of trades accounted for by the voice traders. Now, I am instructed by MUFG, so I would ask you to treat my submissions as correct on the part of MUFG. I am not able to generalise that to other banks, so I just wanted to make that clear.

THE CHAIRMAN: Thank you.

MS KREISBERGER: Unless I can assist you on any other points, sir, those are my submissions.

THE CHAIRMAN: No, thank you very much, Ms Kreisberger. We have raised our questions during the course of your submissions so we have got nothing more. Thank you very much.

Mr Hoskins, would this be a good time for a five-minute break?

MR HOSKINS: Certainly, yes.

THE CHAIRMAN: And we started five minutes late and we have had our fair share of IT issues, so I think you can take it that we will run to 1.10 at least, if that makes a difference to you, but you should know that.

MR HOSKINS: That is very kind. I will try and keep to the existing timetable, but an extra ten minutes obviously will be gratefully received by myself, and indeed, I am sure the PCRs' counsel if we need it, so thank you.

THE CHAIRMAN: Thank you.

Very good, we will rise for five minutes.

(11.42 am)

(A short break)

(11.57 am)

THE CHAIRMAN: Mr Hoskins, over to you.

MR HOSKINS: Thank you.

I cannot see you, sir.

THE CHAIRMAN: Ah, that is extremely annoying.

MR HOSKINS: I can see a red panel that says "Competition Appeal Tribunal, CAM1", which I think is probably meant to be you, but I cannot see --

THE CHAIRMAN: No, that has been on my screen all morning.

MR HOSKINS: Ah, you have just arrived, perfect.

THE CHAIRMAN: Good.

Submissions by MR HOSKINS

MR HOSKINS: I am going to address you on the issues with the proposed econometric methodologies and I would like to begin with five general statements about regression analysis.

Firstly, whilst regression analysis is a commonly used technique for assessing the quantum of damages in competition cases, it is neither infallible, nor suitable for use in all cases. Of course, the paradigm proof of that is the *BritNed* case, because in that case the claimant's expert produced a regression model and defended it robustly in cross-examination, but the court found, at the end of the day, that no weight whatsoever could be placed on it. In this case, what we have is all the experts for the PCRs saying, "Do not worry, of course we will be able to build a model or models", to take Professor Bernheim's point. But *BritNed* shows us

that the fact that an expert can build a model is not the end the story as far as the court is concerned, and that is a very important distinction which I think with respect to the experts none of them have quite realised.

Now, I gave the experts every opportunity in cross-examination to be open with the Tribunal about the inevitable difficulties that will arise in this case in building a reliable model that will survive the rigours of trial, but to a large extent, they refused my offer.

Second general point. We submit that the more complex the model, the more inherently prone to error it will be. If I can ask, please, the *BritNed* judgment to be brought up {AUTH/26/123}. Paragraph 414, you will see the heading, "The reliability of Mr Biro's model":

"Dr Jenkins's approach was clearly significantly more complicated than that of Mr Biro and so inherently more prone to error ..."

I do not think this is an economic proposition. The more complicated something is the more inherently prone to error it is. You do not need to be an economist to understand that.

Then, sir, you went on to say:

"In my judgment, where there is a choice between using actual data and a proxy for that data, the former

ought to be preferred, unless there is good reason for not relying on the actual data."

Again, one does not have to be an economist to see the truth in that statement.

So that brings me to my third general comment on regression. The use of proxies is commonplace in regression analysis; however, the use of proxies, unless they are perfect proxies, will inevitably introduce uncertainties into a model. If we can go to page {AUTH/26/104} of this document, please, paragraph 345, five lines down, you will see opposite E:

"Inevitably, proxies of the sort introduced by Dr Jenkins -- unless they are perfect proxies -- will introduce uncertainties into a model."

Again, we submit that cannot be controversial.

The fourth general observation. A reliable regression analysis must be well specified, and what that means, in simple terms, it is not a purely statistical exercise carried out in a vacuum, it must take account of and sufficiently reflect the real world. We submit there are obvious difficulties in that regard in this case, and I will return to them very shortly.

The fifth and final general observation is deciding which explanatory variables to include in a model is very important, and it is common ground that that

decision should be informed by industry knowledge, by literature and by economic theory. It is also common ground that the literature is still developing. If one reads the articles, they look at different aspects of the market. There is no off-the-peg model for calculating damages in the market. This will be new territory for any expert who is asked to undertake that task.

Let me now turn to the use of econometrics in this particular case. I would like to show you a document I showed to Professor Breedon in cross-examination. If we could go, please, to {MOH-H/0/36}. This is the first report of Professor Bernheim, and I took Professor Breedon to some of these paragraphs, so let me just summarise what we take from them. Paragraph (96):

"To reliably identify the effects of the FX cartels' conduct, a regression analysis needs to account for factors that affect half-spreads."

Paragraph (97):

"... the explanatory variables included in the model must be economically relevant for FX half-spreads. Economic theory and pertinent academic and industry research ... should guide the identification of the appropriate candidate explanatory variables."

Paragraph (98):

"When possible, one should avoid including explanatory variables that were under the control of the FX cartels and/or influenced by the cartels' operation [in] significant degree."

And then over the page in the document {MOH-H/0/37}, paragraph (99):

"If there is reason to think that the cartels influenced or manipulated [a particular driver of spreads] it may be appropriate to use a proxy ... [in the model]."

And paragraph (101):

"... explanatory variables should account sufficiently for the main factors that determine bid-ask spreads, so that any remaining magnification of the spreads is attributable to the cartel."

Again, there is nothing whatsoever controversial in those statements which I have taken from Professor Bernheim's own report.

Now, in this case there are many factors that potentially affect the bid-ask spreads set by individual dealers, again common ground. Mr Ramirez identified at least 15 potential explanatory variables. That is paragraphs 112 to 119 of his first report. We do not need to go to it, I will give you the reference {EV/10/51}.

Professor Breedon identified a non-exhaustive list of ten potential controls at paragraph 6.45 of his first report, that is {MOH-B/0/66}.

Professor Bernheim identifies at least 20 potential explanatory variables, paragraphs 127 to 130 of his first report, {MOH-H/0/45}.

Professor Breedon, you remember, when I showed him that list, did not actually agree with them all.

Finally, the respondents identified eight further categories of potential drivers of bid-ask spreads at paragraphs 141 to 151 of our CPO response {A/1/65}, and those included the many lawful exchanges of information between dealers as part of their legitimate trading activities, and those lawful exchanges are, of course, referred to in the Commission decisions.

Now, whilst there are obviously overlaps between these lists, they are not identical and there is not yet agreement, see Professor Bernheim and Professor Breedon, and they are works in progress.

Now, the difficulty in identifying potential explanatory variables and then deciding which ones should be included in any model, we submit, is particularly acute in this case. First of all, there are many drivers of bid-ask spreads; secondly, not all of them will be readily apparent; thirdly, many of them

will not be capable of measurement; and finally, it is obvious that a number of proxies would have to be used in any model. Again, in our submission, none of those points can be controversial.

In her opening submissions, Ms Wakefield for the Evans PCR suggested that the experts have done what they can for the purposes of certification at this stage and that is sufficient for the purposes of this stage, i.e.certification. But with respect, that is not correct. The question for the Tribunal is not how good a job have the experts done to date, but how good a job will they be able to do leading up to and at trial? That is what we are concerned with. In that regard, we already have evidence of the substantial difficulties that will be faced, and that evidence comes as a result of the US experience.

Now, both PCRs seek to rely on the fact that regression analysis was used in the US proceedings. It is referred to in both sets of expert reports, and indeed, that is what prompted the Tribunal to ask to be provided with copies of the relevant reports in the US proceedings. Now, those reports were submitted as part of the certification procedure in relation to *Credit Suisse*, they had not been considered by any US court at final trial, they had been looked at for

the purposes of certification.

Now, it is important to note that because of the different system in the US, those reports were submitted after the claimants had received disclosure of a very rich dataset. So you remember the mantra, "This will all be fine once we get the dataset", but that is what the US experts had. Can we please go to {MOH-E/0/13}. Now, this is the first witness statement of Ms Hollway, and she sets out -- you see the heading -- "Data obtained in the US". Can I ask the Tribunal to read to yourselves paragraphs 16 and 17.

(Pause)

So you will see, as Ms Hollway herself describes, that the US economists had large amounts of information and data. Now, of course, the US and UK certification procedures have important differences and therefore one cannot simply read across from one to the other, but as I am about to show you, a consideration of the US reports confirms that creating an econometric model that will accurately or reliably estimate FX damages is fraught with difficulty.

So let us, please, first of all go to {C/3.6/1}. This is the first experiment report of Bjønnes and Ljungqvist -- these were the experts for the claimants. Can we please go to page {C/3.6/11} of the bundle,

paragraph 28:

"Our econometric model is based on trade cost analysis (TCA). TCA is widely used in the investment management industry."

Etc. And if you want to know the details of TCA, you find it at paragraphs 93 and following of this report, but I do not need to go to it for this submission:

"Our TCA model follows a 'bottom up' approach where we first estimate the 'but-for' trade cost that would have prevailed in the absence of collusion on each trade for which we have available data from the Class Period."

And then you can read to the end of the paragraph.

So, the US claimant experts explained that their model follows a bottom-up approach based on individual trades.

Can we please go to {C/3.6/27} of this document -- sorry, page 31 of the document, my mistake {C/3.6/31}. Paragraph 91:

"Our economic model for estimating damages flows directly from the theory of harm we have set out in Section V. The model offers common formulae to estimate individual and aggregate damages due to artificially inflated spreads resulting from Defendants' persistent, systematic, and interconnected conspiracy to fix FX

prices."

Etc.

So, Bjønnes and Ljungqvist, B and L for short, claimed that their model offered common formulae to estimate individual and aggregate damages.

Then page {C/3.6/37} of this document. What we see is that B and L proposed a predictive model. So 102:

"To estimate the but-for effective cost of a given customer trade during the Class Period ... we proceed first by identifying a 'clean period ..."

103:

"Using Defendants' transaction data, we have analysed two alternative clean periods... "

And then describe them.

Then, over the page in the document, please16 {C/3.6/38}, paragraph 104:

"Trades in the clean period are used to establish but-for effective costs. To impute the but-for effective cost of a trade that was executed before the end of the conspiracy (what we will call the 'collusive period'), we use the effective cost of a trade with equivalent characteristics that took place in the clean period."

Then over the page again {C/3.6/39}, at 106:

"Holding equivalent characteristics constant is

achieved by means of regression analysis, a method that is widely used by economists and statisticians (among others); the precise details of the regression are provided below. Intuitively, we estimate a set of predictive regressions, separately for spot and forward transactions, using data from the clean period only ..." 107:

"The clean-period predictive regressions produce a set of regression coefficients... "

Etc. So, the B and L reports proposed a predictive model.

Now let us see the response on behalf of Credit Suisse. Can we go, please, to bundle {I/4/2}. So this is the furthest expert report of Professor Kleidon on behalf of *Credit Suisse*. Can we go to page 22 of the document {I/4/22}. Paragraph 33:

"BL's own data show that their model only accounts for 0.4% of the variation in Actual Costs across spot trades in the three top currency pairs between 2014 and 2015, while the unexplained trade specific component, or 'error term', in their model comprises the remaining 99.6% of the variation in Actual Costs... "

And then on page 24 {I/4/24}, paragraphs 36 and 37, you will see the echo of what we have been looking at over the last few days:

"In their depositions, BL acknowledged that their model does not account for multiple trade-specific factors that influence costs. One such factor is any individual trader's view on the likely direction of the market ..."

And then a reference to Bjønnes' testimony where he said:

"It is of course, impossible to measure the view of a dealer at a particular time."

Continuing:

"Another such factor is any individual trader's risk limits or intraday losses. Bjønnes testified that BL did not control for this factor because ... '... there are no common variables in the market microstructure on FX' ... Yet another such factor is an individual trader's perception of market risk or client risk. Bjønnes testified that BL did not account for a trader's perception of client risk, since it is 'of course, impossible to measure directly ..."

Paragraph 37:

"Other trade-specific factors that influence trade costs, and that BL do not attempt to incorporate in their model, include available market liquidity, expectations of future price trends, the trader's risk management choices, and the client relationship at the

time a quote is provided to the customer."

Page 28 of this document {I/4/28}.

Paragraph 41:

"The fundamental flaw in BL's proposed econometric model becomes most apparent when the model is applied to the Clean Period."

So, the model that has been created, based on the clean period, is then applied back to see what it would predict for the clean period.

Continuing:

"During the Clean Period, the Actual Costs equal the But-For Costs by definition, since there is no assumed collusion during this period. Thus, if BL's model accurately predicted costs in the absence of collusion, it would predict costs that were equal to Actual Costs for all trades in the Clean Period. Instead, BL's model yields higher Actual than predicted costs for roughly half of the spot trades during the Clean Period, and lower Actual than predicted costs for the other half of the spot trades during the ... time period ...

"Put simply ..."

I am skipping a few lines to the end of the paragraph:

"... BL's econometric model would produce positive

ostensible damages for about half of the spot trades in the Clean Period."

Then, finally in this document, please, page 31 {I/4/31}, paragraph 45:

"BL's econometric model generates ostensible negative damages numbers for roughly half the spot trades during ..."

The infringement period. We are now looking at the infringement period:

"This means that BL's own model predicts that roughly half of all spot trades during the Putative Class Period were benefited as a result of the alleged collusion."

The response to that, we see {I/6/2}, so this is the B and L response. If we could go, please, to page 36 {I/6/36}. Please could the Tribunal read paragraphs 85 to 87 inclusive.

(Pause)

Now, what you will see from this is that Bjønnes and Ljungqvist essentially adopted a strategy of confess and avoid. So here, they do not deny that their model would produce positive ostensible damages for about half of the spot trades in the clean period, however they seek to avoid that consequence by saying that it is inappropriate to apply the model to the clean period.

But it is a well-established method to test the reliability of a model to do what Kleidon did in this case, applying the clean period model to see if it accurately predicts the results of actual trades in the clean period is a fair and reasonable way of testing the robustness of that model. Indeed, that was one of the mechanisms that was used in *BritNed*. Obviously, we are not dealing with predictive models, but that is precisely one of the debates we had between the experts.

Then page 40 of this document {I/6/40}. I will take you through this, but again, B and L do not deny that their model predicted that roughly half of all spot trades during the infringement period were benefited as a result of the alleged collusion. If I can ask you quickly, with that in mind, to read paragraphs 99 to 101. I will take you through the details, but it is just to pick up the main points.

THE CHAIRMAN: Yes, of course.

(Pause)

Yes.

MR HOSKINS: So what is absent from this is any denial that the model predicted that roughly half of all spot trades during the infringement period would have benefited from the cartel. What B and L do is to say two things in response. First of all, at paragraph 100, they claim

that the model might show that trades have negative damages due to "statistical noise". But with respect, statistical noise does not begin to meet the fact the model suggests that roughly half of all the spot trades in the infringement period would have benefited from the cartel.

Then at paragraph 101, they simply abandon the suggestion that the model can accurately estimate individual trades, even though their first report described the model as a "bottom-up approach". You will see that in the first three sentences of paragraph 101, where they retreat to an aggregate approach and simply abandon and do not seek to defend the individual aspect of their model, which was said to be the basis upon which it was built and was said to be one of its features.

Now, the response to this I do not need to take you to because you are not deciding the American case. The response one finds, for your note, second Kleidon, bundle {I/8/2}, paragraphs 7 to 12 and 15 to 20.

Now, on the basis of this evidence and the arguments, certification was granted on a very limited basis. Can we please go to {A/1/76}. Now, this is the respondent's joint CPO response, and in an annex to that response, we summarised the position in foreign

FX class actions, and the US certification ruling begins on page {A/1/74}, but I simply want to show you what the nature of the certification was and that is at the top of page 76. You will see in the top line:

"Judge Schofield did, however, certify a more limited class action confined to the questions of: (1) the existence or otherwise of a conspiracy to widen spreads in the spot market ..."

So was there an infringement at all:

"... and (2) Credit Suisse's participation in any such conspiracy."

That was the extent of the certification.

Now, the reason why I have shown you this material is to demonstrate that it is clearly not good enough for the PCRs in this case simply to say, "We will use econometric techniques to assess quantum", and to say, "Econometric techniques were used in the US proceedings". The evidence in the US proceedings serves only to confirm the difficulty of constructing a reliable model to assess quantum in the context of FX markets.

Now, not surprisingly, the experts in this case, having all admittedly seen the US materials, do not suggest that they will adopt the same approach as the US claimants. That would have been a very foolish thing to

do. But that does not detract from the fact that very respected economists in the US, having had access to a very rich dataset, had real difficulties in producing a robust econometric model. Maybe the proposed experts in our case will produce a better result, maybe they will not, but what is unarguable is that their task will be a very difficult one. The difficulties in producing a robust econometric assessment of damages, in our submission, are relevant to the strength of the claims and therefore can and should be taken into account by the Tribunal pursuant to rule 79(3) of the Tribunal rules when considering whether certification should be opt-out or whether it is more appropriate for it to be opt-in.

Just to be clear, we do not submit that the strength factor is a hard-edged question. We submit that on a proper approach, the Tribunal should form a high level view of the merits of the case and then weigh that view along with the other factors that the Tribunal considers relevant to the opt-in versus opt-out decision.

However, as one of the two express factors expressly identified in rule 79(3) is pointing to opt-in, we say the strength of the claims is an important factor in this case in the multifactorial assessment, and we say that the Tribunal can and should treat it as such,

i.e.as an important factor.

Let me deal, lastly, with some of the questions that have been put by members of the Tribunal. I am not dealing with all of them, just a couple of them.

First of all, yesterday Mr Lomas said, well, the claimants might say, "Give us the data, we will conduct an empirical exercise and see if we can identify the movement in spreads". You have part of my answer to that from the analysis of the US position where the data was available, that does not get the PCRs home even on the limited test we have at certification.

But furthermore, as all the experts accepted in cross-examination, in order to be reliable, statistical analysis cannot exist in a vacuum. It must take account and reflect the real world. For example, it must be based on a theory of harm that has a grounding in fact. I would like to take you back to a document I put to one of the experts in cross-examination. {B/11.1/1}. So, you will remember, this is the "Reference Manual on Scientific Evidence" published by the National Academies Press, and I would like to go to page 2 {B/11.1/2}. You have seen these before in cross-examination:

"Model specification involves several steps, each of which is fundamental to the success of the research effort. Ideally, a multiple regression analysis builds

on a theory that describes the variables to be included in the study. A typical regression model will include one or more dependent variables, each of which is believed to be causally related to a series of explanatory variables."

Then over the page, please, to page 3 {B/11.1/3}, you see above the heading, "Choosing the depend variable", the paragraph above:

"Failure to develop the proper theory, failure to choose the appropriate variables, or failure to choose the correct form of the model can substantially bias the statistical results -- that is, create a systematic tendency for an estimate of a model parameter to be too high or too low."

I believe, from memory, it was Mr Ramirez that I put this to and he agreed with these propositions.

So, we submit that, given the need for a model to have those virtues in order to be reliable, it follows that a claim put solely on the basis of data or econometric analysis would be inherently problematic. It cannot exist in a vacuum.

That leads me, finally, to one of the chairman's questions. We had our attention drawn to an article written by the chairman, and in relation to that article, the chairman yesterday raised a question about

how the Tribunal should react to a case which might turn almost solely on economic analysis rather than factual evidence. The response to that is, this case will turn on factual evidence and econometric analysis, and the submissions of Ms Ford and Ms Kreisberger, I hope, make that point absolutely clear. There will be factual evidence, there will be expert factual evidence as well, as to the manner in which the market operated, for example, because we will be challenging the claimant's theory of harm and challenging their causation story and saying it simply does not reflect the real world, it does not stand up when put against the real world. So therefore, the first answer is the case will not be resolved solely on economic evidence.

But if that were not the case, if we were in a world, alternatively, where this case were going to be resolved solely on econometric analysis, then we would say the following. The burden would be on the claimant to prove that the infringement had (a) caused it loss and (b) how much loss, and if either of the claimants chose to bring a claim which relied solely on economic analysis, as I have already submitted in response to Mr Lomas' question, that would be inherently weak, given the need for a robust model to reflect the real world. We say, in such a case, if it were to arise,

the Tribunal could and should take account of the inherent weakness of a proposed claim based solely on econometric analysis. That would be flashing lights in multiple colours in terms of weakness of the proposed claim.

In relation to the article, we would agree with some of the final comments in the article where the chairman said -- this is the final column on page 6 {H/614/7} -- I imagine people may have it loose, apologies, I am not sure it has been added to the bundle:

"It is a mistake to see economic evidence as containing 'The Answer' to, for example, a legal question of causation. Rather, it is evidence -- granted of a somewhat idiosyncratic nature, at least to the lawyer -- that goes into the pot with all the other evidence, on which the parties make their submissions and which the judge has to weigh."

In other words, lawyers need to look at economic evidence, understand it for what it is, and apply it as a part of the material before the court.

And we wholeheartedly agree with that as an approach.

So, sir, unless you have any further questions on the econometric methodology, those are our submissions.

THE CHAIRMAN: No, thank you very much, Mr Hoskins. No

questions.

PROFESSOR NEUBERGER: Yes, I have a question.

THE CHAIRMAN: Sorry, Professor Neuberger.

PROFESSOR NEUBERGER: I have a question, Mr Hoskins, about your statistical econometrics points. The claimants propose to demonstrate, given the data, that there is a significant difference in the average spread between the cartel period and some clean period. Are you -- is it your argument that you could only hope to do that if you have a model of the spread on the individual transactions which is reliable? Because --

MR HOSKINS: No, that is not our case. I took you to that -- I mean that is obviously within the gravamen of the dispute in the US law. But I still say the American material is relevant, because the problem with the model was largely that it omitted all those explanatory variables that I identified for you in the report. But this is an aggregate damages case, it is not a case in which the model has to be built bottom up, so I do not rely on that aspect of the American reports.

PROFESSOR NEUBERGER: But without taking any specific evidence on this, just from my general knowledge of this literature, the chance of producing a model of its spreads on individual transactions which has a correlation coefficient between model estimate and

reality of anything, you know, above a per cent or something is trivial, it is not an achievable aim. So if you -- I -- you are not arguing that it is necessary to have a proper model of spreads?

MR HOSKINS: No.

PROFESSOR NEUBERGER: Fine.

MR HOSKINS: Simply, just to be clear, in the US, the primary criticism I showed you -- or sorry, one of the criticisms I showed you was that the model did not produce good results for the infringement period, and the way in which the claimant's expert sought to deal with that was to say -- was just to forget they had said it could predict aggregate and individual damages and just focus, and say, "Well, even if it is not very good for individual, it is still good for aggregate".

But the point I take from the American reports is, the reason why that particular model was flawed was because the experts were not able to accurately identify the necessary explanatory variables that such a model would require. That is the specific point.

PROFESSOR NEUBERGER: Thank you.

MR HOSKINS: Thank you.

THE CHAIRMAN: Actually, Mr Hoskins, just taking your last point about factual -- proper factual evidence and factual evidence which is essentially econometric.

I quite understand your point that you will -- if this case is certified on the basis that the applicants want and goes ahead, you will be adducing a lot of evidence to say, "Look, the chain by which the harm is said to occur just does not work", and therefore, your case would no doubt be, the damages ought to be nil because there is simply no causative effect shown. I mean, that would be your case.

Now, suppose you lose on that and we find that there is an effect, in short, we accept the consequence of the modelling that is done at trial. It would be the case that we would actually be told, without any kind of ability to exercise judgment, what the quantum of that loss would be. In other words, we would have a -- effectively, to use a word that we did use in *BritNed* -- a "black box" telling us what the quantum was, much as was being mooted, I think, in BritNed and as I mention on page 6 of the article you have just referred to. Why can you not take a confident interval of 51% and establish damages by reference to the lowest end of that range? I mean, is that where we are going to end up?

MR HOSKINS: No.

THE CHAIRMAN: No.

MR HOSKINS: Well, it might be in the crystal ball, but it

is unlikely to be that. The reason I say that is, factual evidence, in terms of robustness of a model, is not limited to causation. Factual evidence is also required in relation to, for example, explanatory variables. Again, to take an example from *BritNed*, one of the major problems with the econometric model put forward by the claimant in that case related to capacity in the industry. There was a great deal of factual evidence in the case about capacity in the industry and a great deal of debate about the extent to which a proxy could be put in the model which reflected that factual issue, and that is one of the reasons that that model ultimately was rejected, because it could not, by way of an explanatory variable, accurately model for that issue, even though it was accepted that that was actually almost a necessary explanatory variable.

So, in my submission, it is very unlikely we will get to a stage where all the facts have been decided one way or another and all the facts are absolutely clear and you are left with a black box and the Tribunal has to decide between a black box, on one side, and a black box, on the other.

What we will have, as, sir, your article suggested, is the econometric models in the midst of a wealth of factual information going to causation, going to

explanatory variables, etc, and the black box will have to be assessed in light of all of the evidence. It will never -- I think it is very difficult to imagine a situation, even hypothetically, where one could end up with a case where it was simply one black box against another, because that is not the way regression analysis actually works.

THE CHAIRMAN: No. Yes, thank you, Mr Hoskins. Nothing more.

So, we move, I think, to Mr Jowell. Is it you who are opening for the O'Higgins applicant?

MR JOWELL: Closing, I hope.

THE CHAIRMAN: Quite right.

Mr Jowell, before you begin, there is one point that I think we want to make clear. I do not want you to read too much into it but, we have shown a certain reluctance to accept, as it were, brick walls in terms of our choice which both sides, I think, have attempted to construct. Your brick wall was, we do not have the ability to select opt-in because you are only putting opt-out on the table, and we have indicated we think that is a factor, but, I mean, obviously we will hear you on what you say about the law in that regard.

Equally though, we were not particularly attracted by the notion that there is a hard and fast distinction

in terms of the merits to be drawn between the test for certifying on an opt-in basis and the test for certifying on an opt-out basis.

Now, we are not saying for a moment these factors are irrelevant, they are obviously highly relevant. What I think we are saying is, we regard them as all together much more fluid in terms of the decisions that we have to make.

That being the case, and without in any way indicating what is going to be a very, very difficult decision for us, I think we should make clear that we see every permutation as being on the table. In other words, given the fluidity of the -- for instance, the merits question, we are not going to place very much weight on the concession made by the respondents that this case can be certified on an opt-in basis. It seems to us that we need to view everything in a -- in the round, including, obviously, the merits, and decide both certification and basis of certification on the factors that we have got.

I just wanted to make that clear, because whilst it may be a very easy answer -- I am not sure -- but it is something we are going to approach, as it were, from first principles.

MR JOWELL: Well, I am very grateful for that indication.

I was just going to say that I should make clear that I have got two and a half hours allocated to me now for this -- these closing submissions. I would like to leave Mr Patel, who is the cost counsel for these purposes, half an hour at the end to deal with the cost matters relating to carriage, which leaves me with two hours. My plan is to split that evenly between certification and carriage, and of course, that means that I have one hour in which to respond to the seven hours of submissions that the Tribunal has just heard.

Now, the reason I mention that is not to complain, and nor is it to discourage interruptions. Quite to the contrary. I only mention it because you will appreciate that I will not be able to deal with every point made by the respondents. I will seek to deal with what I perceive to be their major points, and of course, you will take it as read, I hope, that the fact that I do not deal with a particular matter does not mean that in any way I accept their arguments. Equally, I trust that the Tribunal will draw to my attention, if there is a point that I have not dealt with and that vexes them. So I just say that by way of opening, if I may.

So, could I start then by briefly addressing this point of legal principle and the correct approach to the opt-in/opt-out matter.

Now, one thing is, I think, now common ground, and that is that in determining whether proceedings should be opt-in or opt-out, rule 79(3) lays down a multifactorial assessment and the Tribunal must take into account all the matters it thinks fit, and those matters include -- may include the two matters mentioned, strength of claims and practicability, it may also include the matters in 79(2), and it can include other relevant factors. I think it is also accepted that one rather important factor is that there is before it in this case no actual opt-in application. So I think all of that is common ground.

Now, the point that arose is whether the Tribunal has the power to make an opt-in order when it only has an opt-out application before it. Now, for our part -- and I do not purport to speak for Mr Evans here -- we say that even in a claim, we accept that even in a claim where it is -- where the Tribunal is faced only with applications by one or more opt-out claims, we acknowledge that the Tribunal has the power, the jurisdiction to at least give a judgment in which it

says, "This claim has been brought on an opt-out basis, nevertheless, pursuant to section 79(3), we consider that it would be more suitable to be brought as an opt-in". We recognise that power.

But it is also important to say that there are limitations, even on that jurisdictional power, and there is also, of course, the difference between the existence of a power and whether that power has been or can be exercised lawfully. What we say the Tribunal clearly could not lawfully do -- and it does not really matter whether one looks at this as a question of jurisdiction or not, but we say it could not lawfully make an actual collective proceedings order under rule 80 authorising the class -- one or other of the class representatives before it as a representative on an opt-in basis. In other words, what you do not have power to do is to take our application, or the Evans application, tweak it, make it opt-in and make an order in those terms.

THE CHAIRMAN: No, I think that must be right, Mr Jowell, and --

MR JOWELL: Yes.

THE CHAIRMAN: -- to be clear --

MR JOWELL: Yes.

THE CHAIRMAN: -- if we were to reach the view that

the matter should be certified but not on an opt-out basis, what we would do was we would hand down a judgment, we would give you a period -- both parties a period of three months, say, to take a view about amending their application, and we would then have to have a further hearing to discuss certification on that basis and resolve, if there was a carriage dispute, any carriage dispute, but that might not arise, given we would be talking about an opt-in basis.

So you are absolutely right, we would not for a moment contemplate doing that, but that is how I think we would square that particular circle, if it arose.

MR JOWELL: If it arose. I am glad that we are in agreement on that, because it is clear and obvious that the Tribunal cannot foist upon a representative, or its lawyers or funders, the obligation to act for an opt-in class which nobody has ever offered to represent, and of course, you know, if -- I doubt that the defendants disagree with that either, because I am sure they would be the first to jump up and say, "But you cannot, this opt-in application is completely unfunded, for one thing, so therefore you cannot make the order".

I think that what that underlines really is that the Tribunal would have to do as you have described, and that is not a very satisfactory state of affairs.

I mean, to be fair, that type of situation is not entirely without precedent, because it would not be entirely dissimilar to the situation in the *Pride* case where the Tribunal in effect adjourned matters to allow the applicants to reformulate their case. But of course, in that case, no one ever came back to the Tribunal, and in our submission, the same would be likely to be the case here.

Now, as I have already said, there is a distinction between having a power and the lawful exercise of it, and we say what would not be a lawful exercise of it, in addition, would be to decline an application for an opt-out CPO because -- on the grounds that an opt-in CPO is more suitable unless the Tribunal is confident that an opt-in version will be forthcoming, because if it does not, if it does not have that confidence, then there is not a genuine choice, and actually it would be a misuse of power, in our submission, for the Tribunal to certify on the basis that an opt-in would be, as it were, hypothetically preferable unless it has confidence that an opt-in application will actually then be made. Or, put another way, it would be to use a power for an improper purpose if the Tribunal stifled this claim by using its power to select opt-in over opt-out. So that is all I would like to say really about the

jurisdictional issue.

Now, my learned friend has taken you to the Guide, and we take great comfort from your words that it can essentially be put to one side because it is acknowledged that it cannot trump the rules. But I should say a few words about it, just briefly, because in our submission, it has been sorely misrepresented on these issues. I mean, all the passages relied upon by my learned friends are really saying is that if practicability of an opt-in were established, then that would be one factor that points in favour of opt-in. That is all we think it is saying. It is not, in any way seeking, in our submission, to elevate practicability into a presumption or anything like that, it is just the direction of travel, if you like, where that factor -- where the vector of that factor points.

As regards strength of case, what the Guide says is, on a fair reading, directly contrary to the thrust of Ms Kreisberger's submissions. It says in terms that a follow-on claim will typically meet the required standard of proof. As for the stipulation in the Guide that as part of the process for applying a PCR should make submissions as to why opt-out proceedings are justified, well, that is just a procedural requirement. It was fulfilled in this case by both of the proposed

PCRs. It does not -- and indeed it cannot possibly -- turn what is a statutory multifactorial assessment into some sort of default presumption in favour of opt-in. So that is all we would like to say about the Guide. Of course the Guide also, of course, preceded Merricks, which one must bear in mind.^^^

Now, the simple fact is that you have before you evidence given in good faith by very reputable funders, Therium, by reputable solicitors, by Ms Hollway of Scott+Scott, by a member of the class, Mr Mitchell, who is also on the advisory board, and they all say it is unlikely that an opt-in would be practicable. Now, the defendants invite the Tribunal to, as it were, wave its hand rather magisterially and say, "Well, we are not convinced by this evidence". They invite you to say, effectively, to the two PCRs before you, "Well, I know that you have all put in this massive expense and effort to opt-out actions, but off you go, back to square one, come back in three months, please, with 1,000 signed up claimants to this action and a new funding arrangement and then we will decide". Well, I do not need to quote Mandy Rice-Davies. It is in the interests of these defendants to make the claim against them as small as possible, as slow as possible and as difficult as possible. But the interests of the class, particularly

the small members of the class, are of course to the direct opposite.

So too are the interests of the collective action regime, and we must not lose sight of the fact that one of the purposes of this regime identified by Lord Briggs and indeed by the government is behavioural modification by these infringing defendants. It is important to bear in mind also that, although the O'Higgins PCR and the Evans PCR seek to represent this class, the ultimate guardians of this class are you, the Tribunal. They and the regime have to trust you to do the right thing for them, and we are sure that you will.

THE CHAIRMAN: Yes, that does raise, I think, the point that has been made on several occasions by the respondents about one virtue of opt-in over opt-out is that it gives a colour to the sense that there is a wrong to be redressed, and of course we have debated in argument why it is that no one has -- why it is understandable that persons have not been signing up because of the nature of the evidence by which you make good your case.

That said, is there not something in Mr Hoskins' point that a little bit more fact would assist us? For example, you are postulating certain effects on the market which you are explaining entirely through econometric evidence. Why do we not have some trader

from one of the members of the class affected to say, "Look, I cannot give you chapter and verse because it is a statistical question, but to be clear, if I had known what was going on in the Commission decisions, if I had known this at the time, it would have explained certain things about spreads that I found very hard to explain at the time"?

Why do we not have that sort of interest here to supplement the professors?

MR JOWELL: Well, we hope we will, and of course, sitting on our Advisory Committee is Mr Mitchell, who has given a statement to you, and he has explained in that statement the reasons effectively why he says that an opt-in claim would be very difficult, you know, to persuade people to come in.

But I think one needs to ensure that we are not confusing two difficult things here, which is -- one is, what is the desirable evidence at trial. We may very well adduce evidence from people affected at the final trial of this action, such as Mr Mitchell and perhaps others, and we certainly do not intend a trial purely on econometrics, which is a point I will come to. But there is a very different question, which is actually getting a claim off the ground, and we say that if you insist on this being an opt-in action, there will be no

claim, full stop. There will be no evidence at all, because there will be no claim.

Now, a pervasive suggestion that runs through the respondents' written and oral submissions is that somehow the PCRs or their lawyers or their funders have deliberately withheld bringing opt-in claims knowing that they could viably do so. There is just no basis for that assertion and it is wrong.

Now, Mr Kennelly took you to the passages in the transcript in which the two proposed PCRs had acknowledged that large organisations could opt-in to claims like the Allianz claims. "Aha", he said, "This shows you that the PCRs accept that large claimants can and will opt in", and you may recall that I made a rather impolite intervention at that point.

The reason for my angst was this: the Allianz claim is not an opt-in claim, it is an individual action brought by a group of claimants in the High Court.

The claimants are all essentially, with one exception, I understand, essentially the same claimant groups that opted out of the class action in the United States.

They are effectively doing what they did in the United States in which they opted out of the class actions and opt-out claims there and they are doing the same here. Forgive me for the confusing

terminology, but I mean opt out in the opposite sense of an opt-out claim.

But what they are doing is not in any sense a collective proceedings. It is not, as far as we are aware, even though group -- under a group litigation order, it is certainly not an opt-in claim. An opt-in claim involves a representative coming forward to represent a class. So, for the PCRs to acknowledge, as they did, that some large organisations might choose to join claims like Allianz does not amount to saying that there could be a viable opt-in claim or even that significant numbers of large organisations would join in an opt-in claim where they were represented by a representative. Above all, of course, one has to appreciate that the sine qua non for a representative class claim, whether it is opt-in or opt-out, is obtaining funding.

Now, we have put in a detailed statement from Mr Purslow of Therium addressing the question of funding of both opt-out and opt-in claims. Mr Kennelly took you to the statement, but I am afraid there was a bit of selective quotation by him. I suppose that is an advocate's prerogative, but it is also an advocate's prerogative to fill in the gaps. So if we could go back to it, please. It is in {D/4/1}. If we could go

forward -- I think it will be two pages -- to paragraph 6 {D/4/3}, and he did not take you to the last sentence of paragraph 6 where he says:

"I explain why, from Therium's perspective, opt-in proceedings would, in the present case, be likely to be impracticable."

He then provides a detailed explanation of Therium's risk management process, how it chooses between opt-ins and opt-outs, how Therium do and have funded opt-in claims where appropriate -- I would refer you to paragraphs 11 and 12 {D/4/5} -- I will not read them to you, but I invite you to do so.

Then if we go forward to paragraph 13, which I think is on {D/4/6}, he then turns to Therium's specific decision-making and why they as experienced funders consider that it was right to run the case as opt-out collective proceedings.

Then if I could invite you to look at paragraph 14, we see that he explains that the decision that the opt-out approach was considered appropriate:

"... was due to the likely difficulty of building a sufficient large opt-in group ..."

He explains that that was based on a number of interrelated factors. You see in (a) the understanding that the losses would be "distributed very widely across

a number of organisations". You see that he refers to the "long 'tail' of a very large number of claimants with smaller ... claims".

Then there was (b) that Mr Kennelly took you to, which is the large number of class members, "likely in the tens of thousands".

Then over the page {D/4/7} we see he speaks of the time and cost involved in reaching numerous institutional large corporate clients.

At (c), he refers to the diverse nature of the claimants and the absence of an industry organisation or body to act as a natural "lightning rod" around which the claimants would coalesce.

Now, Mr Kennelly, in the course of his submissions, took you to various industry organisations that we have referred to in the pension sector, hedge funds, businesses and so on, that we plan to contact for the purposes of distribution of any award, and he suggested in his submissions to you that such industry organisations could also be used to supply opt-ins. Well, of course, there are -- these bodies can supply databases of mailing lists, but they are rather unlikely to corral or encourage their members in the same way as a representative body would if all of its members were impacted in a singular way. Still less could one use

any of those industry bodies to act as the actual proposed class representative, which is what the Road Haulage Association has done rather successfully in the *Trucks* litigation. So it is a very different -- it is a very different kind of situation.

Then if we could go over the page, please, to (d) {D/4/8}, if we could go to page 8 -- thank you -- we see that Mr Purslow mentions his concerns over whether the key decision-makers would opt in, and he mentions a number of specific factors, the relative novelty of collective proceedings of this nature, and he notes that the mere fact that claimants are sophisticated does not mean that they are necessarily willing to participate in collective proceedings. He mentions the small size of the damages relative to the amount of trading, he notes that larger clients expect larger returns. He notes at (iii), which I think we need to find -- again, over the page at {D/4/10}, could we go to page 10, please -- you will see that he mentions the specific concern, which I will come back to, that claimants would be reluctant to sue --

THE CHAIRMAN: One moment, Mr Jowell, I am sorry.

MR JOWELL: Yes.

THE CHAIRMAN: Mr Hoskins, are you there? We are concerned that you may have dropped off the line. Yes.

Mr Jowell, this is doubtless an inconvenient point, but I see the time. Should we rise?

MR JOWELL: Very content to rise at that point.

THE CHAIRMAN: I am very grateful. We will resume then at 2 o'clock and hopefully whatever technical difficulties are afflicting Mr Hoskins will have been overcome by then. Two o'clock.

MR JOWELL: Thank you very much.

THE CHAIRMAN: Thank you.

(1.06 pm)

(The short adjournment)

(2.00 pm)

THE CHAIRMAN: Well, good afternoon, everyone. Mr Jowell, if you could resume when I give you the green light that the live stream is working.

(Pause)

Ms Kreisberger, are we there? We may be waiting for two things --

MS KREISBERGER: Yes, I am here. I wondered if you did not want your screen crowded with too many people.

THE CHAIRMAN: No, I am just very concerned to ensure that we do not have any unanticipated omissions.

Are we able to go?

(Pause)

Mr Jowell, off you go. Thank you.

THE ASSOCIATE: We are now live and ready to go.
THE CHAIRMAN: You are muted, Mr Jowell.
(Pause)
MR JOWELL: Sir, can you hear me now?
THE CHAIRMAN: Yes, we can, thank you. We cannot see you yet, Mr Jowell.
MR JOWELL: Can you see me and here me now?
THE CHAIRMAN: We can, and the motorway has vanished, thankfully, that is excellent. Do continue.
MR JOWELL: Thank you very much.
Could we have document {D/4/10}, please, on the screen. I was just showing you in (iii) how he discusses the specific concern that I will come back to that claimants would be reluctant to sue their own banks with whom they have an important ongoing commercial relationship.
Then finally, at point (e), he notes that the cost-benefit is worse to claimants in opt-in because, of course, the class members pay legal and funding costs out of their own damages.
Then, at paragraph 15, another paragraph, I am afraid to say, Mr Kennelly skirted over, he scotches the notion that the mere fact that non-UK domiciled claimants may be opt-in would make it viable for everyone to be opt-in.

Then finally at paragraphs 16 to 17, {D/4/11}, which Mr Kennelly did take you to, he concludes by explaining that Therium's funding agreement was predicated on the opt-out approach and he states in terms, at the end, that he does not think that he would get approval from his investment committee for an opt-in action.

We say, with respect, that that is cogent, detailed and persuasive evidence. It shows that it is unlikely that an opt-in claim would be funded and that it would therefore be impracticable. In a sense, that, in our submission, is the end of it, or should be an end of it, but I will proceed to address in a little more detail the points raised by my learned friends.

Now, Mr Kennelly stressed that the investors are largely sophisticated and well resourced. Now, that is a rather uninformative generalisation, because yes, of course, they may be well resourced and sophisticated in general terms, but that does not get one very far. The mere fact that an entity is a business, even a large business, does not mean it is not subject to inertia or a fear of retaliation by its bank, or damaging the relationship with its bank, or that a sophisticated investor may simply not consider the cost-benefit worthwhile to join the claim, particularly if it has to provide lots of documents to do so. Indeed, Mr Purslow

says that some sophisticated investors will be more reluctant to join such a claim.

Now, the respondents have latched on with abandon to Mr Ramirez's extraordinary estimates that out of a total class of what he says is 18,154, there is a group of 338 with an average claim value of £2,220,935 and 342 with an average claim value of £3,418,052, in total 680 with claims over 2 million.

Now, we, with respect, do not think that it is helpful to provide figures with spurious levels of precision. The precise numbers in the class and the precise value of the claim remain to be considered. But what we do know can be gleaned and can be gleaned with a reasonable reliability from the parallel and similar United States proceedings, and you have seen this in Ms Hollway's fourth statement. Now, Mr Kennelly took you to paragraph 17 of this, but it is actually important to see more of it, so could I bring it up. It is at {D/3/5}, please. Perhaps if I could just invite you to read paragraphs 14 to 19.

(Pause)

THE CHAIRMAN: Yes, thank you, Mr Jowell.

MR JOWELL: So the United States evidence is that the vast majority of claims are small, so small that one would not expect significant numbers to opt-in.

Now, we are told by Mr Kennelly based on Mr Ramirez's evidence that the claim values are large for this particular subset of the class. Now, it may be true that there is a subset of the class where there are potentially large claims, but it must be remembered that, at this stage, they are only that, they are claims. Here, I am afraid, the defendants just straightforwardly contradict themselves, because we hear Mr Kennelly in his submissions telling us how the claimants would be bound to opt-in for these incredibly valuable claims, and then we hear Ms Kreisberger and everyone else telling us that the claims are so weak as to be valueless. Well, you cannot have it both ways. The reality is that what we must all accept is that these are indeed just claims. They are not properly described as speculative claims, they are strong claims which have a sound factual and economic basis, and it is true that large sums were paid by these same defendants to settle these claims, or very similar ones, in the United States. But, of course, we and everyone must acknowledge that their precise value in this jurisdiction is unknown, and that that is all that can really reliably be said to be now.

Now, Mr Kennelly suggested at one point that Mr O'Higgins or Mr Evans could go to potential class

members and say -- and I quote him, "There is 2 billion on the table, ultimately". Well, with respect, of course, Mr O'Higgins could not properly say anything like that, and I am sure as a responsible class representative he never would. All any prospective representative of an opt-in claim could responsibly say is essentially what I have just said, and to a prospective claimant there is a huge difference between on the one hand putting your head above the parapet to actively sue your own bank for a mere claim and, on the other hand, coming forward to claim sums from an administrator in the distribution of a judgment sum or settlement that is simply there to be collected. Those two acts are a world apart -- worlds apart.

Now, we are told by the respondents that if there were this core group that would provide momentum to encourage those with lower value claims to opt-in. Now, the only evidence for that assertion was to rely on the O'Higgins statements that opt-ins from outside the UK, from elsewhere in the EU, effectively, might come forward in the event that there was momentum deriving from the core opt-out claim here.

First of all, that was itself expressed as a hope, it is far from certain that there will be substantial

opt-ins from outside the United Kingdom.

Secondly, that was not envisaging lots of small businesses from the EU opting in, that was envisaging large -- other large businesses, large pension or hedge funds and the like, potentially opting in. It is a very different matter to suppose that small value claimants, either here or in the EU, would be inspired to join the claim against their banks merely because there was some core of large claimants. That is highly doubtful.

Now, the other point we were told with great confidence was that the notion that banks might ever retaliate against those that sued them in class actions was divorced from reality, there is no evidence that it ever happens, it is denied in the strongest possible terms. Well, despite these confident assertions, the fears of claimants over suing their banks are well evidenced and are a clear reality. It is important just to note that Mr O'Higgins raised this point in his very first witness statement, long before the defendants had raised their opt-in argument. So could I just show you that. It is at {MOH-C/0/11}, and you will see -- this is paragraph 27(d) of Mr O'Higgins' first statement, and he says:

"In my experience, commercial parties may be reluctant to commence proceedings against key suppliers,

such as the banks with whom they deal, for fear of damaging commercial relationships or wider reputational harm."

That has been corroborated by other statements that were read to you by Mr Kennelly. I will not take you to them, but Hollway 4, paragraphs 20 to 21, Mitchell 1, paragraph 18.

I should actually just show you a little more of Mr Mitchell's statement, because, again, Mr Kennelly skipped over some important paragraphs. If we could go to that {D/5/7}, and you see what he says from paragraphs 24 to 25:

"Based on my own experience and ... conversations with other people I know in the market, I believe many potential class members, in particular those still dependent on banking relationships, would be reluctant to 'stick their head above the parapet' and sue [their] banks.

"I think this is particularly the case where class members would be signing up at an early stage of proceedings (as I understand would be the case in an opt-in collective action), where the claim may last several years and success is not guaranteed, in particular if there is any requirement to provide data at this early stage. It also seems likely it to me that

class members would be more likely to participate in a distribution in which the banks are not directly involved ..."

And so on.

If one -- that is an important statement.

If one goes further forward to page {D/5/8}, please -- thank you -- we see, at paragraph 32, that again was not read to you:

"The banks are arguing that there 'can be little objection to obtaining [trading data] at an earlier stage through an opt-in mechanism'. I believe my experience of preparing and producing data in the US claim demonstrates that this is not the case. Indeed, I believe it would be a serious perceived and practical barrier to class members participating in the claim due to the labour-intensive and potentially costly process required, the time it can take to obtain the data ... and the potential reputational damage which would arise from having to approach the banks for data."

So, now, whether these fears are ultimately justified or not as to whether the -- what the banks would ultimately do, but they are certainly not irrational and they are very real, and it is fair to say that the respondents could have done more if they had wanted to make it clear that they would never retaliate.

They have never made any clear statements to the effect that they would never respond to a claimant joining an opt-in class action against them, and they could have done that and they have done so. So, as both I and Ms Wakefield stressed in opening, there are strong grounds to consider that, even if an opt-in claim were practicable in the sense of economically viable, if you could find funding somewhere, there are strong reasons to consider that the opt-in rates would be low and would not include most of the small claimants, and that is a powerful reason against opt-in and for opt-out.

I should just come back to this point about disclosure that Mr Mitchell mentioned, because whilst we do understand the desire to have data and to have evidence from the class members, we totally understand that, but if one made the provision of trading data a condition of opting in, it would become a very burdensome and serious deterrent to doing so for all the reasons that Mitchell -- Mr Mitchell explained. It is also not the case, as was repeatedly wrongly asserted by the respondent's counsel, that our side's experts have indicated that they would find class members' data helpful. That is not the true position and I do not think that either myself or Ms Wakefield's clients have suggested that.

The problem with class members' data is that it is likely to be fragmented and exceptionally difficult to reconcile to the defendants' more comprehensive data. Professor Breedon has made it clear that he expects the defendants' data to be comprehensive and sufficient for his purposes, and if he was interested in seeing any other data, he would really like to see the data from the United States proceedings and possibly from non-defendants, but that is not a core requirement on our case at least. So, we do not agree that the prospect of obtaining claimant data is itself a good reason to select opt-in rather than opt-out.

So, may I then come to the strength of the claims.

PROFESSOR NEUBERGER: Mr Jowell, can I just interrupt you a moment?

MR JOWELL: Yes.

PROFESSOR NEUBERGER: Before you leave the question of opt-in and opt-out. You asked us to raise questions which were in our mind following Mr Kennelly's address.

One of the points that he was making, he described the kind of ecology of opt-in and opt-out and, if I do not misrepresent him, he was saying that basically opt-out was more suitable for large numbers of claimants with small individual claims who were relatively unsophisticated. So, I can understand that world where

there is a role for opt-in and opt-out.

Can you give me any indication of what your view is of the role of opt-in and opt-out in this ecology?

MR JOWELL: I take it from what the government said in the one passage that Mr Kennelly cited to you, and forgive me, I do not have it to my fingertips, but I think that it said in the government's consultation that it was for small -- for where there are small numbers of claimants who are relatively easily identifiable, and that is when an opt-in claim is particularly appropriate.

When you start to have, as in this case, thousands and thousands of claimants, opt-in, unless you have something like the Road Haulage Association, and even there I am sure it is very difficult, it just becomes -- it is going to become unmanageable, because you have effectively got all of the -- you have got thousands of thousands of, effectively, quasi clients. Even just -- even if you can contact them all, which is very difficult to do, and get them to sign up, which is an enormous book building exercise, it is then incredibly difficult to manage these kind of vast, unwieldy opt-in claims going forward. So that is how we see it. So it is for small numbers, easily identifiable.

PROFESSOR NEUBERGER: Thank you very much.

MR JOWELL: Now, strength of the claims. The defendants' reliance on the guide suddenly becomes -- well, either evaporates or becomes very selective when it comes to strength of the claims, because what the guide tells us is that {AUTH/83/86}:

"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."

Now, this is a follow-on claim, it is also a follow-on from a settlement decision. We have submitted multiple expert reports from very distinguished experts testifying to the fact that there is a methodology able to quantify the likely harm that the infringement has probably given rise to. If we then add to that the fact that these very same respondents have paid out over 1 billion for settlements for ostensibly the same or very similar claims in the United States, we say there is self-evidently a sufficiently strong claim for the purposes of section 79(3), and it is not appropriate to do what you are being invited to do, which is to go down further into the weeds of the merits and form a kind of impressionistic view of the prospects of the success of

the claims.

Now, I appreciate that -- and I will come to, Mr Chairman, your point and the fascinating article and the blue cab problem or the blue bus problem, I will come to that, but can I start by just picking up on a few of the points that Ms Ford made about the nature of the Commission decision.

Now, she relied on the limited number of participants, and one might have gained the impression, based upon the respondents' submissions, that these were just a few very junior rotten apples in these otherwise spotless trading departments of the banks. Not so.

Now, the names of the individuals are confidential and the precise roles of all of them are not yet known to us, but information in the public domain about at least four of them shows that they were senior on their respective FX desks. Could I just show you a letter where we sought to collate this information which went to the Tribunal. It is at {H/606/1}, and I stress it contains, by implication, confidential information, so it should not be shown to anybody outside the room.

THE CHAIRMAN: What we will do, Mr Jowell, is we will read it and you can make submissions.

MR JOWELL: Yes.

(Pause)

I think you will need to show the other page of it as well because I think there is a fourth -- could -- yes, thank you, {H/606/2}.

So not only are these gentlemen very senior in the FX desks, but they also supervise a number of other traders. So whether they divulge the information to the junior traders or not is irrelevant, they were positioned to instruct them on how to use the information.

Now, no evidence has been adduced from the banks to suggest what proportion of trading the trading desks supervised by these persons represented. Ms Kreisberger asserted in answer to a question that it would be -- she said initially she does not know, then she added a reassurance saying they would be "vanishingly small". Well, I am afraid, last time I checked, you cannot give evidence yourself as counsel, and in any event, as I think she corrected later on, she is not in a position, and neither is her client in a position to give evidence about this, because she is counsel to only one of the banks, that bank which was involved in one of the cartels for about one year. So, we just do not know, but it is notable that when the Commission fined the banks, it did so on the basis of all of its trading, not some subset of it, and if a large part of

the defendants' trading was unaffected, they have certainly not put forward any evidence to demonstrate that.

Now, the next point that Ms Ford made was that she sought to portray the limited scope of the relevant conduct and she relied on the limited duration of the commercial utility of the information. The limited duration is not -- is neither here nor there. This is a very high turnover market and information of even limited duration can be incredibly useful. We would also add with Ms Wakefield that this kind of inessential finding would not be binding as against the claimants and it is entirely open to the claimants to establish the existence that the information exchange led to somewhat wider tacit collusion.

Another point that was stressed by Ms Ford was that the coordination found was only on occasions or occasional. Now, "occasional" is a very vague term and it is not clear what exactly it means in the Commission decision. But as I said in opening, if you look at the footnotes to the confidential version of the Commission decision, where it evidences the occasional conduct, one sees that examples are given, and I invite, for example, the Tribunal might want to count the number of instances listed, for

example, in footnote 32 of the Three Way Banana Split decision, and one sees -- which is -- and I raise that one because it is the one that relates to bid-ask spreads, and to bear in mind that those are only -- stated to be "only examples". So on occasion or "occasionally" is not meant in the sense of rarely, it is really used in contradistinction to the communications and the exchanges of information which were almost daily. They also used that term because the actual coordination could only be implemented profitably when the occasion presented itself, but quite how many occasions, whether we are talking about the high tens or the hundreds or even the thousands, well, that will have to await disclosure of the underlying documents, the chats.

Now, the second point that it is important to emphasise about this is that the occasional coordination was not the only way in which the infringement took effect. There was also exchange of highly confidential information that was recurrent and extensive, and indeed, in our submission, the Commission strongly does imply that those exchanges were almost daily of the confidential information.

Now, we have put together, as requested, a list of the relevant key passages from the Commission decision.

Could I just take you to that. It is in {AB/21/1}. It is not coming up. It may be that it has not reached the system yet. I think it was sent in this morning.

THE CHAIRMAN: We may have it in hard copy. This is a --

MR JOWELL: Yes.

THE CHAIRMAN: -- document which has a table under paragraph 2 with the description of the content of --

MR JOWELL: Yes.

THE CHAIRMAN: -- the decisions.

MR JOWELL: I am very grateful.

THE CHAIRMAN: We have that.

MR JOWELL: What I would like to show you, if I may, is just a couple of additional paragraphs to those that I showed you in opening.

Paragraph 94 {AB/21}. Oh, it has gone up. Thank you.

Could we go to page 6 of that, please {AB/21/6}. You see 94:

"The extensive exchange of certain current or forward looking commercially sensitive information among the traders about their trading enabled the traders ..."

And then it is separate things:

"(1) to make market decisions informed by those information exchanges."

And (2) separately:

"To identify opportunities for coordination in the market."

So, one has this underlay of these constant exchanges of information, and then they lead to two different things. One is, it allows the traders to make their own informed decisions, and that is probably a daily process where they are using this information, and then, secondly, it allows them then to have these occasional opportunities for coordination in the market.

If you look down at 101, you see, I think it is correct to say that the confidential information is exchanged daily, because look at the way it is put there:

"The participating traders maintained a consistent pattern of nearly daily communications where they had extensive and recurrent information exchanges pursuant to the underlying understanding ..."

So -- and bear in mind, this extensive and recurrent, almost daily exchange of confidential information, which forms the substrata of this infringement, goes on for a period of over five years.

Now, one possibility is that this was, if you like, the perfect victimless tort, or at least one that had only local or occasional consequences. But another possibility, and in our submission the more likely

possibility is that it had consequences that they were likely to be market-wide.

Now, in some markets, exchanges of information on, say, price or quantity or capacity lead to -- are what lead to increased prices, and we are all reasonably familiar with that. Now, here, it is true the mechanism is a little different, it is adverse selection, but that does not make it a speculative mechanism. It is well attested to in the economic -- both in economic theory and in microstructure theory. If I could ask you to go to Professor Breedon's first report at paragraph 4.3, which is {MOH-B/0/35}. You see what he says:

"A key feature of most FX ... Microstructure analysis is the role of asymmetric information in determining price movements and Spreads. The basic idea is that some traders in financial markets are better informed than others and so, when they trade, non-informed traders ... lose money to them but will also adjust prices so that the information held by the informed traders is eventually incorporated into the market price. Additionally, in a Dealer market, if a Dealer knows that informed traders are present in the market, they will tend to widen their Bid-Ask Spreads so that the money that they lose to the informed traders is compensated for by larger revenue against

uninformed traders ... This is a fundamental premise of most FX Market Microstructure models of price movements ..."

So this is not some kind of novelty, and you will have seen that -- evidenced -- we have had evidence really from three distinguished professors, two specialise in microstructure and one in anti-trust economics, and they all attest to the fact that this is a well recognised feature of FX markets, and they all consider that it would have led -- that this information would or could have led to wider spreads for non-defendants and defendants alike. Now, if three professors are not enough, I can introduce you to a fourth and a fifth professor, because they are Bjønnes and Ljungqvist from the United States proceedings, and Mr Hoskins has already taken you to this.

Now, I am not going to read it out to you, and I am very short on time, as you will appreciate, but I do think that there is actually a longer version, effectively, of what Professor Breedon says in 4.3 that is in very clear terms, and I do invite you to read it on the note on what -- how adverse selection works in the context, and it is at C-- so for your note, it is at {C/3.6/27}, and it is paragraphs 82 to 89 of their report, and I think they put it in particularly clear

and comprehensible terms.

Now, the respondents have made many claims about the expert evidence. They say, well, the information exchanged could have caused the cartel dealers to narrow their spreads. But Professor Breedon has explained that such an outcome is economically implausible. Again, I will just give you the reference, paragraph 3.19 of his second report at {C/1/19}, and Professor Rime said the same.

I have to say a word really at this point about Ms Kreisberger's evidence. Now, I call it "evidence" deliberately, because I am afraid that it seems to us that much of it was precisely that. She made, time and time again, what were frankly just economic assertions and she criticised the economic views expressed by our experts. She did so in a manner that you might expect to see in closing at the end of a trial, but almost none of those criticisms she levelled at our experts were put to them when they gave evidence.

Now, the respondents, I am afraid, are willing to wound, but afraid to strike. They had the opportunity to cross-examine, but they did not put those points. Instead Mr Hoskins put quite different points to the experts, and that is not, with respect, acceptable as a procedure. It is a fundamental principle that if

a witness's evidence is to be rejected, the case must be put to them, and there is no evidence at all, of course, put forward by the defendants. We cannot cross-examine their phantom experts --

MR HOSKINS: I am sorry to interrupt, sir, but I -- (overspeaking) -- from the outset, Mr Jowell making absolutely the opposite point that in the context of these proceedings, he would not be able to put every point to the witnesses and that should not be held against him. Again, he cannot have his cake and eat it. We are all operating within time constraints, but that is not a fair criticism.

MR JOWELL: Well, I am afraid it is a fair criticism, because my point was simply -- my point has always been that one should not delve too deeply into the merits in a certification hearing.

Now, if you want to reject -- if you want to say that certain evidence should be rejected, then you have to put your case. One cannot have a situation where an eminent professor -- two eminent professors' views are rejected on the basis of which -- where they have not had an opportunity to have the points put to them and respond to them. That would be, in my respect, procedurally improper. It would not be a mini trial, it would actually be worse than a mini trial, it would

involve a process less favourable to a claimant, because it would mean that cases do not have to be put to witnesses, that evidence can be given via counsel and that there is no opportunity for the claimant to respond or to cross-examine themselves.

Now, there is no application for a strike-out before this Tribunal. The Tribunal has not given notice to the claimants that it intends to strike-out of its own motion, and in light of *Merricks* in particular, it would be quite wrong for this Tribunal to accede to the respondents' invitation to embark on an assessment of the detailed merits in these proceedings, and it would be equally wrong for the Tribunal to use epithets such as "speculative" or even "opaque" in relation to the merits of the case. Any assessment of the merits in advance of disclosure, in advance of full evidence, would necessarily be impressionistic, could be prejudicial and would be entirely counter to the clear tenor of recent Supreme Court authority.

My Lord, we are very grateful for the reference to the article in the Competition Law Journal, and it is, if I may say so, a fascinating article, and we share entirely the instinctive reluctance to engage in a pure trial by mathematics. This is not going to be that kind of trial. This is not the blue cab/yellow cab case

where the only evidence that is going to be before the Tribunal will be statistical.

First of all, one has got the fact that the defendant dealers undoubtedly colluded for over five years, and the Commission decision gives us an outline of the nature of their conduct. More importantly even than that, we will study the chats when we get them in disclosure and we will find out what went on in far more precise detail, and that is going to be a crucial substratum of fact in this trial. We will be able to see how frequent the exchanges were, we will see the number of exchanges, the precise nature, who were they between. We have emphasised repeatedly in our submissions and in our evidence the vital importance of seeing those exchanges.

What is more, we have a sound basis in economic and microstructure theory in the form of the theory of adverse selection and its likely effect on spreads. When one unpacks that theory, one can also identify the main causal steps in the argument, for example, how it occurs via the interdealer market, and it may be possible to test those causal links by considering the position as it affects the interdealer market. The expert opinions disclosed in the United States regarding the wider spreads in the interdealer market

actually support the theory and each step of the causal link.

As Mr Hoskins himself said, the regression must be tested by linking it directly to the factual evidence that is all around it, and it can be done -- and that can be done also by looking at the intensity of the collusion by, for example, number of participants, or number of communications, as Professor Bernheim and Professor Breedon have suggested. There is also the possibility of using corroborating margin analysis. Can I just show you that? That is -- if we look up {AB/11/36}. You will see that this is our neutral statement and you will see 28(2):

"It may also be possible to evaluate the impact of the cartels by analysing the revenue and/or profitability of the colluding dealers. To the extent that individual dealers were motivated by their bonuses, dealer profitability metrics may reflect the cartels' success. The defendants likely kept profit and loss data for individual traders' books, as well as for the trading desks as a whole, to measure their performance."

So that is rather akin to the sort of marginal analysis from *BritNed*.

Now, we say that these are all the sorts of things

that one can do to bolster the regression analysis and to corroborate it, and the criticism of Mr Hoskins, elegantly as they were made, they boil down to the submission that regression analysis is complex, sometimes difficult to specify, sometimes difficult to obtain reliable evidence and data, and no doubt that is true. We do not deny that regression models can be unreliable. But there is every reason to suppose that if there is one person, perhaps one person in the world, who is very eminently qualified to overcome those difficulties with skill and with integrity, then it is Professor Bernheim of the Stanford economics department and Professor Breedon of Queen Mary University.

Now, it is important, though, to bear in mind that cartel overcharges are being routinely considered using regression analysis in competition cases, and sometimes, and perhaps ill-advisedly, but sometimes with very little supporting data, because -- I say "data", I mean factual information. Let me show you an example of that in a recent major cartel case, which is -- it is in the context of the claim against -- the air cargo claim against *British Airways and others*. So the authorities bundle {AUTH/20.1/2}, please. This is a ruling by Mrs Justice Rose in the air cargo matter in October 2015, and she was faced with a dilemma, and you

see -- I think we can pick it up in paragraph 6, at the bottom. She says:

"One of the issues on which I heard submissions yesterday afternoon is on the question of overcharge. That is the issue as to whether the fuel and security surcharges which were agreed ..."

Could we have the next page, please {AUTH/20.1/3}:

"... as part the cartel in fact resulted in a higher charge for air freight being imposed by the airlines than would have been charged in the absence of.

"The claimants say that it did have this effect. British Airways say that because of competition between the airlines, in fact the surcharges were counteracted by reductions in other elements within the price so that the overall price is no higher than it would have been in the absence of cartel.

"If there were only one airline involved and only a few claimants and a few transactions, one might think that this issue would be tackled by the traditional kind of evidence comprising a combination of witness statements from employees in the claimant or within the airline who had the task of negotiating freight rates, who would then be cross-examined on the basis of the usual email traffic and notes of phone conversations that we are used to dealing with in this court.

"However, given the number of claimants and the number of transactions, that is not a feasible way to go on here. I was assured yesterday that all sides are committed to dealing with the issue not by anecdotal evidence of employee witnesses involved in the day-to-day running the business, but by a completely different approach whereby huge amounts of market data are analysed to show what movements in prices or other variables there were during the cartel period and comparing that with the movements in those variables during a clean period not affected by the cartel."

If that sounds familiar, that is because it is a regression analysis.

Then she says:

"This, as I made clear yesterday, has repercussions for other kinds of disclosure. I will not allow [she says] mixing and matching of evidence. If everyone chooses the econometric method of determining whether overcharge existed, this replaces, so far as I am concerned, any role in the trial for the examination of 23 sets of internal airline communications, or email communications between airlines, or notes of airline meetings."

And so on. So, an understandable decision given the disclosure problems, but there she was willing to

use econometrics alone. But that is not what we are proposing here, I stress. We want to look -- this is a trial of such magnitude, potentially, that we want to look at the chats as well and the underlying evidence.

What one cannot do is simply put one's hands in the air and say, "I am afraid all this regression, it is all too difficult, too uncertain". I would remind you of what Lord Briggs says in *Merricks*. He says that {AUTH/34/19}:

"Where in ordinary civil proceedings a claimant establishes an entitlement to trial ... the court does not then deprive the claimant of a trial ... because of forensic difficulties in quantifying damages, once there is a sufficient basis to demonstrate a triable issue whether some more than nominal loss has been suffered. Once that hurdle is passed, the claimant is entitled to have the court quantify their loss, almost ex debito justitiae. There are cases where the court has to do the best it can upon the basis of exiguous evidence."

And then he goes on to say:

"A resort to informed guesswork rather than (or in aid of) scientific calculation is of particular importance when (as here) the court has to proceed by reference to a hypothetical or counterfactual state of affairs."

That is the law of England and I invite the Tribunal to apply it.

If I may then go on to the --

THE CHAIRMAN: Just pausing there. Yes, I think we are all very familiar with the broad brush or the sharp axe or however you want to convey the way in which tribunals in this jurisdiction in particular grapple with quantification. The problem is, this is not just a quantification exercise, this is a case where causation is squarely in issue and where it is not answered by the Commission decisions.

Now, my concern is that we do not have a theory of harm that is written on, as it were, the back of a postage stamp. What we have got is a monumental amount of expert evidence explaining how the misconduct of the traders translates into harm, and in a sense, the point you made about cross-examination of witnesses over a day makes that point for me. If we had a three-sentence framing of the theory of harm, we might be in an easier position than we are now, and I think it is the difficulty in grasping, in articulating in three sentences what it is you are going for that is the difficulty, because what we have got is not a kind of straightforward articulation of what is going on here, what is going on here is something which is

difficult to encapsulate.

MR JOWELL: Can I make a suggestion, which is --

THE CHAIRMAN: Yes.

MR JOWELL: -- could I take you, in fact, to those passages from the Bjønnes and Ljungqvist report? Because I found them very illuminating in terms of the clearness with which they set out the various stages of the causal connections. It is at {C/3.6/27}.

THE CHAIRMAN: Yes.

MR JOWELL: Perhaps if I could just invite you to read, Mr Chairman, paragraphs 82 to 89.

(Pause)

THE CHAIRMAN: Yes.

MR JOWELL: I hope that is illuminating. I was tempted to start to -- to try to extrapolate from Professor Bernheim's swimming pool, but I am not the person to do that. But I thought that that really does encapsulate the theory in a tolerably clear way and makes it entirely comprehensible what are the causal connections in play here.

I do not know whether --

THE CHAIRMAN: Yes, I mean, at great risk of moving into the shark-infested pool myself, the concern that this passage raises in my mind or the question it gives rise to is, how, in a thick market, can you increase your

spreads in this way without actually eliminating your business?

MR JOWELL: Well, Professor Breedon notes that some people will have gone -- predicts that some people may have gone out of business as a result of this, because they simply will have lost out. But it is rather like how you might say if everyone in a market faces an additional cost -- this is how Professor Bernheim puts it. He says if you increase your rivals' costs in a -- then your rivals then have to increase their prices in order to continue to make a profit, and you, those who are colluding to increase your rivals' costs, you do not necessarily -- or probably will not keep your prices down and gain market share, rather what you do is you effectively increase your own prices in order to benefit from the higher prices that you are now able to charge.

That is why I think it is quite helpful to see this in the way Professor Bernheim does, as an anti-trust economist, as an instance of colluding parties raising rivals' costs and that is very familiar to anti-trust economists.

PROFESSOR NEUBERGER: Can I intervene here to some extent? I mean, I recognise fully the sort of models that the experts are talking about and they are standard in the microstructure literature, but they do assume

idealised behaviour of dealers and traders and they do not account in any effective way for the sorts of competitive economics of a competitive dealership market where market share is important for getting information and so on, and it is not necessarily clear that a group of dealers who have been disadvantaged by unfair practices by another group of dealers will necessarily respond by widening their spreads and reducing their market share in order to protect themselves. This is a kind of theory of pass-on, or pass-through, which has not got a strong theoretical basis behind it. It is part of the models, but it is not strongly evidenced.

MR JOWELL: Well, we have seen four professors of microstructure who believe in it, and for a certification hearing, I respectfully submit that is more than enough, and it is not inherently implausible. I think that must be common ground.

MR LOMAS: Mr Jowell, as we have broken your flow for a second, can I ask a question that occurred to me earlier, to which I quite understand you may not know the answer, but it is a question, in a sense, of how you put it.

We were talking about the role of traders and their seniority. We, of course, do not have the chats by and large, although there are some in the evidence which

give a flavour of the way in which they were conducted. Is it your interpretation that if a trader of Bank A says, to take an example, hypothetically, "I am long US dollars", is he talking about his private book that he is trading because he has a certain amount of capital to trade, is he talking about the trading desk for that bank in, say, London, which he runs, or is he talking about the bank's global position because he happens to be trading that in that time zone at that day, or do we just not know?

MR JOWELL: I think it is fair to say that I do not know and I am not going to give evidence to you because I genuinely do not know.

MR LOMAS: I could not find that in the evidence anywhere.

MR JOWELL: Yes. I think what one is going to find when one starts looking at this chat is, it is almost going to be like requiring a kind of translation manual because there is so much in there that is incomprehensible to a layman like myself, and I think we are going to almost have to have them translated into terms that are comprehensible, and it may be that we will have all of the answers to your questions or only some of them.

MR LOMAS: I do not really want to change the direction of the question you were just having but, if one of the issues that we were just talking about is the extent

to which any impact on the widening of spreads from banks in the cartel would, in the thickness and scale of this market, have an identifiable effect on spreads more widely, then a relevant question, of course, is whether that spread increase applied to a very small amount of trading, albeit perhaps high value transactions, or applied across the trading of the institutions involved.

MR JOWELL: I am sure it would be. I mean, once we find out the details following disclosure, then we will know the answer to those questions. But I am sure those are -- I agree with you, those would be -- certainly be relevant factors.

THE CHAIRMAN: Mr Jowell, I do not want to make too much of the merits point, because in one sense all this talk about theory of harm may not matter because it is a characteristic that is shared by both applicants and so, in a sense, is not really going to go to assist us on the carriage dispute, and as you have said very clearly, the certification question is articulated by *Merricks* and is, we all agree, a low standard. So, it may be that our probing in this area is going down the wrong rabbit hole.

But that said, I think it is really very important, at least for my satisfaction, if nothing else, that we understand as clearly as possible how this is intended

to work, because it seems to me that when one is articulating the purpose of these proceedings, it is to remedy a wrong, and that is what informs the very low standard of *Merricks*, but it seems to me to require a neat encapsulation of what that wrong is or what that loss is as a starting point.

Now, it may be that the fact that you have both brought out a series of extremely eminent professors to say this can be done and we will do it, but it is very difficult, maybe that is enough, and that is fine. But I think I would be assisted if the parties could provide a short reading list of the sort of financial papers that Mr Hoskins has been plaguing himself with --

MR JOWELL: By all means, of course.

THE CHAIRMAN: -- that is unrelated to the participants in this case. In other words, I would like to have some understanding of the theory that gives rise to the very clear statements in the expert report of Mr Ljungqvist that you have taken us to. Because, speaking for myself -- and it may not matter, but speaking for myself, I have great difficulty in understanding how you can have independently set spreads which are out of line with the market in a market that is not dominated by large undertakings, but is actually very close to an economist conception of perfect competition.

MR JOWELL: Ah, well, I think, just pausing there, I think that may be --

THE CHAIRMAN: That may be a mistake.

MR JOWELL: I think that is a mistake. This is actually a rather concentrated market, surprisingly so, because the -- as you see, I think, from Professor Breedon's report, he talks about the fact that these five participants constitute about 45% of the market. Then you have got Deutsche Bank, I think that is about another 19%, so you are up to 65%, then there are a few others. So, this is actually -- this is not a perfectly competitive tough market, this is not an oligopolistic market. It is very surprising to everyone, but these are the only banks that, you know, deal in this -- currencies at this kind of scale. It is a relatively small market of the really big players and that is -- and that is how these dealers were able to make money out of this at the expense of many others.

THE CHAIRMAN: All right.

MR JOWELL: I think that is a rather fundamental misconception, and the mechanism of raising rivals' costs, the effect of that is that you do not have one set of dealers charging one lot of spreads and others charging others, what you have is a rising tide lifting the boats.

MR LOMAS: I completely understand that the banks are liable for the behaviour of the traders and all decisions are addressed to the banks, but these were, within the chatrooms, quite individual personal relationships between the participants, and indeed, banks dropped in or out of the chatroom depending on where the trader moved from one bank to another. So we do need to be quite careful to look at this as relationships between a group of four or five people, who may be manipulating the trading between them, with the banks, in a sense, being their employers rather than the participants. Liable certainly, but the banks were not driving it.

MR JOWELL: Well, when you are the head of a trading desk --

MR LOMAS: Understood.

MR JOWELL: -- you kind of are the bank.

MR LOMAS: No, but it is interesting that there is a correlation between the membership of the chatroom and the institution that is alleged to be in the chatroom, and the transfer of the individual from one bank to another. He takes a set of relationships and plays in the chatroom under a new umbrella, so to speak, a different bank.

MR JOWELL: I do see that. I do see that, yes. No, I agree, and one needs to -- one will need -- once one knows, you know, the complete facts, one will be able to

ascertain how significant that point is. But one cannot simply assume, like Ms Kreisberger, that it is all going to be a vanishingly small proportion. On the contrary, all the evidence points to it being a very large proportion.

THE CHAIRMAN: Yes, but I entirely understand that there is a whole raft of factual inquiries that need to be undertaken. What is troubling me now, to add to my list of concerns on the economics, is this: I am not sure that it has been clearly articulated in any of the economists' reports -- I may have missed it -- that there is an importance to be attached in market concentration in order to make the adverse selection case work.

I mean, are you saying that the phenomenon being described in paragraphs 82 and following of Ljungqvist is pre-supposing a market that is concentrated?

MR JOWELL: I do not think it is pre-supposing that, but I think it is wrong to say that it is undermined by the existence of a perfectly competitive market, because the evidence that there is is that it is not a perfectly competitive market.

THE CHAIRMAN: No, but --

MR JOWELL: It is quite a concentrated market.

THE CHAIRMAN: If that matters, then it is something that

needs to be, to the very low standard that you are working to, articulated. I mean --

MR JOWELL: Well, if one does -- if one does see -- if one looks, for example, at paragraph 2.20 of Professor Breedon's report -- I do not intend to take you to it --

THE CHAIRMAN: No.

MR JOWELL: -- he goes through the market shares of the main addressee banks.

THE CHAIRMAN: Yes, well, let me be clear about this -- and I do not want to take up --

MR JOWELL: Forgive me, there is a heading -- let me read you what he says. The heading is, "Market concentration", {MOH-B/0/22}, and he says that:

"Market Making activity across the FX market was dominated by a relatively small group of Dealer banks."

That is a point in Professor Breedon's first report at paragraph 2.19.

THE CHAIRMAN: Okay.

MS WAKEFIELD: Sir, I hesitate to interrupt, but I could take you to a similar paragraph in respect of -- (overspeaking) -- in ours, if it helps.

THE CHAIRMAN: No, I do not need you to do that. What I think I would like, in addition to the list of academic articles that articulates this theory, is an

understanding -- which I do not want you to answer now, because it would not be fair, is an understanding of, first, whether a concentrated market is necessary for this to work. In other words, whether our academics, when they are postulating this effect on spreads, whether they are saying, "Well, we are actually assuming a market that is not the free-flowing market that one would, I must say, expect". Even with a limited number of institutions, it seems to me that, at first blush, this ought to be a pretty competitive market, but I am not going to give evidence on this point, I just need to understand, first of all, whether that is an important part of the thesis.

Then secondly, if it is an important part -- if it does not matter, then I do not need to go further, but if it does not matter, then we will have a look at the evidence on concentration. But frankly, that is something where you get a following wind from *Merricks*, because you have almost certainly done enough in the bits that you have taken us to say it is arguable that the market is configured as you say.

So it is the anterior question which is really concerning me that, in trying to encapsulate what is very difficult economics, I want to be able to start whatever judgment we are writing with a three or four

sentence encapsulation of the theory.

Now, in *BritNed* one could do it falling off a log, it really was capable of being done in two sentences. Here, every time I think I am getting close to it, someone tells me I am wrong, and that is fine, but at some point we are going to need to get the right answer, and that is why I am raising this as a problem now. It may not matter, as I say, because it may be that *Merricks* just prevents this from being an issue, but that would be to make a presupposition about where our judgment is going, which I would rather not make at the moment. So that is why I am flogging this horse.

MR JOWELL: By all means. May I give you one more reference, which is where Professor Bernheim deals with this point about whether adverse selection risk is prevented by the limited market share accounted for by the individual participating traders, and the answer to that is a decisive, no, and he explains why in paragraph (86) of his third report. That is {C/4/35}. Perhaps I could show you that, sir.

THE CHAIRMAN: Yes.

MR JOWELL: It is not quite the same point that we are on, but it is connected to it.

(Pause)

I do not know whether that was of any assistance,

sir. Perhaps we need the second -- the next page {C/4/36}.

THE CHAIRMAN: Yes.

(Pause)

Yes, thank you. I appreciate time is short, so I am going to renew the invitation to give us some bedtime reading on the academic front and, to the extent that it matters, identify the articulation of the sort of market that is being hypothesised for the operation of this theory, whether it is concentrated, not concentrated, whether that matters. If it does matter and we then need a list of references as to the evidence on concentration, well, we will come back, but I do not think we will need that because, frankly, we can read that for ourselves. I think what had escaped me was the potential significance of the nature of the market on the mechanism that is being described. It may be that there is no significance, but I think we do need to know that.

MR JOWELL: Well, I am grateful for that. We would be very happy to give you some of the references to the textbooks or literature to try to encapsulate the points that we have been making and that was made in the expert reports.

THE CHAIRMAN: If it could be a joint list from, as it were,

all the parties, then that would be ideal.

MR JOWELL: That may be difficult to agree, but we could --

THE CHAIRMAN: Well, produce a single document and each side can have five papers each and we will read those.

MR HOSKINS: Sir, can I say, I think it is better if the claimants want to put a particular case based on articles, they identify them, and if we have anything to comment upon them, allow us to do that. I mean, where I have cited a number of articles in the footnotes, for example, in our joint skeleton --

THE CHAIRMAN: Yes.

MR HOSKINS: -- I mean, our point is going to be, you do not find this particular theory put in this way in any of the papers, but that is why I think it is better for the claimants to put their best foot forward and if we need to, we will respond. But I cannot see us putting forward anything beyond, for example, the articles I have got in the footnotes to our skeleton which you already have copies of.

THE CHAIRMAN: Well, in that case, the job is easier. If the applicants could produce one list, ideally one list would be better than two, but if it has to be two, then so be it.

MR JOWELL: Well, I am grateful for that. On this we may be able to agree, but we will see.

The carriage dispute. I only have, I am afraid, 15 minutes and then I have to hand over to Mr Patel, I will have to therefore go at a fair lick.

First of all --

THE CHAIRMAN: Mr Jowell, let me just check whether we can give you a bit more time. We will sit at least quarter of an hour later than 4.30.

MR JOWELL: Well, I am very grateful. That will help me.

I would like to deal with the following three matters: the parties' respective teams, the competing class definitions, and the priority of commencement. Then, as I said, I will hand over to Mr Patel to deal with funding and ATE.

The two proposed class representatives. The role of the class representative is not to represent all consumers, nor is it to be an advocate for the collective action regime. The role of the class representative is to represent the class. What Mr O'Higgins brings, in addition to a history of public service and competition regulation like Mr Evans, what Mr O'Higgins brings in addition is a real connection to the class through his particular experience -- his two important regulatory roles in the pension industry and a real depth of connection to that sector. He is far more knowledgeable and connected to that important part

of the class.

Now, of course, we accept Mr Robertson's observation that pension funds are not the only members of the class, but they are an important one, and we also have, of course, a hedge fund manager who sits on Mr O'Higgins' advisory board, Mr Mitchell, who, as you have seen, has given evidence, and hedge funds are another important sub-category of the class.

In addition, we do say that Mr O'Higgins has a depth of experience in project management and budgetary control that is beyond that of Mr Evans, and indeed you saw that Mr O'Higgins in his oral evidence gave details about that, and he had all the hallmarks, in my submission, of a skilled, experienced and decisive manager.

Now, before I go on to consider other aspects of the O'Higgins team, I recall that Mr Robertson made an unfortunate reference to Mr O'Higgins hiding behind his SPV. Now, the setting up of an SPV was actually a very sensible decision and one that is in the clear interests of the class. It ensures that Mr O'Higgins is not exposed to personal liability and it is rather like the factor of having enough ATE, it is something that enables the PCR to pursue the claim without fear and without undue personal pressure. That is profoundly in

the class interest.

THE CHAIRMAN: Mr Jowell, two points. First of all, this one. I mean, if it were the case that there was a real risk of the class representative bearing the shortfall of any ATE insurance that was obtained, so, you know, you buy 35 million and it turns out the costs are 40, is it realistic that this Tribunal would make a costs order personally against the class representative? Is that the way the market understands it to happen?

MR JOWELL: We do not know, because this regime is wholly untested.

THE CHAIRMAN: Yes.

MR JOWELL: But the point is not whether this Tribunal would, it is rather like the point about the potential retaliation by banks, it is whether they could, and it is the concern over the risk of that that would inhibit class representatives from making the best decisions in the interests of the class.

THE CHAIRMAN: Yes. I mean, the reason I ask it is not so much because it is necessarily an important factor of this case, but it seems to me, if we are going to tread in our judgment a description of how these things ought to work, then it might be that we ought to give some sort of indication that I would regard this sort of costs threat as something which actually would be quite

undermining of the regime, be it opt-in or opt-out, because it is essentially saying either you have got to incorporate, and maybe that veil could be pierced, or you have got to make sure you overbuy on your ATE, which is also entirely unsatisfactory.

So, it seems to me that if it is a point of differentiation between the two of you, it is one that really should not be.

MR JOWELL: Well, in an ideal world, but right now it is.

THE CHAIRMAN: Okay.

MR JOWELL: And, of course, there is a question of the extent to which any indication that you gave would necessarily bind future tribunals. So, at the moment, it is a point of differentiation and important that the class representatives should be in a secure position.

THE CHAIRMAN: Okay.

MR JOWELL: Now, as far as the experts are concerned, I was reminded that -- the Evans skeleton argument, {AB/3/7}, at paragraph 17, makes the bold statement that as regards the expert teams:

"The O'Higgins PCR is not in a position which is even close to equivalent."

We agree.

Now, tempting as it is just to leave it there, there

is one comparison where we have to state that there is a real gulf of expertise and experience and that is between Professor Bernheim and Mr Ramirez and which came out in the course of their oral evidence. Now, when it comes to any trial, the role of the competition economics and the econometrics, as you have already anticipated, is likely to be if not centre stage, then certainly front of stage, and it is likely to be important that one quantifies and analyses the regressions in a way that is robust to criticism.

Now, on the one hand, you have Mr Ramirez, who has no material academic record in his chosen fields of economics and statistics with no publications to his name, and whilst he is an experienced practitioner, he has had no experience testifying orally prior to this hearing.

Professor Bernheim, on the other hand -- well, his academic experience speaks for itself and he has had testifying experience that has been very well-respected in the United States. As reinforced by the oral hearings, it is, in our submission, clear that Professor Bernheim is able to articulate and explain these complex economic and econometric matters with great clarity and authority.

Now, when this matter goes to trial, the defendants

will have unleashed their own instructed experts and they will no doubt be formidable, heavyweight academics and practitioners. Now, it is surely in the interests of the class that Professor Bernheim rather than Mr Ramirez should be instructed.

Now, Evans rely upon the fact that they put forward on this occasion Mr Knight, an FX salesman. Now, with no disrespect, it was clear, that, even for this certification stage, Mr Knight's contribution was largely peripheral. The O'Higgins PCR has at its disposal the services of Mr Reto Feller, who is an experienced trader and who works at Velador Associates. Professor Breedon himself has a history as a trader having worked at Lehman Brothers. We have served a witness statement from Damian Mitchell, who is on the Advisory Committee of Mr O'Higgins and who is himself an FX trader who has 32 years of experience in the FX markets. It simply was not considered necessary to have as an expert report for the purposes of certification a current or former trader. That is not a meaningful point of distinction between the two teams.

As for Professors Breedon and Rime, there is no proper basis for the Tribunal to distinguish between them on the basis of their qualifications, I do not suggest there is. They recently co-authored an academic

paper and they are respected colleagues. But I do say, and as I will come on to that, as rather emerged in the course of cross-examination, there are real difficulties in the way that the Evans team has sought to use Professor Rime's analysis. What we have found is that there are inconsistencies and mismatches between the overall approach of the Evans PCR and Professor Rime.

Now, I am certainly not going to embark on a comparison of the advisory boards which, as you rightly observe, Mr Chairman, would be clearly inappropriate and indeed quite impossible. All one can say is that they are both full of very distinguished individuals.

I do finally, again, reiterate that there is a real advantage in the fact that Scott+Scott's US affiliate is the main lead counsel in the FX proceedings in the US. Now, it is fair to say that Hausfeld was invited to be co-counsel in the US, but there is no doubt that Scott+Scott have done the lion's share of the work. You will find that -- I do not think you need to take it up, but I refer you to Ms Hollway's statement -- fourth statement, paragraphs 44 to 47, which is in the bundle, for the record, at {D/3/15-17}.

So, that is important, because there is going to be

a wealth of institutional knowledge that should become available, and that would only increase as the case progresses once disclosure of the chats is obtained. At that point, Scott+Scott will be able to turn to their US colleagues, who will already have analysed many, if not all of the same documents. Equally, in due course, it may be possible also to use their analysis of certain data.

Let me then come to class definition and methodology. Now, as I have said many times, the suggestion that the court should seek to assess the relative prospects of success is not one which the Tribunal can or should embark on in this context. That would be contrary to *Merricks* and also contrary to the Canadian jurisprudence that we have cited and I refer you just to paragraph 6 of our skeleton argument.

One point that is interesting though from the Canadian jurisprudence is that there is more latitude given to class definition, and if I could just briefly show you that. It is in {AB/63}, which is the Canadian case of *Mancinelli v Barrick Gold*.

THE EPE OPERATOR: My apologies, counsel, I have not got 63, I am afraid. Could you have a look at the reference again, please?

MR JOWELL: Yes, I may need to come -- I will come back to it.

MR HOSKINS: Sorry, I think you just said "AB", rather than "authorities". So it is the authorities 63 that we need.

MR JOWELL: Sorry, yes, {AUTH/63}. Thank you, Mr Hoskins.

THE EPE OPERATOR: There you go, thank you.

MR JOWELL: If we can go forward to paragraphs 23 to 25, I am guessing -- forgive me, I do not have a precise reference, I am guessing about five pages in {AUTH/63/8-9}. So that is the background, you will see.

Then if we could go to paragraph 41, which I think would be probably three pages on. One more {AUTH/63/13}, and if you could read from 41 to 50, so if we could have also the next page, please, at the same time, if possible {AUTH/63/14}.

(Pause)

Perhaps if we go on to page 15. I am sure everyone has ... there we are. {AUTH/63/15}.

(Pause)

Perhaps one more page {AUTH/63/16}. Thank you.

(Pause)

So, we say there is some analogy there to our case, because, as we say, it is an advantage and a point of differentiation of our claim that it includes recovery

for all three types of order that were subject to the cartel's manipulation. Not only the immediate orders, but also the benchmark and the conditional orders, and the experts have identified a plausible methodology to measure that loss via realised spreads.

Now, the main argument that Mr Robertson has deployed to date against this is that his 10%/90% point that it is spending -- effectively, it is not worth the candle. And in support of that, he says, that it is only 8% of the volume of commerce. But the problem is that even if one accepts that 8% is a reasonable estimate of the volume of commerce -- which is, of course, just itself very much a stab in the dark by Mr Ramirez -- the fact remains that that is not the same as the proportion of damage. What we do know is that this aspect of the conduct, the conditional orders and the benchmark fixing, was clearly a central part of the conduct identified by the Commission and by other regulators, and it is conduct that is at the heart of the infringement described in the Commission, and yet, the Evans application does not seek to claim damages for it for the class.

On the contrary, doing so does not make life easier for them, it makes it more difficult, because if they -- they have to try to exclude these orders from the data,

which is a highly dubious proposition as to whether it can be done, and if they cannot do that, then they are just going to have to lop off, as Mr Ramirez acknowledged in cross-examination, a proportion of the aggregate damages that are referable to these trades.

Now, criticisms are made in the Evans -- by the Evans experts of the use of the realised spread. Those have all been answered in the evidence. For example, the idea that realised spread is just a -- is a measure of dealer gain and not customer loss, well, the answer to that is, as Professor Bernheim pointed out in cross-examination in response to a question from Professor Neuberger, this is essentially a zero sum gain. The gain to the trader is the loss to the customer -- and you will see that reflected in Professor Breedon's second report, and again, I will not ask you to take it up, but it is at {C/3/36}, paragraph 4.21 -- and other points are made that are again wrong-headed, such as that the realised spread is smaller than the effective spread, but again the point is just wrong, because it is not whether they are smaller or larger in absolute terms, but the extent to which they change as between the clean period and the infringement period. Again that point is corrected

in paragraph 4.29 of Professor Breedon's second report at {C/30/40}.

Now, time does not permit me to go through all the arguments, but they have all been -- all of them -- the arguments about use the realised spread have been rebutted and I simply refer you to Professor Breedon's second and third reports.

Now, if we then turn to the Evans class definition, they try to make a virtue out of the fact that they draw a bright line between these two classes, A and B, one with the dealers and one with the non-dealers, and they say that this -- a distinction, they say, is the backbone of their theory of harm. The problem with that is that the theory of harm that they are advancing and the theory of harm that Professor Rime is advancing and his notion of direct and indirect effects do not correspond, because as was explored with Professor Rime in cross-examination, an important part of his theory is the manner by which the adverse selection effect, which is what he calls an indirect effect and operates on the non-defendant dealers, then acts to in turn enable the defendant dealers to keep their spreads wide. You will recall that I asked him about that, about what I called the "feedback effect" and what he called a "byproduct" of this -- of the elevated adverse

selection risk on the spreads charged by the cartel members, and Professor Rime clearly said that it was an indirect effect, and he accepted that -- he accepted that this indirect effect was effectively one that still operated on the transactions with the proposed defendants.

Professor Bernheim deals with this issue more generally in his third report, at paragraphs 22 to 25, again, just for your note, which is at {C/4/12-13}. What he explains there, rightly, is that the effects that Professor Rime calls "direct" and "indirect" effects are ultimately blended and ultimately felt by both classes.

Now, another oddity really of Professor Rime's theory and how it differs from the Evans team's understanding of their own theory of harm emerged again in the oral submissions and testimony. So, you will see this -- we have provided a note of some of the key sections from cross-examination, which you will find at {AB/22}. Could we have that. Thank you very much. If you go to page -- on page 2 of that {AB/22/2}, you will see the cross-examination on direct and indirect effects that I have just mentioned.

If you go to page {AB/22/3} of that you will see Ms Wakefield, rightly in our submission, said that

adverse selection risk arises as a consequence of all of their unlawful information exchanges, not just the bid-ask spread information exchange, and she said that we have tried to set them right on that a couple of times.

But then, when Professor Rime was cross-examined by me -- and you see that in the next quote -- he said the precise opposite. He said -- he contradicted that, and where it came out after my cross-examination and Mr Robertson's re-examination was I think that it was only the immediate orders that, in his view, gave rise to the adverse selection effect and only certain of the information exchange.

So there is just a mismatch, really, on the Evans side, I am afraid.

Now, when it then comes to the plan to use different data and different models for these two classes, which are the points that they also rely on, again, as emerged in the cross-examination, their ability to actually use this other data that they have identified for their B class is, to put it lowest, highly questionable. It does not -- again, you will see there the -- we have put in the quotes from the cross-examination. You will also see Professor Breedon's third report, paragraphs 5.12 to 5.15, which deals with all of this.

So -- and all of those, of course, as I have said, raise the problem of how you exclude certain transactions from the data.

Now, we say, more generally, there is a more general point that arises out of all of this which is that the O'Higgins experts are simply not just more qualified, as I said, but they are also more flexible and they are more willing to interrogate the data and then see what can be done, and they do not make the elementary error of trying to over-specify models in advance before you know what can be done on the data. The O'Higgins team has shown a flexible openness to adopt multiple corroborative techniques, as I have shown you, including profit or margin analysis, if necessary.

Now, I want to just make one -- put down a marker, which is on this point about winners and losers. Now, this is not a point that has been seriously emphasised by -- certainly not at all by the respondents, and not yet orally by Mr Robertson, and I will -- I will just simply put down a marker that, if it is said that somehow our class includes winners and losers and their class somehow does not, then that is wrong. If there is a winners and losers problem in this class, then it applies to each equally.

But also, I would just add a few points in

anticipation on this point, which is that actually one needs to be really careful about the terminology that one uses here, because the language of winners and losers is not appropriate. It comes from the Canadian jurisprudence and it refers to situations where there is an actual conflict of interest within the class on the outcome of the proposed issue or question. So, if the proposed common issue was to be answered in a way that would, say, benefit some members of the class, but harm other members of the class, so some would win and some would lose, then, as the Canadian authorities say, then there are winners and losers and there is no genuine common issue. One can see that from the *Vivendi* case, again, I do not have time to take you to it, but it is in the authorities, {AUTH/61/19}, you see that at paragraphs 43 to 47. So, there is no such conflict of interest here, because if the O'Higgins PCR can, via the realised spreads methodology, establish net loss to the class from the front-running on these benchmark and conditional orders, that is only going to benefit the class. There will certainly be no losers in the class if that loss is established, there will only be winners.

So now, I mean, the other point is, we also say that the evidence from our experts is that it is actually

unlikely that there will be any net beneficiaries from the infringement. I would also go on to say that both as a matter of the proper analysis of *Merricks* and, if necessary, also from first principles under the statute, the idea that it is necessary to show consistent to the harm to the class, in the sense that there can never have been any benefit to any members of the class on any of our -- any of the affected transactions, is simply wrong and inconsistent with section 47(c).

Now, if needs be, I will come back to all of those points in greater deal in reply, but I just sort of lay out those points so that Mr Robertson can respond to them if he needs.

Now, the final point that I would -- the final point I would just make on this, actually, is that if it were impermissible in law or undesirable in practice to make an aggregate award of damages, or to distribute to members of the class that suffered no loss or that had benefited from the infringement, if that transpired to be the case, then that is a matter that can and should be dealt with at a later date, after certification, when it can be ascertained whether such persons exist within the class that cannot be ascertained at the moment, if so, whether they can be distinguished from others in the class, and then, at that point, it can be decided

whether they can be removed from the class. If those that have suffered no loss can be identified and removed from the class, then there is, in principle, no reason why either the class definition cannot be adjusted in due course or that can be sorted out at distribution. That is the proper way in this sort of circumstance where one just does not know whether there are actual beneficiaries or not, that is the only sensible way that one can deal with it.

Now --

MR LOMAS: Presumably there could be a sub-class?

MR JOWELL: Yes, and indeed it may well be appropriate in due course at distribution to have sub-classes, and that is indeed something that we, I think, put even in our very original application, because we fully appreciate that there may well be differential impact among different groups within the class that we have identified.

I am not going to go through the other differences in the class that are relied upon by my learned friend, the list of relevant financial institutions and the definition of trades that fall within EU law, they are all very small beer, less than 1% in the first case and it is very implausible that there will be many transactions that did not occur on the London market in

the other. So these are -- I am simply going to leave those, if I may, to reply.

Finally, if I may -- and I am intruding I am going to have to intrude five minutes into Mr Patel's time, the question of priority of commencement.

Now, I have already -- we have already explained how this arises in the law, paragraphs 32 to 33 of our skeleton, and we say this should be accorded some weight in the analysis. It promotes the key goals of the regime of efficiency, judicial economy, access to justice, and we really do think that people that bring later claims, subsequent claims, long, long after, should only be encouraged to do so if they are confident that they offer a distinctly better proposition to proposed class members. One should not encourage free riding on initial risk taking.

We entirely reject the idea that there was any rush to the courtroom by Mr O'Higgins or that the original application was deficient. The Commission decision was made; it was final, it had been final for two months, the full text of it was not available, but we had a summary, and of course, one had ample knowledge of the background to it from other regulatory decisions. As Mr Evans himself acknowledged in his oral evidence, it can sometimes take years before the full text of

Commission decisions are published. It was not reasonable, or certainly not unreasonable to say that the class had waited long enough and it was time to commence proceedings straight away.

It is also just simply incorrect to say that there were radical amendments to our claim. The only amendment to the class definition, that Mr Robertson pointed to, was to go from 1/2 of the following pairs of currencies to 2 of the following pairs of currencies, an entirely minor amendment. The other amendments are simply removing the reference to the foreign regulatory decisions and putting in the Commission's findings. You will see all of that set out in Ms Hollway's fifth statement, paragraphs 42 to 45, which for your note is in the bundle at {D/7/14-15}.

Finally, if I could just take you to the concise explanation from Mr O'Higgins himself as to why he filed early. It is worth, I think, reading that. It is paragraphs 35 to 37, and if we could have that up, it is {D/1/16}. If I could just invite you to read paragraphs 35 to 37. We will need to have both pages, if that is possible. {D/1/17}.

(Pause)

THE CHAIRMAN: Yes.

MR JOWELL: We say that was an entirely reasonable approach

to take.

We also accept it might not have been entirely unreasonable for Evans, from their point of view, to seek to await to get the Commission decision in full and obtain it. But then, what becomes unreasonable is that they then do not come forth with even a possibility that they might have a parallel claim until over a month later, after they receive the decision, two days before our CMC, and then do not file their claim until 12 weeks after they receive the Commission decision, which, as I said, compares -- if one compares it to the 60-day rule used in Ontario, it is beyond the (inaudible - audio interference) in Ontario. We say that really is an inexcusable delay in the circumstances. If, as Mr Evans repeatedly suggested in his oral evidence, they were ready to go at any time, then it is simply inexplicable why they did not issue at least two months earlier.

So with that, I then want to hand over to Mr Patel for funding and budget, but before I do, I do want to make one point about the budget, and I am just going to make it orally, if I can, giving you references rather than taking you to the documents.

If you go to their budget, it is at {D/8.7/3}, they have budgeted for £530,000 before VAT -- and you will

need to look in the columns -- for "notification and disclosure", for solicitors' costs, £530,000. You will see that, it is the third column along and it is at the bottom of the first chunk, as it were. For that, they say, that breaks down to 85 hours of partner work, 300 for a senior associate, 400 for an associate and 1,000 for a paralegal.

Now, their pre-CPO costs for their solicitors here are 6 million. They are actually 7.2 million. It is, with respect, completely unrealistic that they are going to only spend that amount for notification and disclosure, which will be a crucial stage of the litigation, and there is a real mismatch, because when you go to their neutral statement, if I could pull that up, it is at {AB/13A/12} -- forgive me, that is a bad reference. {AB/13A/1}. We see there -- forgive me, I have got the ...

Let me just tell you the point. I have got a bad reference here. But if you go to their neutral statement on the merits and you look at the section that deals with disclosure, it is very clear that they have got high ambitions for this stage of the process, and rightly so, because they intend, like us, to look at all the chats, to obtain the data, indeed, they say they want to try and get more data than we do, and there is

just no way that they can realistically suppose that they are going to be able to do that within the budget that they have currently allocated themselves.

The same applies for other stages. One particularly concerning point is that their total expenditure on the stage for notice and administration is just £600,000. Now, that may seem like a lot of money, but that is also going to be a very burdensome stage, contacting the class, receiving the claims from the class, deciding how to divvy up the distribution, verification of claims, and again, that is not a realistic budget and it is particularly concerning, in our submission, that there is a lack of budget for that stage, because of course notice and administration is where there is a real prospect of direct conflict of interest between the funders and the class, because the funders potentially benefit from a lower distribution, and so the Tribunal should have real concerns that that important stage is also underfunded.

If I may then turn over, and with apologies for cutting him slightly short, to Mr Patel.

THE CHAIRMAN: Well, thank you very much, Mr Jowell. Any questions? No.

With half an eye on the shorthand writer and with the promise that we will ensure that everyone has

the time they have budgeted for, we will rise for five minutes and resume at 4 o'clock.

MR JOWELL: I am very grateful, thank you.

THE CHAIRMAN: Thank you.

(3.55 pm)

(A short break)

(4.05 pm)

THE CHAIRMAN: Mr Patel, good afternoon. Is everyone ready to proceed? I think we seem to have everyone, yes. Mr Patel.

MR PATEL: Good afternoon, sir. Can you hear me all right?

THE CHAIRMAN: Indeed, very clearly.

MR PATEL: Thank you.

Submissions by MR PATEL

In the limited time available I shall be focused on the most salient distinctions between the funding packages for the purposes of this carriage dispute, and we say, when you look at those, the O'Higgins PCR is clearly the superior class representative. There are a number of less significant points of distinction between the regimes and, in respect of those, we continue to rely on our written submissions, our skeletons, and I --

THE CHAIRMAN: Yes.

MR PATEL: -- give the same disclaimer, as it were, that

Mr Jowell did at the outset of his submissions on that.

Further to your exchanges with Mr Jowell on Monday, sir, you may have seen that both parties have filed further notes --

THE CHAIRMAN: Yes.

MR PATEL: -- which we hope have been useful and they are in the advocates' bundle, but I will not go to those unless we need to.

THE CHAIRMAN: Thank you.

MR PATEL: In terms of the structure of my submission, the two main features of these funding packages are: (1) the litigation funding, and (2) the ATE insurance. I am going to take those in term.

If time, I had intended to deal with an issue in relation to Hausfeld's CFA and transparency, I do not know whether I will have time to get there, we have dealt with it in our written submissions.

So can I start with the litigation funding, sir, and before we get to some numbers, start with a bit of scene setting. As we say in our skeleton argument, the pursuit of this collective action beyond the CPO stage will be heavyweight and hard fought litigation. The proposed defendants are numerous, they are as well resourced as any defendants could be, and they have engaged representation from among the best firms of

solicitors and counsel available. To fight on a level playing field, a class representative must be equally well resourced. That being the case, the deeper the available war chest, the better the prospect of the class' interest being fully and fearlessly represented. We say that really should be an uncontroversial proposition: other things being equal, having more funding available to bring this litigation is better for the class. If funding becomes tight, on the other hand, the defendants can put pressure on the class representative to settle -- that would be bad news for the class -- work streams could be compromised, points can be overlooked, facts may not be fully investigated, documents not fully analysed. So the class' interests, we say, are unambiguously served by having more funding available, and given the centrality of the interests of the class on the question of carriage, it should take some doing to persuade the Tribunal that the enormous benefit conferred by the greater availability of funding should be outweighed by other factors relating to that funding.

Now, when we talk about "available", it is the expression I have used, what we mean is "contractually committed". That is the funding that you can say with confidence will probably be there because

funders have promised to provide it. Of course both parties expect their funders to behave reasonably in due course, but at the end of the day, a funding -- a request for funding, like a request for more after-the-event insurance, may come when the balance of power has shifted and the case may look less attractive. The funder's commercial priorities might have changed. If a big CAT case fails in the meantime the market could take fright. If a funder has taken on another CAT case, they may not want to increase their exposure to this one. The funders' investors may have become less keen on this as an asset class by the time they are called upon. So, we say, it is obvious, a contractual right is far more valuable than a hope or expectation of further funding.

And, of course, the fact that the funding is available does not mean you have to use it; it has been promised to you and it is there if you need it.

Are there any discernible benefits to the class of having less money available? We say, no. To the extent that it costs more, the class does not pay for it and that is because the cost the funding is paid out of undistributed damages. That is what both class representatives have agreed with their funders in their deeds of priorities and waterfall agreements.

What about the interests of the defendants? Does it impinge on fairness to them to have more litigation funding? Again, we say the answer to that is, plainly not. In terms of the inter-party costs, the money spent on the action, they will only ever pay the reasonable costs of bringing the claim, there is to be an assessment.

In terms of the costs of unrecovered costs and funding outlay, it comes out of undistributed damages, defendants do not pay, so the more funding that is available, it is better for the class and of no prejudice to the defendants, and on this topic everything else, we say, is smoke and mirrors.

Turning from those propositions to the numbers, can I start with establishing some objective facts about this from our neutral statement. If you can be shown, please, the advocates' bundle {AB/10/20}, you will see the table that is at the back of our neutral statement as annotated by Mr Evans. You will see there that is -- we have got a side by side comparison with various features. Mr Evans has helpfully included various details. On the amount, you will see it is common ground and that the amount of funding available to the O'Higgins PCR is 29.375 million, and the equivalent amount for Evans is now 22.487 million as of July 2021,

so this month. That was an increase we were told about last week from a figure of 19.6 that you will see in the evidence column. In absolute terms, that is a difference of 6.89 million between the amounts of funding available.

The next question is how much of this funding is available to fight the rest of the claim. Now, you might think that was a simple calculation involving taking the amount spent off the amount that you see in a table, but that is not a useful metric because it does not tell you the amount left in respect of conduct of the litigation. In particular, it does not tell you the amount which will disappear out of the pot automatically if a CPO is granted to one of the parties, and what I am talking about there is ATE deposit premiums.

Now, on Monday, Mr Jowell took you to Mr Evans' skeleton argument, and it is {AB/3/19}, and he showed you a comparison that was made in that skeleton argument. If that could be brought up, please. {AB/3/19}. Thank you.

You will see that in paragraph 55 there, we are told, right in the middle, Mr Evans has 15.9 available, and Mr O'Higgins has 16.243 available, and so, what he has said about that is, well, that is what is left, it

is even-stevens. Now, we say, that that is, Mr Jowell used the word "misleading". It is misleading in the sense that that is not the available funding for conducting the litigation, and can I make that submission good?

If you could be taken, please, to {AB/15A/18}, you will see a table which is appendixed to Mr Evans' neutral statement and this is described as the "Comparison of Mr Evans' and the O'Higgins PCR's funded costs", and in the right-hand column, those are our red-lining. I will try and take this as briefly as I can, I do not know if you have had a chance to look at this table, it is of some use. But what it shows you is the amount of funding that is expected to be spent pre-CPO and post-CPO, and this is how the issue arises. If you look at the ATE column, each party has an ATE column. Mr Evans' ATE, you will see, pre-CPO is 1.646 million, that is his deposit premiums for his ATE. O'Higgins' is 5.474 million, and that is because O'Higgins' funder has already paid all of the deposit premiums, bar a very small sliver in respect of this ATE.

Now, if you look under Mr Evans' figure of 1.646, there is a further 3.404 million. That is money that comes whistling out of the pot as soon as Mr Evans gets

his CPO. That is in respect of his existing ATE cover.

So, where we see, at the bottom of that big table, the figures 15.9 million, on the right, for Mr Evans, and 16.1 million for O'Higgins, those are the figures that we saw in the skeleton argument. The 15.9 figure to equate -- if we are comparing apples and apples, with the O'Higgins figure, we have to take that ATE premium off it, because that is money which is not for the litigation it is going to go for the ATE which has already been acquired. So that would bring you down to 12.5 million.

THE CHAIRMAN: Yes.

MR PATEL: Saying that they have got 15.9 and we have got 16.1 is, with respect, misleading.

Now, there are further adjustments to both of these figures, even when one gets to 12.5 for Mr Evans and 16.1-odd for us. Those adjustments arise -- they arise because these tables exclude the cost of anti-avoidance endorsements, AAEs. You will have read something about those, but they effectively reduce the rights of insurers not to pay under the terms of the insurance policies.

Now, the reason that these figures are not accounted for, they arise from -- those reasons arise from two omissions, one on each side of this carriage dispute.

We omitted to include the cost of those in the information we had provided and we have apologised for that, we filed a witness statement and we do apologise for it, if we have not. The amount that we omitted to account for is £1.5 million plus IBT, so 6.6 -- sorry, £1.68 million.

Mr Evans, on his part, omitted to obtain any anti-avoidance endorsement at all until last week or the week before, when we were told that he had obtained a quote and 2.884 million of funding for that.

Now, even -- the box on the right-hand side of this table, we have brought those figures into account. So, the 2.884, you will see, Mr Evans -- that is the money he needs for his AAE -- is included as a contingency in Mr Evans' table in the bottom row, and if you take that off the 12.5, which we get to for Mr Evans, and if you take our 1.68 off our 16, you will see that where you end up is a difference of 4.9 million. That is the money, if both parties have paid for their AAEs and all the rest of their deposit premiums for their insurance, that is the difference in funding that will be available for running this litigation for solicitors for counsel for disbursements.

To make -- to summarise that calculation, I think Mr Jowell took you to this, I will take you to it very

briefly. There is a table in our supplemental note, {AB/1A/3}, if you can be shown that, please. You will see in that table, it is all in the one place, you start with the total funding, the less pre-CPO expenses are from Mr Evans' own table, less future ATE commitments, which for us are the AAE premium, and for Mr Evans are the 3 million-odd and his 2.8 million AAE, and where you get to is 14-odd -- 14.5 left for us, 9.6 left for Mr Evans.

Now, can I raise a very quick point, because I am anticipating something Mr Williams may say about this, on these AAEs. Our position is that Mr O'Higgins, or O'Higgins PCR will acquire the AAEs if certified. Well, we do not say they necessarily get deducted from the funding, because Mr Purslow has stated in his third witness statement that if more money is needed, he would provide it. Now, our position is that committed funding is plainly better for the class than hopes and expectations, so we assume against ourselves that that funding -- that premium should be deducted from the existing funding.

Mr Evans' position is that he may not buy his anti-avoidance endorsement and, if not, he will have the 2.8 million extra as contingency. Now, we say that will not fly. To deploy a hackneyed expression about

having and eating cake, you cannot have your AAE premium and your ATE. If Mr Evans thought that his ATE was as good as the O'Higgins ATE without this anti-avoidance endorsement, he would not have obtained the quotes or the funding, which is precisely the right amount to pay for them, he would have just got some more funding and said "well, now I have got more funding and so the gap has closed". It is reasonable to suppose that if Mr Evans does get a CPO, the respondents will press him to buy this AAE, as, indeed, they pressed us to buy an AAE in respect of our policies, and that he will do so. So that is the right comparison, we say, and on any metric, we have a lot left -- a lot more left in the tank than the Evans PCR.

Now, that is, as it were, the figures.

Can I deal then with the question of adequacy. In Mr Evans' carriage submissions -- it is {A/5/59}, paragraph 155, it is said:

"Once it is established that a PCR has funding which meets the threshold requirements of Rule 78, it is submitted that a comparison of the quantity of funding available to each PCR in absolute terms is unlikely to be of assistance."

You can see that there on paragraph 155.

What they are saying is, once you are satisfied that

each PCR has adequate funding, the amount is not a point of distinction. We have two responses to that. The first is that it assumes that the Tribunal can, today, say what this litigation will cost. It cannot. Nobody can. We can make educated assumptions and have done so, but the cost of this case, as at today, is unknown. Other things being equal, the best interests of the class would be served by certifying the PCR with more funding available.

The second point, however, is that in this case there is a real concern about whether the Evans PCR can carry out this case within budget, and that concern jumps off the page from the document at {AB/15A/19}. This is appendix 2 to the Evans neutral statement, if it can be shown, please. {AB/15A/19}. Thank you.

Now, this appendix 2 is a comparison of a recoverable inter partes costs, so solicitors fees are shown at their full rates, not their reduced rates, but the exercise is useful because you can see what has been spent pre-CPO as compared to post CPO, and you can see how much each party has budgeted to spend in respect of solicitors' costs and disbursements for each phase.

Now, whilst it is, in some respects, difficult to know today how much phases of this litigation will cost, there is some element of proof of the pudding in

the cake which has been eaten. Both parties have exceeded their pre-CPO budgets, principally, because of the carriage dispute. To make an obvious point, the Evans PCR should have seen that coming because they issued when we had already issued.

Pre-CPO, you will see from this table that Hausfeld expected to have spent £7.2 million, that includes VAT. So, that is their solicitors' fees pre-CPO.

If you look down that column, you will see that the total solicitors' fees for Hausfeld they expect to spend in this litigation is £12 million of Hausfeld's fees. So what we are told is that Hausfeld have already spent 60% of their budget for solicitors' fees for this entire case. That is an astonishing statistic, sir. The remaining phases of this case, witness statements, experts, settlement, pre-trial and trial, and this assumes an eight-week trial before you, those have to be satisfied for 40% of that solicitor fee budget.

Now, what has happened is that the pre-CPO budget has ballooned because it has ended up costing more, but these later phases just have not been increased. It is safe to say that the rest of this budget is totally unrealistic for completing this case to trial.

Now, Mr Jowell addressed you on some of the detail between these -- comparing these two tables without

the table in front him. I am not going to go through the numbers, I do not have time, but I would urge you, when considering this issue, to look at the amounts for solicitors' fees and disbursements in the respective columns. You will see that on O'Higgins' side, we have spent more like 30%, there is a lot left in the tank solicitors' fees-wise, there is a lot left in the tank disbursement-wise, and the same can be said of the total column. So, while we do not know today what this litigation will cost, there are real reasons to think that the Evans budget will be inadequate.

The next piece I need to deal with is cost of funding. Now, it is possible to end up very far in the weeds on this issue and we do not propose to go there because, not least, of the limited time available. There are two related issues arising: one is, how much the litigation funders get by way of return, and the second is, how much comes out of the pot of distributed damages in total. The difference between the two being, essentially, unrecovered costs as well as the other contingent liability, so ATE premia, which are contingent on success, and solicitors' success fees, which are not recoverable inter partes.

Our position, our overarching position is that there is nothing between the parties which really assists you

in determining the carriage dispute on this question of costs of fund. We have six points in that regard.

The first point, which is an obvious point, is that the class does not pay and the defendants do not pay for this funding, it comes out of unrecovered -- undistributed damages. I have made that point already.

The second point is that it is, in fact, common ground that there is very little between us, and the terms of that consensus are quite striking. One sees in our supplemental note, where I have quoted it, it is {AB/1A/3}, if you can be shown that. In the footnote, I have quoted the two -- each parties' respective submissions. It is {AB/1A/3}, please. Thank you. In footnote 2, you will see that in Evans carriage submissions, it was said:

"Overall, the cost of funding available to each of the PCRs is broadly similar and Mr Evans does not advance this as a significant point of distinction."

And we had said in response:

"The O'Higgins PCR agrees with the statement at paragraph 157 ... it is not a significant point of distinction."

Now, we see from more recent documents filed by my learned friends that they seem to be shifting away from that position and suggesting that there is a point of

distinction here. Well, that is why I draw your attention to this consensus. This consensus is right and we can see that from the most recent cost comparison filed by the Evans PCR and that appears at {D/14.8/2}. It is exhibited to Mr Maton's sixth witness statement, which was filed on Monday of last week, if that could be shown, please. And what Mr Maton has done here is set out for various judgment scenarios what the funders would walk away with. There are various assumptions that go into these, but I am not going to get into the weeds of those, because one does not need to. In fact, the similarity between the funder returns in the middle, the non-extreme outcomes, is quite remarkable. I mean, the funder returns are identical, near enough, at 34%, at 40% they are very close, at 65% they are very close. So, the statement in the consensus is made good by this document. There is very little between the funders.

The second observation that we have about this document is, of course, the outcome all depends on the assumptions that you plug in. In our written carriage submissions, we had identified that Therium probably gets cheaper at around £250 million of recovery and we did a calculation at £400 million, which is not shown in this table, where Therium is much cheaper.

I am not going to take you to that, but the point is, it all depends what you put in. That calculation is at {A/9/34} for the transcript, we do not need to go to it. So, the common ground is right, sir, there is not much between the parties.

My third point in relation to the cost of funding though, is that it is, on the state of the evidence before you, impossible to work out which of the PCRs' funding packages is likely to be more expensive in the end. What Mr Evans says about that is, in the majority of the scenarios which we have calculated, the Evans PCR funding is cheaper. That, sir, involves a statistical faux pas. It implicitly invites you to assume that all these outcomes are equally likely. It is equally likely that the class will end up with £2.7 billion of damages as it is half £1 billion of damages. Well, that is obviously not correct. There is a bell curve, but at this stage, we do not know how high it is, how wide it is or where it sits. It is possible that it peaks in the range where Therium is cheaper than Donnybrook, Mr Evans' funder, we just do not know. So we say it is not possible to predict any funding outcomes and these calculations are illustrative and interesting, but do not provide you with a significant point of distinction.

If the analysis of cost of funding is extended to the question of how much will come out of the pot, then the comparative exercise really starts to break down. I am not going to take you to the documents, again, but you may have seen some quite substantial tables coming in exhibited to witness statements. Evans did an exercise and we tried to replicate the exercise; Evans did not like the exercise we did and poked some holes in it. We do not agree with all their points. I am not going to take you to the granular detail of all of that. Our point is that it is not possible to create a pure read across in all of these scenarios. To take an example, our ATE contingent premiums are staged. So, if you make a table with settlements scenarios, a great deal turns on when you assume the case settles, whether it is after disclosure before -- two months before trial, there are three different periods.

So far as O'Higgins is concerned, that is an arbitrary assumption, but it makes a big difference. It makes no difference to Evans though, because his ATE costs are single hit so far as contingent is concerned.

So, how can one come up with any sensible or neutral comparison of these settlement scenarios? Answer: you cannot. We say the documents give ballpark figures based on a large number of assumptions and that's it.

We also noted that in Evans' skeleton argument they made the point that one of the reasons why, in various scenarios, our total funds coming out of this pot are higher is because our ATE costs are higher. Now, of course, if we have to pay all of our ATE costs, that is right. We do not think that is right in every scenario, but it may well be right. But to state the obvious, in those circumstances, O'Higgins' funding will be more expensive because he is getting a lot more for his money: he gets £33 million of ATE insurance whereas Evans at paid for £23 million. So the comparisons, in a very real sense, are apples and pears.

Finally on this point -- and I am going to skip my fifth point. If you are counting, I am going to skip one and we will go to the sixth point immediately. If and to the extent that it is suggested that taking more out of the pot would be prejudicial to charity -- of course, the charity obtains the remainder in the pot -- it is the case that the Tribunal always has a say. So, certainly in opt-out proceedings, the Tribunal decides how much comes out of the judgment pot at the end, and, as decided in Merricks, the Tribunal can take evidence about whether the amount that the funder is seeking is reasonable and commercially normal at the time, and in respect of a settlement, the Tribunal can refuse to

approve on the basis that these parties are getting too much, the funder's getting too much, the ATE insurer's get too much, so there is always a safety valve.

For all those reasons, we say that the question of cost of funding is, on close analysis, not -- analysis not one which in this case gives the Tribunal any point of distinction between the PCRs, and I have dealt with at that a little length because we anticipate that Mr Williams is going to be focusing on that point from the further submissions that were filed, unbidden, at the end of his matrix note on Tuesday.

Sir, that brings me to ATE insurance, which I should be shorter on, I hope. I will just check how much time I have been given, because I know that the break overran. I am in your hands, but I think if I can have another six or seven minutes ...

THE CHAIRMAN: No, do carry on.

MR PATEL: I am very grateful sir.

In respect of ATE insurance, there are three points really. One is the amount, the second is the terms and the third is the cost and how each of these factors feeds into the question of the decision that you have to make.

In respect of amount, we have £33.5 million of ATE insurance and the Evans PCR has £23, so that is almost

50% more. What is the relevance of the amount? You had a brief exchange with Mr Jowell about this earlier, sir. Well, firstly, fairness to the defendants of course requires that they are as well protected as reasonably possible if the claim turns out to be a bad one and you are required to look at the question of fairness to the defendants. But more importantly, we echo -- I echo the point made by Mr Jowell. This is litigation against well-resourced defendants who we all know will spare no expense in fighting this case, and the PCR, with more ATE, is better protected and better able to progress the case fearlessly without concerns of liabilities.

One sees this sort of scenario all the time. Let us suppose at some point we get some costs information from the defendant and at that point they are saying that the amount that they have incurred is above the amount of ATE that is available to the PCR, and then they make an offer, which the class would improve on if the claim went forward. That is a crunch point for a PCR. There is pressure on him to settle, particularly for Mr Evans who is a party, as opposed to the SPV, and whenever that point comes, whatever the actual numbers are, the O'Higgins PCR will be in the better position because he is better protected, he has got a greater amount of protection. It is vastly preferable to the class to

have a greater amount of protection, and we say on this, therefore, the O'Higgins PCR is far head.

You made the point, sir, earlier to Mr Jowell that of course the court could simply refuse to order -- to make a costs order against a class representative in excess of the amount of ATE he has. One sees that. There are arguments up for grabs in this jurisdiction which, of course, have not yet been heard. One can see that the defendants would resist that strongly and say, "Well, why should we be capped at that amount; why didn't you get more; we told us it was going to cost such and such". It is certainly not a foregone conclusion that the PCR would escape that liability and so it is bound to influence his thinking.

Now, despite the bizarre protestations to the contrary from the Evans PCR, we say there really is no downside to having more, because the class does not pay for it and the defendants do not pay for it. The ATE insurers pay the risk and the funder bears the risk.

Now, responding to two points about, the first is that Mr Evans says, "Well, what we have got is likely to be enough". Again, the defendants have not provided any costs information, but let us look at the pudding that we looked at a moment ago {AB/15A/19}. This is

the amount of recoverable costs spent by Evans and O'Higgins. You will see that Evans have spent £11.8 billion, O'Higgins will have spent £9.2 million. Between the two PCRs, they have spent £21 million in recoverable costs at the CPO stage, and are these six banks going to spend any less than that from the start of this case through to an eight week trial? We say we only need to make that observation for the answer to be clear.

Now, of course their costs will be assessed, but even so, the figures that we are playing with do not leave Mr Evans with a greater deal of comfort. So, the mantra that has been deployed by Evans, which is that O'Higgins has taken out insurance "for the sake of it" -- that is the expression they use -- we really have not. We think there is a good chance we are going to need it and need what we have in place, and the numbers do bear that out.

The second responsive point is that it is said, "Well, if we need more, then we will get it", and we repeat the point that obviously a bird in the hand is better, it is better to have the protection locked in now, and whether ATE will be available in the future, on what terms, is unknown; we do not know what the risk profile of the case will look like then. If Mr Evans

starts to feel exposed and decides to get more ATE, and it proves difficult or expensive, or he is struggling to get more funding from Donnybrook to pay for it, there is a major risk for the class of undersettlement and O'Higgins is better insulated from that risk.

In relation to terms, all I will say is that if Evans gets his AAE, there will be no material difference between the parties in terms of the prospect of insurers exercising any contractual rights not to pay. We say that if he does not do, then O'Higgins is in the better position, and we have set out our submissions on that in writing in {A/4/17}, and I will leave it for the transcript.

Now, finally, a point is made about costs of this ATE, and this really is a non-point. The point is said -- made against us that ATE has cost more. It has not. We have done a table, which is at {AB/8A}. All of the figures in that table -- if you can be shown it very briefly -- are agreed. {AB/8A}, please. Thank you. All of the figures in this are grade, because they come from Mr Evans' annotations on our neutral statement. They show the cover in the first column and then all the deposits, but they do not all add up, they are different stage premiums. You can look at in your own time. But the assertion that we were expensive was

based on excluding Evans' AAE from his table. If you put it back in, you will see the cost of insurance is very similar, we are slightly cheaper, but nothing turns on it, because, again, the class does not have to pay for it.

Unless I can assist further, that is a whistle-stop tour, as it were, of our submissions on funding and ATE.

THE CHAIRMAN: No, I am very grateful, Mr Patel. Thank you very much.

Submissions by MR WILLIAMS

MR WILLIAMS: Good afternoon, sir. Can I check that you can hear me?

THE CHAIRMAN: Yes, indeed.

MR WILLIAMS: Thank you.

Well, sir, I appear to have inherited the graveyard shift, what might be thought of as something of a graveyard subject. Any glamour will come from Mr Jamie Carpenter QC, who appears with me to my right. I think his glamour is somewhat diminished by his being off camera, but he can come on to camera, if that becomes necessary.

Sir, can I check at the outset -- I appreciate that we have run over slightly -- I am in no sense bellyaching about that -- I would just like to have some guidance from the Tribunal as to what time you would

like to sit.

THE CHAIRMAN: Well, we are anxious to ensure that everyone has the time that they are expected to have. What I am minded to do is to say that you run for 15 minutes this evening and we will start at 10.15 tomorrow to enable you to catch up with the last 15 minutes of your submissions then, if that works for you.

NEW SPEAKER: Yes, I am very much obliged, sir. Thank you.

THE CHAIRMAN: Very good.

MR WILLIAMS: Sir, well, you are aware of the question: to what extent should the differences in the parties' funding provisions impact on the rival applications? Now, we, for Mr Evans, accept that Mr O'Higgins' application has greater provision for after-the-event insurance and also for post-CPO costs, if you include the projected post-trial costs, which are principally the costs of distribution, and for reasons I am going to come to, however, I say that you should not include those in the calculation, in which case the picture is different. But even if we are wrong about that, as you have seen from our written submissions, our theme is that greater does not mean better.

Now, of course there must be a threshold, and we recognise this. Any serious applicant for carriage must have sufficient provision in place, both for their own

costs and for adverse costs, if I can use that jargon, which I suspect will be familiar. But we say that once the threshold is crossed, then funding retreats in importance, and indeed that it may be contrary to the interests of the class, the defendants and the governing principles of the Tribunal itself in rule 4 for a superabundance to trump sufficiency, in particular if that superabundance comes prematurely in the litigation and at significantly increased cost.

One of the reasons for that is -- and one of the vices to it is that it assumes that the funding and insurance position is static -- and it is my learned friend Mr Patel's "bird in the hand" point -- rather than something which can, and indeed should, develop organically with reference to actual developments in the litigation rather than on a precautionary principle in the face of known unknowns, so that, for example, ATE is procured before estimates of the defendants' costs are even available, which may exceed the amount which the defendants ever claim, or which alternatively, and just as bad, may encourage defendants to spend more than they otherwise would have spent.

Now, sir, before we can debate those questions, we do need to identify the relevant index points, and I am grateful to my learned friend Mr Patel for the very

crisp way in which he has begun that exercise. Like him I will focus, firstly, on our own costs, and secondly then on the provision for the defendants' costs, which of course means the ATE.

Now, sir, as to our own costs, to use a word I have used already, here too there has been a superabundance of written material which presents evolving figures in evolving ways. To cut through it, we say the relevant starting point is the amount available to the parties post-certification, because what -- the water that is under the bridge is under the bridge, and in terms of working out who is suitable to carry the case forward, if forward it will go, one needs to look at the prospective spend not the historic spend. The relevant real world figures, we say, on current information are 14.56 million for O'Higgins versus 12.55 million for Evans. Those are obviously slightly rounded figures. So that, on the face of it, does give O'Higgins a £2 million advantage.

Now, just before I address that seeming advantage and explain why I say it is not in fact an advantage at all, just to make those figures good, can I ask that we put up {AB/1A/3}, which is the O'Higgins' supplemental note. That is {AB/1 A/3}. So, that is where they have collected the figures together as they see them, and you

can see that for O'Higgins, if I take their column, it discloses original funding of 29.3 million, or 29.4 million-odd, to round it, less their pre-CPO expenses, less their future ATE, leaving them 14.563 million. So that is where I get that figure from, 14.563.

The figure we do not agree is the 9.661 million figure which is shown for our costs, and this is a point which Mr Patel has obviously anticipated and, quite appropriately from an advocate's perspective, attempted to spike my guns, because it presupposes that we will be spending the sum on the anti-avoidance endorsement for the ATE. So, when, in that chart -- or table that we have up, we see a deduction for Mr Evans' budget of 6.288 million for future ATE, that is a deduction which includes the costs of the anti-avoidance endorsement provisions which Mr Evans says are unnecessary and which we say, dispositively of this issue, the defendants have not asked for. This is not a case, in contrast to the position of the O'Higgins application, where the defendants have developed a sustained attack on our ATE policies requiring AAE to be procured, and though they had the facility, for example, in the same way that O'Higgins has done, to make comments on our neutral statement of funding to point out the inadequacies which

they perceive vis-á-vis their own legitimate interests, they have not done that, and we say they have not done that for a good reason.

So it is important to understand that although we have put forward a -- we have procured a facility for after -- for AAE -- for an AAE provision at a quoted cost of 2.884 million, that is not something which we have paid for and it is at present not something that we have any intention of paying for, and, as is explained in Mr Chopin's fifth statement, the funder has made that sum available not as a hypothecated sum dedicated to AAE but as part of the litigation contingency, so it would be available for other costs, if so required. The reference for that is {D/15/2} and {D/15/3}, if they could both be put up momentarily. So, it is paragraphs 9 to 11, which I will just -- of Mr Chopin's fifth statement, if I could just pause momentarily.

(Pause)

MR LOMAS: Can we move it up so that we can see the whole of paragraph 9, please.

(Pause)

THE CHAIRMAN: So, Mr Williams, when we are doing our comparison, you want us to effect a comparison on the basis that this money is available but that the endorsements are not taken up?

MR WILLIAMS: Indeed.

If, perhaps -- I hope, in the time I have left, this will fit quite neatly as a self-contained subject which I can deal with in about five minutes. Can I just assist the Tribunal as to why we say that the anti-endorsement provisions are not in fact required and why the banks' stance in that respect thus far is an entirely unremarkable one.

That is because our policies, which, as will be seen, are cheaper -- once you -- once you set the AAE aside, they are substantially cheaper -- it is because they already include an entirely sufficient anti-avoidance provision, and you have a copy of the policy in the Evans bundle {EV/16/7}. If I could ask the Opus to enlarge so that clause 4.7, which is towards the top of the page, can be clearly seen. Thank you.

So, what one sees there is:

"Rescission/avoidance by insurer.

"Save for the conditions in clause 4.'2 Fair presentation', the insurer waives its right to rescind or avoid the Policy, on any reasons other than non-payment of Paid Premium ..."

And so on.

THE CHAIRMAN: We better have a look at clause 4.2, had we

not.

MR WILLIAMS: I was just coming to that, sir.

THE CHAIRMAN: Ah, thank you.

MR WILLIAMS: Thank you, sir.

Opus, if you can now revert back to page 5 of the same divider, please {EV/16/5}, and if you could enlarge 4.2, which is at the bottom quarter of the page.

So, shall I just pause? It is 4.2.1 and 4.2.3 that is material.

THE CHAIRMAN: Yes, thank you, we will read them.

(Pause)

MR WILLIAMS: So, the qualification of 4.2, which I appreciate is now -- certainly if your screen is like mine, it is no longer visible, but the qualification there is limited to breaches of the duty of fair presentation which are deliberate or reckless.

Now, my learned friends for O'Higgins raised the possibility in their written emanations that although the insurer can only avoid in very limited and improbable circumstances, they nevertheless may have a contractual right to withhold an indemnity absent avoidance. But a telling starting point, sir, to this is, even at their most adversarial in a strongly adversarial document, the O'Higgins team grant that these scenarios are theoretical, and you get that in

their annotation to our own neutral summary. That is {AB/15A/16}. So it is the -- literally the rubric, in the sense that it is read, where they refer to some policy conditions:

"Each set of conditions followed by proviso that absent deliberate or reckless breach, Insurers must indemnify/may not cancel the policy. There is ... a theoretical risk of non-payment based on such conduct ([such as] a reckless failure to notify a claim). [That] would be contractually distinct from 'avoidance' ..."

Now, it is hardly surprising that, even in that adversarial document, they are driven to qualify what they say by saying this is something which is theoretically possible, because quite apart from the improbability of Mr Evans not notifying a claim -- and in fact a very similar point was given extremely short shrift by the President in the Trucks litigation, which perhaps I will show you in the morning before we move on to the next theme, but even here too you will see they are referring to clause 4.5.

With apologies for jumping around, can I ask Opus, before I close for the evening, to go back to {EV/16/6}, and if I can ask some focus on 4.5, which is in the lower centre of the page. If one actually gets to

4.5.3, which is obviously at the bottom of the clause:

"If there is a breach of clause 4.5 by the Insured but such breach is not deliberate or reckless or has been remedied ... the Insurer shall not be entitled to terminate the Policy."

So, even in this theoretical risk under clause 4.5, for it to eventuate, Mr Evans has to, for some unquantifiable reason, fail to notify a claim, to do so either as a deliberate act or with reckless indifference to the financial peril he would cause himself by not notifying it, but even if both those preconditions are satisfied, the failure to notify must be irremediable, and obviously a failure to notify usually will not be irremediable, because you can rectify by giving the notification you should have given in the first place.

Then one also sees -- and perhaps this will be the natural point at which to pause, to draw stumps for the evening -- what 4.5 is envisaging is that the insurer might have a right to terminate the policy earlier if there is some breach of 4.5. But, sir, insurer's right to terminate early is itself codified by a clause on the next page. That is page 7 of the same divider, if Opus could shift that up, please {EV/16/7}. Thank you. If I could ask for a focus on 4.8, which is

the, sort of, middle third of the page. You will see, sir, that is headed, "Withdraw of indemnity/cancellation by insurer", and you see at 4.8.2:

"In the event that the Insurer withdraws the indemnity/cancels the Policy under ... clause 4.8 then the Insured may still submit a claim in accordance with the terms and conditions of this Policy which shall be restricted to Opponent's Costs incurred prior to the date of the Insurer's written notification withdrawing the indemnity/cancelling the Policy ..."

At 4.8.3:

"If the Insurer withdraws the indemnity/cancels the Policy, and the Insured continues to pursue the ... Action at their own expense, then the Insurer's liability pursuant to any claim under this Policy will be restricted to those Opponent's Costs incurred prior to the date of the Insurer's written notification taking effect."

So, not only can the contractual term at 4.5 only operate in the highly improbable circumstances of Mr Evans both committing some reckless or deliberate breach of the policy directly in opposition to his own interest, which is irremediable, but any right on to cancel which it gives the insurer can only operate prospectively in any event.

So, when one sees those things, in our respectful submission, one well understands why, in contrast to the position with the off-the-shelf policies which O'Higgins took out, Mr Evans saw no need to negotiate or incur the very substantial costs of further anti-avoidance endorsements. He procured a facility in the run-up to the hearing out of an abundance of caution, but he has not incurred the costs and he does not propose to incur the costs for the reasons I have given.

So, sir, subject to showing you what the president had to say about entirely fanciful risks of this sort in the Trucks litigation, that is my submission about the ATE policies -- endorsements, and I wonder if that is an appropriate time to pause until 10.15.

THE CHAIRMAN: Yes, well, thank you very much. We will adjourn until then. Thank you all very much.

MR WILLIAMS: Thank you, sir, good afternoon.

THE CHAIRMAN: Good afternoon.

(4.59 pm)

(The hearing adjourned until 10.15 am on Friday, 16 July 2021)

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