IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1441-1444/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 16th December 2025

Before:
Ben Tidswell

Dr William Bishop

Tim Frazer

(Sitting as a Tribunal in England and Wales)

BETWEEN:

CICC I - II

Class Representatives

v

Mastercard, Visa & Others

Defendants

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A P P E A R AN C E S

Kieron Beal KC and Flora Robertson (On behalf of CICC, instructed by Harcus Parker Limited)

Brian Kennelly KC and Emily Neill (On behalf of Visa, instructed by Linklaters LLP and Milbank LLP)

Matthew Cook KC and Hugo Leith (On behalf of Mastercard, instructed by Freshfields LLP and Jones Day)

Tuesday, 16th December 2025

(10.30 am)

THE CHAIR: Morning. Before we get going some of you are joining us livestream on our website. I must start, therefore, with the customary 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 contempt of court.

Good morning, everybody. Mr Kennelly.

Submissions on behalf of VISA DEFENDANTS

MR KENNELLY: Good morning. Members of the Tribunal, the usual suspects. I appear with Ms Neill for Visa Defendants. Mr Cook KC appears for the Mastercard Defendants. My learned friend Mr Beal KC and Ms Robertson appear for the Class Representatives.

MR TIDSWELL: Thank you. Over to you, really. We just have the one slightly multi-headed matter before us, haven't we? Yes, as I understand it.

MR KENNELLY: Yes.

MR TIDSWELL: I suppose the only preliminary question I have beyond welcoming you all is just to ask you about confidentiality, because I did notice there is "confidentiality" marked on some of the documents; is there anything we should be worried about saying in open court? Do you know? Is there anything anybody is particularly nervous about?

MR KENNELLY: There may be some individual bits of information which we can ask the Tribunal to read. But, unless I am told otherwise, certainly for the first hour when I am making my submissions, I don't anticipate any confidentiality issue at all. I will

have it in mind.

MR TIDSWELL: The only reason I raise it is I haven't seen anything I thought was confidential and I just didn't want to stumble into it. So we are very much relying on you if we're getting into that territory.

MR KENNELLY: We will have that well in mind as we go through the morning.

There are, as the Tribunal has seen, three issues before you. The first is whether, on a proper construction of the CPO and the associated documentation in this case, the communication of an intention to opt in made on behalf of a group or undertaking by a person authorised by that group or undertaking has been effective to opt in any legal persons in that group or undertaking the issue in the application.

The second is, as a matter of fact, which class members opted in to these proceedings by the opt in deadline in February 2025.

And, third, should class members that did not opt in now be permitted to do so, we say some nine months later, and, if so, on what terms?

My learned friend Mr Cook and I have divided the issues between us on the Defendants' side. I will deal with the legal arguments and proper approach to opt in in this case and Mr Cook will deal with issues 2 and 3.

As to those legal arguments, I will start, if I may, with the Class Representatives' position. For that you will need to look at the CR skeleton. Could I ask you to go, please, to -- it is in the first volume, if you have it in the bundle, if you have not taken it out, tab 4, page 80. I will start at paragraph 3, if I may. It carries over the page into page 80.

If you are looking at the top of page 80, it is the second line that begins:

"The use of the term 'person' ..."

So we are concerned here with the meaning of the word "person" in the Opt In Order:

"... must be construed consistently with the legislative framework."

Then this:

"While there is nothing in the wording of section 47A of the Competition Act which would preclude an undertaking bringing a claim as a person entitled to do so, in practice the CR has recognised that the constituent claimant entities should be specified when bringing any section 47A claim."

So, pausing there, two things needs to be -- strike the Tribunal. The first is the CR here appears in part to be reviving the argument that an undertaking can be a person for the purpose of this procedure.

And the second point -- that's in reliance on the Volkswagen v CMA case you see cited in the footnote on the previous page, footnote 1.

The second point is although the CR says that in practice the legal persons, the class members, should be specified, the CR does not say when these legal persons should be specified. On the CR's approach, they do not need to be identified by the deadline. So now, even ten months after the deadline, the Class Representatives say they are not all identified. That is entirely compliant with the statutory procedure.

Page 85 next. Top of the page, paragraph 19, we see a reference to "Merchant", a capitalised term. And this is important when we come to look at the CPO Order. But, here, the Claimant is saying:

"The opt in of the merchant, i.e. group or business."

CR here appears to be saying here the "merchant" means the group or business, which is wrong. We will come back to why that is.

Then, on page 88, paragraph 27, we have a necessary acceptance by the CR which we adopt. In 27, halfway down, beginning:

"While it is true ..."

So the CR says --

MR TIDSWELL: Which paragraph are you on?

MR KENNELLY: Paragraph 27. I am looking halfway down that paragraph:

"While it is true that the CR has accepted that relevant rights of action belong to a specific legal or natural person ..."

And in the context of this case class members will be legal persons:

"... the definition of 'Excluded Merchant' means that a specific legal person can only be a class member if it is part of an undertaking with a turnover exceeding £100 million."

So, on this key point, the CR appears to accept that a claimant and a class member must be a legal person, but an undertaking is not necessarily a legal person.

Over the page, we have the CR's main case. Top of page 89, second line:

"The CR has established in accordance with these principles the notification by 93 different undertakings [which are persons under the Competition Act] of an intention to opt their eligible claimant companies into a set of proceedings which has already been initiated by the Class Representative."

That is the CRs' case on the law. Despite the discussion we had and our hopes at the previous hearing, it is necessary for the Tribunal to grapple with this question. This is the first time this issue has arisen. It is a question of principle and clarity -- is needed, we say, if this opt in procedure is to be effective.

I am sorry, sir.

MR TIDSWELL: I was just going to make sure I have understood what I think is going on here. I think they are saying -- tell me whether you think I have it right. I think they are saying: if you start actually with the Competition Act, section 59 and interpretation for part 1, and then you look at Volkswagen and so on, you can equate undertaking with a person.

So they say as a matter of general principle that's possible.

They are, how, I think, accepting that when you get to 47A, reference to "person" in

47A is more difficult to treat as being an undertaking, which is why I think they have recognised, at the end of paragraph 3, that you are down to the legal entity level at least. Whether they have accepted that it has to be a legal person, I am not sure. But, certainly, you are down to the legal entity level when you get to that.

So the distinction that's been drawn is the process of -- as I understand, they are saying the process of opting in, which can be done at an undertaking level, and some further action that needs to be done in order to identify precisely which entities are the claimant entities for the purpose of section 47A. That's the argument, isn't it?

MR KENNELLY: I think that is what it is. "Undertaking", "opt in", mentioning the legal persons, and then, at some later stage, the legal persons, the class members, are identified.

MR TIDSWELL: Yes. There's a practical point, isn't there, there, that -- I suppose -- maybe you are going to come on to this.

First of all, we are dealing here, aren't we, with the first of two situations? We have two situations, haven't we? We have a situation where -- I appreciate there may be some other variants on this -- but, broadly speaking, you have a situation where the opt in is expressed at undertaking level or said to be expressed at a group level, and you are saying that's no good because you have to say who the entities are. Then you also have a situation where the opt in has been expressed at an entity level and you are saying: if that's what's happened, then you are fixed with the entity that's opted in that level.

MR KENNELLY: Exactly.

MR TIDSWELL: Yes. You are maybe going to come on to this. I am sure you are going to come on to this. I don't want to take you out of your way. What is the right way of looking at this? We seem to be interested in intention, some sort of inference about intent, and maybe the argument is about how far we can infer intent.

But, just to give you an example of that, if, for example, there were one or two examples of the opt in being by entity plus its group -- one example, I think, is there is a hotel group, isn't there, PPHE, and they say, "We want to opt in the holding company and group", so it is clear there is an intention to opt in the group. But I am not sure whether you say at that stage -- I think you do say that's not good enough; is that right?

MR KENNELLY: Absolutely not, because the legal -- a class member has to opt in and that class member is a legal person. So the legal person has to opt in and there has to be some sign that legal person is giving authority to the person who is signing to opt in on its behalf.

MR TIDSWELL: Yes, just put aside the authority point for a minute, because I think there is a difference, isn't there, between the question of whether somebody had authority to do what I have just said or not, and there is obviously an important question, but it is a separate question, isn't it, from whether it is permissible for somebody with authority to come along and say, "I am opting in my whole group and I am not specifying the entities. I don't know who they are yet". So it won't be the whole group, because we all know there will be non-trading entries and entities that didn't take card payments or whatever it is, but I am giving you, if you like, a blanket opt in for my group.

Putting aside authority, is that something you accept as a matter of principle can happen?

MR KENNELLY: No, because there has to be an act of a named legal person to opt in. The opting in is done by the legal person. So, if you don't have a named identified legal person, there is no act of that legal person to opt in before you even get to the question of authority. There has to be a legal person, an identified class member opting in.

MR TIDSWELL: Yes. And there is a legal person. As it happens, we now know, don't

we, that the group has X many companies in it, and we also probably know -- I am not sure if we have come this far, but we will certainly know at some stage whether they have a claim or not. So we will be able to filter out those ones that don't.

You are saying -- I think, just to make sure I am clear where your starting point is: you are saying unless it is the name of the entity put into the bit of paper that goes into the opt in machinery, then it is not good enough.

MR KENNELLY: Yes. And it's as simple as that. The regime, as I hope to explain, is very simple. A class member opts in by identifying itself and opting in. It is the act of a legal person. What you can't have is company A opting in and then someone coming along later and saying, "Actually company B opted in".

MR TIDSWELL: If it was straightforward to infer from what was said in the opt in that company A and B were opted in; why would that offend?

I think you're saying -- I am just asking the question. I am not saying I think that. I'm just trying to get the shape of this and from your point of view, because I think you are saying that there's no difference between the opt in process and the section 47A specificity. I think that's what you are saying, isn't it?

MR KENNELLY: Yes, exactly. But, to be clear -- and this is why I should get into these submissions -- the concern you are raising with me, sir, focuses principally on: what if the person who is opting in says, "I am doing so for a group"?

THE CHAIR: Yes.

MR KENNELLY: That's why we shouldn't spend too much time on that because in reality there are three examples of that in this case.

I appreciate, since we are discussing a point of law, you will have to take a view, but shall I just develop the point --

MR TIDSWELL: Actually, I think we are going to have to ask the question because I don't see how we are going to be able to deliver a judgment on this without dealing

with it. As I think you are just recognising, that is not going to be limited to this case in terms of its ramifications.

MR KENNELLY: Of course. The point is it won't do to say, "I am opting in the group", in any event. In this case, the situation is even more extreme because in the vast majority of cases that's not what is being said.

MR TIDSWELL: Although if you are right about that, it would dispose, certainly, of that entire first category, because there could be nothing that could be done later either by way of authority -- regardless of authority, you would say there is nothing that could be done to cure that problem.

MR KENNELLY: Shall I continue?

MR TIDSWELL: Yes, please do.

MR KENNELLY: I don't want to keep you here for any longer than I need to.

Before looking at the legislation though, just to understand what an undertaking is because the idea is that "an undertaking" opts in other unnamed companies, we must look at what is meant by an undertaking. What does it actually mean?

For that could you take up the CMA v Volkswagen judgment in the authorities bundle? Tab 18, page 288, paragraph 41. This is a quote from the *Sumal* judgment of the Court of Justice. It is the indented paragraph 41. We are concerned here with the definition of "undertaking":

"The decisive criteria [you see in the second line] is the existence of the unity of conduct on the market. Without allowing the formal separation between various companies that results from their separate legal personalities to preclude such unity for the purpose of the application of the rules. The concept of 'undertaking' covers any entity engaged in an economic activity irrespective of its legal status, the way it's financed. It defines an economic unit even if in law it is several persons, natural or legal. It consists of the unitary organisation of personal, tangible and intangible

elements. It pursues a specific economic aim on a long-term basis and formulated in that way it can contribute to the commission of infringement of the kind in Article 101." So it's not necessary for the companies in a particular undertaking even to share a common ultimate owner. An undertaking is a much more fluid concept than a group of companies with a common owner. For an undertaking what matters is unity of conduct on the market, common organisation as a matter of substance, not form, pursuing a specific aim. It's a substantive, not a formal test. It looks to control at a particular point in time.

So, depending on the degree of unity of organisation or objectives, particular legal persons may come or go out of an undertaking, depending on the circumstances.

With that in mind, we look at the legislation. That is in the first volume of authorities, tab 4, the Competition Act.

Sorry, it is section 47A. So it's tab 1, page 4. We can pass over these fairly quickly because I think this is common ground. Section 47A:

"A person can make a claim to which this section applies.

"(2) this section applies to a claim of a kind which a person who has suffered loss or damage may make in civil proceedings."

And only a natural or legal person may make claims to the proceedings, so it is common ground that an undertaking is not necessarily a natural or legal person.

MR TIDSWELL: It could be, where there is a narrowing of that group of persons who could bring the claim, couldn't it? If you accept the Class Representatives' argument for a moment, that would be consistent, wouldn't it, to say you have a broad definition of "person", and you pointed out how broad it is, but what is happening, in 47A, is it is making plain only those who could bring claims in civil proceedings, which, as you say, could only be an entity.

MR KENNELLY: Yes, indeed.

MR TIDSWELL: I am just making a point there may well be a narrowing, if you like, of the class of persons when you get to this point.

MR KENNELLY: Absolutely. So we don't deny in section 59 of the Competition Act a person includes "undertaking" in the definition, but that's subject to such narrowing as may take place in --

MR TIDSWELL: You would say narrowing has taken place here?

MR KENNELLY: Yes, absolutely.

47B, on page 8, that's the combining of two or more such claims that we have just looked at. Those are the claims and legal persons.

Over the page, page 9, we see section 47B(7):

"A directive proceedings order must include the following matters ..."

This is (b):

"A description of a class of persons whose claims are eligible for inclusion in the proceedings."

Those are the claims of naturally legal persons who then are class members if they are eligible for inclusion.

It is on page 9, sir.

MR TIDSWELL: I am sorry. I have it now.

MR KENNELLY: We are in subsection (b).

MR TIDSWELL: Yes.

MR KENNELLY: Then 47B(10), same page:

"Opt in collective proceedings are collective proceedings which are brought on behalf of each class member [we have just seen who that is] who opts in by notifying the representative in a manner and time specified that the claim [and that is the claim described above and in 47A should be included in the collective proceedings."

So the legal person is a class member and it opts in.

How does it do that?

MR TIDSWELL: So you are saying that those sections link the opt in process back to the narrowing in section 47A?

MR KENNELLY: Yes. So that's the claim. How does the class member bring its claim?

It does it by opting in, by notifying the representative that the claim should be included in the collective proceedings. That is how the legal person initiates its claim. It initiates it by opting in. This is the originating process. It is critical that the defendant and the Tribunal know which legal person or persons have initiated a claim against the defendant and by when, not least for limitation purposes.

Saying that an undertaking has sued couldn't possibly be enough. It is mentioned as fluid. It depends on links of substantial control. It may only be ascertainable -- even properly at trial.

Then we look at the rules, tab 7, 29.41. Rule 73. Rule 73(2):

"A class member means a person falling within the class described in the collective proceedings order."

Consistently with the legislation, it must be a natural or legal person.

Then 29.46, Rule 80:

"A collective proceedings order shall [it is mandatory] authorise the Class Representative to act as such in continuing the proceedings and shall ..."

Skipping down to (h) over the page:

"The order shall specify the time and manner by which in the case of opt in collective proceedings a class member may opt in."

So this is mandatory. There must be a date and time by which legal persons, who are class members, opt in, when they initiate their individual claims.

Rule 81(1):

"Class Representative shall give notice of the collective proceedings order to class members in a form or manner approved by the Tribunal."

81(2)(e):

"The notice shall draw attention to the provisions of the order setting out what a class member [that's the legal person] is required to do and by what date so as to opt into or out of the collective proceedings."

Then 82(1)(a) immediately below that:

"Class member [the legal person] may on or before the time in the manner specified in the order in the case of opt in collective proceedings opt into collective proceedings."

You have, obviously, 82(2), which will be taken up by Mr Cook about needing permission to do so after the deadline.

While we are here, over the page 29.48, Rule 83. It is an important rule for the purposes of construction. 83(1):

"After the collective proceedings order has been made the Class Representative shall [so it is mandatory, no exceptions] establish a register on which it shall record the names of those class members who in accordance with Rule 82 opt into [for our purposes] the collective proceedings."

So, at the deadline, there needs to be a register of the names of the legal persons who have opted in.

MR TIDSWELL: It doesn't say deadline, does it? It just says --

MR KENNELLY: I am sorry, it's related to the deadline and anyone who has been added later under 82(2).

MR TIDSWELL: Yes. It doesn't specify any time, does it, other than it has to be after the order has been made?

MR KENNELLY: Except we have just seen, sir, that the opting in must be done by the date or time specified by the Tribunal's order.

MR TIDSWELL: Yes.

MR KENNELLY: On that basis, when 83 requires a register of the names of the class members who have opted in, it must mean opted in by the date and time specified by you subject to 82(2).

MR TIDSWELL: I understand that. I am just challenging. I think the reality is that the register is not going to be done at the time of the deadline for opting in, is it, because, presumably if someone opts in at 5 minutes to 4.00 pm, that needs to be checked and put on the register, which in itself is going to take you beyond that, but also this -- there is bound to be some form of due diligence that is required to establish they should be on the register.

I am challenging the point that the register really has any timing implications here.

MR KENNELLY: If Rule 80 and 81 require that the opting in is done by a deadline, and Rule 83 requires a register of those people who have opted in, it must be approximate to the deadline for opting in, because at that point the Class Representatives will have the names of the class members who have opted in. So one would expect the register to be on or about that date in order to do its job, in order to fulfil its statutory purpose.

So I do maintain the submission that what the rules contemplate in Rule 83 is that when the class members have opted in, at that point there should be a register held by the Class Representatives of the names of all the class members who have opted in, because without that there is no discipline as to when the register is maintained. If it is open-ended, the register could be produced years later. There needs to be some discipline as to when this register is to be produced as a matter of construction.

The important point I'm making is that it is a register of the names of the class members, the individual legal persons who had claims and opted in.

The reason why this register -- another reason why the register ought to be prepared

at the time of the opting in is there's an important right in the Tribunal, and in the defendant, to ask for a register, to inspect it in 83(2):

"On request the Class Representative shall make the register available for inspection by the Tribunal and the defendant."

That's very important, because it allows the defendant to know who is suing it and the Tribunal obviously needs to know who is before it, who has originated proceedings, who has originated process and initiated their claims before you. That is something that you are entitled to at the point that they've opted in -- sorry, by the deadline. By the deadline by which they ought to have opted in.

Now, in this case, when the Defendants asked for this register, of course, as you know, when they asked for this information, the Class Representatives refused. We had to apply to the Tribunal for an order.

What the Class Representatives ultimately produced, in March 2025, was not what your Order required. It was not the names of the individual class members who had opted in. It was a list of 94 groups or undertakings which Harcus Parker claimed had opted in other legal persons who were not named on that register. It wasn't a list of class members at all.

You have seen the document. I will just give you the reference. It is in volume 3, tab 63, page 1310.

I will then look at the collective proceedings order itself. I will take the Visa version. It is in the first hearing bundle, behind tab 10. Page 253, it begins. I would ask you to go to page 255, paragraph 8, the definition of "merchant". You saw the suggestion the Claimants, as part of their skeleton, that merchant means "group" or "undertaking". Here:

"'Merchant' means a person which accepts payments by means of payment cards and which has a contractual relationship known as an MSA with an acquirer that provides

services to the merchant, enabling the acceptance of a payment card by the merchant in accordance with applicable rules laid down by the Visa scheme rules."

That means, obviously, that the merchant must be a legal person. Only a legal person can enter into a contract with an acquirer. You can't speak of a group or undertaking entering into a contract. They don't have legal personality.

Then page 256, paragraph 13, the definition of Excluded Merchant. This is obviously relied on very heavily by the Class Representatives:

"'Excluded Merchant' means any undertaking the turnover of which on average is less than £100 million per annum in relevant period."

But, as the Class Representatives said in that passage from the skeleton I showed you, what that means is that an Excluded Merchant means a merchant which is part of an undertaking, the turnover of which is, on average, less than £100 million per annum. All that means is that the legal persons are excluded if they are part of an undertaking with a turnover at that level. That paragraph of the CPO cannot change the requirements of the Act or the rules. There is no need for it to do so. It cannot have that effect, if that's what the Class Representatives contend.

Page 257, paragraph 21, another reason why the Class Representatives' construction simply does not work because, in paragraph 21, the order deals with domicile. It provides:

"The domicile of the class member be established, because any person domiciled in the UK on the domiciled date that falls within the class shall not be included in these collective proceedings unless they opt in."

So you need to know the domicile of the class member. Now that can only be a legal person. An undertaking does not need a domicile. It may not have one.

Look at (a) and (b), this legal person, in order to opt in, must follow the procedure in the order notice. And then (b):

"The legal person must notify their decision."

That is the decision of the legal person, the decision of the class member. It has the relevant domicile, which can only be held by a legal person. Their decision to opt in to the collective proceedings by the deadline that is specified in the order.

MR TIDSWELL: The point about domicile is a bit of an odd one, isn't it? As I understand it -- and you may tell me I am wrong about this -- but Rule 81(g) requires a domicile date to go in every order. But I can't, at the moment, see what the point of it is in the opt-in proceedings? Is there any point in it? Does it serve a purpose?

MR KENNELLY: The domicile requirement at all?

THE CHAIR: Yes, in the opt-in proceedings.

MR KENNELLY: Plainly, it's a policy choice as to the geographical scope of the order itself. But, for the purpose of construction, I mean, I don't even need to go that far.

MR TIDSWELL: No, I know. I am curious about it really, partly because I simply wonder whether there is any reason why the rule should extend to opt-in proceedings. But I suppose there is a sort of slightly broader point, which is, with the benefit of hindsight, this order has some slightly odd things in it.

MR KENNELLY: Yes.

MR TIDSWELL: I suppose that does suggest slight caution in using it as an aid to construction because I am not sure a lot of the points we are talking about were contemplated by anybody when this was drawn up, certainly not by me. That's not to say we can ignore it because obviously it is the Order. I appreciate that's the guard rails. If it says something that's plain, then clearly we have to abide by that. I understand that.

I am, I think, just making the point there are some oddities that give rise to arguments both ways about what it means.

MR KENNELLY: I respectfully agree. In construing the process the most important

provisions are obviously the statute and the rules. The Order cannot be the tail wagging the dog. That's our submission.

It is the Class Representatives who place so much reliance on the word of the Order and the annex to the Order. We respectfully agree with the observation from the Chair. What is plain as a matter of construction is that what is contemplated is no two-stage process where a group or undertaking opts in on behalf of a whole group of unnamed, unenumerated, unnamed people. Then, at some later stage, the Class Representatives sort out who are the class members. That is not what is contemplated.

What is contemplated is a very simple process where, by a deadline, class members, who are legal persons opt in.

MR TIDSWELL: Does that work in the real world? A point that's made, I think, in Mr Robinson's witness statement is in the real world the Class Representatives are going around to hundreds of companies trying to encourage them to join the proceedings and doesn't really know, until quite late on in the process, whether people are going to or not. Obviously, if you have very large entities with lots of subsidiaries who then decide to join at the last point, it is actually not terribly practical for someone to suggest that you can get, with some degree of confidence, identification of the entities which should be in the claim, and that's just unreasonable and impractical. That's, I think, the argument that has been made.

MR KENNELLY: We don't accept that at all.

Parliament, and through the Rules, has applied its mind to how much time is needed to do this. I am sure there are arguments to say the period should be longer or shorter. That's a matter for the legislature. The rules are clear as to how much time is allowed for class member who are legal persons to opt in.

I think the Tribunal should take Mr Robinson's evidence with a grain of salt because if

you actually look at his second statement, he speaks to decisions being taken much more rapidly. And one cannot allow the confusion or disorganisation on the part of one firm of solicitors or their agents to drive the construction of process which applies to the whole country.

Mr Robinson's second statement; can I just show that to you, sir, since you raised the point?

MR TIDSWELL: Yes.

MR KENNELLY: It is in the second volume, behind tab 49. If you go to page 1112 and paragraph 15 -- actually, if you go on to the previous page, you see how it begins. It is the American Express global travel business. So they are entries within the GBT corporate group.

Over the page, GBT acquired, in September 2025, CWT. If you look at paragraph 16, a query is raised about that in October 2025. Harcus Parker asked for confirmation of authority from CWT.

Then in paragraph 17 -- this is the paragraph I wanted to show you – Mr Zuppa asked Harcus Parker whether other GBT entities could join CWT's claim, on 25 November 2025. And Harcus Parker and GBT have, since that date, discussed which precise entities should form part of the request for permission to opt in and they are included on the November register.

This statement is signed 28 November 2025. So it can be done in a week. Sometimes it takes longer than that, but the idea that six months is insufficient ...

And, of course, they are not coming from a standing start. We know from all the other opt in and opt out cases, the book building exercise being long before the certification and judgment itself. In any event, six months was determined by Parliament to be sufficient. And in our respectful submission, the evidence before you does not come close to undermining that policy choice.

Now, sir, I say six ...

Sorry, I made a mistake. I was just checking to make sure it was the Rules that said six months and not just the Order. I understand the rules say it.

MR TIDSWELL: The Order is the source for six months.

MR KENNELLY: I think the Rules also specify that it is six months.

In any event, six months was specified. If that period is to be extended, that's a matter to pick up in the 82(2) application.

What Mr Robinson said was he was close to showing that the process itself, the process by class members as legal persons have to opt in by the deadline, that is somehow so impracticable that you have to blow up the regime and create extraordinary uncertainty, to which I will return.

MR TIDSWELL: Sorry, can we go back to the Order? I have a question for you about that which has just vexed me slightly. I think I know the answer to it. There is another unsatisfactory aspect of it, though.

So I am just looking at -- it is tab 10, I think, and I am looking at page 258.

MR KENNELLY: Yes.

MR TIDSWELL: I had forgotten this Order was redrawn, I think under the slip rule. Rather oddly, when it was done it was redated 17th February 2025. Whereas, in fact, I think the original Order was 10th August or 9 August 2024. I don't believe anyone has taken a point on this. No one is suggesting that somehow six months starts to run from 17th February.

What I think happened was there was some reason to amend it. I now can't remember what it was. I think there was a point made about -- there was a reference in the previous order to it being an aggregate claim for damages, which, of course, it isn't. So I think the Class Representatives' solicitors suggested it be amended, and it was. I think what probably should have happened is it should have been re-dated the

9 August, having the date changed.

MR KENNELLY: No-one is suggesting anything turns on that.

MR TIDSWELL: I am wondering whether we should be exercising this jurisdiction and adjusting that date, so it is 9 August 2024. You may not know the answer. I might have to ask Mr Beal this. But presumably there were no fresh notices issued?

MR KENNELLY: You will have to ask him.

MR BEAL: The date of the amended Order was 17 February. It was after the deadline had closed --

MR TIDSWELL: Yes.

MR BEAL: -- so no fresh notice went out. We haven't taken a cheeky point that somehow that error means that six months has not expired yet.

THE CHAIR: It took me some time to work out. I couldn't work out why my six months was different to everybody else's, but I did eventually work it out.

Thank you. That's helpful.

MR KENNELLY: So those are my submissions on the Act, the rules and the order. I am turning now to the Class Representative's argument, the reformulated issue 1, that an individual can sign a notice on behalf of an undertaking or group and that has the effect of opting in all the eligible legal persons in that undertaking without any need to mention particular legal persons being opted in. We say that is wrong in law and completely unworkable in practice.

As a matter of law, a company or other legal person can only act and so can only opt in to collective proceedings through officers or agents authorised to do so by that legal person.

The Class Representatives seem to accept this. In the second volume of the hearing bundle, please, could you turn up tab 32, page 525, paragraph 21. Paragraph 21, second part:

"Nothing prevents, for example, the director of treasury of Pilgrims Europe from signing and returning a separate opt in form on behalf of each of the five relevant legal persons in that group provided he has the due authority to do so on behalf of each legal person."

So that makes sense because of the concept of a decision of a corporate group. The idea that a corporate group that can decide to opt in, that is legally meaningless because a corporate group has no independent legal identity. A corporate group cannot authorise a natural person to act on its behalf or on behalf of individual group companies.

MR TIDSWELL: I just wonder how helpful the authority point is in all of this. I appreciate it is a point you have made and made consistently, and obviously it has been responded to. I am just not sure why it really gets us anywhere very much. Obviously, as a matter of fact, if there isn't proper authority, then I understand the point you're making, but when you work through the -- and I don't know whether you are going to do the law on authority, hopefully not. But, when you work through it all, particularly with the later authorisations -- and I appreciate you have some points about the terms of those -- is this really what this case is about, what this argument is about? It is not really, is it?

MR KENNELLY: It is the second point.

MR TIDSWELL: I understand you have a further point. But, I suppose, you know, there is no question, is there, that somebody who is the director of treasury at a holding company could be authorised for every entity? If they listed them all, they could be authorised.

Indeed, I think we have one or two cases where someone has listed an entity and said, "I am authorised for them all", even though they are not an officer of that entity. You have to be an officer of a company to be authorised by it. Clearly, that is evidenced

by the Class Representatives' solicitors sitting here today, being representatives for some purposes under the law of agency.

MR KENNELLY: Indeed. The first point is: is there a named identified legal person saying, "I would like to opt in"?

The second question is: is this person signing for this legal entity, authorised by it?

MR TIDSWELL: Yes.

MR KENNELLY: That is the second point. The first point is: where is the identified legal person --

MR TIDSWELL: I just think where --

MR KENNELLY: -- opting in?

MR TIDSWELL: It just seems to me if you are wrong on the first point, the second point is not very attractive, is it? Even if the Class Representatives have not managed to do a tremendous job, on your argument, of ratifying that authority, is it ratifiable? And presumably, if we were to say, "There is a defect on that. Go away and do it again", it seems to me to be a bit of a hopeless point if the true reality is that the entity in this situation wants to be involved. If that's the defect, it can be fixed and it can be fixed very easily. And if it's not been fixed properly yet, then we can direct how it's fixed. I just don't see where that really gets you.

MR KENNELLY: That's the second stage.

The first point is: is there a legal person who is ostensibly acting, who is making the decision to opt in?

And then: is the person signing for it authorised by the legal person?

But one cannot ignore the second point.

Let me start with the first part --

MR TIDSWELL: Just to be clear, I am not disregarding hundreds of years of agency law. I'm not (inaudible) a bit.

I think the point I am making is that whatever the defect is, if you are wrong on point 1, whatever the defect with point 2 is, it can be cured.

MR KENNELLY: Yes.

MR TIDSWELL: You may have some point about whether it has been cured or not. But I mean we are really wasting an awful lot of money if that's where we are.

I appreciate -- I am absolutely not giving you any signal you are wrong on that. It is obviously a very difficult point and challenging point for us. But, if you are wrong on it, I just wonder whether we need to get into agency arguments.

MR KENNELLY: If I am wrong on my first point, then you need not concern yourself with questions of authority.

MR TIDSWELL: I am testing, I think, the point that if you are wrong on your first point; where do you think the agency point takes you? Are you really going to resolve this by the agency point in circumstances -- so the proposition I am putting to you, that the agency point is curable, if indeed -- assume you have lost on the first point, and if indeed the entity doesn't want to be involved in these proceedings, whichever entity it is --

MR KENNELLY: Yes.

MR TIDSWELL: -- whatever defects in authority have been apparent so far are curable.

So Mr Beal could produce a bit of paper from anybody, no matter who they were on this list, so long as they passed the first test, and you wouldn't be able to push back on that. And he could do that next year or the year thereafter. Frankly, the timing wouldn't matter terribly because it would validate what happened retrospectively. Maybe next year is a little ambitious. But, certainly, he could do it tomorrow if the problem that emerged today was one he could fix.

MR KENNELLY: Obviously, a lack of authority in both situations -- we will come to

those -- can be fixed. Mr Cook will address this when he comes to his submissions. But the point is that a letter from anybody, not necessarily do to show authority to opt in a person for the purpose of ratification.

MR TIDSWELL: No, I appreciate you have points about the authority argument. I'm not saying -- and by all means we will hear them. I suppose I'm just trying to -- I'm asking the question as to -- in circumstances where -- is there anything that isn't -- I suppose that's my question: are you saying there is anything that isn't curable as a matter of authority here, provided the Class Representatives have the paper right?

MR KENNELLY: In principle, a lack of authority can be cured. In this case, they have not done so.

MR TIDSWELL: No, I understand on the facts, but just as a matter of principle.

MR KENNELLY: As a matter of principle, of course. On these facts that's not what's happened.

MR TIDSWELL: You can see why I am pushing you on it, can't you? It is not very attractive -- if you have lost on point 1 -- and I appreciate there may well be arguments about a litany of error and all sorts of things. I am sure you will make all those points, if that's what the position is, I don't know. But we're not really in the business of having big fights about things that can be cured. If Mr Beal can cure them, he will cure them.

MR KENNELLY: Which is why I am trying to get away from the second point because I hope to not lose on point 1.

MR TIDSWELL: Yes, of course.

MR KENNELLY: That's why --

MR TIDSWELL: No, no, well, we will have to address the point regardless of whether you win on point 1.

MR KENNELLY: Indeed.

MR TIDSWELL: That may be a luxury you have. It's not one we have.

MR KENNELLY: Let's look at point 1 first and then I will see what I can do about point 2.

Point 1 -- the reason why I am trying to pull you back on point 1 is because it is so overwhelming, in our submission.

Can I take up the Armagas case that's cited by -- there is a link between point 1 and point 2. It is in authorities bundle, tab 12. This is cited against us by the CRs and it goes to why we should just accept that the person who signed, they say, for an undertaking should just be taken as having authority to sign for the unnamed legal persons within that undertaking.

If we go to page 119, the speech of Lord Keith. Top of the page. This passage is slightly against us. It deals with ostensible authority. Their case is a person who signs has ostensible authority to act for these other legal persons. Second line:

"Ostensible authority comes about where the principal by words or conduct has represented that the agent as the requisite actual authority and the party dealing with the agent has entered into the contract with him in reliance on that representation, the representation from the principal."

Who is the principal for the purpose of establishing whether these legal persons are opting in?

The principal is the legal person who is said to be opting, not the undertaking or the corporate group. Then further down that page, between B and C:

"Ostensible general authority may also arise where the agent has in the course of dealing with the particular contractor and the principal has acquiesced in this course of dealing in honoured transactions arising out of it."

Who is the principal?

The principal is the legal person who is said to be opted in.

Where is the evidence that these legal persons have honoured transactions arising out of the agent's course of dealing with the contractor?

Where, before the opt in deadline, is there any representation by these legal persons of any kind or any sign of these legal persons acquiescing in the agency by honouring transactions?

There is no sign or mention of them at all. There is no representation by these legal persons by the deadline of any kind.

MR TIDSWELL: I'm sorry, no. I'm sure that is not what this is about. Surely, if you have the general counsel of the company, that is the representation. The representation is the general counsel when they go and say, "You can start proceedings on behalf of the company", is -- surely that's a representation? They have the authority to do that.

MR KENNELLY: If it is from the company. The principal here is --

MR TIDSWELL: The point I am making is the appointment of someone who is the general counsel is a representation that they are authorised to represent it.

MR KENNELLY: Yes, sir. But --

MR TIDSWELL: If it was somebody in the post room, clearly you wouldn't be able to draw that conclusion.

Surely a senior officer of any organisation has been given ostensible authority just by that very nature to bind that organisation.

MR KENNELLY: What organisation, sir? The principal here is the legal person. The agent is the general counsel who has sign the contract. The principal making the representation is an identified, specified legal person.

MR TIDSWELL: Well, in this particular circumstance, it would be the general counsel on behalf of all the companies in the group.

MR KENNELLY: If that's what the general counsel was saying.

MR TIDSWELL: Yes, of course.

MR KENNELLY: If he was saying "these X number of companies which I am identifying", perhaps by implication, that would be representation by the companies.

MR TIDSWELL: Forgive me, I may be missing something. I had thought we were going back to your argument (inaudible) argument. Isn't this all just about authority?

MR KENNELLY: No, there is a link, because in Armagas what is stressed here is the principal has to be making representations. That's why you need to see the name of the company. The company itself has to be acting, the legal person. Not the undertaking or the corporate groups, the legal person has to be taking an act which serves as representation that the person signing has authority from that legal person.

MR TIDSWELL: Just let me see if I have this right. So you are saying to reinforce your arguments that only a legal person could do the things we have been talking about, you are saying in addition that someone can only be authorised to represent them at a specific level. So, if they're general counsel, they have to be the general counsel representing whatever entities, and you're saying that's another reason why we should shy away from accepting a generalised, is that right, the generalised representation?

Sorry, it's my fault, I'm sure.

MR KENNELLY: I am simply making the point that you need an identified legal person making an act. And what Armagas shows is the link to authority, because you assume that the person signing has authority because of the representation from the legal person, the person signing, the natural person has authority. It's because you are getting representation from a company. That's why the identification of the company is so important.

You see that in the Companies Act. Can I show you tab 6, a similar point? It goes to -- don't be alarmed, please, by the fact it speaks of powers of directors to bind the

company. It looks like an authority point. But, again, it shows, encapsulated in statutory form, why the identification of a legal person is so important. This, again, is relied on against us in the CR skeleton. Tab 6, page 27, Companies Act 2006, section 40:

"In favour of a person dealing with a company in good faith the powers of the directors to define the company or authorise others to do so is deemed to be free of any limitation under the company's constitution."

(2)(b):

"The person dealing with the company isn't bound to enquire as to limitation in the powers of directors to bind the company."

In order for this to apply you have to be dealing with the directors of a company. That makes sense if you are dealing with the directors of a specifically named company. If you are dealing with the directors of company A, you don't need to enquire as to their authority to bind company A. But you can't assume that they are acting for company B when company B isn't mentioned in the Act.

MR TIDSWELL: I see. So, actually, is this the inference point then? Is that the point you are making? Which is that you can't make -- you are saying we can't make the inference that somebody who is the general counsel for the group is acting on behalf of any particular member of that group unless they say so. Is that simply the point you are making?

MR KENNELLY: Yes.

MR TIDSWELL: So you are shutting the door on inference is basically what you are doing?

MR KENNELLY: Yes.

MR TIDSWELL: That is entirely consistent with your point 1, isn't it, that you're saying you have to work on the basis of identification of entities? And you're saying in those

circumstances -- in addition, you are saying you should be careful about drawing inferences in circumstances where there is no identification of the entity. That's the point, is it?

MR KENNELLY: Yes.

MR TIDSWELL: I get it.

MR KENNELLY: I have to look at authorities that are cited against us on this point. To be clear, the Defendants have been accused of nit-picking and being officious in relying on these authorities. That's why I need to go to them. The particular one that came up next in the submissions of the CR was Waugh v Clifford, tab 11 of the authorities bundle, page 55. It is at the top of the page, page 55, tab 11. The facts are immaterial for our purposes. It deals with ostensible authority on the part of a solicitor acting for a party litigation to settle the litigation. At the top of page 55, between A and B, there is a reference to implied authority. We can skip that. Then, just above B:

"Ostensible authority as between the solicitor and the opposing litigant to compromise the suit without actual proof of authority."

Then between D and E. This is what's relied on against us:

"The supposed information ... the terms of compromise are discussed. The defendant's solicitor writes to the plaintiff's solicitor offering a compromise figure. It would be officious on the part of the plaintiff's solicitor to demand to be satisfied as to the authority of the defendant's solicitor to make the offer. Why is it officious? It is perfectly clear that the defendant's solicitor has ostensible authority to compromise on behalf of his client, notwithstanding the large sum involved."

So the reliance, again, is on ostensible authority. We know from Armagas and from the cases on which it relies that ostensible authority requires a representation from the principal, the legal person who is said to be acting. Of course, in this case it

is perfectly clear, because the defendant, a named and identified natural or legal person had already retained this solicitor. He was the established agent of a disclosed principal. That's why it was officious to ask if the agent had authority.

MR TIDSWELL: Yes, it wasn't that the argument going on here -- the limits of that. That's all about whether at some point before now the key words are:

"Notwithstanding the large sum involved."

Then you go down. There is a discussion, isn't there, about the point at which you can't take that authority because you are doing things that aren't -- I think there is the use of the word "collateral", isn't there? It is not collateral to the action, whatever it happens to be. That's a bit like the general counsel discussion we were having, isn't it? That you would, I think, expect general counsel to have authority in relation to the whole group in relation to some matters, but obviously not all matters.

MR KENNELLY: Well, put one way, in this case it was officious because there was a named identified principal and its agent, and it would be officious to ask if that agent had authority. Again, we are coming back to the identification of the principal, the identification of a legal person.

If we have an opting in on behalf of a company, a legal person -- no mention of "group" or "undertaking" -- and it is signed by the general counsel, you cannot infer from that the general counsel was also opting in a whole load of unnamed unenumerated legal persons.

MR TIDSWELL: I mean, I am just not sure where any of this -- I don't think any of this really gets you very far. Obviously there is the authority point which we talked about. You know, I think there is some unattractiveness to that point, as I have indicated. But your point is either you're right on point 1 or you are not. I am not sure this makes an awful lot of difference to it, does it?

I understand the point you're making about inferences. But do you need to get into

this question -- if you are right, then it doesn't matter whether it's the general counsel or the chairman of the group, or whatever it is; it doesn't matter, does it?

MR KENNELLY: Yes.

MR TIDSWELL: It doesn't matter how obvious if they have authority because they haven't complied with the Act, on your argument.

MR KENNELLY: That's correct.

MR TIDSWELL: And if you are wrong about that, I don't see how any of this gets you home on your point 1. It leads you into your authority point. You dissuade us from making inferences, but if you are wrong on point 1, then we are actually agreeing with Mr Beal, we should be undertaking some inference.

MR KENNELLY: Well, there is a question who bears the burden on inference. You mentioned inference a few times. I will come back to whether you have enough before you to make those inferences.

MR TIDSWELL: I understand.

MR KENNELLY: The reason why I am making these points is they are responding to submissions made by Mr Beal.

MR TIDSWELL: But he is making them in the authority context. He is making them as part of your argument that he can have authority and he is saying you shouldn't be enquiring into them.

MR KENNELLY: He is making two points. He is saying, first of all, where you see a general counsel for a company in an undertaking, even if the undertaking is not mentioned, that counts as an act, all unenumerated, unnamed legal persons. That's the first point. Then --

MR TIDSWELL: But he doesn't say.

MR KENNELLY: -- he also says: and the general counsel has authority to opt them out.

MR TIDSWELL: I don't think he is saying because he is a general counsel -- I am not sure that makes any difference to his argument. He is just saying: as long as that person is authorised it doesn't matter who it is.

He is just saying: as long as that person is authorised, and you shouldn't be enquiring into the authorisation, then we are entitled to infer where there is an indication -- I think he goes on to say there is an indication it is on behalf of the group. If you look at his schedule, the schedule in relation to every entry has the wording "on behalf of the group or undertaking". So he's saying: no matter who has done it, there is an inference we are entitled to take.

I appreciate you are going to say -- well, you are saying "we shouldn't in any event" and you're saying they're not going to say "on the fact we shouldn't". I am just challenging, really, where the authority point fits into your first argument. I just don't think it does. I don't think it adds anything.

MR KENNELLY: From our perspective, the authority point doesn't go anywhere if you haven't an active legal person. I am responding to the points of Mr Beal. He says the authority point is linked to (inaudible).

MR TIDSWELL: Maybe I've misunderstood what you're saying, but you carry on.

MR KENNELLY: I am conscious of time. I am rather behind.

The next authority Mr Beal relied on is the Hawksford v Hawksford case. I am not going to take you to that. What it says is that although -- it's in tab 15 of the authorities bundle.

What it says is that although we bear -- where someone challenges on a question of authority, they bear the legal burden. But, when they raise an inference that authority is lacking, there is an evidential burden on the person who is claiming the authority existed to make that good. That principle split between the legal burden and evidential burden I don't think is in dispute.

Now I do turn to the facts, because the evidential burden has definitely not been discharged.

Mr Cook will show you the detail of the entities for which we still say there is no evidence of opting in. The key issue for you, the key piece of evidence is the discrepancy between the database where the class members did opt in and the registers which Harcus Parker and its consultants prepared.

I just give you one example of the problem. If you go, first, to database -- I think Mr Beal gave you an expanded version of it.

MR BEAL: I have not yet.

MR KENNELLY: If you go to volume 1, tab 22 of the hearing bundle, larger versions have been prepared because the font is very small.

MR TIDSWELL: Shall we wait? This is very difficult to read.

MR KENNELLY: You have it on the screen. This is just one example of a discrepancy between the acts of the class members and the register prepared by Harcus Parker.

So we are on the first page of this Angeion database, page 2 --

MR TIDSWELL: Just give us two seconds. We have an enormous amount of paper. Right, you are in the database?

MR KENNELLY: Yes. First page, there is a row, on the left-hand side, of numbers. If you go down to number 22 and follow that across, you see a company City Fleet Networks Limited.

MR TIDSWELL: Just the tables -- the first column is what they do; is that right?

MR KENNELLY: I am focusing really only on City Fleet Networks Limited. That's a single named legal person.

MR TIDSWELL: This is an example of the second problem I identified, where it is very specific and there is no indication.

MR KENNELLY: Exactly.

MR TIDSWELL: I mean, there is a long list of other subsidiaries which are now put into the list.

MR KENNELLY: Exactly. And for City Fleet Networks Limited you have a person signing it, a natural personal, Alice Blake, head of legal. This is the act. This is the only act of the class member of the legal person in question. It is signed by an individual by reference to this company only. There is no mention of a group or an undertaking, or any other legal persons.

Let's look at the register now, produced by Harcus Parker, same bundle, tab 24, page 310. You see at the bottom of that page, City Fleet Networks is the name of the merchant group. That was not the name that was entered in the database. That was not what the opting in legal person said. Then a list to the right of that of the legal entity names.

MR TIDSWELL: What is the date of this?

MR KENNELLY: This is the November --

MR TIDSWELL: This is the November.

MR KENNELLY: -- register. The legal persons named from number 42 down to number 51 are all claimed to have been opted in. The claim is that when Ms Blake signed on behalf of City Fleet Networks Limited, she was, in fact, signing on behalf of all these companies also. But there is nothing to support that from the time of the opting in by the (inaudible).

MR TIDSWELL: You say that. In a sense, you go further, don't you, and say because she has put City Fleet Networks Limited, the inference is it's just that company?

MR KENNELLY: Absolutely.

MR TIDSWELL: There is a peculiarity about the form, isn't there? Or maybe not a peculiarity. But it's perhaps slightly unhelpful that the form anticipated that people would put the name of the company on it and inevitably that is going to be the name

of the company the person works for, so it is directing them towards specificity. Which you might say is a good thing, generally.

But I wonder, if they had put on it, you know, "City Fleet Networks and group companies"; where would that leave us?

MR KENNELLY: First of all, if you go back to that table we were looking at, it doesn't ask for the company name. It asks for the business name.

MR TIDSWELL: That may be right, but the form -- I don't know if you can tell us where the form is. But the form makes it plain they have to put a company name on it. The form has a spot where it directs you to put in the company name and number, I think.

MR KENNELLY: But there is no suggestion, sir, it -- in fact, it would have been impossible for the person opting in to say, "I am opting in for the other members of the group who are these legal entities", and naming them also. There is no suggestion that there's some technical reason why it was impossible for the legal persons who happened to be in the particular group to -- sorry. No reason why they could not opt in their own names.

MR TIDSWELL: I am simply making the point that the form is perhaps not the most helpful document because, if it does anything, it directs the person to put in the name of the company they work for, rather than considering the question you're advancing.

MR KENNELLY: I mean, there is a template letter that does refer to company number, the letter itself. But the point again is --

MR TIDSWELL: The letter? Isn't that the replica of what was on the website?

MR KENNELLY: Yes, exactly. That refers to company number. Again, there is no reason why, and the whole regime directs what the class member should do is opt in their own names, by reference to their --

MR TIDSWELL: I understand the point you are making. I am not making a point against you, necessarily. I am just making an observation.

We should take a break now, Mr Kennelly. I do appreciate I am asking lots of questions. It's actually very helpful for me.

MR KENNELLY: I am just conscious of time.

MR TIDSWELL: On the question of time; what is the position? Do you have an agreement about time?

MR KENNELLY: Mr Cook and I had hoped to finish by lunchtime today. Mr Cook is, I am sure, wondering when I am going to sit down and he can have a go. That would allow Mr Beal a short time to speak and allow us a short reply and be finished today.

MR TIDSWELL: So you are aiming to get finished today?

MR KENNELLY: That's the plan, yes. I will speak to Mr Cook because I thought I would take about an hour and I've been longer than that.

MR TIDSWELL: One of the things we can do, you might have a think about that, I think we would be happy to sit for a short adjournment, if that's helpful, and if that is convenient for you. If what I am doing is making things more difficult, I can try to make it a bit easier. We will take a ten minute break now.

(11.47 am)

(Short break)

(11.59 am)

MR TIDSWELL: Yes, Mr Kennelly.

MR KENNELLY: Thank you, sir. So, just to pick up on something I said earlier on, which I felt, as I was saying it, it was a mistake, and it was, which was the six-month period. My point was Parliament commands you to set a deadline. The six months was in your order. The six months is something said by the Tribunal. In a way, it makes my point, I would submit, even stronger. Which is if that period isn't long enough in a particular case, the Class Representatives can say so. They are the ones doing the book building. They can say, "Would he need a year", or whatever they

need. They will say it to you and the Tribunal makes a decision. That six-month figure is tailored to the needs and difficulties which the Class Representatives persuade you exist. So that's an even stronger reason why the deadline is important and should be respected. And why, by the end of the period, there should be a list of the names of the class members who have opted in.

MR TIDSWELL: I don't know where that six months came from, whether that was in previous orders or whether it was suggested by the Class Representatives, or the subject of discussion. I don't think it was something that was consciously introduced in the proceedings.

MR KENNELLY: I have a memory we wanted a shorter period and they wanted a longer period. I'm sure someone could find out.

MR BEAL: If it helps, my instructions are Visa pushed for three months; we asked for nine. Six was the wisdom of Solomon, if I can put it that way. It was as a result of submissions made in writing to the Tribunal, where all other aspects of the order were agreed between the parties.

MR TIDSWELL: Thank you.

MR KENNELLY: Coming to the crux of the first point, putting to one side all these questions about authority, just the basic first point: is there an act by a legal person to opt in by the deadline?

And you have seen the database. You have seen how we say the register misrepresents it. That leaves the question: was there something going on in the background?

To pick up the Chair’s point, we are in the situation where, in reality, the person signing for City Fleet Limited was saying "I fully intend this to cover all the other legal persons who are in the group and they ought to be opted in, too".

This is obviously a question live in these proceedings and we look for evidence from

the Class Representatives.

Mr Robinson did put in a statement on this question. This is in the second volume, behind tab 34. Page 549, at para 21, he says:

"Book build exercise."

And the result was large because 95 merchants opted in.

Then at 22:

"We did not know the governance and decision-making procedures of each organisation of the corporate group."

He was not aware that any organisation opted in without at least one senior individual within that organisation -- at the organisation level considering the matter. Then this:

"I infer, and I do stress that word 'infer' in the conversations and e-mail exchanges we had often with multiple senior individuals within an organisation, as well as references those individuals made to other conversations, that the decision to opt in involved multiple senior stakeholders of a business and the resulting opt in communication 'registration for claims' ..."

That you've seen:

"... was made with appropriate authority on behalf of the business as a whole, i.e. all entities therein."

So even Mr Robinson is not saying that anyone said to him, "I am opting in these other legal persons additional to the one I am actually naming on the form". There is no evidence that anyone said that. Even Mr Robinson is inferring it. And he's inferring it on the basis of an extraordinarily vague and unspecified piece of evidence at paragraph 22.

MR TIDSWELL: What about people who did say that on the form? I have made a note somewhere, there were three or four.

MR KENNELLY: They are in a different category. We say that also fails. I can see

the Tribunal's point about those, because then you will ask: what else suggests that the individual persons intended to opt in?

MR TIDSWELL: I think I asked you that earlier and you had just said, "It just doesn't matter unless they specify the entities". But, in a way, the inference point is -- I thought your position was there was no room for inference. I thought that to be your position.

MR KENNELLY: There is no room for inference. This is the countervailing evidence. If there was room for inference, this is not good enough.

MR TIDSWELL: Except for the three or four cases where someone has said they are doing on the basis of -- then the inference is there, isn't it? It may be uncertain as to -- because if they say the evidence is in favour, which, as you say, is fatal, but at least there is an inference it is more than just one company.

MR KENNELLY: There is an argument there. We say it is not enough. But there's a big difference between that and the category which is 74 out of the 221 legal persons in the November register.

MR TIDSWELL: Yes.

MR KENNELLY: What's really interesting about this evidential question is you see the importance of this database. The database is the only thing that actually records the positive acts of the class members who are opting in. It allows -- the database is the only thing that allows us to test the accuracy of the registers created by Harcus Parker. For that reason it is truly regrettable that the Class Representatives refused to provide this database for eight months, until the Tribunal finally ordered it to be produced by 31st October. The Defendants have asked for this information at least five times since March 2025. The reference is tab 89, volume 3, page 1382.

Had we known sooner what the opting in class members had actually said; could they have made the claim they made in September?

Could I show you volume 2, tab 32, page 519. This is the Class Representatives'

Response to our Application.

If you look, please, at paragraph 3.3, the Tribunal was told, first line:

"Individuals with appropriate authority have taken the steps stipulated by the CPOs to communicate the intention of all entities in their respective corporate groups to opt into these proceedings."

That's just not right. When we finally saw what the opt in notices said, you see that in almost all cases they are submitted for specific legal persons, not corporate groups or undertakings, and there is nothing to suggest that these other unnamed legal persons in the register wanted to opt in.

Moving on now, if I may, to the consequences of the Class Representatives' approach if their legal submissions are correct on how the regime should work and in particular on this case because, on their argument, one legal person, which is part of an undertaking, apparently even a minor sister company, could opt in. And automatically, all other legal persons which happen to be in that undertaking are also opted in. Because in this case the notices by which the class members opted in do not purport to opt in, in the majority of the cases, as a member of an undertaking or as part of a group. They don't, on their face, opt in any of the legal persons in whatever group they happen to be in.

So, presumably, the Class Representatives say that under the regime as it should be construed one legal person can opt in all the other legal persons in whatever undertaking it happens to be in without any express statement to that effect, without any need to name the class members or identify them in any way.

On this approach, the identity of the class members would be unknown until much later and well after the expiry of the deadline.

This comes back to the discussion we were having about the register. On the Class Representatives' approach there wouldn't be any deadline. They aren't saying there

would be a deadline by which the class members need to be identified, and that would, we say, drive a coach and horses through Rule 83. But there needs to be a register of the names of the legal persons, the class members who have opted in, which, as I said, is vital for the right of the Defendants and the orderly conduct of the litigation.

On the Class Representatives' approach, the register would be something that they could just add to, depending on the results of their enquiries, once they had established the boundaries of the undertaking.

If one thinks about the subsidiaries of the groups or undertakings which are not included in the first version of the register or later versions of the register, on the Class Representatives' approach, they can just be added later, without permission, on the basis that some other company in their undertaking implicitly opted them all in a year ago.

That might be why in this case the Class Representatives felt under no compunction to file a final, definitive register. Because, as you've seen, the CR has filed four registers since February, and they are all different. Legal persons have been added and removed. The opt in register filed in October this year included 228 individually entities. 228 entities. Of those 20 legal persons, 10 per cent are not included in the November register. We have no idea why that is. But it shows the danger of the Class Representatives' approach with all of its lack of certainty and rigour. Because, from February to November 2025, the Class Representatives were purporting to act for these 20 legal persons without authority, for all we know.

That is not idle nit-picking. If the Class Representatives had not been challenged, they may have gone on representing these legal persons without -- we don't know -- possibly without authority. According to the Class Representatives, even the November register did not need to be final because, on their case, the opting in has taken place and the identification of the CMs, the class members, is a separate

iterative process.

We see that most clearly in their letter just before this hearing. It is in volume 3, tab 107, page 1425. It's a letter dated 5 December 2025 from Harcus Parker. At paragraph 4, they repeat their point that the corporate groups did the opting in, and our position is by doing so the subsidiary entities within each group were badly opted in. Over the page, paragraph 7:

"As regards whether the November register is the final version of the register proposed by our client and therefore represents the full and complete list of all represented persons, you are aware as at the time of writing we cannot give any such confirmation."

Then they say:

"In particular [so not limited to what they're about to say] we have applied to add further entities."

In the final line, they confirm:

"We are not aware of any other entities which wish to be added to the register."

The implication is -- and it is consistent with their legal argument -- that if other entities popped up and said, "Oh, I am actually a member of that undertaking that was opted in by an individual legal company, without mentioning me or the undertaking, I have a right to be added".

MR TIDSWELL: To be fair, I think paragraph 7 is more aimed, isn't it, at people who might make an application under 82? Is it 82?

MR KENNELLY: That may be a fair reading of it. But the principle of the thing is that there's nothing to stop the CRs adding new class members well after the deadline, depending on their investigations, their discussions, and their enquiries as to the scope of the undertaking. Because if an undertaking can opt in in this case and the boundaries of the undertaking are fluid, which we know as a matter of law, that injects a further layer of uncertainty because who was in the undertaking or not? As far as

factual investigation, it's not certain. And it is something which, on the CRs' case, they can be enquiring, investigating for an unlimited period after the expiry of the deadline. That makes, we say, a mockery of originating process in opt in collective proceedings. Now, originating process and certainty is important in all civil proceedings. But in collective proceedings in particular; why clear rules? Because, as the Tribunal knows very well, unlike standard claims, these aren't managed by claimants. The claimants themselves are at a relative distance and your rules prevent overenthusiastic or disorganised firms purporting to represent and treat as signed up legal persons who have not decided to do so, by the deadline or at all.

MR TIDSWELL: Just on the general point about why this all matters to your clients. Obviously, it does. I'm not suggesting it doesn't. Can you just give me the short articulation of the points that matter? Why does it matter to the Defendants to know with precision at the opt out date what they are facing?

MR KENNELLY: First of all, there is a fundamental right to know who is suing you.

MR TIDSWELL: Yes.

MR KENNELLY: Which particular legal persons have initiated their claims against you? That is a fundamental point of principle.

Secondly, the process, the process of the proceedings themselves; how are you supposed to settle with the individual class members when you don't know who they are? How are you supposed to consider questions of disclosure when you don't know who the individual class members are who have opted in?

And you have a point about domicile. How are you supposed to take domicile points when you don't know who they are and necessarily --

MR TIDSWELL: It is not just the domicile point. I suppose it's how do you challenge any claimant's participation on whatever basis you might -- and presumably you might challenge on the basis they didn't have an MSA. I can't remember what the position

is. But are you able to identify whether you have a record of an entity in the system? I can't remember. This is a vexed question and we have been through this many times before. But, if you wanted to know whether City Fleet Networks Limited had ever paid a MIF, could you tell that from the system, knowing the name and going looking for it? I think the answer to that was yes, wasn't it?

MR KENNELLY: Absolutely. It's very interesting, sir, you picked that point up. Because if we were back at the certification stage and I was making my standard Rule 39 points about how to identify the class members, it is all very uncertain, you know where those submissions normally go. If the Class Representatives said, "Actually, we are just capturing undertakings, and at some distant point after the deadline we will have to enquire as to who the class members are", that would have been a very different discussion.

In fact, on the contrary, at the certification stage, when they were trying to persuade you how straightforward it would all be to identify the class members, they made it clear that what they had in mind were individual merchants who would be able to identify very easily that they had individual merchant service agreements with acquirers, and even merchant identification numbers, which are --

MR TIDSWELL: I suppose the position -- we know, don't we, somewhere -- I can't think of where -- there might be different arrangements. There might be a parent company with the MSA. It might be different acquirers at different levels and so on. So, actually, there could be all sorts of permutations.

Generally speaking, the person who has the contract is the person who is, on the face of it, the claimant presumably?

MR KENNELLY: Absolutely. It can only be a legal person, because only a legal person has capacity to --

MR TIDSWELL: That's fair (Overspeaking).

MR KENNELLY: -- they may be doing so on behalf of other named legal persons, in which case fine. Those other named legal persons can opt in, too, and they can sign the register --

MR TIDSWELL: Maybe it is not relevant. I am not sure how that works if you have the parent company entering into the MSA with an acquirer. Then, presumably, the only person who can see all that is the parent company, isn't it? Because they have to be taken to have made the charge.

MR KENNELLY: But they will be liable to --

MR TIDSWELL: The MIF.

MR KENNELLY: The MIF. The idea that an undertaking, this fluid concept, can come in through a named legal person who purports, without mentioning undertaking group or anyone else, to do so on behalf of everyone else, as I say it, would make a mockery of originating process in this Tribunal. And the idea that it somehow counts as communication by unnamed, unenumerated legal entities of their intention to opt in, it makes no sense at all.

The idea that it's not practicable to do it by six months, you have my submissions and I showed you Mr Robinson's evidence.

I am just going to check with Mr Cook before I sit down.

On the question of ratification, I make one final point before I hand over to Mr Cook. The pro forma letter that was circulated asked whether the individual was or has now been authorised to opt in the individual entity. That is deliberately vague. It doesn't assist you in knowing whether the signatory was, in fact, authorised in February. The consequence --

MR TIDSWELL: Again, aren't we in danger of muddling up the two points?

Clearly, it is validating the authority for whatever was legitimately done. But you say they have not legitimately identified the claimants.

I just don't see how it works. If you're saying you have lost on one, I don't see how you can really take a point on this.

MR KENNELLY: That's a different issue. My first issue is the one I am advancing.

MR TIDSWELL: I understand that. We have simply drifted from one to the other without me understanding why that's happening. It is probably my fault, I expect.

MR KENNELLY: No, no, it is probably mine. That is a point you have to have in mind when we come to the application. That is really is an issue under rule 82(2), which Mr Cook will address in his submissions.

MR TIDSWELL: Who is dealing with the specific cases and the non-doms?

MR KENNELLY: Mr Cook is. I will bow out.

Submissions on behalf of MASTERCARD DEFENDANTS

MR COOK: Sir, I am afraid I have a certain amount to rattle through. I am not saying the Tribunal shouldn't question me when they need to, but --

MR TIDSWELL: Yes. If you need some extra time -- why don't we get to 1 o'clock and see how you're going.

MR COOK: Thank you, sir.

Mr Kennelly has addressed the legal question of who can opt in to collective proceedings. I now turn to the factual questions, which Mr Kennelly was a little bit across the line on already. But which entities did in fact opt in by the opt in deadline. By this I mean simply: what evidence is there to support the CICC's case that as a matter of fact opting in was done for or on behalf of the entities which figure in the CICC November register.

Obviously, there's a certain amount of common ground which has now emerged in relation to 80. That's 40 per cent or so of the companies that are there. For the entities where there is a dispute, which is the majority, with respect, we say there is simply no

evidence to indicate that they did, in fact, opt in.

The legal arguments don't help when the evidence simply does not show these entities even sought to opt in. Of the two categories you identified, sir, the big category here is what you referred to as category 2. And the big category -- which is the vast majority of them -- there is a specific named entity which files an opt in notice. We say great - that entity has opted in. There is no reference that can possibly be interpreted as being broader than that entity and then, months down the track, CICC tries to add some other group companies into the register. We say on those very clear, specific identification, with absolutely no possible uncertainty about it, it is the only entity which has opted in. There are a couple of the very -- which are the exceptions, not the rule here, which I will come to at the end, where there is fuzzier language that can be used. And we can look at some of those and how we deal with that.

But the starting point is: if somebody says, "I act on behalf of company A", you can't interpret that as acting on behalf of company B.

MR TIDSWELL: Yes. Just so I can locate this, you have adopted Mr Kennelly's submissions?

MR COOK: I very much adopt his submissions. My submissions, to some extent, don't -- we say the legal point is important, absolutely, but it probably doesn't matter that much --

MR TIDSWELL: Yes. But, in so far as it matters, you are saying you're addressing the question of what inference could be drawn?

MR COOK: Yes. Either way, even if technically an undertaking could opt in, if, in fact, somebody has tried to opt in more narrowly, a specifical legal entity, it doesn't matter they could have done something wider. They didn't. That's why the crux of the point we would say is, without in any way taking away from what we say is absolutely right as to the legal analysis, actually we are not really in that territory because what has

happened is specific companies have opted in for the vast majority of cases.

This isn't an authority point. There are undoubtedly authority points which we say CICC hasn't properly addressed. It is more basic and fundamental. Which is: is there an opt in act which purports to be by or on behalf of those unnamed entities? It's just a -- is there something you can say that was by company B? We say if it says this is by company A, then it can't be interpreted more widely on any conceivable basis here. CICC has dropped 20 legal entities over the last month alone. That shows us there are substantial problems here. The real question is: how wide are those problems?

We say the starting point here is to see what information opting in businesses were asked to provide. The clearest indication we have for this is the template letter which was attached to the notice which accompanied the opt in CPO. That, of course, is a formal legal notice which was issued at the direction of the CAT. We find that in the bundle, at page 1143. The notice itself is at 1138, but the letter, the draft letter, is at 1143 in the bundle. That provides that -- it says:

"I [name of person] on behalf of [name of business] wish to opt in to the collective claim against Visa ..."

Case number; name of business; company number, if applicable; address; e-mail; telephone number.

So that asks the individual to identify which entity they are acting on behalf of, i.e. which entity is opting in to the collective proceedings.

Now, importantly, given CICC's submissions, it is not saying to the individual: who are you employed by?

The reality is this could have been done, potentially, by an external solicitor, who would be employed by whichever law firm it would be if they were authorised on behalf of. They are asked to identify the business they are acting on behalf of.

MR TIDSWELL: It's a little bit odd, isn't it, because it requires you to put the name of

the business in twice? I'm not quite sure why it does that. Unless the second is doing something useful, you wonder why it's there. It's just -- as I say -- it is an unhelpfully worded document. I think that's the bottom line. Because it really ought to be saying: which companies do you represent and wish to opt in?

That's what it ought to be saying.

MR COOK: We say, in the first case, "on behalf of", which company are you doing so? We say that's absolutely clear.

It presents no problems. The reality is if you wanted to file an opt in notice on behalf of two entities, you could simply do it. Actually if you have the big sheet of the Angeion database, we can see it very conveniently because it is the first couple of entries, which is on behalf of Flight Centre.

So what you get is two notices were served, one on behalf of Flight Centre UK, one on behalf of Flight Centre European Holdings. Both notices were served by Mr Ramondo, is that? Who describes himself in slightly different terms, but essentially was their general counsel. It is the first two. It's 2 and 3, on the left-hand side.

DR BISHOP: I see.

MR COOK: What we have is two separate notices on behalf of two entities. As it happens, they are filed by the same person. He puts in, in one case, one company is obviously authorised to act on behalf of the other. So it's very simple to do this without any problems at all.

MR TIDSWELL: Just hold on. It looks like those are two separate notices, aren't they?

MR COOK: Yes, they are.

MR TIDSWELL: Because if you go across to the right, they have different identifiers. Presumably the start is when you start the form and the submit is when you press the button, do you think?

MR COOK: That's how I interpret the words as well, but, obviously, without any direct

knowledge.

Yes, so you simply identify -- you do two notices separately for the two companies, on behalf of -- not -- you know, realistically it is unlikely this individual is employed -- he may or may not have two employment contracts. It sometimes happens. Probably he's employed by one of these companies, possibly another company. Sometimes people are employed by companies where a lot of the employment contracts are held. But, simply, he is on behalf of -- filing a notice on behalf of Flight Centre UK and Flight Centre European Holdings.

MR TIDSWELL: Just remind me what's your position in relation to them? Are you taking an authority point on them or are they in, both of them?

MR COOK: I think there is a point -- I'd have to check -- I think those are both in --

MR TIDSWELL: It looks like you have challenged both of them on the basis that they were late.

MR COOK: No. That's not, sir -- that is Flight Centre that were -- so those were in fact told they're late.

MR TIDSWELL: They were late. They were after the deadline. I see.

MR COOK: On the basis, can you do this? It is very simple. You simply file two notices on behalf of two entities, if you want to opt in two ones. There is no problem here because you are acting on behalf of whichever company you are acting on behalf of in those circumstances.

MR TIDSWELL: It may seem like a silly question, but it is possible, isn't it, that somebody might put a different name in the name of the business, because they might put -- I think we do have at least one example -- they might put the name of the group, and then they might put the name of the company they are employed by as a second name of that business; do you know which --

MR COOK: Well, it will be clear, when we come to the Angeion database there is

somewhere for there to be two.

MR TIDSWELL: No. So the example of that -- the one example I picked up was the hotels, the PPHE. I think they might have said in their form that -- I don't know. Do we have them on here?

MR COOK: It would simply be that one box they fill in. We can come to that as being what I would say is one of the exceptions, not the norm.

MR TIDSWELL: Well, I am interested in them because I want to understand the flow from the form to the --

MR COOK: 41.

MR TIDSWELL: Thank you. 41. Yes. So, actually, there you do have the group, don't you? Yes. So it is possible to put it in.

MR COOK: It would equally be possible, one would imagine, to write "A Limited, B Limited, C Limited", if you wanted to do it like that.

Flight Centre chose to do it with two forms. You could certainly have done it with clarity identifying each of them. It is a question of interpreting -- as long as it is clear who is doing it, which company is doing it, it doesn't really matter as long as that is made clear.

We say in most of these cases it is absolutely clear who has done it. It's one entity, nobody else.

So I intend to go through two illustrative examples. Mr Kennelly has given you a little hint in relation to the second of those. They are British Airways and City Fleet Networks Limited.

What I have done is produced a couple of hand outs which I will pass to the Tribunal. It has all the references on it, hopefully avoiding the need for me to go through them all in detail. It is double-sided, so there is one sheet of paper you will need to worry about.

There are two examples. The first page is British Airways Plc. Over the page, it is City Fleet Networks Limited. These are, we say, illustrative of the vast majority where there is a specific named entity. There can be no doubt it is a specific named entity originally in the opt in notice and over time CICC has tried to add in a lot of other group companies.

The important thing is to start and end with the opt in notice. That's the critical document. We get that from the Angeion database which shows the information the individual filling it in provided. The first one of those -- in terms of the Angeion database is British Airways, it's line 25. That identifies it is British Airways Plc. It has identified Verity Kyley, Head of Payments. The form was completed on 6 February 2025. So it's a specific entity, British Airways Plc. It doesn't make any general, generic reference that can be interpreted more widely. It has identified the specific entity.

What it certainly doesn't include is any wording of the kind you identified in Mr Beal's schedule on behalf of the group undertaking. Nothing like that is present in any of these examples we are looking at. That's just Mr Beal's advocacy take on this, which is not present in anything which is said in any of these forms at all.

In terms of what we then get in the registers, the first register, the March register just says "British Airways". So it has dropped the PLC. At that point CICC is advancing the theory that undertakings can be members of the class. Whether right or wrong, the point is it's British Airways Plc which opted in. They then figure in the June register. It is now PLC identified in the June register, British Airways Plc. But then, in the October register, we get BA City Flyer Limited and BA Euro Flyer Limited, which are added for the first time. And, just simply, they don't figure in any of the documents at all we have seen prior to that October register. So we say British Airways Plc filed a notice. Absolutely fine, we accept that. These two other entities added in October, months after the event. There is no reference to them in the notice or any of the

documents. They have just been added to the register. There is not a valid opt in, and that remains the position.

They are included also in the November register, so they are still in issue.

The other document I need to show the Tribunal is the DBA, the damages based agreement, which we find in the bundle at 756. This is the agreement that Harcus Parker sought to sign with all the legal entities which opted in.

MR TIDSWELL: I have somebody else as DBA there.

MR COOK: I apologise. 765. The first bit to note is it is signed -- 755 is -- the start of it, the parties are identified as being -- no, it is 765.

MR TIDSWELL: The party is BA, British Airways.

MR COOK: Yes, so it is identified the agreement is between British Airways and Harcus Parker, so it's clearly identified.

If we go over to the second page, the front of the back page, which is fair enough, it says "signed for and on behalf of". Again, that language, "on behalf of", British Airways Plc. It is signed by Ms Hitchin, who is Associate General Counsel, dated 10 February.

So, again, that's a contemporaneous document with the opt in notice. But it is British Airways Plc, a specific entity. There is no other reference to the additional entities, City Flyer and Euro Flyer, which figure much later.

Then the third line in this document I need to show you is page 1106. That is described as a retrospective confirmation of authority. This says -- it is on behalf of British Airways Plc. It says:

"We confirm that Verity Kyley [who is the one who filed the opt in notice] was authorised or has now been authorised to submit the opt in form dated February 2025 for the purpose of opting in. The DBA documentation is to apply to British Airways Plc. The capacity is merchant of record."

So what we have here is a couple of points to take from this document. Firstly, it only

refers, again, to the one legal entity, British Airways Plc, this of course, is 28 November. There is no reference to BA City Flyer or BA Euro Flyer at all. So there's just no documentation that ever mentions them.

Secondly, we have this wording used in all the retrospective confirmations which says the individual was authorised or "has now been authorised" to admit them all. It's certainly not saying authorised by anyone other than British Airways Plc. But, of course, we have this lack of clarity about what that authority existed at the time or comes in later. With respect, we say it is quite remarkable that having gone through the process of obtaining authority confirmations in readiness for this hearing, CICC has sought and obtained confirmations that don't clarify when authority existed to file these.

And as we will see from my City Flyer example, often aren't very clear who the authority was from, in any event. That may lead to problems --

MR TIDSWELL: What do you think it means at the end:

"In its capacity as merchant of record."

MR COOK: I suspect that means -- I can't comment, other than making some educated guess based on what the words might mean. It might mean the company which has the MSA.

MR TIDSWELL: That's what I am wondering. As I discussed with Mr Kennelly, it is presumably the only company that could bring a claim.

MR COOK: That doesn't follow. It may be that there are many companies within the group that could --

MR TIDSWELL: Yes, I see.

MR COOK: It is quite common for people to have different MSAs depending on what they do.

MR TIDSWELL: I understand.

MR COOK: I think there is an issue you often get with airlines, which is unusual, which is: I buy a British Airways ticket, but I may not end up flying on a British Airways plane. So they code-share.

So if I end up flying on an Iberian plane instead because they code-share I still have a contract. The merchant is still British Airways, even though that's not the plane that flies me. So that may be something of a term of art from the airline industry. But, either way, it doesn't sort of -- you know, for these purposes, what is perfectly clear, we say, is there is just no reference anywhere to anyone other than British Airways Plc opting in, intending to opt in or anything else at all. British Airways City Flyer, Euro Flyer simply do not figure at all.

You simply cannot interpret documentation that is clearly identifying one limited company as, you know, being intended to apply more widely. On the contrary, when somebody specifies something that limited, it should be read as doing exactly what the wording intended it to.

As we have seen, with Flight Centre, you can file more than one notice and find a way of referring to more than one company, if you wanted to. Where you refer to one company it is perfectly clear.

Where there is an authority issue we say it still also arises here and given no reference to City Flyer or Euro Flyer we say it's difficult to see how CICC has any authority to represent those companies for the purposes of a Rule 82 application. But I will come back to that when I look at Rule 82 applications.

The City Fleet Network is the other example, which my learned friend has already introduced, essentially. Again, in terms of what's present in the Angeion database, it's City Fleet Networks Limited and it is Ms Blake head of legal, who completed that form on 7th February. So, again, it is absolutely clear. It identifies a specifically legal entity. It doesn't make any reference to other legal entities or wider -- and there is just no "on

behalf of a group undertaking" language being used.

So we accept City Fleet Networks Limited opted in, but the eight or ten other entities that CICC has added over the next six months simply shouldn't figure at all and don't figure.

I have given you the references to the other registers when they do appear. They appear initially -- I think eight appear in June and a couple more appear in the later registers.

In terms of the DBA, which is the other document in this set of documents to show you, that's at 715. That DBA is signed on behalf of City Fleet Networks Limited. So, again, exactly the same entity which completed the notice.

If we go over to the second page of that signature page, "signed for and on behalf of City Fleet Networks Limited". Again, it is absolutely clear it is on behalf of exactly the same specifically legal entity.

To show you again the confirmation of authority documentation, the retrospective one, which is at page 1058 ...

MR TIDSWELL: 1058? I think we have a wrong reference on this. It says 106 for this as well.

MR COOK: The bundle reference is certainly 1058 in my --

MR TIDSWELL: On the paper it says 1106 for this as well.

MR COOK: 1109 would be the numbering of the pdf, if you are using that, sir.

MR TIDSWELL: No, I think it's just a mistake in your bit of paper.

MR COOK: Yes, it's 1058 in the document we should be looking at. In terms of what that document says, it does two things. The first sentence says:

"We confirm that Alice Blake was authorised or has now been authorised to submit the opt in form."

The second bit says:

"The DBA documentation executed on 6 February is to apply to both City Fleet Networks and the participating companies."

Now, we get the same familiar wording of "was authorised" or "has now been authorised". I don't know what authority it is. More significantly, we don't get any indication which entities are said to have given her that authority. But, with respect, the authority point, we acknowledge, doesn't go anywhere here. The critical thing is: who is the act, on its clear face, undertaken by?

City Fleet Networks Limited.

MR TIDSWELL: Here, actually, one place we do now have something which indicates an intention to include all those companies, but you would say that's too late.

MR COOK: Absolutely. You can see this document is --

MR TIDSWELL: It's November.

MR COOK: It is November. It is an intention they would like to, but that is nine months after the opt in deadline. So they would need to be looking at a Rule 82 application if they wanted to join. You can't sort of retrospectively, nine months later, change an act that was committed in February on behalf of one company and try to pretend it was undertaken on behalf of multiple companies when nothing about it was determined on that kind of basis.

That is the sort of ratification point that was being referred to by Mr Kennelly, which is: if an act took place on my behalf without my authority, I can ratify it after the event. If somebody did something on behalf of Mr Kennelly, I can't turn round and say, "I would like to ratify it as having been done on my behalf", because at the time I simply did not figure. I wasn't referred to. So you can ratify things in your own name, but not on behalf of somebody else.

DR BISHOP: Am I right in thinking these 11 companies listed, City Fleet Networks, Addison Lee, Computer Cabs and so on, down to Argyle Satellite, that these are

independent companies who have a contractual relationship with this thing called "the network"; is that right? These are not wholly owned subsidiaries or anything like that?

MR COOK: I must say, I haven't looked into the ownership structure of this particular group of companies in order to know whether that is or isn't the case.

MR TIDSWELL: The inference is there outlined, I think, because you have a director who is common to all of them.

MR COOK: That's a fair point. They have common directorships. It is likely to at least have some degree of common ownership, whether it is wholly owned or else.

Which is one of the other complex problems one gets about the concept of an undertaking, which is, in the real world, when you start looking at company structures, it doesn't tend to have a very simple set of subsidiaries. It often has partially owned subsidiaries. Exactly where do you start drawing the lines? Which is the reason, in any event, why you would need a lot more clarity than is possibly being suggested, because competition law might take a rather different view in terms of who are sufficiently connected to be part of an undertaking to what would be the corporate group structure for that.

But the simple point here is: this is many, many months too late.

So those two examples, we say, are just illustrative of the vast majority of the disputed companies. You have a specific legal entity named in the opt in notice. We accept that specific legal entity is validly opted in, unless there is some other problem we can come to. It's not a dispute. But, when there's no reference to any other entity, no scope to argue the identification of the entity and the notice is unclear or generic in some kind of way, we say it is very simple. The notice is clear, you simply follow what the notice says. And if somebody has been missed out and they wanted to opt in later, they could, of course, have applied to the Tribunal to do so. They could have applied to the Tribunal a week later, a month later. In practice, we know they waited nine

months to do so, while being added to registers when they clearly, in fact, had not opted in.

Let us turn then to CICC's submissions in the light of those documents. They are set out in CICC's skeleton argument. That's at paragraph 10 onward. The crux of the argument comes at paragraphs 17 and 18. I don't know if the Tribunal have that document to hand? It may assist you to be able to look through the arguments that are being made.

It is paragraphs 17 and 18. If you are looking at it in the online bundle, it is page 84 onwards. The key submissions start in the third sentence of paragraph 17.

Before I address the detail of the submissions, it is important to note that this section of the skeleton argument we are looking at is largely devoid of any references to evidence. The reason why we say there are no references to evidence is because this section of submissions is almost entirely a matter of assertion. There is simply no evidence to back up these points. The material which does exist, the Angeion database, the DBAs, the retrospective confirmations of authority all contradict the entire narrative we have here.

The Tribunal set down two deadlines. Originally, it ordered CICC to disclose the documents it intended to rely on, including any document indicating any authority, firstly, to disclose them by 31 October. There was then a process of documents trickling in and the plan to carry on trickling them in right up until this hearing. The Tribunal said, "No, absolutely not", but gave them a second bite of the cherry and said: you have until 28 November to put forward all the documents you intend to rely on.

So they have had two go’s at it. With respect, the Tribunal has bent over backwards to allow them to put forward the evidence to support their case. What they can't do is fill those evidential holes with unsupported assertion.

The first, what we say is an assertion, is the third sentence:

"HP held detailed discussions with each corporate group about the fact that the group, rather than specific named entities within it, would be opting in."

Really, there is no clear evidence at all that anyone at HP told companies they should opt in as a group. There is no evidence of any of the potential opt in businesses they were told they were opting in as group. Frankly, even if there had been such discussions, that can't alter what we say is the legal position, which Mr Kennelly has addressed. Specifical legal entities have claims and they are the ones which should have opted in. So, with respect, that doesn't take CICC anywhere.

The second assertion then, the next sentence, is:

"It was left to the discretion of each group to select the relevant individual to complete the online registration process. Inevitably, the individual who completed the opt in form was employed by a specific legal entity which provided details accordingly."

So the argument here is that the individuals who completed the opt in forms listed their employer rather than the legal entities they were opting in. This was a point that was made for the first time in the skeleton argument.

Now, I've taken you to the standard wording. We say that's completely false. It is who you were filling in the form on behalf of, regardless of who you might have been, where your employment contract might have sat in the group.

I have shown up the Flight Centre example, which had the same named individual completing it for two separate companies within a group. There is just simply no basis, we say, here to suggest, and no evidence from any of the many other individuals to say, "By mistake I listed my employer, not the company I was filing the form on behalf of". We say it is absolutely clear from the form's standard wording it was the companies opting in they were filing, not their employers in particular.

That we say is clear. If somebody wanted to give evidence to say there was a mistake, they could and should have done so. There is not that evidence.

The next assertion we say is, however, the understanding of both Harcus Parker and the groups with which they were engaging was that the business merchant was opting in the entities within the group. To be fair to CICC, there is a little evidence here as to Harcus Parker's understanding, and that's Mr Robinson's evidence, which Mr Kennelly has addressed. That he inferred that businesses were opting in as a whole. With respect, we say he doesn't address and cannot explain how that inference is consistent with the documents, where you have specific named legal entities. No references, for the most part, to any form of group.

There is also absolutely no evidence at all to suggest that the understanding or the intention of the individual who completed the opt in notices or of their businesses was that every single group company was being opted in. Quite the contrary. You have specific namely entities.

Then the fourth assertion, we say, is that understanding was subsequently confirmed and the authority of the individual confirmed or ratified by the participation of group entities in the process described in section C below.

Section C starts at paragraph 19. What it does is, it describes a subsequent process of Harcus Parker and various other consultants identifying group companies which might have a claim. With respect, what happened after the opt in deadline tells the Tribunal absolutely nothing about what was intended when the opt in notices were filed, particularly in relation to companies which weren't named or referred to in any way on those notices. It may be that six months later you realised, "Oh, we wish we had filed a notice on behalf of B limited as well". That doesn't mean you can pretend the notice filed on behalf of A Limited also included B Limited. The fact you discover it six months later rather tells you that it didn't intend to do so, even if it wasn't entirely clear on the documents.

The next point then made is paragraph 18, which is -- the sentence which does

a tremendous amount of work in relation to CICC's case. It says:

"The Angeion database thus for the most part record the names and positions of an individual with a specific entity and in the context of that individual acting for and on behalf of the wider undertaking or group meeting the £100 million turnover threshold."

With respect, we say that that is just utterly inconsistent with the material and documentation we have seen, completely unsupported by any evidence from any of these companies at all. The opt in notice was filed on behalf of specific companies without any indication that they were acting for and on behalf of a wider undertaking group. You can't just sort of assume, as it now suits the CICC, that clear wording identifying an individual company can be read more widely. It makes no sense to do that.

There is no scope for inference when the inference contradicts the clear terms. It would have to be contrary to the clear terms of the documents.

So we say, actually, this is a very simple point that has been confused for a very long time by the fact we only got the Angeion database at the end of October. When you see the notices, it is clear the vast majority of them is just specific legal entities.

MR TIDSWELL: Quite a few entries like -- particularly the universities, Kings College London, Cardiff University, Emirates. There are quite a few where there's just ambiguity, isn't there? They haven't specified a legal entity, at least as far as the Angeion database goes.

MR COOK: The majority of those kind of ones -- we have accepted that the University of Southampton -- I mean, sometimes you find something mysterious like "the master and scholars of", I think, Oxford University is that example. But, for the most part, when someone talks about the University of Oxford it's relatively simple to identify the specific legal entity one is talking about, which is the university.

MR TIDSWELL: That's really the point, isn't it? Because it could go either way,

couldn't it? It could be that the intention to be inferred was that they were opting in all entities which could have a claim from University of Oxford, as opposed to just being the entity that had the closest name to the University of Oxford. I don't think University of Oxford is probably the best example.

MR COOK: I think Said Business School they have also tried to include on that basis.

MR TIDSWELL: I think there is Bangor University, isn't there? They just put Bangor University. I think there maybe is an entity called Bangor University, but they want to include another entity.

I suppose the question is: what do you say? There are maybe three categories. There are specifical legal entities. A good example of that is City Fleet Networks. Then there's very clear expressions of intention in relation to a group like PPHE Hotel Group. Then you have things which could go either way in this list, looking at the Angeion list, Emirates. I appreciate, in a sense, your submissions obviously follow on from Mr Kennelly and Mr Kennelly will be saying: well, they don't go either way.

But the simple suggestion you're making in your submission is that you're accepting that there may be an argument that inference matters. So you are closing the door completely, if it is just left -- so are you saying if it is left in a general sense here, you just go for the nearest match for the legal entity and that's it? Is that the position?

MR COOK: What we have done is tried to take what I would suggest is a pragmatic and sensible course, which is the course the Tribunal would take.

If you have -- I mean, City Fleet Networks, for example, had they just put "City Fleet Networks", it might have been quite easy to read "Limited" onto that on the basis there is a company called City Fleet Networks Limited and it might be quite easy to say it's very clear which specific legal entity is being talked about.

MR TIDSWELL: In a way, that's easier, isn't it? But, if you look at -- now I can't find it. Oh, hang on. Christian Aid. What about Christian Aid? Where you are accepting

it was just put in as Christian Aid, the DBA is just Christian Aid. There is a company -- I suppose it's an unincorporated company, a Christian Aid.

MR COOK: Christian Aid does appear to be the name of that charity. That's a relatively easy one, we would say. You identify Christian Aid. That is the name of a legal entity. It may be an unincorporated charity, but nonetheless an entity. What you can't do is read it as a reference to a wider and different entity, which is the Northern Irish one. So a number of these are like the universities, the point being "the name is in fact" doesn't include a limited or a specification like that. So they have --

MR TIDSWELL: That's the point I am making. I think sometimes there isn't a specificity about the name and yet it's not expressed as being in relation to the group. So, you know, are you just saying that's just bad luck and it's not good enough. You just go for it. You just assume that if one name is put in, it's intended to be one entity. I think that's what you are saying.

MR COOK: It is easy when they put in the right name of an entity, like Christian Aid. Then they have properly identified it as if they had put City Fleet Networks Limited, that is -- just its name is Christian Aid. So it's relatively easy. You get ones where there is a formal legal title, as I said, like a master and scholars at a college. If somebody put the name of the college down as being University College Oxford, the legal name is the master and scholars of that college. There's a point where one just says it is very clear what you're talking about. This was a question of clarity.

MR TIDSWELL: That's a good example. So, if it says University of Oxford and it doesn't correspond to the legal name of the entity you have accepted and there is an Oxford Said Business School; why have you not accepted that?

MR COOK: It is probably about understanding. You look at it and say: when you have one clear entity which that term is used to, for example, the trading name. Everybody knows University of Oxford as being the university. How that term can be interpreted

more widely --

MR TIDSWELL: Well, everybody knows that Oxford Said Business School is part of the University of Oxford so why are you excluding it?

MR COOK: We say it's very much a separate one. So where you draw the line, I accept there may be scope for issues of argument. But we would say in most cases, where you have -- if it is -- you know, it's a question of: if the notice can be interpreted with a fair degree of clarity as applying to a specific legal entity, either because it is absolutely clear or common sense tells us it is clear, it is good enough to do so.

MR TIDSWELL: What about where the holding company -- what's their name now? -- doesn't have an agreement, for example, Direct Wine Holdings, for example -- doesn't have a merchant services agreement. As you say, it put its name down as Direct Wine Holdings Limited, so it has identified as a specific entity. But the entities which have got MSAs are Direct Wine Limited and Averys of Bristol. So you say they put their name down when they are ineligible to be a class member because they suffered no loss and we should just accept that. That's just how it is. It's just bad luck.

MR COOK: It depends what you mean by bad luck.

Firstly, this has happened many times in the Umbrella Proceedings, where a claim was brought on behalf of a particular group company and some time later it has realised it should be another group company that actually has the MSA or whatever else. So you can amend in that context and it is simply a limitation consequence. It applies.

And the same here, which is, you know, of course people can be added to the register later. That's what Rule 82 allows, but the question -- if you are starting from the first question: who opted in on day one?

That is one question. And then if it is quite clear that A Limited opted in on day one,

that is where you are. If, later, they decide they would actually like to have B Limited there in substitution or addition, they can apply under Rule 82. But then it may have consequences, in the same way it has consequences if a claim form is issued on behalf of a company that doesn't have a claim and subsequently it's realised you want to change it.

We simply say what you can't do is take knowledge from six or nine months later and treat a notice served on behalf of A Limited that was absolutely, clearly intended to be served on behalf of A Limited at the time and treat it as being on behalf of B Limited simply because it is subsequently realised that you wish you had done something different.

You know, part of it is we just need the system to work in a way that doesn't involve this degree of complexity. And the way the system works is you look at what's on the notice. You don't then read it based on -- so it varies over the course of many months, based on what becomes known over time about how you might have done things differently if you'd known what you know now.

MR TIDSWELL: We should take a break.

MR COOK: I have probably two or three minutes. Then we'll deal with some of the exceptions, what I say are the exceptions to the generality and then that will be a convenient moment for a break, in my submission.

MR TIDSWELL: Then how long are you going to be? How much longer do you need?

MR COOK: I hope to do the rest in 30 minutes.

MR TIDSWELL: Okay. Why don't you just finish your bit now then.

MR COOK: What we say are then the exceptions -- and the exceptions are where, we say, properly understood there is clarity or a sufficient degree of clarity in the notice that you can say it is on behalf of a specific entity and then that is the end of the story. Then the exceptions are situations where the opt in notice includes a bit more of

a generic business name, and we say, essentially, there are three of those. We address those in our skeleton argument, at 35.

One example is Liberty London. We say where you have Liberty London identified -- I recognise there are different ways of thinking about how you could do this. We say the correct approach is you need to identify which legal entity it is referring to because that's the relevant test. A claim can only be brought by a legal entity. Where there is contemporaneous material which allows you to know who is being referred to. In the case of Liberty, the DBA was entered into by Liberty Retail Limited, which is the name of the Liberty company that operates the large department store called Liberty in London. That's clear and sufficient. We haven't taken a point in that regard.

What you can't do is, months later, say Liberty Fabrics Limited is also being added to it, when it doesn't figure in any form of the documentation at all. There is enough contemporaneous material to identify the specific legal entity, not knowledge or information that comes months afterwards.

MR TIDSWELL: You are doing that on the basis you are accepting that was validly opted in rather than Rule 82 --

MR COOK: With Liberty Retail Limited, we would accept that is sufficiently clear, given there is a large department store operated by Liberty Retail Limited in London. That's sufficient for these purposes. Not Liberty Fabrics Limited.

We say, in relation to those and all the exceptions, those ones where it is slightly less clear, there is a DBA in the name of a specific legal entity signed around the same time, which has that identification. So we say in all those there is sufficient material to identify the legal entity, not to interpret anything more widely.

Then there is a handful of entities that opted in late. We deal with those in our skeleton argument, at paragraphs 36 to 37. I am not going into detail now. We just say the

basic point is they did not opt in by the deadline. They did not validly opt in. They can, of course, make a Rule 82 application. They should have made a Rule 82 application nine and a half months ago. They haven't done so. Now, we consider the position as at today's date.

But the short point is they didn't opt in validly.

MR TIDSWELL: I am trying to work out when they did make the application. There were two in November, weren't there? It was either the 18th or the 25th, which one is the --

MR COOK: I would have to check the date the application was made. It was the November date.

MR TIDSWELL: It doesn't matter. Anyway, you are saying they didn't make an application until November?

MR COOK: Yes. You consider the application now. It doesn't matter why you didn't validly opt in. Once you've failed to opt in the rules mean you ask the Tribunal for permission. Had they applied on 12 February, it would have been a very, very short application. Nine months later, it is rather less so and has consequences.

The third category then is there were two opt out notices that were submitted. That is Oriflame and Suit Supply. The point here is CICC says that was just a clerical error. We say, with respect, that doesn't seem to be right. This appears to have been a deliberate intention to file an opt out notice. And the November register -- that's 315 -- states essentially that months down the track the turnover has been investigated and it is found to be more than £100 million based on the specific test in the CPO. That just simply confirms there was a deliberate decision to file an opt out notice. Maybe they shouldn't have made that decision, but they did. They simply have not validly opted in because they didn't file an opt in notice. Again, they simply should have applied. They could have done so nine months ago having left it, having had

their names included in registers when they shouldn't have been there for months on end. Essentially, there is now an application which has consequences for the fact it has taken as long to bring forward as it is. But it is a bright line, you either had opted in on the date or not. If you hadn't, you need permission from the Tribunal.

We say, for the vast majority of them, the simple answer is: companies that were not referenced or referred to in any way just simply cannot be taken to have opted in.

MR TIDSWELL: Are you going to deal with Saga and Amex?

MR COOK: Those are simply Rule 82 cases. There it is common ground. There is nothing being said they potentially opted in back in February. They are just --

MR TIDSWELL: You are going to come to Rule 82 after the break?

MR COOK: Yes. I have Rule 82, including the limitation point and domicile point to deal with. I will rattle through, I hope, in 30 minutes.

MR TIDSWELL: Why don't we start again at 1.45. I am conscious the shorthand writer needs a proper break. If we get squeezed and you feel you need a bit of extra time, we can sit later as well, if we need to. If you are happy, I think that's the way to manage the timing. So we will rise and resume at 1.45.

(1.12 pm)

(Lunch break)

(1.45 pm)

MR TIDSWELL: Yes, Mr Cook.

MR COOK: Sir, just to point out one other example which I think is useful in terms of some of the questions the Tribunal have been asking. If we have the Angeion database open.

MR TIDSWELL: Yes.

MR COOK: It is number 14, line 14. That listed United Utilities Group Plc and United Utilities Water Limited. Again, we didn't need the Flight Centre example, where they

filed separate notices. Where it is quite clear someone wanted to include two companies they can do so, and they have. In those circumstances, we accept it is a notice on behalf of the two identified companies.

So all the sort of practical problems are very, very resolvable and certainly does not in any way suggest the Tribunal needs to read clear descriptions in some sort of broader sense.

With respect to the other questions you were asking me, like Bangor University, Bangor University is the legal name. So a lot of these ones, they are the legal names one is talking about. So there is not any uncertainty at all in relation to that.

Christian Aid, we say, is in the same category. It is the right legal name. It just doesn't include limited or plc, which is what you have for a commercial enterprise, when it's a charity, unincorporated association or whatever else it might be.

Sir, that brings me to the Rule 82 applications. We say there is an immediate, fundamental problem with these applications, which we have addressed in our skeleton argument, at paragraph 50, and hasn't been answered in any way, which is: with the exception of the Saga and GBT Amex entities that I will address separately; how is it that CICC says it has authority to make any application on behalf of these entities? It is a point we have been making since September.

If we get to the Rule 82 stage, by definition this is in relation to entities that have not opted in. So they are not represented persons. They have not opted in. How can CICC bring applications on behalf of entities it doesn't represent?

We can see the distinction here, because in relation to the Saga and GBT Amex entities, Mr Robinson's witness statements explain they have specifically authorised CICC to make the application. For the vast majority of the rest of them, there is just not any equivalent. The retrospective confirmations of authority don't appoint CICC to act on behalf of these entities. They don't make any reference to that kind of

application at all. As we see, the vast majority of them are signed on behalf of legal entities that did sign opt in notices and did opt in, not the entities in respect of the applications that are now said to be made.

British Airways, I showed you that one. It is one that doesn't even make a reference to the two entities which the CICC is now saying it wants to make an application on behalf of.

It is a point that both goes to what we say is a fundamental issue of authority, but it also leads into what is another clear defect, we say, in the application, which is the failure to address the requirements of Rule 82(3), the circumstances, the delay, the prejudice. Any proper Rule 82 application would have needed information from the companies -- from these companies explaining why they'd failed to opt in and why they have taken nine months to make an application.

With respect, there are gaping holes here. There is no explanation, with the exception of a couple I will come to. With the vast majority of them there is no explanation for the failure to opt in by the deadline.

MR TIDSWELL: Just on the first point about authority, isn't it the case that any application under 82(2) would have to be made by the class members, not the Class Representatives? Surely Mr Beal would have to stand up and say he represents the class member, isn't that what Rule 82 provides?

MR COOK: Sorry, sir.

MR TIDSWELL: I am not sure how it is expressed in the application. It seems to me that any application to be included would have to be on behalf of the class member.

MR COOK: I think that would be right, yes.

MR TIDSWELL: Well, if that's the case, you can't really get into the question of authority, can you? If Mr Beal stands up and says he is appearing for whoever it is, you surely can't question that?

MR COOK: He doesn't say he has authority to act on behalf of any of these class members. His skeleton argument says that's a skeleton argument by CICC.

MR TIDSWELL: Let's see what he says about that.

Just on the delay point, the second point, there are two questions, aren't there? One is: what's the explanation for why they didn't comply with the deadline?

And the second is: why haven't they applied more quickly under 82?

In relation to the first, that's a bit easier for most of them, isn't it, because you either have the category that says, "We were just late", and most of those are explained, albeit somewhat briefly. You don't need much explanation for those. If it's three or four hours later, it's because they've missed the deadline and they have misunderstood something. It's not terribly difficult, is it?

The real question is: why has it taken them nine months to work that out and deal with it?

MR COOK: With respect, we say we should be dealing with both of them.

MR TIDSWELL: We have to deal with both of them. But I am just saying it is a much lower hurdle, isn't it, for someone who has missed it by an hour, put it in an hour late? What sort of evidence would you expect to see for that?

MR COOK: When we are talking about the very narrow category --

MR TIDSWELL: I am just starting with them.

MR COOK: For those ones, ultimately, of course, the explanation is -- well, the fact, at least they put it in an hour late, those are the facts. There's no explanation for why they didn't try to do it in good time, but that's probably going to be a relatively short point. Those are extremely exceptional. We are only talking about three or four entities.

MR TIDSWELL: I just want to take it in steps. In relation to the great wash of these, where the position has clearly been on the Class Representatives' side, that they have

done all that's needed, that is the explanation, isn't it? Because it is really when it has become apparent, as it seems to have become, that it's less straightforward than they thought that they have started -- we see in September, don't we, in the response from the Class Representatives, where perhaps the fully enormity of the position becomes plain? They say, "Well, if we have it wrong, we will apply under 82". Again, surely isn't that the answer for the delay -- isn't that the answer for the first limb of: why didn't you do it then? And the answer is: because we didn't think we had to. We thought about it in a different way.

Yet they still don't accept that. Surely that is just the answer, isn't it?

MR COOK: With respect, sir, that again involves an assumption which there is simply no evidence to support.

That assumption is that these are companies which set out to opt in the entire group, signed a notice identifying one group company, thought that was good enough and thought they had opted in the rest.

Again, I have taken you through it. But that is absolutely inconsistent with what the evidence appears to show here.

MR TIDSWELL: I am not sure that's right, Mr Cook. I don't think that can be right, can it? Because if what they have done is a mistaken understanding of what they should be doing, you wouldn't expect to see any evidence. Of course they are not going to produce the evidence you are looking for because that would have been good enough to get them into the opt in, in the first place.

The point is it is absolutely clear, isn't it, that they have proceeded on a mistaken understanding. And I am not entirely clear, perhaps, exactly who understood what at the time. But, in the generality of this, what has happened on that side of the courtroom is they thought they didn't need to do it. As a result people have not done it, at least in the way you say they should have. That's the explanation for it hasn't been done.

Why is it more complicated than that?

MR COOK: With respect, we say that's taking the legal position that's being advanced now by Harcus Parker and assuming people who aren't represented, haven't put forward any material, made exactly the same legal error. And we simply don't know that.

I mean, what we see from the documents in most cases there was a specific entity opting in, a number of examples where, you know, multiple entities clearly did opt in from a group because they knew they could do so. To assume that the 80 plus limited entities that are in dispute here all thought they were doing something that was effectively brought the whole the group in. They were legally wrong on that. That involves an assumption about what their position was. With respect, we say that simply is not evidenced by any material from those companies.

Now, if somebody put in a witness statement that said, "We had understood legally this was sufficient", or a letter or anything else that said that was the position, it would be slightly different. You can't assume --

MR TIDSWELL: Why would you think somebody who had claimed some different entities in the group would only put in one entity's claim, unless they thought that was sufficient? What possible reason would you have for overlooking the other claims you had?

MR COOK: At the time you identified this was an entity that wanted to bring a claim. You may not have thought about every other group company or considered it. It is obviously work they have done over time. It doesn't mean that you thought you were successfully opting the whole group in. It just means with additional work you have decided there are additional claims you might want to bring. That's not the same as believing you have done it on day one at all, sir.

As you say, that might be a different issue if somebody had operated under a mistake

for an extended period. Simply, we say, the evidence is just not there to draw that conclusion.

In any event, sir, we say these are matters that do need to be addressed when a party is coming before the Tribunal seeking special compensation for not complying with the deadline laid down by the Tribunal.

As you say, sir, there is the second bit of it, which is the delay in making the Rule 82 applications and the fact that there were multiple opt in registers produced that included names of people. And, just on the clear face of the notices, just simply didn't opt in. Again, we say these are matters that cry out for proper explanation from people who are -- entities who are actually seeking dispensation from the Tribunal who essentially were not represented by Harcus Parker and so we can't assume that the legal advice they proceeded on is the same as the position CICC is taking here.

There is then the exception, which are the GBT and Saga entities. We do get some evidence. But, with respect, that shows the point because that evidence which we address, at paragraphs 59 to 60 of our skeleton, really doesn't sort of meet the point at all.

Take GBT, for example. They simply say that following a merger some companies decided they wanted to participate. That shows the sort of important point here, sir. They are not saying, "We thought we joined in nine months ago", at all. They are simply saying, "Now there's been a change in ownership, we have thought about the question again. Now we'd like to do so". So that reveals the problem with making assumptions that everyone thought they were joined originally. Those companies clearly didn't.

MR TIDSWELL: I am not sure. It is very difficult to say it shows anything, isn't it? You couldn't run that argument because at the time of the opt in they weren't part of the group. So it doesn't make any sense, does it? I don't understand. That's a case

where some things have happened. They have been given some reasons, but they may or may not be good enough. But that doesn't tell us anything about the other people who are in a different position, does it?

MR COOK: GBT has been bought by Amex. GBT had already opted in one group company. They were part of a group that did opt in one group company. They have then been bought by Amex.

MR TIDSWELL: CWT was the company that opted in. Are you saying they were all one group at the time?

MR COOK: Yes. Then it was bought by Amex and it is under the new ownership they are then thinking of joining in. So this point does arise that they are not part of the original opt in.

MR TIDSWELL: I think that's all clear. I understand. I think I am pushing back a little bit that you can learn anything from that example about the rest of them. It just seems to me it meets across.

MR COOK: I am simply saying it shows that the idea that everyone assumed what they were doing was enough to opt everyone in is simply not an assumption that can be made.

MR TIDSWELL: In relation to CWT that must --

MR COOK: In relation to them. By implication, you can't assume everybody else was operating on a contrary philosophy that it was good enough because we simply don't have evidence from any of them. The one example where we have specific evidence says that was not the assumption they were operating on. We don't have evidence from the others to know what their assumptions were, if any, in relation to what was happening.

The same point comes out of Saga, where there was an issue in relation to Saga group, which was essentially split in two. It has some travel bits and some insurance

bits. The evidence is, basically, the discussions were only with Saga Travel. So there was never any point where Saga Insurance were thinking about it actively. But, actually, what was opted in was only one Saga Travel entity, not others.

Again, there is no suggestion that the other ones thought they were being opted in if they weren't. Mr Sharma didn't get authority in any way to opt other companies in.

Again, there is no basis to assume they must have assumed they were being effectively opted in. The evidence indicates they didn't. So we have two examples which contradict the basic thesis that everyone must have been operating under a mistake of law. That's just not the case.

That brings me to the third issue, which is prejudice to the Defendants. That is the form of limitation. This is a point that applies, essentially, we say, to all the applications, including GBT and the Saga entities.

There is an important disagreement between the parties in relation to limitation. I will set out the starting point here. It is common ground between us that under English law, where you have an ongoing wrongdoing, and the MIF is potentially that, a cause of action accrues daily. So, 1 January, you get a cause of action for that day. 2 January, a separate cause of action for that day. It goes on like that.

What that means is, when limitation cuts in, the standard rule, six years later, again, the same thing is you lose daily causes of action. So your wrongdoing on 1 January 2016 becomes time-barred on 1 January 2022. So you lose a day at a time, and that's the standard sort of way in which limitation operates in this system.

Now, the disagreement between the parties concerns the effect of what are special limitation rules in section 47E(vi) of the Competition Act in relation to parties who were eligible to opt in to opt-in proceedings, but didn't do so by the opt in deadline.

Section 47E is at page 12 of the authority bundle. It would be helpful if the Tribunal could turn that up for these purposes.

MR TIDSWELL: Yes.

MR COOK: What we get in relation to this is -- so the relevant parts, particularly subparagraphs (iv), (v) and (vi).

Sub-paragraph (iv):

"The running of the limitation in respect of the claim is suspended from the date on which the collective proceedings are commenced."

So, the starting point is, once proceedings are commenced there is a distinction of limitation. It stops running for initially so long as collective proceedings are on foot.

Then section 47E(v) then sets out the dates on which time starts running again. For these purposes, it is sub-paragraph (d) which is of relevance to us here:

"In the case of opt in collective proceedings the period within which a person may choose to have the section 47B claim included in the proceedings expires without the person having done so."

So, essentially, if you were eligible to opt in, you fail to make the opt in notice before the deadline. So, in those circumstances, time starts running again. If we go back to sub-paragraph (v):

"Following suspension, the running of the limitation period resumes on the date on which ..."

You basically fail to opt in by the deadline. It is important to emphasise that time starts running again. It is not -- this is important for 47E(vi).

From the prima facie position sub-paragraph (vi) alters that. If you are eligible to opt in and fail to do so, limitation starts running again at the end of the opt in period. So, here, on 10 February, if you didn't opt in, limitation starts running again.

Then sub-paragraph (vi) provides:

"Where the running of the limitation period in respect of the claim resumes under subsection (v), but the period would otherwise expire before the end of the period of

six months beginning with the date of that resumption, the period is treated as expiring at the end of that six-month period."

That's where the disagreement between the parties arises. In a nutshell, the disagreement between us is, we say, because we are more than six months after the opt in date, effectively, all that -- we get the benefit of the full sort of nine months of the delay in doing this, which means in practice they've lost the benefit of the suspension from 10 February, the opt in date, to 28 November, the date of the Rule 82 application, so nine and a half months. Whereas CICC says: no, they just lost benefit of limitation referral in relation to 10 August, so opt in date plus six months, to 28 November. So they've lost three and a half months. That's the difference between us. Nine and a half months versus three and a half months.

We say, with respect, the way the section operates is clear. What it does, in sub-paragraph (vi), is it gives someone who hasn't opted in a six-month grace period in which, essentially, to decide what it wants to do. If it issues its own proceedings within that six month period, it doesn't have any adverse -- additional adverse limitation consequences. So, even if it waits five months and 27 days, it is within that six-month grace period, so there hasn't been more limitation lost at that point as a result of that delay in bringing the proceedings.

MR TIDSWELL: Where does it say any of that in (vi)?

MR COOK: If we go back -- I am explaining how it operates. What it says it:

"Where the running of the limitation period resumes under subsection (v) ..."

And it resumes on 10 February:

"but the period would otherwise expire before the end of the period of six months, the period is treated as expiring at the end of that six-month period."

So we say you interpret that as: if you had commenced it within that six-month period --

MR TIDSWELL: Why are you interpreting it like that? It doesn't say anything about

issuing proceedings at all, does it?

MR COOK: Well, on the basis that issue of proceedings ordinarily stops limitation running and expiring. The issue of proceedings before the expiry of the limitation period.

MR TIDSWELL: The period that is expiring is the original limitation period, isn't it?

MR COOK: Yes, that's correct.

MR TIDSWELL: So what it's doing is saying that doesn't happen. It is saying it doesn't happen for six months after the opt in date.

MR COOK: Yes.

MR TIDSWELL: So where do you get from that that you have to do something else before you get the benefit of the six months. Or you don't get the benefit of the six months unless you do something else. I don't see anything in there that suggests that at all.

MR COOK: On the basis if you had commenced proceedings within that six-month period, you would be within the provision of that benefit. The expiry has not happened yet and that's a standard --

MR TIDSWELL: Sorry, that's not the question I asked you. Where does it say in there anything about having to issue proceedings in order to get the benefit of the extra six months?

MR COOK: On the basis the limitation only becomes relevant when you bring some form of proceeding.

MR TIDSWELL: It doesn't, because it (inaudible) you. In this case, it is relevant and no-one is issuing any proceedings.

MR COOK: I will explain how the rest of it operates in our circumstance.

So we say the way in which subsection (6) operates is it gives up this six-month grace period. Limitation, there is no additional expiry during that six months. The end of it

says:

"If the period would expire before the end of the period of six months, it is treated as expiring at the end of that six-month period."

So, if you have done nothing -- and in this case all these companies have done nothing within that six-month period, the sort of six months of limitation all expires at six months and one day.

MR TIDSWELL: Isn't that the Class Representatives' position? This doesn't expire until August 2025.

MR COOK: Yes, but they then seem to be saying it is only from August onwards that we have the standard limitation period.

MR TIDSWELL: That's right. It starts to then -- that's what I thought.

MR COOK: What I am saying is, on 10 August, six months' worth of limitation expired on that day. So they lost the first six months of that.

MR TIDSWELL: I am really struggling to see how you get that out of subsection 6. I am not sure there is anything else -- unless you have something specific in there to point to, I don't think it says that at all.

By all means have another go at it. I just don't see anything in subsection 6 that says that.

MR COOK: I will have another go, sir. What it is, is the period it treated as expiring at the end of that six-month period.

MR TIDSWELL: Can you be specific about what period you are talking about? There is the period it is treating as expiring. The limitation period, so it doesn't expire until the end of the six-month period.

MR COOK: It is expiring --

MR TIDSWELL: The scheme of the thing is you have six months that would have run on your example -- I can't remember what date the claim form was. June 2022; is that

right?
MR COOK: June 2022. For argument's sake, 1 June 2016 and every day it's moving a day further forward. What this scheme of this thing does is it stops that. It stops it until the end of the opt out period; okay? Or the opt in period. The daily opt in period, except in circumstances where the six years have already expired by that stage or indeed actually in the six months afterwards. It says that doesn't happen and the standstill period expires at the six-month point, which is August 2025. If the standstill period expires then, then it goes back to doing what it was doing before, which is knocking a day off every day. So why would it do anything different?
MR COOK: Because I would suggest the way you read it, it's saying: if the period would otherwise expire before the end of the six-month period, so that is --
MR TIDSWELL: That is a condition, which is met in this case.
MR COOK: Yes, the period is treated as expiring at the end of that --
MR TIDSWELL: The first of those is a condition that is met in this case. We know that's the case because --
MR COOK: So we --
MR TIDSWELL: -- the six-week period will have expired in 2022.
MR COOK: Yes. It then says:
"The period is treated as expiring at the end of that six-month period."
MR TIDSWELL: So the standstill is extended for another six months.
MR COOK: No, we say it rolls up. That's the difference between the parties. What I say is it's not saying the standstill continues. It is expressly saying, in subsection (v), time starts running again. What it is doing is saying that six months' worth of limitation all expires at the end of the six months. The period would otherwise expire within those six months. It is treated as expiring at the end of the six months, so on 10th.

MR TIDSWELL: That's about -- I think we should move on, Mr Cook. I am not sure we are going to get any further.

MR COOK: Sir, I'm afraid it is an important point so --

MR TIDSWELL: It is. But, at the moment, I am not with you because I don't think it makes any sense what you're saying and it doesn't appear to me to be what the subsection says.

So, unless you have something else to say, there is no point in saying what you have just said again because I have heard and understood that.

MR COOK: I'm afraid I will try again because it is an important point.

MR TIDSWELL: If you have something different to say, by all means.

MR COOK: I will try to say it differently, sir, yes.

Take the example then. So we assume the claim form is issued on 1 June, to keep it simple, 1 June 2022. So they could claim at that point about six years up until 1 June 2016. When limitation starts running again, ordinarily they would lose to 1 June 2016, day one, 2 June, day two, as it goes forward like that. Those are the periods --

MR TIDSWELL: Pausing for a minute, just to be clear, if this subsection didn't apply, that is what would happen under subsection 5, isn't it? That's right, isn't it?

MR COOK: Yes. They would simply lose a day of the claim.

MR TIDSWELL: Once we got to 10 February, they would start losing a day after that?

MR COOK: Yes.

MR TIDSWELL: Okay.

MR COOK: What I suggest subsection (vi) does. Firstly, we have already been told limitation resumes running. That's what subsection (v) does. Then it says:

"Where the running resumes, but the period would otherwise expire before the end of the six-month period."

So this is the six months of daily accruals that ordinarily would happen, the period is treated as expiring at the end of that six-month period. We say in relation to that, if you take 1 June 2016 claim, that would ordinarily expire on 11 February, but because of this it's treated as expiring at the end of the six-month period. So that is treated as expiring on 10 August, but that claim is therefore gone, that limitation in relation to --

MR TIDSWELL: For that day.

MR COOK: For that day, yes. And so is 2 June. Again, that would expire on 12 February during that period.

MR TIDSWELL: I understand what you say -- I just understand why you say subsection (vi) is there. You have said everything you can say about it I think. I just don't think that's what it says.

MR COOK: Well, sir --

MR TIDSWELL: It is a perfectly sensible scheme, isn't it? The other interpretation is it just extends the standstill for another six months.

MR COOK: With respect, sir, it doesn't say that because we know, in subsection (v), it says limitation resumes running. So, if it had said, as you get in subsection (iv), that the running of limitation is suspended for six months, absolutely, that would be entirely as you are suggesting.

MR TIDSWELL: It is just dealing the limitation period to last another six months. That's all it is doing. It might not be expressed, perhaps, as clearly as it could be done. I can see there is a point about that, but I don't think you can go beyond that.

Anyway, I have your submission and we will see what Mr Beal says about it and you will get to reply on it.

MR COOK: I want to say again the critical words, we say: the period is treating as expiring --

MR TIDSWELL: Yes, there is no point continuing to read it out. I know what it says.

We have been over that before.

MR COOK: My explanation on how that operates at the end of that six-month period is not that everything is deferred --

MR TIDSWELL: I know exactly what you say happens. It's just I am not entirely clear why you think that's what it says.

MR COOK: Because if it had simply intended to carry on suspension --

MR TIDSWELL: I understand that. You raise it in paragraph (iv).

MR COOK: We say it operates differently in relation to that. So we do say the effect of that is --

MR TIDSWELL: Mr Cook, you will need to move on because we're short on time.

MR COOK: That brings me to the issue of domicile. We do say in relation to this: this is a situation in which there is wording in the operative order. It refers to a domicile date and says: if you are domiciled in the United Kingdom you must opt in. What essentially is being said now is that wording is otiose. That doesn't serve a purpose and should be basically ignored.

We read that by reference alongside it to the opt in notices. The opt in notices --

MR TIDSWELL: Before we do that, can we look at the Order? Do you mind going to the Order?

MR COOK: It is 383. It is 387 is where this particular bit arises --

MR TIDSWELL: It is 383, is it? So the bit that we are looking at is paragraph 22, isn't it?

MR COOK: 387.

MR TIDSWELL: Yes. That first sentence:

"The setting of the domicile date is required by the rules."

Rather oddly, I think, but it does require it. I will ask Mr Kennelly. I don't know if you can think of any reason why you would need a domicile date for opt-in proceedings in

general terms?
MR COOK: In general terms, that is simply something the rules suggested should be in there. I mean, there may be potentially good reasons to want to know who is domiciled on particular dates for the purpose, for example, of limitation, for example.
MR TIDSWELL: You might have a class that is restricted expressly to UK domiciled people, in which case obviously you would have to. But the thing about Rule 81 is it lists all the things that go in both types of proceedings and it is not entirely clear to me why you need this in these proceedings. But anyway.
Then you get on to 22, and in the way you don't actually need the words "domiciled in United Kingdom" or "the domiciled date" because what is important is you have to opt in. But it does say that. I appreciate it does say that. Then the next sentence, it just goes on and sets out the requirement for a person to opt out. It doesn't say anything about domiciled persons. That's the Class Representatives' position, I think.
MR COOK: Yes, sir, and we say in relation to that, as you say, we don't need any of this. It shouldn't be there. The problem is it is there in the order. What I do say --
MR TIDSWELL: Well --
MR COOK: -- where it specifies you are UK domiciled, you have to opt in, we say that has to be given some kind of meaning and effect.
MR TIDSWELL: Well, it is given a meaning, isn't it, because everybody who is domiciled has to opt in. It's just everyone who is not domiciled has to opt in as well. The real question is: does the order say if you are not domiciled, you can't opt in. That's your argument, and I don't think it says that. So, in a way, you are trying to read into the order, I think, something that's not actually there. It may be a perfectly legitimate construction, but it doesn't say so in terms, does it?
MR COOK: The question is: how do you interpret where it says if you are domiciled, you shan't be included unless you opt in. Dealing with that specific situation, it is not

addressing the situation with a non-UK merchant --

MR TIDSWELL: Yes.

MR COOK: We say if you have something that specifically says if you're domiciled you must opt in, you need to opt in. That is dealing with the situation of the opt in position.

If you were allowing non-UK merchants to opt in, you would simply not draft in this way. You would simply say: anyone who wants to opt in should opt in.

You wouldn't need domiciled and you wouldn't need any of this.

MR TIDSWELL: Arguably, the second sentence does do that. It says anyone who wants to opt in does need to opt in.

MR COOK: We say that is the procedure. If a person wishes to opt in, they must do those things. That's telling you if you want to opt in how you do it, the mechanism approach.

That is the only point. We rely on the notice as well, which says in clear terms proceedings are brought on behalf of UK merchants.

MR TIDSWELL: Yes.

MR COOK: What's said against us is two pieces of evidence that suggest there was a clear intention to allow non-UK merchants to opt in. They rely upon the reference from -- this I think is in the skeleton argument. They rely on a reference from the Day 2 of the revised CPO hearing in which it was said:

"Just to restate the position for opt in we say the coverage is proposed to include non-domiciled merchants with transactions made with a UK acquirer."

So that was the -- there is a reference to talking about that. What then went on beyond that bit of discussion was then a conclusion, which indicated, as you get recorded in the order, that essentially that category of transactions would be minimal.

We see this from the judgment, which is at page 225 of the bundle, which simply

effectively accepts the submission that's made.

MR TIDSWELL: Doesn't it make it plain that it was anticipated there would be non-domiciled merchants involved in the claim, though?

MR COOK: Well, it was certainly something that was discussed. They started off saying: yes, they wanted to do it.

But what we then get -- and it is paragraph 121 of the judgment -- they said:

"... no methodology put forward to deal with non-domiciled merchants who may choose to join the opt in class."

Then the Tribunal says:

"The PCR says there is no uncertainty for recording location of acquirers and no need for developed methodology as the point only affects card present transactions which will be of immaterial value."

So we came to the point where they raised the possibility and then said: this is going to be of immaterial value.

MR TIDSWELL: For the card present transactions.

MR COOK: No, it only affects card present transactions.

MR TIDSWELL: That's right. That doesn't mean there's not a significant claim in relation to card not present transactions, does it?

MR COOK: It does, sir. That was the submission that was made. Card not present transactions would not be with a UK acquirer.

MR TIDSWELL: Not with a UK acquirer.

MR COOK: If this was this other category that would have led us into -- the point you're making is: you don't have a methodology for this. The submission on that was: no, this is only going to be card present.

The reference for this is in the transcript. Several pages of submissions in relation to this from CICC's counsel at that hearing which follows. It is page 1627 and it is over

the following three pages or so, where they said: no, card not present will be with a foreign acquirer.

So they are excluded. The only bit that's left is going to be card present, which are immaterial.

MR TIDSWELL: So what -- isn't the short point, though, it was anticipated there would be some, regardless of how material? I don't understand -- are you suggesting that because it is immaterial they shouldn't be entitled to opt in? Is that the point?

MR COOK: We are not saying that, sir. We are saying it is quite clear this was intended. We point out that actually where we got to at the end of the hearing was what was being said could -- people could opt in for was something of immaterial value. So it is hardly surprising if the Order is not drafted to include a claim which, frankly, is said to be irrelevant.

MR TIDSWELL: Well, the other way of looking at it, it is plain it was a claim that was being pursued, albeit it was of immaterial value. So it would be odd if the Order excluded it.

MR COOK: Well, it is immaterial. We say it would make logical sense.

Our submission is you need to read paragraph 20 and 21 to give them effect, consistent with the notice that's limiting the claim to UK merchants and, you know, reading anything else is essentially talking about an immaterial category. With respect, sir, there is no justification for -- particularly when we are in the territory of the slip rule, engaging in some kind of slip rule process where we are talking about an immaterial category of transactions.

In any event, sir, that's the submission I make.

MR TIDSWELL: Thank you very much.

Mr Beal.

Reply on behalf of CLASS REPRESENTATIVES

MR BEAL: I am going to make submissions in broadly six categories.

First, the opt in class procedure.

Secondly, the use of the term "undertaking".

Thirdly, the steps that were taken in practice.

Fourthly, touching briefly perhaps on the agency authority issue, which seems less pressing than, perhaps, it was.

Fifthly, the non-UK domiciled point and, finally, our applications, to the extent they are needed.

Can I start with the opt in class procedure. At the risk of stating the blindingly obvious, these are collective proceedings brought by the Class Representatives. The Class Representatives instruct and retain those instructing me to act on their behalf and the purpose of a notification of a decision to opt in was to identify those merchant businesses that met the threshold criteria.

The whole structure of the opt in/opt out divide was based on a threshold of turnover for the undertaking or corporate group of £100 million. That was loosely based on arguably old authority that larger businesses are capable of doing things for themselves. They don't need the protection of an opt out proceeding. In any event, this is the way it was structured and the opt-in proceeding was therefore conducted on the basis of an assessment of the revenue levels of the undertaking/corporate group.

So when those instructing me were liaising as part of the book build process with the large corporate groups, many of whom had expressed interest in this claim for many years, they were saying, "Do you meet the £100 million threshold figure?" that was the class definition. The class definition was: are you a merchant with transaction value of £100 million or more? If you are not, then you are excluded from the opt-in proceedings and you become de facto involved in the opt out proceedings, unless you

yourself elect to opt out of the opt out proceedings.

That was the way it was structured.

If you would be kind enough, please, to turn in the first bundle, tab 6, to page 167, we have an extract from the first judgment, which had declined to make either an opt in or an opt out order in CICC's applications.

At page 167, one sees paragraphs 218 to 222. This Tribunal was mentioning whether or not there was an identifiable class for opt in claims, and it says:

"These are larger businesses", paragraph 218, "by definition with a turnover of £100 million or more. Common sense suggests it is more than likely they will undertake transactions involving commercial cards and will be aware of and able to evidence that. Most of the potential opt in merchants are likely to be an IC plus or IC plus plus contracts, in which case they will have record of the MIFs they have been charged. It is anticipated the class size will be considerably smaller than that in the opt out proceedings with the expected number of class members opting in being in the low hundreds. This makes the process of requesting information easier."

So the conclusion, at 221 and 222, was that:

"Entities which are in the region of £100 million average annual turnover would find a way to determine which class they should be in and we do not anticipate any real difficulty resolving any issues that might arise."

Now, that last hope has proved unfounded. But the clear intention was that businesses on a group basis, with annual turnover of £100 million or more, would find themselves in the opt in class.

The second CAT judgment made no changes to that conclusion. The Tribunal will see that second judgment at page 226, in particular at paragraph 125:

"There was no reason to alter. The proposed Defendants had another crack at it. But the Tribunal saw no reason to alter the original assessment made in the 2023 judgment

to the effect that collective proceedings are the better way of vindicating the claims of the potential class of merchants who might join the opt-in proceedings."

So it is class of merchant, class of businesses and it is determined on the basis of a turnover threshold.

There was no indication at that stage that the turnover threshold had to be met by a specific legal entity, be that a corporate or an incorporate person. The assessment was going to be made at the threshold level.

How does that fit in with the statutory regime?

Well, if we could turn, please, in the bundle of authorities to page 8 --

MR TIDSWELL: Just before you do that, that last point you made, I am not sure, but I think the Defendants accept that a merchant who has a turnover of less than 100,000 could be a specific class member provided they meet an additional test of being part of a group that has an undertaking that has £100 million. I think that's really their starting point in a way.

So the point here is almost the other way round, which is the undertaking, the £100 million is a gateway. If you get through that, you have to still identify who you are for the purposes of opt out.

MR BEAL: I will come on to look at the CPO Order and then the notice that went out all of which, we say, was geared towards identifying whether or not a generic business, a merchant with an identifiable trading name, i.e. on a group basis, had met that £100 million turnover threshold.

MR TIDSWELL: It is not surprising in a way, is it, because of the --

MR BEAL: No, because if you don't --

MR TIDSWELL: -- between the two proceedings and that was a matter, I think, of some discussion and concern. But I suppose the point being made is that's all very interesting, but, at the end of the day, you still can't be a class member unless you

meet the requirements. But I am sure you are going to move on to, I am sure.

MR BEAL: I am going to come on to that.

If the CPO order had said in terms: the divide is based on a £100 million turnover, but you need to opt in on a specific basis for a specific claimant and explain how.

No doubt, you would then have to explain how the totality of the different claimants you are opting in meet the £100 million threshold. That would have been a very different way of doing it. Of course, that would have been a much more extensive exercise. That sort of order would have essentially required the opt in claimants to have their ducks in a row as to what the individual claimants were, what the individual turnovers were, and how the turnovers summed to the requisite amount in order to then meet the definition in the class.

The difficulty with that is, it is very cumbersome to do that for all the reasons you have seen in the evidence. Instead, what this opt in order said is: we have had an expression of group interest all the way through and you have seen the list of groups that had expressed interest. This Tribunal directed my clients to disclose that ongoing list they had maintained throughout, through Angeion and each of those groups were treated as a group entity. None of them were then broken down into specific claimants. So when the CPO Order was made and when the CPO Notice was published, we followed on with that tradition of opting in people who were meeting the threshold on a group basis.

The question then becomes: is that effective, to have opted in the undertaking as a person as defined by section 59?

We say yes, that is. Do you then need, as a matter of law, to have broken down the individual components of that undertaking for the purposes of meeting the requirements set by the CPO Order?

We say no, you don't.

MR TIDSWELL: Sorry to interrupt you. But I don't think that is what Mr Kennelly is saying.

I think once you ticked the box on the group doing £100 million it doesn't matter what the turnover of the subsidiaries is and if you don't know, so you get £100 million from the subsidiaries you put in, it doesn't matter. I don't think he's saying there is any requirement to go back to the order once you have ticked the box on the £100 million at the undertaking level. I think that's his position. He is nodding.

If that's the argument you are tilting at, I don't think it is quite right. I think it is something actually easier than that, which is once you have identified the group you are a party to is over £100 million, then you are eligible. It doesn't matter what your turnover is.

MR BEAL: If that's right, then what we have done is to identify the group undertaking, the corporate groups that meet that criteria because that is what the definition of merchant effectively requires under the CPO Notice.

MR TIDSWELL: I think that's accepted. I don't think anyone is testing that at the undertaking level. They are just saying that's not sufficient for the purposes of the process that needs then to be followed.

MR BEAL: Well, the question is: is it sufficient for the purposes of indicating an intention to opt in to the proceedings?

The first stage.

And then is it sufficient to identify the specific loss that's been suffered by the constituent elements of the undertaking. And that's a separate stage.

MR TIDSWELL: Yes. On the first limb, I think it's not just a question of intention. It is actually opting in, I think.

MR BEAL: Well, the requirement is to notify by what became 10 February. I think it was initially the 9th, but that was a Sunday. By 10 February you had to indicate

an intention to opt in to the proceedings on behalf of the eligible merchant, rather than an excluded merchant, under the CPO Notice.

I can go through the legal structure or I can go straight to the CPO Notice to make these points good. Maybe start with the Notice. It is easiest, perhaps, to look at the one that was actually made on 9 August and I can show you the deletion that subsequently occurred. That's at page 383.

One sees paragraph 1, at page 384, England and Wales is the designated jurisdiction. It is made, under paragraph 2, against the Defendants. The remedy sought is an award of damages. So the deletion that was made and redated 17 February 2025 was the deletion of the word "aggregate". Otherwise, as far as I can see, it stays the same. It is for the class as then defined.

What we then see, in paragraph 5, is that claims are certified as eligible where they are brought on behalf of the class as defined below arising out of the alleged breaches of statutory duty. In relation to transactions involving a commercial card MIF.

We then see, in paragraph 6, it is merchants who paid a merchant service charge in respect of one or more commercial card transactions during the claim period in the UK that becomes the class. That's merchants. And it says the class does not include Excluded Merchants.

So the class is defined on a merchant basis, but recognising that Excluded Merchants are not within it.

I should add "in the UK" deals with the card present, card not present distinction my learned friend, Mr Cook, was just referring to. Its transactions take place in the UK and generate a UK MIF, which are the ones that are relevant. And that's the opt out proceedings, the class definition excluded any non-domiciled claimants at all. So opt out, it simply didn't matter.

Opt in, it was intended that it would include non-domiciled claimants, but only in

respect of merchant service charges incorporating a MIF paid on commercial card transactions in the UK.

MR TIDSWELL: Where the acquirer is based in the UK.

MR BEAL: Well --

MR TIDSWELL: I am going to correct myself because we have done all of that, haven't we? The acquirer might be based -- but the transaction was here.

MR BEAL: The transaction must be in the UK. And the likelihood is that will predominantly be card present transactions with a UK acquirer going through the usual route.

That's the rather convoluted exchange of views that took place at the CPO hearing, where I was not present.

What we then see, in 8, is:

"'Merchant' means a person which accepts payments by means of payment cards and which has a contractual relationship."

Now, the thrust of my learned friend Mr Kennelly's submission is you have to read "merchant" as meaning a specific legal entity/natural person if this were a consumer claim, rather than a person as defined by the Competition Act 1998.

We say two things about that. Firstly, as you've seen, "a person" means any, effectively, legal person which adopts the Interpretation Act approach of being both natural persons and legal persons, but in the present context it is likely to be legal persons, which can be bodies corporate and incorporate. That's the Interpretation Act overlay. But it also -- see section 59 -- includes an undertaking. For reasons we will come on to, undertaking is a well recognised and defined term in both domestic competition law an EU competition law, and there is no difficulty in reading "merchant" as an undertaking consistent with the statutory framework.

Indeed, that makes all the more sense because, as we see from the evidence that's

been submitted by Mr Robinson and indeed by Mr Martin -- which I think you haven't been taken to yet -- the individual circumstances in which a merchant contracts for acquiring services vary greatly. So you can have a Topco that is responsible for all the merchant service charges but then internally reallocates them on a budgetary basis to the subsidiaries.

You can have Topco acting for and on behalf of named subsidiaries within an MSA which then indicates the contractual arrangements are for and on behalf of all the group companies, or you can have individual MSAs for different parts of the business. The permutations are as varied as commerce dictates. We saw all that in Trial 1 and Trial 2.

What we then see in the definition of merchant provided in the order is that it is a person, which can include undertaking which accepts payments by means of payment cards and which has a contractual relationship typically known as an MSA with an acquirer.

Now, given the permutations of who can have a contract with an acquirer can vary, that necessarily excludes the possibility that it has to be specifically an identifiable, ascertainable legal entity which is entering into that contract, because the contract can be entered into by a Topco for and on behalf of named subsidiaries or indeed by Topco for and on behalf of the group as a whole, depending on the individual contractual arrangement that are put in place.

MR TIDSWELL: If it is for and on behalf, it would have a contractual relationship, wouldn't it?

MR BEAL: It would. But the question then is: who has suffered the loss within that corporate group?

MR TIDSWELL: Yes.

MR BEAL: If the Topco is then reallocating on an internal budgetary basis the

individual cost to a different company, Topco is then in a position that they may be faced with a claim from Defendants who are capable of running legal arguments to this effect that, in fact, it is the individual companies that have suffered the loss, not the Topco, because the Topco has allocated the individual MSC charges through an internal budgetary process to other corporate group companies, and it is those corporate group companies that have, therefore, suffered the loss.

MR FRAZER: All the parties, Topco or others, they were all legal persons. None of them were undertakings in the sense other than a corporate entity; is that correct?

MR BEAL: Each of those company structures involves specifical legal companies in relationship with one another. You can have recognised forms of being part of the group company. And the taxing statutes are a classic example of that, where the corporation tax statute dictates who is an associated member of who for taxing purposes.

In competition law terms, we tend to refer to that corporate structure as being an undertaking, because it encompasses the relevant subsidiaries who are part and parcel of a single economic unit from EU law.

MR FRAZER: The definition of "merchant" is someone in annex A. From what you said, apart from an excluded merchant -- and I think from the examples you have given -- that each of those entities which hold an MSA is, in fact, a legal person?

MR BEAL: "The 'merchant' means a person that accepts payments by means of a payment card and which has a contractual relationship, typically an MSA, with an acquirer."

Now, the person who has the contractual relationship with an acquirer will be typically the group of companies that are mentioned in the MSA that have an arrangement with the acquirer. The specific contractual structure that gives rise to that can't be predicated, because it can take various different forms, as I have indicated. What

gives flavour to the term "merchant" and means it can be as wide as an undertaking is not the reference to contractual relationship, but the reference to Excluded Merchants. What one sees then at page 386, paragraph 13 is:

'Excluded Merchant' means any undertaking the turnover of which is, as I've said, less than 100 million. So by definition you are saying the Excluded Merchant still has to be somebody who is receiving payments, otherwise they are not a merchant. But the very definition of "excluded" means the analysis is being conducted at undertaking level.

I fully accept one would expect a specific legal entity to have a specific contractual relationship. What I am suggesting is the appropriate way of approaching the construction of paragraph 8 is that the contractual relationship can actually involve multiple parties, multiple separate legal entities through the prism of what would -- to all intents and purposes is a corporate group and which, therefore, is, for the same reasons, an undertaking.

MR FRAZER: Would it ever include an entity that is not a legal person?

MR BEAL: Well, it could include a natural person if they are trading.

MR FRAZER: That's to say in this case; are there any -- does it exclude any merchants that are not corporate entities in themselves?

MR BEAL: The universities will be bodies corporate, in the sense they could be chartered -- they won't be a limited company.

Are there any bodies that are unincorporated, such as a trade association? I am not aware of any. The legal structure -- what we don't have, for example, although we could in the opt out proceeding, is -- well, if you have an extremely wealthy lawyer in self-employed practice earning more than £100 million a year, (a) good luck to them, (b) I am not aware of anyone having signed up to that.

But, yes, they could be a merchant. That would be a self-employed practitioner as

a natural person, not a legal entity as such.

MR FRAZER: (inaudible).

MR BEAL: No.

MR FRAZER: This is just theoretical. Does the problem arise because an Excluded Merchant is not a merchant who is excluded in the definition? It is something else. An Excluded Merchant is an undertaking, and an undertaking needn't be a merchant which has a turnover of £100 million or more (inaudible).

MR BEAL: An Excluded Merchant has to still be a merchant or it doesn't make sense to be excluded.

It implies that you are within the group, unless your turnover is less than £100 million.

MR FRAZER: Yes, would it be the same as a merchant who is a member of an interconnected body corporate with turnover less than £100 million. That would have been much clearer, I agree.

MR BEAL: I think what this exercise has taught us is, with the benefit of hindsight, one would have catered for a very literal interpretation being brought to bear on some of this.

What I am urging on the Tribunal is a purposive construction that focus on and recognises that a person can include an undertaking. There is an express division based on the undertaking as a whole for the reasons I have given, and "merchant" should, in my submission, carry the same connotation and meaning in both paragraphs 8 and 13, otherwise it leads to inconsistencies.

So we are in a position whereby if one is construing the order as a whole, it is tolerably clear that it is intended to be conducted -- the initial analysis is intended to be conducted at the undertaking level, the corporate group stage, and you try to work out: are you somebody who has as an undertaking corporate group accepted payments through a contractual relationship under an MSA with an acquirer in circumstances

where your turnover is higher than £100 million.

If you get there, then that is then -- it helps explain, at paragraph 13, the concept of an Excluded Merchant, because it is one or the other, and it is meant to be a binary division.

I am helpfully reminded by my junior if one reads paragraph 13, but replaces the word "merchant" with the lay form definition from paragraph 8, you get excluded persons which accept payments and which have a contractual relationship. A merchant, therefore, is sensibly construed as incorporating undertakings, not anything else.

Just while I have this order open if I could deal with the domicile point, albeit very briefly, I respectfully endorse the observations from the bench in relation to paragraph 22. I think I would ask for rectification of paragraph 21 on the basis it didn't do any good, but it is right that the rule does require domicile date to be given, but it has no practical input.

The rectification it would give effect to -- I will come on to show the Tribunal intended in its judgment. It would simply be:

"If a person wishes to opt into these collective proceedings they must ..."

And then it says -- and person there should be construed, again, in my submission conformably with definition in section 59.

The opt out order is basically the mirror version of this opt in order. It's at page 392. The same definition of "merchant" is given. Paragraph 13 says:

"'Excluded Merchants' means any undertaking the turnover of which is on average equal to or greater than £100 million."

MR TIDSWELL: Could you give us that reference again?

MR BEAL: Page 392, paragraph 13, it is a binary choice. You're either £100 million over or not. If you are not, you are within this one. If you are over, you go into the opt in ones, but only if you opt in.

The CPO Notice followed this framework. It is at page 377, tab 27. Third bullet up from the bottom of page 377, it says:

"Following the grant of the CPO the class of persons who will be able to join the claim are merchants with an average annual turnover of more than £100 million."

Again, it is focusing on turnover threshold and who falls in the following class definition:

"Merchants who paid a merchant service charge in respect of one or more transactions during the claim period in the UK."

The merchant that falls within that class definition is able to opt in.

We then see on the next page, page 378, it is put in more user-friendly terms, arguably, than the formal definition of "merchant" that we see in the box:

"If you fall within the definition of the class and meet the criteria of an average annual turnover of £100 million or more, you may opt in to participate in the claim and be bound by any ... on common issues. Only businesses who meet the criteria for the opt in claim and are formally registered by the Class Representatives may participate. Please see section 9 below for how to opt in."

They then say using "businesses" and "merchants" interchangeably:

"For merchants which would fall within the class definition, but their turnover is less than £100 million they are included in the parallel opt out proceedings."

So, again, you get the binary division between the two. You are either in one or the other, depending on what your turnover is.

379, at the bottom of the page, it says:

"On behalf of the class members the class representative seeks an award of aggregate damages for such alleged loss."

That is, I think, probably this opt in notice needs to be refined.

We then see, at page 380, that the class does not include Excluded Merchants. That's defined as:

"Any undertaking the turnover of which is less than £100 million."

Again, the focus is on looking at the undertaking, looking at the business, looking at the merchant group. And this key threshold of £100 million is very much driving which pot you go into.

At 381, under section 9:

"If you fall into the class definition and wish to opt into the claim, you may do so by visiting the website and completing the online form. You will need to provide your name, postal address, e-mail address and name of the individual authorised to opt your business into the class."

Alternatively, it says you can do so by post. In fact, as we know, nobody used the postal route.

So the person filling in the form is expressly required to be authorised to opt your business into the class.

Now, to make good my point about the importance of undertaking I do need briefly to turn to the Volkswagen case. Mr Kennelly went to only one paragraph and there is a little more to say about it. Please, in the bundle of authorities, could we go to page 261. There, at paragraph 3, there's a section dealing in limine with the concept of both person and undertaking. Please would the Tribunal be kind enough to read that paragraph?

MR TIDSWELL: Could you give us the page again?

MR BEAL: It's page 261, paragraph 3.

(Pause)

This particular case turned on whether the court below had been correct to rule that subsidiaries within a group had no control over the parent company or other subsidiaries and, therefore, effectively could not be compelled to produce documents held elsewhere. The Court of Appeal disagreed with that and reached the opposite

conclusion.

Page 264, please, paragraph 12, there is a reference to section 59 in terms. It essentially says no definition of undertaking is provided. Section 5 of the Interpretation Act states:

"In any Act, unless the contrary intention is shown, words and expressions listed in schedule 1 are to be construed according to the schedule."

It refers to the Interpretation Act definition of "person" and, therefore, the combined combination of schedule 1 and section 59(1) was the persons, included body of persons, corporate or unincorporate and an undertaking. That was the combination. That was the statutory construction of both statutes working together.

Now, issue 2 in this case concerned the position of UK subsidiaries, as I have indicated. If we could turn, please, to page 284, there is quite a long section, from paragraph 76 through to paragraph 80, in which the court addresses the key issue arising under ground 2 and gives a definition of persons which includes an undertaking. Please would you read 76 to 80?

(Pause)

You see in 82, at page 286, the different statutory context in which personal undertaking is used. It is used in different ways at different stages and the appropriate construction can therefore vary, depending on the context in which it is used. But one sees that under section 27(3)(a) Parliament determined:

"An undertaking can be an occupier of premises."

So when my learned friend, I think Mr Kennelly, was saying: undertaking, it's difficult to see how an undertaking can have domicile.

It can perfectly well have domicile in the same way it can occupy premises. There is then a reference, for example, to undertakings being capable of committing infringements, giving commitments to the regulatory authority, providing documents,

as this case found could be done, paying penalties that were imposed upon them.

So the fact that there are constituent elements within an undertaking that can be specifically identified does not stop these operative provisions of competition law having effect.

We see, at paragraph 83, that it was therefore appropriate to have a broad construction of any person as including undertaking, rather than the rewrite that was urged upon them by the Defendants in this case.

At paragraph 88, page 289:

"The use of any person and undertaking in section 26 was intended by Parliament to incorporate joint and several liability and responsibility and preclude the jurisprudentially inconsistent argument service upon a subsidiary was insufficient to enable that subsidiary legally to have access to documents. It rejected the submission of the respondents that the Competition Act 1998 reflected the classic principle of separate legal personality enshrined in Salomon v Salomon. To the contrary, the concept of discrete legal personality was rejected by Parliament in its adoption of the broad definition of a person as incorporating an undertaking."

Now, what we have seen in my learned friend Mr Kennelly's submission is an attempt to reinvigorate the submission that was not accepted when he made it before the Court of Appeal in this case, which is a return to the legally separate, distinct legal personality based on the Salomon v Salomon common law doctrine of separate and distinct corporate personality. Parliament's choice of equating an undertaking with a person is deliberate and is designed to reflect what is recognised to be a common approach of dealing with competition law principles in the EU, which the Competition Act was intended to replicate.

That then is my submission on what undertaking means.

I should say in passing, my learned friend took you to it, but if we could go to page 27

in the bundle of authorities, under section 40(2), what we are dealing with here is essentially what was at common law the internal management law in the Turquand case:

"A person deals with a company if he is a party to any transaction to which the company is a party."

Then simply:

"The person dealing with the company is not bound to enquire as to any limitation on the powers of the directors to bind the company."

So you don't have to get involved in any restrictions on the power of directors that might be imposed under the memorandum and articles of the company itself. It's presumed that the director acting on its behalf has authority to do so.

Those are my only submissions on the legal landscape. Could I please move on to deal with the steps that were taken in practice?

MR TIDSWELL: Just before you do, there is this point about section 47A.

MR BEAL: You are quite right. I did say I would come back to that.

MR TIDSWELL: Mr Kennelly says that's all very well in relation to undertakings, but when you get to 47A it has the effect of narrowing, if you like, the eligibility to be in the class. So this is now a two-tiered thing; you meet the class definition of the order, and you have to get within 47A as well, and in order for that to happen you need to be a legal entity, that's the argument.

MR BEAL: If we could start, rather than with 47A, with 47B. That's page 8. There is method in my madness. What 47B does, it essentially says there is this new procedure of bringing collective proceedings before the Tribunal. Those proceedings are bringing together claims that can be made essentially under section 47A. 47B(1) says in terms: "Subject to the provisions of this Act and Tribunal rules, proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies."

So it is defining the type of claim that can be brought, but saying this new mechanism of bringing them, namely collectively, is going to deviate from the previous procedure of bringing individual claims by individual claimants under section 47A. So collective proceedings now involve the interstitial insertion of a Class Representative.

If we could then look, please, at subparagraphs 10 and 11. There are two different ways of bringing collective proceedings. All of this, of course, is again blindingly obvious, but it does bear repetition:

"'Opt-in collective proceedings' are collective proceedings which are brought on behalf of each class member who opts in by notifying the representative, in a manner and by a time specified, that the claim should be included in the collective proceedings."

So a class member is, in fact, then defined by reference to the order that the Tribunal makes as to who should be a class member.

In sub-paragraph, 11 in contrast, opt-out proceedings are brought on behalf of each class member except any class member who opts out by notifying in a manner prescribed, and nobody has here for our opt-out proceedings.

11(b) then says that opt-out does not include people who are not domiciled in the United Kingdom at the domicile date, and who do not, in a manner and time specified, opt back in to the opt-out proceedings.

In this case, in fact, the opt-out proceedings defined the class so as to exclude the possibility of allowing -- there was simply no provision made for the opt-in of non-UK domiciled undertakings who would otherwise potentially have been able to opt in, relying upon subsection 11(b)(ii). That simply was excluded.

So the only way of opting in in these proceedings was through the opt-in proceedings, and you necessarily had to meet the £100 million threshold at that stage.

MR TIDSWELL: So is the submission that it is the order that defines the class rather than section 47A?

MR BEAL: Yes.

MR TIDSWELL: That is quite a radical submission, though, isn't it, because doesn't it effectively give us licence to go substantially beyond what might be section 47A claims?

MR BEAL: No, because you are still packaging together section 47A claims, but it is recognising that those claims are now being brought through the prism of collective proceedings, which are brought on behalf of class members.

The question is, is there anything in section 47B that requires a class member, so defined, to be a specific legal entity, or would it be acceptable, applying the section 49 construction, for that in principle to be an undertaking?

MR TIDSWELL: There is a useful amount of case law which says that you can't have a 47B claim unless it combines extant 47A cases.

MR BEAL: Yes.

MR TIDSWELL: So you at least have to be able to identify that the cases could exist. Is that consistent with what you just said?

MR BEAL: If we then look at 47A, which is at page 4:

"A person [to which I insert, at least for the purposes of the first stage of statutory construction can include an undertaking] may make a claim to which this section applies in proceedings before the Tribunal."

So what this is doing is opening up the Tribunal's jurisdiction to consider claims by anyone who is defined as "a person".

Now, the caveat, and the reason why we have accepted that one needs in the end to identify specific legal entities or natural persons who are bringing the claim, comes with subsection (2), which says:

"This section applies to a claim of a kind specified in subsection (3) which a person who has suffered loss or damage may make in civil proceedings brought in any part

of the United Kingdom."

Because the common law approach to breach of statutory duty requires a cause of action to crystallise in the hands of somebody who has suffered specific loss, you therefore need to identify the legal or natural person who has suffered loss to make good the cause of action.

MR TIDSWELL: But that person's claim has been aggregated, been included, in the opt-out proceedings?

MR BEAL: That person's claim is being brought together collectively on behalf of the class by the Class Representatives for the class members.

It is a separate question as to how one goes about defining the class members, and that is defined by reference to the class proceedings order that the Tribunal makes. If what the Tribunal has done is said, "You are in this class if you are an undertaking with turnover at or exceeding £100 million," then you are a class member, and the claims that are being aggregated are the specific claims for loss and the parts of the constituent elements of that undertaking, which is why you necessarily have to go to the stage of establishing who has suffered loss in what amount in order to quantify these specific claimants whose claims are then identified on behalf of the class members.

MR TIDSWELL: So the sequencing point, effectively you are saying that the requirement for opt-in is before that, precedes it all?

MR BEAL: Yes.

MR TIDSWELL: And that's something that comes later, is that the argument? Because you are accepting it has to be done, I think you are accepting that 47A(2) does create a narrowing, if you like, of who can make the claims, but I think you are saying that it doesn't --

MR BEAL: You can have a class member on whose behalf the Class Representatives

are bringing a series of aggregated claims. Those aggregated claims have to be for specific loss in the hand of specific legal entities. So at some point you necessarily have to identify who the eligible claimants are and what their loss is.

MR TIDSWELL: But you say you don't have to do that at the opt-in stage?

MR BEAL: At the opt-in stage, the CPO Order could have said, within six months you need to identify the class members, i.e. those undertakings who have turnover at or exceeding £100 million, plus the specific claimants whose section 47A claims are being aggregated for the purpose of the collective proceedings under 47B.

No doubt in the future, alive to this particular technical distinction between 47A claims and collective proceedings under 47B, arguably the Tribunal will be more astute to make sure that everyone knows precisely on what basis people are opting in by a specific date.

MR TIDSWELL: You are saying that the class member is the undertaking, then?

MR BEAL: Yes.

MR TIDSWELL: The class member is the undertaking, and so --

MR BEAL: The class member is a person. If we look at 47B again, it is saying in terms that:

"'Opt-in proceedings' are collective proceedings which are brought on behalf of each class member who opts in by notifying the representative."

Given that "class member" is defined in the opt-in order in the way I have described, and given that we know an undertaking can be a person, there is no difficulty in having a class member as a person who, pursuant to section 59, is an undertaking. Indeed, that's entirely consistent with what I have urged upon you as being the natural and ordinary reading of the CPO Order itself, and, more importantly, the way it was advertised to industry, to merchants, as a result of the CPO Notice.

MR TIDSWELL: In a way the CPO Notices and the Order are neither here nor there,

are they, because either you could do that, in other words make it permissible for undertakings to be the class members, or you couldn't. I think Mr Kennelly is saying we couldn't, it doesn't really matter what the order and the notice say, because that wasn't something that the section permits.

MR BEAL: His submission was a class member by definition has to be a specific legal entity.

MR TIDSWELL: It has to be the owner of the 47A claim, I think is what he is saying.

MR BEAL: But if the claims are being aggregated for the purposes of collective proceedings, it doesn't follow that that is the case. The fact that it is claims under 47A that are being brought, and it is claims under 47B that are being aggregated, you simply then have to work out who is capable of being a class member.

And when you have the broad definition of "person" in section 59, as endorsed by the Court of Appeal in Volkswagen, then one would need a very good reason to resort to the Salomon v Salomon approach of saying corporate identity trumps everything and you can only have specific claims brought by specific claimants, and only specific claimants can be class members, which is the consequence of his argument. He is trying to revert to the formalism of late Victorian Britain and its approach to the corporate personality.

MR TIDSWELL: Yes.

MR BEAL: I ask hypothetically, what would be wrong in principle with an undertaking bringing a claim, given that an undertaking can commit an infringement, it can pay a penalty, it can give a commitment to the CMA or to the EU Commission. It can do all those things, consistently with the statute. Why can't it bring a claim? The answer is, as a matter of statutory construction, it can. What traps the ability of the claim to be brought under section 47A by an undertaking, notwithstanding the wide use of the term "person" in 47A(1), is that the claim has to be of a kind specified, in "which a

person who has suffered loss or damage may make in civil proceedings."

It is the reference back to the common law concept of the cause of action only crystallising when an individual had suffered loss.

MR TIDSWELL: I don't think you are suggesting an undertaking could bring a claim in the umbrella proceedings, could it?

MR BEAL: It wouldn't be able to do so, because 47A(2) necessarily requires it to identify the crystallised cause of action based on loss suffered by a specific person in context.

MR TIDSWELL: And 47A(1) says a person, on your construction, therefore an undertaking, can make a claim?

MR BEAL: Yes. My submission to you is, but for the context of 47A(2), 47A(1) as a matter of statutory construction would be capable of supporting an undertaking bringing a claim.

MR TIDSWELL: Are you effectively saying that 47B is only referable back to 47A(1)? You are saying that's what it means when it talks about a claim that can be made under 47A(1)?

MR BEAL: No, because the distinction between 47A and 47B is, who is the claimant? Under 47A, it is the individual company, by reference to subsection 2. Under 47B, the claim is brought by the Class Representatives, and the Class Representatives are aggregating claims on behalf of the class members. So it's a different structure for bringing the claim.

MR TIDSWELL: So under 47B(1), you can combine --

MR BEAL: Two or more claims.

But it doesn't talk about aggregating claims by specific claimants or specific persons, it simply says it is the claims that are aggregated, and they are aggregated by reference -- understandably, because opt-out proceedings, for example, it's not until

distribution that you know who is going to get what.

MR TIDSWELL: Yes. So you are saying, once you get to the exercise of aggregation, you get away from the problem that 47A(2) presents?

MR BEAL: Yes. Because opt-in proceedings and opt-out proceedings are two sides of the same coin, with a different structure for getting into the class. What matters is the definition of the class. And that's entirely mirrored in the practical steps that were, in fact, taken to deal with the opt-out orders in this case. It is what I have described as the binary choice, you are either in one or the other.

None of that turns on identifying specific individual claims that would be necessary for 47A(1) and (2) purposes, because you are at the prior stage of aggregating those claims.

In due course, you need to make sure that there are claims, and that the class member has eligible claims, and that necessarily involves drilling down into who are the specific claimants that have eligible claims. That's the two-stage process that those instructing me have undertaken, with help from specialists.

Perhaps I could turn to those steps in practice now, please. Page 350 is the witness statement from Adrian Martin of 8th September. It starts at page 530. What he then does at 532 to 533 is explain how he was not involved in the book build exercise, but it was undertaken by the Class Representatives with the assistance of BBMS. It came to an end on 10 February.

He then describes how he was then involved in the different process of working out the eligible claims, and the quantification of those eligible claims, using specific merchant data and so on.

He identifies in paragraph 13 how you can have data difficulties. That's the Tribunal's experience, of course, in some of these cases.

Then at 15 he explains how the contractual relationship between a merchant acquirer

and a group of companies can vary. He says they can be between a group of companies with the merchant acquirer where it is held by the Topco of the group of companies, with the contractual relationship applying to the remainder of the companies of the group. On other occasions, the contractual relationships can be held by different entities or different groups of entities. That may be as a result of prior mergers or acquisitions.

At 17 he says:

"As it is not usual for an external party to know how the contractual relationships between a group of entities are managed, nor which entity in a group incurs card transactions or holds the record, the most efficient approach is to correspond with the Topco. From that correspondence, these different variables can be established."

So what is being done is, as we will see from Mr Robinson's evidence, the initial interchange -- forgive the pun -- with the individual companies is being very much at Topco, who is the person in the business who is the contact? When you are drilling down into the detail of the data and what the contractual arrangements are, and who is actually paid the MSCs, you need the individual data from the individual companies. We then see that that has been achieved in part by sending claimant questionnaires, referred to at page 534, paragraph 20, where specific details have been sought.

So that's a bit of a canter through his evidence.

If we could then, please, look at Mr Robinson's first witness statement, and then that might be a convenient moment to break. Mr Robinson's evidence starts at page 543. I don't know whether the Tribunal has had a chance to read this witness statement?

MR TIDSWELL: Yes, we have.

MR BEAL: I can probably take it a fairly high level. At paragraph 11 he explains the basic architecture as I have, which is this binary choice between £100 million or not £100 million, that essentially lay behind the entire structure of things.

He explains in paragraph 12 how the CPO Orders then reflected that, and that the fundamental dividing line for undertakings below and above the £100 million then led to the design of the book build process. That involved, at the bottom of paragraph 12, page 545, determining the targeting of the media campaign pursued to inform the members of the opt-out class of their right to opt out before the deadline of 11th November 2024.

So that is the first stage. You have to let the opt-out class know that they have three months within which to opt out, or they are going to be within.

The next stage was determining, at the level of undertaking, those businesses which the Class Representatives sought to approach and seek to encourage at the undertaking level to register for the opt-in classes. So what was done was businesses collectively were approved, merchants were approached, those who had expressed interest before on a group level were approached.

Then at 13, 14 and 15, he explains in detail how that book build process was aimed at establishing contacts in relevant businesses, i.e. groups or undertakings. It was large corporate groups that were targeted. They built on the list of people who had expressed interest from the 2023 exercise. He says at paragraph 14 that all discussions that the director of the CR's, Mr Allen, and Harcus Parker had during the book build process were held at a business rather than entity level.

So when my learned friend Mr Cook said there is simply no evidence that all of these people were being approached on the basis that they were opting in corporate groups, that's the precise basis of the book build process that Mr Robinson in this unchallenged evidence -- he was not called to be cross-examined -- is saying happened. All of these entries were approached on a corporate group basis, reflecting the dichotomy of undertaking and the threshold.

He then says, with respect utterly fairly, halfway down 14:

"Neither I nor anyone at Harcus Parker nor Mr Allen were privy to how each business decided which individual or individuals to put forward to discuss with us, or who the relevant contact would be."

They were trying at this stage to get people to sign up, and they were trying to deal with initial contacts, and they were hoping that they would be referred on to people who were capable of making decisions.

What then happened following the book build period was that BBMS and Ankura were then tasked with identifying which entities within the 95 corporate groups had indicated their intention to opt in, and it is the corporate groups that indicated their intention to opt in.

It is simply wrong to say that there is no indication on what basis these individuals were coming forward and acting. They were acting on behalf of the corporate groups who had been engaged in the marketing drive and in the sign-up process, the book build process. And then those same groups are being directed in due course to BBMS and Ankura in order to drill down into the specific eligible claimants, identifying the specific companies, and identifying the data to quantify those claims.

If those companies had not been intending to opt in on a group basis, they would have been saying, "Why are you contacting me to get all these details of these other corporate subsidiaries? I have only intended to opt in a particular entity, not the whole lot. Why are you asking me about all these others?" But no.

These groups have persisted in their liaison with the team, with Harcus Parker and the specialists appointed to deal with this, engaging in a very detailed exercise, which is time-consuming and costly, in order to confirm that they have viable claims within the scope of the class.

He then goes on to explain, really, the book build process. I could go through it at length, but he explains how they were introduced to businesses. They were dealing

with things -- for example, 18.3 at 547, dealing with individuals in the businesses. They had webinars with multiple businesses, and then they had follow up correspondence. There would be an initial contact name. They would then try and identify the individual or individuals in senior positions within the business, see the top of page 548.

It wasn't the case that they were going to post room staff, or somebody who was junior. If the initial response was with somebody more junior, there would be other staff who were relatively senior who would then be engaged with to make the decision. He explains then the questions that were asked and the experience of building books, and the typical conversations he had.

When my learned friend Mr Kennelly said -- well, he inferred, paragraph 22, page 549, he inferred that the decision to opt in involved multiple senior stakeholders. What Mr Robinson is doing is referring to the internal management point. They have engaged with senior people, general counsel, CFOs, directors, heads of legal, heads of payment divisions. They were engaging with them, trying to work out their appetite for coming into the book that is being built, and they have inferred that those people had authority to act on behalf of the business.

Why have they done that? Because those individuals are the ones that they held out as being appropriate for acting on behalf of the business at that level, and for the purpose of building a book to include a corporate group that has a turnover exceeding £100 million.

Of course, what next had to be done was to ascertain that the corporate group in question did indeed have turnover of £100 million, and that involved looking at what were perceived to be the eligible claimants within that corporate group.

That's probably a convenient moment for a break. In terms of how I'm doing, if we start again at just after 3.30, I would hope to be sat down by 4.05, with a fair wind.

MR TIDSWELL: What sort of time do you want? Are you both replying, or just one of

you?

MR KENNELLY: Probably both of us, but that sounds like we will be finished in time.

MR TIDSWELL: We will take a five minute break and come back at 3.30.

(3.23 pm)

(Short break)

(3.32 pm)

MR TIDSWELL: Yes, Mr Beal.

MR BEAL: The fourth section is on agency and authority. My learned friend Mr Kennelly has already taken you to Armagas v Mundogas, and dealing with the distinction between actual authority on the one hand, and ostensible or apparent authority on the other. That was a case, of course, where the contracting party knew that the person they were contracting with didn't have general authority, so I would be citing it simply for the general propositions, which are, I am sure, well-known to this Tribunal.

Again, both the citations in tabs 20 and 21 of the authorities bundle, establish a number of commonsense propositions, namely you can have actual authority through express words or conduct. That's contrasted with apparent or ostensible authority.

The burden lies on the third party to establish lack of authority. See page 355 for your note.

Of course, if a third party challenges the authority, they are likely to be met with a ratification which deals with the matter anyway. That ratification takes place *ex nunc et ex tunc*, so it goes back to the start and it ratifies prior behaviour. Even where, for example, somebody was not authorised to issue a writ, by way of actual authority, if the issue of the writ is ratified, that takes effect notwithstanding the expiry of any limitation period.

So all of these are standard principles.

MR TIDSWELL: As you would have gathered, it wasn't a subject that really excites us very much --

MR BEAL: No, I detected that.

MR TIDSWELL: I mean, I think it probably can be said that some of the existing ratifications leave something to be desired, because they could have been precise, and that's perhaps a little bit unhelpful. But, I mean, I think -- I don't really think that's what this application is about.

MR BEAL: I will turn, if I may, to the Angeion database and just show you how some of it took place. I mean, in a sense, these are sort of points the Tribunal has already made in discussion with my learned friend.

So, people did things in a very different way. Some people filled in the form and did it on a group basis. You have seen PPHE Hotel Group, Radisson Group also, line 55, did exactly the same. Others referred to the generic entities, Swansea University, King's College London, and so on. Harrods, at 43, doesn't list out individuals. Others do list out the individuals, like NFU Mutual Insurance Society Ltd. Aer Lingus entered two separate responses.

And University of Oxford, as you have probably seen from page 146, on the next page, bottom -- last entry, filled in by Bridget Midwinter, who was Head of Income for the University of Oxford, which neither captures the corporate entity, which is the masters and scholars, I think, or chancellor and scholars of the University of Oxford, or indeed the separate legal entities that have commercial revenue.

So, people approached the form in different ways, but my overriding point is that in the light of the conduct and the interface between Harcus Parker and each of these corporate groups, each of these undertakings, there was a process of an evinced intention to opt in the corporate group, the undertaking, and the specific eligible

claimants were to be determined in due course, because that is the way that the interactions took place, as Mr Robinson has said.

It is not that there's no evidence of that. There is evidence of that in a witness statement. But, understandably for a solicitor being instructed by clients to conduct litigation, he has been astute not to waive privilege save where it is absolutely necessary. If he had waived privilege more generally, he would have had thousands of pages of e-mails and internal notes of communications, none of which I am waiving privilege for, but where the interaction with all of these groups is explained in detail. So he has short-circuited that precisely to maintain privilege, which we do, in relation to correspondence with our client.

And I do reiterate that it is highly unusual for a solicitor to be questioned about his authority to act by an opposing solicitor. It is simply not something I've ever seen before. That seems to be the import of my learned friend's submissions this afternoon. But in any event, all of this question of did they or did they not have authority has been dealt with through the confirmation process that you've seen that we put in place following the last CMC, where, through gritted teeth, those who instruct me wrote to the 95, 94 entities and said: please can you confirm, using the following type of document, that you did indeed intend to authorise opting into collective proceedings, and that you did so on behalf of the corporate group or undertaking.

The responses came through in different ways. You have seen examples of them where -- we could turn to a couple. The Greenhous Group, for example, at page 981, bundle 2, listed out specific subsidiaries.

1058 -- sorry, 1054, perhaps, is an example of one director signing for a number of companies -- sorry, signing for separate companies. 1054.

1058 is an example of one director signing for multiple companies.

There is a formal ratification procedure at page 1017. Somebody was following

Salomon v Salomon and went for the formal resolution, written resolution, of the directors. That was the Medivet Group Limited, one of the ones I think that's not contested. There we see a formal resolution that authorisation previously given is ratified.

MR TIDSWELL: Just give me that page number again.

MR BEAL: 1017.

So, people did do it in very different ways. I mean, it's fair to say it's not the most popular exercise that this solicitor has ever conducted, going back to people who have been engaged for a period of six months, with those instructing me, going through the fine detail of their financial data and establishing who the eligible claimants are. And then being told that they need to confirm that they really do wish to opt in after all did draw some surprising responses, or responses which were expressing surprise as to whether this was really necessary. But nonetheless it was done.

And all of those confirmations of authority were reinforced by the execution of DBAs, damages-based agreements, and those DBAs again took different forms. In some of them it's the Topco entering into the DBA, and in others, for example, at page 947, Travis Perkins makes it clear it's doing it for itself and its subsidiaries. But, again, the framing of the confirmation form that's been collected for each of the 94 groups was intended to confirm, where necessary, that the DBA was entered into for and on behalf not just of the Topco or the group company but the various subsidiaries bringing claims as well.

Can I then, please, move on to the non-domicile point? The very short point there is that nothing in the CPO order, as I've indicated, suggests that non-domiciled claimants can't opt in. But in any event, it was made clear, both in argument and indeed in the CAT's judgment that non-domiciled claimants were envisaged to be part of the opt-in proceedings.

Picking up first, please, in the argument, it starts at page 1627, tab 108.

Mr Bowsher, King's Counsel, for CICC, made submissions, pointing out that it was expressly intended that non-UK domiciled merchants would be able to opt in.

Line 9 on that page he says:

"The non-domiciled transaction is, just to re-state the position, for opt-in we say the coverage is proposed to include non-domiciled merchants with transactions made with a UK acquirer and the data must exist to enable that."

So, in other words, you can then exclude the relevant data from the value of the opt out proceedings to the extent that you would need to do so.

There's then some interchange I think with you, sir, as the Chair of the Tribunal.

And at page 1630 there's an interjection from you, sir, at line 7:

"I do not think it's because it is non-domiciled UK. If it's a non-UK domiciled merchant then you cannot include it in the class unless they opt in."

And Mr Bowsher agreed, and you pointed out that, under the Act, that's exactly what was required.

The issue actioned, as I understand it, between the judicial panel and Mr Bowsher was whether or not it was going to be easy to ascertain transactions which were card not present transactions, which might be with a foreign acquirer, which wouldn't necessarily be classified as UK transactions, but that's not for now.

There was then a reinforcement of the position that non-UK domiciled claimants were intended to be included. That's at page 220, please, in the second CAT judgment, authorising the CPO, paragraph 104A.

What the Tribunal there ruled was:

"There was a degree of confusion about the position of ... non-UK domiciled merchants transacting in the UK and ... merchants carrying out UK transactions using acquirers based outside the UK. Our understanding of the position in relation to these categories

is as follows:

"Non-UK domiciled merchants cannot be included in the opt-out class unless they opt-in. If they do not opt-in ... their Commercial Card Transactions need to be deducted from the gross ... figure in order to exclude them from aggregate damages."

So that's an indication, in my respectful submission, that you had recognised that the claimant would include non-UK domiciled merchants, and its therefore a surprising submission, somewhat opportunistically brought, by principally Mastercard, to the effect that you should read the CPO Notice as excluding such claims.

I should highlight that the CPO notices were provided in draft by CICC. Amendments were made by Visa and Mastercard. Those amendments were, I think, put forward on roughly 24th July 2024, is what my instructions say here, but the only outstanding issue that was left was the deadline for opting in. And as I indicated in intervening submissions from Mr Kennelly, the scheme suggested three months, we said nine months, and six months was the figure.

But those orders were otherwise expressly agreed to, with amendments, by the Defendants. Therefore, the suggestion that somehow they don't mean what they say is to be rejected. There is no scope here, we say, for re-writing.

Unless you need anything further on domicile, that's the fifth point. I'll move on to the sixth point, which is our applications.

Now, you will have recognised, of course, as the panel has indicated in argument, that we didn't think there was anything wrong with an opt-in process. In fact, there are a couple of things that have fallen out of the process, the certification process. Principally, we discovered, somewhat to our surprise, that, in fact, Saga had let us know that the individual in question who had signed up for the website form did not have authority to act for some of the companies. He did have authority to act for a couple but not for the rest.

Ostensible authority explains why the companies were included, but you've got the evidence from Mr Robinson that he had been discussing with Saga, the travel group companies, and the intention was to opt in the travel group companies. Once it was established that actual authority did not exist, that ostensible authority can't be relied upon, for the obvious reason that a defect in the authority has come to light and therefore a specific application has had to be made.

For the Amex companies, simply as a result of seeking confirmation for CWT, the Amex entities have said: well, can we now add ourselves in as well?

We recognise for the Saga entities and the Amex entities, where the application I think was made on 28 November -- yes, that's tab 39, page 589 for your note -- we recognise that it is appropriate that the limitation provisions are amended in relation to those entities, following the approach that was adopted in the Deutsche Bahn Court of Appeal case, tab 17, page 239, in particular at paragraphs 3 to 4 and then 67 to 69. So that's Deutsche Bahn, Court of Appeal, bundle of authorities, tab 17, page 239. Paragraphs are 3 to 4 and 67 to 69.

The assimilation of the new claim was treated as running from the date of the application to amend. And we say that, by parity of reasoning, that would also apply to these freestanding entities who, for the reasons given, have come to the party late, and it is acknowledged they have done so.

MR TIDSWELL: Just in relation to Saga -- or perhaps in relation to both of them -- so, with Saga, there was one entity named on the opt-in form. Is that right? So, if Mr Kennelly turned out to be right and that's the only one that has validly opted in --

MR BEAL: Yes.

MR TIDSWELL: -- then you would want -- you are seeking relief under 82 to opt in the rest. If Mr Kennelly is wrong and you are right, then what is the position?

MR BEAL: It's just the insurance business and the book publishing business that

would be covered by that.

MR TIDSWELL: Yes.

MR BEAL: I should add if my learned friend Mr Kennelly is right on his primary submission --

MR TIDSWELL: He put the blanket (inaudible).

MR BEAL: -- I need everyone.

MR TIDSWELL: Perhaps I'll come back to that in a minute. Yes. Okay. Fine.

MR BEAL: Except for those who are accepted, of course.

MR TIDSWELL: Then with Amex it is not really a question of -- I mean, is there any suggestion that CWT intended to opt in more than (inaudible)?

MR BEAL: I don't think so.

MR TIDSWELL: So that is just a pure addition --

MR BEAL: Yes.

MR TIDSWELL: -- yes, which has been forwarded.

MR BEAL: It has been explained in Robinson 2, but I wasn't unless you --

MR TIDSWELL: No, no, no. I have read Robinson 2. We don't need to go back to it. There is obviously a question -- I mean, it's not a question. There is a point, isn't there? We have had explained to us by Mr Robinson why it is late. Because of the circumstances (inaudible) they have worked out they would like to do it now, but there is no suggestion that there's any other reason, is there? I mean, this is now nine months --

MR BEAL: No. They took over the CWT business. The confirmation exercise jogged the memory of somebody who was no longer there, as it were, as in e-mail correspondence with the person who had formerly been our point of contact, but it was passed on to somebody because she had left. That triggered "What's all this about?" They then said, "Can we add these in as well?", as simple as that.

In terms of the suggestion that there will be more coming out of the woodwork the way it has been phrased in Mr Robinson's evidence and indeed in the letters is, "We can't stop people coming forward and instructing us to apply on their behalf to join. We naturally can't stop that". What we can say is that when this Tribunal directed us to provide the specific claimant entities by the deadline of 28th November, we did everything in our power to make sure that what you now have in a tediously compiled table, which took me several hours to complete, is the list that is the final list of eligible claimants for the 94 groups.

MR TIDSWELL: Saga, Saga insurance and publishing business and all of the Amex business aren't ready to be treated as if they were anybody else turning up now and saying "We did not see it before. We have now seen it and would like to join in".

MR BEAL: The fundamental question is: is it worth having these entities issue a claim form in the High Court tomorrow and ask to be transferred here for umbrella proceedings? Or does it make more sense to give them permission to come in late, but to recognise a potential limitation argument -- because I don't want to say it would be a well-founded limitation argument, but a potential limitation argument that is open to the schemes?

We say we recognise that could be prejudice, but it is dealt with by directing that the claims are treated as having been brought from a specific date and that the limitation provisions will follow as a result of that. I can't say more about the proper construction of 47E than you, sir, have already done, with respect, because I simply don't understand how that doesn't simply provide a grace period. It is the expression Mr Cook used. What he did not then say was that the grace period would somehow still not actually produce a grace period for the additional six months he is after. I am afraid I just don't see it. It is one of those submissions I simply don't understand I'm afraid, so I can't assist you any further, other than to say naturally construed you can

imagine a situation in which opt out or opt in collective proceedings fail for whatever reason, and you have to give people whose claims have otherwise been subsumed within it time to catch up and work out what they want to do. The six-month grace period -- I think it is an appropriate of putting it, as it happens -- allows them to do that and de facto operates to continue the suspension for a further six months.

MR TIDSWELL: A sort of general point about -- actually more specific to the Saga and Amex claimants. There is a philosophical question, isn't there, about whether the scheme of the collective proceedings is to lock down on the opt in date insofar as possible and to avoid the constant drip, drip, drip of new claimants or whether actually, as I think you are saying, the benefit the collective proceedings brings suggests you should keep drip, drip, dripping. There must be a limit to that, must there not? It is quite an uncomfortable submission in a way, because everything in the legislation and Rules suggest that it is intended to be locked down.

MR BEAL: I think the further one moves away from the opt in deadline date, the harder it is to justify a late opt in and the more one should be encouraging private claims, to be honest. There are books being built out there which no doubt will make applications on an individual basis to be brought within the Umbrella Proceedings in due course. That's just the nature of the beast.

Unfortunately for so long as the schemes carry on charging interchange fees in the face of a ruling that says that is an object infringement of the competition provisions, it is likely that people will carry on bringing claims.

MR TIDSWELL: (Inaudible) for these proceedings is almost immediately after the opt in closure date we went into a trial in which the Class Representatives on behalf of the opt in claimants participated, as you well know, in a trial.

MR BEAL: Yes.

MR TIDSWELL: That is quite odd I suppose. How does that fit into the delay point?

I mean, it is quite an odd thing, isn't it, that you could join these proceedings later as the Saga entities in circumstances where there has been a trial and I know there is not a judgment, but it is not far away I can tell you.

MR BEAL: In a sense the a fortiori point on that is, in fact, that the CICC claimants are now getting the benefit of Trial 1, having watched from the back benches and not taken an active part.

MR TIDSWELL: That's partly, though, because the Defendants consented to it in circumstances where I think we were unwilling to give them the benefit of that application for summary judgment. I think our indication to the parties was we did not like much the idea that you could just relate back, if you like, because you were joined. So I think anybody could do that, obviously take the benefit of those proceedings.

MR BEAL: It was a question really, as I understood it, of managing this case which arrives because of the double CPO application too late to be part of Trial 1 and managing that as part of, in a sense, the archaeology of the proceedings. With respect, it seems as if the parties between them have reached a sensible outcome and the endeavour now is to move forward with Trial 3 and try to get the remaining issues dealt with. But that's not my submission. That's for Mr Woolfe in January.

In terms of the other individual applications that are made, I mean, in essence, it is all in our skeleton argument. Aer Lingus I think was 25 minutes late. Flight Centre was a bit later, a couple of hours late. There is an e-mail from Daniel Lawrence, at page 1368, tab 86, explaining the intention had been to opt in. Our letter of 31 October 2025, page 1361, deals with Aer Lingus, Flight Centre, EasyJet, who missed the deadline, and then Oriflame and Suit Supply. I should clarify one thing on Oriflame and Suit Supply.

If you would be kind enough to turn to page 1393, tab 92, what we have there is a letter from Harcus Parker dated 20 November 2025 explaining signed forms for each of

Flight Centre, Oriflame and Suit Supply have been provided. Specific client instructions were disclosed in relation to Flight Centre and Angeion had been asked for the cache evidence that shows that Oriflame and Suit Supply were originally opt out claimants.

Mr Cook, I'm afraid wrongly, said that means they were evincing an intention to opt out of the opt out proceedings. In fact, the bit they filled in was on the website where you can leave your details as an interested claimant for the opt out proceedings. It mirrors the expression of interest provisions that Angeion has kept on its website ever since the 2023 Order, and the relevant Excel extract -- I think is at page 1046 -- is part of the database where those opt out merchants can say, "We are interested in this claim".

What then happened is they were checked to make sure that they didn't have turnover exceeding the threshold, and you will see at page 1394 a table has been produced by those instructing me which sets out why, in fact, that assumption was misplaced and they were above the turnover threshold. So they entered the wrong bits of the website, expressed an interest in the way that the Angeion confirms, but their turnover then excluded them. So that's them.

MR TIDSWELL: Why has it taken so long for these applications to be made, because one can see -- I am not sure we have evidence, have we, about when they have been identified? Do we have any evidence about when these were first identified as errors?

MR BEAL: So what happened was our initial response -- and this is at page 527, tab 32, which I think is probably in your bundle, too. I think they are all electronic. So page 527 is part of our response, and we had taken the view, rightly or wrongly, that, in fact, the register we had compiled met all the requirements and explained the individual opt in.

I think the original register from March 2025 had footnoted that one of the entities'

entry was 25 minutes late. There is a footnote reference in that original register but I think essentially the Angeion database was relied upon at face value as indicating that people had opted in. It wasn't until this specific challenge was brought and the request for disclosure was made that we drilled into what the response should be.

At page 527 one sees that the counsel team at that stage for CICC were saying, paragraph 27:

"Should the Tribunal take the view that the CPO and the notices required authorised persons either to submit separate opt in letters or to list all entities, then they seek a ruling under rule 82(2)."

So the first application strictly to rectify matters, if they turned out to be incorrect, was at page 527.

I think what has then happened between that and the October register and the November register is that Angeion, in conjunction with Harcus Parker, have been drilling down into the individual details at a granular level for the purposes of preparing what became the updated register served on 28 November, which is now in its full glory in the responsive table.

It is the process, really, of double checking each of the bits of evidence against each other for consistency and to make sure that things can be explained that individual errors came to light, and they were the subject of the letter of 31 October at page 1361, where those instructing me set out at paragraphs 5 to 9 the people who had missed the deadline on the database, what are described as the specific entities and then the additional information I have shown you at page 1393 was then provided. As I say, it is a different story for the Saga entities and the Amex entities.

MR TIDSWELL: So 1st October is the first occasion on which there is any substantive engagement by your instructing solicitors with the Defendants' instructing solicitors on these delay points, on the late points? I think there might have been

a footnote somewhere else.

MR BEAL: On the delay points it is 31st October. I think it is misdated. 1361 I'm afraid is misdated. It was 31st October when we were directed to provide evidence of the opt in process. It was really for the purposes of preparing the evidential package to show how opt in had taken place that these errors came to light, with the exception of the first opt in register. I will give you the reference for that. Can I pass up the chronology?

MR TIDSWELL: The obvious question is: if at any time people became aware -- and I think I see it now. It is page 284, isn't it? 284 is the footnote.

MR BEAL: I am sorry. Page 283 is the original opt in register, as I have it.

MR TIDSWELL: Yes, and 284 is the footnote for Aer Lingus, isn't it?

MR BEAL: Thank you very much, sir, yes. So your question to me is going to be if we knew that they were 25 minutes late, why wasn't the Rule 82 application made immediately?

MR TIDSWELL: Well, it is the sort of thing that I would hope that if you had written to the Defendants on that date, it would have been quite difficult for them to resist agreeing and asking the Tribunal to make the order as a matter of consent. It seems somewhat odd to have left the point and then come back to it on 31 October with some others that had been discovered?

MR BEAL: I respectfully agree that with the benefit of hindsight it would have been better to immediately recognise that was a non-compliance and to seek at least a waiver of the material non-compliance through a direction on the basis that it was a de minimis delay. That wasn't done. I accept that.

I think the further oversights or errors only really came to light when the detailed analysis was being done of who had done what, where and when. It is at that point, for example, it was realised that relevant entities had been entered on the wrong

register, because there was a process of compiling that original register using Angeion and they were using their internal sources and we took that at face value.

What then happened is, with the disclosure, disclosure had been given. We get the material from Angeion, we review it and then the questions come.

I hope that provides an explanation, if not necessarily a full understanding, of what's gone on. I am constrained by matters of privilege, but with the benefit of hindsight we apologise for the fact the application wasn't made sooner once those errors did come to light. The application was made effectively on 8 September, but then the details necessary to go behind it did come out in two separate stages, firstly, 31 October 2025 and then, secondly, various dates in 20th, 25th, 28th November.

But it is fair to say, if I can defend my instructing solicitors in this way, it has been a bit of a process. It has required a great deal of work. The schedule that you now have is the result of considerable work, but it's what's been required by the nature of the applications that have been brought.

I am asked to point out that when that opt in register with the footnote was served no objection was taken to it, but clearly there was subsequent correspondence where this point has been developed more fully, but, as I said to my instructing solicitor, I hope not too sotto voce, it is not our best point.

Unless I can be of any further assistance, that's me in the nick of time.

MR TIDSWELL: One other question. I want to be absolutely clear. I think I understand the position on this, but in your table, your schedule, every entry talks about in column 5 the opt in being on behalf of the group or undertaking, and I think that's a consequence of your analysis rather than pointing to any particular --

MR BEAL: It is a consequence of two things: one, our case, our analysis, and, two, the witness evidence you have had from Mr Martin and Mr Robinson explaining what's gone on to the extent that they are permitted to do so without going behind legal

professional privilege or litigation privilege. So that's why that entry was put in those terms.

MR TIDSWELL: Thank you. Thank you very much.

Yes, Mr Kennelly.

Reply on behalf of VISA DEFENDANTS

MR KENNELLY: Thank you, sir. I will address you on the points which I opened on this morning and Mr Cook will respond on his points, both of us briefly.

On the legal question of who can opt in as a matter of principle, it is appropriate in my submission to begin with the Class Representatives' submissions before you which were made in response to our application. That's the second volume, tab 32, page 519. These are the submissions which the Class Representatives lodged in response to our application. Page 519, paragraph 3.1 on the question of principle.

MR TIDSWELL: Yes.

MR KENNELLY: The first two sub-paragraphs are common ground, that:

"The Class Representative accepts that claims brought pursuant to section 47A may only be brought by legal persons. Claims that can be combined in collective proceedings pursuant to section 47B(i) are claims of legal persons."

Then this:

"Class members", says the Class Representatives, "as defined in Rule 73(2) of the Rules must be legal persons."

Sub (iv):

"The class definition in the CPOs refers to merchants 'which are further defined as legal persons'."

So it was with some surprise that we heard Mr Beal, my learned friend, reverse the stated position of his client in response to the application.

Now my learned friend has accused the Defendants of opportunism, but he has argued the opposite of his clients' arguments without any acknowledgement that he is withdrawing the concession they made in that response to our application.

Now, of course, it will not surprise the Tribunal to know that in our submission the Class Representatives were correct in the concessions they made in September, because when one goes back to section 47A -- I would ask the Tribunal to do that now -- in the authorities bundle, tab 1, page 4, we see the key provisions at 1 and 2 that claims with which we are concerned are the claims of a kind which a person who has suffered loss or damage may make in civil proceedings. Mr Beal, my learned friend, accepted that such a claim must be brought by a natural or legal person. That's a crucial acceptance on his part, because when one goes to 47B, it is those claims which are being combined in section 47B(i):

"Proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies."

We go over the page, and before we come to subsection (10), which my learned friend addressed, I would ask you to re-read subsection (7). Subsection (7) defines who are the class members for this purpose, because it says:

"The collective proceedings order must include the following matters."

At 7(b):

"The order must contain a description of a class of persons whose claims are eligible for inclusion."

Now those are the claims which are described in section 47A and the persons who have those claims are natural or legal persons, as Mr Beal accepted. It is the class of such natural or legal persons who are the class members for the purposes of this regime.

It is with that in mind that you read subsection 10, which defines opt-in collective

proceedings as:

"Those which are brought on behalf of each class member, that is a natural or legal person with a section 47A claim, and they opt in by notifying the representative in a manner and by a time specified that the claim should be included in collective proceedings."

My learned friend submitted that the class member can be an undertaking, because he said an undertaking is packaging or aggregating claims. The combination or aggregation that we see in section 47B is a combination of claims brought by natural or legal persons who have such claims and are thereby entitled to be class members within the meaning of the regime. An undertaking cannot be a class member, because it is not a natural or legal person that can have a section 47A claim.

The argument that an undertaking can be a class member relied on the judgment of the Court of Appeal in Volkswagen v CMA. I will have to come back to that and respond to the parts that you were shown by my learned friend. Volkswagen v CMA concerned the interpretation of section 26 of the Competition Act and the meaning of "person" for the purposes of section 26 of that Act. In the exchanges that I had with the Chair you heard my submission that it is perfectly proper for Parliament in section 47A to give a more limited meaning of "person" than the Court of Appeal found in relation to section 26 of that Act.

Even if one looks at CMA v Volkswagen, it does not --

MR TIDSWELL: I am not even sure you need to go that far, do you? I thought in your argument when you look at 47A(ii) -- you start off with 47A(i), which you could argue, and Mr Beal obviously is arguing, "person" could have a broad meaning there, but once you get to (ii) you have narrowed it, haven't you?

MR KENNELLY: Yes.

MR TIDSWELL: That's what I thought your argument was. In a way you almost don't

need to worry about (inaudible) on your argument, because you say whatever it means in (i) by the time you get to (ii), it is very plain Parliament has said that not by redefining "person" but actually by qualifying what the claims are that then go into 47B(i).

MR KENNELLY: Absolutely. That is absolutely my submission. I am going to Volkswagen v CMA --

MR TIDSWELL: I am not going to dissuade you from that, but I am not entirely sure it makes an awful lot of difference to that submission.

MR KENNELLY: It just demonstrates even more clearly why the submission that's been put to you is wrong. I don't need it because 47A(2) is so clear, especially in light of 47B. I will be very quick on Volkswagen. It just doesn't help them at all, because -- if one looks at this case -- may I ask you to turn up page 285, paragraph 80, which, of course, makes clear that the case was concerned with the expansive phrase "any person or undertaking."

Then when you come to paragraph 99 and the reliance on the Sumal Case -- and there is no need to re-read this. I can make the point very briefly just by way of submission. Sumal in the Court of Justice used the principle of joint and several liability of undertaking which has committed an infringement to find that a claimant could sue any one of the legal persons that makes up an undertaking, not necessarily the parent. The undertaking as a whole answers for the infringement, because infringements are committed by undertakings, and that's necessary to avoid circumvention by infringing undertakings, and you have all that at page 292. None of that carries across to class members in opt-in proceedings.

The same need to avoid circumvention to ensure that infringing undertakings are held responsible does not arise.

MR TIDSWELL: In other words, if you are -- that's the breadth of the undertaking that commit the infringement. The Court of Appeal are saying, "Why would you narrow

that when it comes to notices?"

MR KENNELLY: Precisely. They say in terms, "We are construing it this way to avoid circumvention". That's exactly why it has to be construed in this way. If one part of an undertaking commits an infringement, the undertaking as a whole is guilty and liable. This is the crucial distinction. The part that had no involvement in the cartel, say, cannot choose to have no part in the liability of the whole. By contrast if one company in an undertaking decides to opt in to collective proceedings, even on the Class Representatives' case, legal persons in that undertaking may not want to participate and can decide to withdraw. There is no analogy at all to be drawn with why "person" was construed in that way in the CMA v Volkswagen case.

That's the legal regime and I shan't go back to the Rules of the Tribunal, which fortify the points that we see in the Statute, but to go to the Order, because obviously my learned friend places great reliance on the CPO Order itself, and that's in the first volume, tab 28 -- actually we can go to the Visa version I showed you. It is the same for our purposes. Volume 1, tab 10.

MR TIDSWELL: What page is it?

MR KENNELLY: Page 255.

MR TIDSWELL: Yes.

MR KENNELLY: He relied on the definition of "merchants" in paragraph 6. He had to address the definition of "merchant" in paragraph 8. He said here:

"Merchant can be an undertaking."

That just makes no sense on the face of the language of the Order:

"A person who accepts payment by payment cards and who has a contractual relationship known as an MSA."

My learned friend said different legal persons can have MSAs within a group, but yes, in those circumstances where he suffers loss each legal person is a class member

and can opt in, subject to the other requirements. He said that the Topco will often have the MSA on behalf of the other legal persons.

Yes, in that situation there is either a direct or indirect relationship to agency. There are a series of chain and legal persons each of which, subject to loss, can be a class member. He made the point, "Well, some of these class members may not ultimately have suffered loss because of the allocation of losses within a group". That's a point which we have come across in other cases dealing with the identifiability of class members for the purpose of certification.

The fact that a class member may ultimately turn out not to have suffered loss for whatever reason does not stop that class member being a class member, being identified and eligible as a class member for the purposes of certification and opting in.

MR TIDSWELL: We have certainly come across that in opt-out cases. Has it been addressed in an opt-in case as well?

MR KENNELLY: No, not in terms that I can recall. Opt-in cases are more rare, but there is no reason in principle why it should not. It is not necessary in order for a class member to opt in to prove they have, in fact, suffered loss as they would at trial. That would be inconsistent with the certification case law that we have on the opt-out cases.

Over the page obviously we see in paragraph 13 the definition of Excluded Merchants. As the Class Representatives' own skeleton said, that means merchants which are part of an undertaking which is on average earning less than £100 million per annum. That construction in paragraph 13 is not a stretch and it's far, far easier to do than to use that language to change the meaning of the rest of the Order and make it inconsistent with the legislative regime. That would be the tail wagging the dog, as I said earlier.

My learned friend said that a person can be a group by reference to unnamed tax

cases, but ultimately I think he accepted with the intervention of Mr Frazer that all of these situations that are described involve legal persons, and that demonstrates that there is no practical problem with legal persons being class members. There is no need for an undertaking to be a legal person for these purposes.

Turning then to the evidence, in his opening submissions Mr Beal said that Mr Martin's evidence demonstrates that they had been book building for many years. It was a telling submission. That combined with the evidence of Mr Robinson demonstrates that there was no practical problem with gathering the necessary information sufficient for individual legal persons to be class members and opting in by the deadline. He said the evidence demonstrates a process of evinced intention to opt in all the legal persons in the group with those individual legal persons to be identified later.

That is not what the documents say. It is not what the class members said when they completed the entries on the Angeion database form and there is no evidence to that effect from any class member.

You have my submissions about Mr Robinson's inferences from discussions with senior people. He says about an intention to opt in other legal persons. Query whether he did, in fact, need to waive privilege in order to give more detail on that. It would have been possible I submit for him to have given more detail without waiving privilege as to the nature of the instructions he got as to the decision to opt in on behalf of other named legal persons.

Finally, on limitation we on Visa's side endorse the submissions that my learned friend Mr Cook has made and we do urge the Tribunal to listen to them, because this is a critically important point, and although we addressed limitation in our skeleton argument, to the extent that there is any distinction between that and what Mr Cook has been saying, we adopt Mr Cook's submissions. He will have to obviously respond to Mr Beal on them.

With that I hand over to him unless I can be of any further assistance myself.

MR TIDSWELL: No. Thank you very much.

Reply on behalf of MASTERCARD DEFENDANTS

MR COOK: Sir, I am going to confine myself to addressing the Rule 82 application. I'm afraid that does include a little come-back on limitation, which I know you are excited about.

Sir, you made the point in comments to Mr Beal about the importance of having a firm date for closure of the opt-in register. With respect, we do say that is a critical part of how the regime is intended to operate, not a sort of rolling process of people joining as and when they choose. The Tribunal lays down a fixed, clear date and that's when people need to opt in by. The register closes and so there is certainty.

There are all sorts of reasons that Mr Kennelly dealt with earlier on today why it is absolutely critical everyone knows who is in the case and who is not and the applicability of judgments and trials is just one of those. There needs to be that level of certainty about who is in it, which is, of course, another reason why the whole undertaking concept simply doesn't work, because you need to have that clarity about, for example, who is going to be bound. If there is a ruling on a particular point, which legal entities are bound by that ruling? You can't have sort of an amorphous mass of people who may or may not be in joining later. We do say the regime depends upon clear-cut off.

There are many deadlines the Tribunal lays down. This is a really important one for that level of clarity. It does mean if people are going to come to the Tribunal and try to get dispensation to join late, they really do need to put forward evidence. They need to put forward evidence that gives a good reason for not having opted in in time. If there is not a good reason, they shouldn't get that dispensation. If they delayed in

making the application, again they need to explain and have good reasons for that delay. Again you shouldn't be able to sit and wait and see what happens before deciding to join.

With respect, there was no good reason for the delay that's been taking place here. Mr Beal said it came out later. It was all very unclear. None of those points have been properly developed. There really is no justification if somebody was late eight or nine months to spot that. Ultimately we are not talking about a huge number of companies. So it has taken time, but the reality is even at the extreme here we are looking at just over 200 entities. This is not a process of thousands where you can think one or two might slip around the edge. It should have been clear. The effort should have been made to say who was in and who was out early on, and if there were problems, they should have been dealt with promptly, not nine months later.

MR TIDSWELL: So you are not treating them separately. You have got different categories, haven't you? You have the wider group where, if you are right, they then have to come back and get relief in order to be included, because they have got it wrong in terms of their offering procedure. Obviously the delay on that is obviously they don't accept whether you are right or not. In a way I am not sure that there is not much more to be said than that, is there?

Then, of course the question is when did they first apply for relief? I think September. Their response, I think they would probably say, "Well, we could not do it any earlier, because it depended on you raising the point we had not thought about". In a sense that delay -- I am not saying that's the answer. I mean, I'm just -- the question is -- isn't that different -- I suppose the point I am making is isn't that different from a situation where in the case of the people who were late on the day one of those was spotted in March and nothing was done about it and then three others or two others were spotted in October and then fairly promptly led to an application.

So there's differences in all of it, aren't there? I mean, I am not sure you can just treat them all as one block and say they have taken too long and it is not clear why they did it.

MR COOK: (Inaudible). The point you are putting to me presupposes that they thought they would successfully opt in everybody and it wasn't until later they realised that was an issue. With respect, we don't accept that. Specific examples we have seen are Saga, Amex companies. Actually they didn't (inaudible) have specific evidence (inaudible) would be to the contrary.

MR TIDSWELL: So you are not saying, though, that -- you are just simply saying they failed to meet their build. That's what you're saying, aren't you? No doubt there are some people in there who did think that thing. It seems to me there is enough in Mr Robinson's statement to suggest there might have been some, but you are saying, "That's just bad luck. I've got enough".

MR COOK: You don't put forward evidence. The evidence should show A or B. You can't expect the Tribunal to assume (inaudible).

MR TIDSWELL: I understand that submission, yes.

MR COOK: So we do say that's the case in relation to the failure to make those assumptions. There may have been some, but we simply don't know that. Where they were late, again those points should have been raised promptly as a justification. I mean, with all of those, they must have known -- in many cases we know they did know -- that they were after 4.00 pm for whatever reason. So they all knew they were after the deadline.

So again, you know, there's no -- you know, who exactly at Harcus Parker when Harcus Parker realised it is one thing. It is the individual opting in class members knew they hadn't done it by 4.00 pm on any view and their knowledge is the critical point for these purposes.

So with all these points we do say there needs to be an explanation and there needs to be an explanation for both failure to do it initially and why it took so long to raise these points.

That takes me then to the third point, which is the question of prejudice. I do rely upon -- continue to rely upon my submissions on limitation. What I am going to try to do based on what Mr Beal said is approach this in a slightly different way on the basis I recognise my earlier efforts did not meet with clear success.

Before we get to the complexity of subsection (6) what I would like to do is look at those claims which are not subject to subsection (6) but which I say are clearly time-barred.

So going back to the simple examples, just simply, CPO commenced we will assume on 1st June for simplicity. That allowed them to go back six years to 1st June 2016. So start on 1st June 2022 and go back six years to 1st June 2016. What I would like to think about, my thought experiment, is a cause of action that arises on 1st January 2017. That is seven months --

MR TIDSWELL: What do you mean "action"?

MR COOK: Cause of action.

MR TIDSWELL: Cause of action. I see. Sorry.

MR COOK: A cause of action that arose on 1st January 2017. So that's my daily accrued cause of action. The reason I am picking that date is that is seven months into the period. So when the CPO proceedings were commenced, that cause of action still had seven months left of limitation to run.

The reason why I am picking an example which is more than six months, as I will come on to explain, that cannot on any view be caught by subsection (6), (inaudible) six months within subsection (6). So I am thinking about an example of a claim which had seven months of limitation left to run when the CPO proceedings commenced.

Limitation is suspended by the CPO proceedings. We are all agreed in relation to that. That's the effect of subsection (4).

Then we come to what happens on subsection (5). Subsection (5) says limitation resumes running effectively when you fail to opt in. That's the important bit that's in Mr Beal's submissions. Mr Beal said suspension is effectively continued. We see from subsection (5) it says quite the reverse. It says:

"Following suspension under subsection (4), the running of limitation resumes."

So it is clearly not saying the suspension is extended. It says the running of the limitation period resumes on the date on which the following occurred. That date is the failure to opt in.

So the starting position is limitation resumed running on 10th February. With my example that claim that accrued on 1st January 2017 has seven months of limitation left to run at that point.

MR TIDSWELL: Yes.

MR COOK: Now that claim isn't caught by subsection (6) at all. It is just simply not captured by the words. As you rightly said, sir, the words in there, they are a condition to subsection (6) applying, which are that -- so subsection (6), going back to the wording, says:

"Where the running of limitation resumes" -- it has resumed -- "but the period would otherwise expire before the end of the six-month period ...", then there are consequences.

We don't need to worry about those consequences for now. My example has seven months to go. So it is quite clear the limitation period would not otherwise have expired before the end of that six-month period. So immediately we see that subsection (6) does not apply.

MR TIDSWELL: Just do that again. We have -- what date are we -- when is this all

happening?

MR COOK: After 10th February. So 10th February happened. Somebody has not opted in and the effect of subsection (5) is limitation starts running.

MR TIDSWELL: That's right.

MR COOK: So I am simply saying if we have a cause of action that has seven months of limitation left -- that's my 1st January example -- subsection (6) simply does not capture it at all. It is not covered. There is a condition for subsection (6) to be triggered, which is the limitation period would otherwise expire within six months, and that clearly isn't the case. On my example that has seven months left to run.

So we can immediately simplify things by putting subsection (6) to one side. It doesn't apply. What that means is we're back to just simple standard limitation principles. Subsection (5) says "Limitation resumes running". So it resumes running on 10th February. It runs for seven months, and that cause of action which accrued on 1st January 2017 expires after seven months, which would mean it expired on 10th September.

So we say the very simple point here is on any view causes of action which had six months or more of limitation left continue to expire daily from 10th August onwards. That means they continue to expire up until the application is brought at the end of November. So any cause of action which had six months to nine and a half months has undoubtedly expired, because we are not in subsection (6) at all. So there's no doubt we would say that those causes of action had expired.

What we then do, having established three and a half months of limitation, we then have sort of -- the question is you go back to subsection (6). Do those older claims that had 0 to 6 months of limitation left -- can they still be pursued even though we know this category of newer claims is time-barred? Obviously that would make no possible sense at all and indeed that is not how subsection (6) operates.

I then come down to deal with a specific example. Take 1st July, a cause of action that arose on 1st July 2016. On my example they had one month left of limitation to run when the CPO was originally commenced. So that had one month of limitation. Then we look and see -- I am afraid this is going back to the wording of subsection (6) -- how that operates. That is something where subsection (6) is triggered. It says: "Where the running of the limitation period resumes but the period would otherwise expire before the end of the six-month period."

So clearly we are in subsection (6) in relation to that. Just to understand how the two bits of this clause operate, it says:

"Where the period would otherwise expire before the end of the period of six months beginning with the date of that resumption."

The date of the resumption is 10th February. So it is the period that would have expired before the period of six months. So it is saying if it would otherwise expire before 10th August, so that's the six months from 10th February -- the starting point is if it will expire before 10 February, the period is treated as expiring at the end of that six-month period. The word "that" is, with respect, quite an important one. That six-month period is on our example 10th February to 10th August. So it's saying for that claim it would otherwise ordinarily expire before 10th August, but the period of limitation is treated as expiring at the end of that period, so it is treated as expiring on 10th August.

So that cause of action that accrued on 1st July 2016, it doesn't expire, as you would ordinarily expect, within a month of 10th February. It expires at the end of that six-month period, which we know is 10th August. So that one, which is also then -- which is now within subsection (6), but it has expired on 10th August, the end of that period.

So we say it is absolutely clear that anything with longer than six months is not covered

by subsection (6) at all. It just expires in the ordinary case. There is undoubtedly three and a half months of that which has expired. The way subsection (6) operates is it gets rid, as you might expect, of the older claims as well. It would be baffling to have a situation where some of the older claims remained and the newer ones did not. We say it is absolutely clear they do. They expire on 10th August.

MR TIDSWELL: When you say remain, you mean remain for the purposes we are looking for?

MR COOK: That they can be pursued. That they are not time-barred.

MR TIDSWELL: That's the bit I am not quite sure I understand. I have understood everything up until then I think. Surely what this does do is say if you issue proceedings before August 10th on any basis, it doesn't matter whether you were one month or six months, you still get the six months, don't you?

MR COOK: Yes.

MR TIDSWELL: So that's all that is doing, isn't it? Functionally that is really what this clause is designed to do.

MR COOK: Yes.

MR TIDSWELL: Your point is you are saying once you get past that obviously no-one is going to be issuing any proceedings then because you can't. So the only relevance of this is in a situation where we're looking at the prejudice and what effect it has on your --

MR COOK: They could have issued section 47A proceedings at any point. This regime is largely intended on the assumption that people have decided not to opt in and the likely scenario where you decide not to opt in is because you wanted to issue your own section 47A proceedings. You certainly can issue your own proceedings.

MR TIDSWELL: Of course you can. I am not saying you can't. I am just saying that the only relevance this provision has now is whether we -- is what the reference date

is for looking at prejudice. That's the only reason we are looking at it.

MR COOK: Indeed.

MR TIDSWELL: So we only care about it because we want to work out whether you're three months worse off or nine months worse off.

MR COOK: Indeed.

MR TIDSWELL: You are saying -- what you are saying -- what you are effectively saying is that the grace period is only there to allow people to issue proceedings and shouldn't be used for any other purpose. That is really what you are saying.

MR COOK: I am not. If they had made their application to opt in late within that six-month period, we couldn't have said there was any prejudice.

MR TIDSWELL: That's what I have just said. I mean, it's there for that purpose and you are saying it shouldn't be used for any other purpose, but, I mean, it is not drafted for any other purpose. It is drafted to give people the grace period (inaudible): We are looking at it in a way -- I am not sure -- I don't think it's fair to say that Parliamentary draughtsmen did not anticipate it, but it probably wasn't top of their mind, was it? We are looking at it through an odd lens, which is on the assumption that if we need to look at section 82(2) to add prejudice, what is the right reference point? So I think you are asking it to be an awful lot of weight, aren't you, for that purpose when it's really designed to give somebody six months to issue their proceedings?

MR COOK: Well, the limitation provisions are ultimately always about deciding when causes of action can be brought and then the flip side it cannot be.

MR TIDSWELL: The simple answer -- on that basis very clearly and purposively the simple answer is that subsection (6) allows the cause of action to be brought all the way until 10th August. So why is that not the reference point that we are using for the discussion?

MR COOK: Because we are after 10th August. The application was made after 10th

August. If they did it before 10th August, we wouldn't have an argument at all.

MR TIDSWELL: But we know they can't bring the claim. That's the whole point, isn't it? The whole point is this is about relief. It is about ...

MR COOK: The question about this is what claims do they have which they could in principle bring, and the prejudice is that a certain amount of their claims are now time-barred as a result of this provision, because this provision in general is saying "Claims are time-barred as follows" and it starts with six years.

MR TIDSWELL: If they brought their claim on 9th August, you couldn't have done anything about that. So why is that not the reference point for the prejudice?

MR COOK: Because having gone beyond that date -- once they go to 11th August, they then -- the effect of this is that they have time-barred claims to a greater degree than they had before, and therefore they can no longer bring --

MR TIDSWELL: Because of your argument about the dichotomy between longer seven month claims and one month claims?

MR COOK: Well, with respect, it is not because of that. I have shown you the seven month claim point to explain that, you know, the later claims that are actually newer are undoubtedly time-barred on any view, because they aren't captured by subsection (6) as a way of, with respect, helping the Tribunal understand how to interpret subsection (6), because if subsection (6) allowed a rump of older claims to survive when newer claims were time-barred, that would be a surprising outcome.

MR TIDSWELL: But it doesn't do that, does it, because it does exactly what it says on the tin. It lets people have six months to 9th August regardless of what the comparison is with people with longer, shorter. It just gives them that time. I mean, that's just all it does.

MR COOK: If they had brought the application proceedings by then, it wouldn't matter. Now we are beyond that we have accrued limitation defences and that's the prejudice.

MR TIDSWELL: The question is: accrued since when, though? That's the question, isn't it? (Inaudible) why is it different from the date on which they could have brought their claim? That's the bit I just don't get. Why should you get the benefit of an accrued limitation period for the purposes we want to use, which is not referrable to the last date on which they could have brought a claim against you? It doesn't make any sense.

MR COOK: Well, I mean, the short answer is because the starting point is subsection (5) actually says you can -- limitation carries on -- resumes --

MR TIDSWELL: Yes, but this alters.

MR COOK: So once you come beyond that -- so they have this grace period. If they don't choose to use the grace period, then the position gets worse, the limitation position.

MR TIDSWELL: I have got the point.

MR COOK: That's the point I make. Seven months onward -- six months and one day onward is time-barred and you must read subsection (6) in accordance with its wording, which has the effect once you are beyond 10th August that it mops up the previous six months as well.

MR TIDSWELL: Okay. Thank you very much.

MR BEAL: I am sorry to rise. One factual point. Mr Kennelly suggested I had said book building had been going on for years. If I did say that, I'm afraid --

MR TIDSWELL: I missed that.

MR BEAL: Mr Kennelly suggested I had said by reference to Mr Martin's evidence that Harcus Parker had been engaged in book building for years. That's what I thought he said I had said. I can't remember. I don't think I said that, but the transcript will reveal all. If I did say that, I misspoke, because quite clearly the book building exercise by Harcus Parker only started following the grant of the CPO orders.

What I have been referring to separately is the expression of interest schedule which Angeion have been keeping, which this Tribunal directed to be disclosed in March 2023. So that was not formal book building for the claim, because you do not do that until the CPO has been given, but there was this antecedent register of interest. I just wanted to make that absolutely crystal clear.

MR TIDSWELL: Thank you very much.

MR COOK: (Inaudible) to an 82 application having been made in September. It was floated as a possibility but only ultimately made in November. I think we have all been proceeding on the basis that they are November applications.

MR TIDSWELL: Yes. I suppose -- we can look at the response and see what it says on that. Thank you.

Right. I think we are done now. We will obviously reserve our judgment. Thank you very much. It's been a big job I know for lot of people, so we are very grateful for all your efforts. Thank you.

(4.45 pm)

(Hearing concluded)

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
…	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?