IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1698/7/7/24

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 12th September

Before:

The Honourable Mrs Justice Bacon
Robert Herga
Professor Anthony Neuberger

(Sitting as a Tribunal in England and Wales)

BETWEEN:

CLARE MARY JOAN SPOTTISWOODE CBE
Proposed Class Representative

v

(1) AIRWAVE SOLUTIONS LIMITED,
(2) MOTOROLA SOLUTIONS UK LIMITED,
(3) MOTOROLA SOLUTIONS, INC
Proposed Defendants

A P P E A R AN C E S

Rhodri Thompson KC, Anneli Howard KC and Professor Suzanne Rab on behalf of Clare Mary Joan Spottiswoode (Instructed by Ashurst LLP and White & Case LLP)

Brian Kennelly KC and Tom Coates on behalf of Airwave Solutions Limited, Motorola Solutions UK Limited and Motorola Solutions, Inc (Instructed by Herbert Smith Freehills Kramer LLP)

Friday, 12 September 2025

(9.32 am)

Housekeeping

THE PRESIDENT: Good morning, everyone. Some of you are joining us livestream on our website, so I start with the usual warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual of the proceedings, and breach of that provision is punishable as a contempt of court.

MR THOMPSON: Good morning, President, gentlemen. First of all, many thanks for sitting early to accommodate us within a day.

THE PRESIDENT: Yes.

MR THOMPSON: I'm here with Ms Howard and Ms Rab; and Mr Kennelly and Mr Coates are here for the Defendants.

Being a democratic organisation on this side of the house, Ms Howard will address the factual elements of the class definition and opt-out/opt-in issue, and I'll make some initial remarks on the case as a whole and on the relevant legal principles as we rely on them.

That's how we're proposing to go forward, obviously within the allotted timescale that we've been given.

THE PRESIDENT: Yes.

Now, on the timetable, the transcriber has asked for two breaks during the course of the morning. So, what I propose is that at some point between 10.30 and 10.45, you indicate when would be a good moment for a five-minute break, and then we will then have a five-minute break at 11.45, so rather than one ten-minute break, we'll have two five-minute breaks and then that will get us back on track, with Mr Kennelly's

submissions, at 11.50. I hope that will work for everyone.

MR THOMPSON: Yes. I'm grateful. It may be that a convenient idea will be to break between my submissions and Ms Howard's submissions, but we'll see how we get on. I'm intending to address two introductory topics. First of all, to briefly summarise our position on the main issues to be determined: whether statutory requirements for certification or matters for the discretion of the Tribunal are met; and secondly, relevant case law for the purposes of class definition and the opt-out issue. As the Tribunal has already noted in correspondence, the *Pro-Sys* arguments in relation to Mr Bell's reports, and thus the reliance on Mr Colley's first report, have been abandoned for the purposes of certification. We say that this is a significant issue in itself, both in respect of opt-out and in respect of the strike-out application.

Turning to the issues for determination, we say that there are three substantive issues for the Tribunal; the first two to be determined on the basis of submissions this morning, and the third, the first issue raised by Mr Kennelly, to be addressed this afternoon.

THE PRESIDENT: Yes. Well, before you get into those specific issues, can I just raise a question about how we're going to deal in this hearing with some of the confidentiality points. I notice that in Mr Kennelly's skeleton argument, there are some, green figures which are redacted, which are in the Inner Confidentiality Ring. But there are also some Outer Confidentiality Ring points which are redacted in yellow, which relate in particular to the first of the issues that's on the agenda: class definition and opt-in/opt-out.

I'm absolutely bemused as to why there is anything at all confidential in the matters that are highlighted in yellow. Who is claiming confidentiality? And is there really any basis for claiming confidentiality in those particular points?

MR THOMPSON: I think I might defer those to Mr Kennelly and Ms Howard. I'm not

proposing to refer to anything confidential today.

MR KENNELLY: That is our friend's client's information that has been redacted as confidential, or is information that was designated as confidential.

THE PRESIDENT: Right. Well, someone needs to give me an answer as to what we do with this. It's pages 12 and 13 of your skeleton argument. I presume that you've redacted that because somebody asked, because they --

MR KENNELLY: Because that is the User Report. The Home Office conducted a survey and the User Report was produced following it, and its contents are confidential, according to the Home Office. And they were - and they were only supplied to us on conditions of confidentiality.

THE PRESIDENT: Yes. No, I understand. There's no criticism that you've redacted this if confidentiality is being claimed and if that is at the moment in the Outer Confidentiality Ring, the question is whether there's any basis at all for that to stay in the Outer Confidentiality Ring and whether we can't simply refer to this in open court today.

MS HOWARD: Obviously, the Home Office is not our client; we're acting for the Proposed Class Representative. I think the circumstances of the User Report is that that was conducted by the Home Office under obligations of confidentiality. So they reached out via their lawyers to potential class members, as we call them now, to make enquiries. But it was on the strict basis that their information would not be revealed at a later date. And so the Home Office has redacted that information to protect --

THE PRESIDENT: But there's no specific information given at all. I mean, the sentence that is redacted at page 12 is just a completely anodyne, general comment, which doesn't reveal any information whatsoever about individual users. To be honest, that's more or less also true for the information redacted at page 13. The first part of

that information is simply -- there's a question asked, and the second part of the redacted information is a very general comment about what is -- in fact, it's a speculation; an assumption made on the basis of the question. I just don't understand why that's confidential or why it's necessary to discuss -- if Mr Kennelly wants to refer to that I don't see why we'd have to go into closed session for it.

MS HOWARD: I don't know if the Home Office is here. I don't know if they've got anybody in attendance. For its part, the PCR is happy to proceed as if the information is not confidential information, so we'll be led by the Tribunal.

THE PRESIDENT: Well, look, that's very unsatisfactory for us to be here today with a confidentiality redaction which no one is able to speak to. I don't want this to happen again. If there is a confidentiality claim, that needs to be sorted out properly. I don't want matters in submissions to be redacted and then not be able to discuss at the hearing whether we can deal with that in open court or not. It seems to me that there is nothing whatsoever confidential in this.

Mr Kennelly, how do you suggest that I proceed? Because I'm very unwilling to go into closed session for the sake of a couple of very anodyne and general comments that can't possibly be confidential.

MR KENNELLY: Madam, I'm not surprised to hear that. We agree. We're not asking the Tribunal to go into closed session. I'm hoping to manage, when I come to my submissions. I will obviously have to refer to the User Survey and the User Report, and I'll have to do what we do, which is to direct you to the passages and ask you to read them yourselves. But, for my part, I cannot see why this is confidential either. And when we come to the User Report and the User Survey, there will be passages that refer to figures. I'll be very careful not to mention numbers, but anodyne sentences like those, for my part, I cannot see why they're confidential, and it's most unsatisfactory from our perspective that the PCR is here disavowing any ability to deal

with the Home Office when the Home Office, as we'll see, is driving the litigation, funding it, and has adduced evidence to support the application for certification.

THE PRESIDENT: Right. I want somebody from the PCR's side to get on the phone to the Home Office right now, and come back within half an hour with an answer as to whether this is confidential or not. If it's confidential, I need to be given a very good reason for it. Otherwise, I'm minded to make a ruling that this isn't confidential, and we'll proceed on that basis. Right.

Yes.

MR THOMPSON: I certainly don't want to get bogged down on this. You'll recall, from the way that this has evolved, that Ms Spottiswoode made a reference in her first statement to this User Survey and Report. The defendants then asked for a copy of it. The PCR has approached the Home Office and, for reasons best known to the Home Office, it has taken the position it's taken. The PCR is in effect bound by the position of the Home Office. But, as you'll have seen, we haven't referred to any of this in our skeleton, and the Defendants have chosen to. But it sounds to me like Mr Kennelly's not necessarily going to rely on anything very confidential, if at all, even in the Home Office's eyes. So I'm hopeful that this won't slow things down, although I suspect the indication from the Tribunal will be conveyed in clear terms by the PCR and her representatives, as soon as possible.

THE PRESIDENT: Right.

MR THOMPSON: I apologise for any delay this has caused, but we'll obviously take it forward now.

THE PRESIDENT: Thank you.

MR THOMPSON: We say that the first substantive issue is the clarity and objective of the proposed class definition, which the Tribunal will be aware is a hurdle for certification, or a legal requirement for certification, in that it must be included in any

order for certification under section 47B(7)(b) of the Competition Act, which for the Tribunal's note is at tab 2 of the Authorities Bundle E, page 7, and Rule 79(1)(a) which is at tab 3, page 58. So that is the legal requirement that must be satisfied.

THE PRESIDENT: So when you're giving me references to the Authorities Bundle, just so that you know, as is my consistent practice, I've got everything electronically.

MR THOMPSON: Yes.

THE PRESIDENT: And I just have a single PDF for that. So what I need to be given is simply the page number of the PDF. Unfortunately, because of the way that the bundles have been prepared, there is a mismatch between the PDF page and the page marked on the bottom right-hand corner of the bundle.

MR THOMPSON: Could you, President, give me an indication of what the gap is and then I should be able to manage arithmetically. I've got page 7 which is the red mark. What does that come up on the PDF?

THE PRESIDENT: I think the gap is five pages.

MR THOMPSON: So, the red mark 7 comes up as 12 on the electronic version?

THE PRESIDENT: Well, it's not what it comes up as. That is page 12 of the PDF.

MR THOMPSON: Yes. Is it marked as 7 at the bottom right-hand corner? Because I'd marked it by reference to the pagination of the bundle.

THE PRESIDENT: Yes. 7 is page 12 of the PDF.

MR THOMPSON: Hopefully, if I add five to everything.

THE PRESIDENT: Perhaps you can just give both numbers so that everyone knows where they are.

MR THOMPSON: Yes. So in the electronic bundle, it'll be page 12 and 63, if my arithmetic is correct.

The second issue is, of course, opt-in/opt-out, which again is a matter that the Tribunal is obliged to include in any order for certification. And that's 47B(7)(c) on the same

page, and Rule 79(3) on the same page, page 58 or 63 of the bundle, and the Tribunal has described this as "a multifactorial judgment", taking into account a range of issues, subject to the guidance that's been given recently by the Court of Appeal and is pending in the Supreme Court in the *FX* case.

The third issue, which we'll come to this afternoon, is the Claim Period, and the Proposed Defendants' strike-out application, which is governed by Rules 41(1)(b) and 79(4)(a), which in the paginated bundle is at pages 38 and 58, so I anticipate it'll be electronic pages 43 and 63. That is a matter for judgment, based on the case law and the statutory rules as they have been laid down.

The PCR submits that the purpose of the Proposed Defendants, in raising each of these points, appears to be to narrow the scope of the claims as far as possible, to minimise the Defendants' exposure, and to make the claims more difficult, lengthy, and expensive to pursue. That is an understandable strategic approach for the Defendants to adopt in their narrow commercial interests, but it is not a matter that should have any weight in the Tribunal's exercise of discretion.

By way of overarching response, we say this approach would be contrary to the statutory objectives, as recognised by the Supreme Court in *Merricks* and by the Court of Appeal in a series of subsequent cases.

The purpose of the collective damages regime, we say, is threefold:

first of all, to promote access to justice in the effective vindication of individual rights, with appropriate compensation for loss suffered;

secondly, to ensure the expeditious conduct of proceedings with a view to saving expense and making efficient use of scarce judicial resources;

thirdly, to complement the deterrent effect of regulatory action, by weakening the incentives of undertakings to engage in anti-competitive conduct.

And we say that these public interest concerns resonate all the more loudly in the

present case, which has been brought to recoup excessive payments for critical, publicly-funded services, and represents the cost-effective use of public funds in the conduct of litigation.

So, just briefly, to summarise our position on the three main points in turn.

First of all, the clarity and objectivity of the proposed class definition. The Defendants suggest the class should be limited to those with contracts for the supply of Airwave Services from the first Defendant during the Claim Period, the so-called "Motorola List", and what we have called at paragraph 20 of our skeleton "contractual users", and the reference to our skeleton is at tab 11 of Bundle A, which, at least in the paginated version, is at page 222. We say that this is an artificial and unprincipled restriction. This is a tortious claim for breach of statutory duty, not a claim for breach of contract, and the proposed class definition has been carefully designed to include all those that suffered harm, by paying for the use of Airwave Services during the Claim Period, whether or not they have a contract with the Proposed Defendants and whether or not they themselves made use of those services.

As Ms Howard will explain in more detail, the other subcategories at paragraph 20 illustrate the inadequacy of the Proposed Defendants' approach, and we say that, contrary to the Proposed Defendants' suggestion, these subcategories are not hard to understand, nor will they be difficult to apply in practice.

Secondly, in respect of opt-in and opt-out, the Proposed Defendants suggest that the proceedings should only be certified on an opt-in basis. Again, we say this is an artificial restriction that would impede access to justice and introduce unnecessary complications and delays in determining the claim. As such, we say that an opt-in order in this case would be contrary both to the statutory objectives and also to the governing principles of efficient case management set out in Rule 4 of the CAT Rules.

THE PRESIDENT: On the question of impeding access to justice, where is the specific

evidence on precisely the decisions that are going to have to be taken and why it is such a difficult decision that the members of the class would have to go off and seek external legal advice? I've got lots of speculation that this is what they're going to have to do, and I don't doubt the genuineness of that belief right now, but what I don't have is an explanation of why they would need to take external legal advice. That this is at all a difficult decision, would seem to me, a complete no-brainer, for them to opt-in.

MR THOMPSON: I can see why the Tribunal puts it in those terms for the larger claims, up to and including the Home Office. But even in relation to those larger claims, the larger claimants are almost exclusively public bodies, and the Tribunal will be familiar with the fact that such bodies have very particular procedural requirements, not simply a matter of the managing director of a firm saying, "Let's go for it", or indeed an individual saying, "Yes, that's fantastic, let's do that".

THE PRESIDENT: I understand that they might have governance requirements, but what is it that they would need to take external legal advice on? If the Class Representative properly explained what the consequences are and what any potential liabilities were, as in terms of information that they might need to provide or expenses that they might have to incur.

MR THOMPSON: That's a procedural question for the larger firms. I think Ms Howard will come to this in more detail in due course. But in terms of the smaller bodies, who include a range of charitable organisations, rescue organisations, a diverse group, they may well face difficulties, both in terms of knowing whether they have a worthwhile claim, and which they may want to take legal advice on, and in terms of whether they have any access to legal advice at all, indeed a budget to seek legal advice. In my submission, it's just a proliferation of unnecessary expense, but I think that's in outline our position, but I think Ms Howard's going to address that in more detail.

THE PRESIDENT: Right, okay. Well, she will need to. Right.

MR THOMPSON: There is a further point that I think should be borne in mind and I said already, that the significance of Mr Bell's report is important for this issue as well as for the strike-out, and in particular, section 7 of Mr Bell's expert report, which because of having some confidential information, it is, in fact in Bundle D, tab 6, and I'm referring to pages 1047 to 1053, and this is a section which is also unchallenged for the purposes of certification, we say.

THE PRESIDENT: Is that red number 1047?

MR THOMPSON: It should be red number 1047.

THE PRESIDENT: Okay.

MR THOMPSON: Is that correct?

THE PRESIDENT: So these are four out.

MR THOMPSON: Oh, I apologise. So is that 1051?

THE PRESIDENT: Yes.

MR THOMPSON: I'm sorry. So that's 1051 to 1057. We say that this illustrates the clear advantages of an aggregated approach to quantification and distribution, and that that will be most readily achieved by an opt-out claim, allowing a top down assessment of damages suffered by the class as a whole, as described by Lord Briggs and Lord Sales and Lord Leggatt in *Merricks*, and by the Court of Appeal in a series of subsequent cases, including the *Gutmann Trains* and the *FX* cases. (Pause)

We say that that is obviously going to be a much more straightforward exercise, to look at the overall financial effect, rather than to pick and choose between those who've opted in and are not opted in, let alone the approach that the Proposed Defendants are suggesting, of only allowing approximately 400 claimants, and then having to work out what loss has been caused to them, as against other people who are not within the proposed class. We say that is a recipe for confusion and

unnecessary complication.

THE PRESIDENT: Are you going to explain in a little bit more detail what you mean by "top-down approach", or is Ms Howard going to deal with that?

MR THOMPSON: Well, by that I mean the approach described in Mr Bell's expert report.

THE PRESIDENT: Well, I should just say, by way of pre-reading, from my part, I've done what is proposed in the skeleton argument of the Proposed Defendants. Given the disappearance of the economic issues from the issues to be determined today, I don't think it was useful or proportionate for me to have to plough my way through the expert report, so I haven't done any of that. So if you want me to understand that, I don't want you to just give a reference and say, "Well, it's there", you'll have to explain what you mean by the "top-down approach" and how we're going to take that into account.

MR THOMPSON: Yes. I mean, in a nutshell, I can say that, just as the CMA, I think with the agreement of Motorola, did not go into any great detail about where exactly the discovered overcharge was to be located.

THE PRESIDENT: It didn't need to.

MR THOMPSON: Different regulation of different prices to different --

THE PRESIDENT: It didn't need to; it wasn't a damages claim.

MR THOMPSON: No, what I'm saying is that, similarly, the question of costs allocation between individual claimants may not be entirely straightforward, and I think Mr Bell is open about that, that the clearest way and the simplest way to work out any overcharge will be to proceed on an aggregate basis, which inevitably means looking at the total receipts as against the total costs.

THE PRESIDENT: I thought you said, in your skeleton argument, that distribution would be a relatively straightforward exercise.

MR THOMPSON: Yes. Well, the proposal that Mr Bell has made, which is something of an upgrade on the system that I think was approved by the Supreme Court in *Merricks*, where they suggested that a uniform cash payment might be a fair allocation, it is the provisional suggestion of Mr Bell would be that a percentage of the contribution would be a fairer approach, which would cut through the various allocation issues and simply mean, say, for example, the Tribunal found that there was a ten per cent overcharge overall, as for example, was done in *Royal Mail*, where I think they found a five per cent overcharge, then if you could prove that you'd paid, say, £1 million on Airwave Services and there'd be ten per cent overcharge, you would simply get ten per cent of that expenditure, and you wouldn't trouble yourself with the individual allocations.

THE PRESIDENT: Yes.

MR THOMPSON: And I think that partly addresses the point that Mr Kennelly raises in relation to causation.

THE PRESIDENT: That's about distribution, but you were talking to me about the economic analysis of the total damages pot, and you were saying that it would be easier if it was opt-out, because of Mr Bell's top-down approach. Can you explain what you mean by that?

MR THOMPSON: Yes, I was going to come to it by reference to the guidance of the Court of Appeal in *FX*, which we could go to now, if that would be convenient.

THE PRESIDENT: Wait, no. You were asking me to look at a section of Mr Bell's report. Before we just move on from that, because you've referred to that and because as I've said I haven't read Mr Bell's report, I think I just need to understand: what you're saying about that section of Mr Bell's report; and what it is in which specific paragraphs you're referring to; and if you could summarise what you understand to be the top-down approach, which you say that would be easier on an opt-out basis.

MR THOMPSON: I'm sorry, it arises in various different parts.

THE PRESIDENT: That's all right. I've got it open at page 1047.

(9.58 am)

(Fire alarm test)

(10.00 am)

MR THOMPSON: I apologise to the Tribunal. I'm not sure, I think I may have given an incorrect reference. Section 7 of the expert report of Mr Bell begins at page 1047, which I anticipate will be 1051 of the ...

THE PRESIDENT: Yes, that's what I have.

MR THOMPSON: He describes his proposed approach in outline in 7A and then the counterfactual in 7A.2, and the approach to distribution at 7A.5.

THE PRESIDENT: We're not talking about distribution. The proposition that you made, if I've recorded it correctly, was that the economic analysis would be more straightforward on a top-down approach using an opt-out basis as described in Mr Bell's report?

MR THOMPSON: Yes.

THE PRESIDENT: What I really need you to do is unpack that statement.

MR THOMPSON: Yes, indeed. I'd obviously anticipated that given the expert report was unchallenged, I would be entitled to rely on it. And so --

THE PRESIDENT: There's no point about whether you can rely on it. What I need you to do is to explain the statement that you've just made, if I've summarised it correctly.

MR THOMPSON: Yes. So I think in summary, it is at 7.2:

"*My proposed approach in this case is to estimate the damages by considering different user groups of Airwave Services together (i.e. on an aggregate basis). This approach reflects the nature of the relevant Airwave Services [...]*"

And he cross-refers to section 3C, which is on evidence and preliminary views on market definition at page 973 of the hard copy. I anticipate 977 of the electronic bundle. And he goes on:

"[...] *and the reasons set out in section 5B above*."

Which is quite a long section starting at page 1010 of the hard copy bundle, 1014 of the electronic bundle. So it's a reasoned analysis drawing on both his evidence in relation to market definition and his evidence in relation to abuse. Then he says:

"*For the same reasons, my view is that an aggregate approach to assessing quantum excessiveness is an appropriate and efficient approach*."

THE PRESIDENT: Yes, but what I really need you to do is not to read out his report, which I can read on the screen, but just to explain to me in a nutshell why you said that a top-down approach on an opt-out basis is easier than applying Mr Bell's analysis on an opt-in basis.

MR THOMPSON: Well, I think there are two points: one, if the class is, if I can call it fragmentary, so that it isn't a comprehensive class, then inevitably one has to look at the composition of that class, and even if it's an aggregate award, you've got to then look at the different characteristics.

For example, if only central government departments opted in, the case is going to look very different from if only police forces opt-in, and look a bit different again, if only Premier League clubs opt-in, because the case will be quite different in those different cases.

THE PRESIDENT: How is the analysis that he conducts going to be different? That was your point. You said that as a matter of principle, the economic analysis would be conducted in a different way as between opt-out and opt-in. And I didn't understand that. If that's not your submission and if it's just that the number of claimants is going to be different and that the scope of the damages will be different, that's a different

question.

But if there's a principled way in which the economic analysis is carried out, exactly the stages of that analysis and the methodology -- if that's going to differ as between opt-out and opt-in, that's what I need to understand.

MR THOMPSON: Yes. I mean, I should say that I don't think the aggregated approach was challenged by Motorola in its response.

THE PRESIDENT: This is not about whether it's been challenged. I want to understand whether you say that the methodology itself will be different depending on whether it's opt-out or opt-in.

MR THOMPSON: Yes. The reason I refer to that is that these Defendants, like other defendants, are not shy of taking points. The reason they haven't taken points --

THE PRESIDENT: I don't need that kind of submission. I just need you to explain: is the methodology in principle different for opt-out and opt-in?

MR THOMPSON: Well --

THE PRESIDENT: And how, if so?

MR THOMPSON: Well, I have just made a submission, which in my submission is a good one, which is that the composition of the class is important. If it's a comprehensive class, then you don't need to worry about the composition of the class. But as soon as the class is not comprehensive, you have to look at what class you've got. You have to look at whether or not it's a group of central government departments or a group of small rescue companies, or a mixture of the two, and if a mixture of the two, what the proportion is of the two. The issues may be different across the different members of the class depending on its composition.

THE PRESIDENT: All right, wait a minute.

MR THOMPSON: Yes.

THE PRESIDENT: (Audio error) line of questioning. You need to answer this by the

end of the day, so perhaps you might want one of the breaks to discuss this and come back to me later.

But please, just move on in your submissions.

MR THOMPSON: I'm grateful. I will say one other thing is that the issue of causation is being floated in the Defendant's skeleton argument, and in my submission, that sounds like a stalking horse for arguments that there will be different causation issues depending on the composition of the class, which in my submission would not arise either on the CMA's methodology for its charge control or on the methodology that Mr Bell is proposing in his expert report. But subject to that, I'll move on. (Pause)

We'll deal with the Claim Period this afternoon. But I will just say this: we are surprised, candidly, that the Defendants maintain this application, given their abandonment of the challenge to the expert methodology of Mr Bell --

THE PRESIDENT: You don't need to say anything about that now.

MR THOMPSON: -- which includes that initial period.

THE PRESIDENT: We will deal with the Claim Period this afternoon.

MR THOMPSON: The other issues that are raised are two discretionary factors identified by the Proposed Defendants: one in relation to class definition; and one in relation to funding.

I'll say nothing more about the funding issue, because that arises this afternoon and is the only remaining objection to the authorisation of Ms Spottiswoode.

So far as the class definition issue goes, that arises under 79(2)(e), which is at Bundle E, tab 3, page 58, or 63 in the electronic version. The question:

"*Is it possible to determine in respect of any person whether that person is or is not a member of the class*?"

The Proposed Defendants allege that it may be difficult to determine whether some individual entities are members of the proposed class. We say the proposed class

definition is not only clear and objective, but that membership of the class can be addressed by evidence of a kind that's likely to be readily available, for example, commercial invoices, financial records or inter parties correspondence relating to the supply of the relevant services.

THE PRESIDENT: How is that going to be determined? Is it going to be that the Tribunal has to determine membership of the class? The whole point of the class definition is that there should be a bright line which enables anyone to know very easily whether they fall in or out.

If there is going to be an issue as to whether someone does fall in or out, who is going to do what with the evidence?

MR THOMPSON: Well, we say there is a bright line, namely those who paid for Airwave Services and those who didn't. That's a matter for evidence. Whether or not it's a contract or it's some form of arrangement, such as, for example, the Scottish Government has with the UK central government to contribute to the cost of Airwave Services.

THE PRESIDENT: Are you saying that at some point the Tribunal is going to have a hearing to have to determine whether some of the members who put themselves forward as being in the class are in or out? How is that going to work if it's opt-out?

MR THOMPSON: If it's opt-out, you won't have to do that. That's precisely the case. The question of opt-out -- as the Tribunal has found at least since *Trucks* -- one of the advantages -- and it's certain the Court of Appeal has endorsed this -- is that that's a matter that can be put off to distribution. As long as the criterion is clear, the Tribunal doesn't need to worry about that.

THE PRESIDENT: But why? Because the claim is still brought on behalf of the members of the class, whether it's opt-in or opt-out.

MR THOMPSON: Yes, this is, on my hypothesis, an aggregate claim for opt-out for

people who have paid for Airwave Services. So, that's conceptually perfectly clear.

THE PRESIDENT: But how do you aggregate it if you don't know who's in the class or not?

MR THOMPSON: I'm not accepting that you don't know. Obviously, the easiest way to work out the aggregate position will be the aggregate revenues of Motorola during the period of the claim. But that doesn't mean that the only people that can claim are the people who have written the cheques that were received by Motorola. Our point is that there will be a penumbra of people who have contributed to that, perhaps the most obvious example being the Scottish Government, who are perfectly entitled to claim, but they don't have a direct relationship with Motorola, and they don't use Airwave Services. What they do is pay for them. We say that's a perfectly clear criterion. Indeed, you'd have thought it was the most obvious criterion you could have for an action for damages for overpayment is whether you've contributed to that payment.

That's the guiding principle we've adopted, which is simply to look at where the money flows come from, and say that people who can be shown to have made a specific contribution to Airwave Services are entitled to claim, whether or not they have a contract, because this is not a contractual claim.

THE PRESIDENT: All right.

MR THOMPSON: What we say is the fact that one or two individual cases might fail on the evidence is not a relevant issue for certification. If you can't prove you did make a specific contribution, then you may not be able to recover.

MR HERGA: Isn't there a difficulty in what is a specific contribution? I mean, if we take the airports, for instance, I think you give an example of Heathrow Airport -- somebody gave an example of Heathrow Airport contributing. Well, Heathrow Airport won't have on its invoice: "this is a contribution towards Airwave."

I can assure you. But it might well have: "you are paying for police costs on a sort of aggregate basis."

So are Heathrow in even though they haven't specifically paid an invoice that says contribution towards Airwave?

MR THOMPSON: Well, I think what we've said is that there may be internal evidence with the relevant police force, or external evidence with the relevant claim. I think it is important. I think it's the point that somehow -- sometimes has been mixed up in the case law -- that this identification question is a factor; it is not a decisive issue. That's clear from the judgment of Lord Briggs in *Merricks*.

The fact that you may be able to think of difficult cases is not a red line issue for certification; it is simply an issue for discretion. We say that as a matter of discretion, there are an overwhelming series of reasons why this is a suitable case for certification and collective proceedings. Indeed, it's not been contested by the other side that that's not the case.

In those circumstances, the mere fact that it's possible to think of some circumstances where some claimants may find it difficult to prove, and we're obviously not in a position to go into the evidence on that question today, is not a decisive factor. It is simply a factor to take into account. In my submission, it is a relatively weak factor as against all the other factors, which are uncontested, suggesting this is a suitable case for collective proceedings.

That goes fairly fast, but I suspect the President at least is very familiar with the relevant passage in *Merricks*, where Lord Briggs draws a clear distinction between hurdle issues, such as 79(1)(a), and discretionary issues, such as 79(2)(e), and what the status is of the one as against the other.

THE PRESIDENT: Are you going to deal with pass on issues in your submissions, or is that Ms Howard?

MR THOMPSON: I'm not going to deal directly with the question of pass on. I think you'll have seen in our skeleton argument, we say this is not a case of pass on; this is a case of contribution. I've given the homely example of somebody who books a restaurant for two people, and the person who hasn't booked the restaurant contributes to the cost. We say that's not a case of pass on; they're both eating the meal. It's just one has booked the restaurant and has a contractual relationship, and the other one has simply contributed to the costs.

In my submission, the Scottish Government, and for that matter, Tottenham Hotspur, are broadly in the same position as the guest rather than the host in such an arrangement.

THE PRESIDENT: All right. But supposing that the Tribunal were to certify on a direct class -- only direct purchasers. What then happens as regards the indirect purchasers, who do they have a claim against?

You have to address me on the supposition that not all of your submissions may be accepted by the Tribunal. So, exactly what happens? Is there a potential pass on argument to be raised by the Defendants? You may say it's not a good one, but the Defendants have said that they're only giving their undertaking on not relying on pass on if the proceedings are certified as opt-in.

Now, let's suppose that the proceedings were to be certified, as you seek, on an opt-out basis, and no undertaking were to be given as to waive pass on arguments. What kind of pass on arguments may be run, and how would the Tribunal deal with them? Indeed, how would the indirect class then bring their claims in relation to the damages award?

MR THOMPSON: Yes. I mean, the Tribunal will obviously be acutely aware of what has happened in *Interchange* and *Trucks*, where a variety of categories of claimant have come forward with multiple section 47A claims based on some form of pass on.

In my submission, there is at least a risk that the position could become very messy, both for the reasons that we discussed earlier in terms of Mr Bell's methodology as to -- because I think what they're saying is that the Defendants do not intend to take pass on as an issue, but they have made it clear that they do intend to take causation as an issue.

There could be positive causation or negative causation; they could either say, "This claimant has not been caused a loss for some specific reason", or they could say, "This person's loss has actually been reduced because in fact somebody else bore the costs, such as the Scottish Government".

That's not a question, necessarily, of pass on, but it might be a question of causation. Then what is supposed to happen? Is the Scottish Government meant to apply to be joined on an individual basis, or is there going to be another collective action for the indirects? It's just a very messy situation. We would submit that it's quite unnecessary, and that the way forward is to have an opt-out, bringing everybody in on the simple basis that we've suggested.

MR KENNELLY: Madam, that's not a point that we intend to take. When we said we wouldn't take a pass on point, it's the same point for causation. We wouldn't be taking a point that the indirect purchaser suffered no loss, and therefore there was no tort because there was no causation; that's not a point that we'd be taking on the basis that we would not be taking a pass on point. The direct purchasers would claim with respect to the payments they made --

THE PRESIDENT: Yes.

MR KENNELLY: -- from an overcharge perspective, then.

THE PRESIDENT: Yes. What I'm trying -- yes, thank you. That's what I understood your position to be. What I'm trying to understand is the PCR's position. If that were to be the way in which the proceedings went forward, and it were direct purchasers

only, and then -- and as I think your submission is that the damages payment would then go to the direct purchasers -- what then happens to the indirect purchasers? What is their claim? Do they have a claim against the direct purchasers? Or could they come back and claim in separate proceedings against the Proposed Defendants? Is there a risk of satellite litigation? How is that resolved as a legal matter; have you thought about how that would play out?

MR THOMPSON: Well, I must confess, this is a new idea that has been canvased in the Defendants' skeleton argument.

THE PRESIDENT: Well, it's not new. There are these four, I think, permutations of what can happen:

One of the permutations of what can happen at the end of this, assuming that there is certification, is it is certified for direct purchasers only. What I'm trying to understand is, in that case -- I mean, assuming you don't succeed on your class definition -- what happens to the indirect purchasers? What is their remedy? Do they have an action -- a cause of action -- against the Defendants themselves, theoretically, or is their remedy against the direct purchasers?

MR THOMPSON: Well, on our case, it's not merely theoretical; they do have a case against them, because this is not a contractual claim. So I asked rhetorically: what prevents the Scottish Government from having a claim?

THE PRESIDENT: Right. So they theoretically would still have a case against the Defendants if it were certified for direct claimants only?

MR THOMPSON: I think what's been suggested, and I think faintly and not only are the Proposed Defendants indicating that they might be prepared to give some sort of undertaking not to take a pass on point, and now it seems to be expanded to not take a causation point -- at least some causation points, though, we are not clear exactly on the scope of that new concession.

But it also seems to be suggested that either the PCR or individual members of the class should also give some sort of undertaking that they will play fair and dish out the money to other people if they have a credible claim.

THE PRESIDENT: That wasn't Mr Kennelly's submission; that's what I'm asking you.

MR THOMPSON: Well, I think it was, with respect. It seemed to be said that it could be sorted out at distribution by, as it were, charitable donations from the members of the class to other people who might also have a claim; that effectively it would be left to them.

THE PRESIDENT: Yes.

MR THOMPSON: But their position could only be protected if somehow that was the position approved by the Tribunal. Otherwise, there is obviously a risk of a mess in that they might or might not agree. The Tribunal would have no jurisdiction.

THE PRESIDENT: But at that point, does the Tribunal have jurisdiction to require the pass on of the damages award?

MR THOMPSON: Well, I certainly would. [Inaudible] My basic submission is that a much more satisfactory approach would be an opt-out, because then the Tribunal has --

THE PRESIDENT: I know that that's your position, but I'm trying to understand what your position is on other permutations which don't involve you winning everything you want.

MR THOMPSON: I understand that, but I'm entitled to argue for everything I want.

THE PRESIDENT: Yes, you've argued for everything you want, but what I want to understand is: your position if you don't get everything you want.

MR THOMPSON: I understand that, and that's why I'm addressing that, and what I'm addressing is saying it's liable to be a very unsatisfactory situation.

THE PRESIDENT: So what is the legal position for the indirect purchasers, if certified

only on a direct purchaser basis?

MR THOMPSON: Well, leaving aside as to whether this is a case of pass on, or of some form of contribution, of the kind that we've raised, what is true is that there may be a difference of view as to who's entitled to the money. And so, it's then a question of how that issue is resolved, and in an opt-out, it's resolved by supervision by the Tribunal and guidance as to what the basis for distribution should be, as described by Lord Briggs in *Merricks*. In this situation, as I understand it, it would be at large, and there would be no necessary guidance or expectation from the Tribunal, except some sort of browbeating of the PCR, but it would be difficult for her to enforce against any individual class member. And then it would just have to take its course, whether in the form of litigation, discussions, settlement, ADR; it's just a very uncertain situation.

THE PRESIDENT: So are you saying that, if the class is certified as direct purchasers only, and if it were on an opt-in basis, are you saying in that situation, the Tribunal has no jurisdiction to require a pass down, and it would then be a matter for litigation or settlement as between the indirect purchasers and the direct purchasers? Is that your position?

MR THOMPSON: I'm saying two things.

First is: despite Mr Kennelly's apparent concessions, we are concerned about causation issues, in relation to individual members of the class.

THE PRESIDENT: Alright, let's just leave aside the arguments that he may or may not take. Let's suppose that the class is certified as direct purchasers only, you get a damages award which aggregates the damages that go to those purchasers, so, you know, somebody who's an aggregate purchaser of services will end up with the whole pot, what I want to understand is what you say is the mechanism by which the indirect purchaser may get their share; are you saying that the Tribunal has jurisdiction to direct that on an opt-out basis, but would not have jurisdiction to direct that on

opt-in?

MR THOMPSON: Well, I'm certainly saying that, but I'm also saying that the size of the aggregate award is not immune to the composition of the award. So, I don't think I can simply assume all will be well if there's an aggregate award, because there'll be an argument about how big that award should be.

THE PRESIDENT: But I've just put to you the supposition which is that the aggregate award comprises everything that the direct purchasers have paid. So they end up with a total pot divided between the direct purchasers, and then what happens to the indirect purchasers?

Then let's assume all the money goes to the direct purchasers -- I need to know what you say about the Tribunal's jurisdiction. Opt-in or opt-out? Is it different? Can we direct something, one way or the other? If not, what is the remedy of the indirect purchaser?

MR THOMPSON: Yes. I think we're probably piling up questions that we need to think through. But my immediate reaction is -- the point we make in the skeleton argument and in our reply -- that the Tribunal has a very much larger jurisdiction to order direct distribution, and in particular settlement, in opt-out cases, and the position in relation to an aggregate award for opt-in is really wholly untested. I don't think it was even sought in *Trucks*. I'm not sure there is a case where the approach to an aggregate award has been contemplated at all, and in my submission, it's potentially very difficult, both in terms of the composition of the class and in relation to causation for members of the class.

THE PRESIDENT: I think I need a bit more specificity than "it's a bit difficult". You've got, as I said, four different possible outcomes: opt-in: narrow class, wider class; opt-out: narrow class, wide class. We need to choose between those, and I need to understand -- it's not a case of just coming along and saying, "Well, everything's

solved if you go for our wide class and opt-out", I need to understand how you say the procedure would work on the other permutations and what are the specific difficulties with it, and for us to understand whether those are actually resolvable or not.

So, there we are. I think you'd better move on. At some point between now and 10.45, we'll need a five minute break.

MR THOMPSON: Yes. It may be that it's suitable to take a moment now. I've got a number of cases I was going to take the Tribunal to, but I don't want to waste time. We could break and regroup, and then see how we're doing for time.

THE PRESIDENT: Yes, all right.

MR THOMPSON: That may be the best way forward.

THE PRESIDENT: Let's have a five minute break now, and then we'll return, and then you'll have until 11.45 for the remainder of your submissions on this point, before Mr Kennelly starts at 11.50. All right.

(10.28 am)

(A short break)

(10.35 am)

MR THOMPSON: Given the passage of time, I'll cut short what I was going to say about the law. Can I simply give the Tribunal the reference to the passage I mentioned, which is paragraph 106 of the *FX* judgment in the Court of Appeal, which is E/39, and the passage is at 2476, which I anticipate will be 2481 in the electronic version, where Lord Justice Green looks at the causal implications of opt-out, as against opt-in.

THE PRESIDENT: Bundles --

MR THOMPSON: Bundle E, page 2481, I think it will be. It's 2476 in the paginated bundle.

With that, I'll hand over to Ms Howard and we'll regroup over the short adjournment.

THE PRESIDENT: Yes. (Pause)

Can I just ask: it's paragraph 9.60 you want us to look at?

MR THOMPSON: Yes. We refer to various paragraphs in our submission, (inaudible) that addresses the question of quantification, and there are obviously well-known passages in *Merricks* on the same issue.

THE PRESIDENT: All right, thank you.

Yes, Ms Howard.

MS HOWARD: My Lady, I'm conscious of time. I'm not sure the extent to which the Tribunal has managed to actually read the underlying witness statements in the evidence I was planning to take you to. Well, I'm going to take you through Gale 2, Parr 2 and Spottiswoode 2.

THE PRESIDENT: I've read everything that is on the list in the Proposed Defendants' skeleton argument. So I think I've read those two, Parr 2 and Gale 2, most certainly.

MS HOWARD: Okay. Well, I'm going to give you the references rather than take you to them, because we're running out of time. It might be a bit rapid fire --

THE PRESIDENT: All right.

MS HOWARD: -- and please tell me if you've read them and you don't need me to labour the point, please let me know.

Just in terms of route map, what I was going to do is to take you, first, to the proposed class definition and tease out some of the elements, why we say that it is sufficiently clear, then to explain how the class works. You will have seen this chart at the back of our skeleton. I've got some hand up copies to give you, and I was just going to work through the chart, to explain how these various dynamics and interactions work.

THE PRESIDENT: Have you amended that, or is it --

MS HOWARD: No, that's exactly the same as the one at the back of the skeleton. (Pause)

Then, I was going to turn to specific financial contribution and what we say that means and how it operates to create clarity, and then explain the conflicts position, why we say there aren't any conflicts, and then go to opt-in versus opt-out.

So that's just a route map, but I'm very happy to take your direction, at this point, if there are points you don't want me to go to.

Submissions by MS HOWARD

MS HOWARD: So the proposed class definition is in our Claim Form, paragraphs 39 to 40, that's at pages 14 to 16 of Bundle A/1. (Pause)

The focus has been on the purchasers of Airwave Services, and it covers a wide range of entities, largely within the public sector, and this is to reflect the fact, and the economic realities, of what happens in the public sector for arrangements over network access and cost sharing for national infrastructure. So it's a very different market context to a commercial situation, where there is a bilateral contract between party A and party B, because the way in which the Airwave Network was procured and the way in which it's utilised is that there is not just the immediate ring of direct users, which I've coloured in red on the chart, but there are other entities -- whether that's public sector or private entities -- who have access to the network, and are paying for the access.

We've tried to focus on the payments, and trace the payments for the Airwave Services, because that reflects those that have suffered the loss. So the aim is to put the money back into the pockets of those that have suffered the loss, and that's very important when you're dealing with public sector bodies with limited budgets, to make sure that they can recoup money for their budgets.

The class definition is not intended to be a mathematical equation; we're trying to find a pragmatic and workable definition that is sufficiently clear to enable the Tribunal to

determine the membership, but also to manage these proceedings, and importantly, the focus on purchasers rather than users is meant to make sure that there's no overcompensation or under compensation, because some users will have had access but won't have paid for it, and other entities, will not have used the service themselves, but will have paid for it. They'll either have contributed to it, for use by others, but they may not have actually used it themselves, or they'll have paid for services carried out by the police or other entities, and those payments encapsulate an element of the overcharge, and therefore they need compensation for the losses that have been suffered.

Now, the members will know whether they have either used or paid for Airwave Services, and the public safety context is a very important one. The Airwave network is a bespoke tetra network; it has its own Ofcom spectrum, it has their own tetra handsets that the police and the ambulance and the fire service have, so anyone who is using this, or making use of it, like football stadia, or events venues, they will know that they are using the tetra network, they'll have a control room with access to it, and they know whether it's themselves or whether it's the police or other parties that will be using that network.

And so, by definition, because of the context of this public safety network, that itself acts as a barrier and creates clarity. We say that if the class definition was confined to just Motorola's direct contractual parties, that would, in effect, exclude all those indirect purchasers that do have a right, as recognised under EU and domestic competition law. It's trite law that, from *Courage and Crehan*, and *Manfredi*, that any individual has the right to seek compensation for loss, whether that's caused by a contract, whether that's caused by conduct, and that extends to indirect purchasers. That principle has been carried forward in the Damages Directive, and it is implemented into paragraph 2 and paragraph 9 of schedule 8A of the Competition Act.

So if we were to 'pollard' this claim in the way that the Proposed Defendants suggest, that would lead to a defeat of access to justice and ineffective relief. In effect, it would lop off the branches of injured parties who have suffered loss and it would afford the Defendants the opportunity to trim down the claims of the direct purchasers and preclude access to justice.

Your Ladyship asked: well, what's going to happen if we just order an opt-in for a narrow claim? Well, you cannot exclude the fact you're either going to deny relief - those indirect purchasers will not have the right to opt-in; they will be absolutely precluded from opting in to a very efficient vehicle for conducting these proceedings. I'm going to come to these points later when I deal with opt-in versus opt-out, but opt-out is the most efficient and effective means of bringing these proceedings, both with respect to the litigation costs and budget of these proceedings, but also for the Tribunal's resources.

THE PRESIDENT: But would their damages then not be captured, as Mr Kennelly I think is suggesting, in the claims of the direct purchasers? That's really my question. Are they captured? If there is a narrow claim, Mr Kennelly is not saying that in order to cut down the total award, but rather to ensure clarity of the class.

If there were a narrow claim, I think his position, subject to understanding the scope of his pass on undertaking, is that the damages would go to the direct purchasers. Hence my question: what would be the remedy of the indirect purchasers? How would that trickle down? What's your submission as to how that would trickle down? Would the Tribunal then have to order that? Can it order that, depending on opt-in or opt-out? If it can't order that, how would the indirect purchasers then get their money?

MS HOWARD: So my learned friend has said they're not going to take a pass on point.

THE PRESIDENT: Yes.

MS HOWARD: My concern is, regardless of that very generous concession -- I'm standing on my feet to make this point, I may want to come back and finesse it, but from *Courage v Crehan*, the Tribunal is under a duty to ensure that there's no overcompensation. So regardless of that concession, you need to make sure that, although this isn't a strict compensatory regime in the traditional sense, there is a risk that if all the money goes to the direct purchasers, they may end up recovering more than they've actually lost. That is because, if you look at the diagrams that we've got here, we know already that the Home Office pays several charges on behalf of the Blue Lights. So they pay for core services and recoup from other users.

THE PRESIDENT: Yes. That's exactly my concern.

MS HOWARD: That's what we wanted -- I mean, the Home Office has been very candid. You'll have seen in the witness statement of Mr Parr and Ms Gowler's witness statements that they didn't want that to happen; they wanted to have a situation where the damages would cascade down to those that had paid for it and suffered loss.

THE PRESIDENT: So what is the Tribunal's jurisdiction in that situation to order a cascade down?

MS HOWARD: But I think the point --

THE PRESIDENT: This is not a loaded question. What I genuinely want to do is to understand what your position is.

MS HOWARD: Well, my learned friend in their skeleton says: oh, well, this can be done on a voluntary basis, and the direct purchasers can just make voluntary payments or agree to some kind of extrajudicial ADR regime where they can just volunteer the payments.

I mean, that may not reflect the realities of a public authority suddenly having money coming into your budget that you might not then want to see disappear. We all know that voluntary redress schemes, whether that's within the CMA or within the financial

services industry, are not very effective, and they take a long time, and they don't necessarily sound in the best relief.

So is the Tribunal going to what, construct some kind of ombudsman regime? I'm not sure whether you have the powers to do that, but also how would you supervise it and case manage it; have some kind of judicial supervision over it?

My greater concern is that, if the indirect purchasers -- and there are some more powerful indirects -- were to bring their own claims -- and they have a right to do so under Schedule 8A Competition Act; there's nothing to preclude them from doing that. They could bring claims not just before the Tribunal, but before the High Court in their own standalone or group claim. Then it's a retrograde step; we're back to where we were in Visa and Mastercard litigation in 2014, with a multiplicity of claims being brought across different fora with different limitation periods, different rules of procedure, different tribunals, different judges.

THE PRESIDENT: Yes. So your submission is: you're not sure what the Tribunal's jurisdiction would be to order trickle down, and irrespective of that, the indirect purchasers would then retain their right to bring their own claims if they weren't brought in? Yes.

MS HOWARD: The risks you face are either a multiplicity of (overspeaking) --

THE PRESIDENT: Yes, no, I understand.

MS HOWARD: -- or you end up having to transfer them all to the CAT.

THE PRESIDENT: Yes.

MS HOWARD: And then case manage them like *Trucks*.

THE PRESIDENT: Yes.

MS HOWARD: And bring them all together, which is another headache.

THE PRESIDENT: Yes, well, that was what I was trying to understand.

MS HOWARD: Our concern is that we wanted to make sure, acting for the Class

Representative and her duty to act in the best interests of all the members of the class, i.e. all those that have suffered loss -- that this recovery was done in a coherent, consistent fashion under judicial supervision. That is the core advantage of the opt-out regime, which means that any distribution, but also any collective settlement, is done under the aegis of the Tribunal's watchful eye.

Because it's a huge responsibility and the Class Representative is acutely aware of that responsibility, she wants to make sure that it's done within a judicial architecture. Even though she's got the support of a very sophisticated and experienced advisory group, she thinks that it's better done transparently, and also where all parties will have the opportunity to make submissions and to make sure that their representations are heard before any final decision is made on distribution.

THE PRESIDENT: Yes, thank you.

MS HOWARD: So I will come back to some of these points later, but those were just my headline points.

Let's go back to the chart and let me try and take you through. You may not need me to take you in great detail, but I wanted to take you to some of the examples, because there are a wide range of diverse users. Now, I say diverse: they're diverse in size; some of them are very small, medium, some are very large. Some of them are central government departments; some are individual police forces; individual ambulance trusts; and some come down to very small NGOs; charities; mountain rescue groups; and lifeboat associations.

THE PRESIDENT: On your chart, those are direct purchasers?

MS HOWARD: Some of them are direct purchasers, and some are not, and that's what I'm trying to delve out: the complexities of the sharing arrangements within the public sector. So if we take the red group, which are the direct users, who have contracts with Motorola, you'll see that there's a spread of users from the Home Office,

down to the Blue Lights. But some police forces are hybrid, depending on whether they buy core or menu services. So, for instance, the Blue Lights contract directly with Airwave for menu charges. The police forces pay menu charges directly. You'll see that in Ms Spottiswoode's second witness statement, paragraph 32. But the core charges for the police are paid for by the Home Office.

THE PRESIDENT: So they contract directly with Airwave for --

MS HOWARD: Menu services.

THE PRESIDENT: Menu services.

MS HOWARD: Which are sort of like a call off individual selection; by contrast, the core ones are common to all of the police forces. The Home Office pays for all of the core services for England and Wales.

THE PRESIDENT: Yes.

MS HOWARD: But there are other menu choices that they can choose.

THE PRESIDENT: I see.

MS HOWARD: Which individual police forces, and I think there are 43 of them, will pick and choose which ones they want to contract directly for, and they pay direct. There's a similar arrangement with fire and rescue where -- that's Spottiswoode, paragraph 40, page 748 of the bundle -- they will pay --

THE PRESIDENT: Sorry, which bundle?

MS HOWARD: Sorry, it's B/7. I'm working electronically.

THE PRESIDENT: All right. So Bundle B, page?

MS HOWARD: Page 748.

THE PRESIDENT: Is that 748 red numbers or 748?

MS HOWARD: I've been using red numbers.

THE PRESIDENT: So that's PDF page 752, I think. Yes, all right.

MS HOWARD: All my references are to the red numbers at the bottom of the page.

THE PRESIDENT: Right.

MS HOWARD: So you'll see this paragraph 40.

THE PRESIDENT: I've got it.

MS HOWARD: So you'll see -- yes, the police force was paragraph 32. Paragraph 40 talks about the FRS separately entering into call-off charges, and they make those payments direct to Airwave. So that's represented in the chart here, with the red arrow going direct from the Blue Lights.

THE PRESIDENT: Yes.

MS HOWARD: The Home Office itself is a direct user because it will pay for Airwave Services to prisons, Border Force and Immigration, which are within the Home Office's remit. That's over the page at paragraph 41 of Spottiswoode 2.

THE PRESIDENT: But I can see on the chart you've got a blue line going from the Home Office to Blue Lights, suggesting that they, the Home Office itself, makes a contribution payment to Blue Lights. How does that work? You've got a purple arrow saying "*user purchaser non-contractual*", so that's the core services that are contributed to?

MS HOWARD: Yes. So for the core services, the Home Office will pay for, for example, English and Welsh fire and rescue core services, and then it invoices them and recharges them those costs.

THE PRESIDENT: Yes. Well, that's the reason for the purple arrow from Blue Lights to Home Office.

MS HOWARD: Yes, that's right.

THE PRESIDENT: But what about the blue arrow going the other way?

MS HOWARD: That's the contribution the Home Office makes for the police. So for the police, they don't actually recharge the costs for the police. So the blue line going the other way is because the Home Office is paying for the police core charges, but

no there's no recharge.

THE PRESIDENT: Oh, because the blue arrow is, in the description, is a contribution payment. So are you saying that there isn't a contribution?

MS HOWARD: I think that blue arrow may be --

THE PRESIDENT: Is the blue down arrow wrong?

MS HOWARD: I think it's just, sorry, it may be -- it's definitely the Home Office contributing, and they're paying ASL for police core services, but they don't recoup it from the police; whereas the purple arrow shows the payments by the Home Office for the fire and rescue core services, where they're recharged by the Home Office. The reference in the evidence for that is Spottiswoode 2, paragraphs 37 and 38. Again, that's on page 748. There, she says that the Home Office pays on behalf of fire and rescue, and then they invoice the fire and rescue back. But we understand there's no recharging for the police.

THE PRESIDENT: All right.

MS HOWARD: That shows the wide range of direct users. And, at the time of my learned friend's Response, they said they weren't aware of any other users other than those that were on the Motorola List. The Motorola List, just as a reference if your Ladyship's needs it, it is Bundle D/11, pages 1181 to 1189. Now, that is confidential, and there are references in the wider documents, whether somebody is on the Motorola List or not on the Motorola List, which are marked as confidential. We don't really understand why that confidentiality is being maintained. It makes it quite difficult to refer to entities and whether they are on the list or not.

THE PRESIDENT: Have I got a different version? I've got lots of redactions on the version that I've got.

MS HOWARD: A lot of it is coloured in red, which is the confidentiality redactions.

THE PRESIDENT: Ah, no. On the version I've got -- Okay. So on the previous page,

say, for example, on page 1180, 1180 is entirely blacked out. Is that how it should be?

MS HOWARD: That is the end of the User Report. The Motorola List starts at 1181.

THE PRESIDENT: Yes. I'm just seeing that pages 1176 to 1180 are completely blacked. Is that correct?

MS HOWARD: Yes. That is the User Report. And that's not redacted for confidentiality. I understand that part is redacted because of legal privilege --

THE PRESIDENT: Right, I see.

MS HOWARD: Because that's the Home Office's legal advice that was given by TLT.

THE PRESIDENT: I see. So I've got the red redactions, and that's the Motorola List.

MS HOWARD: That's right. I see that there's a number of them which are marked out in red, and those are confidential-- I can't refer to those in open court.

THE PRESIDENT: Okay.

MS HOWARD: I don't think I need to -- I've managed to do it without --

THE PRESIDENT: No, no, you don't need to. But I can just see that there are a number --

MS HOWARD: Scrolling down, you can see the broad range of entities that are included.

THE PRESIDENT: Yes.

MS HOWARD: And just to help the Tribunal, there are some, obviously, abbreviations. So "*AMB*" is ambulances.

THE PRESIDENT: Yes.

MS HOWARD: And you also have "*Fire*", which is the fire rescue services. Then you have "*LCL*", which I think is a local council.

THE PRESIDENT: Yes. I mean, what I can't understand is why there's a distinction between those that are marked as confidential and those that aren't.

MS HOWARD: I think that's one for my learned friend to answer.

MR KENNELLY: That's a function of the agreements between Airwave and the particular entities marked in red --

THE PRESIDENT: Yes.

MR KENNELLY: -- which provide that the fact that they receive Airwave Services has to be confidential.

THE PRESIDENT: Yes.

MR KENNELLY: I can quite see why for some it might be hard to understand why that is; for others, maybe easier.

THE PRESIDENT: Well, that's my question. Yes. All right.

MS HOWARD: There are -- we have managed in the short time that we've had, to discover entities that are not on this list, but who have paid for Airwave Services.

THE PRESIDENT: Directly or indirectly?

MS HOWARD: Indirectly.

MR HERGA: They wouldn't be on the list, would they? Because isn't the list all those that have been billed by Airwave?

MS HOWARD: That's correct. Those are the ones that have the direct contractual relationship with Airwave. But because we're in the public sector, we have this shared network infrastructure which has extended users who are paying for that use, but also parties that are contributing.

MR HERGA: Yes, but they won't be on the Airwave list because they won't have any invoices relating to those people.

MS HOWARD: That's right. They're not on this contractual list.

MR HERGA: Yes.

MS HOWARD: There are other lists. There's an Ofcom list. Ofcom has -- there's a process to get accredited to be a user of Airwave or to have access -- because

Airwave has its own spectrum and it's monitored by Ofcom. There's a two-stage process to get onto the Ofcom list. We've included some guidance that Ofcom has given on how to get on to what's called the sharer list, which I can take you to if you need -- in brief, Ofcom has a process for vetting people to get access to the spectrum, and it has created what's called the Ofcom sharer list. Then there's an accreditation process within the Home Office run by the Airwave Accreditation Service, the AAS, and they produce an AAS list and then there is the third list, which is the Motorola List, which is the subset of those that have contractual relations with ASL.

MR HERGA: Yes. Okay.

MS HOWARD: So there will be entities that are either on the Ofcom list or on the Home Office accreditation list, which are not on Motorola List.

MR HERGA: Yes.

MS HOWARD: I'm not saying that any of these lists are perfect because people come on and off. You know, there have been restructurings. People might be on the Ofcom list but have not actually used Airwave, or they come under the umbrella of somebody else that is on the Ofcom/AAS list who's able to share their accreditation with others.

MR HERGA: Can I just check that there are people who are paying who are not in the contractual relationship and not users?

MS HOWARD: That's right.

MR HERGA: And so who won't be on any of the three lists you've mentioned?

MS HOWARD: So, for example, and a good example of that is if you look at the Scottish Government, here.

MR HERGA: Yes.

MS HOWARD: We've called them a contributor, and, because of devolved government arrangements, they will pay for services in Scotland that are used for the Scottish fire service and, and they will pay the Home Office for the Scottish element of

the fire and rescue service. That's at Spottiswoode, paragraph 39.

MR HERGA: Yes.

THE PRESIDENT: You say that this diagram is illustrative. Does that mean that it's not exhaustive and that there may be other contribution arrangements that aren't reflected on this?

MS HOWARD: This is prepared on the best available evidence that we've had at the moment. This is by using the Ofcom process, the Home Office accreditation process, but also (as I'm going to take you to some of the evidence), actually going out into the field to get evidence from the parties, as Mr Gale has done within his team at Ashurst.

THE PRESIDENT: So that implies that the only contribution arrangements that you are aware of are represented on here.

MS HOWARD: That's what we're aware of. And the TLT User Report -- TLT, who advise the Home Office, conducted their own analysis as they were advising the Home Office on bringing a claim initially, and that User Report also gives a very good overview of the arrangements which are broadly consistent with this as well.

THE PRESIDENT: All right.

MS HOWARD: So the categories that -- maybe the best point is I can go into what we call non-contractual users, which we've described in section (2) in our skeleton. We've broken it down into (2)(a) and (2)(b). These are at paragraph 20(2) of our skeleton. This is dealt with in the evidence of Mr Gale in his second witness statement, paragraphs 3.1 to 3.28. That's in the Confidential Bundle. I'm using the confidential version. It starts at page 915.

THE PRESIDENT: Bundle D?

MS HOWARD: Bundle D, tab 5, and it's page 915 to 922.

At the beginning of this section, Mr Gale explains how he took a team of six associates and trainees. I think they've spent over 300 hours so far trying to explore and get

evidence on this, and they've divided it into two issues:

One is those that get use via an intermediary. So they effectively will "piggyback" -- I think that's what the TLT User Report calls it -- they'll piggyback off a direct user. The best example here is the tier 2 local authorities.

THE PRESIDENT: Yes.

MS HOWARD: So the tier 1 authorities, Mr Gale deals with this at paragraph 3.22, page 920: some tier 1 local authorities will share their network access with either a district or a borough council (tier 2). Some will charge and some don't for that access. So in the limited time that's been available, Ashurst has identified that Norfolk County Council permits shared access with seven other councils. This is at Gale 3.24 to 3.26.

THE PRESIDENT: Yes.

MS HOWARD: Those six councils, that are charged for that use, pay for the services, but they are not recognised by Motorola.

THE PRESIDENT: Yes.

MS HOWARD: And we've given the example of one council -- I'll call them BC just in case it's confidential. I don't think it is, -- it's Breckland Council. They have paid Norfolk for their access during the Claim Period, and their invoices, which I can show you, do have itemised charges for Airwave Services.

Would you like me to show you that invoice so you have some certainty of how ...

THE PRESIDENT: Why don't you just give me the reference?

MS HOWARD: I can give you the reference for it. It's B/10, and it's 802 to 806.

(Pause)

Now, that's just one local council, but there are likely to be more. There are two points that I'd like to make to show you those: one is that the Ofcom guidance, the sharer list process -- that's at B/4, 87 to 92 -- refers to entities such as government departments

sponsoring access to the network for other users. It specifically refers to the Ministry of Defence, the Blue Lights, or local authorities.

So there are these sharing umbrella arrangements where other entities can get access under the umbrella of an accredited user.

If I could take you to the TLT Supplementary User Report, that's at D/10, page 1171. (Pause)

The redactions here are for legal advice, I should say, not for confidentiality. At the moment, this is in the Confidential Bundle. The table at the top of the page under paragraph 6.2 refers to local authorities --

THE PRESIDENT: What is this document?

MS HOWARD: There were two user reports that TLT produced for the Home Office.

THE PRESIDENT: Yes.

MS HOWARD: This was where they did a sort of survey to assess the extent of users that might have paid for Airwave Services to advise the Home Office. They issued one user report which I'm going to also take you to, and this is the Supplementary User Report. (Pause)

You'll see in the table that their survey included -- they reached out to 230 local authorities. I don't think there's any problem with me revealing these numbers; I can't see anything confidential in them. They got a response rate; you'll see the response rate in the next column.

Then the last two columns split those responses into those that contracted directly and those that piggybacked. And by "piggyback", that means -- you'll see there's a double asterisk:

"*[Those] who piggyback do so off a larger Local Authority or a local Police Force*."

That rate is approximately 50 per cent of those surveyed. There's also a table in Annex 2 of this report at page 1175. (Pause)

That also shows, with names of the councils involved, who have also got shared use through another council. So if you see line 2 and line 4, line 5 and line 7, are also examples of councils who have had this indirect use through either the police or another council.

Then I would just take you to the first user report, which is at paragraph 111.

THE PRESIDENT: Sorry, bundle?

MS HOWARD: This is the same bundle. It's just the previous document, and it's page 1163. (Pause)

There you'll see at paragraph 111, with all the sub-indents, there are names of other councils there who have been given shared access, with named examples, either through police forces or from other councils. (Pause)

So the key takeaway is that we're giving you a snapshot at the moment that there are other indirect users out there. There's a large number of local authorities who did not respond, either to TLT's enquiries or to Mr Gale's enquiries at Ashurst.

There are apparently 317 local authorities in the UK, so there are likely to be more examples of indirect users who are paying for the Airwave Services. If we take that 50 per cent as a proxy, that would equate to there being approximately 100 or so local authorities -- that's just a rule of thumb at this stage.

But we're working up from scorched earth on a sort of bottom-up analysis -- trying to work out who's been involved. Obviously, local authorities do know that they have access, and as will the primary direct users, because they're recharging the costs. So there will be information, there will be invoices, and a causal nexus there.

PROFESSOR NEUBERGER: Sorry, can I just understand, the users who are not accessing directly, you have evidence that they're being charged specifically for the services?

MS HOWARD: Yes, so the Breckland Council example that I gave you, they are being

recharged by what we call the tier 1 local authority, the tier 1 allows them to share their access, and then recharges them.

PROFESSOR NEUBERGER: But when you talked about half the local authorities were accessing indirectly, you know that those people were all being charged, or do you not know about their charging situation?

MS HOWARD: So the TLT table that I took you to --

PROFESSOR NEUBERGER: Yes.

MS HOWARD: -- said that of their survey, which is obviously a snapshot, 50 per cent had this piggyback arrangement. Then I took you Annex 2, and that splits out who was paying and who wasn't. So some are recharged, some are not.

PROFESSOR NEUBERGER: Right, okay.

MS HOWARD: It depends on the tier 1 local authority.

There will need to be a process of inquiry as part of the evidence for trial. Mr Bell in his methodology refers to the fact that there might be indirect users like this. He said they'll be able to take account of that through requests for information. So yes, this will be a matter for evidence at trial. I suppose it's where do you want your default position to be? With the opt-out, everybody's in; they have the option to opt-out. Like *Gutmann Trains*, you may at that initial stage include people in the class who haven't suffered loss, but they get filtered out through the trial process, as has happened in *Gutmann Trains*.

So in that case, there will have been people initially included in the class who didn't tap in and tap out at the right barriers, or they didn't buy a ticket. But as you go through the trial process and get to settlement or distribution, they will be filtered out through the evidential process.

MR HERGA: Okay. I think there was a suggestion that in order to make it -- to add more clarity to the class definition -- those making a financial contribution would

actually have to show that they had made a contribution in respect of Airwave Services, so presumably having Airwave on the invoice or something like that.

I mean, there must be a multifarious agreement; some will just have a contribution towards police costs, some will have contributions towards police infrastructure costs, and some will have Airwave on the invoice. But it seems unsatisfactory that it's only those that have Airwave on the invoice that are part of the class.

MS HOWARD: I know, but at some point you have to put the line somewhere. It always happens that somebody can't actually prove that they have suffered loss -- so that's why we have introduced the concept of specific financial contribution.

The word "specific", we say, is a very important filter. I was going to come to this point at the end of this section of my submissions, but my learned friend says: oh, you know, how do you distinguish a specific contribution from a general contribution? I'm not quite sure what he means by "general", but it is something that's very, very different from a general contribution to, say, overheads or something else. What I wanted to really do was to take you to our example of police services for airports, to show you how the charging carries through. That's my next category of users, and what I might do is just dial back a little bit just to show you which users are affected, and then take you to the NPCC guidance which shows specifically how police forces are instructed to account for Airwave Services, and they do need to itemise them.

To take you to the evidence, we're now dealing with our category 2(b). Now, these are the entities -- the little circles here in purple -- who have received Airwave Services as a component of wider services, police servicing being one example. These entities comprise football clubs, airports, events, stadia, counter-terrorism units. But the important thing to recognise from the outset is that the Airwave Service element is a discrete and separable component; we're not talking about eggs which have been mixed with sugar and flour and baked into a cake, and cannot be removed at the end;

they are a discrete element of the service that, as I will show you, is accounted for separately.

Now, in the time available, the team at Ashurst has contacted a few police forces. I think there are 43 police forces in the country in total, I think Ashurst have managed to check with three or four, perhaps, but the evidence of Mr Gale is that Greater Manchester Police, this is at paragraph 3.8, 3.10 -- I'm using the confidential version, which is in D/2, tab 5, at page 916 to 917.

It starts at paragraph 3.8. I'm not going to read all of these out, but 3.8 to 3.10, I'll summarise them for you: Greater Manchester Police have confirmed that they provide what are called Special Police Services to counter-terrorism units and Manchester Airport.

The total value just for those entities is set out at the bottom of paragraph 3.8. It's quite a substantial sum, I don't know if that's confidential. I'm told it's not. Just for those two entities of counter-terrorism in Manchester it is over £1.7 million they paid for Airwave Services. It recharges at cost, but not with profit, to those entities.

They also provide, and you'll see this, police services for football matches, concerts such as the Etihad Stadium and Old Trafford. Gale at 1.6(c) explained that:

The Greater Manchester Police invoices for use of Airwave Services. It keeps internal records identifying the amount of Airwave service costs, and those charges range from £3,500 to £2 million."

Then further down the page at 3.14, he refers to the London Met Police, and again their similar story:

They itemise and recharge costs for Airwave Services to third parties such as airports, transport hubs, events, stadiums, nightclubs.

He names some of them as being Heathrow, London City Airport, Tottenham Hotspur, the Emirates and the Olympic Park.

The further enquiries have identified -- this is down the page at 920 -- there's at least one other police force that also charges third parties and similar types of entities for Special Policing Services. There, the charges will include the costs incurred by the relevant police force.

THE PRESIDENT: Yes. So, we've got a lot of evidence on the recharging arrangements. I'm wondering if you want to move fairly quickly off this point, because I know there's a lot of other things to cover, including practicality of opt-in versus opt-out.

MS HOWARD: Should I take you to the SPS guidance, the NPCC guidance? Because you might not have had a chance to look at that, and that's just to answer Mr Herga's question about the airports having itemised costs. I think I can take you to that quite quickly.

THE PRESIDENT: Yes.

MS HOWARD: That's in the Authorities Bundle, it's at E/54, it's right down the bottom of the bundle, and page 3451.

THE PRESIDENT: And this is?

MS HOWARD: So, these are the national policing guidelines, handed out to the police forces, on how they should charge for police services. So there has been a spate of cases about police charging, and this is where, you'll see at the beginning of these, these guidelines were not the latest version, these are the version dated in 2022, so they're the version in force during the Claim Period. They were issued by the Chiefs' Council, the NPCC, and they provide -- you'll see under the document information -- comprehensive advice on cost recovery.

If you just quickly scroll down to the foreword.

THE PRESIDENT: Which page?

MS HOWARD: This is 3448.

There is a distinction, in the second paragraph, between ordinary public duties -- that's the police on the beat on public land -- normal policing duties, which are funded through central and local tax funded services, and functions that go beyond ordinary policing, where the police are entitled to charge for their costs and recover them, as part of Special Police Services.

I'm not going to take you to all the case law. There are some in the bundle, like *Ipswich*, which talks about the distinction between the two; normally when you're on private land, not public land, and the police are providing these services, that is treated as something that's going beyond ordinary public duty, something where there is a kind of public order or public safety element, like for a big concert, or for a football match, where they are providing services that go beyond just being on the beat in an ordinary way.

Some of those cases are referred to in the bottom of this foreword, where police have charged, for example, at Leeds and Wigan, Ipswich football, Reading Music Festival on private land, and again just at 3455, if you click forwards. (Pause)

So page 3455, paragraphs 2.1.3 to 2.1.4, you'll see there examples where police can provide these types of services, whether it's for single events, like a pop concert, or a number of linked events, such as policing football and other sporting matches, shopping malls, entertainment complexes, pubs and nightclubs.

And then further down it talks about rugby and football clubs, charities, local authorities, other government agencies.

Now, this document is quite repetitive, and says the same thing, but what the guidance does is it sets out a methodology, at 3450, for cost recovery. This is the summary in the costing methodology at 1.4, and the important thing is: it is about cost recovery. It is not about profit making. I've gone through the whole document; I can't see any reference to there being a profit markup, in the way like a pass on situation would

arise, it's all about cost methodology, and it distinguishes between two types -- sorry, just in this section -- it talks about recording an appropriate allocation of costs.

The third bullet, which is the one that concerns us, refers to recovery of relevant ancillary costs.

And then there is a distinction -- you'll see just at the bottom of 1.4 -- between direct costs versus full economic cost recovery. The direct costs tend to be used in charitable situations, and the full economic cost recovery -- I stress that's not with a profit markup, it's just where there is a contribution to general overheads and fixed costs -- we can see that at 2.4.1, which is at page 3457. There's also references for your pen at 3472.

So there is a paper trail, where the police are advised to keep a transparent record of their costs, but also there's a methodology for recovering them, and that is set out in Appendix 4, and that's at 3476. (Pause)

So this table, if you're with me -- I'm sorry, I'm moving very, very quickly -- sets out the direct costs, which are basically the salaries and the employment staffing costs of the police officers who are being used. That's the direct cost model, but then there is section B: the contribution to direct overheads, and if you look down the page -- sorry, just further down the page on 3476 -- you'll see item 21 includes information communications technology, which talks about information communications infrastructure, applications and support. And then it says "*see note 8 below*", and note 8 over the page refers to the budget that should include the full costs of maintaining ICT services, including -- and then we scroll down and you'll see Airwave costs.

THE PRESIDENT: Yes.

MS HOWARD: So Airwave costs there are included in the assessment of the information communications technology costs, and then they are divided by the

number of police officers at the event, and there is a worked example at 3480.

THE PRESIDENT: Now I think you really need to move on to other points.

MS HOWARD: Okay.

THE PRESIDENT: You've got 15 minutes now.

MS HOWARD: Just very quickly on this, paragraphs 1.5, 1.6 and 2.5, advise the police of their duties of public funds, the need for clarity.

THE PRESIDENT: Paragraphs of what?

MS HOWARD: Sorry, of this document, on the identifiable costs. So if we look at page 3459. (Pause)

If you look down the page at 2.5.16 and 2.5.17, there it talks about the need for a statement of intent and a written agreement. And so there will be documentary evidence, because here we're dealing with public funds, we're dealing with accountability and use of public money.

THE PRESIDENT: Yes.

MS HOWARD: And so there will be a paper trail here --

THE PRESIDENT: Yes, I really think you need to move on and get on to some other points, because we've spent some time looking at the paper trail and charging methodology now.

MS HOWARD: In that case, I'm going to move to opt-out. I'm not going to deal with conflicts; I'm not sure whether my learned friend is going to make that point, I'll make those points in reply or my learned friend Mr Thompson will.

Let's go to opt-out versus opt-in.

So ultimately, this is a matter of discretion for the Tribunal, and we say there are four key drivers which favour the use of opt-out proceedings in this case. They are: access to justice, cost efficiency and the effective administration of justice, thirdly, importantly in this case, value for public money, and lastly, the effectiveness of the private

enforcement and settlement regime. I'm going to deal with each in turn.

So access to justice. Now we've said that there may be large central government departments who might be prepared to bring their own case. However, that would not assist that wide range of smaller users and contributors who have suffered relatively small losses and lack the resource and budget to be able to opt-in and participate in these proceedings in their own right. If I can take you to the evidence, the Class Representative, Ms Spottiswoode, in her very first statement, paragraph 61(b) and (c), expressed her concerns about the feasibility of opt-in for agencies and public sector organisations. And those concerns have been validated by the subsequent evidence.

Let's start with Mr Parr in his second statement. That's B/8, at paragraph 9. It's page 763 of Bundle B. Mr Parr is the SRO, the Senior Responsible Owner, within the Home Office, who's responsible for the Airwave Network, but he's also a former police officer and held a very senior role in policing before he moved to the Home Office, so he speaks from his direct experience. And paragraph 9, he talks about the tail of affected users who have comparatively small value claims and would not be able to seek compensation.

At paragraph 12, he explains about their limited resources, the budget constraints, and quite simply, the limited bandwidth that they have to deal with matters other than their public service functions. What we're dealing with here are police forces, ambulance trusts, who you would think are quite well organised public sector entities, but their primary responsibility is dealing with emergency situations, which are their core mandatory statutory obligations. They don't have the ability, internally, to commit resource to something as extraneous as litigation, especially complex litigation like this.

Mr Parr explains, at 17 to 26, that most of those sorts of entities, the police, the fire, the ambulance, simply don't have internal in-house expertise to deal with the claim

that is this complicated, and he says at paragraph 21 --

THE PRESIDENT: So, I asked earlier, can you just give some specific examples of what decisions have to be made that would cause difficulties? And again, it's not a loaded question, I just really want to understand what your case is, because this is saying they would have to commit resources, but what exactly do they have to decide? Go through the decision chain.

MS HOWARD: I don't think it's just a simple issue of opting in and ticking the box. I don't think -- I don't want to be giving evidence from the bench, but Mr Parr talks about the governance structures of dealing with large-scale, sophisticated litigation. This is paragraph 21. And he talks about having to get the approvals internally, within the police force. So it's not just to tick the box to opt in, but it's also ongoing participation as well in these proceedings.

At paragraph 20 of his statement; so, they would have to persuade the upper echelons of that police force, or the ambulance trust, they need to justify setting aside resource, manpower to deal with the merits of the action. They're not going to opt in until they actually understand the risks and the merits of the litigation, and particularly when they don't know what the value of their claim is going to be, and it may be relatively low level compared to litigation of this type, which is large budget.

And so he says, his evidence at the bottom of paragraph 20: "*There would be a trade-off to consider*". [As read]

The public entity would think, if time and money is allocated to participating in this opt-in action, what other well-deserving public service activities will be forsaken, because they have to lose that resource and budget allocation?

THE PRESIDENT: Why is there a difference? And again, this is an open question: can you explain the difference between the decision-making for opting in and the decision-making for participating in a settlement? Because Mr Kennelly says,

ultimately, the differences that you've relied on are overstated.

MS HOWARD: Okay. I haven't got evidence on this point, but I would imagine it's a mindset shift, when you've got a risk averse entity-- Mr Parr explains how these entities are very risk averse anyway. You're venturing into unfamiliar territory, very complex litigation, not really knowing what's involved, how much time you've got to commit, how much money you're going to get out of it, and what the demands are going to be in terms of manpower and budget and resource, taking it away from your core duties. Contrast with a situation where there's been a finding of liability, there's been a finding there's a big pool of damages out there, or there's a settlement offer of a sum of damages, and there's also a process that's being set out of how that pool of damages is going to be divided. That's a much easier decision, because it's concrete, and the steps and the process are set out, and the extent of the commitment is known.

THE PRESIDENT: i.e., the commitment to establish how much they've paid.

MS HOWARD: I'm sorry, my Lady?

THE PRESIDENT: So at that point, the commitment is simply to establish how much they've paid for the service.

MS HOWARD: They've got the certainty of knowing they're getting something.

THE PRESIDENT: Yes.

MS HOWARD: I think, Mr Gale -- sorry, I've also been dealing with Mr Parr's evidence, but similar points are made by Mr Gale in his witness statement, which is at page 791. Let me just check that page reference is right, because there's a non-confidential version and a confidential version.

THE PRESIDENT: Yes, all right. I understand your submission, Ms Howard.

MS HOWARD: Mr Gale, again, he talks about:

"*The reality is that the Blue Light entities are made up of smaller local entities with no internal expertise*." [As read]

So he refers to conversations he's had with the NPCC -- that's the National Police Council -- and the APCC. That's at paragraph 4.8 of his statement.

THE PRESIDENT: I think you've got four points to get through --

MS HOWARD: Yes.

THE PRESIDENT: -- and you've got seven minutes, so please can you move on to your other points.

MS HOWARD: Okay, but in that paragraph he talks about the diversion of resources, and just simply that the issue of opt-in is that he fears that would slip down to the bottom of the pile, and just so you --

THE PRESIDENT: Two is efficiency, so let's move on.

MS HOWARD: Okay. The second thing is efficiency, and that is simply -- and I speak from experience of the difficulties of book building -- effectively having to book build a claim. Which, I mean, I've been involved in *Trucks*, I've been involved in *Salmon*, you know -- it's a minimum of two years to locate potential claimants, make contact, chase responses and follow up due to the lack of availability.

Mr Gale deals with this in his witness statement at 1.6(a), that's page 911, and just his experience -- and previously TLT's experience in its User Survey -- of reaching out to however many hundreds of local authorities and only getting a hit rate of 45 per cent, and that's just a response rate to a survey.

This is corroborated by the TLT User Report. If I could just take you to that. D/9, 1135. (Pause)

You can see at the bottom of the page there's a table which goes over the page to 1136, and it shows those that were surveyed compared to the responses. So yes, there were high response rates from the Home Office and the police forces, fire and ambulance. But when you dive down into the other sharers, then the response rate drops off. So I'm just going to -- I've worked out the percentages on these figures.

The government departments is less than two thirds, it's 58 per cent; transport entities, 14.7 per cent. Now, rescue entities, there are actually 108 unaccounted for, but only six were surveyed and only three responded. Local authorities: 17.4 per cent. Healthcare authorities, you'd think they would be interested, only two responded, 5.8 per cent, they've probably got a lot else to do.

And then the miscellaneous entities, again, 33 per cent. Now, this was just a response to the survey; that's not even the subsequent stage of taking a decision to opt in. So we say those figures are indicative that there will be a significant number of affected parties that would be practically excluded from relief.

So we say the default position of an opt-out claim is therefore critical for facilitating access to justice and enabling legal redress, enabling that money to cascade down into the pockets and the budgets of the parties that have suffered the loss. That, in practical terms, do not have the resource, expertise or the stamina to commit to opting in and participating in such complex and long, lengthy proceedings.

THE PRESIDENT: All right, value for public money.

MS HOWARD: Okay. Before that, this is linked to my first point, which was the cost efficiency. Simply that obviously the costs of book building is time consuming, it's going to add expense, it creates a format that wastes costs, introduces administrative inefficiency, distractions contrary to the Rule 4 objectives of the Tribunal.

In effect, what's going to happen is on top of the legal costs run by the Class Representative, you're going to have an extra layer of costs by these small entities who will not have their own in-house expertise; they will probably, as Mr Gale and Mr Parr have explained, have to incur their own legal advice separately to be able to advise them through the governance process. Those external legal costs as Mr Parr explains are likely to be higher than the quantum they may recover.

Ultimately, the increased legal fees, where work is done by the Class Representatives'

lawyers, will be added to the litigation budget and that will come out of the damages pool. So that's going to reduce the overall damages pool and lower recovery for the class members and actually affects -- disrupts -- the cost benefits of these proceedings.

Now, moving on to value for money, that dimension of cost efficiency is really important in this groundbreaking case where the claims are being brought on behalf of the public sector, and they are being funded, not by private investment bankers weighing up the risks, but by funds through central government. And we need to ensure that taxpayers' money is being used to best effect, by reducing the litigation costs and maximising recovery. That's all the more so when any excess charges for Airwave Services have already been borne by the public purse in the first place.

So there has to be a streamlined, efficient way of recovering that excess compensation.

THE PRESIDENT: All right. Let's move quickly on to settlement, then. You've got a minute.

MS HOWARD: Yes. Now, as I said earlier, there's one critical distinction between opt-out and opt-in proceedings, and that is judicial supervision over settlements. We say that those safeguards are really important to ensure that there is a comprehensive framework that meets a just and fair settlement in the interests of all those that have been affected. There is no equivalent framework for opt-in claims.

I don't want to make ad-hominem attacks here, but just the commercial realities of litigation: there's no barrier to the Defendants cherry-picking certain claimants and persuading them either not to opt in at all or to go for early settlement. By pulling at the threads of the jumper, they can pull out certain larger value PCMs, which would then disrupt the funding structure for the litigation, because it would remove the cost benefits. Likewise, they could encourage smaller, weaker claimants to settle more

quickly for lower amounts, which don't actually reflect the full extent of their loss. I don't want to be -- I'm not casting aspersions at my learned friends, but that is a real dynamic in litigation.

THE PRESIDENT: All right. I've got one question, which is would it be feasible under the funding arrangements for the larger claimants to settle and for the smaller claimants to refuse to settle but then would have to be funded?

MS HOWARD: My understanding of an opt-out is that once the claim has been issued, then it has to go through the collective settlement.

THE PRESIDENT: But what about opt-in?

MS HOWARD: For opt-in?

THE PRESIDENT: Yes, that's what you're talking about; cherry-picking of claimants. So is it feasible for the Home Office, for example, the three largest claimants, to settle and leave, leaving the others unsettled? And would they have to be then funded; how does it work?

MS HOWARD: You would think they would opt out, or they wouldn't opt in, if they were going to pursue their own track.

THE PRESIDENT: Well, no, if it was an opt-in proceedings and then the larger claimant settled, but the others refused to settle; what then happens?

MS HOWARD: I think you still have to proceed on the basis of the claimants that are left in --

THE PRESIDENT: And would the Home Office then have to continue to fund them under the funding agreement? (Pause)

You might want to come back to this in reply.

Okay, that's the end of your submissions, we'll rise for five minutes and Mr Kennelly will continue.

(11.46 am)

(A short break)

(11.53 am)

Submissions by MR KENNELLY

MR KENNELLY: Members of the Tribunal, before I open my submissions on class definition and opt-in/opt-out, I'll begin, if I may, with my last point, which is our proposed solution, and the jurisdictional issues that arise if the Tribunal proceeds on the basis of an opt-in proceedings for direct purchasers only. Opt-in, the class definition covering direct purchasers; those with contractual relations with Airwave.

As the Tribunal saw in our skeleton argument, the initial proposal was that, because of the unique nature of this case, because the direct purchasers are for the most part public bodies with existing charging and recharging arrangements, the Tribunal could leave it to them to recharge and repay the money according to their own assessment of the proportion paid by the indirect purchasers, but to the extent --

THE PRESIDENT: But why? Because there are a whole penumbra of indirect purchasers, they may not be satisfied with the way in which the money is recharged.

MR KENNELLY: Yes. To cut right to the chase on that point, in this scenario, the indirect purchasers would not be represented by the PCR.

THE PRESIDENT: Yes.

MR KENNELLY: The indirect purchasers would not offer us any indemnity, and it would be, in theory, open to the indirect purchasers, if unhappy, to issue their own claims.

Now, that is a risk which the Proposed Defendant in these proceedings is willing to take, because it's our view that in reality, if the case proceeds under a direct purchaser on an opt-in basis, proper compensation, to the extent deserved at all, will be made and it will be repaid and recharged through the existing mechanisms to those indirect

purchasers.

THE PRESIDENT: But where is the evidence on how that would happen? We've got no evidence from you. This is simply a submission.

MR KENNELLY: The evidence, madam, is that in this scenario -- let's assume the Tribunal wants to make an order; let's assume that the voluntary assessment isn't appropriate. The first question then is: your jurisdiction. May I deal with that very quickly?

THE PRESIDENT: Yes.

MR KENNELLY: Rule 93 of the Tribunal Rules, that's in the Authorities Bundle, I think it's page 67 in your PDF. It's 62 on my one, I think it's 67 for you. Rule 93 of the Tribunal Rules. Does the Tribunal have that?

THE PRESIDENT: Yes.

MR KENNELLY: So 93(1) deals with your powers in awarding damages for opt-out proceedings.

THE PRESIDENT: Yes, and we were looking at this. 93(2) says that the Tribunal "*may make an order as described*".

MR KENNELLY: Indeed. So you may make an order of the type specified in paragraph 1, and paragraph 1 tells you that you may make an order in opt-in proceedings:

"*Providing for the damages to be paid on behalf of the represented persons --*

"(a) the class representative; or [...]"

And this is what I rely on:

"*(b) such person other than a represented person as the Tribunal thinks fit*."

To that, by way of your jurisdictional powers, we add, over the page, rule 93(3)(c): the order that you may make under 93(2) may specify *"any other matter as the Tribunal thinks fit*".

So you have an express power to order us, in any damages award, to pay persons other than the represented persons, and you may do so in any manner that you think fit.

THE PRESIDENT: But that's only if the Tribunal makes an order. What about a settlement case? If it's a settlement on an opt-in basis, the Tribunal's jurisdiction is more limited.

MR KENNELLY: It is. This has to be an order in respect of the settlement -- it still needs to be approved.

Sorry, forgive me. On an opt-in basis, I'm corrected; there's no need for you to supervise and approve it.

THE PRESIDENT: Yes, that's a problem.

MR KENNELLY: That is a problem on the opt-in settlement. I'll have to come back to that, because I can see how in a settlement scenario, the Tribunal's ability to supervise would be much more limited.

But may I just deal before that with the earlier question, which is: how would the distribution to the indirect purchasers work if you made an order?

The order that you would make in this scenario would be to order the PCR to pay from the damages award to the non-class members who contributed indirectly to Airwave, according to the methodology developed by Mr Bell.

Mr Bell has an existing distribution methodology for the allocation of damages between direct and indirect purchasers. He would have to modify that in this scenario, because you're certifying, but you'd have to go back and revisit his methodology for this purpose.

THE PRESIDENT: But the problem is that in that event, the class members who would be the recipients of that wouldn't be at the table. Why, in that case, leave them out? Then it makes no sense if you're envisaging that they're going to be paid, which is

what you're saying; why exclude them from the party?

MR KENNELLY: For the sake of procedural efficiency. Because the problem is -- it's a trade-off that plainly, in this scenario, the indirect purchasers will not be legally entitled to attend, unless you in your order -- perhaps I'm speaking too soon.

In your order to the PCR for the purposes of making payments to the indirect purchasers, and you may make that order in any manner you think fit, you may specify -- you may order the PCR and the class members to involve the indirect purchasers in the allocation process; that bites on the direct purchaser, class members and the PCR.

THE PRESIDENT: But how is that procedurally more efficient than just there being there in the form of the opt-out class?

MR KENNELLY: Because you avoid some of the difficulties that I'm about to outline. I haven't outlined the difficulties with the existing proposal.

THE PRESIDENT: Right.

MR KENNELLY: In the existing proposal, which is opt-out, you are going to pull in even direct purchasers who may not want to be in this litigation at all, not least because of the disclosure obligations and the complications with distribution that the PCR accepts are inevitable.

There is a conflict if direct and indirect purchasers are in the same class, a real conflict, on the part of the PCR if she is representing both the direct purchasers and the indirect purchasers. At least that conflict is avoided if she's representing direct purchasers only.

THE PRESIDENT: Is there any evidence that any of the direct purchasers specifically don't want to be in the litigation, but would not bother to opt out? Because if they really didn't want to be in the litigation, then they can opt out.

MR KENNELLY: That's true. I have no evidence on that point, madam. It would be

very difficult for my clients to obtain evidence of that type, but we have nothing from the PCR's evidence to that effect.

But what we are offering is a, we say, procedurally more efficient solution to that which the PCR has advanced. You have the power to make the order. You even have the power to say that the PCR must involve the indirect purchasers in the allocation process at the distribution stage, and in doing so, you would avoid the problems that I'm about to outline with the current class definition and the opt-out approach.

May I move on, madam? That was really just to address your jurisdictional concern, but I entirely accept your other point, which was that the indirect purchasers, in theory, could bring their own case against my clients. That's something we're prepared to accept as the price to pay for this efficient and more clean solution.

THE PRESIDENT: So their remedy would be to bring their own case if they weren't satisfied with what they were being offered on a voluntary basis?

MR KENNELLY: Or on -- well, it wouldn't be a voluntary basis if you ordered the direct purchasers, the class members, to make payments to the indirect purchasers.

THE PRESIDENT: But let's say it's opt-in, so there's no requirement for us to approve the settlement. In that case, one remedy would be to sue you directly; the second would be -- I mean, would they have any recourse against the direct purchasers?

MR KENNELLY: It's hard to see, subject to restitution points, what recourse they could have against the direct purchasers.

THE PRESIDENT: Right, so --

MR KENNELLY: The main recourse would be against my clients.

THE PRESIDENT: Right. Then what about the other point, that irrespective of whether you do or do not take a pass on point, Ms Howard made the point that the Tribunal is limited to awarding damages on the basis of loss suffered. How would that be constructed in a direct purchaser only scenario if they hadn't actually suffered loss?

MR KENNELLY: Yes. The point that we made in our skeleton is clear as could be, is that we will not take that point against direct purchasers. By not taking a pass on point, we're not taking a causation point against them. The direct purchasers will recover such overcharge as they paid to us, even if they passed on some or all of the overcharge to indirect purchasers down the line. That is a clear undertaking we will give the Tribunal in order to have clarity in this case. But that does mean that where direct purchasers do not opt-in, we will not be paying damages in respect of those to the extent we are liable to do so, to pay in respect of --

THE PRESIDENT: You say you wouldn't take the point, but I think Ms Howard was saying the Tribunal would have to raise it on its own initiative anyway, whether or not you specifically take it, on the basis of the Tribunal's application of the general law. I think that's what she's saying.

MR KENNELLY: That's the first time we've heard that point, madam. I'm not sure that point is even right. They have a claim against us; these are adversarial proceedings. If we are prepared to make an offer to pay the money to them and not take a pass on point, it's difficult to see what further role the Tribunal has. And that is a fortiori in circumstances where the certification would be on the basis that the indirect purchasers would have to be paid in any distribution according to the Tribunal's order. Not because they are represented, but because that is a condition of certification: that in any distribution, the class members and the PCR would have to ensure that indirect purchasers were paid according to the revised methodology of Mr Bell's report.

THE PRESIDENT: Well, that's a different point. I mean, you were saying that we could make, as a condition of certification, a stipulation that the indirect purchasers would have to be paid.

MR KENNELLY: Yes, but if you made that stipulation, it would -- to the extent there is an overcompensation point -- that stipulation would address it.

THE PRESIDENT: If we were to make that stipulation, that could be made irrespective of whether your pass on undertaking is triggered?

MR KENNELLY: Yes.

THE PRESIDENT: All right, is there any reason why your pass on undertaking is confined to an opt-in scenario? As, in principle, why should it not apply if it's opt-out?

MR KENNELLY: Because it's a concession: by giving up the pass on defence, we make a concession; we give up our right to take a point which may ultimately be financially valuable to my clients, and they're not required to do so. I'd have to take instructions as to whether, if the case were to proceed an opt-out basis, they'd be prepared to sacrifice that --

THE PRESIDENT: Right, can you take those instructions over the lunch adjournment? Because it seems to me that if you didn't give that undertaking, Ms Howard would have a much more powerful argument to say: irrespective of whether it is opt-in or opt-out, the wider class needs to be certified.

MR KENNELLY: Yes, well, I'll take instructions on that point, madam.

May I move on, because I'm conscious of time?

THE PRESIDENT: Yes, of course.

MR KENNELLY: So starting with the class definition. Very briefly on the authorities, my learned friend Mr Thompson said that this question of whether a class member can identify itself or not was the point that went only to discretion; it was not a threshold point. That is wrong.

May I show you quickly the *CICC* judgment of the Tribunal? It's in the Authorities Bundle. I'll go straight to the law on page 1176 in my copy, it should be 1178 in yours. It's paragraph 58. It begins with a citation from the Guide to Proceedings.

THE PRESIDENT: Page number 1176?

MR KENNELLY: It's in the *CICC* 2023, tab 17 -- it's in the Authorities Bundle.

THE PRESIDENT: Yes.

MR KENNELLY: My page is 1176.

THE PRESIDENT: Okay. Paragraph?

MR KENNELLY: 58.

THE PRESIDENT: Yes.

MR KENNELLY: That's your Guide to Proceedings, and over the page, page 1177, I'd just draw your attention quickly to the reference to claims being brought on behalf of an identifiable class of person, that is, Rule 79(1)(a).

Skipping down about halfway in that indented passage, the Guide says that this requirement:

"*[…] has practical implications, such as in relation to the requirements to give notice. Indeed, it is the class definition which* [this is important] *potential class members will read when considering whether to opt in or out of the proceedings*."

Now, in order to opt out of proceedings, the class member needs to know whether they are covered or not. In the same judgment, could I ask you to go, please, to the class definition in that case, in *CICC*?

MR THOMPSON: Sorry, can I just ask the Tribunal to look at paragraph 62(1), which was referred to?

MR KENNELLY: Well, it's not in dispute that the Rules have overlapping but distinct functions.

May I take you to the class definition, please, in that case, it's my 1182. Very briefly, I know the Tribunal is familiar with the *Interchange* proceedings.

THE PRESIDENT: Sorry, page?

MR KENNELLY: It's 1182 in my version.

THE PRESIDENT: Yes.

MR KENNELLY: Madam, I see now that you you're using our page references.

Should I give you the ones that I have already in my notes, or add on --

THE PRESIDENT: I mean, I think because of the confusion, just give me the red numbers and I'll work it out myself.

MR KENNELLY: So in this case, the problem was that the claimants were suing in respect of commercial and inter-regional multilateral interchange fees, but the interchange fees that merchants paid were blended. The merchants got paid a single figure and didn't know the figures, or whether they paid any particular MIFs; the single fee was a collection of different interchange fees. The problem in this case for the PCR was that the individual merchants didn't know if they'd paid the particular MIFs that were covered by the claim or not, because on their invoices they simply paid a blended figure, and some merchants may well never have paid the interchange fees that were covered by the proposed claim.

If you go, please, to page 1186 in the red numbers, you see a reference to these blended contracts.

Moving on then, please, to page 1195 in the red numbers, we have the Tribunal's conclusion. They begin with the threshold question, which is the Rule 79(1)(a) question: is there an identifiable class in the opt-out proceedings?

They make the point that because of these blended contracts merchants, this is a paragraph 114:

"*Merchants will not necessarily know whether they have accepted payments to which an interregional or commercial card MIF applies*."

If you go, please, to 1196, over the page, down to paragraph 119. This again is on the threshold question of identifiability. We see the question that was put to the PCR's representative:

"*How [...] a merchant would know if they had conducted a transaction to which an interregional or commercial card MIF applied*."

The Tribunal's analysis begins from paragraph 180, which is on page 1211 in the red numbers. They say they're not satisfied that there's an identifiable class, and that's a consequence of the fact that the merchants couldn't tell from their blended contracts whether they had actually paid the MIFs covered by the claim.

At 182, they made the point that you can't just assume that because they paid a MIF that they paid these particular MIFs -- unlike the *Mastercard Merricks* case, that couldn't be assumed -- and over the page, 183:

"*[There is] no obvious way of determining*" whether they paid the impugned MIFs or not. One sees exactly where I'm going with this in our own case.

My final point on this is that all of this analysis was relevant to 79(1)(a). If you go to page 1214, paragraph 192, the Tribunal is dealing with the threshold question of Rule 79(1)(a), and they say:

"*The design of the class is flawed [because of] the combination of the MIFs [...] and the breath of the merchants […]. That is apparent from the basic factual circumstances surrounding the merchants in question [...] and in particular the difficulty that any merchant on a blended contract might have in understanding whether they are a member of the class*."

So that ability to know yourself whether you're in the class or not is a 79(1)(a) question; it's a threshold question. So with that in mind, we go to the class definition itself.

THE PRESIDENT: Paragraph 193 says:

"*We read Rule 79(1)(a) as allowing for a degree of certainty [...]*" [As read]

MR KENNELLY: Yes.

THE PRESIDENT: Sorry:

"[...] *a degree of uncertainty, in the sense that there need not be an absolutely rigid definition of a class*." [As read]

What do you say about that?

MR KENNELLY: Well, we accept that, and we said we accepted it in our skeleton also. There's obviously going to be some grey areas; it may not be entirely straightforward for a person to know if they're in the class or not. But there has to be, still, a workable basis, in the class definition, for class members to know if they are in the class or not. (Pause)

And in our submission, this proposed class definition in our case fails, because the definitions I'm about to show you apply to those who have made a specific payment in respect of Airwave, but the word "specific" is highly uncertain, contrary to the submissions of Ms Howard, my learned friend. (Pause)

As I'll show you in the evidence, the class includes people who have paid in respect of Airwave without knowing whether they've paid in respect of Airwave or not, because there's nothing in their contract or their invoice to that effect, and I'll show you that in Mr Gale's evidence.

So, in view of the time, I shan't take you back to the class definition itself; the Tribunal has that well in mind. It covers situations where "specific payment" is made, but the word "specific" is not defined, and as I say, there are two major problems:

One is that this definition covers entities who paid, but Airwave was never specifically mentioned, and you can't assume, unlike in the *Merricks* case, that every time police or emergency services received a payment, that covered Airwave.

And the second big problem is the conflict that arises when the costs are shared between different entities, without any consideration at the time as to how those costs were to be shared. There's obviously dispute when you have an aggregated bill as to how much of that money paid to the police covered Airwave or not.

So going to the first of those problems, Mr Gale's evidence, B, I'm taking the Tribunal to the non-confidential version. I've tried to stick to the non-confidential materials wherever possible, in the interests of transparency. It's B, tab 9, page 782 in the red

numbers. (Pause)

And these passages you've seen before, I'll take you to some different parts, starting with the Metropolitan Police Service, at paragraph 3.13. Mr Gale spoke to the Met, and if you go over the page to paragraph 3.14, let's take these passages carefully, because my learned friend Ms Howard suggested, I think, that there was no problem, because the class only covered those who had itemised bills specifically identifying Airwave, and that's not what Mr Gale is saying here. He says in (a):

"*During the claim period, the [Met] engaged with […] third parties […] large transport hubs, airports, […] venues, […] stadiums [and so forth] to whom [they] provided enhanced police services […] [which required the use of Airwave]*." [As read]

Then (b):

"*In some (but not necessarily all) of those cases,"* so these are the cases where the police are providing the enhanced police services – *"in some [but not all, they] allocated the cost of Airwave Services referable to the relevant third party by invoicing them for the police services, including the charges for Airwave*". [As read]

So in some cases, they provide these enhanced services, but they don't charge for Airwave. So that's contrary to the NPCC Guidelines that we saw earlier, so those are not universally followed, according to Mr Gale.

And then (c):

"*During the Claim Period, the costs of Airwave Services were individually itemised on the invoices issued to third parties in at least some (and potentially all) of those cases."*

And those cases are the subset where the police did actually charge when providing those enhanced police services.

So it's not the case that the class is limited to those who had a direct contract referring to Airwave, or invoice specifically itemising Airwave. And in those circumstances, the paying party, to the extent that the paying party would not know, first of all, could not

assume that, if they brought the police in, they were paying for Airwave, since the police did not always charge for it, and if they received an invoice, it didn't necessarily itemise Airwave.

And then if you go to 3.20, that's the Met page --

THE PRESIDENT: I think all he's saying is he can't be absolutely certain, because they haven't done the exercise of looking at all of the invoices. So he's got to sign a statement of truth. He can't say, because he hasn't had time available to look at all of them, that in all of those cases it was allocated, or that in all of the cases the Airwave Services were individually itemised. He's saying, in at least some, and potentially all of the cases, they were. But all this does is to protect himself against the position that somebody might find one stray case where it wasn't invoiced, and this doesn't tell us that there were actually some where the costs weren't recharged.

MR KENNELLY: Madam, that's fair, and Mr Gale's evidence is fair; he has drafted in a fair way. May I show you something more precise then? On page 784, paragraph 3.20, Mr Gale says he spoke to representatives from five other police forces. Paragraph 3.20 on page 784, do you see that?

Over the page, he says:

"*[A]t least one other police force [of the five] charges third parties […] for special or additional policing services. In some, but not all, of those instances, the charge(s) applied to the third party will include the costs […] of Airwave*". [As read]

And that's not a reference to uncertainty, that's based on his discussions. He says his conclusion is "*[i]n some, but not all of those instances, the charges applied to the third-party will include the [Airwave] costs*".

And then (b):

"*[O]ther police forces indicated* [...]" [As read]

THE PRESIDENT: Well, okay, the rest of that paragraph needs to be read to

understand the point that he's just made. He said he couldn't, in the time available, get specific invoices, and a specific paper chain. All that he did was to speak to the police force, which indicated what it did. That's, again, giving an appropriately caveated statement as to the information that he'd been given. We can't really conclude from that one way or the other, because this is quite a general statement, on the basis of very limited information.

MR KENNELLY: Madam, may I just dwell on that second sentence for a moment. He has said that in some, but not all of those instances, the charges will include costs incurred by the relevant police force. But then, where it's not been possible -- we see what's not been possible in time -- he didn't get the internal approvals to identify the third parties in question, or a breakdown of the charges to third parties. So he can't give specificity as to the third parties in question, and he can't get specificity as to the breakdown, but he has said clearly that in some but not all instances, the charges will include costs incurred in respect of Airwave.

So, read fairly, he is saying that he knows. In some instances, Airwave will not --

THE PRESIDENT: He's been told.

MR KENNELLY: Or he's been told.

THE PRESIDENT: Yes.

MR KENNELLY: And then similarly at (b), other forces have said, as far as they're aware, and I entirely understand awareness based on the enquiries he was able to make, they did not undertake any cost-sharing or recharging arrangements.

And so what I'm going to say here is that these class members who paid indirectly, who paid to the police forces, will not be able to know, in a straightforward, workable way, whether they have paid for Airwave or not.

And if you go back to --

THE PRESIDENT: Why? Because if you're right about that, then there will be some

cases in which there was no payment for the use of Airwave Services, and why do you extrapolate from that, that the class member won't know whether they were paying? The most you get out of these paragraphs is that it appears that in some cases, the third party just wasn't charged. That doesn't tell you whether the third party knows that they were charged or not.

MR KENNELLY: No. It's true that, in some instances, they may not be charged at all. So we can't assume that every time the police provide the services, they charge.

THE PRESIDENT: Yes.

MR KENNELLY: More importantly, when they do charge, they don't always charge for Airwave.

THE PRESIDENT: Yes.

MR KENNELLY: And even when they do charge for Airwave, they don't itemise Airwave in every case, and so the payer doesn't know, even that --

THE PRESIDENT: That's not clear for me. Where do you get that from? That they do charge for Airwave and don't itemise it?

MR KENNELLY: Well, first of all, from this passage at 3.20, they say the charges will include the costs incurred for the use of Airwave.

THE PRESIDENT: Yes.

MR KENNELLY: So in some instances they will charge, but not for Airwave.

THE PRESIDENT: Yes.

MR KENNELLY: And if you go back to 3.10 and 3.14, but let's go to 3.10 first, on page 782. (Pause)

This is now the Greater Manchester Police. They similarly provide these Special Policing Services, and they keep internal records about the Airwave Services costs. But Mr Gale can't say with certainty the extent to which the invoice is specifically itemised.

THE PRESIDENT: Because he hasn't seen them. As far as I can see, there's nothing that says with any certainty, or even suggests, that there were cases where Airwave was charged but not itemised. All he's saying is that we haven't seen the invoices, so we can't be sure that it was specifically itemised.

MR KENNELLY: What we do get, madam, is real uncertainty. The PCR has to persuade you that this is a class where the members will be able to identify themselves in a workable way. He has made an investigation, and at paragraph 3.10 and 3.14, he says they may or may not specifically itemise Airwave when they are charged. And that's 3.10 and 3.14(c), that's the cost of Airwave, individually itemised in some, and potentially all, of those cases. That is a long way from saying (and the burden is on them) don't worry, everybody who's charged by the police for Airwave will know whether they have paid for Airwave or not. (Pause)

And again, we get this from the User Report, D/9, page 1135. D, the Confidential Bundle.

THE PRESIDENT: Yes.

MR KENNELLY: And 1135, paragraph 3.2, we have the responses to the User Survey, of the organisations who responded.

3.3, we see that a certain number of bespoke terms, others have contracted on standard terms at 3.3.2, and then others piggyback, and for many of them, this is at no cost, except that one airport, which is potentially charged by the Metropolitan Police.

THE PRESIDENT: Yes.

MR KENNELLY: So there's uncertainty as to when they are charged, whether they're charged for Airwave.

THE PRESIDENT: Well, actually, that's just saying we're not sure about that, the 11th, but we know that in ten cases, there is no cost. So that statement could have only

been made if ten of the respondents said, "We piggyback, but we don't pay for it".

MR KENNELLY: The point is that it's for the claimants to come before you, and put detailed evidence before you, to say that there is a workable basis upon which class members can know if they're in the class or not. And it's not good enough for them to come here and say it's all very unclear; it's a point against them.

In some cases, they say there may have been separate invoices, there may have been itemised bills, but in others we don't know.

My learned friends refer to the lack of time again and again. This case has been in preparation, in the offing, for some time. This is a very simple question. The pool of indirect purchasers is actually much smaller than we see in other collective proceedings, and the information should and could have been obtained. It's not a point against me that they have failed to do so. I'm only identifying the flaws in the evidence they have put forward. I'm not able to adduce evidence of my own as to the contractual relations between the police and their customers in this scenario.

One last reference before I go to my next point. The Reply, in the A bundle, the Core Bundle, we see another passage which raises the same concern. Because obviously we took this point in our own pleading and the Class Representative replied. It's A bundle in the red numbers, page 124. It's paragraph 17(c).

Again, they're dealing with our concerns about what is a specific financial contribution. And they say this:

"*Provided [...] the [...] Contribution can be attributed specifically to the use of Airwave [...] the Purchaser would be in the [...] Class even if the payment [...] may ultimately need to be disaggregated and accounted for at the distribution stage to identify the quantum of the element that related to Airwave*."

Now, this is a long way from saying that the class members are restricted to those who have an itemised payment specific to Airwave. On the contrary, it suggests that there

may be a lump sum payment that has to be disaggregated to identify the Airwave component. And how is a class member supposed to do that at the initial stage of deciding whether they're in the class and if they need to opt out or not?

THE PRESIDENT: You're reading quite a lot into the word "disaggregated".

MR KENNELLY: Well, in my respectful submission, that is a fair reading of it. And if you read that with what we saw from Mr Gale, one can see the only proper reading of it is to say that the PCR through Mr Gale has seen that in many cases class members will either not have paid or paid a lump sum, which will need to be split up in order to identify the Airwave component, if there was one.

What you see nowhere in the materials is a statement that every class member will have a contract or an itemised bill specifying an Airwave payment. I was going to go to the NPCC Guidelines. In the time, I'm afraid, I'll simply draw your attention to the fact that it's common ground that in those NPCC Guidelines -- first of all, they're guidelines. And we saw how, according to Mr Gale at least, they don't appear to be followed strictly. Secondly, the police have a discretion to apply abatements in certain circumstances, my learned friend pointed you to this, where they don't have to recover the Airwave costs if they decide that's not appropriate.

So again, the extent to which the abatements were applied may not be fully known by the customer of the police in that circumstance. There's nothing to suggest in the evidence that they would know. And there could be a dispute as to whether and to what extent Airwave costs were ultimately recovered in that scenario.

So true it is, we saw in the materials just now that the police forces in question may have internal records dealing with Airwave costs. So the Met Police, for example, might know they may charge the Emirates Stadium. They've made provision for Airwave costs. But Mr Gale was careful to say that the internal records were held by the police in this scenario, not by the customer, and that therefore does not solve the

problem that the class member itself who made a payment, without a contract or an itemised bill, will not know whether they paid for Airwave costs or not. That is not a workable class definition.

Turning then to the conflict, we see this in the PCR's own pleading, and you saw it in their Reply at paragraph 17(c), if the payment to the police or to the emergency service is a lump sum, and it has to be disaggregated, there will be a conflict. And that is not something that arises only at the distribution stage; it will happen from the beginning.

In the same Reply, if you have it open, if you go to page 131. Page 131, the red numbers, paragraph 35. Dealing with our conflict point, the PCR says there isn't one. And they say in the second sentence:

"*It is of course possible there may be some difference of view as to how best to allocate and distribute the aggregate award as individual class members*."

But being realistic, these are very substantial sums. Airports, large entertainment venues, sports stadiums: they all make large payments to the police. Now, where there are those payments, and the contracts under them make no mention of Airwave costs or how they're passed on to these businesses, what will happen? The businesses will want the largest share of the overcharge possible acting in the best interests of their shareholders. The Home Office is dedicated to ensuring the maximum recovery for the public purse, and one sees that right away from the airports example.

Stansted Airport pays for emergency services, pays for Airwave. They pass on some of those costs by way of landing charges, so the airlines are also covered by the class definition. The airlines are paying through their landing charges for those emergency services. Now, unless the allocation of Airwave costs is clearly specified as between the airline, the particular airline or the airport, there will be a dispute. An airline like

Ryanair, for example, will fight that point unless the allocation is express.

THE PRESIDENT: That would happen anyway on your basis, because you are saying that the order, the certification order, could require the PCR to pay damages to non-class members according to the distribution methodology. So that doesn't avoid the possibility of disputes about that. All an opt-out on a large class means is that those parties would be nominally at the table from the start, and that the Tribunal would, as you've fairly acknowledged, have more control, because it would then, on any event, be able to control the distribution, whether there was a settlement or not.

MR KENNELLY: From a practical perspective, madam, I can see how the dispute may happen now or be postponed. The difference is that the Tribunal can specify how, through Mr Bell's methodology, when you come to approve it the second time around, how best to minimise that dispute at the distribution stage.

But there's a prior question, which is whether the PCR can properly represent the direct and indirect purchasers, because of the conflict that arises. That's a threshold question. The Tribunal has looked at this, as has the Court of Appeal.

Before I turn to those authorities, the answer to my argument is not just the practical point that the President makes to me, but also a different argument, which the PCR has made, which is that we're not concerned with the pass-on at all. Because there's no markup, we're not in a pass on scenario. And to be honest, I don't understand that submission. There doesn't need to be a markup for the dispute to arise if the pass on is happening; as we see here in the airport scenario, that will create the same conflict when they're fighting over the finite pot.

Now, the PCR relies on the *Trucks* CPO, but the *Trucks* CPO judgment is dead against them. And may I take you to it? That's in the Authorities Bundle, tab 38, in the red numbers, page 2420.

And the problem in *Trucks* was that the PCR was seeking to represent both the

purchasers of new trucks and used trucks. And obviously the people who owned the new trucks were selling to the people who bought used trucks, and they would have to fight over the overcharge, which created an obvious conflict. That was pointed out at paragraph 56 by the Defendants, about half-way down that paragraph.

"*[The conflict arose] where new truck owners had suffered an overcharge when they purchased the truck which they sought to pass-on resale or buy back by charging the used truck purchaser more than would otherwise have been the case*."

And if you go over to page 2421, this went further than simply to the mechanics of the matter; it went to the funding, the conflict related to funding. Also, paragraph 62, the Defendants posited the scenario where, in relation to the used truck purchasers, the Tribunal reached the same conclusion as in *Royal Mail*, in which case they would recover nothing. In the event that the sub-class of used truck purchasers wanted to appeal, the PCR would need funding, but under the funding agreement, the funder had a complete discretion. It wouldn't be in the funder's interest to pursue an appeal because that would almost certainly reduce its overall recovery, since it was representing the different segment of the class.

And so, for that reason, because the interests of the direct and indirect purchasers were not exactly aligned, there had to be different funders to make sure that those decisions could be funded separately, if necessary.

THE PRESIDENT: Well that's it, the submissions, but do you want to take me to the decision?

MR KENNELLY: Then the Chancellor in the Court of Appeal, paragraph 88, page 2426, found that there was a conflict, but it could be resolved by having separate teams within the PCR, but also that a different funder would be needed. A different funder would be needed for one of the sub-classes, given that the conflict potentially extends to funding. And it was important that there was an independent

decision-making in the litigation in relation to settlement, because one can see how in settling there could be a conflict between direct and indirect purchasers in the allocation of the pot.

THE PRESIDENT: In this case, it's difficult to see how the conflict arises at any stage other than the question of distribution.

MR KENNELLY: It could arise as to whether someone's a class member or not because if the class member thinks that some Airwave costs are passed on to them, but the police say: "well, actually, even though we didn't specify it in that scenario, we didn't use Airwave or didn't need Airwave", and the stadium says: "that's ridiculous, you all had walkie talkies", that's a question that goes to the threshold stage of whether they're even class members. So the conflict arises at the very beginning of the process.

THE PRESIDENT: But at what point would the Tribunal ever be called upon to determine this? Is it that somebody tries to opt out and at that point they're told: "actually, you're not in the class at all, so you don't need to opt out", or what? I mean, how do you think this actually plays out in practice?

MR KENNELLY: It doesn't come before the Tribunal necessarily, but it plays out in practice in the internal decision-making and discussions in the PCR. The Court of Appeal was very clear in *Trucks* that even if the problem would only crystallise at the distribution stage, it had to be resolved at the beginning. The PCR in *Trucks* said that this is something that could be sorted out later in the proceedings, and the Court of Appeal said: "no, if you have a conflict, if you have divergent interests within the class, it needs to be resolved at the beginning".

THE PRESIDENT: But in this case, why would you need to resolve that question at any stage other than distribution? Obviously, if there is doubt as to whether somebody is in or outside the class, that doubt can be resolved, for example, by coming before

the Tribunal for a decision to be made. That can be dealt with, it seems to me, relatively straightforwardly.

But the question you're raising is a distribution one. So why would the PCR need to reach a firm decision on who is in and out right from the start?

MR KENNELLY: In *Trucks*, madam, it was also principally a distribution question. The question of conflicting *Trucks* claimants would also crystallise at the distribution stage. The Court of Appeal said: "No, where you have a conflict in principle, it needs to be resolved at the beginning, even if it's mainly a distribution question". One can imagine a scenario where, if the PCR is representing two classes of divergent interests, the divergence would be in the methodology, for example. If we're actually dealing with where the losses fell, a methodology that favours the indirects over the directs, or vice versa --

THE PRESIDENT: But there's no suggestion of that.

MR KENNELLY: It may develop in the course of the proceedings. The problem with conflicts, madam, is you can't anticipate in advance all the problems that arise, which is why --

THE PRESIDENT: But how could it possibly arise? How could there possibly be a different methodology for direct and indirect purchases?

MR KENNELLY: It wouldn't be a methodology for the overcharge; there could be analysis which affects their relative recovery when it comes to findings that the Tribunal may make that would affect the degree of different kind of recovery you'd make at the end.

THE PRESIDENT: Where's the evidence on this?

MR KENNELLY: Madam, there's no evidence on that point. It's simply that in *Trucks* --

THE PRESIDENT: Well, that's just a submission on your feet. I don't know what I can do with that without some suggestion of exactly how that works.

MR KENNELLY: The point in *Trucks*, in the Court of Appeal, was the same. There was a conflict which wouldn't crystallise until the distribution stage, but might crystallise at the settlement stage, but it had to be resolved at the beginning. There was a way of resolving it which allowed the proceedings to continue, but it had to be resolved.

Generally, when it comes to conflicts, the question is not: "what immediate problems are caused?" It's to resolve it so that those problems don't arise in the future; it is to anticipate them and to fix them.

But madam, I simply point you to the judgment that the Court of Appeal made on this very similar question, where they were invited to leave it to distribution, because that's when the problem would crystallise. And they said: "no, it needs to be fixed now".

THE PRESIDENT: Well, in a very different factual situation to the present case.

MR KENNELLY: Absolutely, the facts were different, but the divergent interest is there.

THE PRESIDENT: We need to look at what conflicts are likely to arise in the present case and at what stage.

MR KENNELLY: The only conflict I'm pointing you to, madam, is the fact that how the balance of harm falls between the direct and indirect purchasers is a matter which may be disputed between them, and I fully accept --

THE PRESIDENT: What do you mean by the balance of harm?

MR KENNELLY: As in the degree of pass-on between them.

THE PRESIDENT: All right, so that's a distribution point?

MR KENNELLY: Yes, madam, indeed.

THE PRESIDENT: Can you identify any point other than the question of exactly who gets what out of the damages award on which there may be any difference in the position of the direct or indirect purchasers?

MR KENNELLY: No, no, indeed. In our skeleton, in our pleadings, that's the conflict we've been identifying from the beginning. But I'll say it one more time, at the risk of annoying the Tribunal, that we think it is the very same conflict which the Court of Appeal saw in the *Trucks* CPO; despite the difference in facts, that was the problem which they spotted.

There's a reference to *Ad Tech v Google* in the PCR's skeleton, where a conflict was raised and not found to be a block on certification. The problem in that case, when our friends take you to it, if they do, is that we just don't know what the conflict is; what the conflict is said to be is not identified in the judgment. (Pause)

The outcome is the inability of class members to identify themselves in a workable way and/or the conflict. But even if we're wrong about the conflict, the first point is sufficient in itself to mean that the PCR's current approach on class definition should not continue.

Our solution -- although not perfect; I freely acknowledge that our solution, our skeleton, does give rise, not least to the risk that indirect purchasers may seek to challenge us later -- is a more practical, workable, and neat solution. It allows the case to proceed. It means that the direct purchasers' damages will not be trimmed down; they will receive such overcharge as can be, which should be paid to them by reference to the payments they made to us. The approach to that would simply be to take their direct payments and calculate, by reference, the overcharge, if any, that you find -- a very straightforward process for those direct purchasers who have sued us. You can, within your powers, make an order ensuring that such indirect purchasers who dealt with them be compensated as part of the distribution award. That's a perfectly workable, sensible approach. And the class members will know exactly who they are and will be able to proceed accordingly.

Those are my submissions on class definition. I was going to move on then to

opt-in/opt-out, if I may.

PROFESSOR NEUBERGER: Can I just ask, Mr Kennelly, the problem about identification, would that be resolved if the indirect purchasers were included, provided Airwave was in their invoice, or have I misunderstood your point?

MR KENNELLY: That would go some way to avoiding the problem. If the class was restricted to those indirect purchasers who had a specific invoice specifying the amount allocated to Airwave, then some of my submissions would fall away; it would make my job more difficult.

We can't assume that even if that were the class definition that it would work, because it would depend on how Airwave was referenced on the invoice, and one can only speculate as to whether it be in respect of a specific project or a long-term contract. It wouldn't be appropriate, in my submission, for me to anticipate that evidence without having seen any of it. If the Tribunal is minded to certify on that basis, we would have to have a separate hearing, I think, and the PCR would need the opportunity to put in evidence as to how that would work if the class definition were limited to those which itemised Airwave costs.

Moving on to opt-in/opt-out, on either class definition, the class members are really relatively few in number compared to the other CPO cases. With a very small number of exceptions, they are large, sophisticated organisations. The Home Office is the main class member, with 50 per cent of the claim value, and it appears to be committed to bringing and funding this action, if necessary, on an opt-in basis. It has not said otherwise.

We say an opt-in proceeding is practicable, efficient and effective. It will also provide for aggregated damages and so all the advantages of an aggregated damages approach, which Mr Bell has referred to, apply equally in opt-in. But crucially, it will facilitate disclosure from the class members on a number of matters, including

demand side value of the Airwave Service -- because this is an excessive pricing case after all -- which the PCR accepts will be necessary.

Really, we say, stepping back, if the opt-in approach -- if that category is to have any meaning in this system, it has to apply here. The test is set out in *Evans* and I will take you to that, if I may. It's in the Authorities Bundle, behind tab 38, in the red numbers page 2469. (Pause)

Paragraph 82. This is a nice way of seeing what the rule is in the Tribunal's Rules. Paragraph 82, in the indented passage:

"*In determining whether [the] proceedings should be opt-in or opt-out […], [you] may take into account all matters […], including the following […]*

"(b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings".

So practicability is the question. If you turn, please, to 2471, please, over the page, please look at paragraph 89 and the citation from the Court of Appeal:

"*[T]he principal object of the collective action regime is to facilitate access to justice [...]*".

We've heard that from Ms Howard, but the whole sentence is important:

"*[...] for those (in particular consumers) who would otherwise not be able to access legal redress*."

We are a million miles from that in this case.

Over the page, page 2472, paragraph 93, just below the halfway point:

"*The factors the [Tribunal] will take into account should bear upon such questions as which option is better able to vindicate the claim, which affords better access to justice and which enables the case to be best case managed from the point of view of judicial efficiency […]. By way of example it is said that in the main opt-out aggregate damages claims are likely to be easier to fund [...] and therefore likely to result in better run*

litigation."

Obviously, that consideration doesn't arise here. In that particular case, in *Evans*, now please go to page 2481, paragraph 120, we see the evidence that ultimately succeeded in keeping it as an opt-out case. There was evidence describing the unsuccessful efforts made to enlist potential class members to proceed on an opt-in basis. Indented passage:

"*[H]aving contacted 321 organisations, […]"* 14 only were asked to provide legal and strategic advice, and that made it -- penultimate line -- *"practically impossible to put in place funding"* because of the lack of interest.

And why was there lack of interest? Over the page, 2482 at C on the right-hand side:

A key concern expressed by the organisations contacted was they did not want to fight the banks for what would be potentially a modest amount of damage. They did not want to take steps that might cause conflict in those relationships.

At the bottom of that page, paragraph 121, there was witness evidence from a potential class member, over the page, describing how:

"*The financial services industry [was] heavily dependent on relationships ... [and that led to] inherent nervousness about suing banks […] disputes were normally resolved informally*."

Paragraph 122:

"*There [were] […] 18,000 financial class members [and] the great majority [were] modest in size measured by turnover; […]*". 16,000 had turnover of less than £0.5 million.

Stepping back and asking what analogies can be drawn with our case: the Home Office cannot be described as intimidated by the Defendants. The Home Office was the complainant before the CMA and has organised this claim. The departments of state and the large businesses in this class are not modest in size.

On the practicability considerations: in the case law, it's still useful to turn to the Tribunal's judgment in *Evans*. Although it was overturned ultimately on opt-in/opt-out, there is a useful description of what is practicable, which was not appealed, and that's in the --

THE PRESIDENT: So in this case, sorry, you said it was certified as --

MR KENNELLY: Opt-out.

THE PRESIDENT: Opt-out, sorry. I thought you said the opposite.

MR KENNELLY: I'm so sorry, I probably did. It was ultimately certified as opt-out for the reasons that you've seen in the evidence presented to the Tribunal and ultimately the Court of Appeal.

THE PRESIDENT: So it was opt-out despite the fact that the typical claim for most class members was around £16,000. In this case, what's being said is that for many class members, many of the smaller charities, the claim is likely to be much smaller than that.

MR KENNELLY: Yes. But that, madam, by itself, we say, is not enough to dislodge all of the factors pointing towards the practicability of an opt-in case before you today. The value of the claim, in our case, is actually a relatively minor consideration, because as you'll see, the number of very small entities with small claims is very small indeed; much smaller than you were given to understand in my learned friend's submissions.

In the *FX* case, it was striking that despite being a financial services case, the values of most of the claims were very small. The fact that the small financial entities were intimidated by the large banks was a powerful factor in that case, which is why it's referred to consistently throughout the judgments. None of that arises here.

The great departments of state are going to sue the Defendants come what may, and they are not going to be deterred. They provide a pre-packaged, ready-made case for

others to join.

The Tribunal's judgment in *Evans* is behind tab 14 in the Authorities Bundle, and in the red numbers it's page 813. (Pause)

It wasn't just the value of the claim, also, madam, in *Evans*, and the fact that they were intimidated. The size of the entities, even though they were financial services entities, 16 of the 18,000 had turnover of less than £0.5 million. That tells you how small they were in the financial services sector, relative to the banks. So --

THE PRESIDENT: Sorry, page?

MR KENNELLY: Page 813 of the Authorities Bundle. This is the Tribunal's judgment in *Evans* dealing with practicability at paragraph 123, and another reason why an opt-in case may be more practicable than opt-out is disclosure.

About halfway down paragraph 123:

"*More to the point, such class members* [who have opted in] *may also be able to contribute data, documents and materials that facilitate the pleading and making good of the claim: an applicant for opt-out [...] proceedings may not have such material available*."

That reference to the greater ease with which one can obtain data, disclosure and materials applies equally, and a fortiori, in our case, because even on Mr Bell's analysis, the PCMs will need to provide disclosure in evidence even, he says, on an opt-out basis. That would be easier to obtain and interrogate if this were an opt-in case. So --

THE PRESIDENT: But if, as you say, the majority of the class members here are going to be substantial organisations, what is going to be the problem with the Tribunal making orders for disclosure, or the Home Office and the PCR being able to obtain relevant information from the larger claimants within the group? If they're in, they don't opt out, and evidence is needed, the PCR will either get that evidence or potentially

won't be able to make good its claim, and they will know that. I'm not sure where this goes as between opt-in or opt-out.

MR KENNELLY: The need for the materials is undisputed and I'll come to materials that we require. It's not just materials that the Claimant needs to prove its case, it's also materials which the Defendants will need in order to make its defence.

True it is, in an opt-out case, one may have to make third-party disclosure orders; one may have to involve class members externally, but they will not be the PCR. That will add a layer of difficulty and controversy, which we can avoid if we're doing --

THE PRESIDENT: They're not a PCR in either case; the PCR is a PCR, whether it's opt-in or opt-out.

MR KENNELLY: Yes, but if the opt-in party is before you, it makes it much easier to get documents and disclosure from them.

THE PRESIDENT: But why are they not before us? I mean, in both cases, the representative claimant is the Class Representative, and the Home Office is the largest, so let's just use the Home Office as an example.

Why on earth would it be more difficult to make an order against the Home Office if it was opt-in, as opposed to opt-out? If the Home Office hasn't opted out, it is in the proceedings. So what difference does it make?

MR KENNELLY: If the Home Office has opted in, the Home Office has committed to prosecuting the proceedings.

THE PRESIDENT: Yes, as it has if it's not opted out. So at the end of the day, the biggest claimants will almost inevitably be there one way or the other, because it will be a no brainer for them to be there. There's no suggestion that anyone's going to bring separate proceedings or opt out, in terms of the bigger claimants.

So why does it make a jot of difference whether they are in on an opt-in basis or in because they have not opted out? Either way, it's collective proceedings. Either way,

you've got the PCR, and either way you can make an application for disclosure.

MR KENNELLY: The Tribunal and the Court of Appeal in those cases, *Evans* and in *Trucks*, took the view that if the party was opt-in, it would facilitate -- I can see, madam, immediately what --

THE PRESIDENT: Well, the Tribunal might have said it in those cases. We haven't gone to anything where the Tribunal explains how that would have been different. I'm asking you -- I can see it's 1.00. Why don't you come back and answer that question after the adjournment?

(1.00 pm)

(The long adjournment)

(1.59 pm)

MR KENNELLY: Madam, members of the Tribunal. We were discussing disclosure just before the break, and what's the difference between opt-in and opt-out when it comes to getting disclosure from class members. Part of the reason for our concern was actually the PCR's own approach to what it understood were the implications of opt-out proceedings. May I show you --

THE PRESIDENT: Sorry, I've just got an IT issue. (Pause)

All right, we're there. Sorry.

MR KENNELLY: Thank you. So could you go to the Reply, please? It's tab 4 of the A bundle, in the red numbers, page 170.

THE PRESIDENT: Okay, hang on. The PCR's Reply?

MR KENNELLY: Yes.

THE PRESIDENT: Page?

MR KENNELLY: Page 170 in the red numbers.

THE PRESIDENT: I've got it, yes.

MR KENNELLY: Paragraph 122.

THE PRESIDENT: Yes.

MR KENNELLY: The heading is:

"*Why do the Proposed Defendants want these proceedings to be on an opt-in basis*."

And they say at the end, just before the indented subparagraphs:

"*The PCR is significantly concerned that […] in reality, [we seek opt-in] for three key reasons:*

[…] that the Proposed Defendants' tactical approach to the proceedings [would] be to argue for disclosure and evidence to be provided on an individual basis by reference to the PCMs that have opted in. […] [We] may seek extensive […] disclosure or [RFIs] from individual PCMs. That will cause additional costs and delays at an early stage […], making [it] […] difficult […] for individual class members [...]Mr Bell has explained the advantages of an aggregate assessment of liability and quantum". [as read]

Now, we'll come back to Mr Bell. In fact, we say, with the benefit of him but also on our own evidence, that there's going to need to be significant disclosure from individual class members in any event. But plainly, the PCR took the view that it would be harder for us to get individual disclosure from class members in opt-out proceedings. Since disclosure of individual PCMs is so important in this case, that's another reason why we pushed for opt-in.

I entirely take the point put to me by the President that technically there shouldn't be a big difference, because the Tribunal can make its orders against class members either if they haven't opted out and if they've opted in. The highest I can put the point is that if a party has positively opted in, it's taken that important positive step, signalling a willingness to assist the Tribunal.

In an application against it for disclosure, one would expect a slightly stronger position, because they've evidenced a positive willingness to assist, and that would be a point in my favour if I was pressing them to give disclosure in the proceedings, but I can't

put it any higher than that.

THE PRESIDENT: Yes.

MR KENNELLY: There is also the point about the ease of availability of material for experts, not least in the assessment of damages stage. That was the point that the Court of Appeal approved in the *Trucks* claim. Just to give you the reference, I mentioned this before we broke: it's in the Authorities Bundle, tab 38, page 2411 in the red numbers.

It's citing the finding by the Tribunal in that case, paragraph 27, second sentence. The Court of Appeal is noting that:

"*[The Tribunal] considered that opt-in proceedings have the considerable advantage of giving the expert economists access to a very significant source of data from the claimants to inform and support their quantification of damages.*"

And that was a point in favour of practicability.

THE PRESIDENT: Okay, but that was on the facts of that case.

MR KENNELLY: Indeed.

THE PRESIDENT: In this case, why would there be such an advantage?

MR KENNELLY: Because the need for individual disclosure from PCMs, representing their different categories, is going to be particularly important, not least for the question of abuse -- I'll come to this when we look at Mr Bell's evidence. Just on the question of disclosure, this is an excessive pricing case, and a critical question in assessment of fairness in excessive pricing is the assessment of demand-side value. What value in economic terms were the particular PCMs getting from their use of Airwave?

That's a matter that's within their own understanding, their own business models and the alternatives available to them, depending on the particular categories they fall into.

THE PRESIDENT: Yes, but you're not going to need disclosure or evidence from all of the class members for that.

MR KENNELLY: No, but we will need it from the different categories and a sufficiently robust sample of them.

THE PRESIDENT: All right.

MR KENNELLY: It will need to be individually for that purpose.

THE PRESIDENT: I don't know why that's any different, on the same basis as for disclosure, for opt-in versus opt-out. One way or the other, they're either there or they're not there.

MR KENNELLY: Indeed, the point that I really want to overstate is the one that I made a moment ago, that if someone has opted in, they're positively signalling a willingness to help. It may smooth the path and it was something that obviously impressed the Tribunal in a different case. I'll move on, because that's as high as I can put that point. The final point on -- if it is as onerous as they say, that may be a reason for why parties should have the option of opting in before they take on this obligation to give extensive disclosure, rather than expecting them to opt out. It's very unlikely that in an opt-out scenario, they will know that extensive disclosure obligations lie ahead of them.

But I'll move on from disclosure, and I'll come back to it when we come to Mr Bell.

The final point on the law is the relevance of trade associations. The PCR in its skeleton refers to the *Hammond v Amazon* case. Could I just show you that? It's in tab 28 of the Authorities Bundle, in the red number it's page 2060. (Pause)

That's an authority relied on in the PCR's skeleton, and at page 2060, the Tribunal is dealing with practicability of opt-in proceedings. At paragraph 153, they find that opt-in proceedings are not practicable. In that *Amazon* case, I'm looking at subparagraph (1). I mean, I note in passing that the class size is 211,000 in the *Amazon* case, so it's really a very, very different case, factually, for the PCR to cite in their favour.

But I rely on this, the bottom of subparagraph (1):

"*[U]nlike the Road Haulage Association, [the Class Representative in Trucks], there is no trade association or representative body which has regular interaction with many of the class members.*" [as read]

I shall show the Tribunal that in this case there are large representative bodies that can provide that interaction if necessary, alongside Ashurst.

I also note, before we leave this authority, over the page, paragraph 155, in that *Amazon* case, the Defendants reserved their right to come back to the Tribunal in the event that the Supreme Court in the *O'Higgins* and *Evans* case changed the test for opt-in/opt-out. As the Tribunal notes, that's before the Supreme Court; we reserve our rights in the same way, to come back to revisit this question, depending on what comes out of the Supreme Court.

Turning then to the facts of this case and the PCR's own evidence, Mr Gale makes two main points: the first is that the class is diverse and not easily contactable; the second is that many of the smaller class members would prefer opt-out, because they think that would involve less work on their part.

Dealing with the first of those points, you've already seen that it's common ground that Motorola has listed 397 users of Airwave who purchased it directly, and you've seen that list. Those are obviously easily contactable. Mr Gale's focus, however, was on the additional potential class members who had contributed toward the cost of Airwave, and he gives examples in his evidence. And I'd ask you to go back to that in the B bundle, tab 9, page 775. (Pause)

That's at the beginning of his statement, and please go to page 783. You've seen this before; I'll take it quickly. He's referring to the indirect purchasers, and in terms of contactability and the diversity of the class, I draw your attention to something you've already seen, which is that these are all large businesses, or large concerts, and that's not surprising, because those are the kinds of concerts that need that extra policing,

for which the police or emergency services can charge, airports, major sports stadiums and so forth. And even in this context, Mr Gale acknowledges that -- and we've seen this already -- not all of the police forces charge for the services they provide to those kinds of venues. We've seen that in paragraph 3.20, and there's a footnote on page 788, red number 788, footnote 5. He says:

"*Our discussions with four other police forces […] to date indicated that they [do] not have similar arrangements in place.*" [As read]

And those arrangements, if you look up in subparagraph (a), those arrangements are the arrangements where -- like those of the Metropolitan Police and Greater Manchester Police -- they charge for Special Policing Services provided to large venues and businesses.

Next, Mr Gale addresses the practicability of opt-in directly, and I'd ask you to turn to page 791. And here he's dealing with the administrative burden, but his own evidence belies that, because he is speaking here to the representative bodies of the class members. And it's clear, even from his discussions, that they could be useful in informing their members, in co-operation with him and Ashurst, of what was required to join, to opt in to the class. And here I'm speaking about opt-in on a wide basis, assuming I'm wrong on the class definition.

He speaks to the National Police Chiefs' Council and the Association of Police and Crime Commissioners. Paragraph 4.5, and then 4.7 over the page, he notes that the NPCC and the APCC can give recommendations to police forces as to whether to opt in or out. (Pause)

He says after that, over the page, that -- and this is the submission they make -- legal input might be necessary as to whether to opt in. But from the Defendants' perspective, we struggle to see why that is the case. The complexity and difficulty of opting-in has been completely overstated by the PCR. Where the claim is happening

anyway, brought by the Home Office and the other great departments of state, who constitute more than 75 per cent of the value of the claim, and there's no adverse cost risk, and the Home Office is funding the prepackaged claim, it's a straightforward question. With budgets constrained, if you want to opt in to get some money, opt in, and – as the President asked my learned friend -- what evidence is there for the complexity of the decision that needs to be taken to opt in? Why is detailed legal input said to be necessary, especially for the smaller potential class members? And my learned friend Ms Howard eventually acknowledged that there just isn't evidence.

My learned friend could speak without evidence to the mindset of public authorities, even very large public authorities, but that's not the test. The fact that even large public authorities may allow this question to go to the bottom of the pile isn't good enough. That is not the test for practicability, and where they are large bodies with existing legal departments, it's very difficult to see why there could be any problem at all, and for the smaller bodies -- and there are a few of those -- it's a straightforward question.

And moving on with the rest of these categories, page 793 -- yes, I've given you that reference to slip to the bottom of the pile already -- then 794 speaks to the Blue Light Commercial (BLC), it's paragraph 4.11, and that is the national commercial body for policing, the perfect example of a representative body that could assist in informing members as to why to opt in.

Before I move on from 794, you'll see at the top of that page, there's a reference to police forces being constrained budgetarily and needing additional money. Well, that's a reason to opt in. If it's a prepackaged claim, and there's a possibility of some money, that's a reason why they should be eager to opt in, and why they would in reality opt in, if that's what the Tribunal ordered.

Over the page, page 795, we have the National Fire Chiefs Council, another

membership association, the professional voice of the fire and rescue services in the UK. That's a co-ordinating body, in our submission; paragraph 4.13.

And 4.14(a), there are 50 fire and rescue services across the UK. I'm pausing there -- we're a long way from *Merricks*. If that's 50 fire and rescue services represented by the NFCC, and Mr Gale fairly acknowledges, at the bottom of that page, that some of the larger ones will have robust financial and legal support which may assist with considering whether to opt in, but he says the smaller ones will have more limited resources. You have my submission as to why even a small fire service, properly advised or guided by the NFCC and Ashurst, can decide whether to opt in or not.

And Mr Gale again fairly acknowledges that, on subparagraph (d) on page 796:

"*[...] some fire and rescue authorities may well opt-in to the proceedings [...]*".

So he accepts that some of them would opt in, but they have a strong preference for the opt-out model, because they think it will relieve the administrative burden, but what they were told about the administrative burden, we don't know. And if they were told that in opt-out, for example, there would be no need for disclosure, but an opt-in would be very onerous, that's just not correct. We don't know what they were told about the burden they would face.

Moving on to page 796, there's a reference to the local authorities, and they acknowledge that even a small local authority like Breckland Council has legal functions. Now, local authorities, even the smaller ones with legal functions, litigate all the time. They're involved in environmental cases, in planning cases; the idea that they are unable to opt in to a relatively straightforward process, from our perspective, is hard to believe, and local authorities have demonstrated themselves willing in more difficult circumstances to involve themselves in competition litigation. The *Trucks* case, that my learned friend Ms Howard referred to, is a perfect example.

In the *Trucks* case, local authorities have signed up, opted in -- although it's not

a collective proceeding -- en masse. There are 138 local authorities in the *Trucks* litigation, providing fire and rescue services across the UK. There's demonstrable evidence that local authorities are willing to join in large-scale class litigation when they feel it's in their interests.

Finally, we have the Loch Lomond Rescue Boat, on page 798. This is one of the very, very few smaller entities that Mr Gale has found, but even it has a claim value of about £6,000 -- sorry, a volume of commerce of about £6,000, paragraph 4.19. Their annual charges are about £2,000 annually. And they're a direct counterparty, so identifiability is definitely not a problem for them.

And over the page at 799, we have the RSPCA. The RSPCA, as Mr Gale says, does have an in-house legal function and, as we will see in the User Report, a very substantial claim of its own, well able to opt in if it decides it's in its interest to do so.

Moving on, then, to the User Survey. Can I ask the Tribunal, please, to turn to Bundle D. (Pause)

And I'd like to point out something quite basic about the survey first of all, because my learned friend Ms Howard made much of the low response rate of certain categories of potential class members to the survey, but you need to see just how much time these recipients were given to respond to it.

Could you turn, please, to page -- in the red numbering -- 1129? (Pause)

Before I come to my point about the dates, paragraph 10 is the reference to the funding being provided by the Home Office.

But at the bottom of page 1129, we see the date of the survey: it's 8 December 2023. I just don't believe this is confidential, these particular numbers I'm about to give.

And then over the page, 1130, we see the deadline for responding to the survey, very top of page 1130, and one sees that, at the first part of the survey, the addressees are given one week to respond.

And we turn over the page to page 1131. The second part of the survey, if you look about two thirds of the way down, the addressees are asked to respond to Section 2 by 22 December, 2023. So they're given two weeks to respond to the second part, and the deadline -- I mean, it's hard to imagine a worse deadline for anything. In those circumstances, the fact that they got 154 responses out of 430 recipients is pretty impressive.

THE PRESIDENT: Yes. Where did you get to on confidentiality?

MR KENNELLY: Well, we are waiting, and I'd be interested to hear. Of course, it's not for us to say.

THE PRESIDENT: No, but honestly, you said -- and I totally agree -- I can't see that there's anything confidential in a date. So what's the position?

MR THOMPSON: As I understand it, there's no problem in relation to the materials in the skeleton argument. I don't know whether there's been any wider authorisation.

THE PRESIDENT: All right, well, that will need to be sorted out for future hearings, at which any of this material is relevant. All right, thank you.

MR KENNELLY: Before we move on from that, I didn't take this point earlier on, just in case the Tribunal is concerned: the question of whether things are designated as confidential or non-confidential is a matter for the PCR and not for the Home Office, and the PCR has acknowledged that. If you could pull up this document please, it's in the C bundle, so it's the Correspondence Bundle, page 104. Because originally the Home Office declined to disclose that User Report and Survey at all, initially the Home Office didn't want us to have it, even for the purpose of this case, where it was being relied on by the PCR.

Then they said it should be in the Inner Ring -- the Home Office said that. But finally, it accepted, quite rightly, that it was a matter of the PCR to decide how it should be designated, and that's what Ashurst has acknowledged in the letter that you see at

Bundle C, page 104.

I will still take care in the citations I give going through this document. So, coming back to that document, I'd ask you now please to go to the User Report itself, which begins, as you know, at 1134. And could you go, please, to page 1138, because we're concerned again with Mr Gale's first point about identifiability. And again, very unusually, in this case, the users of Airwave are subject to a licensing process, and they are on specific lists. My learned friends pointed this out to you this morning. It's easy to identify the users, because they need a licence. They're on this "AAS List", and by users, I mean those who are entitled to use Airwave; it doesn't necessarily mean they actually do use it. That's a different question.

Moving on to page 1139, paragraph 16. You see the organisations who use Airwave on that list. Again, one sees from the list and from the nature of the licensing process just how easy it would be to identify these in an opt-in process. They are eminently identifiable. There is no practical reason why they could not be notified and brought into an opt-in claim.

At 16.7, my learned friends refer, and Mr Parr referred, to a wide range of smaller charities and entities, but those on the list include one utility, and you see the number of search and rescue, you see the number of charities, and then obviously much larger entities that follow that.

Moving on, please, to paragraph 23, over the page, page 1140, just to absolutely bury this point about the class including a huge number of small entities, charities and so forth, at paragraph 23 -- I'm not going to read this out loud because it is, as things currently stand, confidential -- but the Tribunal can read that to yourselves as it goes to the extent to which these small charities actually pay for Airwave. This is the Home Office's document relied on by the PCR in support of her application. (Pause)

THE PRESIDENT: I want to ask a question about that. I'm not sure I can do that

easily if it's confidential.

MR KENNELLY: For my part, I cannot see why this is confidential at all. It's quite different from the -- if I may say so -- the Motorola List, where some of the entities that have Airwave may not want anyone to know they have Airwave. But here I just cannot see why this relatively bland and unsurprising statement is confidential. But I'm happy for my friends -- having said that, I don't want to lose a minute of my time.

THE PRESIDENT: No. I mean, this is very unsatisfactory. I'm going to ask in general terms. So, what is said is that some organisations don't pay. Does that mean that they wouldn't be within the class in any event?

MR KENNELLY: Yes.

THE PRESIDENT: Yes.

MR KENNELLY: So the idea that there's this long tail of tiny bodies. Taking you to Mr Parr's evidence, and you will have noticed when you saw it how unspecific he was, he referred to a large tail of tiny bodies. Well, here is the actual specifics. And this is what tells you how many of them there are. And that's confirmed if you go -- now we're looking at the User Survey results in the breakdown. As you leaf through this, you see the size and contactability of the entities covered by the class. As you go through it, you'll see the very large sums which are in issue. These are not small claims at all. You see that at page 1150, the Welsh Ambulance Services and so forth. And it's common across the other organisations who have paid for Airwave directly and indirectly.

If you go, please, to page 1160, where the report deals with the land, maritime, and rescue teams. These are the small rescue charities in small towns.

THE PRESIDENT: Sorry, is this supposed to be confidential?

MR KENNELLY: Well, I don't think the heading can be confidential.

THE PRESIDENT: Right.

MR KENNELLY: I'm not going to read the details. Paragraph 104, that tells you how many of these search and rescue organisations are allowed to use Airwave, and you see the number, and then you see the number of them that replied. So we're dealing with a very, very different picture from that that was painted for you by Mr Parr.

Over the page, when we come to the larger bodies, like the Maritime and Coastguard Agency, well, there's no question that that's a small body which is hard to contact. That's a major public body. Then there's a search and rescue service at the bottom of the page that isn't a user. And then, over the page, we have the Loch Lomond Rescue Boat. It's not confidential because it's referred to in the non-confidential evidence.

Then we have the local authorities that follow that, no question of the local authorities being hard to contact. And then we come to miscellaneous sharers on page 1165. Again, no problem contacting these miscellaneous sharers. They are very, very substantial bodies. Then we come to the RSPCA at the very end of the list, and we see the size of the RSPCA's spend on Airwave for one year in subparagraph 125.2.1. So the RSPCA is actually a heavy user of Airwave, and again, easy to contact and has a perfectly viable claim if they want to opt in. And that is it.

So the class members are, even if I'm wrong about class definition, entirely identifiable and, save for a tiny number of small entities, major public bodies, large businesses with large claims; and for the smaller ones, trade associations can help co-ordinate and recommend action. That's all on the PCR's own evidence.

Ms Howard mentioned the difficulty in herding large numbers of parties in cases like *Trucks* and *Interchange*, but there are 11,000 claimants in the *Trucks* litigation who have opted in, in a manner of speaking, and in *Interchange*, there are 3,000 merchants, either over the past or currently in a direct action. So they're quite different cases from the one that we're looking at. The difference between *Trucks* and

Interchange is that Mr Gale has actually done the work here. His evidence and his efforts and the User Report give us a very clear picture of the identity of the class members, the ease with which they can be contacted, and the viability of the individual claims. And critically, there's no problem with funding. The largest class member is going to provide that. And you see that in Mr Waddell's evidence.

Could I ask you to go to that, D, tab 3, page 137 in the red numbers. He is speaking to the relative value of commerce for Airwave users. Paragraph 66(a): "*The Home Office […] is responsible for approximately 57% of total fees*". Over the page: "*The Department of Health […] 11% of total fees*", and "*The Ministry of Housing, Communities and Local Government […] 7%*.

So the top three customers account for 75% of the value of commerce. So this case is going to go ahead come what may, and it's funded. That's the identifiability point.

Mr Gale's second point is practicability in relation to the work that class members would have to do if they opted in, as opposed to what they would avoid doing in an opt-out case. And here we've seen what the PCR says about disclosure; they seem to think that there'll be no disclosure obligation on individual class members in opt-out, but they might have to give some in opt-in. We've had that discussion with the Tribunal already.

If it's true that they're more likely to give disclosure in an opt-in case, that's a point in my favour for opt-in. And if it makes no difference, this point is neutral. But disclosure will be required. Mr Bell's evidence, contrary to what you saw in the Reply -- Mr Bell's evidence is in D, tab 6, page 993 -- here, Mr Bell, as he's obliged to do, he's expressed a preliminary view on dominance. And he's setting out here the data and information that he was going to need as the expert economist with PCR in making good his case on market definition and market power.

I'd ask the Tribunal to look at Table 3.1 on page 993. Do you have that? So I'm looking

at numbers 2 and 3, and then 4 over the page. So 2, he says he's going to need:

"*Documents explaining the communications requirements of emergency services and public safety organisations, the extent to which these differ from those of other telecommunications users, and whether commercial telecoms services could be used by emergency services and public safety organisations.*"

That's going to require PCM-specific disclosure and data. Similarly, number 3:

"*Documents explaining the technical and functional requirements".*

The extent to which commercial telecom services can be a substitute will vary depending on the different category of Airwave users that you saw in the earlier documents. Over the page, number 4:

"*Information on which Airwave Services PCMs use/purchase, and the extent to which they considered that there were credible alternatives.*"

That is directly addressed to the individual PCMs, and one can imagine in some scenarios, an ordinary mobile telephone contract might be a substitution. In other scenarios, it's absolutely not a substitute because of the need for secrecy in a highly robust emergency service. That's a PCM and category-specific request.

Then, in the same document, go please to page 1065, where he deals with the evidence that he'll need. We've looked at data and disclosure. Now, Mr Bell speaks to his likely requirements for witness evidence. At number 2 in Table A2.1, Mr Bell says that he will need:

"*Additional evidence explaining the communications requirements of emergency services and public safety organisations, and the extent to which these differ from those of other telecoms users*."

THE PRESIDENT: But not from everyone.

MR KENNELLY: No, no, as I said all along, madam, I'm not suggesting that disclosure needs to be given by each and every PCM, but there will need to be disclosure given

by the different categories and sufficiently robust samples from each category for this to be a meaningful exercise. According to Mr Bell himself this has to begin with PCM-specific disclosure.

Over the page, at 1066, he refers to evidence speaking to the points that we discussed earlier on, that I showed you earlier on, about market definition and market power; the extent to which the class members thought there were substitutes, the extent to which substitutability was easy, and so forth.

Now, what this doesn't address is the need for disclosure on demand-side value. In an excessive-pricing case, this Tribunal will have to interrogate the extent to which the different categories of class members obtained value from the services which might be sufficient to justify the charge. Demand-side value is a critical part of the fairness test, the second limb of *United Brands*. We point this out in our response to the CPO Application. Mr Bell responded, and we see that in his second report, B, tab 14, page 906.

He's responding to Mr Colley. Mr Colley gave evidence in the Proposed Defendants' Response, and Mr Bell is here responding to Mr Colley. We were concerned about the fact that he didn't seem to take account of economic value. Mr Bell says: "no, I recognise that he will need to address distinctive value through an 'absolute' assessment of economic value and the claim period."

On page 907, top of the page, he says:

"*I consider that the points highlighted by Mr Colley, which include an international comparison of Airwave's capabilities and quality metrics as well as customer surveys, and security of supply, could be part of this assessment to the extent relevant.*"

He says the customer surveys may be relevant. They're unlikely in themselves to provide a measure of economic value. The relevance depends on factors such as the customers surveyed and whether they have adequate knowledge of their useful

comparators.

To address that: whether the sufficient or appropriate customers are surveyed and their level of knowledge, that's going to require a relatively comprehensive survey. And again, in *Le Patourel*, it was wrong to dismiss satisfaction levels as simply being irrelevant to an assessment of economic value. But the weight to be placed on them will be fact dependent, highly fact dependent.

So there will need to be a customer survey dealing with that question: value, knowledge and satisfaction. That will be addressed to a large number of the individual PCMs, and they will need to back up their responses with disclosure and possibly evidence.

THE PRESIDENT: And you say there would need to be a customer survey?

MR KENNELLY: We'll be pressing for it. If the case proceeds, madam, we would be pressing for it.

THE PRESIDENT: All right. But he's not saying that he'll definitely do that. He's just saying that could be part of the assessment to the extent relevant?

MR KENNELLY: Yes. He doesn't need to be more specific for the purpose of this stage.

THE PRESIDENT: No.

MR KENNELLY: The fact that he's acknowledging it, he's not shooting it down. And one can see right away, one is assessing the value of the Airwave Service from the perspective of the user, which is the question in economic value for the second limb of *United Brands*. That could well require, that's very likely to require, something like a survey, some way of engaging with the individual class members themselves, and in a sufficiently robust sample.

And where we have, even on the widest case, a couple of thousand class members, easily identifiable class members, it would be hard to resist a fairly extensive survey.

There'd be no proportionality problem with it, not least when the vast majority of the class members, even on the wide basis, are well able to answer a survey. They did pretty well when they were just given a week, and they'd have more time to answer a proper survey if this case proceeds. That is, we say, an advantage of opt-in proceedings. And you have my submissions about that.

So what does the PCR say in response to all of this? Could I ask you to take up their skeleton? (Pause)

Paragraph 33. Well, they begin -- and this is tracking the headline points that Ms Howard mentioned to you this morning -- access to justice. They say that Mr Parr highlighted:

"*Barriers to participation for small and public sector PCMs to participate*".

Well, you've seen the number of genuinely small class members in this case, and even the ones with smaller claims are substantial bodies in their own right. It says:

"*Factors of this kind were specifically taken into account by the Tribunal in Rodger v Google*".

The passage here is paragraph 91. Could I ask you to turn up *Rodger v Google* briefly, please? It's in the Authorities Bundle, tab 29, page 2094. (Pause)

2094 is where we see the paragraph cited by the PCR, but to put it in context, we need to see the preceding paragraph, paragraph 90. The PCR sought a CPO on an opt-out basis, but Google, the defendant, didn't suggest otherwise. So Google didn't argue in that case that opt-in was preferable; it made no submissions at all.

Then if we look at the paragraph that the PCR actually cited, paragraph 91, we see the factors that motivated it there. If you see those over the page 2095:

"*The Proposed Class is likely to contain [over 2,000] app developers, most of whom will be seeking to recover relatively small amounts.*"

So most will be seeking relatively small amounts, not the case in these proceedings.

"*Many of the proposed [...] members are likely to be small businesses [...] unlikely to have the resources to take [...] positive steps*."

Again, not our case.

"*In addition, their ongoing relationship with Google may make them reluctant to do so."*

Again, no evidence suggests that the Home Office or the Department of Health or any of the potential class members will be afraid of Airwave such that they won't opt-in.

Back to the PCR's skeleton, we're now on page 15 and paragraph 34. On *"Budgetary and resource constraints*", you have my submissions about the minimal time and money that would have to be spent on deciding whether to opt in or not, especially if Ashurst and the representative associations co-ordinated to notify their members. Similarly for "*Resource and Contactability*", there's no problem with resources, and Mr Gale has shown us how the class members can be contacted.

Then, "*Risk aversion*":

"*Risk aversion to participating in complex litigation even where they have valid claims*".

If the risk aversion is because of disclosure, you have my submission that opt-out proceedings will still require disclosure, so that can't be a valid reason to want to avoid opting in. But as for the cases that are cited over the page, *Lloyd v Google*, citing *Ross v Southern Response* -- this is the top of page 16 -- these were, as the Tribunal knows, consumer claims. They were individually very small and they didn't benefit from aggregate damages because they weren't collective proceedings at all.

Even the Loch Lomond Boat entity has a claim, the volume of commerce at least worth thousands of pounds, and it must be one of the smallest, since it's referred to repeatedly by the PCR.

Then we have "*Information asymmetry*":

"*[l]imited awareness of legal rights* and *[…] limited [...] understanding of competition law and litigation procedure even for those PCMs that have their own dedicated legal*

resource".

That makes no sense. The vast majority of the claim is brought by massive government departments that know exactly what they're doing and are expertly advised. For the local authorities, there are already lawyers in place; they don't need a detailed understanding of abuse of dominance to know when there might be money on the table in a prepackaged claim. They litigate all the time and they're well able to opt in if they choose to do so.

The difference between the costs involved between opt-in and opt-out is overstated, as I said.

Then we have paragraph 35, a slightly unreal reference to a "'*David and Goliath' situation*"; the suggestion that the small and public sector PCMs face a David and Goliath situation. But they're not suing Airwave alone; this is not a case where they are on their own. The case is going to go ahead, they'll be joining in behind the very large entities who are going to sue us in any event, and even the smaller local authorities can hardly be described as David in that scenario.

THE PRESIDENT: So what's in this for you for plugging for opt-in rather than opt-out? I mean, if actually the vast majority is all well-resourced bodies who can then be expected to opt-in, none of these realistically are going to go off and pursue a claim on their own. So as I said at the start, it's a no brainer for them to opt in if they've got the resources to do so.

On your case, or on any basis, the only people who might not be in the room if it's opt-out are those who don't have the resources. You say there's only a few of them, because nearly everyone does have the resources to make that decision. So, what you're excluding is precisely the small claimants who the collective proceedings regime is designed to protect.

MR KENNELLY: So, madam, first of all, if opting in has any role at all, there has to be

some case that justifies opt-in proceedings. So Parliament must have had somebody in mind for opt-in proceedings, and we say when the practicability concerns are addressed, this is the case. Now, what's in it for us?

We have a right to say that if you are going to sue us, and opt-in is practicable, you should at least be expected to make the small, positive effort to actually opt in. It's very likely, because the Home Office is going to proceed against us anyway, that the smaller entities will opt in.

THE PRESIDENT: Yes, but the point is: what you exclude then are the entities for whom opt-in isn't practicable.

MR KENNELLY: No. For the entities, it's practical for everybody. The Home Office is going to sue us anyway, and the smaller entities like the Loch Lomond Boat Rescue, they can get a message from their representative body, from Ashurst saying: "this case is going ahead, we think it's worth X, there may be some surveys to answer, but if you have a claim worth £5,000 or £6,000, please go ahead".

That's a very straightforward decision and there's no cost risk. The thing is funded by the Home Office already. I suppose it's possible -- it's unlikely, but possible -- that some of the larger entities might consider the underlying merits of the case and think: do we really want to join this action? Because we will be expected to give disclosure and engage in a proper (Overspeaking).

THE PRESIDENT: There's no reason why consideration of the merits and the risk of disclosure is not going to have to be the case for entities whose exposure is a few thousands pounds, and who might be a public body or a charity, and would simply not have the in-house capability of making that decision.

If you're a small charity, Loch Lomond Rescue, and you don't have an in-house capability, then it seems to me that you probably would want to go and take some legal advice before deciding whether to participate, because you just want to satisfy yourself

that you're not going to be exposed to the risk of having to spend lots of time and money doing disclosure or file witness statements or whatever. So when we're talking about practicability, we know that the big entities are going to be around the table in any event, so actually what we're talking about is the smaller entities. So for those, you do have a practicality issue.

MR KENNELLY: I think there are two different points. First of all, it's possible some of the larger entities will not opt in, because they will have to fight the case almost like a proper defendant. So we'll put them to one side - it's- possible.

THE PRESIDENT: It's possible, why?

MR KENNELLY: Well, because they might themselves consider that the underlying merits of the case don't justify their involvement, which could be significant. We're dealing with questions at the margin, madam. The difference in opt-in and opt-out in many ways is often very fine, but there has to be a difference because there are different routes in collective proceedings.

So really then we're left with the tiny number of small bodies that don't have an independent legal function. The tail shouldn't wag the dog here.

THE PRESIDENT: There's a tiny number of small bodies, you say. So again, why are you pushing this? Why are you spending your time and money trying to persuade the Tribunal to boot out what you say is a tiny number of entities of the likes of Loch Lomond.

MR KENNELLY: Madam, we are not trying to boot out any tiny entity. Our submission is that tiny entities are very likely to come in behind the Home Office, because they are unlikely to have to do very much, except --

THE PRESIDENT: So then what's in it for you if you don't --

MR KENNELLY: As I've said twice, and you may not think it's credible, but what's in it for us is the possibility, albeit a small one, that some of the larger entities might

actually engage with the merits of the case and decide not to opt in. The Home Office is going ahead, come what may, but it's possible that some other large entities will not opt in. That's the first point.

The second point is: if it's an opt-in case, as the Tribunal and the Court of Appeal has held consistently, there is potentially a difference in terms of the involvement of the parties in disclosure and the orderly resolution of the proceedings. Now --

THE PRESIDENT: Okay, so just let me get this clear. What's in it for you is your position that it's possible that some larger entities will not opt in, and also your submission that you've made earlier and I've noted, but I'm not sure really it goes that far, about the ease of disclosure if somebody is opt-in rather than opt-out.

MR KENNELLY: And my final point is settlement. With opt-in, it may be easier to settle the case because we can settle it as one would a commercial settlement, rather than have the very detailed process that is required for a settlement of an opt-out case before the Tribunal. We've seen examples of that in other cases.

Of course, there's a process for it, but it's a more cumbersome process than one would have in settling an opt-in case.

THE PRESIDENT: Well, I wonder, because actually, if you're opt-out, you're essentially negotiating with one entity, which is the PCR. Then you come to the Tribunal for approval.

If you're opt-in, you've got many more prospective entities that you're negotiating with. It's not clear to us, on the submissions before us that -- although obviously the settlement mechanisms are different -- that one is likely to be easier than the other.

MR KENNELLY: Because we can do it as one would an ordinary commercial settlement. We think there is a difference; it is easier to settle it if it's opt-in. Whether it's opt-in or opt-out ultimately, the settlement will be driven by, very likely, the very large class members. That's the reality.

The Tribunal, as I've said before, can make specific provision for how indirect purchasers are to be compensated in any order that you make, whether you go with my class definition or not. But there is a difference in favour of settling in the opt-in process that makes it easier and less formal. Madam, the differences you may regard as relatively small, but if there are differences, and opt-in is practicable, we say you should order opt-in. And --

THE PRESIDENT: So the difference is that you don't have to get Tribunal approval on the one hand.

MR KENNELLY: Yes.

THE PRESIDENT: But on the other side of the ledger, you've got the fact that you would be negotiating with the entities individually rather than necessarily having a collective, or potentially you would have an individual negotiation, as opposed --

MR KENNELLY: Yes.

THE PRESIDENT: Now, is that also the case for opt-out?

MR KENNELLY: I'm so sorry?

THE PRESIDENT: Am I right to say that you are more likely to be having an individual negotiation if it's opt-in than if it's opt-out?

MR KENNELLY: No, we'll still be negotiating with the PCR, whether it's opt-in or opt-out. It's just about the process that surrounds the settlement negotiation. If we don't need formal approval from you and we don't need the hearing -- the steps that are required to settle -- the Tribunal in opt-out proceedings do require often independent legal advice, independent economic advice. There is a process, and it's in public. There are practical advantages to settling these cases on an opt-in basis; it's just a fact, and that's why my clients are spending their money on me to ask for it to be opt-in. We're not here for the fun.

THE PRESIDENT: Well, yes, I'm just trying to work out what they're spending their

money for. I hope that's not pejorative, Mr Kennelly.

MR KENNELLY: They're spending some money, and they're not wasting their money, so the fact that they're asking if it could be opt-in tells you something about how we think this case is going to go.

THE PRESIDENT: Yes, well, that's what I'm trying to work out.

MR KENNELLY: What I'm trying to tell you is that there's a possible advantage. Maybe it's tiny, but even if it's a tiny advantage that somebody might not opt in, the bigger entities especially, that's an advantage.

Secondly, disclosure; you have my submission. It may not be a great one, but it's a difference, we say, and on settlement, there's obviously a practical advantage.

THE PRESIDENT: Yes.

MR KENNELLY: And those are good enough, and in circumstances where there is absolutely no practicability problem with this going ahead as opt-in, we say it should be ordered as such.

The idea that a handful of small entities will be confused and will decide not to opt into something, if they get a letter from their representative association, backed by Ashurst, to say, "There's no downside for you, except possibly answering a customer survey or giving some disclosure, possibly a short statement, which would be helped by the association and by the solicitors, and thousands of pounds or tens or hundreds of thousands of pounds in it for you", that is opt-in. That's what Parliament had in mind for opt-in proceedings.

We've been doing these cases for many years, and it's hard to think of any case better suited.

THE PRESIDENT: You've made the point.

MR KENNELLY: Sorry, am I over time?

THE PRESIDENT: Yes, you're over your time.

MR KENNELLY: I want to deal with one point though before I go, because it's just mentioned in passing.

THE PRESIDENT: I was quite strict on the PCR.

MR KENNELLY: You were.

THE PRESIDENT: Can I give you a minute?

MR KENNELLY: One minute.

There's a suggestion in the skeleton that people may be afraid to sue Motorola because of a concern. It's called "dependency", and my client asked me to strongly deprecate that suggestion. The idea that anyone would be afraid that we would do a less good job and not act according to our contracts if somebody sued us is a terrible thing to suggest. It was not suggested in the evidence or the pleadings at all. And so, to the extent that it's advanced before you today in the skeleton, we think it is, we strongly reject it.

THE PRESIDENT: All right. Thank you very much.

All right, there's one point that you haven't answered, which is whether you -- following instructions -- are content to waive the pass-on point in both an opt-in and opt-out scenario, because as I put to you before, if -- if you don't waive the pass-on point, whether it's opt-in or opt-out, I can see that there will be then a submission that we have to bring everyone in.

MR KENNELLY: I understand the submission, but we do not offer an undertaking. So we do not waive the pass-on point if the Tribunal orders an opt-out case.

THE PRESIDENT: All right, thank you.

Reply submissions by MR THOMPSON

MR THOMPSON: I am deputed to reply purely on the law, and I'm going to do it very briefly, if I may.

First of all, in relation to *CICC*, I think I perhaps interrupted Mr Kennelly, but I do insist on the statement of the law at paragraph 62 of the first judgment, and in particular 62(1), which draws a clear distinction between 79(1)(a) and 79(2)(e).

THE PRESIDENT: I flagged that in my notes.

MR THOMPSON: On the facts, Mr Kennelly took you to the first *CICC* judgment, but I suspect the President is aware that there was a second one, and on that one, the class definition was approved on the facts. And that's at tab 24 of Bundle E, but I won't say any more about it, because obviously this is a fact sensitive issue.

In the Defendants' skeleton, they referred to Ms Spottiswoode's previous case of *Nexans*, where an amendment was made to the class definition. I'll say no more about it, but that that was a consumer claim, and we would say that the factual reasons for that were very different here, and you have our submissions about the evidence that's available in this case in terms of invoicing et cetera, which we would say was different from an allocation of costs between members of a household, for example.

Turning to *Trucks*, various submissions were made by Mr Kennelly in relation to conflicts, and I'd essentially refer the Tribunal to paragraphs 36 to 41 of our Reply, where we deal with this matter in some detail, and there are essentially two points.

In *Trucks*, as I think the President is probably aware, there was a direct conflict on the pleadings and the expert evidence between the position of new and used *Trucks*. So it was by no means simply a matter of distribution, it was actually a substantive legal conflict, and the Court of Appeal nonetheless did reject the appeal and allowed the case to go forward with a single class representative, but in that case they required separate experts and separate legal representation, and it was then remitted to the CAT. So it's a very different case from this one, where I don't think it's suggested that we need to have separate experts or separate legal representation; it's really a quite different case. And I'll also say that at paragraphs 40 to 41 of the Reply, we refer to

the Canadian case of *Infineon*, and make the point that in that case, the Canadian Court said in an opt-out aggregate case -- which is what we say this should be -- the issue of any conflicts can be left to distribution, and we say that that's exactly the position here, and I think it was pretty much the position in the *Ad Tech* case that Mr Kennelly referred to.

The only other point I'd make, in relation to opt-out and opt-in, is to refer the Tribunal to paragraphs 37 to 39 of our skeleton argument, which is at A/11, 231 to 232, where we refer to various passages in the *Evans* judgment, and also to paragraphs 93 and 106 of the *Evans* judgment, where various points are made about how the discretion should be exercised and the possible advantages in terms of causation et cetera, in relation to opt-out. And that's at tab 39, pages 2476 and 2472.

So those were the points, and then the only other point I'd make -- and Mr Kennelly briefly referred to it -- in *Lloyd v Google*, Lord Leggatt gives a very high level judicial account of the difficulties facing opt-in as a proceeding and the difficulties that led to this collective regime being established, given the failure of a previous case.

THE PRESIDENT: Sorry, in which case?

MR THOMPSON: That's *Lloyd v Google*. And in particular, paragraphs 26 to 28 of Lord Leggatt's judgment, he describes the problems of opt-in in quite general terms, and that's at E/44, pages 2949 to 2951.

So that addresses some of the points that the President was putting to me this morning, in relation to why opt-in may be problematic as a matter of practice, as a matter of experience of how cases have been managed in the past.

That's all I wanted to say on the law. If I could hand over to Ms Howard to reply, as it were, on the facts.

THE PRESIDENT: Now, I'll let you have your 15 minutes, so you've got another ten minutes or so.

Reply submissions by MS HOWARD

MS HOWARD: I'm really grateful, my Lady.

I've probably got three zones of reply, and you may not want to hear all of them, so I'll just headline the areas:

The first thing I wanted to talk about, limiting the class to the 397 direct users, what that will mean both for the direct parties and indirects;

Secondly, your Lady mentioned the Rule 93 point about whether the Tribunal could give a direction about the distribution, and I wanted to tease out some of that and what that actually means and how it works in practice, why we say that would not be sufficient;

And then lastly, I didn't manage to make points on specific financial contribution and why that acts -- as we say -- as an effective filter.

Those are the three areas, but obviously if you don't want to hear me, I'm happy.

So, on the first one: limiting the class to the 397, the direct users, we say that that really will undermine recovery and limit the effective relief and the quantum amount. Even if the methodology is the same, on an opt-in/opt-out basis, it will undermine recovery.

I could not present all of the evidence, because of time constraints this morning, that I wanted to put before the Tribunal, but it is clear from the evidence of Mr Gale, as well as Mr Parr, that some of the 397 directs would be deterred from opting-in. That's either because of practical barriers or because there is the intervening notice period before they opt in, where they could settle, get settlement offers and leave, and we say the funding regime would be undermined if people were settled out early without opting in.

And then the second thing is the practicalities, and both Mr Gale -- there are a lot of

references in his second statement, which is B/9, 786, it starts at paragraph 4.8(b).

THE PRESIDENT: But are you making a point about the claim definition --

MS HOWARD: I'm --

THE PRESIDENT: -- or an opt-out?

MS HOWARD: -- just saying the realities are that, because you said there's four options, we can either go 397 opt-out, or 397 opt-in --

THE PRESIDENT: So which one are you talking about?

MS HOWARD: I'm saying if you were to cut it down to the 397 --

THE PRESIDENT: So that's the claim size?

MS HOWARD: Just the claim size.

THE PRESIDENT: Yes.

MS HOWARD: And you were to do that on an opt-in basis.

THE PRESIDENT: Right, so you're doing the narrowest possible.

MS HOWARD: The narrowest possible.

THE PRESIDENT: Yes.

MS HOWARD: That's going to create prejudice for the 397, the direct purchasers, as well as the people outside the tent, the indirects that are not allowed to opt-in at all. And for the direct users, there is evidence in Mr Gale's second statement and paragraphs -- I can reel them off, because I don't think I'm going to have time to take you to all of them -- 4.8(b), 4.14(c), 4.16(a) and 4.24(c), and that's B/9 page 760 onwards, which spells out the practical realities for these entities that will not have the resource or the capability to opt in. A really good example that he gives is of the RSPCA; that's at 4.24(c) of his second statement.

THE PRESIDENT: Yes, what I'm slightly concerned about is the sort of intermediate situation, where you limit the claim to the direct users, but you have opt-out. On that basis, no undertaking is given regarding pass-on, how do you say the pass on

arguments would then play out?

MS HOWARD: In an opt-out claim where the indirects are not within the class…

THE PRESIDENT: The indirects are not within the class, but it's opt-out.

MS HOWARD: That's right.

THE PRESIDENT: Then there's no undertaking regarding pass-on, what are the arguments on pass-on that would be made and how would the Tribunal deal with that?

MS HOWARD: So the arguments -- sorry, this is going to blur my first and my second zone.- My problem is you're going to end up with a situation where the larger users: the Home Office; the police; the tier 1 local authorities; make a claim, the aggregate methodology is the same, whether it's opt-out or opt-in, so you then come to have to distribute the award, and there will be arguments that the Home Office cannot possibly claim for the entirety of the loss calculated on the payments that it has made, because, effectively, it was buying services on behalf of other parties, and therefore it's not the Home Office's loss.

Now, my learned friend has said the Defendants are not prepared to give an undertaking, so they are going to use those arguments to cut down the claim of the Home Office, or of the police, or of the local authorities.

And I said, in response to your questioning this morning, regardless of their undertaking, it's still a consideration that the Tribunal has to take in mind, anyway, of its own motion. I wanted to unpick that, to give you the legal basis for that, and I've got some provisions here to hand up. It comes from the Damages Directive. (Handed) And there's also another reference in *Sainsbury's*. (Pause)

THE PRESIDENT: Has Mr Kennelly seen this?

MS HOWARD: No --

THE PRESIDENT: Really? Why couldn't this have been given to him before, like over the lunch adjournment?

MS HOWARD: Because I was only looking at it over lunch and just trying to pull it together very, very quickly. You'll see I've been scribbling while I've been sitting here, trying to pull things together, because we're trying to squeeze this into one day.

MR KENNELLY: I could have been told about the (inaudible) point before the hearing today. I appreciate we're on a timetable (several inaudible words) submissions (several inaudible words).

THE PRESIDENT: I mean, this is not very satisfactory. If you had thought that we needed more than one day, you could have said so. That was the purpose of us writing to you to propose that, and asking if this was, you know, acceptable in giving a proposed timetable.

MR KENNELLY: From our perspective, it could have been a day.

THE PRESIDENT: Yes.

MR KENNELLY: But now it could not, because (several inaudible words). I'm sure my learned friends are not (inaudible), but I just don't have the availability to attend.

MS HOWARD: No, I'm not.

THE PRESIDENT: I just don't know.

MS HOWARD: I did not have the chance before -- I'm sorry, but on the basis of the arguments in the skeletons, this issue did not arise. It was only until your Lady's question this morning of what was your ability to make a direction about distribution, and did you have the power to do that, and then the references that my learned friend made to Rule 93, that I have been responding to that on my feet during the course of argument today.

THE PRESIDENT: Well, Mr Kennelly will probably need to respond to this in writing, because we're not going to have time today. All right, why don't you just give me the --

MS HOWARD: I was responding to my learned friend's argument that I just said something on the hoof without any legal basis, which, understandably, he didn't have.

So I just wanted to take you to the underlying provisions of the Damages Directive. It's, in particular, the recitals 41-44 and then article 12. (Pause)

The Damages Directive caters for the situation that you might have claimants from differing levels of the supply chain. It's thinking about a commercial supply chain. We're not in the same situation as a vertical supply chain of different levels of the market in a kind of commercial world, but there is this co-sharing and co-funding between the public sector. So, by analogy, we say it applies. So at the end of paragraph --

THE PRESIDENT: Which recital?

MS HOWARD: So I'm looking at the end of paragraph 41 and recital 44. So as to the quantification of passing on, it provides at the end of recital 41:

"*National courts should have the power to estimate which share of the overcharge has been passed on to the level of indirect purchasers in disputes pending before them*."

And then at recital 44, it restates the proposition that has been established in *Manfredi* and *Courage*. (Pause)

Sorry, I think the judicial assistant's taken the other copies out of the courtroom. (Pause)

I understand that we're printing off some more.

THE PRESIDENT: Okay.

MS HOWARD: Is it worth me waiting, perhaps?

THE PRESIDENT: Well, Mr Kennelly is going to have to reply, I think, in writing anyway. So why don't you carry on? It'll be on the transcript. So paragraph 41, you went to recital 44.

MS HOWARD: Recital 44, the opening part of that restates the *Manfredi* proposition that claims can be brought by anyone who suffered loss, wherever they are in the supply chain. It says, second sentence:

"*[In order to ensure consistency and] avoid the harm caused by the infringement [...] not being fully compensated or the infringer being required to pay damages to compensate for harm that has not been suffered, national courts shall have the power to estimate the proportion of any overcharge which was suffered by the direct or indirect purchasers in disputes pending before them*."

Then it says:

"*In this context, [they] should be able to take due account, by procedural or substantive means available under Union and national law, of related actions [...] particularly where passing-on has been proven. […And they should be able to have] appropriate procedural means [...] to ensure that compensation for actual loss paid at any level of the supply chain does not exceed the overcharge harm caused at that level.*"

THE PRESIDENT: And then article ...

MS HOWARD: Then articles 12.1 and 2 set out those principles as well. Again, it's the duty to make sure that compensation does not exceed the level of harm caused by the infringement to that claimant.

Paragraph 2:

"*In order to avoid overcompensation, Member States shall lay down procedural rules [...] to ensure that the compensation for [any] loss at [the] level of the supply chain does not exceed the overcharge harm suffered at that level.*"

THE PRESIDENT: Do you just want to give us the reference to the paragraphs you want to look at in *Sainsbury's*?

MS HOWARD: So it's just 217, which where the Supreme Court states and --

THE PRESIDENT: Right, just to give us the reference, don't read it out. Don't read it out.

MS HOWARD: It's not achieved if a claimant receives less or more than its actual loss.

THE PRESIDENT: Okay.

MS HOWARD: So that's the simple proposition. We say that even though we're not dealing with a vertical supply chain in the same way, the same principles apply, that you need to make sure that, between the direct purchasers and the indirect purchasers, in this case within the class, that there's some mechanism for allocating or distributing the loss between the directs and the indirects.

Now, Rule 93(2): the Damages Directive, has been implemented through a whole panoply of different provisions, whether it's schedule 8A or rules of procedure. We say that Rule 93(2) with that power to distribute is a reflection of those principles in the Damages Directive.

So yes, you do have the power and the discretion to do that, whether it's opt-out or opt-in, but standing back, how do you do that in practice? Because how can you make directions to the Defendants or to the Class Representative as to how to make payments and the amounts needed to cascade the damages down without first hearing evidence and being able to estimate how much of the damages should be awarded where?

How do you make sure that that's done on a fair basis if half of those members are outside the tent and are not represented before the court? They've got no mechanism of having legal representation, making submissions, they may have had to bring their own separate claims in other court proceedings that are still pending.

Whether you do this as an opt-out basis or whether you do it as an opt-in basis, you're leaving the parties potentially having to battle it out with the risk of satellite litigation.

Now, Motorola says that it's big enough to hedge that risk, and it can take the risk of disgruntled indirects claiming against it, but there's also a risk of satellite litigation being brought either against the Proposed Class Representative or against the direct purchasers by the indirects, if they're unhappy.

THE PRESIDENT: Right. Do you want to wrap up your other points in reply?

MS HOWARD: Yes.

So we say that it's better to have everybody in the tent. In terms of cost efficiency and expediency, you're going to have arguments on this anyway, so it's better to have everybody in.

The points I was making about opting out, the directs may be opting out, I was giving you references to further evidence in Gale 2 to explain why they may not have the resource. There's quite a bit of evidence, both in Gale 2 and in Mr Parr's evidence that there's a strong preference by the users for opt-out claims, particularly at 4.8 of Gale 2.

But also 4.12 refers to a previous case where the police forces were being asked to opt in to proceedings, and less than half of the 43 police forces in England and Wales decided to opt in, so there was a great fall-out rate where they simply didn't have the time.

If you stand back and think: well, in terms of the documentation, imagine you are a volunteer for a mountain rescue or a lifeboat association -- you're not a lawyer. You get an information pack with the claim form of 52 pages, expert reports of over 100 pages, even a summary of the claim in legalese about all this complex economics and competition law. You're already working full time, you're volunteering in your spare time. Where is that pack going to end up? There's only one answer, really.

These are all emergency service bodies with greater priorities on their time. So we think the likelihood of opting in will be minimal.

Then you have to weigh that up against the actual recovery. Yes, there are some large claimants here with large claims, but this regime is designed to vindicate the rights of smaller claimants, as you've just recognised.

THE PRESIDENT: Yes.

MS HOWARD: There are figures in the evidence of Mr Gale and in the User Report that some of these users would have spent £1,000 per annum on Airwave Services. Now, if you take the CMA's findings of the extent of the overcharge that's been charged during this Claim Period, I think it's -- I don't know if it's confidential, but it's in the --

THE PRESIDENT: Well, look, I think you need to wrap up in the next minute.

MS HOWARD: The value of the claims would range from a couple of hundred pounds at the lower level to just over a thousand, up to millions. But it is the small tail that we're worried about that will not be able to get relief. For a mountain rescue charity, you know, even a claim of £500 is a considerable amount when they're relying on donations and fundraising.

THE PRESIDENT: Yes. All right.

MS HOWARD: I just want to take one last point, which is the litigation funding agreement and clause 17.2. It's at B/15 on page 944. (Pause)

You'll see there that clause 17.2.3:

"*In the Funder's reasonable determination [...]*"

THE PRESIDENT: Yes, we've noted that.

MS HOWARD: "*[If it's] no longer [...] value for money for the Class as a whole [...]*"

So obviously not just the Home Office, but the whole of this document is drafted on the interests of the class as a whole, because that was the Home Office's intention. But there is a right of withdrawal there from the funding if the cost benefit of this litigation is distorted.

We say that by either narrowing the class to the 397, or putting it on an opt-in basis will fundamentally distort the basis on which these proceedings have been constructed and designed, and it will add so much additional cost and expense and delay and uncertainty, that that cost benefit ratio will be distorted.

THE PRESIDENT: Thank you. All right, so we're a little bit over. I'm going to rise for

ten minutes now, and can I leave you in that time to work out how to distribute your submissions on the Claim Period, so that we finish by, I'm going to say, 4.20, and then we'll be five minutes over. So we just need to reduce everyone's submissions on the Claim Period, so that we catch up and don't finish too late tonight. All right.

(3.20 pm)

(A short break)

(3.31 pm)

Discussion regarding the Claim Period

Submissions by MR KENNELLY

MR KENNELLY: Thank you. So this is the Proposed Defendants' strike-out application. We seek to strike out the PCR's case, in respect of the first nine months of the time period, from 1 January 2020.

THE PRESIDENT: Can you tell me how you're going to divide the time up, so I can just make a note and make sure we don't overrun.

MR KENNELLY: We've lost ten minutes; it'll be five minutes out of me and five minutes from my learned friend, so I hope to finish by five to the hour, and earlier if I can.

THE PRESIDENT: Sorry, so you're going from -- all right. Yes.

MR KENNELLY: (inaudible) both this and the funding point are short points, and I'll reassure the Tribunal, I really think the funding point is a very short point, so I will move at a fair clip, if that isn't too inconvenient for you.

I want to recall, first, the basic case against Motorola. The Airwave Network was procured by the Home Office for the period up to 2019. Airwave was necessarily a monopoly provider, because that was a term of the procurement, but the procurement process provided the constraints to avoid a competition problem. The

original term was slightly extended in 2017, to September 2020, but as I'll show you, everyone expected Airwave's replacement, ESN, to be ready in 2020. So again, there was no competition problem. Why? Because the imminent prospect of ESN in 2020 provided the competitive constraint in that negotiation. In 2017, the Home Office wasn't over a barrel.

The alleged problem arose after that. The Home Office, the allegation is, became aware that ESN would become much more seriously delayed, possibly by several years. The allegation is that, at that point, the Home Office was over a barrel. The allegation is that it was then forced to enter into a contract extension, called UCCN2.

A flaw in the pleading is that the damages claim is not limited to the prices agreed under UCCN2. It contains an allegation that the prices agreed under the earlier short extension, the one in 2017, were also abusive, even though there's no allegation that Motorola was dominant at that time. That's the point, and I'll just show you the Claim Form first. Core Bundle A, tab 1, page 3, the red number.

Paragraph 4, the Claim Period is defined as the period:

"*[...] commencing 1 January 2020 and ending on […] 31 July 2023 or […] such later date as [...] may order*."

Page 29, red number 29, we have the "Dominance" plea:

"*Motorola holds, and at all times during the Claim Period held, a dominant position.*"

The dominant position is alleged to arise from 1 January 2020, and that's not a slip, because they specifically cite the expert evidence, page 32 --

THE PRESIDENT: So the Claim Period is contiguous with the dominance period?

MR KENNELLY: Yes.

Page 32, paragraph 85, they cite Mr Bell's expert evidence, and he will:

"*[...] assess the relative bargaining position of the parties [...] in order to assess the*

market power held by the Proposed Defendants during the Claim Period."

So he's looking at the market power during the Claim Period, because it said that during the Claim Period, that's when Motorola is said to have the market power. It's relevant, according to the PCR, to the fairness of the price negotiation.

Question in the claim is: what market power did Motorola have at and after 1 January 2020?

And then we turn to the allegation of breach. Paragraph 93(a) on page 34:

"*The prices charged by Motorola for the Airwave Services during the Claim Period were [abusive] […] for […] the following reasons:*

"a. They enabled Motorola to reap trading benefits [...] which it could not have obtained in a normal and sufficiently competitive conditions […]

"c. When assessing whether prices were unfair, it is relevant to consider the market context, which was lacking in competitive constraints [...]. The market context [is] characterised as a monopoly provider of a critical and essential service, facing purchasers with very weak bargaining positions [...]".

THE PRESIDENT: Yes, well, that's down at c, and you've skipped over b:

"*They were excessive because they were significantly and persistently above costs, with no reasonable relation to the economic value of the Airwave Services.*"

That does not depend on dominance; that's just the statement of the basis on which they're excessive.

MR KENNELLY: Yes.

THE PRESIDENT: It's only when you come to considering whether they were unfair, it's relevant to consider the market context, which was lacking competitive constraints. But in relation to whether they were excessive, that doesn't turn on dominance.

MR KENNELLY: But that's the first limb. That's limb one of the test. Limb two is the question of unfairness.

THE PRESIDENT: Yes, but all is said is it's relevant to consider the market context. And then you go on to d:

"*[...] the charges [...] were unfair in themselves is also indicated by […] lack of economic justification […].*" And so on.

So again, none of d turns on dominance. So I'm not sure how this is said to depend on a finding of dominance.

MR KENNELLY: Madam, my submission is that it does depend on dominance, because, first of all, b is limb one of the excessive pricing test, c refers to limb two, which is unfairness. It's said to be unfair because of the very weak bargaining position of the counterparties, which is a reference, we say, to when the prices were negotiated.

And then that's even clearer in d; they're unfair in themselves, because of the lack of economic justification for the price level to be set. The price levels were set for that first part of the Claim Period in 2017, when they weren't alleged to have the market power.

THE PRESIDENT: But d does not turn on whether there was dominance or not. It's talking about the lack of economic justification.

MR KENNELLY: My submission is that, read with c, it is referring to the unfairness of the prices because of the market power of Motorola when the prices were agreed. (Pause)

The PCR's evidence makes this even clearer. Mr Parr's first statement, Bundle B, tab 3, page 63. (Pause)

Section 10 deals with the extensions to the ESN timetable. We say this is critical to understanding the nature of the abuse that's alleged in this case, which was that the prices were unfair because they arose from the situation when the Home Office was over a barrel. It was at that point that there was no constraint, it was at that point that

Motorola was dominant.

At page 63, "*Initial extensions to ESN timetable*", 10.1.2, up to this point, everything is on track. ESN is supposed to take over at the end of the original procurement period.

10.1.2, Mr Parr says:

"*[...] in December 2016, [the public body, the Emergency Services Mobile Communications Programme] was conscious of a potential 9-month delay to the final roll-out of ESN [...] (such that the transition would start around July 2018 with shut down at the end of September 2020), but [critically] no further substantive delays were envisaged at that time."*

"Given the potential 9-month delay [...] the parties negotiated the […] changes [...] beyond December 2019 (if it was in fact needed)."

And then we have the agreement in 2017, and that was the agreement that set the prices until September 2020. And if the services were required after 2019, there'd be an extension to September 2020.

And that is the negotiation which led to the prices, which is in the first part of the Claim Period.

But then we have Section 11, the UCCN2 negotiations, and this is where the dominance arose, because the competitive constraint of ESN vanished, on the claim.

11.1, summarising the Final Report, which they rely upon from the CMA.

We see at 11.1.2, the Home Office became aware of additional delay to ESN.

11.1.3:

"*Towards the end of 2017, ASL put pressure on the Home Office to commit to conclude negotiations [...]*"

Leveraging the alleged dominance to commit the abuse.

Then over the page, you see that now we are in the territory of UCCN2.

And then page 70, the *"Bargaining position of the Home Office". So* this is focused on

the market power of the Home Office relative to Motorola, which made the agreed prices unfair.

19.1:

"*Given the above the Home Office and other users have no realistic alternative options, other than to continue to purchase the Airwave Services [...] UCCN2 resulted from further negotiations between [Airwave], the Home Office, [and others] in December 2018 to amend the […] agreements [...]*"

And skipping down, in italics:

"*The Home Office lacked outside options and buyer power [...]*".

THE PRESIDENT: So which paragraph are you reading from?

MR KENNELLY: The bottom of paragraph 19.1, madam.

And then at 19.2, second half, second sentence:

"*When faced with further delays in 2018 [not 2017] and no alternative network available [...] my understanding is the Home Office considered that its only possible option was to revise the plan for the delivery of ESN [...]*".

We see no allegation in the Claim Form, or in the evidence, that Motorola had that market power, the market power that generated dominance, in 2017, such that it could, or did, impose abusive terms then. The allegation is that it was in 2018, that the Home Office was over a barrel, the ESN constraint went, and the prices agreed at that point were abusive by virtue of the market power that Motorola had then.

Mr Bell had to prove this effect at D, tab 6, page 981. (Pause)

Just the heading, he is dealing here with dominance, Motorola's position in the market during the relevant period. This is Section 3E.

THE PRESIDENT: Sorry, which bundle?

MR KENNELLY: This is Bundle D, tab 6, page, in red numbers, 981.

THE PRESIDENT: Okay, got it.

MR KENNELLY: Mr Bell is dealing with dominance. At page 982, he explains, paragraph 3.50:

"*[...] market power that arises from being in an exclusive provider position would be constrained through the competitive tendering process.*" But here: "*[...] the […] circumstances leading to the Claim Period, (namely the substantial delay to ESN and the lack of credible alternatives) means [this] did not play out.*"

So this is the 2018 period. There was no substantial delay to ESN in 2017 when the extension was agreed, the first one.

And 3.51:

"*[...] two time periods […] have the potential to deliver a competitive outcome [...]. [One is the procurement]. The second is once ESN is ready to replace the Airwave Network*".

And when ESN was found not to be ready for years, that's when the market power shifted.

3.53:

"*The speed at which other potential alternative providers could enter [...] is likely to be relevant to consider in due course.*"

That's because he's looking at constraints.

And over the page, last sentence of that paragraph, top of the page, 983:

"*I'm aware of no other alternative provider that could enter in the short term.*"

It's the speed of entry that generates the constraint. This is all about 2018. On the PCR's own evidence, it couldn't be any earlier.

3.55, to the same effect because:

"*[...] there was no credible alternative available to Airwave during the Claim Period (or immediately before) [...]*".

That means looking at the short term, there was limited competitive constraint. That

is the language of dominance, and this reasoning means no dominance prior to 2018.

3.57, more of the same.

So to draw it all together, the PCR's own case is the prices were unfair, because they were set by a monopoly provider without the constraint of ESN replacing it in the short term. The PCR's response to this is to say, well, conduct carried out by a non-dominant firm can become abusive when that firm acquires dominance, and as a matter of principle, that's correct, but that misses the point here. The PCR's own case is that the market position pertaining when the prices were agreed is critical to their unfairness.

Secondly, as this is an excessive price case under the Chapter II prohibition, it's not a case where conduct from a non-dominant period was rolled forward into a period of dominance.

Now, the PCR says they don't accept that Motorola was not dominant before 2018. That's not good enough; it's for them to plead a coherent case and then prove it. They could have amended it when we pointed this out and they chose not to.

In their skeleton, they refer to the *Albion Water* case. It's in tab 7.

THE PRESIDENT: So you're saying that because of what Mr Bell says, this is not a maintaining a price set before dominance case?

MR KENNELLY: Exactly.

THE PRESIDENT: You're saying that the basis of the case is that when the price was set, there were not sufficient constraints.

MR KENNELLY: Yes.

THE PRESIDENT: But that's not what's pleaded.

MR KENNELLY: Well, madam --

THE PRESIDENT: I mean, we have to go off the pleaded claim. And what's pleaded is that the prices were significantly and persistently above costs and that there was

a lack of economic justification for that price, and the other points made in 93(d) about the differential between prices and costs.

MR KENNELLY: But, at the risk of repeating myself, that's one, the unfairness of the prices is said to arise from the very weak bargaining position of Motorola's counterparties in circumstances where a critical service was needed, and when the prices were set higher than costs, that was a function of Motorola's bargaining power. Obviously we look at the pleading first, but then we look at -- the pleading has specifically cited Mr Bell. And in order to understand what's pleaded, and I say it's clear from the face of the pleading, I see the Tribunal may take a different view, but it's plain as day when this is read with their own evidence, that in this case, it's not a situation where something that's benign becomes abusive because a dominant position is acquired. The clear case is that the prices were abusive because they were negotiated and set at a time when the Home Office had no real bargaining power, because the ESN had disappeared into the distance.

That was not the case in 2017 when the initial period prices were agreed because they believed, everyone believed then, as Mr Parr says, that ESN would be ready by September 2020, if not earlier. Mr Bell says that when it became clear that ESN was not going to be ready, that constraint disappeared, and then Motorola had dominance.

THE PRESIDENT: But Mr Bell says at paragraph 3.57, well, let's say let's scroll back to 3.56. He says that Motorola occupied a high share of the market from the start of the Claim Period and then says, in this context, I would review additional factual evidence, both before and after the start of the Claim Period, to consider the relative bargaining positions of the parties and to understand the extent to which this contributed to market power at the time of the alleged abuse. So he is saying -- he bases his analysis on the 100 per cent share of the market from the start of the Claim Period. But - quite properly, he's saying he'll look at any additional factual evidence

from around that.

So if you're relying on what Mr Bell says, he's not saying he's basing his analysis on an assumption that there was dominance as such before the Claim Period. I think.

MR KENNELLY: That's quite right. The pleaded case and Mr Bell's case is that there was no dominance in 2017. There's no allegation that in 2017, market --

THE PRESIDENT: No, it doesn't say there was no dominance. It just not alleging that there was dominance.

MR KENNELLY: No positive case in the pleading or Mr Bell that in 2017 Motorola had the market power that it went on to gain in order to generate abusive prices.

THE PRESIDENT: No. But what he's saying is, and quite properly, that he would look at this in context by looking at any additional factual evidence on the relative bargaining positions of the parties before, it seems.

MR KENNELLY: The starting point is at paragraph 350 on the previous page. Mr Bell explains what he understood to be the factors that generated the abusive prices, why the prices were abusive. And he starts with the fact that where the market power arose, the 100 per cent market share is neither here nor there because that's a function of the procurement. But where the market power arose, when it became unconstrained, this was because ESN was delayed, and that happened in 2018, not 2017.

That meant that a competitive outcome could not be achieved, according to Mr Bell. That's their positive case. They don't allege that that situation arose in 2017. But for the prices agreed in 2017 to be abusive, they have to plead that in 2017, also, the Home Office is over a barrel, because their case is that the fact that the Home Office is over a barrel, that rendered the prices abusive. And I take that, I'm repeating myself, from the pleading.

THE PRESIDENT: Yes, all right. No, I understand your case.

MR KENNELLY: That is it. Those are my submissions, and it could be cured by an amendment, but they haven't amended.

THE PRESIDENT: Thank you very much.

Actually, we've gained quite a bit of time, so if I give you 25 minutes now, that should take us to no later than 20 past.

MR THOMPSON: I'm grateful.

MR KENNELLY: I was due a tiny reply in our timetable.

THE PRESIDENT: Yes. Let me just --

MR THOMPSON: My watch says it's nearly 3.55 pm.

THE PRESIDENT: So what about if you finish by quarter past?

MR THOMPSON: Yes.

THE PRESIDENT: And then Mr Kennelly has five minutes.

MR THOMPSON: I think that should be quite comfortable.

THE PRESIDENT: Yes.

MR THOMPSON: But we always say these things.

THE PRESIDENT: And if you can deal with it even more quickly, as Mr Kennelly has been quite snappy in his submissions.

MR THOMPSON: Yes.

THE PRESIDENT: Thank you.

Submissions by MR THOMPSON

MR THOMPSON: Mr Kennelly didn't take you to the legal test, which in statutory terms is in Rule 41(1)(b), which is at E/238. And I think the only possible relevant provision is 41(1)(b), which is that the Tribunal considers that there are no reasonable grounds for making the claim. In our skeleton, we refer to a well-known passage in the judgment of the House of Lords in *Three Rivers*, paragraph 95 of that judgment, where

Lord Hope talks about the claim being fanciful or entirely without substance. And that's at E/41, pages 2795 to 2796.

So the Defendants seek to strike out the claim from 1 January 2020 to 30 September 2020 on the basis of negotiations that took place in 2017, when it was believed that only a short extension of the Airwave Network would be necessary, i.e., before it was known that the replacement network would not be ready for a period of several years. In assessing this application, it's necessary to have in mind, first of all the PCR's pleaded case, and the basis for that case. And so the pleaded case, I was going to take the --

THE PRESIDENT: We've seen that; we've seen the pleaded case.

MR THOMPSON: If I could just refer the Tribunal to paragraph 15 where the primary case is stated:

"*The PCR contends that Motorola has abused its dominant position during the Claim Period by continuing to charge the prevailing prices for Airwave Services beyond 31 December 2019 and refusing to negotiate sufficient price reductions to reduce the prices to a non-excessive and fair level, or otherwise failing to reduce the prices, for the period beyond 2019.*"

And then it gives three specific indications. First of all, the circumstances prevailing from 1 January 2020, and then references to market power, and then, at paragraph 16, reference to Mr Bell's report, which is now uncontested. And so the basis for that pleading, and for the more detailed pleading later on, includes reference to Mr Bell's report, and I'd refer the Tribunal, first of all, to Section 1.3, which is in D, pages 947 to 948. I don't know if the Tribunal has that. It starts at paragraph 1.25.

Mr Bell says:

"*Following the delay to ESN, to ensure continuity of the service, the PCMs had no alternative but to procure services from Airwave, and to accept the commercial terms*

that Motorola was prepared to offer for the period from January 2020. I understand that Motorola was not prepared to enter into negotiations on substantial pricing reductions for this extended period."

And then it goes on:

"*This meant that from 1 January 2020 Motorola was able to charge PCMs prices that were substantially the same as those that had applied before 1 January 2020[...]*".

And then at the end of 1.27:

"*From an economic perspective, these pricing practices should be assessed with reference to the factual and market context which applied at the time they were imposed.*"

So that's one basis for the pleading, an unchallenged basis. And then at Section 4, which is at D, starting at page 995, Mr Bell at 4.5 gives the history of the transactions.

Then at 4.8, he says:

"*Over the following two years* [so that's after 2016] *it became clear that there would be significant delays to the roll-out of ESN, which meant that emergency services and other public safety organisations would need to remain using the Airwave Network for a period significantly beyond the end of December 2019.*"

And then at 4.10 and 4.11.

"*In this case, it is alleged by the PCR that the terms imposed by Motorola from 1 January 2020 and throughout the Claim Period were abusive. In particular, it is alleged that these pricing arrangements were excessive and unfair and amounted to Motorola abusing its dominant position (as of 1 January 2020).*"

"*In economic terms, such an abuse would have been continuous throughout the Claim Period.*"

So, in my submission, that sort of material which is unchallenged is very unpromising material for the sort of allegation that would need to be made in relation to

Rule 41(1)(b). I mean, far from there being no reasonable grounds for making the claim, there is in fact uncontested expert evidence, and, for good measure, the expert instructed by the Defendants, Mr Colley, in his report at paragraph 3, said that he'd been instructed not to contest the position in relation to market definition and dominance. So there's never been any dispute about the position in relation to dominance for the Claim Period as alleged, or as found by Mr Bell.

The other basis for the pleading -- and I'll take this shortly because it's in a way this collateral issue about the status of the CMA Report. But the Tribunal will be aware that there were detailed findings made by the CMA which were rehearsed and endorsed both by the Tribunal and the Court of Appeal on the history of the negotiations. And you find that in the Tribunal judgment, where they describe the position in some detail, and I'll give the references: paragraph 47, 65(2).

THE PRESIDENT: Sorry, I need a bundle reference.

MR THOMPSON: Bundle E, tab 20, pages 1457 and following. (Pause)

THE PRESIDENT: 1457, did you say?

MR THOMPSON: It's paragraph 47, there's the first reference to the 2017 negotiations. (Pause)

And then there's a much more detailed account of what happened after that.

THE PRESIDENT: Right.

MR THOMPSON: At paragraph 65(2), there's reference to a submission by Motorola, in relation to the status of the 2017 negotiations, at page 1467.

At paragraph 75(2), there's a description of the CMA's submissions. At 1473:

"*As regards the 2017 Negotiations, they resulted in a short extension and a "very small" discount in price, and were incidental to the bigger picture. They did not form part of the findings of AEC and are not referred to in Section 4 of the Decision. It is not suggested that these negotiations establish that there could be no AEC, and nor,*

given that it was only a small extension, could it be."

And then the conclusion of the Tribunal is at 82, which is on page 1478, where it accepts:

"*[...] the CMA's submission that the 2017 Negotiations were incidental to the bigger picture and do not understand it to be suggested that these affect the conclusions we would otherwise draw based on the 2016, 2018 and 2021 Negotiations.*"

And then, the position of the Tribunal was considered and, in my submission, endorsed, by the Court of Appeal.

THE PRESIDENT: What do you get out of this? I don't understand the point you're making.

MR THOMPSON: Well, as I understand it, Mr Kennelly is saying that the 2017 negotiations were in some way decisive in relation to the first part of the Claim Period. I'm merely saying that as far as the CMA, the Tribunal and the Court of Appeal was concerned, the 2017 negotiations were effectively overtaken by events, precisely because of the change of circumstances after 2017.

THE PRESIDENT: Yes, but whether it was 2017 or 2018, he says that there wasn't an allegation of dominance until 2020. So he says you can't take into account anything that came before, and instead of that, there is reliance on what came before.

MR THOMPSON: Yes, well, he's placing reliance on 2017. I'm simply saying that from the point of view of the Tribunal, they endorsed the CMA's position that the 2017 --

THE PRESIDENT: All right, in 2018, there wasn't a finding of dominance. There is not an allegation of dominance in 2018.

MR THOMPSON: No, I mean, my basic position, that I'll come to it in a moment, is that given the fact that this is a high test and the basis for the claim is the expert evidence of Mr Bell, which is uncontested, you can't seriously say that there's no

reasonable grounds for making the claim. But I also have a number of specific arguments, which I'll come to now, if I may.

THE PRESIDENT: Yes.

MR HERGA: You also said, because of a refusal to renegotiate, as it were, the 2017 agreement, when it became clear an extension was required, that that is an abuse at that stage.

MR THOMPSON: Well, what I'm actually saying is that the pleaded case, correctly, is based on the prices charged, which were charged from 1 January 2020. At that point, it's never been contested for the purposes of certification that Mr Kennelly's clients were dominant. The evidence of Mr Bell is that the prices charged from 1 January 2020 were excessive and unfair.

There is a point that may arise on the Defendant's defences, if they so plead, that they may say that they can't be unfair because of the history of the negotiations. But in my submission, that's a matter for trial; it's certainly not a matter for strike-out at this stage. I'm not trying to shut them out from making this defence. I'm just saying that this strike-out doesn't get off the ground.

I say that there are legal, logical and factual fallacies in the application as set out in our Reply and skeleton argument, by reference to the relevant case law. As I've already said, it fails insofar as the claims are based on unchallenged expert evidence, so that the matter should be pursued at trial rather than here at summary judgment.

So first of all, the legal position. The PCR, as we've seen, alleges that the Defendants breached section 18 of the Act from 1 January 2020 to the 31 July 2023; the Claim Period. The PCR must therefore plead and prove that the Defendants were dominant on a relevant market during that period, and that they abused their dominant position during that period. We say that's elementary.

The nature of the alleged abuse, we have seen, was the charging of excessive and

unfair prices during the Claim Period, contrary to the *United Brands* case law, under Article 102 as applied in the UK in a series of recent cases. In support of that pleading, the PCR relies both on the findings of the CMA and on the evidence of Mr Bell.

The PCR is not and does not, and does not need to, allege any additional breach of section 18 of the Act prior to 1 January 2020. In particular, she does not and does not need to allege a further or distinct abuse of offering excessive and unfair prices prior to the Claim Period. Nor does she need to allege dominance or abuse in 2017. That's neither the alleged abuse nor a necessary component of the alleged abuse.

It is therefore legally irrelevant to the PCR's case whether the Defendants were or were not dominant prior to 1 January 2020, and/or whether any prices offered prior to that date were excessive and unfair. From a legal point of view, those points are irrelevant.

The market power and the conduct of the Defendants prior to 1 January 2020 may emerge at trial as a relevant factual context for the alleged abuse, but it's not a legal requirement of section 18 of the Act, either that the Defendants were dominant prior to 2020, or they acted in a way that is alleged to constitute an abuse before the period of alleged abuse of dominant position. So we say the case is legally hopeless.

Secondly, we say it's based on a logical fallacy. It doesn't follow from the fact that some of the allegedly excessive and unfair prices charged by the Defendants after 1 January 2020 were also allegedly offered prior to that date, it doesn't follow that the PCR must be alleging that the offer of those prices must also have been in breach of section 18 prior to 1 January 2020.

One logical possibility, which is in fact what happened, is that there was a material change of circumstances between the offer of the relevant prices and the subsequent charging of those prices. Even if the prices offered were not necessarily excessive and unfair when offered, they may have become so as a result of that change of

circumstances so that those prices were excessive and unfair when they were charged, which is the relevant question.

Another logical possibility is that the Defendants were not, in fact, dominant when the relevant prices were agreed, so the prices offered were not, in fact, in breach of section 18 of the Act at that time, for example, in 2017, even if those prices were already excessive and unfair as a matter of substance.

THE PRESIDENT: Mr Thompson, I think we've got most of these points. Do you just want to summarise your remaining points in a couple of sentences? Because I think we understand what you've said.

MR THOMPSON: Yes. I was then coming to the facts, which I think I've addressed already, that there was, in fact a change of circumstances, precisely as described by Mr Bell, so that by 2020, Motorola did have the Home Office over a barrel and was not under pressure to reduce its prices, and that this is actually what happened, and that the fact that there may have been a different market position in 2017 is not only legally irrelevant, but readily explicable, but as you as the President already put to Mr --

THE PRESIDENT: Kennelly.

MR THOMPSON: -- [Pause] Mr Kennelly - I actually remembered his name, but I've forgotten the point the President put to him, so I'll pass on from that at the moment.

I think the other point that I'll make is one that I've made already, that you can't say that a matter has no basis if you don't challenge the economic evidence on which it's relied. So I think that that is the substantive point and that the remaining point is simply that, as I've said, there's no reason why these issues cannot be raised as a positive defence in relation to the economic analysis, and in particular, unfairness, at trial, subject to the caveat that we've made in our Reply, I think, in particular at footnote 5, that there may well be a debate about how far issues that were fully ventilated in front of the CMA, the Court and the Court of Appeal can be relitigated at trial. But I know

that the President at least is very familiar with these types of issues and that there has been guidance in various cases, including in the trial judgment of *Le Patourel*, so I won't take up any more time on that question now.

THE PRESIDENT: Thank you very much. Thank you.

MR THOMPSON: So I think those are my submissions and I'm broadly within time.

THE PRESIDENT: Thank you very much.

Just a few minutes' reply?

Reply submissions by MR KENNELLY

MR KENNELLY: Yes. For the avoidance of doubt, because the statement was made that we don't contest what Mr Bell says, obviously nothing in Mr Bell's report is accepted for the purpose of trial if this case proceeds, but we are not contesting his evidence at the certification stage.

In fact, for the purpose of the strike-out, I positively rely on how Mr Bell puts it.

THE PRESIDENT: Yes.

MR KENNELLY: My learned friend very helpfully accepted that one must read the Claim Form with Mr Bell's evidence, and he did so in his submissions. I ask the Tribunal when you go to deliberations to go back to Mr Bell and to look at the paragraphs surrounding those referred to by my friend. I'll give you the references:

Page 996, paragraph 4.8, Mr Bell makes a distinction between the negotiation that took place in 2017, that's footnote 211, where there was only a short-term delay to ESN contemplated, and the very different situation that arose after that when a much longer delay was contemplated, paragraph 4.8.

Then 4.11, my learned friend Mr Thompson showed you that Mr Bell says that the pricing agreed in 2018 reflected the fact that there was no short-term alternative provider.

Then, critically, members of the Tribunal, at paragraph 4.16, Mr Bell's conclusion on this question, page 999, Mr Bell says:

"[…] *there were no alternative provider, and the only terms Motorola were prepared to offer for the extension period* " --that is the extension period after 2018 -- "*were essentially the continued imposition of the existing terms. It is the continued imposition of the existing high prices to new time periods outside the scope of what the initial agreements anticipated, that represents both the potential abuse and the source of any associated financial harm.*"

That is the pleaded case. It is the Home Office over a barrel after 2018 that made the prices abusive. That's our short point in response.

As to the significance, finally, of the judicial review against the CMA and their appeal, that's absolutely irrelevant. The issue in that case -- the point I tried to argue -- was that there was no dominance after 2020 because the prospect of ESN, even a distant one, was enough to provide the relevant constraint. That had nothing to do with the separate question of whether Motorola had the requisite level of market power in 2017. It's telling that not even the CMA sought to allay to that, precisely because in 2017, Motorola did not have even the alleged level of market power which the PCR says was the reason why the Home Office was over the barrel and agreed to prices which they alleged to be unfair.

The authorities that are referred to in my learned friend's skeleton weren't pressed in submissions. I shan't reply to them. They're also irrelevant. Those are my reply submissions.

Funding

THE PRESIDENT: Thank you very much.

Thank you everyone. So I think we more or less caught up. We now go to -- very

quickly, then -- the funding point.

Now, on this, both of you referred to the early stages of the *Qualcomm* case and the comments that were made about funding there. Going back -- this is obviously a few years ago -- what was said in the judgment in that case was that there was an initial, somewhat general exclusion, and that was then tightened up and clarified, following which that was accepted.

It did occur to me that maybe one should explore in this case whether there should be some similar tightening up to meet the concerns that have been expressed. Because on the one hand, Ms Spottiswoode is clearly very experienced and she said in very trenchant terms there's simply no way that she would be acting unreasonably; it would cause her huge reputational damage and I can absolutely believe that. On the other hand, there seems to be somewhat of an incongruity between her saying: "this definitely won't happen", and then the need to maintain the clause.

So I did wonder whether, in light of that incongruity, one might want to deal with it by tightening up the agreement.

Mr Kennelly, would that be a way through from your perspective?

MR KENNELLY: Yes.

THE PRESIDENT: Yes, all right. On that basis, I could simply rise for a few minutes and you could discuss the point between you, because it seemed to me that that might cut through this issue. What do you think, or do you want –

Submissions by MR THOMPSON

MR THOMPSON: Well, I think the Tribunal will be aware from our discussions earlier that the position of the Home Office is not within our gift. This is the terms of an agreement between two parties, and you'll appreciate that authorisation from the Home Office is not a straightforward matter. So I don't know if I could make brief

submissions on what I would say is the legal position.

If the Tribunal nonetheless wishes to give indications about what it wants to happen, we'll obviously have to take instructions from the Home Office, but I don't think -- I mean, in a sense, this issue is not really Ms Spottiswoode's to fight, in that it is an exclusion which potentially increases her liability. But nonetheless, she has entered into an agreement.

My basic submission is that, first of all, given that this is the only point that's taken against the suitability of Ms Spottiswoode to act as a class representative, in my submission, it is a very weak, if any, minus factor, as against a mass of overwhelmingly strong plus factors. So that is not a basis to refuse certification. As the Tribunal, President, has already said, there are no reasons to doubt whether Ms Spottiswoode would seriously risk infringing this provision anyway.

The funding arrangements, in my submission are exceptionally favourable, not only in themselves, but also to the Defendants in that they eliminate a whole band of costs in that the Central Government or Government funds -- public funds - are being used not only to finance the litigation, but also effectively to -self-insure against any adverse liability.

These are terms negotiated by Ms Spottiswoode with the Government. Overall, she's given a -- recital H to the agreement states her position that this is a reasonable, good deal.

Then finally, there's the point that we make in our Reply that the concern is unrealistic in practice, in that the Tribunal would have the power to impose liability on the Home Office directly, on the basis that, although it wasn't a commercial funder seeking a return, it is the largest single claimant and thus has a strong policy and financial interest in the success of the claim.

Of course, if the Tribunal as a matter of case management says: "we would prefer it

to be like this", then we would clearly take instructions from the Home Office and I'm sure that they would listen carefully on that as they would on disclosure. In my submission, as a matter of certification, however, it's certainly not a basis on which to refuse certification, because it's only one relatively minor factor, as against all the other plus factors, using the language of Lord Briggs in *Merricks*.

But I can see that's a somewhat awkward submission for me to have to make at this time of night.

THE PRESIDENT: Yes.

MR THOMPSON: But nonetheless, in the interests of my client and as a matter of reality, those are my submissions.

THE PRESIDENT: Yes. All right. Well, I'll hear Mr Kennelly, but I think our position is going to be that we will want to know if the Home Office would be amenable to tightening the clause up in the way that was done, or similar to the way it was done, in the *Qualcomm* case.

MR THOMPSON: Can I just ask whether the Tribunal has specific wording in mind, or whether that's a matter for us to put together?

THE PRESIDENT: Well, no, we can go and look at the wording in *Qualcomm*. Not least because Mr Kennelly has helpfully said that that would resolve the concern from his perspective. It's towards the end of the *Qualcomm* judgment.

Yes, it's paragraph 112 onwards, red numbering 1036 of the Authorities Bundle. The amendments are set out at paragraph 115. Paragraph 117 confirms the Tribunal's view that the clause should "[…] *be amended in that way, to clarify the scope of the exclusion.*"

Then the main point here is that there is an additional provision that the exclusion applies, provided that where it's reasonably practicable to remedy the failure, the representative or the insurer has promptly notified the insured, and within

three working days of any such notice, the insurer does not remedy the failure by cooperating with and/or following the advice of the representative.

MR THOMPSON: Can I just say that, rather informally, my instruction from behind is that the Class Representative would have no objection to this course of action. So it's purely a matter of getting agreement from the Home Office.

Submissions by MR KENNELLY

MR KENNELLY: While I take instructions on that, madam, it's rather unsatisfactory because we still don't have instructions from the Home Office as to whether they are happy to agree to it or not.

THE PRESIDENT: Yes.

MR KENNELLY: That's a key missing link.

THE PRESIDENT: Yes. What I would propose is you make your submission setting out your concern, those will then have been ventilated in court.

MR KENNELLY: Okay.

THE PRESIDENT: What I will do in any event is I'm going to give you a very short -- I suggest a couple of pages -- reply on the new points raised by Ms Howard on the Damages Directive and the *Sainsbury's* case. So obviously we're not -- we're going to have some further submissions on Monday, or early next week. I propose that that you put that in by the end of Monday.

By the end of Monday -- this is within the hearing window in any event -- we have confirmation from the Home Office. I know this is a new point, and you have very helpfully given an indication that this would or at least might resolve matters from your perspective -- is that your instruction? That if the clause was drafted more along the lines of the *Qualcomm* clause in paragraph 115, which provides for the exclusion to kick in only if -- where it's reasonably practicable to remedy the failure that there has

been notification to the insured and the insured has then still failed to co-operate, so we're tightening up the situation in which the exclusion can bite; is it your position that that would resolve the matter?

MR KENNELLY: I'm sorry, madam, in the context of *Qualcomm*, is the idea that because of that notice period and that period for discussion, if -- and I'm not suggesting this would happen here -- but if the insured -- if the PCR was just behaving completely unreasonably, would there be an opportunity to replace the PCR or take steps like that, to ensure that the litigation proceeded on a proper basis?

THE PRESIDENT: Well, no --

MR KENNELLY: Because we're concentrating on quite an odd situation here where the insured is in defiance of what is considered to be reasonable at the time.

THE PRESIDENT: So the previous clause in *Qualcomm* referred generally to just a failure to co-operate, and it was then tightened up so, as you say, you got to a situation when the exclusion would only bite if the insurer was "in defiance of". So it's a much narrower exclusion. You would remove a situation when they can simply say: "oh, well, we think it wasn't reasonable", and they could only argue that if they'd given notification of the failure to co-operate, or failure to follow reasonable advice, and it was still not complied with.

MR KENNELLY: And it was reasonably practicable to remedy.

THE PRESIDENT: Yes, exactly. So you avoid a situation there when they can come back and say later: "oh, well, we don't think that their conduct was reasonable"; actually you put them -- the onus is then on them if it can be rectified to give notice. That makes it even less likely that Ms Spottiswoode would act in that way and therefore constrains even more the situation in which this exclusion could potentially bite.

MR KENNELLY: I understand, and those behind me are just checking --

THE PRESIDENT: Yes.

MR KENNELLY: Sorry, madam. Would you allow us to just consider that clause with our clients, because we'll need to take instructions from Motorola in the United States before we agree. And since we have until Monday --

THE PRESIDENT: No, I'm not asking you to. Obviously, if you can't agree that --

MR KENNELLY: Very grateful.

THE PRESIDENT: Another thing is, in the first place, we need to see if the Home Office would agree to something along those lines, and then you would be able to respond as to whether that resolved your concerns. I was just wondering if you could give an indication.

But why don't you ventilate your concern generally with the wording as it stands, and then we'll, just at the end of that, rather than getting a reply from Mr Thompson, I think we'll just have to work out a process for further submissions to be put in on this.

MR KENNELLY: I'll be very brief, since it's obvious that the Tribunal has read the clause and understands the concern. The real issue is why is Motorola bearing this risk? The provisions as they currently stand mean the Home Office would have grounds to withhold funding if it thinks that the PCR has behaved unreasonably and there could be a dispute which would leave Motorola out of pocket, and the question is why should Motorola bear that risk?

Now, the PCR's response is it's just fanciful that you would ever behave unreasonably. But that's not the point. First of all, if the risk is fanciful then why has it not been excluded? The Home Office is driving this, they are the funder. They are in, I'm sure, very close contact with the solicitors for PCR. We would expect that if it was fanciful, they would not have it, since it is by that very evidence unnecessary.

But one imagines there could be a dispute. Motorola could succeed in the trial and then the Home Office might decide that the PCR is behaving unreasonably and

withdraw funding. It's not completely impossible to imagine such a scenario. Why should Motorola bear the risk of that outcome? We can't constrain the PCR; we have no control; we're not in discussion with the PCR to ensure that it behaves reasonably. But the Home Office can take steps if, God forbid, anything was to happen that would make her behave unreasonably, the Home Office would be able to see that and take steps. We are powerless. Why should we bear the risk in those circumstances?

THE PRESIDENT: Yes. Well, that point is actually the one that is met by the *Qualcomm* clarification.

MR KENNELLY: I see that, madam, and that's why I want to explain that to my clients and revert to you on Monday. But that's our concern; there's no reason why we should bear that risk.

THE PRESIDENT: Yes, all right.

Well, I think the position on both sides has been articulated. What I think I would want to do on this is to understand whether the Home Office would make the clarification, or a clarification along the lines of the revised wording in the *Qualcomm* agreement.

(Pause)

Can I ask that by 4.00 pm on Monday, the Home Office's position, and that of the PCR, is set out. So that submission comes in from the PCR explaining whether there is an agreement to amend the funding agreement to deal with this issue along similar lines -- I'm not going to draft it by committee in the courtroom -- to those set out in the *Qualcomm* case. If so, can you put forward the precise revised clause that you would propose? That's by 4.00 pm on Monday.

By 4:00 pm on Monday, I would also be grateful for Mr Kennelly's maximum two pager response on the Damages Directive.

Then Mr Kennelly can then take instructions overnight from his clients, and then Mr Kennelly, you can then respond, with I think very short and again, no more than

two pages submissions on Tuesday as to whether any revised position on the funding is acceptable and resolves your concern.

If the Home Office's response is that they're not willing to amend it, then I don't think any further submissions are required, because I've got your submissions made today and in your skeleton argument, and the Home Office is aware or will be aware of the concerns of the Tribunal as articulated in discussion.

MR THOMPSON: Yes. I think the only issue I anticipate -- I'm sure we can as lawyers decode *Qualcomm* and come up with some similar wording based on the slightly different funding structure here - but in terms of authorisation, I'm aware that the original funding agreement, as you can imagine, was somewhat unprecedented for, certainly this jurisdiction, and also I think the government generally. So I'm not quite clear how the authorisation process would go to amend it, but clearly we'll take instructions and move it forward as fast as we can, because from the PCR's point of view, as I already said, we're very anxious to co-operate with the Tribunal.

THE PRESIDENT: Yes.

MR THOMPSON: So it's simply a matter of, given the plus side of the Home Office's central government funds, the downside is it's like less light on its feet than commercial funding.

THE PRESIDENT: Yes, well, that's going to have to be resolved going forward. Because we can't end up in a situation in very complex litigation where you don't have a clear line of authority and power to make decisions.

MR THOMPSON: Yes. I think the position of commercial funders has come up as a potential difference of view from the Class Representative. This is a different situation, we will obviously do our best to make everything align.

THE PRESIDENT: Yes, yes.

MR THOMPSON: Because the Home Office is not our client.

THE PRESIDENT: Yes. But I mean, there's a more general point that if you are struggling to get instructions from the Home Office, that's going to need to be resolved very quickly, because there may well be points during the course of the litigation where a decision has to be taken quickly.

MR THOMPSON: Yes. The question of the Home Office's role, or communication with the Home Office, is obviously something that we will consider as part of this exercise.

THE PRESIDENT: Yes, yes, all right. Thank you.

All right, now, is there anything else that, from the perspective of the parties, needs to be dealt with today?

MR KENNELLY: Just in terms of the deadlines, our two pages response on the Damages Directive is 4.00 pm on Monday.

THE PRESIDENT: Yes.

MR KENNELLY: For our response to the Home Office, could we have 4.00 pm on Tuesday?

THE PRESIDENT: Yes, that was what I envisaged. If Mr Thompson and Ms Howard were going to put in a short explanation of the Home Office's position by 4.00 pm on Monday. Obviously, if they are not able to do so and they ask for extra time, then you would have the corresponding extra time.

MR KENNELLY: I'm obliged.

THE PRESIDENT: Yes.

MR KENNELLY: On that basis, we have nothing further to raise.

THE PRESIDENT: No. I mean, it's not going to make any difference to the delivery of our judgment. As you may imagine, we're not going to be delivering our judgment on Tuesday. So much as we may endeavour to get this out promptly, which we will -- yes, is there anything else, Mr Thompson, you think?

MR THOMPSON: We will obviously take on board the indications of the Tribunal. We'll do our side and obviously, we will notify the Tribunal as soon as we can.

THE PRESIDENT: If there is any delay.

MR THOMPSON: We will do our best.

THE PRESIDENT: Yes. Yes. All right, let me just check if there are any further questions from the Tribunal members. (Pause)

Thank you very much. Thank you very much for delivering your submissions within the quite tight timetable. We've finished even a few minutes before we thought we were going to, which I'm sure everyone will be very happy about, so you can all go home a little bit earlier on a Friday.

I hope the tubes are now running better than they have been for the past week. I'll look forward to your submissions next week. Thank you to everyone in court, also to those who've not spoken and to those behind you who I know will have done a vast amount of work preparing for this case.

(4.35 pm)

(The hearing adjourned)