**IN THE COMPETITION APPEAL TRIBUNAL**

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

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

Friday 16 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

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# A P P E A R A N C E S

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|---|---|---|
| **Michael O'Higgins FX Class Representative Limited** | Scott+Scott UK LLP | Daniel Jowell QC<br>Gerard Rothschild<br>Charlotte Thomas |
| **Barclays** | Baker & McKenzie LLP | Mark Hoskins QC |
| **Citibank** | Allen & Overy LLP | Max Evans |
| **JPMorgan** | Slaughter and May | Sarah Ford QC<br>Daisy Mackersie |
| **NatWest / RBS** | Macfarlanes LLP | Tom Pascoe |
| **UBS AG** | Gibson, Dunn & Crutcher UK LLP | Brian Kennelly QC<br>Paul Luckhurst<br>Hollie Higgins |
| **Phillip Evans** | Hausfeld & Co. LLP | Aidan Robertson QC<br>Victoria Wakefield QC<br>David Baily<br>Aaron Khan |
| **MUFG** | Herbert Smith Freehills LLP | Ronit Kreisberger QC<br>Thomas Sebastian |

Friday, 16 July 2021

(10.15 am)

THE CHAIRMAN: Good morning, everyone.

MR WILLIAMS: Good morning, sir.

THE CHAIRMAN: Mr Williams, if you wait until our live stream comes up, I will indicate when you should begin.

MR WILLIAMS: Very good, sir.

THE ASSOCIATE: We are live.

THE CHAIRMAN: Mr Williams, I will give my usual warning. These are public proceedings but being conducted remotely. Because they are being live streamed, I should make clear that that live stream should not be recorded, photographed, broadcast or retransmitted in any way, shape or form. Obviously a transcript and recording is being made at this end, but that is for the records of the public.

Mr Williams, over to you.

MR WILLIAMS: Thank you, sir.

Submissions by MR WILLIAMS (continued)

Sir, I am sorry to begin with dispiriting news, but it has been agreed internally to Mr Evans' team that I will have somewhat longer than initially planned, so I may go on as long as 11 o'clock, but of course, that comes out of our time allowance and does not impact on any other parties.

THE CHAIRMAN: (inaudible).

MR WILLIAMS: Thank you, sir.

Yesterday, I was arguing that so far as our costs are concerned, the relevant point of comparison was the funds the parties have available going forwards and that Mr O'Higgins' reckoning about those funds is immediately out by almost £2.9 million, because he wrongly treats -- it is -- precisely, it is £2.844 million that we have added to our contingency -- as irretrievably hypothecated to the anti-avoidance endorsement or AAE, which we say we will not, in fact, incept. Of course, I ended yesterday by showing you that our policies already contain an anti-avoidance provision, so that the circumstances in which the insurers could, in fact, withhold cover are limited to ones which are wildly unlikely to eventuate, like a deliberate and irremediable failure by Mr Evans, contrary to his own interests, to notify a claim.

Just a few further notes to bring that part of my submission to a conclusion. Firstly, I pointed out yesterday that the banks, who here are the parties whose interests matter, had taken no point on our coverage in stark contrast to their position on O'Higgins, where they actually issued an application for security because they said that the O'Higgins ATE was inadequate, and as

I understand it, it was that which led to Mr O'Higgins needing to purchase anti-avoidance endorsements.

Just for completeness on that, and without necessarily turning it up, sir, at paragraph 36 of our neutral statement, we asserted in terms that, to the best of our knowledge, the banks took no point on the adequacy of our insurance policies or the ability of the insurers to withhold indemnity. That submission was proffered to the banks for comment in the same way as it was to Mr O'Higgins and they do not comment on it, so that does appear to be an uncontroversial assertion on our part.

That difference in approach between our insurance and -- unendorsed, and Mr O'Higgins' insurance unendorsed is not surprising, because if you look at Mr O'Higgins' after the event in its original form -- and again, I do not suggest we take up time turning it up now, but for the transcript, it is at {F/2} -- if you look at that you will find that not only did the O'Higgins insurers have completely unfettered common law rights to avoid ab initio in the event of any misrepresentation pre-inception, and that was clause 9, but they could also exclude cover in the event of any loss resulting from a delay or a default or a breach of the rules by Mr O'Higgins, or if, for example,

Mr O'Higgins had the temerity not to follow the advice which his lawyers gave him. So, it was a result of all of that that OH-- O'Higgins had to purchase AAE to fend off security in a way that we have not and will not. As you will see in due course, by obtaining policies on standard terms and then having to go out into the market ex post facto to purchase AAE in order to fend off the inevitable resulting applications for security for the banks, the costs of ATE procured by Mr O'Higgins, allowing -- even allowing for the fact that he has got further coverage in terms of the amount of indemnity, is in fact considerably greater than the amount that Mr Evans has had to spend to get policies which already include anti-avoidance endorsement. Really, it is for the same reason that the table Mr Patel showed you yesterday suggesting that costs of insurance was about the same, with respect to him, that table is falsified because it falsely assumes that we will be spending 2.884 million on AAE when we will not be, and as soon as you remove that assumption, his own table shows that the O'Higgins insurance is considerably more expensive.

Now, I have already suggested and it is a suggestion I will make also in the context of -- later, in the context of whether or not you just look at funding on the -- at the sort of particular punctum temporis

that this argument gets in front of the Tribunal, or do you look at it in the real world and also take into account the fact that further funding is inevitably going to be available, if one needs it, in an ostensibly meritorious claim which people, as we can see today, are fighting to bring. That proposition is that in looking at all these matters, in our submission, the Tribunal takes a pragmatic and real world approach and assumes here, in the context of ATE, that class representatives act rationally in their own interests, and it makes that assumption precisely because it is an entirely safe, real world assumption. The Tribunal takes into account, for example, when looking at the risks that insurers will not honour indemnities, that these are not personal injury cases or cases of alleged fraud, where claimants might not always be honest, and instead recognise that follow-on competition claims conducted by class representatives do not turn on the personal evidence of the class representatives, still less on whether or not the class representative conducts the proceedings honestly. In those circumstances, the risk, for example, of an insurance policy being invalidated because of a deliberate or wilful breach by a class representative is simply unreal.

Sir, just to give the Tribunal an illustration of

that pragmatic approach, I do invite you to turn up the President's decision in *UK Trucks*, which is {AUTH/29}, and I want to show you two passages. The first is at page 38 {AUTH/29/38}, and if I could take it at paragraph 83, which is at the top the page. This is in the context of the banks resisting certification on the basis that provision for their costs was insufficient or inadequate. It was furnished through anti -- it was furnished through ATE policies and what is said at paragraph 83, and there is a reference to *Premier Motorauctions* which is a court decision about security for costs, and as they say:

"As the judgment there made clear, the risk of avoidance of the policy, or exclusion of cover (which in practical terms is much the same thing) has to be assessed on the facts of the case itself."

*Premier Motorauctions* is a case where it was being alleged that a firm of accountants and a bank had conspired to depress a company's assets and acquire them as an undervalue, so the case turned heavily on truthfulness.

"In a case of that kind, the prospect of insurance after a trial having grounds to assert material non-disclosure could not be dismissed as illusory. But the present proceedings have a very different character.

They are follow-on claims based on the Decision finding a serious infringement, where the issues are causation and quantum."

In that case, the proposed class representative was a trade body:

"[It] is a responsible, well-established body, and we regard as minimal the risk that it would be reckless, let alone fraudulent in providing information to the insurers."

And obviously, we say mutatis mutandis, exactly the same assumption can be made of Mr Evans bringing his follow-on claim.

Then, if I could just invite Opus to turn up pages 39 and 40 {AUTH/29/39-40} of the same document, please. Thank you.

If -- on page 39, it is just the bottom two lines. So there is a reference to "the OEMs", that is the original engine manufacturers, I believe. They make -- so it notes, at 88, they are taking more fundamental objection to the structure:

"A costs order against UKTC ..."

Which -- was that an SPV?

Yes, that was an SPV which was established to bring that class action.

"... will only result in payment under the relevant

ATE policy if UKTC demands payment ..."

So this is again the risk that it is posited, albeit realistically prefaced with the word "theoretically" in my learned friend's submissions, but they nevertheless posit theoretically that Mr Evans might, for some reason, fail to notify a claim, it is essentially the same point that is being asserted against UK Trucks.

And 89, Mr Justice Roth says:

"We regard this submission as completely unrealistic. We have referred to the experienced board of directors of [the SPV]. If a costs order was made against [them], for which it had a right of indemnity ... the suggestion [they] would choose to default on the company's legal liability rather than enforce [a] contractual right to ensure payment is in our view fanciful. And if such a demand was made ... there is no conceivable reason why Yarcombe [that was the funder] would not claim under the policy for which it had paid [a] substantial premium."

So again, sir, we do say that that shows that really the Tribunal need not be concerned with the possibility that Mr Evans might, for example, deliberately make an irremediable breach of, for example, his notification obligation.

So, sir, that is the background to us saying that

the respective of positions on own costs are not even, as a starting point, the 14.5 million versus the 9.6 million-odd as stated in my learned friend's supplemental note, but in fact, 14.564 million versus 12.54 million once the extra -- the addition to our contingency is taken into account. So, even as a starting point, the difference is just over £2 million.

Obviously, sir, I recognise that that immediately invites the response to that £2 million is still £2 million, it is a very tidy sum, but that then begs the question of why Mr O'Higgins says that an extra £2 million is required. This is where we invite the Tribunal to note this: the whole of the difference and more besides, is accounted for by the difference in the parties' budgets for just one thing, which is the post-trial costs, principally the distribution of realised funds. If I can make that good by asking Opus to turn up {AB/15A/18}, please.

MR LOMAS: Mr Williams, we are in budgets here. There is no constraint on the parties to use those budget levels as caps, they can trade between them, so at the end of the day it is a pot of money that is available and the budgets are just essentially for helping estimate and control.

MR WILLIAMS: Well, clearly that is ultimately correct, and -- but nevertheless, if one is looking at how, you know -- the funding has been organised in order to reflect the budgets which the parties think they need. We -- it is not part of our case that we wanted an extra 2 million and we could not get it. We have not incurred the expense of getting £2 million which, at the present, we say we do not need, and if one tests whether or not we need it, then in my respectful submission, it is useful to see, well, why does O'Higgins say they need it? The reason they say they need it is the whole of that £2 million difference and more besides. It is accounted for by the difference in what the parties predict will need to be spent post-trial, and the proposition which I am about to make to the Tribunal is post-trial expenditure in these circumstances is irrelevant, it is a red herring, for a simple reason. If the cases fail, then there is never going to be any post-trial expenditure. If the cases succeed -- and this is common ground between O'Higgins and myself -- the banks will have to pay for the distribution anyway.

So the reality is a difference in opinion between the parties as to the costs of distribution really is neither here nor there, because you only get to distribution if you have won, and if you have won, you

are getting the money in from the banks to do it. So, even if O'Higgins is completely vindicated that we have undercooked distribution, by the time we get to distribution it simply will not matter. That is the proposition.

If I -- just to make the figures good -- I am grateful to Opus for putting it up -- this is one of the areas of stark divergence between the two sides which both my learned friends Mr Jowell and Mr Patel have already emphasised, because they say it does entail this undercooking. You see that on the left-hand side, for post-trial notice and administration, we have catered for just under 857,000 and on their side it is 3 million. So, sir, that is a difference of 2.175 million, it is the whole of the difference between our pots -- our effective pots. So, on one view, the whole of the argument about the relative adequacy of future funding comes down to who is right about the likely cost of distribution, but in fact, as I have said already, the parties in fact agree that by the time you get to distribution the banks are paying for it anyway.

So, sir, in fact, if you set the cost of distribution to one side -- and I am not going to make a point of this because it only amounts to about quarter

of a million, but we actually have got slightly more money than them if our assumption about distribution is right.

MR LOMAS: Mr Williams, sorry, a question. It is a very fair point that you are making, I had not considered that. So why is it in the budget then?

MR WILLIAMS: Well, if I may respectfully say so, that, in turn, is a fair point. Obviously, there is an attempt to be -- there is an attempt to be holistic and the function of the budget is obviously not also to show what do the parties need to bring the claim, but what are the potential costs to the bank and the banks and the potential deductions to which both sides need to aspire from the undistributed damages, and of course, the figures are relevant data points for that exercise.

So, the only point that I am making, but for the purposes of this exercise, we say that they can actually really be put to one side. Clearly also, it may very well be by the time you get to distribution you have got so the sort of interim payment from the banks, but if you do not have an interim payment from the banks, it illustrates what the funder sort of needs to put up to enable pay-as-you-go. But, as I say, one suspects by the time you get to distribution, you do not even need that because you probably do have some sort of

payment on account.

As I say, it is common ground between Mr O'Higgins' team and us that the banks will pay for distribution. I appreciate the banks may not want to agree with that, but they are bystanders to this dispute. But just for the tribunal's note, in -- or for the transcript, it is -- the reference for O'Higgins agreeing with us about this is carriage submissions {A/4/16}, paragraph 36, and Ms Hollway's fourth statement -- again, no need for Opus to turn it up, {D/3/25}, paragraph 76(a). Both of those, they make the point that the banks will have to pay for distribution. So that is common ground.

If there is any doubt about it, there is, in fact, a decision of the Court of Appeal which shows that O'Higgins and Evans are both right about this proposition and that is the one that we have added to the authorities overnight. If I can just ask Opus to turn that up, that is {AUTH/12.1/19-20}. This is a case called *Motto v Trafigura*, I think it is the largest costs claim that has ever come before the English courts, which involved the settlement of a pollution claim where toxic waste had been dumped in the Côte D'Ivoire, and there was a £30 million settlement to be shared between 30,000 Ivorians. Obviously, the Ivorians were mostly living in abject

poverty and did not have bank accounts in a very unstable country, so the costs of distributing a settlement of £30 million were, in fact, extremely considerable, and so, unsurprisingly there was a debate between Trafigura and Leigh Day, who acted for the claimants, about who had to pay for it. But the only argument Trafigura had that they did not have to pay for it, which was an argument they lost, is because they said it was precluded by the terms of the settlement. They accepted that absent a contractual term to the contrary, as a matter of common law, it did form part of the recoverable costs incidental to the proceedings, and Lord Neuberger, Master of the Rolls, demonstrates with reference to previous authority that that concession was absolutely correct. The Tribunal has that at paragraph 92, which straddles the page. If I can perhaps ask Opus just to focus on the bottom of the left-hand page, which is cut off at the moment.

So you will see:

"The ... point taken by the defendants is that, in the light of the terms of the settlement agreement, it was not open to the claimants to treat the costs of advising and taking instruction on the agreement, and then in distributing the £30 million. I do not

understand Mr Gibson ..."

A familiar name in this world, counsel for the defendants as he always is:

"... to be suggesting that such costs are not, in principle, recoverable by a successful claimant ..."

And then, the Master of the Rolls says:

"For the avoidance of doubt, I should state that, subject ... to ... reasonableness and proportionality ... or necessity ... such costs are recoverable, as they are plainly part of the costs of the proceedings."

And he refers to a number of cases to that effect.

So it really is for those reasons why we say that this gulf between us, which we say is a gulf where we are right and they are wrong and they have massively overcooked -- well, who is right or wrong about that really does not matter, and once you set that dispute to one side, both parties' fighting funds for taking this case through to the end of trial are basically exactly the same.

THE CHAIRMAN: Well, I suppose it depends on how one treats these figures. What one could do is say, okay, these are costs that are realistically not going to be incurred, so let us put a line through everything, the figures and the description. Or we could say, well, there is a slight oddity in both side's budget and they

seem to have included figures which have a label that is inapposite, so we will just delete the label but we will just treat the figures as being available for, let us say, other parts of the process which may be undercooked, in that -- and I say this on a purely impressionistic basis -- it does seem to me that whatever process of disclosure takes place in this matter, it is going to be pretty expensive. It is going to be an unusual disclosure process involving not the piling through of individual documents, but the piling through of very complex datasets, and one can imagine that, actually, the reliance on paralegals that normally would take place in a document-heavy case is going to be substituted by fewer, but much more expensive IT experts who can regularise the data in tables and make sure that it is workable.

So, I can see great potential for getting the estimate for that stage wrong and getting it wrong in an unhelpful way, in that the process may well cost more. So can we, as it were, use this money, re-purpose it for problems like that?

MR WILLIAMS: Well, I think -- I respectfully say, sir, to some extent that point overlaps with the point that Mr Lomas put to me earlier, and obviously, as I accepted with him, I accept with you that you are quite right,

the money is there for potential re-purposing. But it brings me back, firstly, to the response I gave to Mr Lomas, which is, yes, but the parties borrow what they predict they will need, it does not mean they cannot borrow more if their predictions are wrong. Secondly, the point that you, sir, have just put to me would be, if I can respectfully say so, one that would be extremely difficult to deal with if I were presenting to the Tribunal a budget which did not have any headroom. But, of course, we are presenting to the courts -- the Tribunal, a budget which does have headroom of 4 million already, that is our contingency.

THE CHAIRMAN: Yes.

MR WILLIAMS: I will come, if time permits, to deal with disclosure in a little bit more detail.

The precise point that you, sir, have put to me about the forensic shape of the disclosure exercise, if I can candidly say so, is beyond my pay grade as somebody who is just involved in the sort of dirty engine room of the costs and funding. So, if either of my learned friends from Brick Court take a different view to the Tribunal as to the likely forensic shape of disclosure, I will yield to them in due course.

But the point -- the point that we make about disclosure is that certainly Hausfeld, who have a great

deal of experience of this form of litigation, they believe the provision that they have made is sufficient. If they did not believe the provision that was made was sufficient, they would have just allocated money from the contingency to this particular heading. When, for example, my learned friend Mr Jowell was saying yesterday, almost suggesting a lack of candour when he suggested it would have been more candid for them to say that they expect disclosure will cost X and they have not got enough to pay for it, I mean he is obviously wrong about that, because if we truly thought disclosure would cost X and X is more than the figure we have provided for, we have got lots of headroom in our contingency and we could have just reallocated funds from that here and now, and we have not done that because we do not think we need to. But if we are wrong about that, we have got that headroom.

I have also been instructed to say this. As Mr Patel certainly knows, solicitors' costs estimates are not things which are writ in water. Solicitors, once they give a costs estimate, can only depart from it, you know, for sound reasons, and if solicitors make a mistake about what something is going to cost which has radical consequences, they cannot just willy-nilly bill their clients more, and I am certainly instructed

to say that, you know, just as Hausfeld have agreed in respect of the costs of the carriage application -- because that has been much more expensive on both sides than anybody expected -- that they have contributed to funding that by going no win, no fee for most of their costs, I am instructed to say that, if, contrary to expectations, the cost of the disclosure exercise, because Hausfeld have mispredicted what it will cost, is much more expensive and consumes not only what they have budgeted for, but also starts eating into the contingency, then Hausfeld are more than willing to put their money where their mouth is and go no win, no fee on that. But we just do not think that will happen, firstly, because we think the predictions that we have made are robust and because we have got a contingency built into the budget which is very substantial.

That is a neat segue if that is a sufficient answer to your point, for good or for ill.

THE CHAIRMAN: No, thank you.

MR WILLIAMS: For the next point I was going to make, which is about the criticism, for that is what it seems to be, about Hausfeld have been gone no win, no fee in respect of a large part of their costs of this carriage application, and it also said with a certain sort of metaphorical deployment of smelling salts as if there is

something sort of not quite right about the fact that Mr Evans' counsel team are themselves also partly acting on CFAs, and to that, we respond with a very crude, so what? It is not a disadvantageous thing at all. In fact, it is the opposite. Funnily enough, O'Higgins themselves, at a previous juncture, made that point. If I can ask to turn up {A/9/31}. It is paragraph 86. At (2), they say:

"It could ... be a point of distinction."

And the contingent fees were disparate, but:

"Here the solicitors are on equivalent funding arrangements, and there is no reason to think that one claim requires materially more work ... the O'Higgins counsel team do not stand to earn contingent fees ..."

But then they go on to say:

"[But] in any event [it is] unclear why this factor should be a disadvantage, as opposed to incentivising the robust pursuit of the claim for the maximum reward reasonably available."

And obviously, I respectfully agree with that, not just a sort of advocate's trick, but because it is a statement of the economically obvious. It is for Hausfeld and our counsel team to be incentivised by, in the case of Hausfeld now, a full no win, no fee agreement in respect of much of their past costs, and

for counsel, a no win, partial fee agreement is a perfectly sound arrangement. It is also perfectly commonplace. It is popular with clients and funders because of its incentive effect, and my Lord, if I can apologise for the crudeness of my language for the second time in two minutes, in a popular phrase, it gives them skin in the game. That is a word you constantly here from clients in this world, because is what they want.

The reasons I am perhaps slightly labouring this point is because, in some of Mr O'Higgins' written emanations, for example, its annotations on our funding statement, they suggest that the fact that we have done these things is a sort of objective correlative to some hidden financial crisis which involves some desperate measures. In our respectful submission, that is just wishful thinking of the highest degree, it is -- both sides have overspent on the carriage dispute, it has taken much longer than anybody ever thought that it would. For example, there have been three preliminary hearings when I think both sides expected there to be one. It is not a criticism of everyone, we all know that in this area you pile known unknowns and unknown unknowns on top of one another, but -- and our pragmatic response to that was, Hausfeld have reformulated their

funding arrangements to a certain respect, and in other respects, we have got more funding from our funder, and for Hausfeld to have reformulated matters as they did was the best way of going about matters because it is quick and it has not led to an increased funding cost. On any view, we submit it is preferable to what you see on Mr O'Higgins' side. They have dealt with the considerable increase in pre-CPO costs not by obtaining more funding and not by increasing the amount of lawyer risk sharing, but by attenuating their post-CPO budget by more than £3 million. So, I mean -- either they have got £3 million less than they think they need or they overcooked it to start with. But whichever it is, they robbed Peter to pay Paul, and as I say, it is because of that that we say that both of them have got the same amount of funds available going forwards. So, if -- you accept the premise of my point about the post-trial costs.

Again, when it is suggested, for example, that there is some sort of indication here that, because Hausfeld have taken on more risk, that there have been problems increasing our funding, it perhaps is a useful juncture to respectfully remind the Tribunal that only -- on the two sides here, there has only been one funder that has, in fact, increased its provision when it has been

approached and that is Mr Evans' funder, it has increased it twice. In April, they increased our disbursement funding by just shy of £950,000 because of the increased disbursements in the carriage dispute. I think that is partly, I am afraid, the arrival of Mr Carpenter and myself, but it is also -- and in fact most of the ATE cover. Then, of course, this month, they have increased the contingency. So, for example, we can cover the AAE if somebody says that we need to and that has been an increase of another nearly £2.9 million.

I was at this stage going to address the criticism about paragraph 55 of our skeleton being misleading, but I am grateful for the measured way in which Mr Patel restated that yesterday. He is obviously right to say that there is always a risk in cases like this of apples and pears comparisons, it is inevitable, because you are comparing apples and pears. The point, however, is that apples and pear are pieces of fruit of approximately the same size and palatability, you are not comparing pumpkins and nutmegs, or something of that sort.

Because the funding arrangements are differently structured, of course they can pluck a paragraph out of our skeleton and say, "Oh, well, they have said this, but they have not acknowledged that". What Mr Patel

said yesterday is right, the figures in paragraph 55, all of those are agreed figures, there is no misstatement in paragraph 55 of any kind. But he makes the fair point, yes, the picture is somewhat changed when you appreciate they have paid for their ATE already, or nearly all of it, and we have still got some ATE to pay for. But we say that is simply a distinction that does not matter when, for the reasons I have already sought to show you, both sides have, broadly speaking, got the same fighting funding going forwards to take this case through to the end of the trial.

With some of those detours, you will remember that yesterday I proposed that the watch word should be sufficiency. I obviously need to address the criticism of Mr Evans' budget and the resulting funding provision, but I have done quite a lot of that in passing because I have obviously been addressing -- there are only two areas where a discrepancy has been attacked. One of them is distribution, and you have my points as to why we say that is not really very important, and the other is disclosure, and the question to me from the learned chairman has obviously made me to some extent advance that in my submission. But I will come back to disclosure briefly.

But just some overarching points. Firstly, and

I think it is common ground, the opt-out regime is unusual in the post-Jackson world, as claimants do not bear the direct cost of funding. So rather than taking a haircut on their damages to meet funding costs, they are met out of undistributed damages. My learned friends for Mr O'Higgins really seem almost to extrapolate from that, that that really means the concerns about funding and such like are completely irrelevant, all that matters is who has got the biggest pot in -- and if you have got the biggest pot, all other things being equal, you will succeed. In our respectful submission, that simply cannot be right. It does not -- the fact that the opt-out regime does have this, for claimants, very advantageous funding regime cannot mean and does not mean that there is no advantage to marrying sufficiency with economy. You know, so long as you have sufficient to bring your case home and to pay the other side's costs, then economy remains a virtue.

That is, firstly, because there clearly is always the risk of a substantial dispute at the end of the case about whether the funding for which recoupment is sought is reasonable, and that will require the Tribunal itself potentially to make some very difficult decisions. Obviously, it will have to hear, potentially, market evidence about what it is reasonable for funders to

charge. There is almost a sort of through the looking glass element to it, in a Tribunal which specialises in competition issues having to decide what is reasonable for funders to charge customers who never have to pay for the funders' services out of their own pocket because of the undistributed damages regime. So, it potentially gives rise to questions of extreme nicety and difficulty at the end of the case. In all of which, of course, there is always the interests of the Access to Justice charity which is intended to be the principal beneficiary.

So, that is the first point.

The second point is that here, because uniquely the cost of funding falls on the defendants in the sense it comes out of money which they will supply -- I mean all other areas of law since the Jackson reforms, claimants have to pay for funding out of their recovery -- there is always the risk that excessively high costs will deter or protract settlements in a way which is not to the claimant's advantage, because, in crude terms, the more defendants are called on to pay by way of funding -- and of course, when it comes to settlement, you know, that may well be part of the negotiations -- the more likely they are to resist and challenge.

Thirdly -- and here again I think we do differ from

O'Higgins -- we do say that so long as the claimants have sufficient funding, there are legitimate interests for the defendants to consider, who, if they settle, do potentially get at least some of the undistributed damages back, rather than seeing it diverted, you know, more than it is needed into the pockets, for example, of ATE insurers.

Now, my learned friends say, if I can say so respectfully, really with a sort of airy insouciance, that, oh, well, defendants always have the protection of detailed assessment. Firstly, as anyone who has ever gone to detailed assessment will know, perhaps with a certain wry or self-effacing laughter, that is a long way from a panacea. It is itself a very expensive, uncertain and cumbersome process.

Secondly, of course, the costs of the funding, which does fall on the defendants, will not be amenable to assessment.

Then fourthly -- and I appreciate that one has to be cautious about descending into platitudes, but we do say there is a public interest in litigation being conducted efficiently and at proportionate cost. I know I hardly need to remind the Tribunal of its own governing principles in rule 4, which expressly stipulate that for costs to be -- expressly stipulates that costs must be

proportionate, and couple that with a positive obligation on the Tribunal itself to, so far as practicable, go about conducting and managing litigation in a way that saves expense. Recognising that this case is likely -- is the first carriage dispute likely to be adjudicated is likely to have some precedent value.

We do respectfully say that follow-on claims within this opt-out regime cannot be permitted to be some sort of fantasy island, the land that Sir Rupert Jackson forgot. So that, contrasting with all other areas of litigation, the more expensive you are, you know, the better you are placed. In our respectful submission, that would be a very troubling precedent for the Tribunal to find itself set -- to find itself setting.

So, those are some overarching points. As I said, when it comes to the budgets itself, there are really only two areas where our costs have been challenged. Mr Patel yesterday also did say, well, you know, just look at the figures, how can they possibly afford an eight-week trial. Our budget for trial is £1 million more than theirs, that is how we can afford an eight-week trial. So one can forget about that one, that must have been Mr Patel on the, sort of, balls of his feet, adding a new point.

The points they made in writing with the point about disclosure and the point about distribution. So far as disclosure is concerned, we -- our -- as I say, I will defer to others who know -- who do not, sort of, labour in the engine room, but sort of have a -- the panorama of the bridge to say if they disagree with the learned chairman's description of disclosure. It clearly is the case that both sides expect that nearly all disclosure will come from the banks, there will be no disclosure exercise by claimants. That is assumed in both sides' litigation plan. So it is a review of documents which will be disclosed to us rather than the conventional disclosure exercise where we also have to do a massive exercise in checking documents for relevance and privilege and then excluding all of those which do not fall into the disclosable categories.

It is against that background that Hausfeld, with their experience in this area, believe that a budget of over half a million pounds for them, half a million pounds for any disclosed contractor, and hundreds of thousands of pounds more for counsel and experts is sufficient. But if they are wrong about that, we have the contingency, as I have said, and if we are wrong about the contingency being amply sufficient, we have Hausfeld's agreement that they will put their money

where their mouth is and if they have misjudged these matters, then the buck will stop with them and they will have to proceed on a no win, no fee basis once they have exceeded a reasonable provision.

MR LOMAS: So, Mr Williams, your point is, in a sense, that is a question about allocation that, on the disclosure side, the expertise will be more heavily expert expertise and is counted under that head, rather than document checking expertise that one might traditionally expect to see?

MR WILLIAMS: It is certainly my instructions that the allowance for experts includes an expectation that experts will be much more heavily involved in disclosure than would usually be the case, sir, yes.

Because of the time and because obviously my primary argument is that distribution does not really matter, but I should also say, perhaps just for the transcript, that the budget that we have set for distribution is a considered budget which has been reached after consultation with an expert third party. The expert third party will be the conduit for distribution and that is suggested in Mr Maton's fifth statement and it is, for the transcript, {D/12/14}, it is paragraphs 40 to 44. Again, if we are wrong about that, there is the contingency, but better still, if we get to

distribution, the reality is it will be funded by a third party.

There is just one other point I think I have to deal with about distribution, though I do have to allow myself time to deal with ATE properly. It was suggested yesterday for the first time that there was some sort of conflict of interest around distribution and we might be undercooking that in a sort of cynical desire for the funders not to see things distributed, so, you know, they have got a lot to get their teeth into. I am not suggesting in any professional sense that was an improper point to take, but I do say this is a rather unworthy and unreal one to take. Firstly, Mr Evans and his legal team are completely committed to being champions of the class they seek to represent.

Secondly, as we say, we have a third party who will be dealing with distribution which is very experienced.

Thirdly, if you look at the figures, given the expected compensation in these cases, for a level to be reached where there is not enough sort of fat on the meat for the funders to be remunerated, the take-up figures have to fall to an extraordinarily low level, and I think, in fact, neither side -- both sides have put various calculations in front of you, they are not completely agreed, but really all those calculations

show that you can get distribution -- either the damages come down to tiny fractions of the full pleaded value, or the distribution can come down very low indeed and there is, in fact, plenty for both funders -- both rival funders. So, in our submission, it is simply not a real point, even before you come to the safeguards which we have in place in our litigation plan, and then, of course, the further safeguards of the Tribunal itself, because there can be no distribution from uncollected damages and there can be no approval of the settlement by the Tribunal unless the Tribunal is first satisfied. If I can respectfully say so, the Tribunal is obviously not going to be satisfied any settlement plan or any deduction from undistributed damages after the judgment in circumstances where there has not been a proper distribution exercise first.

Now, I am going to come on to ATE. If I can just be forgiven a moment just to check where I am with timing with the people to my left. I am just going to turn off my microphone for a moment.

(Pause)

Thank you, I have been told they will forgive me if I am a few minutes over.

So, sir, ATE, if I can shoot two canards at the outset. The first is, there is a suggestion in my

learned friend's annotations to our neutral funding statement that further after the event insurance will be necessary. That is what they contend. That is emphatically not the position. We do not have costs breakdowns from the banks, they have not yet suggested £23 million is insufficient. Provision is only required for reasonable costs and, on the information we have, we believe that £23 million is sufficient and we have got no plans to enlarge it at this stage. For all we know, on the hypothesis the case is certified for opt-out, it might be -- well be that settlement negotiations open the very next day, so of course we have not rushed out getting £33.5 million worth of ATE that may never be required. It certainly is our position that the £23 million we have may, depending on the precise sort of decision tree which grows out of the tribunal's decision, it may very well be amply sufficient to take this case, for example, through to settlement.

The second canard is that we -- it is posited that we have been unable to secure more than £23 million worth of the ATE, and again, that is simply not our evidence. We have secured the ATE which we thought was prudent. I mean -- and there may even be an irony here as to -- it would be very interesting to know what both parties would have actually procured by way of ATE if it

had not been for this funding -- for this carriage dispute, but -- or an anticipated carriage dispute, because that is one of the troubling things here. If paying for ATE upfront on a worst case scenario that the case will inevitably go through to a trial which is incredibly expensive and becomes the way in which you secure carriage, the potential distortion, that has an effect -- the distorting effect that has both upon the ATE market and also the ultimate loss out of undistributed damages that will end up going to funders and ATE insurers instead of under settlements back to defendants and absent settlements to the charity, you know, you only have to state it to immediately see the problem. In economic terms, it makes no sense to obtain ATE you might not need, because ATE is extremely expensive, the ratio of premium to cover is very high compared to almost any other form of insurance, and that is an inevitable function because the premium is contingent. Obviously, we pay to insure our houses whether or not they actually burn down, but when you have ATE insurance, the insurer only gets paid in the cases where there is not a fire. But if I can stretch the analogy too far, obviously the chance of an insurer -- an ATE insurer being called upon to pay out is obviously rather higher than most of us, say, of our

houses burning down in the next 12 months, and so that is why it is more expensive.

MR LOMAS: Mr Williams, the prospect of domestic risk to one side for a second. I think the thing that we need to consider is that the opt-out regime is unusual and it creates particular dynamics between the claimants and the defendants, and in this case, in the context of a very big action, which will be expensive to fight. So, I think the proposition that we would like to see tested is, against that background, are we not obliged in fact, certainly entitled to look for a higher degree of ATE cover and security of cover than we might look for in a normal case?

MR WILLIAMS: Yes, well, I am very happy to deal with that, of course. Can I just -- can we perhaps quickly look at the figures, if I can ask people to turn up {AB/15/19-20} and page 20, if we can have both those pages up, please. Thank you. So, on the left we have Mr Evans, he has £23 million worth of cover. What we do not -- if you add up the total premiums, they come to £15 million. That is not the deposit premiums, that is the total premiums.

So, Mr Evans has taken on potential liabilities of 15 million to ensure 23 million, so that is a 65% relationship between premium and level of indemnity.

Over the page, the total premiums add up to 23.66 million to insure 33.5 million. So on their side of the equation, 71%.

So, it is a huge expense per pound of cover, as it were, but we have spent considerably less, 65% as compared to 71%.

So far as -- and because of the particular dynamic, we do submit, with respect, somewhat differently from the way in which Mr Lomas put the point to me. We say that here, in fact, it is particularly important to make sure that parties do not needlessly insure in an attempt to sort of buy carriage, because there is absolutely no reason to suppose that insurance will not be equally readily available post-certification, and it ought to be available more cheaply, because once you have got certification, you have lost -- there clearly is no longer a carriage dispute, that is one diminution of risk, and there is obviously also the loss of the certification dispute, so that is a double -- in a case like this, there is a double diminution of risk.

In cases such as this where you have a carriage dispute, we say there is -- I mean, Mr Patel, I think, might say, well, there is not any expert evidence about this, but we respectfully say, it is blindingly obvious. It is blindingly obvious that after a carriage dispute,

you have got all the insurers who were backing the unsuccessful application who have already stress tested the case and agreed it is a risk that is worth ensuring, it is a risk where we think we will earn our contingent premiums because the banks are going to settle, that is likely to be the thought process on the insurer's side, they are sitting there suddenly with £33.5 million worth of funds enfranchised because Mr O'Higgins has not won, with the opportunity, if insurance is needed, to sell their services to Mr Evans for a further round of deposit premiums, but at much less risk, given they no longer have the certification risk, they no longer have the carriage risk, and they are going to be at the back of the queue with £23 million worth of other insurance in front of them. So, in those circumstances, we do say there is no reason whatsoever to conduct this exercise on a sort of blinkered approach that on the other side of the blinkers is an insurance void, when there is not; the ATE market is still there, and, in fact, there is a suddenly enfranchised capacity on the part of all the insurers that had backed, if I can stretch the blinkered analogy too far, that had backed the wrong horse.

So, so far as that is concerned, it is Mr Chopin

that gives evidence about this. Given the time I cannot ask the Tribunal to turn it up, but it is Chopin 3, paragraph 27, which for the transcript is {D/10/6}, and Mr Chopin is quite clear that, in his experience, there will be no difficulty procuring further insurance.

THE CHAIRMAN: Where does the incentive to procure further insurance come from though?

MR WILLIAMS: Well, the incentive to procure for the insurance, should come from the exposure to the defendant's cost. An obvious point, we would say, is if there is certification, do not rush off and get insurance that will not be necessary if the defendant, for example, quickly decides to open settlement negotiations. Maybe they will, maybe they will not, but it is an obvious possibility --

THE CHAIRMAN: I understand the exposure, but is it not an unreal thing? I mean, where is the payment of the costs over and above the ATE insurance going to come from?

MR WILLIAMS: Sir, I am not sure I am following that.

THE CHAIRMAN: Well, look, the reason you get ATE insurance in this case is because you are going to have your house or your personal property on the line as someone who is exposed to costs. Now, I made clear to Mr Jowell that I did not see very much difference between the protection that Mr O'Higgins has procured in

incorporating himself versus Mr Evans' exposure, but that cuts both ways. If that is the approach that we take, that the representative should be recognised as acting in the interests of the class and therefore should not be exposed to costs, the problem with that approach is that you do not really have the incentive that normally arises of ensuring that you personally are not paying the costs. So, let us suppose that you have got ATE insurance of 25 million, but let us suppose -- and this is, I think, a not particularly improbable scenario -- that the respondents, then the defendants' costs are far higher than that, and if we look at the costs that have been run up in relation to the pre-certification stage, I think that is a not unrealistic assumption, where is that going to be paid from?

MR WILLIAMS: Well, yes, obviously your original question to me, sir, was what is the incentive. The incentive is that it is -- it is an ongoing -- on the authority of this Tribunal it is -- it is not just a certification requirement, but it is an ongoing certification requirement that you have sufficient provision in place for the defendants' costs. There is, of course, always a risk also of a security for costs application, not against the claimants because they're claimants, but

against the funder under the regime to give security for funders. So, there is an incentive in place to have adequate ATE insurance, but the question is should there also be a further incentive as a route to purchasing carriage to purchase ATE insurance before you know that you need it, at a point now, where, as I have said before, there are known unknowns, we do not know what the defence costs are, we obviously will get costs estimates from them in due course, they may (inaudible) seek security, but they may equally open settlement negotiations, in which case the need to enlarge ATE will retreat.

So the argument is, simply, what is the -- you know, what is the shape at which one purchases ATE? One has to purchase sufficient and prudent ATE at the outset to make sure, for example, you have satisfied the initial qualification for carriage, but that is a continuing obligation, and if, for example, the case looks like it fights and goes further, then you may, at that point, wish to revise your ATE. It may very well be that O'Higgins would need to revise their ATE as well, if -- you know, if took a -- if the case took a particular turn. But the specific incentive is to certify, to continue being certified and to avoid security being sought against you.

THE CHAIRMAN: Yes, but you could also say that what is being in-built is a pressure to settle early. I am not making that a point against you particularly, I am making it as a point about how these things are structured.

MR WILLIAMS: Well, it is certainly true to say, sir, that, for example, the opt-out regime, to take an example, but it would also be true of funding regimes, for example, you have in the courts, they can -- I mean, of course, you know, costs is the principal incentive to settle in almost all litigation. I mean, maybe not the sort of litigation that you, sir, conduct in the Chancery -- when you are sitting in the Chancery Division because, you know, in those cases the compensation which is claimed can be so high, like they would be in this case. But (inaudible), the vast amount of litigation in this country, costs exceed damages, and it is costs that drives people to settle, so you always have those settlement drivers. In this particular statutory regime, obviously, one has the particular settlement driver that under a settlement, a defendant can see undistributed damages return to it once the funding has been paid for, rather than going to the charity. So you have all forms of -- you -- you know, there are all sorts of incentives which operate.

What we say should not be incentivised is driving parties to obtain after the event insurance which they do not yet need in order to fend off a carriage dispute in circumstances where the banks themselves have made no suggestion that at this stage in the proceedings the £23 million we have got is too low to make a suitable candidate for certification. That is not a point that they take against us.

Of course, it is not just a question of taking out ATE unnecessarily leads to more ATE premiums, it also leads to more funding costs, because the funders have to pay the deposit premiums and they will want more.

Can I also say -- is -- and this -- I will start drawing to a close, is we would say that this sort of approach where you keep the amount of adverse costs cover which you need under review and the amount of funding which you need under review, we say, again, is consistent with the approach of the president in the *Trucks* case, where he acknowledges really that, at this early stage in proceedings, the ultimate forensic shape and the costs and the adverse costs are very much unknown qualities and it does not make any sense at all to require class representatives to make full provisions against their maximum possible exposure on a sort of precautionary principle. So that is the authorities

bundle again {AUTH/29/45} and I wanted to turn up page 45, if I could, please. If, perhaps -- and, in fact, can I have page 46 {AUTH/29/45-46} put up as well.

So, at the bottom of the -- so, if one takes -- paragraph 103 one sees the background:

"The [Road Haulier's Association] ... policy provides cover of 20 million."

And there is a recitation of what the premiums entailed, and there is -- and then, if we can focus on the bottom of the left-hand page, please:

"The [UK Trucks Co] policies [provided] cover of12 ..."

I think that was "16 million", but it is obscured -- 12, I am sorry:

"... for this premium ..."

Then it says what the premium was. Then it goes on to say that:

"[A witness statement has] ... advised that they expect to be able to source at least a further £8 million ... [worth of] cover ... On that basis ..."

There is 4 million to fund 20:

"We therefore proceed on the basis that both Applicants can secure adverse costs cover of £20 million."

So, firstly, that was a case where there was a -- it

was a very -- as you will know, it is a very complex action involving alleged manipulation of the markets over many years by a host of major European truck manufacturers, all -- nearly all of whom were representing firms -- represented by Magic Circle firms or their close comparison, £20 million worth of cover was felt to be sufficient.

The approach of the COTE is stated at paragraph 106 {AUTH/29/47}. If we could have page 47, please, and it might be useful to have 48 {AUTH/29/47-48}. Thank you.

So, the COTE's approach you are really getting in 106. They say:

"In our judgment, the enumerated factors ... are not ... [all] of equal weight ... the Tribunal's decision under rule 78 is made at a very early stage of the proceedings, before even defences have been served, there is inevitable uncertainty even as to the likely level of defendants' costs such that it would be impossible for the Tribunal to be satisfied that the [CR] ... 'will be able to pay the defendant's recoverable costs'. None of the ... solicitors who have given evidence suggest that it is possible at this point to provide a firm estimate of their client's likely costs and it is notable there is considerable variation in their figures, with several of them reserving the

right to revisit funding issues later ..."

Then at paragraph 107, looking at the end of it, at the top of the next page:

"On any view, £20 million is a very substantial figure for the defendants' costs ... In our consideration ..."

So they say that.

Then, can we have the next page -- I am sorry this is slightly bitty.

THE CHAIRMAN: Not at all.

MR WILLIAMS: Paragraph 108 {AUTH/29/49} where they say:

"There is a further consideration ... we regard as relevant. The cost figures are high ..."

Then, they go on about the particular forensic shape of the proceedings, which I perhaps do not need to describe, but it is really at the bottom, they say:

"We resist an approach whereby it is only 'just and reasonable' to authorise someone to act as the class representative if that person has adverse costs insurance at a level which may make the obtaining of such cover prohibitive."

So, I mean, that is a case where, I appreciate this is a certification rather than a carriage dispute, that the Tribunal, you know, are not insisting that at the outset, class representative -- putative class

representatives have to tool up on the basis of the worst possible series of contingencies, potentially at prohibitive expense, which is not in the interests of anybody.

MR LOMAS: Mr Williams, we are not in prohibitive expense territory here are we?

MR WILLIAMS: Perhaps I used the word prohibitive when I should have used some less energetic word, but at unnecessary expense in the sense that purchasing cover that may never be --

MR LOMAS: I mean, your whole case is that you can get the extra cover at these rates, so it cannot be prohibitive.

MR WILLIAMS: Indeed. No, no, that is why I mis-spoke. You are quite right to pull me up on that. But it is more of a question of efficiency and economy, it is buying that which there is no evidence that you will need. Again, when the Tribunal is -- obviously, it is simply assumed here that if further cover is needed in due course, it will be available. That is consistent with the tribunal's wider approach here, and I wonder if we can put up pages 32 and 33, {AUTH/29/32-33}.

Can I just invite the Tribunal to look at paragraphs 72 through to 75, so it is just those two pages, particularly 75 -- yes, particularly 74 and 75.

(Pause)

So, it is, really -- it is 74 and 75, and it is the point I have already made about ATE really more generally. The Tribunal, you know, should not approach either ATE specifically or funding more generally on the assumption that it really draws a line at the point that judgment is reserved. It has to look at matters pragmatically. I have already suggested that, you know, once you hive off the considerable risk these cases already face for both proposed class representatives on whether they get carriage and, if so, whether they get certified, once you hive that off, I mean, it should be much easier, not much more difficult, to get ATE insurance. The same applies with funding, as the President says at paragraph 74 {AUTH/29/32}, if funders are investigating -- sorry, are investing such huge sums into a litigation project of this sort, then so long as the litigation remains prima facie meritorious, then funding will continue to be available, and if the litigation ceases to be meritorious there is not any public interest in facilitating its continuation.

So the reality we say here is, is that both parties have prudent -- both parties satisfy the requirement of a prudent funding package which enables them to take

the case through to a trial. Both parties have a budget which facilitates the costs up to trial on actually -- of actually relatively similar predicted dimensions. Both parties have contingencies within their budgets, and in our case, in fact, our contingency is larger. Both parties continue to have access to a funding market which this Tribunal, per the president, has recognised, you know, has to be looked at in the real world as something that will continue to be there for a claim so long as it remains meritorious. So far as ATE insurance is concerned my clients have procured ATE insurance which already contains anti-avoidance provisions, which the banks have not suggested is inadequate, but where in any event, if further provision is needed and my client is granted carriage, we say, it is as clear as can be that there will be further cover which can readily be procured, and that is our unchallenged evidence. Really, it cannot be right, in our respectful submission, for another party to say, "Well, you may have enough ATE coverage in the sense the defendants do not say they need more, but we have purchased an extra £10.5 million just in case, actually at considerably more expense than you, because we have only managed to get a 71% ratio between what we have paid for and the cover we get, whereas you have actually managed

to get a 65%" and somehow suggest that that makes them in the better position. In fact, in our submission, at best for them it is neutral, at worst, it actually shows that they have gone about this process in a needlessly over-egged way, which has taken on financial commitments which are not, in fact, necessary, in circumstances where Mr Evans manifestly has the wherewithal to bring this case prudently and responsibly to the conclusion which he seeks on behalf of the claimants whose interests he champions.

MR LOMAS: Mr Williams, if I can just check this because I know we have been around this a little bit. Even if the O'Higgins insurance is more expensive than the Evans insurance on the percentages you have just been giving, that is a cost that does not fall on the defendants and it is a quality of cover that -- sorry, it does not fall on the claimants, the class members, and it is -- the solidity of it is a benefit for the defendants. So I am trying to work out, to be honest, why the relative cost per pound of the ATE insurance actually affects very much the decision we would have to take?

MR WILLIAMS: Well, sir, you are quite right it does not fall -- it does not fall on the claimants themselves. As I have already suggested, it potentially does, for example, distort settlement negotiations, because

suppose there is --

MR LOMAS: Or on the charity, of course.

MR WILLIAMS: Or on the charity. It does fall on the charity because there is less undistributed damages. It can impact on the claimants because, as I say, in settlement negotiations, where the banks do have the incentive of saying, "If we settle, we can stipulate to have some distributed damages back", a bank might very well argue, "Well, why should we pay the £33.5 million worth of ATE insurance, that was unreasonably premature", when, as I have just sought to show, it would always have been open to you to buy more if you needed it post-certification. So those arguments can still arise.

MR LOMAS: And it is a point you made earlier, yes.

MR WILLIAMS: Yes. But you are obviously right to say, sir, the dynamic is different that it would be in conventional litigation, where it does just come out of the damages. I accept the premise, but I do say, respectfully, that perhaps you have pushed the premise slightly too far in suggesting it is something which cannot impact upon claimants; it can do so indirectly.

So far as -- and for the same reason, I say it can impact on the banks because, yes, if the case goes to judgment, then the undistributed damages are gone

forever and it is no bones to the banks whether they go to the charity or they go to the funders. But in the case there is a settlement, then obviously the attraction of settlement for the banks is they can stipulate for a reimbursement of undistributed damages, and if there is less to reimburse because of unnecessary ATE insurance, then that does affect the banks, it affects the terms on which they may be willing to settle and, obviously, if they settle on the basis of a surrender where they agree to pay ATE for the sake of a quiet life, they may be mulcted in paying for ATE which was not, in fact, required.

MR LOMAS: I do not want to prolong the point too far, but in terms of the size of damages that are being floated around on the tables -- say more than £1 billion -- the difference in the ATE costs are going to be quite small beer in those negotiations, are they not?

MR WILLIAMS: I -- that -- of course. If the case settles on anything close to its pleaded value, then really the entirety of the funding packages, you know, are of limited importance, and that, of course, is why, you know, our premise has been that certification ultimately should not turn on funding, it should turn on all those matters which are beyond my pay grade. But to the extent it does turn on funding, then, in our

respectful submission, it should not be seen as a sort of, you know, strong chin and elegant nose in the metaphorical beauty parade, that one has gone off and purchased you know £10 million worth of ATE insurance you may not ever need in circumstances where there is simply no reason to suppose the market will not still be there, you know, after certification, and in fact, there is every reason to suppose that if more ATE is needed then it can be procured more cheaply because the risk to insurers will have fallen.

You know, so far as precedent is concerned, and I appreciate that may be a factor the Tribunal has in mind, clearly, the sort of numbers we have in this case make the point that Mr Lomas put to me a sound one, there may very well be other cases before this Tribunal which involve much smaller amounts of damages where the suggestion that a party should be incentivised to secure carriage by buying ATE insurance -- it might affect the balance of factors very differently.

THE CHAIRMAN: Mr Williams, two questions, and do say if you want to pass them down the line to Mr Robertson or Ms Wakefield.

First of all, you may have been present when Mr Jowell made the point that we absolutely could not certify this matter on, as it were, a basis that was not

being sought. Now, he was making that argument in the context of opt-out versus opt-in and there was violent agreement between the Tribunal and Mr Jowell on that point. It is less extreme, but how does the point that the Tribunal has a watching brief after certification in relation to costs and ATE work? Both sides have come up with very carefully thought through budgets and ATE packages. No one could suggest that there has been an absence of consideration, and obviously, we are talking a very careful exercise of judgment on the part of the funders and the class representative, or the applicant for class representation, and these are matters which, it seems to us, we ought to be quite slow to second guess.

So how far can we, after certification has occurred, go back to you and say, "Look, we have seen how things are developing, we are very troubled by your budget in the light of events now, or we are very troubled given the costs that we understand the defendants to have incurred about your ATE insurance, we are going to require you to rethink this"?

Now, if you say, "Well, we have thought about this, not going happen", do we -- what do we do? Do we remove certification? Do we think about certifying someone else? How does the dynamic work? I mean, are we

allowed to shift the goal posts?

MR WILLIAMS: I am passing it up the chain literally.

MS WAKEFIELD: Sir, could I ask you to turn to {AUTH/82/48}, in the Tribunal rules and that is rule 85, and you will see, sir, that 85(1) says that you:

"... may at any time, either of [your] own initiative ..."

I think you just adverted to the possibility of your own motion:

"... or on the application of the class representative, a represented person or a defendant, make an order for the variation or revocation of the CPO."

Then in (2) it sets out the considerations which you would take into account, including under (b), of course, authorisation of the class rep, which is where funding slots in.

Then, in (3), it says when you make such an order you can make provision as to the claims, class rep, and then in (c), "as regards costs". So, we say that sets the framework in which you would exercise that discretion. I hope that is of some assistance.

THE CHAIRMAN: Well, yes and no. It is rather like Mr Jowell's point on basis of certification. His point was, there are some instances where we undoubtedly have

the power, but we cannot properly exercise it, and of course, we have the power, I see that. My point was really rather more, on the basis of having extremely carefully worked out proposals, huge costs having been incurred by both applicants, how far, if we are at the moment saying, well, we are bit troubled, actually, about, let us say, the level of ATE on both sides -- let us keep this hypothetical -- but these are the only applicants here, we will approve on this basis.

Now, to what extent is there going to be an argument, and quite a proper argument, for whoever gets certification to say, "Well, look, you had all the data, you saw our budgets to massive detail, you had all the details about ATE insurance, how can you possibly consider invoking rule 85 in order to take away that which you have granted"? Now, are we therefore in an area of there needing to be a material change of circumstance, a kind of Tibbles approach? Is that how it works? If so, do we need to be quite careful about building into any certification a bit of wiggle room for the Tribunal, so that you are conscious at the point of certification that there may be additional costs which we will impose on whoever becomes the class representative, if that is what happens. Even if there is not, what would, under Tibbles, be a material change

of circumstance?

MS WAKEFIELD: Sir, I am speaking, obviously, without instructions on this point, but, in principle, it would plainly be open for the Tribunal, in my submission, to set, in its case management directions or in the CPO order itself, some reference to a rolling review of the need for ATE. I am looking at Mr Williams to see if he is nodding or not.

THE CHAIRMAN: I have aired the point.

MS WAKEFIELD: You have.

THE CHAIRMAN: It is something which, again, I do not want answers which it would be unfair to expect, and in a sense, it may be a matter for the drafting of the certification order --

MS WAKEFIELD: Yes, sir.

THE CHAIRMAN: -- in the normal(?) -- but I think it is probably worth the parties appreciating that that is something which is crossing our mind, and we say it entirely independently of the points that have been made about the specific budgets and insurance provisions.

So, my second point -- and since you are in the hot seat, I will address it to you -- is, how far are we entitled to consider the unclaimed damages as free money? The reason I ask that question is because Mr Williams made the point that there was a distinction

between, as it were, judgment and settlement, in that the banks could, as an advantage of settlement, stipulate for the repayment to them of the unclaimed damages, which makes for quite a big difference between judgment and settlement so far as the charitable purposes are concerned.

What my question really is is this: is that something which we should just not take into account at all, we should just see what goes to the charity as something which may be a massive win, payment to them if there is a judgment and unclaimed damages. I mean, one can imagine in a case like this, if one has a 60% claim rate, which is higher than either party is suggesting, I think, then 40% of, you know, 1 billion, is rather a lot of ready money for a charity. Now, if that is going to be traded away in a settlement -- and one could understand exactly why it would be -- would that be something that we need to factor in in approving the settlement, or do we need to have regard to the interests -- the charitable interests which arise only in opt-out, rather than opt-in proceedings as one of the factors to take into account in certification?

MS WAKEFIELD: Sir, unhelpfully, I do not feel I can give you an answer to that on my feet. I do not know if Mr Williams feels better placed. I am going back over

the microphone, sorry.

MR WILLIAMS: Sir, those of us, and I suspect there are several of us, who studied Lord of the Flies at school may be sort of reminded of passing the conch shell from one to the other, but I hope I do not suffer same fate as Piggy or indeed the conch shell.

So far as that is concerned, sir, I think that perhaps all of this is a difficult point because it is a new regime. I would say the question as to what impacts upon the distribution of proceeds, whether to the charity or not to the charity, should not be a consideration at the certification or carriage stage, it might be, but I suspect it would be a matter very much for argument as to whether it is something that the Tribunal should pay regard to at the point of approving a settlement. I mean, should, for example, a settlement only be approved if the charity gets a cut? I have to say, to know whether or not there was any traction to such an argument, I would probably want to know quite a lot more travaux préparatoires and such like for the new regime than I presently have available to me. I see Mr Jowell has appeared on camera, so it may be a point he has had done some thinking on and I am very happy to yield momentarily.

Before I do, just on the earlier point, sir, so far

as keeping provision under review is concerned, Mr Carpenter, to my right, reminds me this is something the president does touch on in the *Trucks* judgment at paragraph 109, and you might just want to look at that, certainly, during your reservation of decision. But certainly, he says that there -- I will not ask you to turn it up given the time and Mr Jowell is waiting -- but he says that what you need is you need to have enough adverse costs cover for a significant part of the defendants' costs, and then authorisation should be given but kept under review.

I have to say, I suspect that no one would, I think, automatically expect the Tribunal itself to be a sort of active policeman, more of a sleeping policeman for the defendant to attempt to wake up if the time comes when the defendant thinks the provision has become inadequate. That certainly would be my expectation. But anyway, I have kept Mr Jowell waiting too long.

THE CHAIRMAN: Thank you very much, Mr Williams.

Mr Jowell.

MR JOWELL: Not a bit, and at the risk of being perceived as being Ralph, I thought I might just say one or two words about this from our perspective, which is that the way we see it is actually that it is quite important for the workings of the regime that the Tribunal should not

take into account the amount going to the charity in the context of a settlement proposal. The reason for that is, the way the system works is it supposed to incentivise settlement by effectively giving the defendants the opportunity not to have to, as it were, pay out everything by settling. So it is quite important that the Tribunal should not weigh in the balance, if you like, the fact that the charity will get -- get less in that way, otherwise settlements will not happen, and settlement is, as a general matter, desirable.

So that is all I wanted to add. That is how, in our submission, it is meant to work.

THE CHAIRMAN: Thank you, Mr Jowell.

MR WILLIAMS: Sir, with apologies to everyone for the time I have taken, unless there is anything I can assist with, I will again pass the conch shell.

THE CHAIRMAN: Not at all, thank you very much, Mr Williams. We have no further questions for you. Thank you.

MR WILLIAMS: Thank you, sir.

THE CHAIRMAN: Ms Wakefield.

Submissions by MS WAKEFIELD

MS WAKEFIELD: Sir, if I might start by giving a roadmap through my submissions. As Mr Jowell said yesterday, the difference in the amount of time over which

the proposed defendants developed their submissions and the time which I have today means that I will aim simply to cover the big points, if I might put it like that, and again, please do not assume that if I do not address something, I accept it.

I will structure my submissions today as follows: firstly, I am going to address the legal regime which applies to certification, and particularly in relation to the opt-in opt-out question; secondly, I will address practicability, so class size, claim value, ease of contacting class members and so on; and thirdly, I will come to strength of claims. So, I will address Ms Ford's points together with Ms Kreisberger's points, and, in particular, I will address you on our theory of direct harm, tacit coordination, in relation to which there were various exchanges yesterday with the Tribunal, and I will also address Mr Hoskins' submissions under that heading.

So that will conclude my submissions on certification, but I will then turn to take one aspect of the carriage dispute, which I am covering rather than Mr Robertson, and that is the exclusions issue, namely our approach of excluding benchmark trades and resting or limit orders.

I had hoped that that would take me around 1 hour

and 45 minutes, but I do need to be done by lunchtime so I hope that will take me 1 hour and 20 minutes, that is my aspiration.

THE CHAIRMAN: Well, Ms Wakefield, we will run to 1.15 if that assists.

MS WAKEFIELD: I am grateful, thank you.

So, starting then with the law on certification. Sir, you said to Mr Jowell yesterday that you are, of course, very familiar with the Supreme Court's judgment in *Merricks* and that is, if I may say, entirely unsurprising, so I will not take you to that judgment. Rather, I would just emphasise three key points.

Firstly, the statutory objectives of the collection action regime to which there has been various references over the course of this week, vindication of claims, and disincentivisation of wrongdoing, Lord Briggs, paragraphs 52 and 53.

Secondly, the entitlement of a claimant who surpasses the strike-out threshold to a trial ex-debito justitiae, that is paragraph 47 of Lord Briggs.

Thirdly, of course, their prohibition on considering the merits as part of the conventional certification exercise in paragraph 59, save for the instances which Lord Briggs specifies there: strike-out and rule 79(3).

Now, I know you have these points well in mind of course, but they are particularly important in this hearing, in my submission, because the overlay of the carriage dispute in particular, and its slightly free for all nature has tended perhaps to obscure that fundamental structure.

With those preliminary points in mind, I will turn to the opt-in/opt-out question as a matter of law.

The first question is, does the Tribunal have the jurisdiction to determine opt-in versus opt-out, even when there is not an application for opt-in on the table? Now, of course, I heard and I took very much to heart the tribunal's indication that you are, by way of preliminary indication, against us on this issue, but I am afraid that I do maintain our argument, and so it is only right that I develop it now --

THE CHAIRMAN: Of course.

MS WAKEFIELD: -- and, of course, it is an important point of law in the new regime, so I will set it out mindful that I know that you are, at least tentatively, against me.

So there are four principal reasons why I say that you have no jurisdiction to consider whether Mr Evans' application for opt-out proceedings should be rejected on the basis that these claims should be brought instead

on an opt-in basis. The first is the primary legislation. So if we could go, please, to {AUTH/2/3}. Of course, this is a provision with which we are all very familiar, section 47B. It is highly prescriptive. We see, in 47B(5), the two criteria for collective proceedings: the authorisation criterion and the eligibility criterion, as they have come to be referred to. Those two criteria are amplified in 47B(6) and (8). There is no mention in those tests of an additional requirement that the Tribunal must also ask itself whether the proceedings should be brought on an opt-out or opt-in basis. All that the proposed defendants can point to is section 47B(7)(b), which relates to the contents of a collective proceedings order and says that the order must include specification of the proceedings as opt-in collective proceedings or opt-out collective proceedings. Now, in my submission, those words mean what they say. They simply mean that the CPO needs to tell the class whether they need to opt-in or opt-out.

I observe in that regard that it is profoundly odd drafting, if what that provision actually means is: and the Tribunal shall, of its own motion or at the invitation of proposed defendants, consider whether an application for opt-out proceedings would be more

suitably brought as opt-in proceedings. If that is what the draftsman meant, he or she has expressed themselves in a particularly odd and opaque way.

I also say that that language does not describe what you are doing. You cannot specify in the CPO that the proceedings are opt-in proceedings. Instead, as Mr Jowell said yesterday and as you agreed with yesterday in violent agreement, sir, you would have to give judgment in this case setting out your views, presumably refusing our application, but giving us time to see if we could do something on an opt-in basis. In my submission, that does not fall within the jurisdictional language of specifying something in an order.

I also say that the statutory language goes some way to answering the --

THE CHAIRMAN: We would not dismiss the application, I think we would stay everything, would we not? We would just adjourn it over. I do not think we would dismiss. We would want to keep the application alive, otherwise you would have to start again and that might raise all sorts of questions about limitation and things like that.

MS WAKEFIELD: True it is. Sir, true it is, for the purpose of limitation, it would need to be a wholesale re-amended application with entirely different

supporting documents --

THE CHAIRMAN: Yes.

MS WAKEFIELD: -- funding and everything else. That is true. I mis-spoke, sir. But I hope that my point remains good that what you would not be doing, respectfully, is specifying in an order that something is opt-in or opt-out.

I say that the drafting of the legislation answers, in large measure, the proposed defendants' safeguard points. They say that this assessment that they urge upon you, opt-in versus opt-out, is a key safeguard in the regime, but that is not borne out by the legislation, which does not include it as part of the tests in respect of which you need to be satisfied.

The second reason why I say, respectfully, that you do not have jurisdiction relates to the statutory objectives of the regime. Now I refer to vindication of rights and disincentivisation of wrongdoing, and you know, sir, from all the pre-legislative material, that one thing is clear, namely that it is the opt-out nature of the new statutory regime which is the novelty which facilitates and furthers those objectives. It is the opt-out nature which maximises vindication of rights and it is the opt-out nature of the regime which disincentivises the wrongdoers. I make no bones about

that. Plainly, it is because you have dramatically better participation by default, and whether one calls it default effect or inertia or a statement of the blindingly obvious, or of lived experience in the predecessor regimes, it is the opt-out regime that meets the statutory objectives, and again I say, that speaks forcefully against the construction which is being urged upon you.

My third reason is grounded in practicality. What if you do consider the question, as you have indicated you are minded to do, and if you were to give judgment in the terms which you have indicated, and you give us three months to go away and try and do something on an opt-in basis? Imagine we come back and we say, we are not making an application, we are not amending our application to proceed on an opt-in basis. Would you reopen your decision? Would it depend on our reasons and our evidence in support? What if Mr Evans said, on reflection, he was not interested in representing a group of 50 hedge funds, or that our funders said they would not fund the claim, or perhaps we did attract that core group of class members adverted to by Mr Kennelly, but we did not manage to attract the SMEs? Would we have the fight that we have had this week all over again but by reference to fresh real world evidence? Or would

you take the view that having decided that opt-in proceedings were the better alternative in theory, it was irrelevant whether they were an alternative in reality?

If you were to take that course, sir, I would say that that is contrary to *Merricks*. It is contrary to *Merricks* to deprive claimants with non-strikeable claims of their day in court, and it flows ineluctably, I say, from that position that unless there is actually an opt-in claim on the table, you cannot consider a hypothetical opt-in claim as an option, because otherwise the obvious risk is that we will end up with claimants who have no access to court.

The fourth reason is the rules, and I would like to address the submissions which Mr Kennelly made in relation to the rules. So if we could have those up, please, at {AUTH/82/46}. He relied on the words "in determining whether" in rule 79(3), and he went back to rule 79(2), which also contained those words "in determining whether", and he went to rule 78, which is on the preceding page, please {AUTH/82/45}, and he said that the words are used in 78(2) "in determining whether" and also in 78(2) "in determining whether", and he says, well, that shows that they all have the same sort of status and they are definitely things which you

always need to determine, I think. The easy answer to that is that on each of these other occasions, the words are followed by the relevant part of the statutory test to which they relate.

So, in rule 78(3), it is:

"In determining whether the class representative would act fairly and adequately for the purposes of paragraph 2(a)."

Then we go up to 78(2)(a) --:

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

And then, up 78(1) and we have that in (b). If we go over the page to page 46, please, the same point applies here that we see in 79(2):

"In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph 1(c) ..."

Then, we go up to 79(1)(c) and we see "suitable to be brought in collective proceedings."

So each time, all those other aspects of your decision-making process are linked into the requirements in the statute, we know where they belong in that analytical framework. In my submission, contrary to the submission of Mr Kennelly, in fact we can see from the fact that there is no home given to the 79(3)

assessment, there is no reference to eligibility or to authorisation, that it forms no standard part of your assessment on a certification exercise.

So those are my submissions in respect of5 rule 79(3).

THE CHAIRMAN: Well, I mean, what you are saying is that just as you are contending the drafter misdrafted in 47B(7)(c) by not indicating that this is a choice that we can make, we have got some woeful drafting in 79(3), because what you are saying, I think, is that we cannot take into account all matters it thinks fit if there is only opt-out on the table in a carriage dispute. Because opt-in is not there, we have simply got to say, "well, what is on the table is on the table, we will have to rubber stamp it". I do not see how, if there was not a fairly rigorous testing as to whether opt-in was not an option, why one has got 79(3)(b) in at all.

MS WAKEFIELD: Sir, if I take those two points in turn. First of all, I do not say the draftsman got it wrong, I say the draftsman got it right and that --

THE CHAIRMAN: Well, yes, in the act, yes. Of course you do.

MS WAKEFIELD: I do. I do.

THE CHAIRMAN: But the consequence, though, is that rule 79(3) is rather infelicitous.

MS WAKEFIELD: It is infelicitous, perhaps, but that second point, which is in essence, I think, what purpose does it serve? In my submission, again, it does what it says. It tells the Tribunal, if you are confronted with that choice, if you are making that determination, here is an indication of what you should take into account. You should take into account everything that is in (2) and also these two further considerations, which are excluded from the (2) considerations, as we know.

THE CHAIRMAN: But (3), on your case, only bites if we have got a choice between the two.

MS WAKEFIELD: It does, absolutely, sir.

THE CHAIRMAN: In other words, if O'Higgins was opt-in and you were opt-out, it would become material to consider then, but actually (3) has no role apart from that. Where you have got two opt-outs, then we do not need to bother with (3) at all?

MS WAKEFIELD: Absolutely. Absolutely, yes.

So that is my submission on the jurisdictional question.

The second legal question is: if the Tribunal does need to ask itself this question in every case, or has jurisdiction to ask itself this question in every case, is there any inbuilt preference in favour of opt-in proceedings? Now, we object in the strongest terms, it

will not surprise you to know, to an approach which favours opt-in proceedings as the default choice or as the starting position, and I do say that it would be an error of law to go forward on that basis.

So, firstly, we see absolutely nothing in the statute which supports it. Secondly, we see nothing in the rules which indicates there is any such preference. I do not accept the summary given by Mr Kennelly in his submissions, namely that -- and this is verbatim -- you were asked to consider, first, whether opt-in is practicable and not to proceed to opt-out until you have addressed that question. That was on Day 3, I have page 6, lines 9 to 12 {Day3/6:9-12}. I hope that is a good reference. I think some of my transcript references are not. But that is what he said in terms. You simply do not see that on the face of the rules. He was purporting to summarise the rules and it is not there. There is no indication that you need to consider any factor before any other factor. There is no indication even that the two factors which are specified there are mandatory. Plainly, you would not order opt-in proceedings if they were impracticable, but just because they are practicable does not mean they are to be preferred over opt-out proceedings, it just tells you they are on the menu rather than being off the menu, if

I can put it that way.

THE CHAIRMAN: Well, since we are talking about menus, why would any rational applicant perusing the menu select opt-in rather than opt-out? Surely everything points in favour of articulating your proposal as opt-out?

MS WAKEFIELD: Might I just take instructions? I am being whispered at from the back of the room.

THE CHAIRMAN: I see the time, could we rise for five minutes and stretch our legs. We will get back at midday.

MS WAKEFIELD: Thank you.

THE CHAIRMAN: Thank you.

(11.54 am)

(A short break)

(12.04 pm)

THE CHAIRMAN: Ms Wakefield.

MS WAKEFIELD: Thank you, sir.

So I am obviously in danger of speculating slightly here, but I am told that the factors which would feed into a decision to make an application on an opt-in basis, rather than on an opt-out basis, might include things like the relationship between the PCR and the claimant class. So, if one were an industry body or association or had that sort of representative function and close relationship with the class members, it might

also relate to the preference of the class members, if you already have that sort of relationship with them they can say what they want. It might relate as well to the availability of data and the fact that one could then get the data from the willing ex hypothesi claimant class, and then one could do a bottom-up rather than top-down assessment and allow for a higher, perhaps, more individualised assessment of damages. There may well be as well benefits in particular circumstances on the sort of funding arrangement that you could make if you are in contact with that available, contactable, willing class.

So, I am told that the RHA claim in *Trucks* is perhaps in some respects similar. I am not instructed in that matter, I do not know it sufficiently well, but it may be that you, sir, know it more, or others who represent other parties here, but that has some of those hallmarks: individualised, bottom-up, provision of data, and industry body.

THE CHAIRMAN: But can you not achieve that, not formally, but informally through an opt-out process? We have already seen representatives on certain boards from the class who can, as it were, speak to it. There is no reason why you could not have X numbers of the class who were interested, but nevertheless on an opt-out basis,

and they would get the peripheral advantage -- well, not peripheral, major advantage of recovering all of their damages without any incursions into those damages by way of costs?

MS WAKEFIELD: That is true, sir, that one could have something that was putatively an opt-out claim, but was in fact in respect of certain issues run as if it were opt-in, in relation to disclosure, for example. But I think I am at risk now of straying into an area which is purely speculative.

Certainly, if it were to eventuate that the core repeated use of this regime was opt-out rather than opt-in, in my submission that would be entirely unsurprising. But, of course, the opt-in version of the regime where you can still do things like, if it is available on your theory of harm and on your data, you can still have aggregate damages awards. Those sorts of aspects of the regime still are beneficial and so it does have that opt-in version.

THE CHAIRMAN: You see, the reason I am raising it is because what is at the back of my mind is that the reason we have 79(3) drafted in the way we do is because opt-out regimes are unusual, and I do not want to say oppressive, but in danger of being oppressive for two reasons. So, they are unusual in that you have

people who are not indicating their willingness to proceed with the action, save in the most tangential way, they have not opted out, their claims are being advanced, and one sees the unusual nature in the fact that one is, looking at Canadian and American experience, seeing in opt-out cases a recovery of around 60% as an average, which makes your 50%, if I may say so, a very realistic one in terms of the sort of maximum recovery that both applicants are expecting to get.

The reason I use the word "oppression" is it is a risk of oppression, but that is why I am wondering whether we do not have (3) drafted the way it is this: what you have got is actually a very potent stick to wield against the respondents if certified to be defendants, because irrespective of the merits of the claim, what you can say is that if there is a recovery, the recovery is hugely leveraged because of the excess that will be unclaimed, which goes to charity. So, what you have got is a situation where -- it is precisely the converse or it is exactly the same point as you have been making on the part of the applicants against the banks, you are saying, look, opt-in is terrible because we cannot fund this. Well, opt-out is terrible, viewing it from the respondents' side on the basis that they will be obliged, if judgment

goes against them, to fund claims which do not emerge because the damage is unclaimed. So the charity benefits enormously.

But what that then creates is an entirely non-merits-based incentive to settle early, and that is -- ties in with the point that Mr Jowell very helpfully made that, in considering settlement, we should positively leave the charitable payment out of account, but what you are doing there is, by having a mechanism whereby any overcharge, or rather any unclaimed surplus of damages being unclaimed being siphoned back to the defendants, you are creating an incentive to settle early, and all of this is occurring in a manner that is utterly divorced from the merits, whatever they may be, of the case. What you have got is you have got a form of leverage which arises out of the very nature of the opt-out collective action.

Going back to the point that we had right at the beginning, is that not why one has 79(3)(b), because one needs to consider whether it is right that one adopts this unusual form of proceeding where one is vindicating claims which are not being advanced by the person who is benefitting from them, save in the very tangential way that I suggested?

MS WAKEFIELD: So, sir, I think this may overlap slightly

with the submissions I made on jurisdiction and you have my submission --

THE CHAIRMAN: I have your submissions on jurisdiction.

MS WAKEFIELD: Of course, sir, but the drafts person set out safeguards, they set out the gate keeping function of this Tribunal, they set out what you need to be satisfied in respect of, and in the other allied provisions, for example in section 47(c)(8), I think, there is a prohibition on damages-based agreements, for example, for lawyers. We have those safeguards in the regime, and we do not see anywhere in the regime in the statutory framework a reference to a need to show that opt-out proceedings are better than opt-in proceedings. It is absolutely neutral as to that.

THE CHAIRMAN: No, I am agreeing with you on that front. But the whole tenor of (3)(b) is suggesting that if one views the matter simply from the applicant side, the rational applicant is going to say: opt-out, it is so much easier. You avoid the front end costs of signing people up, you have room for manoeuvre in terms of the recovery of costs, you have that fund, you have -- and this is the problem -- an incidental stick with which to beat the defendants because there is likely to be, in real terms, an over recovery, which is why one has the charitable provision in opt-out that is not in

opt-in.

So is not (b) saying, look, when you are faced with a collection of opt-out proposals, just have a little sense check to see whether opt-in is not desirable, even though it is not on the table? It just seems to me that (3) is directed very much at checking the proposals, even if they are indistinguishable on opt-out/opt-in, against the putative alternative that might expect.

Now, I readily accept your point that it is a narrow course to be charted between *Merricks* on the one side, and the opt-out dangers on the other that I have been articulating, where one is faced with a situation of saying, "Well, actually, everyone is saying, and they are saying it for good grounds, that the only way forward is opt-out, not opt-in". So, if one takes the route that I mooted with Mr Jowell and we say, "You are not going to get opt-out, you have three months to frame an opt-in", if you do not do that, the logical consequence then is that the applications are dismissed after three months. That is all the sort of balancing that we are having to consider.

What, I think, the danger of your submission is, is that it is removing all together from consideration these matters in circumstances where, as I say, it is no surprise that applicants go for opt-out rather than

opt-in.

MS WAKEFIELD: So, sir, I was just flicking through *Merricks* but I have not found the relevant paragraph, but of course, Lord Sales and Lord Leggatt in their dissenting judgment in *Merricks* made exactly these points about the power which might be given to the opt-out claimant, and in *Merricks*, of course, it was argued on the basis that there was the collective proceedings or nothing at all, so nobody had ventilated the issue which we are discussing today, and it is notable, in my submission, that Lord Briggs' judgment does not endorse that fear of settlement pressure and that concern for the position of the defendants, and I would say that his majority judgment is inconsistent with that concern that they express and which they use as one of the building blocks for their different view of the matters which should be taken into account in the certification process.

So, my first point is that I do express some concern as to that factor, the settlement pressure factor being something which is preoccupying the Tribunal when it comes to this assessment, and I do say -- I am not going to repeat myself in the very limited time that I have got -- that the point of the regime, the vindicatory point of the regime is served by opt-out proceedings and the disincentivising point of the regime is served

exclusively by opt-out proceedings, because the point is that the defendants pay the entirety of the damages caused, no more, the aggregate damages award has to be compensatory to the class as a whole, no more than the damage they caused, but all of it, because --

THE CHAIRMAN: Yes, of course, that is the point.

MS WAKEFIELD: Of course, sir. But under the opt-in regime, they were not paying any of it, in most cases. You have my submissions.

If -- sir, I am certainly not rowing back from these submissions at all, I maintain them.

But if, sir, you look at rule 79(3) and you give it an interpretation which is extremely narrow and just a quick sense check, then of course, that is not what the proposed defendants are inviting you to do in this case, we have spent 7 hours hearing what they want you to do and how robust and important they think the 79(3) check is, so that would be perhaps steering a middle ground, a middle way between what I say the right legal approach is and what they must implicitly say the right legal approach is to have taken so many points. So that is something that is far removed from the general preference which was urged upon you.

THE CHAIRMAN: I think we have given provisional indications both ways, and to be clear, we were not -- obviously

I am going to have to think about it, but we were not much attracted by the notion that there is a rigorous bright line distinction between the criteria that have to be met for an opt-in process and those that need to be met for an opt-out process, and you will recall the exchanges that we had with Ms Kreisberger on that point at the end of, I think, Day 3.

So, yes, I think, again, we are in agreement that these are all relevant factors and that the process seems to be rather more fluid than either side is actually themselves contending for. I mean, you want a hard wall preventing escape away from opt-out and into opt-in, and the respondents want the precise converse, and one can, of course, see why both sides are running those arguments.

MS WAKEFIELD: Sir, you have my submissions and I say my submissions are grounded in, as you know, the statute, *Merricks*, statutory objectives and the language of the rules, so I do respectfully say that I have the better of the points, but I appreciate that you have given an indication as to where you are on this.

THE CHAIRMAN: Well, we will certainly be reviewing the transcript very carefully and provisional views are intended not to indicate where we are going to end up, it is to enable you to push back and we are very

grateful for you having done so.

MS WAKEFIELD: Thank you, sir. Thank you.

So, turning to practicability I am actually going to take this really quite quickly because I developed it fully in opening. Mr Kennelly, I think, made four points. I will address his points under four headings. First, my heading is "the little guy". So that is the point that I referred to in opening in relation to the tension in the proposed defendants' position, that they say the regime's all about the SMEs and not about big business, but they ask you to focus on big business at the expense of the SMEs. As expected, Mr Kennelly did make exactly those submissions. He repeatedly and in terms asked that you should focus on the core group and he defined core group as financial institutions, and then later in his submissions, he defined core group as the last two columns of the financial institutions identified in appendix B to Ramirez 2.

But that does, in my submission, do exactly the wrong thing, which I highlighted in opening, that it leaves the core target of the opt-out regime, those SME members, out in the cold. In that regard, Mr Kennelly said, "Oh, but what about the momentum effect", but the momentum effect, just for the avoidance of doubt, has never formed any part of our case -- Mr Evans' case,

it is only part of the O'Higgins PCR's case, and Mr Jowell clarified yesterday, of course, for the O'Higgins PCR that, on his part, the momentum effect for the opt-out non-UK domiciled -- opt-in, sorry, non-UK domiciled people is said to take effect principally in relation to big business in any event and not these SMEs with their low value claims.

Mr Kennelly made the submission as well, as he needs to, that one should not be looking at 100% participation in the claim if one's looking at opt-in proceedings. This is obviously part of the "do not worry about the SMEs" submission, and he took you to the varying percentages of ultimate distribution that we have set out in our neutral funding document, and of course, our first point is that Mr Evans hopes and intends to do better than that 50% if at all possible.

My second point and perhaps more importantly, is that the comparison is fundamentally flawed. There is no comparison to be drawn between likely take up at the end of the process and the legislative intention in enacting opt-out proceedings.

If I might summarise his submission, he says essentially, "Oh well, lots of people do not come forward in the end anyway, so it does not really matter if lots of people are not in the claim in

the beginning". That is a really bad point, in my submission. It is true that it is difficult and a battle to get claimants to come forward and claim at the distribution stage, but it is an even bigger battle and challenge to get people to sign up to a claim at the beginning, and you have seen and been taken to the evidence of Mr Maton on this, and I do say there is no reason of principle at all to assume that Parliament, when intervening to try to provide effective collective redress, would have intended to limit its idea of class participation at the outset of a claim by reference to likely distribution at the end. So I say that is just a bad point.

My second heading is publicising to the classes. Here, Mr Kennelly took you to our respective notice and administration plans and how we intend to give notice to the class at the various stages of the proceedings as they go on. But, of course, the Guide, when it speaks about practicability, does not speak about publicising. It says, whether it is straightforward to identify and contact the class. As I said in opening, the exercise of identifying and contacting class members in order to seek to encourage them to opt-in is materially different and harder than the publication needed, in particular publication at the time of distribution. Yes, we think

we can publicise the opt-out proceedings in the ways needed. No, we do not think we can identify and contact the tens of thousands of class members in order to persuade them to opt-in to any proposed proceedings.

Thirdly, my heading, perhaps a little unfair, is "Mr Kennelly's evidence". So, when you are assessing practicability, you are necessarily considering a hypothetical world, assuming I am wrong on my various legal submissions, in which proceedings are brought on an opt-in basis contrary to the actual application before the Tribunal. That view -- forming that view would require the Tribunal to consider certain factual matters. To that end, of course, we have adduced various pieces of witness evidence from Mr Chopin, from Mr Evans, and, most importantly, from Mr Anthony Maton, who has, as you know, an abundance of experience in this area and I am not going to read through the basis for his vast knowledge.

Now, Mr Kennelly made various factual assertions in his submissions. He said, for example, that the PCRs' legal teams are well capable to explain to the PCMs, do not worry about the fact whether this is novel or complex or large, once you sign up you will have to do absolutely nothing, that is on Day 3, page 35, line 17 {Day3/35:17}. Mr Kennelly reassures Mr Maton that

actually he has failed to understand how keen the core group would be to sign up, and in fact Hausfeld actually already has a head start. That is at page 75 {Day3/75}. That is just assertion by a barrister, and I hate to be rude because we all do this from time to time, but I am afraid the reaction on our side was, well, really, what would he know about it?

Mr Kennelly's assertions went further still. He says the present claim is there for the taking or that the money is on the table, or he even said that a claim of £3,500 would be well worth opting in for the SMEs. Again, this is just unevidenced assertion.

When Mr Kennelly dealt in his submissions with the fact that we have said to him, you have not put in any evidence on this, and we have said this as the proceedings have moved toward this hearing, he said, well, today is not a mini trial and that the proposed defendants do not need to put anything in. I am afraid that is a bad point. It is a good point, of course, in relation to the claims themselves and issues which will be live at the ultimate trial, so methodology, data, merits of the claim, of course, this is not a mini trial. But so far as the issues which are up for final determination today are concerned, this is the final reckoning and you bring your full case, and no evidence

was submitted.

My fourth heading is "data". So obviously, the assertion that there would be better data availability in an opt-in claim was a distinct and developed factor which the proposed defendants relied upon as relevant to the opt-in/opt-out decision, and that shrunk down over time and I think it took about five minutes of the seven hours that the proposed defendants had ultimately, so I do not propose to deal with it in any detail. I just make three quick points, if I may.

Firstly, we entirely agree with the chilling effect of the burden entailed in seeking disclosure from opt-in class members and, of course, you put this to Mr Kennelly, and it is a plainly dissuasive effect.

Secondly, of course, Mr Kennelly accepted correctly that we do not need data from claimants to calculate harm across the class and we have identified data sources for that.

Thirdly, however, he went on to say that the proposed defendants have identified issues in relation to which data from class members will be needed. That is page {Day3/111:12}. I would like to make it crystal clear that data will not be needed from class members in our opt-out proceedings, that is wrong,

and I rely on paragraphs 39 to 49 of our skeleton in that regard.

So, in conclusion on practicability, I will make the point as I did in opening that even if we are in a world where we are considering all of this and looking at the factors and the rules and the Guide, each of the factors points in my favour. So we have large class, we have the SMEs, we have 18,000 of them on our estimate with the low value claims of £3,500, and difficulty in identifying contacting the class, every single factor points against opt-in and in favour of opt-out. So we say it is impracticable.

THE CHAIRMAN: Just picking up on the question of data, Professor Breedon was, I thought, very helpful in terms of identifying problems in normalising the dataset and he identified those instances where there were trades booked on the data before they had actually been ordered. He was articulating a lot of difficulties in, you know, working out that one had all of the data relevant to a particular transaction gathered in relation to the correct transaction.

Now, given that one has got putatively some quite big potential claimants as class members in your class, and I am not talking about computing individual losses here, I am talking about getting an understanding of how

the damage to the class would have worked, surely it is something which one would want to consider, whether there was data not held by the defendants that could supplement and improve the articulation of a claim on a class-wide basis?

MS WAKEFIELD: Might I just take instructions very quickly, sir?

(Pause)

I am sorry for that --

THE CHAIRMAN: Not at all.

MS WAKEFIELD: -- rather longer delay than I had hoped.

Could I ask you to go to {AB/14/16}, please. Here we see set out the various data sources which we are proposing at present at an early stage of the proceedings to use, and we will see in particular under (b) that not only is their proposed defendants' transaction data obviously outside the period in which they were in the cartel, that is why it is Class B, but then data from FX trading platforms, multi-bank platforms, data from CLS Bank. Then, over the page on {AB/14/17}, we also have data from Reuters and EBS platforms. So we are supplementing the datasets already and at present that is the way we propose to go about proving our case.

We do not propose to ask any class members for any

disclosure, not least because we do not know who any of them are and I suppose it would not be off the table in perpetuity if in due course it seemed a sensible thing to do, but at present we do not see any need to get that data.

MR LOMAS: Ms Wakefield, you know who some of them are in terms of -- you know who some of them are. You may not know all 42,000, but you know, it will not take long to produce a list of 100 major players who are not in the cartel who may or may not be able to give you relevant data to support a claim that you are bringing on their behalf.

MS WAKEFIELD: And not in Allianz as well, but yes --

MR LOMAS: No, not in Allianz. Yes, exclude the Allianz claimants.

THE CHAIRMAN: But even not 100, there must be five pretty big banks who are --

MS WAKEFIELD: I am going to take instructions again, sorry, sir.

THE CHAIRMAN: Okay. No, of course.

(Pause)

MS WAKEFIELD: The good point, if I might proffer a view as to the value of my own points, is made by those behind me that Mr Maton has spoken to the big obvious ones already and they told him they were not interested, so

we are not overly optimistic about accessing the data.

THE CHAIRMAN: No, no, of course. I understand that you have had or you say you have had great difficulty in drawing in these banks. I accept that. But viewing the balancing exercise between the form of the certification, what we are exploring is not so much the willingness to provide, as the significance of the data that they could provide if they were so willing.

Now, that is why I was intrigued by -- I mean, I think all of the experts said they would want to look at the data on a -- you know, if it is on the table, we will look at it because it might be useful.

MS WAKEFIELD: Yes.

THE CHAIRMAN: But I think it was Professor Breedon, but I am sure he was echoing -- or was echoed by others, he was making some fairly fundamental points about the trickiness of getting a complete pool of data. It stands to reason, if you have got banks on different ends of transactions, you are going to see much more coherently what is going on across the market if you have got ten banks contributing their market-wide data rather than just five, and it is that, I suppose, rather basic point that I am trying to see whether there is something in it.

I accept, of course, that you cannot serve up this data. I am quite sure that if you had Deutsche Bank, or something like that, saying, "Here is our database, use it to improve your claim", you would be putting that front and centre as a reason why you should be certified rather than the other applicant.

MS WAKEFIELD: Sir, so I am told that when you have massive datasets that there is comparatively limited added value to have, what may be unfairly put as, snippets of extra data, but to have partial extra bits of data. It has certainly never been any part of our experts' case that they need that extra data, that it would make their approach more robust. It may be that if one puts to an expert economist, would you like more data, they do tend to say yes. But certainly, we do not say it would be any material advantage. It is no part of our case. It may be that Mr Jowell will address it more fully if that is Professor Breedon's position.

THE CHAIRMAN: Well, let me be clear, I am not taking Professor Breedon as speaking only on this point for O'Higgins. I think he was assisting the court on the sort of problems that this kind of data presents. So, I suspect this is one of the points that is sauce for the goose and sauce for the gander.

MS WAKEFIELD: I see Mr Jowell has appeared on screen.

MR JOWELL: I have appeared, but I want to say something helpful, I think, which is, although Professor Breedon did say that there are potential issues in the booking time errors, or booking time problems, he did not say, I think, that he thought that that would be cured by the provision of claimant data. On the contrary, it has always been our position as well that claimant data would have limited added value.

THE CHAIRMAN: Yes, thank you.

MS WAKEFIELD: We agree with that, thank you.

Might I move then to the strength of the claims, sir?

THE CHAIRMAN: Yes.

MS WAKEFIELD: I am slightly concerned by how time is moving, so I am going to take this as quickly as I can, otherwise you may recall at the CMC, Cassandra-like, I prophesied that needed two weeks, and you said you would see whether I turned out to be right or not, and I do not want my own prophecy to come true.

In any event, the legal approach to strength of the claims obviously is something which you addressed, sir, with Ms Kreisberger in particular, and I do accept that it is a difficult factor to interpret in the regime, and I agreed, if I might say so, respectfully, with your observation that the factor

risks running contrary to *Merricks*, in particular, that would happen if you were to be presented with a claim which is better than strike-out, and so which, under *Merricks* has to be able to go to trial collectively, but is not enormously strong at first blush or is just difficult to present to people, is just complicated and so is likely to be off-putting to potential opt-in class members, and if the consequence of the regime was that it funnelled those claims into opt-in only, they would not be brought and that would run contrary to *Merricks*. So we do see that difficulty in how this factor runs.

I do say as well though that we have probably got enough legal issues on the table, so rather than offering some great solution to that problem, might I say this, that if it is the case that stronger claims militate in favour of opt-out, we are plainly in that position, it is a follow-on claim, it settled in the US, we have got our theories of harm, all our various professors, as Mr Jowell put it yesterday, and if it is the case that claims which are more difficult to explain to class members militates against opt-in, again, I think we probably take the benefit of that and that is because, as you put it yesterday, sir, it is a case with some complexity when one is setting it out -- that has

become apparent in the course of the week -- and it would not be straightforward for a claimant side solicitor to go and book build and explain, contrary to Mr Kennelly's submissions, this is on the table, it is straightforward, this is how it is going to work, it is not that sort of claim. So I say, however this factor plays, it plays in my favour.

If I start with some further legal observations on a Commission decision on causation. I will take this very quickly because this will be obviously issues with which you are very closely familiar, sir, but first of all, I said in opening in relation to the recitals which are relied on against me by Ms Ford, where she says:

"... the further ... [the] causal effects are from the findings in the Commission decision ... the greater the hurdle the claimants have ... to persuade the Tribunal that there is a credible case ..."

Then I made the submission by reference to your Lordship's judgment in *BritNed* that where the findings in the Commission decision are not binding on me, my case can build on the Commission decision and that those phrases and sentences and recitals -- and entire recitals, which are non-binding and are only part of the evidential picture to use your language in *BritNed*.

Might I say something else perhaps just about the nature of the tribunal's jurisdiction, if I might be perhaps a little impertinent. But if I adopt, sir, the language which you used, in *Cardiff Bus*, in paragraph 77 -- it is not in the bundle -- but of course, the whole purpose of the tribunal's jurisdiction in a follow-on claim is to assess the damages flowing from the anterior finding of the infringement, and it is the tribunal's role to assess and determine questions of causation and quantum. That is the test Parliament set you and, of course, one should not be deterred from that course, and causation is a matter for you.

My final observation in relation to the law, of course, is just a reference to the fact that this is a settlement decision and therefore it is an abuse of process for the defendants to depart from any of the recitals, and that is pursuant to the recent Court of Appeal judgment in *Volvo*, it is in the authorities bundle.

Sorry, sir, did you say something?

THE CHAIRMAN: I was simply saying Volvo.

MS WAKEFIELD: Yes, Volvo, sir. And of course, the addressees saw the settlement decision, had a chance to disagree with all of it, signed up to it, and so they are bound by it, and I will return to that in due

course.

I am not going to take you through the scope of the decisions. You know that we say they are very significantly -- the infringement is very significantly more material than one would have been led to believe by Ms Ford's submission. I would in particular invite you to read the recitals which fall under the heading "single and continuous infringements", where, of course, as part of that finding, they set out the modus operandi and the extensiveness and repetitiveness of the information exchanges in relation to which we sue.

I will move then to the first of the points made against us by Ms Ford and also by Ms Kreisberger, and I will address their arguments at the same time, or one after the other, if I may.

So, first of all, Ms Ford directed her fire at the O'Higgins PCR and their references to an explicit agreement to widen spreads, and for our part, we have never made that assertion. Ms Ford then criticised Professor Rime for saying that the information exchanges would have facilitated tacit collusion. But whereas the positing of an agreement to widen spreads could well be an improper allegation in a follow-on claim, the positing of tacit collusion is, we say, no such

thing, and we say it was caused by the unlawful information exchange. So, she says, I think, that the word "would" is inconsistent with the decision's finding that the exchanges could or may have facilitated tacit coordination, and might I take you here to {EV/2/21}, which is in the Three Way Banana Split decision and it is recital (89).

THE CHAIRMAN: Yes.

MS WAKEFIELD: So we see (89) is at the top of the page, and this is in relation to bid-ask spreads. We see the first sentence. Then:

"It follows that the information exchanges pursuant to the underlying understanding, whereby the participating traders provided current or forward-looking information to one another on the level of spread quotes or communicated spread strategy for a given client in a specific situation where there was a specific live ... trade ..."

And I take all the points that this is all very specific. I will move on to that. But it says:

"... may have facilitated occasional tacit coordination of those traders' spread behaviour, thereby tightening or widening the spread quote in that specific situation."

So I think Ms Ford's first point is, "may have

facilitated occasional tacit coordination" and that where Professor Rime says "would", that is in a sense contrary to the decision. My simple point is, they flow in the same direction, "may" is a helpful evidential prop so far as I am concerned, and we set out to show that, in fact, the effects of those information exchanges were far broader. As you know we have now set that out for you various times and I will return to that.

I do also say and that is why I referred to *Volvo* that the Commission's finding that the information exchanges may have facilitated occasional tacit coordination is binding on the defendants. So, to the extent that there are the same legal and economic requirements needed for that finding in relation to tacit coordination as would be needed for our broader tacit coordination case, obviously, the proposed defendants cannot depart from it, they cannot gainsay that finding.

For her part, Ms Kreisberger made various criticisms of our tacit coordination theory of harm under the heading that it was a very weak theory, and that led to an exchange with the Tribunal which has led me to seek to address this in some detail now, but hopefully not straying into the territory of the giving evidence.

Now, hopefully you have now, sir, the summary of our theory of direct harm. We handed up a note overnight --

THE CHAIRMAN: Yes.

MS WAKEFIELD: -- I forget over which night now, they are all blurring into one somewhat -- yesterday morning, we handed up a note which set out in a blow by blow account how we say it is that tacit coordination would have been possible in this market by reference to the bid spread -- bid-ask spread information exchanges, and paragraphs 11 to 16 of that note are particularly relevant to our theory of harm. Were I to have had more time, I would have worked through it blow by blow, but I do not have that time, so instead I will turn to the main criticisms levelled at us at present in relation to the theory of tacit coordination.

So the first criticism made is that the traders in the cartel did not have the necessary market power. We say the criticism is not well founded and it fails to recognise the evidence that has been placed before the Tribunal. I am not going to take you to these references, but I will give them to you, if I may, sir. Sir, Professor Rime's opinion is the correct way to look at market power for these purposes is the five infringing banks' market shares which were in the range of 24 to 48% that is Rime 1, paragraph 192 {EV/9/61}.

He also explains in Rime 2, para 74, which is {C/6/39}, that the degree of market power can be inferred from the bank's relative shares being much larger than the other dealers and he relies on the Euromoney survey data at {B/15/2} in that regard. 40 of the top 50 banks have less than a 3% market share.

THE CHAIRMAN: Just pausing there, Ms Wakefield.

MS WAKEFIELD: Yes.

THE CHAIRMAN: I am inferring from your drawing our attention to these passages that it is a necessary part of your case that this is not an elastic market, as some of us have been suggesting, but is a concentrated market, such that, if, to take your direct harm cases, a wider bid-ask spread is generated by one of the proposed defendants, they will not lose market share by it -- it, the trade -- going elsewhere.

MS WAKEFIELD: Yes, sir. As I understand it, and I am loathe to give evidence or purport inaccurately to summarise evidence again, but I understand that it is important to our case and our case is that the market is concentrated among the large players, the major banks, and then there are lots of very small dealers.

THE CHAIRMAN: Okay.

MS WAKEFIELD: I do not know if that helps.

THE CHAIRMAN: Well, no, it does. I mean, I do not think it

is a point of evidence in the first instance. It seems to me it is a pleading point. This is a question of what you need to establish in order to make good your theory of harm, and I am taking it, therefore, that you are saying that this is a harm which only eventuates in a market that is concentrated in the way you are suggesting.

Now, whether it is so concentrated is a completely different question, and there, the evidential burden is far lower. I mean, we are not trying this case, but I think we are entitled to understand what you need to show in order to make good your theory of harm, and that, I think, is perhaps one of the difficulties that we have been labouring under in that it has not been completely clear what are necessary elements of your theory of harm. I can see the concentration can be relevant to the extent to which you have been harmed, but I think it is more than that on your case, it is something which actually has to be demonstrated in order for the theory of harm to work.

MS WAKEFIELD: Sir, I take your point, of course, that this is a matter for pleading. That is very helpful. Our approach had been that, of course we plead tacit coordination and of course we plead causation, but that this issue would be fleshed out by reference to expert

evidence. That said, my understanding is that it is a necessary element of the theory of harm that the market has the structure that it has.

THE CHAIRMAN: Okay.

MS WAKEFIELD: These big players at the top, if I can put it that way.

THE CHAIRMAN: The market has the structure that you say it has.

MS WAKEFIELD: Of course. Of course, sir, yes.

MR LOMAS: And your pleaded -- sorry. And your pleaded case is that it is the market shares of the banks, not the market shares of the traders, if I can put it that way.

MS WAKEFIELD: That is entirely right, yes.

THE CHAIRMAN: Okay.

MS WAKEFIELD: Of course, one aspect of that is the reliance of Professor Rime on the specialist knowledge of Mr Knight in relation to the nature of the trading desk and the positions of the traders, and of course, those issues will be ventilated by reference to factual evidence at trial, so we will have that firm grounding in fact which is so important to the exercise before us.

The second criticism is that the second condition for tacit coordination, namely that there is transparency to monitor and detect deviations from

the coordinated behaviour, is not present. Yesterday, Ms Kreisberger put this as saying that there had to be high levels of transparency, but we say that is wrong as a matter of law and also does not, in fact, reflect the proposed defendants' case as set out in the joint CPO response which we say correctly puts the point as saying that there had to be sufficient transparency to enable participants to monitor each other's conduct.

Now, on the facts, we say that, again, the proposed defendants have disregarded or disparaged our evidence, and again, without putting forward any contrary expert evidence of their own. Again, submissions from the bar, if I can put it that way. Professor Rime's view, as you know, is that there would have been sufficient monitoring, he sets that out in paragraphs 42 to 48 of Rime 2 {C/6} and he supports his view by pointing to findings made in the decisions that would have been conducive to enabling the proposed defendants to monitor each other's conduct. He refers to various recitals in the decisions which show that traders would apologise to each other when they departed from the understanding, he sets those out in paragraphs 41 to 47 of Rime 2. He also properly acknowledges that the FX market may be less transparent than other markets, paragraph 46 of Rime 2, but his expert opinion is that this does not

mean that the proposed defendants would not be able to detect and respond to one of the participating traders undercutting the others, and he gives the specific example of a customer seeking to negotiate a narrower bid-ask spread that might inform one of the proposed defendants that they could obtain better prices from someone who was cheating on their tacit coordination.

In relation to the retaliation mechanism, Ms Ford in particular said that we were starting to stray away from the bounds of the decision because they do not make any findings as to punishment mechanisms at all. But of course, the decisions did not need to make findings as to punishment mechanisms because the Commission was not making findings about the effects of the information exchange, it is an object infringement.

Here too our response is that our expert Professor Rime has done more than enough, especially at the present stage, and he deals with the issue in detail at paragraphs 40 to 48 of his second report.

Finally, I would like to address, if I may, a concern raised by the Tribunal, namely that our theory of harm would not be feasible in practice because non-colluding dealers on the market would undercut the tacitly widened spread. There are two answers to that, first of all, the market power argument which we

have just discussed. That is what market power means, essentially, the ability to charge the higher prices profitably over time and the decisions as well.

The second is the decision finds, in specific circumstances, that the information exchanged would have facilitated occasional tacit coordination, and that is the recital 89 point. We say, the Commission could not have made that finding if non-colluding traders could have prevented tacit coordination.

Now, I am really conscious that I have had to rush through that with an eye on the time because I need to complete -- address the rest of the points, then complete certification and begin on carriage, but something that occurred to our team overnight is that if you were to have continuing concerns in relation to theory of harm and the expert evidence, and also what it is we say that the theory of harm needs to fulfil in order to work this question that, sir, you keep on putting to us, do you need X, if so have you shown it, then it might be possible -- I say this with a slightly heavy heart, but for us to do something like a further teach-in. It need not be live; it could be by way of Tribunal identifying questions that you have, but then we could put them to the expert -- experts and have the experts respond, rather than Ms Kreisberger give her

views, august as they are, contrary to the views of five or six professors, as Mr Jowell said yesterday, and again, me address these points, not only on my feet, but also very, very pressed for time, and that is something that we offer out from our side of the courtroom if I can put it that way.

THE CHAIRMAN: That is potentially quite a helpful suggestion. Let me -- and please do not worry about the time, we will make the time as we can.

Speaking entirely for myself -- and it may very well be that there is disagreement about how we approach this in the Tribunal -- my starting point is paragraph 427 of *BritNed*. If you go to {AUTH/26/128}, that is the paragraph. What I say in that paragraph, and I think it survived the Court of Appeal, is that when one is articulating a cause of action in a case of collusion, you do not need, as part of the damage you have to show to frame your cause of action, show actual monetary loss. What is sufficient is a distortion in the market. And if you can show some kind of restriction or reduction in the level of the claimants' consumer benefit, as I put it, that is enough. The question of what its amount is is a matter that is a quantification exercise, not a causation exercise.

So, for my part, the causative link that I am

looking at is whether you can show -- and of course not to the balance sheet of probabilities, that is a test at trial, it is the (inaudible) lower test as framed in *Merricks* -- whether you can show this kind of distortion in the market, whereby you are not getting what you are entitled to get as a participant in the market, a free competitive market.

Now, that is putting the burden pretty low for gist and it is probably made even lower by the fact that you only need to show damage to patchy members of the class, not to every member of the class, which is a peculiarity, I suspect, of collective actions. But I am not sure it matters in this case, because the way you are putting your case is one that there was not a fair market, there was a distorted market in this way. Of course, we have got a huge amount of material from the experts on various points.

What I do not think we have, and I do not think it should be in the experts' reports, which is why I am rather cagily responding to your invitation, what we do not have is a touchstone of, look, this is how the harm occurred; this is what we are going to be proving at trial, and to my mind, the nature of the market is something which has emerged -- and it may be completely my fault -- has emerged quite late in

the day in that of course we must not -- we will not be deciding what the market is like, but we do, I think, need to understand what your case is about what the market is like in order for the theory of harm to eventuate, because, for my part, I find the notion -- assuming an elastic market, I find the notion that naughtiness in individual transactions, whereby traders are, to be colloquial, stitching up their counterparties, I find it difficult to see how that can have the wider ripple effect that both applicants are pushing for, where there is an alternative with another bank to place exactly the same trade at a different price.

So, it seems to me that it is quite fundamental to the way your case operates for the harm to be transmitted for there to be a much less thick market than I confess I considered coming into this case, and that may be my error, but if it is my error then it needs to be explained so that I can understand how this harm is transmitted.

So, you do not have a problem with the naughty conduct and you do not have a problem with what you need to show in terms of the end result, it is the linkage between the two, the causation question that I find so nebulous, and what we are going to be doing -- what I am

going to be doing certainly is looking at your pleadings with great care to see what you have there articulated by way of your theory of harm, and that is what I am going to be looking at, and I have to say, if this concentration point does not appear, then I am going to be quite troubled. I do not think it is a question of the experts.

The experts have sought to address what they think they need to say by way of, essentially, quantification of the harm that they are almost pre-supposing exists. The thing is one has got a theory, and a lot of their evidence is directed to the quantification of the harm that they say occurs, or how they will quantify it, assuming they are right on the basic theory, and what I think I do not have is a list of bullet points of what needs to be shown in order for the theory to work.

MS WAKEFIELD: That is very helpful, thank you, sir.

So, we would say that whereas Mr Ramirez of course does address quantification of harm, Professor Rime's reports are devoted exclusively, essentially, to the development and the setting out of the theory of harm. What we can, of course, do is seek to reduce that into a series of what Professor Rime identifies as the preconditions for the theory of harm to arise and hopefully do something on one side of A4 so that you

have it and you can see it easily, sir.

When we handed up the note on class-wide harm yesterday, we did seek to set out in it how it is we say the cumulative effect of the exchanges of information would have had a longer term impact. That is in paragraph 13. I do not know if you will have it to hand.

THE CHAIRMAN: I did and I will find it again. Here we are.

MS WAKEFIELD: It is in {AB/20}. I guess {AB/20/4}. Yes.

That is the baseline spreads point which was discussed, I think, in re-examination. It is developed more in section 5 of Rime 1, which of course went in with our claim form.

THE CHAIRMAN: Well, I suppose the short point is this -- these paragraphs, they could not be right in a world of perfect competition. I know we are not in a world of perfect competition, but as a basic proposition, would you -- would the economists agree with that?

MS WAKEFIELD: I cannot answer on behalf of the economists, sir.

THE CHAIRMAN: No, I understand, which is why it goes back to the pleaded case. You see, I am not treating this as a pleading, but it is a very good instance of the issues that we are having to grapple with. It seems to me necessarily implicit in these paragraphs that you do not

have something coming close to perfect competition, but that you are at the other end of the spectrum in that you have got a configuration within the market that enables a non-competitive price to be imposed on the market. So, the issue that I think needs to be unpacked is that kind of influence.

Let me be clear, I am not sure it is completely answered by a market concentration point. A market concentration point is no doubt a necessary step, but let us go back to the filling station example that I articulated with Ms Kreisberger. You can have an oligopolistic market, three/four players holding the vast share, but it is quite possible because of the elasticity of demand, which is not necessarily related to concentration, that if Esso put their price up by half a penny or a penny, they lose so much custom if BP or Shell do not do so that is not worth their while, and that is why these prices move together, as if in collusion, but not.

Now, clearly, they can collude and if they do it is very naughty and it is distortive, but that is the thing which is troubling me, that one obviously must look at concentration, but what we are looking here is, if I am a minor bank in this market where we are effectively talking about fungible trades and where the only metric

is actually the rate and the spread, if one of the cartelists widens the bid-ask spread by three bips or pips, why on earth do they not lose their market? Even if they have 80% of the market and their 20% minority share of the market is held by other banks. That is what concerns me.

To be clear, just to answer in advance rather late in the day Mr Jowell's point, this is not a question of evidence, this is a Tribunal that is trained to deal with economic questions and I am afraid this sort of road testing of a case is something which I think comes with an application. So it is not a question of there not being any evidence from the banks in response, this is us, I think, in order to be satisfied that there is something that meets the *Merricks* test, we need, I think, to be able to articulate what it is you are saying in half a page.

The question, after that is, is it so unarguable that it should be struck out, but I do not think we are there yet, I think we are at the stage where we have not quite unpacked what it is you are asserting must be the case in order for your claim to have legs.

MS WAKEFIELD: Sir, when you refer to the *Merricks* test, might I ask what it is that you have in mind? The strike-out standard?

THE CHAIRMAN: Well, yes, I mean, the trouble is, when one has got a conventional case, you do not really need to worry too much about the articulation of harm. In *BritNed*, you could articulate the harm in two sentences: cartel allocates business not according to a tender process, but according to who they deem should win the tender. The harm is self-evident, it is there. Now, whether it is right or not, well, we had a nice trial about that and we all know that the harm actually was much, much less than was contended for. Now, that is precisely the sort of point which we do not consider here.

But you do need to work out what it is that you need to show in order to get home. Whether you have got a speculative case on that basis or a rock solid case does not matter. That is a secondary question. That is next in line. But we do need to know, for instance, whether it matters that demand is elastic, and it seems to me it does, and that is something which, when I read your note, I put marks by your summary at paragraph 2(c) 1 and 2 because I could not quite understand what you were saying in terms of the circumstances that needed to be satisfied in order for a proposed defendant to widen the bid-ask spread without being the loser not the winner, and that, I think, is a question that

continues to be only partially answered, because you take us to the market concentration point -- and I accept that that is a necessary first step -- but I think you do have to say, do you not, that actually the demand is not as elastic as I am suggesting?

MS WAKEFIELD: Sir, my significant concern at present is that we are embarked on something which is prohibited by *Merricks* and that what the president did, the first time round in *Merricks* was some kind of road testing, "what do I think about the case" kind of exercise, and I am sorry to speak a little disrespectfully, I really do not I mean to.

THE CHAIRMAN: No, no, please do.

MS WAKEFIELD: But I am concerned that what is happening now is some kind of inquiry into the merits of our application when Lord Briggs was clear in terms that if we pass a strike-out standard, then we go to trial. That is what happened, so --

THE CHAIRMAN: I agree with that. I agree with that.

MS WAKEFIELD: Is it the case then, sir, that even though there is not an application for strike-out made against us, or summary judgment, you are enquiring whether our case meets that standard?

THE CHAIRMAN: Well, just where the ball lands at the end of the day is something which we are going to have to think

long and hard about over the summer. What I hope I made clear to Mr Jowell before he started was that we do not regard the concession of the banks or the failure of the banks to make a strike-out as something that should inhibit our consideration of whether you have passed the strike-out standard.

But to be clear, I am not seeking an articulation of why it is you are right. What I am saying is that before you even get to working out whether you meet the strike on the standard or not, you need an articulation of what it is you are proving, what it is you say makes your case. It has nothing to do with evidence. It is nothing to do with economists. It is you are saying, this is the naughtiness, that is the damage we say, there are three links in it. Now, you are saying, yes, direct harm in your Class A is caused by the proposed defendants widening their spreads. Okay, that is fine. But it seems to me that you have got to be obliged to say, the reason they can do that is because this is an inelastic market. Now, if you say that, then clearly we cannot go and kick the tyres on that in anything beyond what is consistent with *Merricks*. But I think we are entitled to have you say that this case works in an elastic or an inelastic market, which may or may not be linked to a concentrated

market.

But I go back to my starting point. I do not see how this case works in a perfect competition world. Now, I know we are not in a perfect competition world, but the question is how far from that ideal we are at, and what I am putting to you is, is it the case that you need to be quite far away from that ideal, i.e. you have a sticky market where the customer is tied to the bank such that they will accept a widened spread, even though narrower spreads are available elsewhere in the market? Well, if that is your case, fine, and we are not going to be requiring you to say you have got to prove or we have got to deconstruct your theory of harm to work out whether the market is or is not the elastic. But I think we are entitled to know whether that is an important element.

MS WAKEFIELD: Sir, might it be that the most useful thing would be for us to provide a short note setting out what is in our pleading and we cross-refer in our pleading to the expert evidence of Professor Rime, and also what we say are the core elements in our theory of harm, because, of course, if these are issues which are troubling you, of course I want to address them, but I do put down a pretty significant marker, I have to say that I am concerned that we are departing from *Merricks*,

but you have my submissions on that.

THE CHAIRMAN: I have your submissions on that.

MS WAKEFIELD: You do.

THE CHAIRMAN: This is a concern that is, I think, applicable equally, and it is bad luck that you are getting these questions rather than Mr Jowell. But I think we are going to leave it at this. We are going to look very closely at the pleadings and what you say the necessary elements are for making good your theory of harm, defining harm in the manner that I have already articulated in *BritNed*, so we know what we are having to establish for your gist. We will look at that, we will look at the evidence and we will reach a view. We have well on board your point that one must not stray beyond the strike-out standard, but let me be clear, if it is the case that you are ducking this -- well, it is really economics 101, is it not? If you are ducking this point about demand sliding away, then that is something you perhaps ought to make good.

MS WAKEFIELD: Sir, just so it is clear, we are not ducking the point, we have put in evidence on the point, but I think the response that comes back to you when I say, this bit of evidence, that bit of evidence is: yes, but did you need that bit of evidence?

THE CHAIRMAN: Well, yes, exactly.

MS WAKEFIELD: So that is what I will say, yes, then Professor Rime says it is sticky, yes he did need to say it, or yes it helps or whatever, and we will produce a note that sets that out.

THE CHAIRMAN: What it goes to, I think, is the point, I mean, it is clearly right that the way the market works, concentrated, sticky, whatever, is hugely important in terms of understanding what is going on. But that is not what is troubling me. We have got an overabundance of evidence on how the economists think the market is working, it is the bits of the transmission mechanism that you have to establish to make good your case that needs to be set out, I think, and --

MS WAKEFIELD: Of course, well, we can certainly do that, sir, if that would be of assistance, and I can see that it plainly would be, because you asked for it yesterday as well, essentially, and so we can do that.

THE CHAIRMAN: Yes, well, I have -- I think I have said far too much, so thank you, Ms Wakefield, for bearing with me.

I see Mr Jowell has popped up.

MR JOWELL: May I just make a couple of observations, if I may, because of course it affects us --

THE CHAIRMAN: It affects you as well, absolutely.

MR JOWELL: The first is this, that, first of all, when your Lordship -- forgive me, Mr Chairman, you referred to the pleadings, the pleadings in this sort of application encompass the expert evidence. I mean, we cross-referred to the expert evidence in it, so particularly on an issue like causation, it is fair to take into account -- it is essential to take into account also what our expert reports say.

The second point is this, is that I think there may be a sort of misconception in the way that you are looking at the causal links in relation to adverse selection at least, which is the central mechanism. I could try, if you give me five or ten minutes at some point today, to try and talk you through it in a way that, as long as it is not -- as long as, if you like, it is not considered to be in substitution of anything else. I mean, I just volunteer that, if it would help, because I did not time and I did not think it was appropriate to do so yesterday because I think -- I, with Ms Wakefield, I do say that this is actually a matter for the experts to be speaking on. But I am happy to try and I do not want it to be said that, if you like, as an advocate I am not able to explain it to you, because I think I am, I just have not done so in great detail because I thought that it was more

appropriate for the experts to be explaining expert issues of causation.

THE CHAIRMAN: Well --

MR JOWELL: If you will allow me to try in five or ten minutes, I am happy to do so, whether now or later.

THE CHAIRMAN: That is very helpful, Mr Jowell. I am very reluctant to deprive the Evans applicants of the -- any time. I mean, we are --

MR JOWELL: No, absolutely.

THE CHAIRMAN: But to be clear, if both applicants wish to put in a clarification of what they say is shown by the experts' reports -- and, of course, it may be that this is a problem with this process that one has got an unfortunate bleed across between what the lawyers draft and what the experts write. But the way I see it is that it is for the lawyers to say how they are going to make good their case, in other words, why, if the evidence goes their way, they win, that is the lawyers' job, and then the experts are there to say, according to the relevant standard, and here it is a very low standard of strike-out, why those elements are met in this case.

So, there is, I think, a very clear distinction between the lawyer role and the expert role, and the problem with having experts addressing lawyers'

points and lawyers addressing experts' points is that you run the risk of conflating what are actually two very separate questions, and that is really what I have been troubled with. I mean, you have got your starting point, you have got the Commission decision and the wrongdoings there and that is great, but it does not give you an immediate causation answer because of the nature of the theory of harm you are running. We know what harm you need to tilt at, it is not a specific pounds, shillings and pence answer, it is an impairment of the market, so that is pretty low hanging fruit, but we do need to know what you have to show to get from A to C.

MR JOWELL: Yes, and I think part of the problem is that it has been to date the experts who have explained that -- the causal link, and maybe they have -- because they have done so, it has perhaps not been articulated as clearly as it could have been, and so I am happy to try and do so in -- break it down, as it were, but it will take me five or ten minutes to do.

THE CHAIRMAN: Well, what I am going to suggest is --

MR JOWELL: I do not have any notes with me, so I will be doing it off the cuff and I may make mistakes which will have to be corrected. It is entirely up to you.

THE CHAIRMAN: Well, if we had another day, I would give you

half an hour or more, but we do not. I am going to invite the parties to take what course they wish in terms of whether they feel the need to provide a written supplement.

If it comes to the point that we still feel that we are just not getting what the parties think they have got across to us, then I think you can rest assured that we will not simply hand down a judgment without further seeking to engage with the parties. Clearly, we are going to be re-reading everything on this point and it may be that the concern I am articulating is one that is simply a wood for the trees problem which is entirely mine. But it does seem to me that, given the concerns that we are expressing, now is the time to raise them, otherwise we will be left drafting over the summer, scratching our heads thinking, we do not actually know the answer to this, and my elasticity point is just one instance where I do not see how your mechanism works if the market is one way rather than the other.

Now, I may be wrong on that, it may not matter, in which case we need to know what the case is. Or it may matter, in which case is does, I think, need to be said what market you are postulating. In saying that, I am not for a moment suggesting that if you cannot prove to us that the market is as you say, you lose. That is

obviously not going to be the case. We are at the very low *Merricks* standard of showing a case that survives strike-out. But you do need to articulate what it is.

MR JOWELL: May I make just one observation which I think might assist, which is it is -- the reason why the analogy with the perfect competition is wrong is because you are talking about a cost here, a cost that is imposed on all other dealers who are not in the cartel, and actually, in a perfectly competitive market, a cost is always passed on. So, in fact, funnily enough, if it were a perfectly competitive market, it would always be passed on.

So -- and the effect of raising your rivals' costs, as Professor Bernheim puts it, causes them to have to raise their prices. Their prices here are the spreads. So that is why the spreads of everybody else rise -- increase.

MR LOMAS: In the same spirit, can I ask that whatever mechanism is used, at a sort of intellectual logic level, not at an evidence level, so from a pleaded point, you also deal with an issue that I think has been troubling us since the teach-in and I think Ms Ford raised yesterday, which is the case, I think, of both PCRs is solely based on expanded spreads. There is no other source of loss that has been identified. Your

asymmetric information case makes the point that the cartel members have better access to information and therefore can appraise risk better and adjust their strategy. Normally, if you can appraise risk properly and address your strategy, that gives you the opportunity to price more keenly, i.e. to reduce your spreads, not to expand them, and therefore, at least as far as the direct losses is concerned, it would be helpful to understand the logical reason why this preferential information flow to the cartelists led to them expanding their spreads rather than reducing them. Not for debate now, but it would be helpful if that were covered.

MS WAKEFIELD: I was about to get started on it, but we will include it in our note.

MR LOMAS: Okay. Well, if you have a complete explanation available in two minutes, that would be fantastic.

MR HOSKINS: Can I raise a practical point which is, obviously, if the PCRs are going to make further written submissions on such fundamental matters, we will need a chance to respond, and for obvious reasons, getting the PCRs' offerings, for example, on the last day of July would cause considerable pain amongst large numbers of lawyers who desperately need a holiday after the last 18 months. I am not suggesting we do it now, but we

obviously need a timetable for this and perhaps we can set that later on during -- the day.

THE CHAIRMAN: Yes, well, that makes sense.

Let me clarify our intentions in terms of how we are going to work. I think it is pretty clear that we are going to be reserving our judgment and not handing one down this afternoon. I think it is also pretty clear that such judgment will likely be handed out at the earliest, but I think we want to aim for the early date in early October. So I intend to do, with my colleagues, a fair bit of work over the summer, but like the lawyers, we too feel the need for a break, and I think, if you were able to conclude the process, to the extent you are so advised -- I mean, you may take the view that when we get down to reading all of this again, in light of the extraordinarily helpful evidence and submissions we have received over this week, it is unnecessary, and if you think it is unnecessary, then there you are, because we will be looking at everything very carefully again in light of what we have learned over this week.

But we would, I think, want to see a process that was concluded by, say, the first half of September in terms of articulation, which I hope gives everyone room for manoeuvre in terms of their commitments, and I do

not see any harm in our starting to articulate what we see as the issues pending those notes. You can certainly take it that to the extent there are issues that we consider have not been flushed out and need to be, we will raise it with the parties rather than simply handing down a judgment which contains within it unaddressed points.

Now, whether that is done by way of a question or a request for further submissions or by circulating a draft judgment identifying a section where we would invite push back, we will leave that to the future. But I hope all of the parties can take it that we will take great care to ensure that good points do not go by default, but equally that bad points are flushed out, and that goes for, obviously, all the parties. We have every intention of ensuring that everyone has their say.

MR HOSKINS: Sir, it is suggested that the procedure starts with the Tribunal then, and therefore we are in your hands as to the first move.

THE CHAIRMAN: Well, I think the short answer is, if Ms Wakefield and Mr Jowell get their notes done as quickly as they can, and you have a time to respond by mid-September, that is the sort of time frame that we are looking at. We have said what we have said about a desire for clarity. To be clear, we are not ordering

this, we are leaving it to the parties to decide whether they think it would assist. I imagine, given the exchanges we have had, that you will emphatically consider it does assist, but this is not a process we are mandating. You may take the view, as I say, that it is all perfectly clear when we get properly to grips with the expert evidence.

MR HOSKINS: Sir, I am concerned with that as a timetable because you have said you intend to work on this over the summer.

THE CHAIRMAN: Yes.

MR HOSKINS: So from the defendants' perspective, I am not comfortable, certainly for my clients, that you have submissions from the PCRs, you work on this over the summer, and then you get us coming in at the tail end of the process. I submit that if this is to be done and to be effective and fair, it should be wrapped up by 30 July. Therefore I would suggest that the notes from the PCRs are done by Friday, 23 July, and that any response from us comes on 30 July, and the benefit of that is you will have everything you need over the summer to allow you to consider this. But it is not fair to have such a long gap where you are sitting with the PCRs' submissions and not ours.

MS WAKEFIELD: I am afraid that we would need two weeks. We

have capacity constraints on our side, so we just cannot work to that timetable.

THE CHAIRMAN: Well, look, I tell you what we will do. I see Mr Hoskins' point. I am not quite sure, given the way I work, that actually it is right, but it is a fair point well made. What will happen is that you will agree a timetable that you both have and we will have everyone's material sent in one go to the Tribunal, so we will have an asymmetric process where you exchange but do not file, and you file in one go. Obviously, the sooner the better, but I am going to leave it to the parties, because I know that diligence will not be lacking, but equally, I do not think it is fair to say the process needs to be concluded by July given the, no doubt, other demands that exist on people's time and the fact that you will want to ensure that, in the usual way, your experts have bought into your pleading, because I always found the most important part of a pleading process on any area involving expert opinion was having my homework marked by the people who actually knew what they were talking about.

So, I do not think this is a process that can necessarily be rushed.

MS WAKEFIELD: Thank you, sir.

THE CHAIRMAN: Mr Hoskins, does that address your concerns?

MR HOSKINS: It does, and I am very grateful. Thank you, sir.

THE CHAIRMAN: Well, thank you all very much.

I see the time. We will adjourn now until 2 o'clock and I suspect we will be running beyond 4.30, but do not take that as an invitation.

Ms Wakefield?

MS WAKEFIELD: Sir, might I ask how long it is likely that we will have, because that does change slightly whether I rush through in ten minutes or -- Mr Robertson needs ideally an hour, perhaps 45 minutes, and obviously we should have finished at 2.45, but I -- could we have until 3.30?

THE CHAIRMAN: Well, let us start at the end point. We will run until 5 o'clock, so if the aim is that we start any wrap up submissions at 4.30, you have got until then.

MS WAKEFIELD: Mr Jowell has another hour and a half, I think, or hour and a quarter.

THE CHAIRMAN: Oh, does he?

MR JOWELL: Hour and a quarter, yes.

MS WAKEFIELD: Hour and a quarter.

THE CHAIRMAN: No, I am so sorry, you are quite right. So where does it go?

MS WAKEFIELD: So, by rights, we should have been finishing at 2.45, but anything additional to that obviously is

1 added on to 4.30.
2 THE CHAIRMAN: You need 45 minutes plus your time.
3 MS WAKEFIELD: Plus my time. I can try and do it all in
4 20 minutes, perhaps half an hour.
5 MR LOMAS: Just looking at the timetable, if you ran to
6 3.15, which is giving you an extra half an hour, that
7 gives Mr Jowell until 4.30, and then 30 minutes for wrap
8 up, which meets the chairman's proposition, I think.
9 THE CHAIRMAN: Mr Lomas' maths is so much better than mine.
10 That sounds right.
11 MS WAKEFIELD: Perfect.
12 THE CHAIRMAN: We will proceed on that basis.
13 If -- we would be pretty reluctant to go beyond
14 5 o'clock, but equally we would be extraordinarily
15 reluctant to have anybody leave this virtual courtroom
16 feeling that they have not had the ability to say what
17 they needed to say. That said, what you need to say may
18 not need to occupy the whole of the time that is
19 available.
20 We will adjourn until 2 o'clock.
21 MS WAKEFIELD: Thank you.
22 THE CHAIRMAN: Thank you very much.
23 (1.37 pm)
24 (The short adjournment)
25 (2.01 pm)

THE CHAIRMAN: Ms Wakefield, just bear with us while live stream starts up again.

THE ASSOCIATE: We are live.

THE CHAIRMAN: Ms Wakefield.

MS WAKEFIELD: Thank you, sir. We are going to take you up on your offer of being amenable to our putting in a note, it will not surprise you to hear, and so I am not going to address the other points made by Ms Kreisberger in relation to causation, we will address them in the note.

I would, however, say a brief word in respect of her criticism of algorithmic trading, and in particular her criticism that Professor Rime and Mr Knight do not provide sufficient evidence for the spill over effect, and she says verbatim from the transcript {Day4/36:4}:

"... on the state of their evidence, there is no firm basis for the assumption that they ..."

The interdealer prices:

"... feed through to algorithms; it is guesswork."

To this I make the perhaps inevitable response that her clients know, they have the answer to that, and so we cannot be criticised for doing our best on the evidence available to us.

The second point I would make is that, I think this may have been obscured slightly in her submission, that

the proposed defendants now accept that there is a relationship -- sorry, I mis-spoke. They accept there is a relationship between voice trades and electronic trades and the argument now is in respect of how close that relationship is with a direct impact. So I just make those two factual points, if I may.

Finally, in relation to certification, opt-in/opt-out, we had Mr Hoskins on methodology and I can be really quite short on this point. My submission is that the proposals to use regression analysis in the proposed proceedings are entirely conventional and plainly cannot be a factor that counts against us. We, of course, agree that there will be and will need to be a host of factual enquiries which will support our causation case and will inform the regression model, and bolster and corroborate it, but I say that is for the future and not for now.

I am afraid that I say that Mr Hoskins' going through their US expert reports was rather unedifying and that is because of course there is a conflict there, or there was a conflict as to whether the regression worked or not, and there doubtless will be in this case, and that conflict was left unresolved by the US court. I also say, of course, that we, in this Tribunal and in this all too short hearing, without proper opening up of

all that material are ill placed to judge which side of the argument was right, and I do say, of course, that that would be illegitimate in any event in the certification context, even if we are considering the strength of the claimants under opt-in/opt-out.

So that brings my submissions on certification to a close. You have my legal submissions, all the factors on opt-in/opt-out, and also our undertaking to provide a note to assist you with the strike-out question, if I can put it that way.

Turning then away from certification and on to carriage. I am addressing benchmarks and resting limit orders, both of which are, as you know, excluded from our proceedings. If I might start, as ever, with some observations about the legal regime. Sir, of course, we have had many discussions this week about *Merricks* and, on Monday in particular, we had a discussion or an exchange between me and Mr Hoskins in particular about *Merricks* and aggregate causation which led to my handing up a note on Tuesday morning. So far as Mr Evans is concerned, it is right that an aggregate damages award brings with it aggregate assessment of causation and we say that that is part of the binding judgment of the Supreme Court. You see that in fact in relation to -- as part of our submissions on compound interest,

which is one of the deferred issues of course that we are not addressing at this hearing.

We also say that it would be obviously undermining of the availability of aggregate damages if it were necessary for causation to be individually and separately proved in every case. So in this case, every class member does not need to provide their trading records. Plainly the opt-out regime does not require that, we say. Thus far common ground between me and Mr Jowell, I anticipate.

However, in my submission, all of that does not provide Mr Jowell with an answer to our criticism of the O'Higgins PCR's decision to include benchmark trades and resting limit orders in its proposed claim and I would make four points in relation to the legal regime at this juncture if I may.

So, firstly, the scope of the claims and the allied question of class definition are issues of critical importance, because if damages and causation are to be assessed at the aggregate level, there must be a sensible and robust basis for believing that the class members are the proper victims of that harm and that their transactions are properly to be included in the class. Otherwise, reasoning by reference to an absurd example perhaps, one could have a class of all UK

domiciled individuals, companies and trusts in every collective proceeding, irrespective of the nature and scope of the infringement, and it would be said, well, if the regression is good enough, then you would identify aggregate harm across the class, and actually, even if only a very small subset suffered that harm, well, you could just sort it all out at the end of the day. So class definition would be diluted to a point where it became essentially meaningless. There has to be something that is going on when you are determining who is in and who is out of the class and it is of critical importance to get that right because of aggregate damages. That is the core exercise in class definition: look for the losses and who suffered them.

Secondly, we agree with the submission made by Mr Jowell yesterday that the legal concern about winners and losers being in the same class is when there is a conflict of interests in that class, and he referred to the Canadian authorities in that regard. He expressly accepted that such a conflict would arise if the answer to a proposed common issue would mean that some class members would win and some would lose, and we agree in relation to the law in that regard, you cannot lump winners and losers together on the same side.

Where we part company, however, is with Mr Jowell's

contention that the O'Higgins PCR's class is free from a conflict of interest. In fact, quite the contrary, there is an acute conflict and I will develop that in more detail later. But in particular, that conflict arises from the O'Higgins PCR's decision to include transactions effected by coordinated trading and that is the benchmark transactions. Indeed, I say there is clear blue water, to use your words, sir, between us and the O'Higgins PCR on this point. Unlike O'Higgins, we deliberately excluded trades affected by coordinated trading in order to avoid this problem. I say that this is not the same as a single claimant giving credit for benefits flowing from the -- (overspeaking) -- because of the principle in *Parry v Cleaver*.

I say, to take an example, you are taking person A, who suffered £100 of loss on a transaction because of an instance of coordinated trading, and then, person B, who gained £80 as a result of that very same coordinated trading, and then awarding £20 to be shared between them. So, person A is horribly undercompensated and person B is quids in, and that is what averaging means in this context.

So, of course, here, I pre-empt the question, well, what if this is the only show in town? Person A is not going to get anything unless this goes ahead, and I do

not shy away from the possibility that there may well be some kinds of factual scenario which simply are not capable of being litigated collectively. If there is a type of conduct which, to use Professor Breedon's words, would result in a large balance, who would gain, their own evidence, that is {Day2/187:13-14}, then it may simply not be appropriate to combine all of those persons' claims into collective proceedings.

MR LOMAS: Ms Wakefield, I do not want to take up time, but I am missing something here so help me. If your case is solely one of expanded spreads and you are removing people who were the wrong side of a cartelised transaction -- specific transaction, where are the losers coming from? Because with widened spreads -- sorry, where are the winners coming from because with widened spreads everybody is a loser?

MS WAKEFIELD: So what happens with benchmark trades -- shall I come on to benchmark trades and I can explain how --

MR LOMAS: Okay, yes.

MS WAKEFIELD: If I finish my legal submissions and then I will get on to them very shortly. I am a page away.

Thirdly, there is an argument that the difficulties can be resolved at the stage of distribution. In response to that, I say it must be recalled that such an

approach is not necessarily in the interests of the class as a whole, because the overall pot of damages has been reduced by including those trades which have benefited, and in any event, the argument rests on the premise that you can reflect, at the distribution stage, who properly suffered the loss. So you would have to get the records anyway at that stage, and it is also speculative that it would even work. Of course, it all turns on the figures. But if you take my example, highly unusual as it might be, my person A and person B, well, you have only got £20 in aggregate damages, you cannot get the rest of the £80 off person B, you have not got enough money, you cannot disgorge off the benefitting class.

Fourthly and finally, I will say that points such as conflict, as well as difficulty of proof, should be taken into account when we are considering eligibility of claims to be included in collective proceedings and, in particular, relative suitability and whether the proceedings are appropriate means for fair and efficient resolution of the common issues, so you will recognise the statutory language immediately.

If I turn now to benchmark trades and hopefully ask -- answer Mr Lomas' question as I go through. It might be helpful first just to look at how they are

described in the decision. So please could I have {EV/3/7}. We have recital 9 there. Actually, could we go back a page to page 6, just so we can see the recital and then we will come back again to 7 {EV/3/6}. So you see recital 9 which says:

"The following three types of orders ... are pertinent in the present infringement."

You have got the customer immediate orders, which we focus on, then -- if we go back over to page 7, please -- we have those two other types of order: conditional order, which I will come to shortly, and then a benchmark trade, trade at the fix.

Now, if we go to page 14, please {EV/3/14}. We will see heading 4.1.2.3, which is, "Occasional instances of coordination facilitated by the exchange of information". Then over the page, please, to page 15 {EV/3/15} and here we have the word "occasional", "by occasionally co-ordinating". So I draw out of those two, and the title and of course the language of the recital, that the coordination was occasional and I make reference to this here simply because, as Professor Neuberger rightly pointed out on Tuesday, when the stories about the chatrooms broke in the press, if I can put it that way, fixed manipulation was very much at the fore, but we would say that this is a lesser

order part of the infringing conduct and the core infringing conduct was the information exchanges.

So the coordinated trading described here which affects the fix will necessarily affect the relevant benchmark trades. The conflict arises because each and every instance of coordinated trading moves the price, the benchmark price -- and do not forget that if a trade at the fix is at the fix, there is not a spread which applies to it, so the loss is that the trade was too high or too low, and that answers in short form your question, Mr Lomas. Each and every instance of the trading moves the price one way or the other. Some proposed class members would suffer a loss --

MR LOMAS: Sorry, does it? I can understand that they might have moved -- they fix the fix, they might have moved that up by a few pips or down by a few pips, but if your case and theory of harm is wholly based on broadening the spread ...

MS WAKEFIELD: Ours is, sir, but O'Higgins' is not, as I understand it. They measure the harm by reference to the realised spread, but essentially, that is the fix price compared to the market mid-price later. So although --

MR LOMAS: Yes, okay, I see. Yes.

MS WAKEFIELD: So although we refer to it as to do with

the spread, but actually the spread's got nothing to do with it. In my mind, I think of it one market mid-price, a fix, compared to a later market mid-price, I think that is Mr Jowell's case.

So, we give an example of fix manipulation in our skeleton argument, and if we could have {AB/3/12} up, please. I do not know if it is ... yes, perfect. So that is paragraph 32(a) and we just set out there the pretty obvious, I would have thought, proposition as to how the two different groups of customer are conflicted. You have winners and losers on that actual trade.

Of course, Professor Neuberger identified this very point when he asked Professor Breedon a question about it on Tuesday. I do not know if we can pull up the transcript on Ring Tel. If we could, it is {Day2/186:14-25} and then {Day2/187:1-14}, but if not, in short, Professor Neuberger, as you might remember, you put that very point to Professor Breedon, and he said:

"I think most would lose, although you are right -- I mean, the thrust of what you are saying is right, that the -- there would be quite a large balance who would -- who would gain."

We are on the right page now and you can read it for

yourself, your question from line 14 downwards. You say, sir, that quite a lot of people would gain and lose by those sorts of transactions.

I also say that in the US proceedings in which, as we are repeatedly told, Scott+Scott are a lead counsel, they excluded trades at the benchmark expressly, and we see that in the Schofield judgment {AUTH/81/13}. So at the bottom underneath, "Type of trade" we see:

"'Benchmark trades' are trades that were entered into at a benchmark price. Such trades are expressly excluded from [both classes]."

Then we go on to deal with resting orders and how they would not be impacted by the conspiracy to widen spreads which I am coming to.

If we go over the page, please {AUTH/81/15}, we see just at the top:

"Benchmark trades and resting orders cannot serve as a basis for liability in the case, [and so] the type of each transaction ... is highly material to their claims."

So they were excluded from the US proceedings. They are generative, I say, of an acute conflict such that they are inappropriate to be included. I also say that Professor Breedon's purported answer to all of this was just to say, well, it would all come out in the wash,

because you average out the gains and losses. But that obviously is not good enough. In my submission, it does not solve of problem of the interests of the winners and losers being diametrically opposed.

When we come on to resting and limit orders as we do now, if I might go back to recital 9 of the Commission decision, and again, that is at {EV/3/7}. I do not envy whoever is operating the system, it must be very stressful. Thank you. We see there (2) at the very top:

"Customer conditional orders ... triggered with a given price level is reached and opens the traders' risk exposure. They only become executable when the market reaches a certain level (for example a stop-loss or take-profit ..."

Just so we know what is meant by "stop-loss or take-profit", obviously, a stop-loss order is designed to limit losses, we have that in the evidence of Richard Knight, paragraph 107, Knight 1. So, if a customer has just purchased one currency against another, it might set a stop-loss order to sell that currency pair if the market went below a certain point. Take-profit order is designed to ensure that profit is captured. So if a customer has just purchased one currency against another, it might set a take-profit

order to sell that currency if the market price went above a certain point.

You will be aware that there has been very significant conflict between the various experts for the two PCRs in relation to how these sorts of orders work. They are obviously treated as one here in the decision as a type of just conditional orders en masse. They are also called resting orders sometimes. Limit orders applies maybe to all of them, maybe to some of them. So terminology, no one really knows, an enormous amount of confusion.

They cannot agree between the experts on what would be recorded in the data, and we have Mr Knight saying that, for example, conditions applying to stop-loss orders would be recorded to explain how it was executed, and critically they cannot agree on how they work. So Mr Jowell says, I think, that typically the customer would pay the spread, so in most cases they would suffer harm, provided, I think, the conditional order was placed with the dealer direct. But we say, well, that is not the case, and Mr Knight said in terms that some orders pay the spread and are therefore harmed, others will earn the spread and therefore benefit, and some will be unaffected because no spread is applied.

So I say that, applying all the legal principles to

which I have already referred, Mr Evans' decision to exclude limit and resting orders from collective proceedings is by far the better approach. It means that the class is properly circumscribed by reference to loss, it means there is no conflict, and it means, as Mr Evans adverted to in his opening position, that we are not locked into some time consuming and perhaps impossibly difficult attempt to deduce from the data exactly what sorts of conditions were attached to which sorts of order, and again, I say that is not only consistent with the statutory regime, but moreover, redolent, better decision-making by Mr Evans as the responsible PCR.

I would make an additional observation, in fact, that O'Higgins response to a lot of these complaints is, it will all just average itself out in the end, oh it is all just in the pot. But I do say that that runs the risk of impairing their causation at trial, and you have repeatedly observed during the course of this week, sir, that you are concerned by the idea that there could be abstract theories, and then a black box and a number come out the end, and whatever it is, we just say, oh yes, it was that theory that gave rise to the number at the end. In my submission, that concern is heightened if the PCR, like the O'Higgins PCR, is willing to say

1 when these difficult issues are pointed out to them, "It
2 does not really matter because the number is the number
3 at the end of the day, whatever caused it". So I say,
4 we are materially better by reference to that
5 consideration as well.
6 So, that brings to an end, five minutes early,
7 everything I wanted to say about our decision to exclude
8 those types of trade, and unless you have any further
9 questions, I will hand over to Mr Robertson for the rest
10 of our submissions on carriage.
11 THE CHAIRMAN: Well, thank you very much, Ms Wakefield. We
12 have got no further questions.
13 Mr Robertson, over to you.
14 MS WAKEFIELD: Thank you.
15 THE CHAIRMAN: Mr Robertson.
16 Submissions by MR ROBERTSON
17 MR ROBERTSON: Good afternoon, sir, members of the Tribunal.
18 Well, as I set out in opening, the task for
19 the Tribunal in deciding which PCR is the more suitable
20 to act as class representative is to select the person
21 who will best serve the interests of the proposed class
22 members while at the same time acting in a way which is
23 fair to the proposed defendants. Now, this Tribunal has
24 already noted the importance of the decision it faces on
25 any carriage dispute. You observed in your judgment on

the timing of the carriage dispute, at paragraph 66, that authorising the most appropriate representative is arguably the single most important issue for the represented class since it directly determines the approach taken to the action that is being brought in their interests.

Now, as you know, both PCRs have of course pointed to many different factors that you should take into account in determining the carriage dispute. For our part, we set those out, first, in our decision matrix back at the January CMC, and we have addressed them in detail in our written submissions, and I am not going to repeat them. We maintain our case that all of the factors we have identified can and should be taken into account, but what I would like to do in closing is to take a step back and focus on two key issues. They are, firstly, which team should be preferred, because both PCRs have teams supporting them, and secondly, which proposed claim should be preferred, and obviously, we say the Evans team and the Evans claim are ahead.

Now, in relation to your decision as to which team -- which application is to be preferred, you rightly posed the question to me on Monday as to how the Tribunal should approach this task. I then called it a beauty parade, but of course, beauty is in the eye

of the beholder, and as we agreed, it is an objective assessment on the basis of the application's action before you, inevitably there is a degree of subjectivity involved in your assessment, but it is an objective assessment. I think it is probably better to think of it, rather more prosaically, as a form of procurement exercise.

So, dealing first with the Evans team. Now, we say that a degree of comparison between the two teams is inevitable. That is because the quality of representation is directly related to the interests of the proposed class members. In short, the team you select will be the team that goes forward into battle to represent the classes. Against that backdrop, we submit that you can and you should ask yourself the question as to which team is better placed and better prepared for battle.

Now, I would, of course, accept that you could reach the conclusion that, on analysis, you consider this to be a relatively neutral consideration, or even a consideration with minor weight one way or the other. It will be of no surprise to you to hear that such a conclusion is not one that we would urge upon you, quite the opposite. We would say there is clear blue water between the teams. But in any event, we say, that

quality of the respective teams is something to be considered in determining the carriage dispute.

So, turning to the application of that consideration to this case, we do say that we have got a very strong team. We are working for a PCR, Mr Evans, who has relevant and substantial competition investigatory and litigation experience, who has made clear his dedication to maximising the benefit of this claim for the proposed classes. With respect to the other PCR, neither Mr O'Higgins, who has been involved in pensions and pensions regulation, nor Mr Damian Mitchell, who Mr Jowell called upon yesterday in closing, who is actually on the advisory panel, he is not a PCR, who is a former FX trader, now running -- or has been running hedge funds, we say that neither of them can have anything like that hands-on experience that Mr Evans has, which will be needed when going into battle with the proposed defendants.

Our team is well prepared for that battle. I do not propose to repeat points I made to you on Monday about the respective teams. Instead I would simply ask you to re-read what we said about this at paragraphs 9 to 18 of our skeleton argument on carriage when you come to consider this issue.

But I do want to emphasise three further points in

this closing. First is this. We submit that the quality and diligence of Mr Evans' team of experts has been demonstrated during the course of this hearing and I would highlight two notable examples. The first example concerns Mr Ramirez's detailed work into providing estimates of class composition and claim value. Mr Ramirez's work formed the basis of very large swathes of the proposed defendants' submissions on practicability. Indeed, it is actually rare to hear opposing counsel comment favourably upon the work of the other side's expert, however on Wednesday, Mr Kennelly referred to Mr Ramirez's volume of commerce tables, at appendix B to his second report, and made the fair-minded observation that Mr Ramirez "has characteristically given us an informative selection of information" that is on the transcript for Day 3, page 45, lines 21 to 23 {Day3/45:21-23}.

By contrast, the O'Higgins PCR has conducted no such detailed analysis of class composition and claim value. Instead it resorts to describing the class in broad brush terms. Professor Breedon looks forward to receiving data in due course, but appears to have conducted limited work to interrogate what might already be available. That is in stark contrast to Mr Ramirez, who chases every point down and identifies what is

publicly available to -- that he can report upon at this point in time without access to defendants' data.

Now, Mr O'Higgins sought to justify this lack of back up when he opened his case to you on Monday morning. Mr O'Higgins referred to Professor Bernheim's teach-in and:

"... the necessity of seeing the data before you finally define the nature of the model that you are going to be using."

That is at {Day1/54:6-8}. But in our submission that is simply lack of preparation. Mr Evans has already started grappling with the methodologies needed to win the case for his classes on the basis of data which is already publicly available.

So that leaves Mr Jowell seeking to denigrate what he called, on a couple of occasions, the "spurious accuracy" of Mr Ramirez's figures. We would characterise that as an unfair and wholly unwarranted dig on his part. Mr Ramirez does not say or imply that his preliminary estimates are anything other than just that, but they are a genuine attempt to assist the Tribunal in feeling its way into this new case under this relatively new regime. Indeed, without Mr Ramirez's work on this issue, the submissions before the Tribunal on the alleged practicability of opt-in

proceedings would have been purely theoretical and abstract. So we say it may well be that Mr Jowell was seeking to deflect attention from his own team's failure to address these issues properly.

In my submission, it is clear and was clear from the way Mr Ramirez gave evidence that he is exactly the sort of practising expert economist and econometrician who can assist the Tribunal in this litigation going forward.

Now, we noted Mr Jowell's latest efforts in his closing submissions to criticise Mr Ramirez for not having published academic papers to his name. We continue to fail to see the relevance of this submission. What matters is whether Mr Ramirez has the skills and experience necessary to conduct the detailed economic and econometric analysis that will be required if these proceedings are certified. Indeed, when this point was put by Mr Jowell to Mr Ramirez under cross-examination, Mr Ramirez quite rightly pointed out that he had been a practitioner in this business for 20 years or so, and that is {Day2/97:9-10}. In our submission, he is highly experienced and a well-regarded competition economist who is well-equipped and well-prepared for the task ahead.

My second example of quality and diligence in

the Evans team concerns the largely unchallenged evidence of Mr Richard Knight. It is a striking feature of Mr Evans' application that he instructed an expert in FX markets and trading to provide industry evidence before the Tribunal.

Sir, Mr Chairman, you noted in your article, "Lawyers come from Mars and Economists come from Venus" -- which does raise the question where econometricians come from, which planet they're on, but anyway: it is fundamentally wrong for an expert to give evidence in relation to an industry in respect of which they have no specific expertise.

We have avoided that very problem by instructing an expert who has specific expertise and experience in the particular factual field under consideration in these proceedings. Mr Knight's reports provide crucial insight into how matters actually worked on the ground.

Although Mr Jowell seeks to downplay the role played by Mr Knight, and described his role in these proceedings as "peripheral", we say their expertise came across clearly; and it was particularly demonstrated in relation to the topic of conditional orders on which Ms Wakefield has just been addressing you.

Now, Mr Jowell first cross-examined Professor Rime on that topic, and that was at -- recorded in

the transcript {Day2/70:6} to {Day2/71:13}. Then you will recall Richard Knight raised his hand on the Teams call, and explained how they work in practice. That is at transcript {Day2/72:1} to {Day2/73:10}. Mr Jowell put it to Mr Knight that:

"... your suggestion is that the dealers do these trades for the customers for free ... they do not ..."

Mr Knight corrected him:

"When you say 'free', quite a lot of the time, yes, there is no transactional profit in it, but the information that is gained from those orders is considered as value."

Mr Jowell had no answer to that. Well, actually, his answer was, "we will have to disagree about that." But he has absolutely no evidence on which to contradict Mr Knight's evidence.

Mr Knight then explained to Mr Jowell how conditional orders are necessarily recorded in the order book. It is a straightforward point once it is explained:

"... to go into the order book it has to be a resting order for it to rest within it."

That is where you get the name "resting order" from: they rest in the order book. That is transcript {Day2/77:22-23}.

Mr Knight was then cross-examined as to whether the information could be matched up to records in the FX dealers' client management system. Mr Knight explained that:

"[If] ... you linked back the transaction and found that transaction within the client management system, at which point it would be identified as a resting order or not."

That is transcript {Day2/80:8-11}.

It was put to Mr Knight that:

"... there will be many trades a second ..."

To which Mr Knight explained:

"But if each trade per second appears in both systems, they would be matchable."

Again, Mr Jowell was just left to assertion:

"... you might think that, but that is not actually the case ..."

That exchange is transcript {Day2/80:24} to {Day2/81:4}.

So when confronted with the industry expertise of Mr Knight, Mr Jowell was left to resort to committing exactly the same solipsism for which he later criticised Ms Kreisberger QC, namely giving evidence as counsel. He has absolutely no evidence on which to contradict Mr Knight, because he has got no expert on his own team

with whom to check these points. None that has testified before this Tribunal.

On the point about matching trades, I should also mention that Professor Rime then pointed out to Mr Jowell that:

"... [the] high intensity [of] FX [is market-wide] ... so ... not necessarily [many trades a] ... second ... [in an individual bank]. In any case, you would match it [up] using computer algorithms."

That is transcript {Day2/81:17-22}.

Mr Jowell then tried to rescue the point by asking Professor Rime whether he was certain he could do this matching exercise. To which Professor Rime replied:

"Certain, no. I would believe I could do it, but certain, that is a big word in social science, so no."

Transcript {Day2/82:5-7}.

I would comment, that is a characteristically measured and careful response by Professor Rime. In stark contrast, I would add, to the way in which Professor Breedon responded to some of my cross-examination in his evidence.

Now, by contrast, when it comes to industry expertise, the O'Higgins PCR competition economists have apparently had the assistance of Mr Reto Feller, but he is not a testifying expert before this Tribunal. He

appears to act in something of a consultancy capacity, advising behind the scenes, rather than testifying in court. That makes it very difficult for the other parties and the Tribunal to evaluate fairly the strength and reliability of the FX market knowledge possessed by the O'Higgins team.

Now, I should also pause here and address Mr Jowell's point, raised in closing, that Mr Knight's experience is somehow less relevant because he was in FX sales. I say that submission is misconceived, and would point to Mr Knight's observations on Tuesday in response when I asked him about this. That is transcript {Day2/120:3-25} and {Day2/121:1-3}. In particular, Mr Knight explained that, on the FX sales side:

"... we are an interlocutor between the trading desk and the clients and, as such, we have to have full knowledge of the methodology of the traders, how they run risk, because it also affects the clients, and also how the trades are managed between client and trader. So ... we have to have expertise in both trading side and ... client side."

You will recall he said that in his working life he was never more than eight feet away from a trader, unless the trading desk was in Paris.

So, contrary to Mr Jowell's submissions, Mr Knight's

experience is substantial, relevant and important.

So, that is my first point on the line-up of the PCR teams.

My second point is more of a response to another point made by Mr Jowell in closing. You may have detected a few references to Scott+Scott USA's role as co-lead counsel in the US class action, and how that institutional knowledge may be of assistance in these proceedings.

We do just wish to make clear, once again, that Hausfeld's US firm is co-counsel with Scott+Scott in those proceedings, and so that institutional knowledge which is available to Mr Evans' solicitors as well.

I do not wish to detain the Tribunal with this issue for any lengthy period, but we would make it clear that we do not accept the various efforts made to play up or minimise the co-lead counsel's roles in those proceedings.

So, turning next to my third point. We do submit that the approach to preparing these two applications tells you a lot about the quality of the teams putting together the applications; and it tells you a lot about the approach that these teams will take to litigation going forward.

I made the analogy in opening to buying a racehorse

unseen. Well, you have now seen the two horses out on the gallops. In fact, I think they have probably done a couple of hurdles races by now. So you have got some idea of their form. That will tell you how they will take the litigation going forward, or give you an indication as to how they will take the litigation going forward.

For our part, we respectfully submit that Mr Evans and his team have taken a careful, considered and comprehensive approach throughout. Knowing how important they would be for these claims, we have proactively obtained the non-confidential versions of the decisions before we filed. The Commission's findings made in the decisions are the lynchpin for our pleaded case, for our proposed class definition and the quantification of harm. We carefully prepared our application and supporting evidence, taking full account of the infringing conduct identified within the decisions. As such, we were able to set out our application fully and in one go. It has required minimal amendment since then.

In his opening on Monday, and again in closing yesterday, Mr Jowell criticised what he characterised as "unnecessary delay" on our part; in particular, after we obtained the decisions at the beginning of

October 2019. He said he could not understand why it took 12 weeks after receiving the decisions for Mr Evans to file his application.

His precise submission was that:

"... one might [give] ... them some slack if they'd done it in two weeks or three weeks, but a substantial delay of 12 weeks ... is simply not acceptable."

That is on the transcript for {Day1/96:21-24}.

Well, we say that observation is quite revealing of the entire misguided approach of the O'Higgins application. It suggests they see CPO applications as something that can be thrown together quickly in a matter of a couple of weeks. Act first and think later. We say it takes some time -- did take a bit of time to prepare the application properly first time round, and that is exactly what we did.

So that leads to my second point of comparison. The O'Higgins PCR filed an application that was incomplete, and when originally filed not fit for purpose. It did so in a rush to be first to file, but without the benefit of the Commission's findings in the decision, upon which its purported follow-on claim had to be based. It has been amending and supplementing the application ever since.

Now, I am not going to take you through blow by blow

all their different amendments. We summarise those at paragraph 109 of our carriage reply, which is in {A/10/40-42}. There is no need to put that up on the screen.

But, in summary, this has consisted of two rounds of amendments to the claim form, including an order to properly reflect the findings in the decision, and to settle their incomplete class definition and the instruction of a new expert, Professor Bernheim, which they say only took place as a result of the carriage dispute.

We say this approach is undesirable and inefficient. It does not advance the best interests of the proposed class members, and it should not be encouraged. In our submission, the right approach is to wait and put your best foot forward, which is what we did. We do not subscribe to an approach of acting in haste and amending at leisure.

So we submit, therefore, that our approach to decision-making shows that we are well placed to take this claim forward in the best interests of the proposed class.

Sir, that is all I wish to say on the -- Mr Evans and his team. I want to turn next to the proposed claims.

Now, sir, the Chairman pointed out on Monday that what the Tribunal is looking to identify are clear, objective differences which can inform an assessment of the competing applications; in other words, that each PCR should identify the clear blue water between their respective applications. Obviously that is still -- in the light of this morning's discussion between the Tribunal and Ms Wakefield, still something of a moving target.

But judged upon where we are right now, we say there are five core aspects of our claim which at this stage, assessed objectively, mark it out as better than the O'Higgins PCR claim.

Firstly, we have a comprehensive theory of harm based on the class-wide harm found in the decisions. Our theory of harm properly focuses on the class-wide harm. That harm takes the form of wider bid-ask spreads, which would result in customers paying more or receiving less on a spot and/or outright forward transaction. I refer you in this regard to the note on theories of class-wide harm which we handed up yesterday morning, and which we have also been looking at earlier today at {AB/20}.

I am not going to go to the note, but as you can see when you look at it, we have done our best to carefully

think our theories through and develop them as far as we can, given the limited information on which we have to go on. Information is limited, because we are following on from what are notoriously curt settlement decisions.

That theory of harm is set out in detail in Professor Rime's first expert report. Professor Rime, a pre-eminent expert in the field of FX market microstructure, has considered the terms of the decisions and set out his theory of harm in as much detail as he possibly can at this stage of proceedings.

His theory of harm is carefully rooted in the academic literature on FX market microstructure -- much of that literature, incidentally, being authored or co-authored by Professor Rime -- and it is -- he properly and carefully distinguishes between the mechanisms by which the infringements identified in the decision caused direct and indirect harm. He also, of course, gave evidence to you on Tuesday of this week.

As to exclusions, we have sought to identify and exclude harm caused by the infringements that cannot be computed on a class-wide basis. You have already heard this afternoon from Ms Wakefield as to why our decision to exclude benchmark trades, resting orders and limit orders from the propped claims is the right decision and is directly in the interests of the proposed class

members.

You also heard from me on Monday in opening to say why, in any event, the O'Higgins PCR proposal to use the realised spread is deeply flawed and we maintain that position.

Now, on this issue, Mr Jowell would have you believe that bigger is better, and that the O'Higgins PCR claim is superior purely by virtue of including these trades.

We say that submission is wrong in principle. The best interests of class members are not, or at least not necessarily, advanced by pursuing the biggest claim. The pertinent question is whether the bigger claim is suitable for collective proceedings.

Specifically, our case is that a responsible PCR does not simply claim for everything that might constitute harm arising from an infringement of competition law. A responsible PCR would consider what could properly be combined in collective proceedings. The O'Higgins PCR apparently has failed to consider this; and its failure to do so will only serve to increase the costs, length, complexity of the proposed proceedings to the detriment of the proposed class members.

To be clear, Mr Evans of course wants to maximise recovery for class members. You heard him say that in

terms on Monday morning this week.

However, he knows that he must take a responsible view of this litigation, as you would expect from someone who has previously been a Competition Commission inquiry chair, and who has brought litigation. He knows he must pursue only those claims that offer a realistic prospect of establishing loss on a class-wide basis.

I would also like to refute Mr Jowell's suggestion that by excluding those trades, Mr Evans is leaving substantial amounts of damages unclaimed.

There is simply no evidential basis for the submission that substantial damages were incurred on those trades. In fact, the available evidence points to the contrary: you have our submission that Mr Ramirez has estimated those trades constitute a relatively small percentage of volume of commerce, around 8% based on his estimates in his second report at paragraph 169.

Mr Jowell's suggestion in closing that this could be a higher proportion of damages -- that suggestion is on the transcript at {Day4/137:18-19}. But Mr Jowell simply has no evidential basis for suggesting that, because his client simply has not investigated this issue at all. Unlike Mr Evans, who has instructed Mr Ramirez to come up with his preliminary estimates, to do the best he can on the currently available data.

We submit it is significant that the O'Higgins PCR has not even sought to put a figure on volume of commerce or on the damages that might have been caused on those orders.

The second of the five points I wish to refer you to are the fact that we have defined two classes, Class A and Class B, which properly reflect the different ways in which the infringements caused harm on a class-wide basis.

Mr Evans' experts have identified separate theories of harm, methodologies and data sources for each of those classes.

As to theories of harm, as you know, our case is that the infringements caused direct harm on transactions entered into with the proposed defendants during their infringement periods, and indirect harm on transactions with the defendants outside of their infringement periods and other relevant financial institutions, RFIs. The causal mechanisms by which that harm is caused are different. Although, clearly there are some overlaps between the two.

So, we say it is appropriate -- in fact, it is necessary -- to define separate classes in order to reflect the important differences between the two types of harm. It ensures that a proper distinction is drawn

between them, and that the harm suffered is assessed and measured separately. It is bringing analytical rigour to these proceedings.

Indeed, turning to the methodologies and data sources, Mr Ramirez has carefully constructed methodologies for calculating harm to Class A and Class B separately.

For transactions entered into with the proposed defendants, he anticipates using their data in order to calculate harm. But the Tribunal will appreciate -- the question has already been raised today -- that it is also necessary for both PCRs to grapple with the question of how to measure harm on transactions entered into with the RFIs, the relevant financial institutions. It is an important issue. Those trades make up more than half of the volume of commerce for both claims on Mr Ramirez's calculations.

Now, he has risen to that challenge: he has conducted very detailed research into potential data sources that he may use in his calculations; and he has identified a number of important sources that would be commercially available.

Ms Wakefield took you to those this morning. Just to reiterate, they are data from interdealer trading platforms, such as Reuters and EBS, Electronic Brokerage

Services, and they are considered to be the most representative sources for prevailing FX market conditions. That is Mr Ramirez's first report, paragraph 102.

Then there is CLS, a financial institution that provides settlement services to its members in the FX market. CLS data is described by Mr Ramirez in his first report at paragraph 138. It is the single largest aggregated source of FX executed trade data available to the market.

There is a source of multi-bank platform data that Mr Ramirez has confirmed is available. That is CBOE FX. CBOE FX was the first electronic communication network, ECM, for the institutional FX market place, allowing buyers and sellers worldwide to trade foreign exchange directly and anonymously. CBOE FX says that it has got a diverse customer base of more than 220 banks, market makers, hedge funds and institutions. Its historical data includes trade activity for 66 currency pairs from 2005 to the present.

So we submit that Mr Ramirez's detailed research is an important strength of Mr Evans' application. It facilitates a materially more accurate calculation of harm to the direct benefit of the proposed classes. We say that, by contrast, the O'Higgins PCR's experts have

failed to address this issue properly. While they are content to take potshots at Mr Ramirez's sources of available data, they have got precious little to offer by way of their own submissions. Instead, they are just waiting for data to turn up.

They have suggested that it might be possible to access data from the US proceedings, but we have seen no concrete proposal as to how that would work in practice. You cannot just dip into other proceedings and get the underlying evidence in this jurisdiction. So we do not know how that would work.

PROFESSOR NEUBERGER: I wonder if I could just clarify one question, which comes to the question about the method the two approaches would have for quantifying damage.

I just want to clarify, the data problem that both teams would have would be in establishing the difference between the -- it would be establishing the spread for people trading with the respondent banks and people trading with the RFIs. So they have got the same data problems, essentially, is that right? Is your argument basically that your team is better able to address those problems? Or is there some aspect in which the problem is easier for you to solve than for the other team?

MR ROBERTSON: It is the former. What I am addressing is the ability of the Evans team.

Mr Ramirez has done his best with what is publicly available, and has drawn it to the attention and explained it to the Tribunal: these are sources of public data which could be utilised.

By contrast, the O'Higgins team, the evidence, certainly when Professor Breedon was giving evidence, was: when the data turns up. We say that is a sort of somewhat -- somewhat lacking in curiosity. Whereas, Mr Ramirez is like a dog on a bone: he is chasing down every source of data. And we say that objectively marks out Mr Ramirez as a more reliable expert than his counterpart on the O'Higgins side.

Just dealing with the other ways in which the O'Higgins experts have suggested how they might deal with this data problem. They suggested that it might be possible to extrapolate harm in relation to RFIs by -- sorry, to calculate harm to RFIs by extrapolating from data provided by the proposed defendants during the periods when they were not participating in the infringements.

But if you try to do that, to calculate all indirect harm, there are notable flaws to it. It means that as participation in the infringement increases, there is a corresponding decrease in the amount of data available to proxy indirect harm. Indeed, there will be material

portions of two years of the infringement period, 2010 and 2011, where no data at all is available, because all of the proposed defendants were part of at least one of the infringements.

Sir, Mr Jowell has gone on the offensive by trying to raise various criticisms of Mr Evans' proposal to define two separate classes. But in my submission, these miss the mark.

He has suggested that direct and indirect harm overlap in some respects, and that therefore there are some what he called "feedback effects" between the two types of harm.

Well, that may well be the case, but it does not change the fact that the two types of harm are still, at least in part, analytically and theoretically distinct. One way to think about the types of harm in this case is like a Venn diagram: there are likely to be distinct, non-overlapping types of harm caused by the cartels. We have summarised that in our note on theories of class-wide harm, which we handed up yesterday.

But as one might expect, we accept there are likely to be some parts of the harm that overlap. But the important point is that overlap does not mean or imply that one should just simply abandon analytical rigour and lump together distinct types of harm with distinct

and separate causal mechanisms and distinct data. The analytically rigorous way is to look at them to analyse each type of harm on its own merits.

In any event, Mr Ramirez's evidence to the Tribunal under re-examination was that it would be possible to distinguish the feedback harm if it were necessary to do so: transcript {Day2/117:119} to {Day2/118:117}.

Finally, there has been a semantic point made about Mr Evans proposing separate classes rather than sub-classes. It is not at all clear where Mr Jowell's going with that point or why it matters. To be absolutely clear, Mr Evans proposes separate classes.

Sir, to summarise on the second point, we submit that Mr Evans' proposed class -- class definition reflects his more comprehensive, his more considered approach to identifying the harm caused by the infringements identified in the decisions. Furthermore, his separate methodologies and extensive research into data sources will provide a clear empirical basis for estimating the harm suffered by Class B.

My third point of distinction is RFIs: relevant financial institutions. We have a materially longer list of RFIs included on our claim which would capture some more harm and generate more damages for the class.

It is common ground between the PCRs that the infringements would have caused harm on transactions entered into with other FX dealers that were not party to the infringements. We are both agreed on that. But our key point is that we did a materially better job of identifying those FX dealers, and our longer list of RFIs ensures the widest possible redress for the indirect harm caused by the infringements.

Our team conducted detailed research to identify the key FX dealers in the UK at the time of the infringements. We consulted not only the FX JSC data from the Bank of England that Professor Breedon solely relied upon, we consulted the BIS, the Bank of International Settlements, triennial survey data; and we identified a list of 57 institutions from the outset.

O'Higgins, by contrast, identified fewer. They missed the institutions which report to BIS.

Now, they sought to paper over this by casting aspersions on the longer list, but we have comprehensively rebutted those. In any event, you should note that their aspersions have, in effect, only been to a very limited number of those additional RFIs. They are down now to four Chinese banks. Although, they have not actually deigned ever to tell us which are those four Chinese banks. Professor Breedon could not

help me with that under cross-examination.

Now, Mr Jowell seeks to minimise this issue. He referred to it in his closing as "small beer". But we say it is important. The O'Higgins PCR's failure thoroughly to investigate this demonstrates that they simply do not do as good a job as Mr Evans and his experts.

Now, I explored with Professor Breedon in cross-examination on Tuesday afternoon what he had done to investigate the discrepancy between his original list of 39 RFIs and Mr Evans' list of 57 RFIs. That was at transcript {Day2/161:2} to {Day2/177:17}.

The answer was that he had done next to nothing, apart apparently from having a quick conversation with someone at the Bank of England, but did not bother recording that in his second expert report. That is transcript {Day2/168:18} to {Day2/170:11}.

So I would therefore invite the Tribunal to bear in mind the striking contrast between that approach and the detailed and meticulous work on this issue, as with other issues, by Mr Ramirez.

My final two points I can deal with shortly.

The fourth point of key difference is that we have got a broader geographical scope of our claim; and that is because we carefully considered the terms of

the decision, and concluded that a class member could suffer harm either if they were located or trading in the EEA. We have pleaded to that extensively and carefully in our claim form; it is at paragraphs 87 to 95 of our claim form. We have explained there why we consider this mirrors the territorial scope of the decisions.

The O'Higgins approach is narrower. That means some class members would go uncompensated.

My fifth and final difference relates to funding. In this regard, you have already heard this morning from Mr Williams QC, leading Mr Carpenter QC, why we submit that Mr Evans has the better funding proposition. We say it is fit for purpose, properly planned, more proportionate, more economic. It is to be favoured above that of the funding plan from the O'Higgins PCR.

So, in conclusion, and to draw all the threads together, and to finish on time, we say that Mr Evans is more suitable to act as class representative in these proceedings. We say that he is a strong individual candidate, backed by a strong team, which has undertaken comprehensive preparatory work before bringing this claim. There are clear objective differences between his claim and that of the O'Higgins PCR which mark his claim out as the stronger of the two.

Sir, unless I can assist you further on carriage, those are my submissions.

THE CHAIRMAN: Very grateful. Thank you very much. We have no questions.

Mr Jowell, over to you.

MR JOWELL: You will be pleased to hear it is actually over to Mr Patel.

THE CHAIRMAN: Ah, Mr Patel, welcome back.

Reply submissions by MR PATEL

MR PATEL: Thank you, sir. On this occasion, I will not get the graveyard shift, thankfully.

I will be replying to Mr Williams as shortly as I can.

The overarching theme, sir, of Mr Williams' submissions was: It will be all right on the night. If we need more funding, we can get it, or Hausfeld can go on to a full CFA if their fee estimate runs short. If we get certified, all the ATE insurers will come flocking and it will be nice and cheap.

It is built on hopes and aspirations. But we say, with the O'Higgins PCR you know what is there, and it is there now.

If I can take the elements of that in turn, starting with the quantity of funding remaining, which you heard Mr Williams on at some length. Starting, just briefly,

with a point on the skeleton -- if it can be brought up AB/3/55. We have looked at this before.

Have I got a wrong reference there? I am sorry if I have. Sorry, it is {AB/3/19}. Thank you.

It is paragraph 55 I wanted to show you. You will remember we have looked at these words:

"The O'Higgins PCR has a total of £16.2 [million] available post-certification (subject to the distribution of the Advisory Committee costs ...), whereas Mr Evans has a total of £15.9 [million] available. However, out of that [16.23], the O'Higgins PCR must find £1.68m of unbudgeted expenditure."

That is a reference to the AAE.

Sir, when one reads that sentence starting "however", the obvious question is: well, what about the amount that Mr Evans has to pay, 3.4 million? This is so obviously a false comparison that Mr Williams made no attempt to support it whatsoever. It has fallen by the wayside. Mr Williams accepts it is not 15.9, it is 12.5; the 3.4 must come off.

Now, that is common ground, but we do say it is concerning that the numbers were presented in this way. It is not a fair comparison.

Now, much of the time my learned friend spent was spent closing the gap between the funding packages.

I make the rhetorical point, firstly: if there was no material benefit to the class in having more contractually-committed funding available, why would he have done that? Well, the answer is clear: it is better to have the funding now than a hope or expectation. You cannot just assume it will be all right on the night.

How did Mr Williams try to close the funding gap? Well, he did so in two parts. First, he said that the Evans PCR was not going to buy its AAE and; secondly, he said that O'Higgins will not have its budget for distribution costs. You take all that out and, hey presto, it is even stevens.

Let me take both of those in terms.

Dealing with the AAE first. Mr Williams' position now, because his principal concern is quite rightly about the funding disparity, is to say, "We have no intention to purchase this anti-avoidance endorsement; we will not be purchasing it." That is a quote from the transcript earlier today.

Now, that is not what his evidence says. Mr Maton says that they have got the AAE and they can buy it if they need it.

But this is really bizarre. Far from being Piggy, Mr Williams seems to be Alice taking us into Wonderland with him. This is an AAE which the Evans PCR has

assiduously sought out, negotiated, drafted. It has been discussed with funders, and they have obtained funding from it. It has been put before you, and two witness statements have been adduced, one from the funder and Mr Maton dealing with it. Mr Williams' submission is essentially: do not look at it; we do not want it; we are not going to buy it; pretend it never happened.

Nailing down the Evans funding proposal is like nailing jelly to a wall. They are driven to these machinations by the position that they find themselves in.

We say it is unrealistic to think that this AAE will not be required. I will go on to make that good, but when I deal with the question of the quality of the ATE. But we say, as it were, put a pin in it, because that sum really does not come out of the difference.

The other attempt to bridge the gap was the £2 million in post-trial costs. It is said that the defendants will have to pay those.

Now, this is really a very poor point on the question of availability of funding. Quite obviously, if we do not need to spend it, that does not mean it is not available to us.

Now, if one looks at the document we have looked at

before, appendix 2, it is {AB/15A/18} -- if that can be brought up, please.

The first point to note is that the disparity is not only in relation to the post-trial costs; the disparity appears throughout. So if you start with disclosure and notification, bizarrely, Mr Evans has got 4.7 million. That is because he has included an ATE premium in that figure. But if you take that out, you have got 1.4 million-odd for disclosure, as against 2.8 million for O'Higgins.

It runs through: witness statements, 370 plays 905; experts, 1.5 plays 1.9; settlement, the same again.

Then Mr Williams took something of a cheap shot at our trial costs, but I think failed to realise that we have included our trial brief fees in the pre-trial phase. So if you take both parties' pre-trial and trial phases together, you will see that we are anticipating having a lot more money set aside -- it is closer to 5.5 million -- than the Evans PCR.

So there is a bit of smoke and mirrors, as it were, involved in simply focusing on the amount in the post-trial administration phase.

But putting that to one side, Mr Lomas has it right that the budgets are just that. If we do not need the money for administration, that is great; we have

more money to fight the litigation.

There is a difference between the PCRs in this respect, because unlike the Evans funding agreement, where the funding is tied to the budget by the way that it is defined in the document as the action costs which are contained in the budget, the O'Higgins LFA works differently: we simply have a series of tranches that start with 8 million and then in 2.5 million chunks, which we can simply drawdown as and when they are needed. So it is not actually tied to any phases, and we will simply use what we can and try and stay within the budget.

So on my learned friend's argument, our extra £2 million is a contingency for us, if it is not needed for distribution costs. Well, so much the better.

But just to take the point that was made at some length about recoverability of these costs. We think it is worth being clear about this. Mr Lomas asked the question: well, Mr Williams, if this is recoverable from the other side, what is it doing in the budget? Mr Williams said: well, it is there because it shows what the other side might have to pay, so it shows their exposure. But with respect, no. It is in the budget for funded costs. You can see it in the page that we have got up. It is anticipated by both sides that

a significant sum of money will be needed to fund this.

Now, of course, we, as Mr Evans, hope that it will be recovered from the banks. But of course it will be subject to assessment and may not be recovered in full.

More significantly, it is a disbursement that needs to be paid as and when this distribution is taking place, which is a long and expensive process that could take many months. Normally what happens is that you spend money, and then you come and say: well, here are our reasonable costs, can we recover those. Defendants do not generally pay costs before they are incurred.

So the parties must make prudent assumptions here. It is prudent to think that the class representative will need to pay these costs in the first instance; there is a very real chance of it. Even if they do recover them, cashflow-wise, from the defendants.

The risk for Evans, Mr Jowell made the point, is that he will run out of cash in this phase, because we say that his budget is inadequate. That really would prejudice the class.

So we say the attempts to bridge the funding gap fail.

Mr Williams then dealt with the question of sufficiency of the budget. They rely on the contingency principally to say: well, we can spread that contingency

liberally around.

Now, if they are wrong about the 2.8 million AAE premium, there is not very much of a contingency there. It is £1.5 million-odd: half-a-million-pounds of solicitors' fees and one-million-pounds of disbursements; not a lot for a case of this nature; and it will be rapidly eroded if the future is anything like the past, in terms of the burn rate of Hausfeld overspending on work which we say should have been foreseeable and budgeted for in the first place.

Secondly, we do adopt the observations, as it were, of the chairman on disclosure being likely to be a very heavy task, and you will see that we have in that phase the £2 million for disbursements and that can be used for data analysis, we had in mind quants, traders for translating chats, and of course, review carried out by e-disclosure providers, so we have got a significantly superior disclosure sum budgeted for there.

That all said and on the question of sufficiency, our primary point is that this is all, to an extent, crystal ball gazing, so other things being equal, having more in the tank is better for the class.

Now, can I address the point that was raised about Hausfeld's fees and Hausfeld going fully contingent and the skin in the game. Until recently, both firms of

solicitors had equivalent amounts of skin in the game, they were both on 50% CFAs, which is a pretty standard arrangement. It is a good arrangement because there is a strong incentive to fight the case to the best interests of the class, and for the solicitors, so they can recover the rest of their fees and uplifts. But it tempers the risk of under-resource. Solicitors are getting paid to do the work on an hourly rates basis and they are not waiting years in the hope of success, and as we know, and some of us know better than others, a firm's overheads do not vanish when the firm goes on a CFA, salaries must still be paid, overheads must still be paid, rent must still be paid. So a 50% CFA strikes a good balance for the class, both parties did it and neither party said that anything the other party had done was not helpful.

Now, we have Hausfeld recently having to throw a load more skin in the game and, we say, unexpectedly. This is not something -- before Mr Williams stood up today, this is not something they have previously said they would do and for good reason, because there are disbenefits. There is no evidence before the court about this being part of the plan. Previously, it had always been, if we need more funding, we can get it, not if we overrun our solicitor fee budget, we will go on to

a full CFA. So, yet again, the Tribunal is faced with nailing the evidence funding jelly to the wall. Reflecting on the chairman's observations earlier that it is all -- these packages are both very carefully thought out, that is a very significant piece of shooting from the hip.

Now, we know that this was not part of the plan, because the variation took place after we had pointed out a hole in Evans' budget, which, frankly, we say the Evans PCR team should have been upfront about. If I can show you a couple of documents in that regard, Mr Evans' second witness statement is at {D/8/28}, can that be brought up, please.

Now, you will see there is a heading, "Updated costs budget". At paragraph 87, Mr Evans talks about how the pre-CPO costs have been overrun and the funder has provided an additional £949,000 for disbursements, so not for solicitor's fees, but for disbursements. In paragraph 89, he describes the CFA, which is a 50% CFA, it is the one we all understood had been entered, and in the final sentence, he says:

"In light of the increases to the pre-CPO costs that I have described above, Hausfeld has agreed to defer seeking payment of its discounted fees from the Funder until after certification."

Now, we read from that what it says, Hausfeld will be seeking the rest of its discounted fees after certification. It does not say anything about contingent fees; it does not say that they will only be paid if the claim succeeds. It is very clear what it says.

Now, it does not take a mathematician to work out that if Hausfeld's fees have increased from £2.5 million in the old budget to 6 million in the new budget, that is £2.1 million at reduced rate fees, and there is no more funding to pay those fees that there is going to be a hole in this budget, and we made that point in our reply submission when we saw this evidence. We said, "We cannot make your budget add up, there seems to be a hole in it, we would calculate it at being around £3 million". There is nothing about that in this witness statement, it does not explain how that is going to be dealt with, because if the money's coming out of the funding after CPO, it does not really make any difference whether it is pre- or post-, it is still coming out the funding.

On 29 June, we got the neutral statement which the Tribunal had ordered, that appears at {AB/15/7}, if that can be brought up. You will see there, in paragraph 18, this is the first -- I think this is the -- well, it

does not matter, you will see that it says that:

"Hausfeld has subsequently agreed to defer until after certification seeking payment of the 50% of its fees which are payable in any event in respect of work done prior to certification."

So that sentence.

You will see there is a footnote and it goes to Evans 2, 89, which we just looked at.

It then goes on to say:

"Hausfeld has also agreed not to seek payment of its fees for work prior to the determination of Mr Evans' CPO application from the Funder above the value of £661,966 plus VAT."

Now, that is new information. We did not know that until we got this document. You will see that there is no footnote and that is because it was not in evidence, and we pointed out in our comments that there is no evidence about that. We then got a further witness statement from Mr Maton several days later, which said this arrangement has been done. It did not tell us when it had been done.

So, what is being said about this, to be clear, is that everything in excess of the first £700,000-odd of Hausfeld's reduced rate fees, pre-CPO, is fully contingent; it will only recover those if this case

succeeds at trial and it recovers them from the other side or out of damages.

Now, without that change to Hausfeld's retainer, the budget does not work. There is not enough in the pot to pay Hausfeld's pre-CPO fees. The first submission about this chain of events is, it is troubling for the class that Hausfeld have unexpectedly found themselves well into the red on cashflow. They will have spent £6 million at their normal rates up to now, for which only £700,000 is being paid into the bank, but this is not the position they expected to find themselves in. Under the original budget they would have been paid 1.25 million, that was their reduced rate figure, for a fraction of the work, and this is of concern to the class, because the financial risk for Hausfeld will only increase as the case progresses. There is "skin in the game", to use my learned friend's expression, and there is unexpectedly carrying over £5 million of whip that you have been paid nothing for. That is where Hausfeld now is, and we say that creates its own risks for the class. We have all seen it. The pressure that can be put on claimants to settle is felt much more strongly when their solicitors need to get some cash in the door.

The second point about this is the whole way

the thing has unfolded is very unsatisfactory. It was left to us to find this hole in the budget, it was not pointed out that it was there, and then, as a reactive step, this CFA variation seems to have been entered, and we are told today, "Well, do not worry about our budget for solicitors' fees, because if we run short, Hausfeld can just carry on without getting anything in the bank for anything in excess of budget". Well, can they? You do not have any evidence about that, and you do not have any evidence about the thinking, what was thought about whether that can add up financially. It was only seemingly thought of today. So, none of this, we say, casts the Evans PCR team in a favourable light as a class representative. We have stable fee arrangements on our side and we know what we are doing.

Finally, sir, ATE, and taking two points. Firstly, dealing with the quality of the ATE and the anti-avoidance endorsement. We do say that the pre-AAE Evans insurance policies are inferior and I will take you to those policies and I will take you to a provision that my learned friend did not take you to in those policies, which is surprising, because they are referred to in our carriage submissions. But if we can be shown, please {F/12/5}, this is the primary layer policy and all the other policies mirror it in terms of

the terms and conditions. Can we zoom in, please, on 4.1. To echo a point that we made in writing, of course, there are a variety of ways that an insurer can potentially not pay: one is avoiding ab initio, one is saying there has been a breach of a condition or a warranty and one is terminating the policy prospectively. Under 4., 1 we have, "Insured's conduct":

"The insured will use reasonable endeavours to keep to the terms and conditions of this policy."

So, there we have an attempt to incorporate all the terms and conditions of the policy: "... and ..."

And then do certain things, various pieces of conduct that the policyholder has to do. Then at the end it says:

"Where an Insured fails to comply with the above, but ... such failure was neither deliberate nor reckless, the Insurer shall indemnify [the] Insured in full, subject to the other conditions of the policy."

Now, this is not well drafted, but the implication is that these are policy conditions which, if breached, entitle insurers not to pay, so long as the breach is neither deliberate nor reckless. But deliberate here is not the same as a deliberate misrepresentation of risk,

that would be a lie, and the courts generally approach these sorts of cases on the basis that that is unlikely. Deliberate, here, is simply deliberate, and if one looks at the sort of conduct:

"... attend any conferences, meetings, expert examination ..."

We made the point in our written submissions that, literally speaking, that would cover Mr Evans deciding to attend a different professional commitment, then a conference, meeting or expert examination. That would be a deliberate breach of that policy condition.

Now, obviously, one can have an argument about what the consequences of that is, but it exposes him to risk. There is a risk under A through E and there is a risk through the importation of the terms and conditions of this policy of these insurers not paying, if they find themselves on the receiving end of the costs order, relying on arguments of this nature. This is much wider than the policy conditions that were under examination in *Trucks* that my learned friend took you to. There they were concerned with the anti-avoidance policies.

So, we made that point in our written submissions. Thereafter, the Evans PCR acquired the anti-avoidance endorsement quotation and the money to pay for it. We say, quite simply, sir, those actions speak louder than

my learned friend's words. The actions indicate that they see that there is a problem here, as much as they now try to squirm to promote their position on funding. My learned friend relies on the actions of the defendants in that regard and says, "Well, the defendants are fine with what we have done", but up until now the primary focus for the defendants has been on the pre-CPO position. Mr Evans has had to pay £3 million in pre-CPO to look after the defendants' exposure to costs, pre-CPO, and we have had to incept our AAE pre-CPO. But now the cat is out of the bag on this AAE, and if a CPO is granted to Mr Evans, the same questions will arise: are the defendants adequately protected, and it seems to us at least reasonably possible that they will say, "Well, Mr Evans you must have got this thing because you thought you needed it, you have got the money to pay for it, you should get it, it protects us better than your old policies did", and we think it is likely that, rather than have a fight over that, Mr Evans will agree to it.

So for those reasons, firstly, absent the AAE, our after the event insurance is more robust, and secondly, you cannot count on the £2.8 million being there as a contingency in the Evans budget.

Finally, on the question of amount of ATE, we have

not over-purchased. You have seen the figures and the pudding, as I said, which has been eaten, but this is not a case where it can safely be said that both parties' ATE cover is vastly in excess of any potential liability. We accept that, after a point, the difference would be academic; it depends on the nature of the case and the amount of cover in play. But we are really not in that territory with the figures that are in play in this case.

Ultimately, there is a weighing exercise here. We say it is plainly very advantageous to the class to have more ATE that they do not pay for locked in now. What are the disadvantages? The best that the Evans PCR can do -- Mr Williams can do on that is to say, the defendants might not want to pay bigger costs and so it could impede a settlement. Now, we have to say, we simply do not understand that. Both of these potential class representatives are fighting this case to maximise the financial return to the class. Mr Evans said so in his evidence on Monday. He is not there to look after the interests of his insurers and his funders, they carry the risk of non-recovery, he does not, the class does not. So why should the PCR decline to settle on the basis which might mean that his funders and ATE providers are not fully paid out? It is just not his

concern. If they are not paid out, they are not paid out, that is what they have agreed to in the waterfall arrangements.

Now, we make the point as well that it is impossible to say that more would come out for -- out of the pot for us than it is for Evans, even in respect of ATE premiums, because the timing of settlement would have an impact on that. But ultimately, this point really is as flimsy as can be and it does not outweigh the points in favour of having a more realistic ATE programme in place now.

My learned friend took you to *Trucks* and the comments there of what was thought of as sufficient. Of course, that was sufficient from the perspective of certification, but *Trucks* was not a carriage dispute. The tribunal's job here is a comparative exercise as between these two potential class representatives and it is possible to say, we say, clearly, on the evidence before you, that one is superior to the other in this respect.

Now, we consider that the Evans team realises this, because my learned friend then goes on to try and persuade you that they could get more ATE if they needed it, and we have said before and we repeat that that is speculation and a bird in the hand is better than

the bird that is flying around the roof tops. My learned friend can speculate reasons why they say it is likely that this insurance will turn up at a reasonable cost. We can speculate reasons why that might not be the case. Indeed, if a party goes to insurers in the middle of the case saying he needs more insurance, there is one inference from that which is that he is feeling exposed, and it might be that insurers feel that they can name their price in those circumstances. But you do not have to get into all of that. Why would you place more faith, we say, in the bird in the bush than the one that is in the hand?

Final point, sir, one point that seems to have slightly gone under the radar is, even if this happens such that Mr Evans goes into the market to find more insurance, what would it cost and where is that money going could come from? There is a budget with a contingency which has been recycled for perhaps the third time now, that has been used for disclosure, it has been used for trial, could well be needed for trial, and now it is being used again for the ATE premium, so it cannot be used that many times over. If the budget does not work, the budget will have to be changed in those circumstances.

Sir, unless I can assist further, those are our

reply submissions on funding.

THE CHAIRMAN: Mr Patel, we are very grateful. Thank you very much.

Mr Jowell, that gives you, I think, an hour, but we will rise for five minutes just to take the mid-afternoon break and we will start with you at 20 to.

MR JOWELL: I am grateful, thank you.

THE CHAIRMAN: Thank you very much.

(3.33 pm)

(A short break)

(3.40 pm)

THE CHAIRMAN: Mr Jowell, welcome back, over to you.

Reply submissions by MR JOWELL

MR JOWELL: Thank you very much, sir.

I will deal first, if I may, with Ms Wakefield's points, and then of course Mr Robertson's, and I am going to make this a genuine reply, because I am only going to engage with the points that have been made, since I consider that I have already had my opportunity to close on the carriage dispute and I will not repeat everything that I have said already.

THE CHAIRMAN: No.

MR JOWELL: Now, Ms Wakefield's first point was that -- on this winners and losers point, as she put it, was that

the scope of the claims should reflect the scope of the infringement, you should look for the losses and who suffered them, and we agree that, applying that test, surely it is entirely appropriate to include losses from the conditional orders and the benchmark orders; they are central to the infringement, as found by the Commission.

Now, the second point that Ms Wakefield makes is that she helpfully agrees --

MR LOMAS: Sorry, Mr Jowell, before you leave that, it would be helpful, I think, to understand whether both of you limit your definition of losers, people who should make claims, as to people whose claims are based purely to the concept of widening of spread. Now, I understood Ms Wakefield to say, yes, that was their case. On their definition of theory of harm, it only flows from widening of spread. I had thought that that was the O'Higgins case, but Ms Wakefield suggested that might not be the case and it would be helpful to clarify that.

MR JOWELL: No, it is also the case for O'Higgins. The only difference is that we use two definitions of spread, and as I will come on to, the realised spread is not something that we have just invented, it is a very well established --

MR LOMAS: That I understand, thank you.

MR JOWELL: So, the second point that Ms Wakefield makes, and she helpfully accepts that the winners and losers comment, which comes from the Canadian jurisprudence, and I referred you in my closing to the *Vivendi Canada v Dell'Aniello* case -- I did not take you to it, but it is in the authorities bundle {AUTH/61/19} -- it makes that very clear. The "winners and losers" comment refers to a conflict of interest on the result of a question or proposed common issue that is put to the court or Tribunal, and if the proposed common issue -- oh, it has come up, okay. I am not going to take you to it, but it is there for your note and on the transcript. But it is very clear that that is indeed the case, that if somebody -- if the answer to the proposed common issue is "someone will win while someone else will lose", well, then it is not a common issue, properly so-called.

But then she asserted that there is a conflict of interest between the members of the class proposed by O'Higgins. Now, it is fair to say that their skeleton argument did make that assertion, but it was just a bare assertion and it was not expanded upon at all, and we, frankly, did not understand that assertion, the basis of that assertion and the nature of the conflict just was not articulated, and of course the defendants have not

suggested at any point that there is a conflict of interest within the class, and if one existed, it would be remarkable if they had not relied on that.

I am afraid that, having heard Ms Wakefield, I still do not understand the basis for the assertion that there is a conflict of interest. I mean, there is simply no conflict of interest. We are seeking to claim for additional trades, conditional and benchmark trades, and for the harm arising from coordinated trading, and to do that, we use this additional measure, the realised spread, and we use that alongside the effective spread, and doing that can only increase the aggregate recovery to the class, it cannot decrease it. If it transpires that the measures using the realised spread do not show any increment, then one -- then we will use the effective spread alone, but it is only an increment -- can only be an increment.

Incidentally, it can also only assist, because it can also assist in actual potentially disaggregating the different elements within the losses suffered by the class.

PROFESSOR NEUBERGER: Mr Jowell, can I just clarify one point about that. You say it cannot reduce the claim, but if you include limit orders, surely there the spread is likely to be actually negative and so, to that

extent, does not that tend to reduce the size of the claim?

MR JOWELL: Well, not -- first of all, not in practice, because if you do what the Evans class are proposing to do -- first of all, we do not accept that they will be negative, our experts anticipate that they will be positive, but if -- because on some they will pay, on some they will gain the spread and the understanding is that on balance it will be positive.

But even if that were the case, the Evans -- on the Evans methodology, we believe that you cannot exclude -- successfully exclude the resting orders from the data. So all you can do on -- if you cannot exclude the resting orders, which is our experts' understanding, is then measure the effective spread with that in it. Then what Evans propose to do is then to lop off a proportion of the volume of commerce to represent what the resting orders have excluded. So, as I put it in cross-examination, it is a sort of double-whammy. So at the very at least, at least we do not have that second stage where you would lop it off. So that is the position.

Now, just to be absolutely clear for the transcript -- I appreciate the Tribunal does know this, but the realised spread measure is a very well

established measure alongside the effective spread and what it measures is the spread net of what is called the "price impact", and by "price impact" what is meant is the propensity of the price to move against the direction of the trade that the dealer has engaged in, and so it measures that, it measures the spread at a slightly later time.

So, coming back to the main point, we say there is no conflict of interest here, and if we can, via the realised spread methodology, establish net loss for the class from the front-running on benchmark and conditional orders, we say that can only benefit the class. There will be no losers, there will only be winners.

Now, Ms Wakefield also suggested that somehow in the course of distribution there would be -- the overall pot would be reduced by those who benefit -- those who benefited, and again, that just falls into the same fallacy, because the pot is only going to be bigger, it is never going to be smaller.

She also said, I think, that this would lead to difficulties of proof and she talked about the fact that in the US proceedings some of these trades had been excluded. But of course, in the United States there is a very different test for certification and for what can

constitute a class action, and in particular there is the test of predominance, that the common issues must predominate over the individual issues, and we say it would be very surprising if, in this jurisdiction, the fact that some members of the class might have benefited on some of the transactions was preclusive of a -- of class certification.

First of all, we say, as I think I said earlier, that that would be inconsistent with section 47(c) which directs -- very clearly directs that one is looking at class on an overall aggregate basis and one is not concerned with establishing individual loss, and you will remember that I took you to the judgments of Lord Sales and Lord Leggatt where they say that that shows that in fact that in effect one does not look -- one has no requirement to show net loss to every individual in the class.

I do say also that this is underlined also by the facts of Merricks, and I said I would take you back to it and I think I should just take you to the first Merricks judgment, which is in the authorities bundle, so {AUTH/23/19}. If you see paragraph 54 there, you will see that it was argued:

"... Mastercard argued that on the compensatory principle the computation of damages should take account

of the benefits received by class members who were Mastercard holders as a result of the higher MIFs. In that regard, it was pointed out in the *Morrisons* trial, the two sides' experts agreed that at least a significant proportion of the MIF is passed through by the issuing banks to cardholders. Such benefits can take the form, for example, of lower rates of interest, loyalty reward schemes or 'cashback'."

And:

"... Mastercard's Response asserted that.

"'... once the value of such cardholders' benefits is taken into account, it is likely to result in a finding that some class members will not have suffered any net loss."

And.

"The nature and scale of such benefits varied significantly as between different Issuing Banks and so, it was submitted, their value would vary greatly as between class members."

Now, it is framed there as being no net loss, but it could equally well have been framed by saying that some in the class of 46 million will have had a net benefit if they received these benefits of lower interest rates and loyalty rewards and cashback, and in fact, of course, we are all very familiar with some people who

are very good at accumulating airline points on their card and so on.

But the fact is that among these 46 million it is almost inconceivable, in my submission, that there would not have been some that were not net beneficiaries, and so although I appreciate that the point was perhaps not taken at the Supreme Court level and was not clearly argued, nevertheless we do say that it is very difficult to square the result of Merricks with the notion that some persons in the class cannot have suffered -- cannot have actually benefited overall from the infringement and when one reads section 47(c), as I said, again, it is clear that there is this shift to the proper focus at the aggregate level.

Indeed, I would say more generally that it would be contrary to the policy of the Act if it were the case that the mere possibility, or even the probability that a very small number of class members may have suffered no loss or even benefited were to preclude certification, because I say that in those circumstances certification would become a real rarity and the notion -- I mean, the notion that the class of victims of a competition law infringement, such as, for example, direct purchasers from cartelists, might have received

benefits from the cartel on certain occasions is not some sort of unique or unusual situation, and indeed the notion that a direct purchaser might have benefited has been judicially remarked on, and perhaps I could just show you that briefly. The Newson case in the Court of Appeal, which is {AUTH/19/4}, and if we could go to page 4.

You will see the facts there at paragraphs 10 to 11. It is a fairly standard kind of situation:

"IMI group were, at the time of the infringement, suppliers of copper plumbing tubes. Newson group are companies owned by ... [a builders' merchant]. They purchased copper plumbing pipes from IMI group and they wish to recover losses which they contend the cartel caused them to incur in making those purchases.

It notes that:

"... the Commission found that ... IMI ... had been parties to an international cartel ..."

They say -- the Commission found that had sought to distort competition and promote their own interests:

"There is no suggestion of any intention to injure Newson group ..."

Now, this is all a case about the tort of unlawful means conspiracy, and I am sure that the Chairman will be very familiar with it. But the basic point is

IMI sells copper plumbing pipes to Newson at a presumptively cartelised price.

The question that is then addressed by Lady Justice Arden, as she then was, was whether IMI had the requisite degree of intentionality for the purposes of unlawful means conspiracy, and in the course of considering that she made an interesting observation, and if we could go to page {AUTH/19/11}, please, you will see paragraph 40, and you will see:

"In my judgment [she says] the passage ... in Sorrell v Smith ... and on which the judge must have relied, does not on analysis support the judge's approach. It uses the word 'ensuing' ... which is ... obsolete. However the sense is clear."

She says.

"Lord Sumner is taking the situation where loss to the plaintiff must follow from the object of the conspiracy. He was taking the case where the proved facts exclude every other inference. As Lord Nicholls puts it, the gain and the loss are inseparably linked. But it does not follow in this case that Newson group would inevitably suffer loss. That would not be so if they were able to pass on the price increases to their customers."

Then this is the sentence I rely on:

"They might even have made a profit if they were able to raise their prices in advance of becoming liable to pay price increases to IMI group."

So, pass on by a direct purchaser more than 100% effectively, which is the scenario that Lady Justice Arden is considering there, is not unknown.

Now, if the mere fact that there might be benefits to some members of the class, or to some members of the class on some occasion was to preclude a class action, that is going to knock out very many direct purchaser claims. So, it is not only indirect purchaser claims like Merricks that would suffer, but also direct purchaser claims, and so we say that surely -- to say that at the certification stage -- of course, it may be that it will be preferable to identify those people later on who passed on entirely, or more than 100% and exclude them. That can be done either at distribution stage, or possibly even at an earlier stage before any award of damages. But to say at the certification stage, "Well, some direct purchasers might have benefited because of more than 100% pass-on, therefore we cannot certify", well, that, in our submission, surely cannot be right.

Indeed, if there is a problem with some benefit accruing to some of the class on some transactions, that

is a problem that is at least as difficult for Evans as it is for O'Higgins. Now, you will have seen that Evans class put more emphasis than us on the mechanism of, if I can try and put it neutrally, concertation on spreads, and if I could just remind you of what the Commission said about this -- of course, you have heard the respondents rely on this a lot. It is in {EV/2/21}. If we could have that up, please. Thank you very much. You see in (89) we have the point that was relied on very much by the respondents, which is that they note that the occasional concertation on spreads -- the:

"... occasional tacit coordination of those traders' spreads behaviour, thereby tightening or widening the spread quote in that specific situation."

The respondents comment on that, and if I just show you what they say {AB/5/39}. You see at paragraph 101 they say -- they make -- they say:

"Accordingly the Commission had found that particular information exchanges on spreads within chatrooms could have affected the quote given to the customer in question ..."

Then they say in brackets this:

"... (either to their advantage or detriment depending on the impact on the spread in question)."

So, they make the point that it is conceivable that

if there was an occasional spread tightening, that might have benefited them in the market on some occasions. But that, of course, Mr Evans does not suggest, "Ah, well, therefore there is a conflict of interest", or that that is preclusive of certification, and of course it is not.

It is very important to note and not to dismiss the importance and important possibility that it may be, at a later date, possible to identify those who have benefited and either exclude them from the class or to make suitable adjustments on distribution, and that is a perfectly appropriate thing to do and does not create a conflict in the class and certainly does not reduce the overall pot.

The other point -- the final point that my learned friend made was that by -- that somehow our methodology for trying to capture the loss on these additional trades involves somehow falling into the black box trap that you have identified, Mr Chairman, and in fact, actually, the very opposite is true, because as I said previously, by using the realised spreads alongside the effective spreads, you are actually only gaining more information -- considerably more information, actually, about how these -- about how this loss may be disaggregated between different heads. So actually

learning more not less.

So, if I may then turn to Mr Robertson's submissions. He spoke about his class representative, Mr Evans, but he ignores the fact, I am afraid, that Mr Evans simply has no connection to this specific class, and that is a fundamental deficiency and a real advantage of Mr O'Higgins.

When it comes to Mr Ramirez, he praises his information and he says that -- he refers to the defendants saying that he has "characteristically given us an informative set of information". Well, all I can say is beware of Greeks bearing gifts. When you are praised by your opponents, it is not normally a good sign. Of course, what he ignores about Mr Ramirez -- and we take the point, we do not say that you have to have academic experience, but if you do not have academic experience, then you do have to have practical testifying experience, and to put someone up who has had no prior testifying experience and has no academic qualification is surely a deficiency.

He referred -- went on at some length about Mr Knight and his answers. I just simply reiterate, there is no shortage of trading expertise in the camp of Mr O'Higgins and we simply do not consider that it is a question of trying to get as many experts in front of

the Tribunal for the purposes of a carriage dispute. It is not about quantity of experts.

He referred to the fact that Hausfeld are co-counsel in the United States. That is true. But it is also true that they have had a distinctly secondary role in the United States proceedings and we do not accept that Hausfeld will have access to the same degree of institutional knowledge as Scott+Scott. I just refer you there again to Ms Hollway's fourth statement at paragraphs 44 to 47 on that point {D/3/15}.

He noted that, in relation to the Commission decisions -- he suggested that our application was thrown together quickly. It certainly was not and it was a very, very long time in coming. I mean, it is not as though people suddenly learnt about the existence of these cartels when the Commission announced its press release and gave its initial -- made its initial decision. These cartels -- there have been numerous regulatory decisions about these cartels for years and years and years, and the decision was years in coming and long, long awaited. When I suggested that they should have been ready in two or three weeks, it is against that background that they should have been well prepared already and the press release containing the essential elements of the Commission decision should

have prepared them to be ready to move very fast after that, particularly in view of the fact that there was already an applicant out there, and waiting 12 weeks, I am afraid, is simply not good enough.

Then, when it comes to the claims, Mr Robertson says that bigger is not better, the question is suitability. We do not say bigger is better, we do say more suitable is better, and you will have seen the Canadian case that I took you to in closing which we say properly characterises the correct approach. But we do say also that it is important that where you have a methodology that is a greater -- able to capture greater harm to the class and is a plausible methodology, then that is preferable.

He said that there is -- he complained about the fact that there is no evidential basis, he said, for suggesting that the harm arising from the resting orders and the conditional orders are more than the representative of the volume of commerce of 8%. Well, the basis for that is in the Commission decision where one sees that in the Commission decision those orders are very much at the heart of the infringement therein described and therefore it is beneficial to seek redress for them.

It was suggested that it was of great benefit that

they had identified direct and indirect harm, and that is said to be really in two ways. One, they say they have identified additional sources for their material, additional data sources, but as we explored in cross-examination and as our experts say at some length, the additional sources that have been identified are of little utility, or, insofar as they were of utility, they have already been identified by our experts. I simply refer you on that point to Professor Breedon's third report at paragraphs 5.12 to 5.15 {C/3/48}.

It was accepted, I think, by my learned friend -- and not, I am sure, a happy acceptance but nevertheless rightly accepted -- that there is a degree of overlap between their direct and indirect harm, and of course there is that overlap and there is a considerable, in our submission, overlap between those two types of harm, and really, once one appreciates that, this so-called analytically rigorous distinction actually entirely breaks down. We note that in the passage that my learned friend referred to from Mr Ramirez in which he says -- in which he asserted that you could somehow -- he was asked, "Can you disaggregate the feedback effect from the primary effect", the first thing he said was, "Well, if you are trying to measure it in the aggregate, it does not really matter", and of course it does not

really matter because they will both be captured by the effective spread. So trying to draw these kind of sharp lines, which is actually -- sharp and inflexible lines, which is a familiar feature of the Evans approach, is actually distinctly unhelpful and does not advance the analytic or the practical progress of the analysis.

Those are the only points that I wish to say by way of reply, and so I think I may have even finished a bit early.

THE CHAIRMAN: Well, all the better for that, Mr Jowell. Thank you very much.

That leaves us with the half hour for "wrap up", as it is unhelpfully put in the indicative timetable. I am not necessarily understanding that there is anything to wrap up, but I suggest that we go through the various advocates who have had speaking roles to identify any points, of whatever nature, that it is appropriate to raise now, otherwise we will rise and adjourn to reserve our judgment.

But is there anyone who has anything to say by way of -- Mr Williams.

Further submissions by MR WILLIAMS

MR WILLIAMS: My Lord, yes, I have just been asked to clear up a few points and I can confirm that no one else on our side will be adding anything. So just, I think

I have got six footnotes, really, in -- after Mr Patel's reply.

At the outset of his reply, Mr Patel showed you, at {AB/15/18}, our budget for trial when, for example, he said to you that what I have said about trial costs, well, you need to look at trial preparation and so on. This is a pure correction. With respect to no Mr Patel, the better page to have shown you would have been page 19 {AB/15/19}, and just to explain why that is.

On page 18 are the costs which are funded, and the costs which are funded -- oh, sorry, I may have a page reference wrong. Mr Carpenter will just look at it. I think I may find I may have the divider wrong, so we will correct that, but I was not intending it to be turned up anyway.

The point is that the page he showed you was the page that summarised our funded costs and the funded costs on the two sides are not the same, and I am not there just talking about Hausfeld's recent increase in its CFA funding to 100% for a portion of the pre-CPO costs, but of course our counsel will also act on CFAs with discounts on their fees of up to 25%. So, if look at the costs of trial, for example, in the funded statements, that will understate our disbursements for trial quite significantly, because our counsel are on a

CFA and theirs are not. So just if -- to the extent the Tribunal has any interest in the particular point that Mr Patel and I were there battling about, one should not look at the funded summary, one should look at the summary on the next page, which is the recoverable costs summary. So that is just really a correction.

The second point, Mr Patel pushed back on the suggestion, well, you do not need to worry about distribution because he says, well, what about paying as you go. Sir, with the greatest of respect, it is simply fanciful, fantastical in fact, to suggest that you might get to distribution -- distributing very large sums in damages without having had a very large sum of payment on account for costs, at which point all coffers really ought to have been full to overflowing. So we do maintain, in a thoroughly unsubdued way, that you can disregard post-trial costs when looking at this, because if you get to them, you have won and there is not going to be any sort of funding problem.

Third point, Mr Patel shows an appreciated concern for Hausfeld's overheads being eroded, or its capacity to payment being eroded by having a 100% CFA. Well, sir, we do not know the economics of Scott+Scott as they practice in the United Kingdom, but so far as Hausfeld

is concerned, I can set Mr Patel's mind at rest. They have no difficulty offering no win, no fee terms, they have offered them from the decade that they have practised in this jurisdiction on a regular basis. It is a quite unreal point. They can pay their staff and their electricity bills, and as you will know no win, no fee terms are completely ubiquitous in civil litigation in this jurisdiction.

Then we come to Mr Patel's exposition of the terms of the policy and clause 4.1. This is not a policy, unlike other policies, which provides that compliance with policy conditions is a condition precedent for cover, there simply is no such term, and absent such a term, the proposition that the insurer could withhold indemnity because, let us suppose, the case ends in disaster, and he can say, "Oh yes, but two years ago Mr Evans was double booked and he played a round of golf with his pals instead of turning up to a conference", I mean, it is so unreal to suggest that, absent the sort of clause I have talked about, an underwriter could take such a point, in my submission, that one can simply discount it.

As I showed you, clause 4.8 -- again, I do not ask you to turn it up -- clause 4.8 legislates for the circumstances in which the indemnity may be

withdrawn, and I showed you that those were very limited circumstances, and even then, indemnity can only in fact be withdrawn prospectively.

Here, I appreciate you are not going to be helped by me making the point for the third time, but it is a such a telling point. The defendants were proffered our neutral funding statements which asserted that they were content with our AAEs -- sorry, absent our AAEs, they were content with the ATE as it stood, they were offered the facility to comment, they did not comment, they had a nil return and they are the ones whose interest matters.

Lastly, as to my learned friend Mr Patel's point: well, even if the market still has ATE, there is nothing to suggest they can fund it. That is dealt with by Mr Chopin in his third statement. Just for your reference, {D/10/6}, paragraph 26. He is highly confident that it would be funded, and we say this falls seamlessly into the pragmatic approach by the president in the Trucks case. So long as a case remains meritorious, the reality is the funding will be available, and Mr Patel said multiple times, I think, about proof of puddings and eatings. Well, the proof of the pudding here about the funding situation is that you have this carriage dispute, and this is a dispute which

investors are fighting at great expense to invest in, and in those circumstances, to suggest that if more ATE is required after certification, the whole house of cards could collapse because of that, in our submission, it is simply, again, unreal.

So, for those reasons, we maintain the submissions which you heard from me earlier today.

THE CHAIRMAN: Thank you, Mr Patel. I am not inviting a surrejoinder, but if you want to say something, I think you are entitled to respond very briefly.

MR PATEL: Thank you, sir. I have nothing I wish to add to what has already been said.

THE CHAIRMAN: Very grateful, thank you very much.

Is there anyone else who has any points?

Mr Kennelly.

Submissions by MR KENNELLY

MR KENNELLY: Yes, the respondents have some short points.

First, on the relevance of the strength of the claim for rule 79(3)(a), this is not a hard-edged question. The Tribunal will, as Mr Hoskins said, form a credible view of the merits and weigh them along with the other factors. The strength is an important factor, because the legislature -- the legislator specifically directed your attention to it.

What that means, consistently with the Guide, is

that the more uncertain the claim, the more heavily that weighs in favour of opt-in. The PCRs' evidence seems to be that few class members are willing to opt-in because of the uncertainty of the claim, but that cannot be a reason to order opt-out. Quite the contrary.

I turn then to practicability and the position of the Funders. In this case, we say an opt-in (inaudible) will work for the funders. I am just going to focus on that.

The first goes to claim value, and you saw the estimates in Mr Ramirez's evidence. The Tribunal will recall that those estimates were only in respect of UK domiciled class members, and could I have up, please, {EV/10/42}. Very briefly I want to show you paragraph 90. You will see that, at the first hole punch, just below the halfway point, Mr Ramirez acknowledges that he limits his preliminary estimates to transactions occurring in the UK, and you have seen Professor Breedon's evidence that the non-UK class members' VoC was likely to be even larger. There's no need to turn that up. We have posed the footnotes in our response at paragraph 40.

But before we leave Mr Ramirez's first report, just very briefly, please, if you go to the previous page, because this goes to a data point, so going back to page

{EV/10/41} and paragraph 88 you can see the first line of paragraph 88, again, where Mr Ramirez is discussing the non-UK domiciled class members. He says he understands from Hausfeld:

"... that non-UK domiciled class members will be asked to submit detailed transaction data when they opt-in to the proceedings."

That is interesting, because it shows that the PCR is prepared to gather transaction data from their own class members. There is no suggestion here that it will deter non-UK domiciled entities.

The next point on how an opt-in collective proceeding will work for funders is the DBA they will need, because of course in an opt-in proceeding the funder will need a damages based agreement to recover, and as the Tribunal knows, under a DBA the funder can recover up to 50% of any damages awarded. So let us assume that the eventual damages awarded amounts to about £500 million, so that is less than a quarter of the estimate from the UK-only domiciled class members. That is less than half, I think, of the US settlement figure. With a 20% DBA, that means the funder still gets £100 million. Now, there is no doubt that opt-out remains more attractive for the funder, but £100 million is still a reasonably

attractive proposition for the funder in this case.

In any event, the funder cannot blackmail the Tribunal by saying, "We are only offering opt-out, and if you refuse us, notwithstanding the fact that opt-in is practicable and otherwise suitable, you will be left with no claims at all". So, we say they cannot be determinative, and in fact little weight should be given to the funders' preference, because they will always prefer opt-out, and if that were to be weighed heavily in the balance, opt-in really would be very rare indeed.

Those are the short submissions. I think Ms Kreisberger has some submissions to make following.

THE CHAIRMAN: I think Mr Jowell has his hand up as well, but we will go, I think, for Ms Kreisberger first to keep the respondents grouped together.

Ms Kreisberger.

Further submissions by MS KREISBERGER

MS KREISBERGER: Thank you, sir.

Sir, I just want to draw the panel's attention to a couple of documents in the bundle for your summer reading list. The first is at {B/47}. Now, this is -- yes, that is the one. So, this is the government's response to the revised 2015 CAT Rules, the Tribunal Rules, when they were in draft. Sir,

I bring your attention to this because you commented this morning that one of the reasons why rule 79(3) requires something more for opt-out claims compared to opt-in is because the represented persons are not given the opportunity to participate in opt-out claims, and so I thought I should draw your attention to this, which echoes that point.

So if we go forward to page 34 in the document {B/47/34}, that should be the paginated numbering, and paragraph 3.16, which you see there under the heading, "Government response", the government said this:

"The Government believes the 'strength of the claims' criteria (draft Rule 79(3)(a)) is particularly important for opt-out proceedings, as cases can be brought without class members' knowledge or consent, as they do not need to actively participate in the claim. As a result, we have decided to incorporate this into the Rules. This will not however amount to a full merits test and the approach ... will be clarified in the Guide."

So it really echoes your point, sir, this is obviously separate from the Merricks standard for certification, it underlines the opt-out procedure is not apt for weak claims.

Sir, the next document that I just wanted to bring

to your attention is in response to Mr Jowell's point yesterday. He took you to the Bjønnes and Ljungqvist report in the US proceedings in relation to their causal chain, so I just wanted to direct you to the relevant sections of Dr Kleidon's report which rebutted that evidence so that then you have the full picture, and that is at {I/4}. That is where the report begins. Now what I will just do, very briefly, is give you some signposts to the material, but I suggest that members of the panel read it at their own leisure.

So, the first section to begin with is section 5, which starts at {I/4/15} of the bundle. That is headed, "Relevant features of the FX market", and I would really just recommend that for an extremely crisp explanation of the relevance of knowledge to FX trading.

Then moving forward to page {I/4/33} of the bundle, you will see there, "BL's theory of harm due to adverse selection risk is fundamentally flawed and untested", so the heading gives you some flavour of the content there, and it is on point, as the critique there is in two parts.

First, it addresses the allegation of spread widening in the interdealer market. So that is at page {I/4/37}, if we go forward. At paragraph 61 on that page, for instance, Dr Kleidon makes the point that even

if the non-defendants widened their spreads on the interdealer market due to ASR, as was being alleged by the claimants, then on the claimants' logic non-defendants would have narrowed their spreads. So that is some economic evidence that goes to that point.

Then if we go forward to {I/4/41} in this document, the heading there is, "Wider interdealer spreads do not necessarily imply wider spreads in the dealer-to-customer market", so we are now going to the customer tier, and you may recall that language directly echoes Professor Rime's contrary proposition. He said, in those terms, they do necessarily apply wider customer spreads, so this section directly rebuts that proposition.

As you do read through, I would just draw your attention to the next page {I/4/42}, paragraphs 71 and 72, and what you will find there in the table at paragraph 71 is evidence that they gathered of customer spreads in that case being routinely narrower than interdealer spreads, so it goes to the claimant's assumption that wider interdealer spreads feed through to customers.

The last point just to note, staying with that same topic. So, at paragraph 72, Dr Kleidon was looking at this narrowing of customer spreads, and he addresses

internalisation in terms, and I thought I would just highlight that as it is something I covered in my submissions. He says it is not surprising to find that customer spreads on electronic platforms are narrower given what he refers to as the banks' "rising practice" of matching offsetting client trades internally instead of hedging them in the interdealer market. So, again, internalisation breaks the chain of causation to the interdealer market.

Finally, just for completeness so that you have the full picture of the US evidence, Bjønnes and Ljungqvist have a rebuttal report, and that is at {I/6} of the bundle, and Dr Kleidon's reply report is at {I/8}. I am not proposing to go there.

Sir, that was all I was proposing to say.

THE CHAIRMAN: Thank you very much, Ms Kreisberger.

Mr Hoskins, I will just check that you do not have anything, as the trade union representative for the respondents.

MR HOSKINS: The only thing I have to say is it is very close to being the weekend and I have made sure that nobody else on our side will say anything.

THE CHAIRMAN: Well, that is an excellent fulfilling of your role, Mr Hoskins. I am very grateful.

Mr Jowell.

Further submissions by MR JOWELL

MR JOWELL: I would like to make one brief point, if I may, really in response to Mr Kennelly and Ms Kreisberger.

First of all, Mr Kennelly says that strength of the claims is an important factor because the legislature directs you to it. Well, section 79(3) says that the Tribunal "may" take into account the strength of the claims, not that it must do so. Of course the Tribunal -- one has to stand back a little, if I may. The Tribunal will of course decide whether and in what circumstances it has got the power to determine whether a matter should be opt-in or opt-out, even if there is no opt-out before it, and if it decides that it does have that power, it is very important, in our submission, that the Tribunal should be astute not to permit defendants like these to abuse that power, because there is a real danger that the prohibition that Merricks lays down of considering the merits will be subverted and circumvented by this technique of defendants raising a theoretical possibility of opt-in as a way to then introduce consideration of the merits.

What the defendants are seeking to do, and Ms Kreisberger illustrated it very well just now, is to entice this Tribunal down a path in which it starts to consider the merits in great, great detail and at great

-- at a level of detail that is completely inappropriate at this stage of the proceedings, and the notion that the Tribunal should be having regard to multiple rounds of expert reports in US proceedings, entirely untested here, in order to test the strength of the claims is just -- in my submission, just shows the point.

I mean, the straightforward answer to the question of whether the issue should be opt-in or opt-out is if there is cogent detailed evidence before you from reputable claimants that it is going to be impractical to bring an opt-in, and that is inherently plausible evidence, and even if you were sceptical about it -- and we say there is no basis for that scepticism -- if this was an opt-in, you can be sure it would be a fraction of the total class and smaller players largely excluded, and in our submission that is the end of it, there is no need to go further. If one wants to look at strength of the claims, you look at it at a very high level. This is based on a Commission decision, there is over 1 billion paid in the US to settle a parallel claim, that is the end of it, there is no strike-out application.

We will of course supply you with the detailed explanations on causation, but we do wish to say that it is against that background of what we say is the proper

framework.

Thank you, I have got nothing further.

THE CHAIRMAN: Very grateful, Mr Jowell.

Ms Wakefield?

MS WAKEFIELD: Mr Jowell said everything I wanted to say, so nothing more from me, and I think nothing further from Mr Robertson, so the weekend is here, perhaps.

THE CHAIRMAN: Very good.

Well, on behalf of all three of us, can I just express our gratitude to all of the teams for the most excellent submissions we have received over the last five days. We are really very grateful. We will reserve our judgment with the aspiration of handing something down as soon as we can in October, but thank you all very much.

MR JOWELL: Thank you, sir.

MS WAKEFIELD: Thank you, sir.

THE CHAIRMAN: We will end the hearing now. Thank you.

(4.32 pm)

(The hearing concluded)

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