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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No: 1643/7/7/24

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Wednesday 4<sup>th</sup> March 2026

Before:

Justin Turner KC  
Lesley Farrell  
Professor Alisdair Smith

(Sitting as a Tribunal in England and Wales)

BETWEEN:

**WATERSIDE CLASS LIMITED**

**Proposed Class Representative**

v

**(1) MOWI ASA, (2) MOWI HOLDING AS, (3) GRIEG SEAFOOD ASA, (4)  
SALMAR ASA, (5) LERØY SEAFOOD GROUP ASA, AND (6) SCOTTISH SEA  
FARMS LIMITED**

**Proposed Defendants**

**A P P E A R A N C E S**

Sarah Abram KC and Camilla Cockerill on behalf of Waterside Class Limited (instructed by  
Simmons & Simmons)

Sarah Ford KC, Emma Mockford and Sean Butler on behalf of (1) Mowi ASA, (2) Mowi  
Holding AS, (3) Grieg Seafood ASA, (4) Salmar ASA, (5) Lerøy Seafood Group ASA, and (6)  
Scottish Sea Farms Limited (instructed by Skadden, Arps, Slate, Meagher & Flom; Freshfields;  
Schjødt; Cleary Gottlieb Steen & Hamilton, and Shepherd and Wedderburn)

1 Wednesday, 4 March 2026

2 (10.34 a.m.)

3  
4 THE CHAIR: Sorry, I have to read something:

5 "Some people may be joining us livestream on our  
6 website, so I must start with a warning. An official  
7 recording is being made and an authorised transcript  
8 will be produced. It is strictly prohibited for anyone  
9 else to make an unauthorised recording, whether audio  
10 or visual, of the proceedings, and breach of that  
11 provision is punishable as contempt of court."

12 Good morning.

13 Submissions by Ms ABRAM

14 MS ABRAM: Good morning. Sir, members of the Tribunal, as  
15 you know, I appear for the proposed class  
16 representative Waterside Class Limited, together with  
17 Ms Cockerill. My learned friend Ms Ford KC appears for  
18 the proposed defendants with Ms Mockford and Mr Butler.

19 As you know, sir, this is the PCR's application  
20 for a collective proceedings order. The proposed  
21 defendants or PDs, as I will sometimes refer to them,  
22 resist certification on only one narrow ground, which,  
23 as you know, is that the balance of costs and benefits  
24 of the proposed proceedings is said to render  
25 collective proceedings unsuitable.

1           I am, though, conscious that the Tribunal needs to  
2           be satisfied that all of the criteria for a collective  
3           proceedings order are met. So I am in the Tribunal's  
4           hands. If it would be helpful for me to start by  
5           briefly addressing the aspects of the test as to which  
6           no point is taken or any of those aspects --

7       THE CHAIR: I think, probably, if we focus initially  
8           certainly on the proportionality aspects, which may  
9           bring in a few other things as part of that discussion,  
10          but I think that would probably be most helpful.

11       MS ABRAM: I am very grateful. In that case, then, I will  
12          move straight to focus on those balance of costs and  
13          benefits. I want to take that issue in four stages.  
14          First, I would like to show you *Merricks v Mastercard*  
15          Incorporated & Ors in the Supreme Court on the approach  
16          to the suitability assessment and when and how the  
17          merits of a claim may be relevant. Second --

18       THE CHAIR: Do we need to look at that?

19       MS ABRAM: I think it is likely to be helpful, sir, if I  
20          may, just to set the groundwork. For example, one of  
21          the points that is taken against me by the proposed  
22          defendants is that the merits of the proposed  
23          proceedings may be taken into account in the  
24          certification decision and the Supreme Court rules  
25          directly against that in *Merricks*, for example.

1 THE CHAIR: Well, I do not think we can take a view -- or  
2 certainly not an adverse view -- on the merits at this  
3 stage, so I do not think you need to trouble us with  
4 that at the moment.

5 MS ABRAM: Mm-hmm.

6 THE CHAIR: Maybe you will deal with it in reply if  
7 necessary.

8 MS ABRAM: I am very grateful.

9 THE CHAIR: Obviously, we are conscious of the authorities.

10 MS ABRAM: I am very grateful for that indication, sir. So,  
11 then, perhaps instead I will start by looking at where  
12 the cost-benefit issue fits into the wider suitability  
13 assessment under the rules.

14 THE CHAIR: Mm-hmm.

15 MS ABRAM: Third, I will address the benefits of the  
16 proposed proceedings to the class members, in terms of  
17 this point made against me on the merits, and then  
18 take-up by class members. Fourthly, I will then turn  
19 to the costs of the proposed proceedings, if that  
20 sounds convenient, sir.

21 THE CHAIR: Just, at the outset, because you do not refer to  
22 it, I do not think, in your skeleton. What about the  
23 retail claim? Are you imagining these claims will be  
24 heard together?

25 MS ABRAM: We are, absolutely. In fact, a fundamental point

1           that we make is that this is a real indication of how  
2           the collective proceedings regime is meant to work.

3           The retail and the --

4       THE CHAIR: Right, and I understand that, but then why are  
5           you spending 17 million on a claim that someone else is  
6           already fighting?

7       MS ABRAM: Well, the retailers and the proposed class of  
8           course agree on liability, at least in a broad sense.  
9           We have not had access to each other's documents in the  
10          proceedings yet, so one cannot analyse the full --

11       THE CHAIR: But things like expert reports, disclosure --  
12          Why do you need to charge anything for that? Why can  
13          you not piggyback or, at the very least, share the  
14          costs of the experts and the disclosure? Why can you  
15          not --

16       MS ABRAM: It may very well be that there can be a great  
17          deal of sharing of burden and, to state the obvious, no  
18          one, including the funder, will want to spend any more  
19          on establishing liability than they need to. So that  
20          may very well be an excellent point.

21       THE CHAIR: You do not refer to this in your skeleton at  
22          all?

23       MS ABRAM: No, we have not made any proposals for that, and  
24          that simply reflects the early stage of the  
25          proceedings, sir, in the sense that we have not yet

1           passed the certification hurdle. Once we do, of  
2           course, one hopes that there will be access to the  
3           documents from the supermarket claims, and we will be  
4           able to see what is said in those proceedings, and they  
5           will be able to see what we say.

6           THE CHAIR: You are not anticipating at this stage that you  
7           will have to run an independent case?

8           MS ABRAM: Well, subject to checking and the scope of the  
9           claims, no. One anticipates that, on liability, on  
10          points where we make common cause, then we absolutely  
11          will be able to co-operate, work in parallel and, of  
12          course, avoid duplication in just the same way that you  
13          will expect the defendants to avoid duplication.

14          THE CHAIR: What that actually means in practical terms, of  
15          course, is going to be a question to be worked out once  
16          we have actually got to grips with what is said in the  
17          supermarket claim. So whether that means that there is  
18          division of labour on particular issues, or avoidance  
19          of duplication by those means, or whether there is a  
20          looser relationship is a question for down the path, in  
21          my submission. The Tribunal can absolutely take as a  
22          starting point that there is no intention on this side  
23          of the Court to duplicate those efforts between these  
24          claims and the supermarket claims, and we agree that  
25          they should be jointly case managed, until the point

1           where a divergence of interests arises. Of course, it  
2           is important to note that there will be that point,  
3           that point will arise, assuming that we succeed on  
4           liability, because one assumes that the supermarkets  
5           will be saying that there was a lower level of pass-on  
6           from them to consumers than we will be saying.

7           MS ABRAM: I am very grateful. So then, perhaps turning, in  
8           that case, to where the cost-benefit analysis fits into  
9           the suitability assessment, perhaps it is useful to  
10          anchor that in the rules. So, that is in the  
11          authorities bundle, and we can pick it up at tab 26.

12          It is volume 2 if you have got hard copies, page 1379.

13          THE CHAIR: Sorry, give me a second please.

14          MS ABRAM: (After a pause) They are in the authorities  
15          bundle, sir.

16          THE CHAIR: Yes. Okay. Sorry. Where did you want to go?

17          MS ABRAM: Rule 79, so page 1379 if we are in the  
18          authorities. So, as you know, Rule 79(1) sets out the  
19          suitability requirement -- that's at sub-point (c) --  
20          and one just pauses at Rule 79(1) to underline that  
21          there is no issue between the PCR and the proposed  
22          defendants as to the criteria at 79(1)(a) and (b), so  
23          the requirement for an identifiable class or for the  
24          claims to raise common issues, and, similarly, no issue  
25          as to the "just and reasonable" criterion, which is the

1 personal suitability criterion in relation to Ms Heal  
2 or the arrangements for the PCR.

3 So the only place where the action is, is  
4 79(1)(c), suitability to be brought in collective  
5 proceedings, and one then sees at 79(2), of course,  
6 that in determining suitability the Tribunal shall take  
7 into account "all matters it thinks fit, including" and  
8 then the list at (a) to (g) of which (b), the costs and  
9 benefits, is just one limb.

10 I want to show you if I may how the cost-benefit  
11 assessment fits into the wider suitability assessments  
12 and the way in which it has been approached by the  
13 Tribunal in some previous cases. Now, the cases that I  
14 will show you establish three important points of legal  
15 principle. The first is that the cost-benefit  
16 requirement is not a separate hurdle that needs to be  
17 individually met in order for proposed collective  
18 proceedings to be suitable. An overall evaluative  
19 assessment is required, and, of course, that principle  
20 originally comes from paragraph 61 of Lord Briggs's  
21 judgment in Merricks; that is the foundation stone for  
22 that.

23 The second point that comes out of the cases is  
24 that, again, consistent with the Supreme Court's  
25 rulings in Merricks and in Evans v Barclays that the

1 merits of a proposed claim are not relevant at the  
2 certification stage other than for a summary  
3 determination application or the decision between  
4 opt-in and opt-out.

5 THE CHAIR: Sorry can I just take you back? Could we just  
6 have a look at paragraph 61 of Lord Briggs --

7 MS ABRAM: Of course, yes.

8 THE CHAIR: -- and just remind ourselves?

9 MS ABRAM: We are in authorities bundle 1 for that purpose,  
10 and it is tab 3 and paragraph 61.

11 THE CHAIR: Hold on a minute. I have not got my --

12 MS ABRAM: It is at page 127.

13 THE CHAIR: I am here. Sorry, page -- Sorry, I am just  
14 having a few IT issues at the moment. Sorry, give me  
15 the page number again, I do apologise.

16 MS ABRAM: So, 127.

17 THE CHAIR: Yes.

18 MS ABRAM: At the bottom of page 127, paragraph 61, Lord  
19 Briggs, for the majority saying here:

20 "The listing of a number of factors potentially  
21 relevant to the question of whether the claims are  
22 suitable to be brought in collective proceedings in  
23 Rule 79.2 under the general rubric 'All matters that  
24 it thinks fit', shows that the CAT is expected to  
25 conduct a value judgment about suitability in which the

1 listed and other factors are weighed in the balance.  
2 The listed factors are not separate suitability  
3 hurdles, each of which the applicant for a CPO must  
4 surmount."

5 Then, at the end of that paragraph, Lord Briggs  
6 says,

7 "In particular, it is not a condition that the  
8 claims are suitable for an award of aggregate  
9 damages..."

10 Which was the point that was directly in issue in  
11 Merricks.

12 THE CHAIR: Right, yes, but Lord Briggs is not dealing there  
13 with -- I am just trying to think of circumstances  
14 where the cost-benefit assessment is against bringing  
15 the proceedings, but you allow the proceedings to go  
16 ahead anyway. Is there any example of that?

17 MS ABRAM: Let me show you an example of that.

18 THE CHAIR: Okay, thank you.

19 MS ABRAM: So, in tab 5 of the same bundle, we can see the  
20 Gutmann v First MTR South Western Trains Ltd rail fares  
21 certification decision, and in that case, the  
22 cost-benefit analysis came out against certification,  
23 but --

24 THE CHAIR: Marginally against -- Yes.

25 MS ABRAM: -- marginally against them, slightly against the

1 SW network.

2 THE CHAIR: Let us just have a look at it. What page?

3 MS ABRAM: So, that starts at 266, the relevant passage. If

4 I may just start -- before I take you to the paragraph

5 you have in mind, sir -- by showing you paragraph 165?

6 THE CHAIR: Of course, yes.

7 MS ABRAM: So, paragraph 165, the Tribunal identifies the

8 expected benefits of the proceedings, so it is

9 considering the expected benefits, and is referring

10 there, on page 266, to Mr Holt who was the expert for

11 the PCR, the preliminary estimate of the claim per

12 journey and then identifies the aggregate claims for

13 members of the opt-out class at 56-odd million for the

14 SW network, and 36 for the SE network. The point that

15 I take from that is that the cost-benefit analysis is

16 conducted on the basis of the PCR's case as to the

17 benefits of the proceedings.

18 What does not follow is you have got no

19 consideration of the merits in the sense that you are

20 invited to undertake here, where the proposed

21 defendants say, "Well, actually, maybe the amount

22 recovered will be less than the PCR envisages." The

23 assessment is conducted on the basis of the PCR's

24 figure, but I think the section that you have in mind,

25 sir, is page 26 --

1 THE CHAIR: Sorry. I am just not quite following you saying  
2 we are required to use your figure.

3 MS ABRAM: I am saying that that is the approach that has  
4 always been adopted so far, and I am saying that the  
5 reason for that is the fact that in Merricks and in  
6 Evans v Barclays Bank, the Supreme Court has held in  
7 both of those cases that the merits are not to be taken  
8 into account --

9 THE CHAIR: I see, I see, I understand what you are saying.

10 MS ABRAM: -- at this stage.

11 THE CHAIR: Yes, yes, and then, sorry, you were going on to  
12 --

13 MS ABRAM: Then, we were going to go on to where that takes  
14 the Tribunal, so page 270, paragraph 178, so this is  
15 the conclusion that I think you had in mind, sir, the  
16 Tribunal finds that the cost-benefit analysis comes out  
17 slightly against the grant of a CPO. Then what the  
18 Tribunal does is goes on to put that in the wider  
19 context of the suitability assessment, so at paragraph  
20 180, the Tribunal goes through the other factors  
21 relevant to suitability, and they are considered at  
22 each of those subparagraphs, and in short, the position  
23 is that each of the other factors favours a grant of a  
24 CPO.

25 THE CHAIR: Where does it deal with uptake?

1 MS ABRAM: Where does it deal --

2 THE CHAIR: So, to arrive at that figure, sorry, conclusion  
3 in 178, have they discussed uptake as an issue?

4 MS ABRAM: Yes, they do. They do consider uptake.

5 THE CHAIR: That is where?

6 MS ABRAM: So, they consider that in a passage that is  
7 starting at paragraph 167.

8 THE CHAIR: Okay, sorry. Let me just get back to that, yes,  
9 yes.

10 MS ABRAM: (After a pause) If it is helpful to summarise --

11 THE CHAIR: Let me just -- Sorry. Can you just give me a  
12 second to just reread this, sorry?

13 MS ABRAM: Of course.

14 THE CHAIR: It is just trying to understand how this fits in  
15 with what happened at trial is quite -- Because, of  
16 course, one might speculate that with the benefit of  
17 hindsight, perhaps this should not have been certified.  
18 I think there might even be a comment to that effect in  
19 the trial judgment, so going to this and saying it was  
20 right to certify it is -- one needs to consider the  
21 context.

22 MS ABRAM: So, I rely on this for a couple of points.

23 THE CHAIR: Yes.

24 MS ABRAM: I rely on it first to show that there are cases  
25 where the cost-benefit analysis individually may come

1 out against suitability, but overall the suitability  
2 assessment still favours certification.

3 THE CHAIR: Well, yes, marginally, yes.

4 MS ABRAM: Second, it is very important to note the  
5 differences between the fact pattern here and the fact  
6 pattern in our case, and you will see throughout this  
7 passage, my name appears several times, which is  
8 because I acted for one of the respondents in that  
9 case, one of the PDs there. One of the points that we  
10 were making was that at that time, the distribution  
11 arrangements envisaged that in order to get any share  
12 of the award, the class members would need to prove the  
13 fact that they had made purchases. We said, even back  
14 in 2021, "Well, hang on. Who is going to have train  
15 tickets from X years ago and be able to prove your  
16 entitlement to a share of the award?" Whereas, in this  
17 case, of course, we have addressed that because our  
18 provisional proposal on distribution is that a class  
19 member should be able to recover the average per capita  
20 loss as part of any award by self-certifying, so  
21 without providing any contemporaneous documentation.

22 So I would say that the analysis of take-up in  
23 this passage is not terribly informative of what is  
24 likely to happen on take-up in this case. I really  
25 rely on it for the principle that cost benefit is not

1           some freestanding hurdle that must be satisfied of  
2           itself. The point that is relied on against me in the  
3           passage is --

4       THE CHAIR:    Just, again, leaving aside the marginal, if we  
5           were of the view that it was not marginal, that the  
6           cost benefit indicate that the cost of the proceedings  
7           do not justify the benefit to the class, are you saying  
8           we should certify anyway?

9       MS ABRAM:    That the costs do not justify the benefits to  
10           class?

11       THE CHAIR:    Yes.

12       MS ABRAM:    Well, I do accept, and I will show you in a  
13           moment another case where the Tribunal has held --  
14           Well, in fact you know better than maybe because it was  
15           Consumers' Association v Qualcomm Inc. The Tribunal  
16           has said that there may be a case in which the  
17           cost-benefit analysis may by itself be a factor that  
18           justifies refusing certification, so I accept that in  
19           principle. That could be the case, but we say that it  
20           is very, very far from being the case here on these  
21           facts.

22       THE CHAIR:    Right, so you are not saying that if the benefit  
23           is against these pleadings -- sorry, the cost benefit  
24           in the case do not justify benefit of the class, you  
25           are not saying it should proceed anyway?

1 MS ABRAM: I am not saying that the claim could never be  
2 found unsuitable.

3 THE CHAIR: I am asking about this case.

4 MS ABRAM: Well, in this case, I would say that even if you  
5 consider the cost-benefit analysis, for example,  
6 slightly against certification, overall and  
7 overwhelmingly, this case is so clearly suitable under  
8 all of the other heads, that those factors would  
9 outweigh the cost benefit, but my primary position is  
10 we do not get anywhere near that in this case. The  
11 reason why I say that, and again, it may be helpful, if  
12 I may, just to anchor this back and to what the Supreme  
13 Court has held on two occasions is the purpose of  
14 collective regime. This is a paradigmatic example of  
15 what collective proceedings are here to do, so if I may  
16 just show you just a couple of extracts from Merricks  
17 --

18 THE CHAIR: I have got that well in mind. I am not sure it  
19 is going to help us on the cost benefit really. You  
20 can go to it if you want, but I am not sure (inaudible)  
21 try to tell us.

22 MS ABRAM: Perhaps --

23 THE CHAIR: Let us go to it quickly, then.

24 MS ABRAM: If I just show you one paragraph from Evans, so  
25 that is in authorities bundle 2, and tab 22. If I show

1           you paragraph 116, which is on page 1051.

2       THE CHAIR: 1051, yes.

3       MS ABRAM: So, 116, this is the Supreme Court saying:

4           "The regimes [that is the collective proceedings  
5           regime, obviously] are designed to accommodate a wide  
6           spectrum of cases with different features to allow  
7           classes of claimants a reasonable opportunity to  
8           litigate, but not an absolute or specially privileged  
9           right to do so. At one end of the spectrum, there may  
10          be a large class..." --

11       THE CHAIR: Okay. We can read this ourselves, thank you.

12       MS ABRAM: I am grateful.

13       THE CHAIR: Right, but the point made against you is not  
14          that the sums are small. As I understand it, that is  
15          not the point that the defendants have raised. The  
16          problem is the total award relative to the costs.

17       MS ABRAM: So, what the defendants say is that if the total  
18          award is the very smallest amount at the end of the  
19          range envisaged by Oxera, then it would be less than  
20          the absolute maximum that the funder could seek to gain  
21          if the Tribunal was --

22       THE CHAIR: Well, we will come to the figures in due course,  
23          yes. You can give us your analysis of the figures  
24          here.

25       MS ABRAM: Yes, and I say that that is extremely gloomy in

1 relation to the value of the claim, and unjustifiably,  
2 frankly, an unjustifiable interpretation of what the  
3 funder stands to gain from the proceedings in those  
4 circumstances, because there is a consistent line of  
5 authority and decisional practice as well, showing that  
6 all these matters are within the control of the  
7 Tribunal.

8 THE CHAIR: But all we are getting out of 116 is the fact  
9 that you can have class actions where the sums  
10 individually are very small.

11 MS ABRAM: Well, in my submission, it goes a little bit  
12 further than that --

13 THE CHAIR: Okay.

14 MS ABRAM: -- because the penultimate sentence of that  
15 paragraph says that:

16 "This is the paradigm type of case in which  
17 opt-out proceedings are likely to be justified."

18 THE CHAIR: Yes, yes.

19 MS ABRAM: So, not just that it is possible, but it is the  
20 paradigm case.

21 THE CHAIR: Yes, okay, fair point.

22 MS ABRAM: So that is the starting point. If I may then  
23 show you Consumers' Association v Qualcomm  
24 Incorporated, which is the case that is relied on for  
25 the idea that cost-benefit analysis may in itself be

1 sufficient to make a claim unsuitable for  
2 certification. That is at tab 9 of the authorities  
3 bundle. If we could pick it up at page 416, and I will  
4 show you all the bits of this I want to show you now so  
5 that we do not have to go back to it later. If we pick  
6 it up at paragraph 102, on page 416, you see Qualcomm  
7 noted that according to Which?'s budget, total costs  
8 would be in excess of £25 million, whereas the  
9 estimates of damages on the Which? side are £16 to £17  
10 per class member, and the Tribunal has that.

11 Again, the point that I take from that paragraph  
12 is that this is another example of the Tribunal, when  
13 considering the benefits of proposed collective  
14 proceedings, doing so on the basis of the PCR's case.  
15 There is no analysis that follows, "Well, what if the  
16 level of recovery is lower than the level that is  
17 envisaged by the PCR?" It was done on the basis of the  
18 PCR's case, and then, if one goes over to paragraph  
19 105, which is the paragraph relied on against me by the  
20 PDs in this case, and that sets out the principle that  
21 is relied on, so whether the proposed collective  
22 proceedings are likely to benefit principally lawyers  
23 and funders. It is the second sentence of that  
24 paragraph that the PDs rely on.

25 THE CHAIR: Mm-hmm.

1 MS ABRAM: So, that is possible as a matter of principle,  
2 but from the way that the Tribunal has presented the  
3 point, it is clear that it is regarded as an  
4 exceptional scenario, so, "We do not exclude the  
5 possibility" is the language used, but then we go on to  
6 paragraph 106, which puts that point in context. The  
7 Tribunal says:

8 "We do not consider that the facts of the present  
9 case come close to representing such a case. In the  
10 current economic climates and given the cost-of-living  
11 challenges, we do not consider this an average claim of  
12 £16 to 17 per consumer, is such a small sum that  
13 take-up is inherently likely to be limited."

14 That can be measured against the sums potentially  
15 available in this case, which are --

16 THE CHAIR: Yes, I do not think that -- Well, I will hear  
17 from the defendants, but I do not think the point in  
18 issue is the figure of £5 or £6, or whatever it is, for  
19 consumer; I do not think that is the battle you need to  
20 fight. I think the more important point is really the  
21 level of uptake and what the cumulative award will be  
22 in the light of that. I think that is the -- I  
23 appreciate the two are related at some level, but I do  
24 not think we would be minded not to certify this on the  
25 basis that it is £5 per person in isolation.

1 MS ABRAM: I am grateful for that because that is in fact  
2 the grounds of the objection.

3 THE CHAIR: Well, we will see, yes.

4 MS ABRAM: Yes. The point being made against me --

5 THE CHAIR: Anyway, we understand that often these are very  
6 small sums --

7 MS ABRAM: The point --

8 THE CHAIR: -- per person.

9 MS ABRAM: Yes. There is no criticism of Angeion's proposed  
10 notice or distribution arrangements. They are not said  
11 to be deficient, for example. This is not a case where  
12 --

13 THE CHAIR: Well, we are very interested in those, so do not  
14 assume there is no point on that.

15 MS ABRAM: No. No, of course, and I will come to them. But  
16 just to let me flag the big picture point where we are  
17 as between the parties, this is not a case where, for  
18 example, as one sometimes sees, proposed defendants  
19 have said, "Well, look, we are not happy with these  
20 distribution arrangements. We think they are deficient  
21 in respects A, B and C. We have got questions X, Yes  
22 and Z. Please answer them." Then come to the Tribunal  
23 saying, "Hang on, there is something wrong with these  
24 distribution arrangements." None of that has happened.  
25 So, actually, on analysis, the sum total of this

1 argument on take-up does reduce to the value of the per  
2 capita sum available. Now, I will show you that --

3 THE CHAIR: That is not how we have been reading it, but let  
4 us hear your submissions on the substance rather than  
5 too much shadowboxing. The defendants are shaking  
6 their heads.

7 MS ABRAM: I should also --

8 THE CHAIR: Of course, although it is helpful for the  
9 Tribunal, for the defendants to take these points, in  
10 the end, it is really the Tribunal's concerns which  
11 have to be addressed because we will see the  
12 defendant's interest in stopping this litigation. Our  
13 interest is obviously to make sure the interests of the  
14 class are being looked after.

15 MS ABRAM: Of course. Let me show you then before I come on  
16 to the facts of this case, just one more authority  
17 about distribution --

18 THE CHAIR: Yes.

19 MS ABRAM: -- which is relied on by the defendants. That is  
20 Spottiswoode v Nexans France, which is at tab 12 of the  
21 authorities bundle.

22 THE CHAIR: Yes. If you give me a page number.

23 MS ABRAM: So if we take it up at page 592 and if I could  
24 just ask you to read paragraph 45, which expresses the  
25 Tribunal's concerns. (Pause for reading) What the

1 Tribunal is saying there is that, "We are worried that  
2 if consumers are required prove their entitlement to  
3 take up a share of the award by recalling and then  
4 proving what they have paid for electricity over 20  
5 years, they might just not regard the amount of damages  
6 available as a sufficient incentive to engage with that  
7 process." Again, that is a point that does not arise  
8 in this case because, as I will show you in the notice  
9 of administration plan, the provisional proposal is  
10 that class members should be able to recover at least  
11 the average per capita loss by self-certifying. So the  
12 point in Spottiswoode does not arise here.

13 Then if one looks at paragraph 49, you can see  
14 what was available to the Tribunal at the certification  
15 stage. So the bottom of page 593, the final sentence.  
16 In that case, the Tribunal records:

17 "The litigation plan [in Spottiswoode] simply  
18 envisages that, after an award has been made, members  
19 of the Class would be notified of their right to claim  
20 and would be directed to submit an online claim."

21 So, there was no plan for notice and no plan for  
22 distribution in Spottiswoode and, unsurprisingly, the  
23 Tribunal considered that that was not good enough. You  
24 can see the touchstone for that analysis at the end of  
25 paragraph 51 on page 594. So the final couple of lines

1 of paragraph 51, the Tribunal is asking whether:

2 "...the proposed collective proceedings offer a real  
3 prospect of benefit to members of the Class as distinct  
4 from lawyers and funders."

5 So that is the yardstick that the Tribunal's  
6 applying. That is expressed slightly differently at  
7 paragraph 53, but to similar effect, the top of page  
8 595. So the issue raised by the Tribunal is:

9 "...as to whether a practical and effective process  
10 will be found for distributing a settlement or damages  
11 award to the class as a whole."

12 So that is the question that the Tribunal's asking  
13 itself. The concern of the Tribunal, again, relating  
14 to evidence is reiterated at paragraph 54 of the  
15 judgment. If you look at the bottom of page 595, the  
16 final eight lines or so of that paragraph, starting:

17 "If only a small proportion of the Class take up  
18 any damages award, or if no viable method of  
19 distribution can be found other than a payment of  
20 relatively small sums to members of the Class on  
21 production of compendious documentation establishing  
22 entitlement to those sums, these proceedings would  
23 compare unfavourably with individual [damages claims]..."

24 So, again, it is an issue about documentation. So  
25 it is about the specifics of the notice and the

1 distribution plan that the tribunal raised an issue in  
2 Spottiswoode. So just trying to pull together the  
3 threads on what the case law shows us. I say, first,  
4 it shows us that cost benefit is not a separate  
5 freestanding hurdle. We have seen that in Merrick's;  
6 we have seen that in Gutmann; we have seen that it can  
7 in principle be a sufficient objection in Which? and  
8 Qualcomm, but it is part of a wider evaluative  
9 assessment.

10 We have seen set against that, that in Evans, for  
11 example, the Supreme Court described a per capita  
12 low-value consumer claim as the paradigmatic example of  
13 a case that is suitable for collective proceedings. So  
14 these are the claims for which this regime was designed  
15 in the statute. We have also seen that on the question  
16 of distribution, it is necessary, of course, for there  
17 to be a plan as to distribution and the touchstone is  
18 that it delivers -- that there is a real prospect of  
19 benefit being delivered to the class and I am going to  
20 say that all of those criteria are very amply satisfied  
21 in this case.

22 It is unsurprising, stepping back, that the PDs do  
23 not argue that there is any other issue with the  
24 suitability of these proceedings. Because if one, for  
25 example, takes that back to the requirements under the

1 rules, so if we look back at Rule 79(2), for example,  
2 so that is page 1379 of the electronic authorities  
3 bundle, and one just sees where cost-benefit analysis  
4 sits in that wider suitability assessment, I know you  
5 have got in mind, sir. We look, for example, at  
6 79(2)(a) whether collective proceedings are an  
7 appropriate means for the fair and efficient resolution  
8 of the common issues. Well, the reality in this case  
9 is that not only are they an appropriate means --

10 THE CHAIR: Yes, I think we are -- Are we not going to  
11 focus on cost benefit at the moment, rather than  
12 disappear down the other criteria?

13 MS ABRAM: I am grateful, sir, but in my submission, it is  
14 important to start with the point that not only are  
15 these suitable cases -- are these suitable claims for  
16 cost benefit -- for collective proceedings, just if one  
17 sets cost benefit to one side -- that is accepted that  
18 is common ground between the parties; that is the  
19 starting point -- they are otherwise entirely suitable.  
20 Indeed, they are the paradigmatic case of what collective  
proceedings are for.

21 THE CHAIR: Yes, you have made the submission several times.  
22 I have got your point.

23 MS ABRAM: In fact, it is also accepted that opt-out  
24 collective proceedings are the only practicable means  
25 for these proceedings to be pursued. So it is not

1 suggested, for example, the opt-in proceedings could or  
2 should sensibly be a possibility in this case. But I  
3 hear what you say, sir, and I will move to the benefits  
4 of the proposed proceedings, if I may, to start with  
5 and then come onto the costs after that.

6 So looking at the prospective benefits of the  
7 proceedings, there are two dimensions that are relied  
8 on by the proposed defendants. The first is the likely  
9 outcome of the proceedings in the sense of the merits.  
10 So I've already made the submission that this is not a  
11 relevant factor.

12 THE CHAIR: Yes. So I am quite keen not to get too  
13 distracted by everything the defendants say because you  
14 have to make out your case to the Tribunal. It is not  
15 just an adversarial procedure in that respect. So you  
16 need to explain what the benefits are and what your  
17 figure for uptake is and how you arrive at it and  
18 address those issues from your positive case as opposed  
19 to just swiping at the defendants.

20 MS ABRAM: Of course. Of course, sir. I appreciate that.

21 In relation to take-up, we do not have a single figure  
22 that we reflect as we put forward as a kind of holy  
23 grail or as a known uptake figure. That is not an  
24 exercise that is being carried out and the reason why  
25 that has not been carried out is that as Lord Briggs

1 held in Merricks, in general, these questions are  
2 better delayed to the distribution stage of the  
3 proceedings. May I just show you what Lord Briggs said  
4 about distribution in Merricks? So, if one looks,  
5 again, at authorities bundle, tab 3, and one skips to  
6 page 134. It is helpful to start by looking at  
7 paragraph 77 and then to look at paragraph 80. Could I  
8 ask you just to read those two paragraphs?

9 THE CHAIR: You want us -- Sorry, I have read 77.

10 MS ABRAM: 77 and 80.

11 THE CHAIR: Not in between, no, just onto 80?

12 MS ABRAM: 80, yes.

13 THE CHAIR: (Pause for reading). Should we also have a look  
14 at Mark McLaren Class Representative v MOL -- the  
15 recent McLaren judgment? Is that --

16 MS ABRAM: Absolutely, sir. Could I just make my point  
17 about (inaudible)?

18 THE CHAIR: Yes, of course. Yes, I'm sorry. I do  
19 apologise. Yes. Yes.

20 MS ABRAM: Thank you. So, on paragraph 77, the point that  
21 is being teed up by Lord Briggs is that it may, in many  
22 cases, be that the -- that an individualised assessment  
23 of loss is not the most appropriate basis on which  
24 class members' share of an award should be assessed.  
25 So Lord Briggs is saying, "Well, there are lots of

1 cases where, actually, class members will not be  
2 getting the amount that individually they would have  
3 been entitled to claim if they brought their own  
4 claim." He says, well:

5 "In many cases the selection of the fairest method  
6 will best be left until the size of the class and the  
7 amount of the aggregate damages are known."

8 That is important context for the point that he  
9 makes at paragraph 80.

10 Because at paragraph 80, he says -- he notes that:

11 "...the Court of Appeal regarded any consideration  
12 of distribution proposals at, and for the purposes of,  
13 the certification stage as premature."

14 Lord Briggs agrees that this will "generally be  
15 true." Then says, "But there may be cases where the  
16 distribution proposals are "relevant to suitability,"  
17 and will therefore need to be considered in the context  
18 of an analysis of suitability. That is what is pressed  
19 on the Tribunal in this case and that is what the  
20 Tribunal did in Spottiswoode.

21 What I say about that is that, yes, that is right.  
22 At the certification stage it is necessary for me to  
23 persuade you that the distribution proposals give a  
24 real prospect of benefit to the class in the words of  
25 the Tribunal in Spottiswoode, but that has to be subject

1 to the reality check that Lord Briggs reflects here in  
2 Merricks, which is that until the size of the class is  
3 known, but in this case particularly, until the  
4 aggregate award of damages is known, it is not actually  
5 very meaningful to start talking about what any  
6 individual class member should obtain or how the award  
7 per class member should be calculated.

8 THE CHAIR: I mean, but we obviously have the experience of  
9 Gutmann and that perhaps has brought home the fact  
10 that uptake may be a real issue in these cases and, of  
11 course, there are some cases where prima facie it seems  
12 likely that uptake will be sufficient, but the point  
13 that is being made against you by the defendants, and  
14 the point we would also like to explore more is what is  
15 going to happen in this case. At the moment, as I  
16 understand your submission, you are saying that you are  
17 not putting forward a figure for uptake, and you have  
18 not carried out any analysis of that.

19 MS ABRAM: The reason for that is that it is common ground  
20 that the level of uptake is likely to depend to some  
21 extent on the size of the award.

22 THE CHAIR: So what was the point of this table you put  
23 forward in your expert report? In the report --

24 MS ABRAM: The notice and administration plan? Yes, let us  
25 go there. So, that is in supplemental bundle, tab 9.

1 THE CHAIR: Tab 10, yes?

2 MS ABRAM: Well, for me it is tab 9, but --

3 THE CHAIR: I am sorry. Tab 9. I beg your pardon.

4 MS ABRAM: I think the table you have got in mind is at page  
5 128.

6 THE CHAIR: Yes.

7 MS ABRAM: What that shows is a list of claims in the  
8 administration of which Angeion has been involved in  
9 the US, showing the per capita award for a  
10 self-certifying purchaser and the number of claims  
11 received, and the point that is taken against me on  
12 this is that it suggests that, by parity of reasoning  
13 --

14 THE CHAIR: But before we get to that, what can we get out  
15 of this table? We do not know the -- We have got the  
16 number of self-certifying claims; we do not know, do  
17 we, what percentage that represents of the class. Is  
18 that right?

19 MS ABRAM: That is absolutely right, sir. So, we do not  
20 know a number of things. We do not know what the size  
21 of the class was in any of these cases. For example,  
22 we do not know whether these were --

23 THE CHAIR: But you could have asked Angeion about that.

24 MS ABRAM: It is true that Angeion may have that information  
25 --

1 THE CHAIR: They are working for you.

2 MS ABRAM: Angeion may have that information. I do not know  
3 if they do. They may have that information --

4 THE CHAIR: Right.

5 MS ABRAM: -- but one does not know if these are pan-US  
6 claims, for example, or claims relating to just a  
7 particular part of the US. One does not know what the  
8 class size is. One of the key factors --

9 THE CHAIR: What about the salmon one?

10 MS ABRAM: Yes. It is not suggested that that is the  
11 equivalent of this salmon case in the US, for example.  
12 Although clearly the product is also salmon, one does  
13 not know --

14 THE CHAIR: What was it about? You have not --

15 MS ABRAM: I do not know the answer --

16 THE CHAIR: -- quite answered the point there.

17 MS ABRAM: I do not know the answer to that question, sir.

18 THE CHAIR: Can you take instructions on that, or does  
19 nobody know?

20 MS ABRAM: I think it is unlikely that anyone in Court will  
21 know but I am sure we can seek to find out. May I,  
22 while we are in the notice and administration plan,  
23 show you some bits of it that I would like --

24 THE CHAIR: Yes. So --

25 MS ABRAM: -- the Tribunal to consider?

1 THE CHAIR: -- your submission on this is that, although you  
2 put it forward, you really do not know anything about  
3 it?

4 MS ABRAM: Well, although we put it forward, we say that it  
5 is not any kind of guide to the likely level of take-up  
6 in this case, and I say that for --

7 THE CHAIR: But what was it advanced for?

8 MS ABRAM: Well, it was advanced by Angeion as part of their  
9 notice and administration plan in the context set out  
10 in paragraph 11.6, so at page 127. So the point that  
11 is made in that paragraph is, you see on the fourth  
12 line:

13 "It is commonplace in the US to receive hundreds  
14 of thousands of claims from self-certifying purchasers  
15 who can only receive a modest sum of damages."

16 So, it is not making a point as to the proportion  
17 of the class that is likely to claim for a modest sum  
18 of damages. It is saying, "Look, we know that as a  
19 matter of lived practice, where you have got a modest  
20 per head award, hundreds of thousands of people are  
21 available to claim." So you --

22 THE CHAIR: So, they are relying on the figures. They are  
23 putting forward the figures as giving information to  
24 the Tribunal: that you can expect in these cases  
25 between 47,000 and 422,000, and they refer to it as

1 "hundreds of thousands." So they are putting forward  
2 -- The figure is not -- They are not putting forward  
3 this table for some other purpose, but they are putting  
4 forward the table to identify, from their experience in  
5 the US, the number of valid self-certifying claims  
6 received in those cases.

7 MS ABRAM: Sir, if I may, I would put it slightly  
8 differently.

9 THE CHAIR: Right.

10 MS ABRAM: They are relying on the table to show that where  
11 a small per capita amount is available to ordinary  
12 consumers on a self-certifying basis, up to hundreds of  
13 thousands of them are prepared to come forward. They  
14 are not making any point extrapolating from that to  
15 what the likely number of claimants would be in this  
16 case.

17 PROFESSOR SMITH: We are talking here about the cost-benefit  
18 analysis for proportionality and for cost-benefit  
19 analysis, where the claim involves many millions of  
20 households, hundreds of thousands of successful claims  
21 is not really relevant. What is relevant is the  
22 take-up rate, and you are not providing us with any  
23 information on the statistic that is needed for this  
24 cost-benefit analysis.

25 MS ABRAM: It is true that this table does not provide any

1           relevant information on that statistic. I absolutely  
2           accept that, because you do not know what the class  
3           size was in any of those cases and so we cannot  
4           extrapolate from that to this case. But there is --

5           THE CHAIR: But there is no --

6           MS ABRAM: Sorry.

7           THE CHAIR: There is no reason why those figures could not  
8           have been provided to the Tribunal. You have  
9           instructed Angeion, you have put forward these figures,  
10          and there is nothing preventing you from saying to  
11          Angeion, "Well, as a percentage, could you give us a  
12          indication what they are?"

13          MS ABRAM: One would assume that Angeion must have those  
14          figures. May I make a further point in relation to --

15          THE CHAIR: So, as I understand, you have not asked? Your  
16          client from the class representative has not asked  
17          Angeion? Because --

18          MS ABRAM: I do not understand that question that has been  
19          asked. But may I make a further point about the extent  
20          to which this table is relevant? It is predicated on  
21          the idea that the level of maximum recovery on a per  
22          capita basis will be in the league of this table and,  
23          of course, what we know from the practice in this  
24          jurisdiction is that there is no reason for the per  
25          capita claim for class members who come forward to

1 accept an award to be tied to the average loss of class  
2 members.

3 In Merricks, for example, the average loss per  
4 class member based on the settlement sum was about  
5 £4.50, but the total amount that class members can  
6 claim under the settlement in Merricks is up to 15  
7 times higher, so it is up to £70 per class member. So,  
8 one cannot at all assume that the amount that the  
9 Tribunal will authorise, whether after a judgment or  
10 after a settlement, to be distributed to class members  
11 should reflect the average loss. That is our  
12 provisional proposal, and I would like to show you that  
13 in Merricks, because that is a very important lever  
14 that the Tribunal might decide to pull in this  
15 litigation -- as in many other cases -- to increase the  
16 amount available per class member and, therefore, to  
17 incentivise take-up.

18 That is another reason why -- I hear what the  
19 Tribunal says about the lack of any figure in relation  
20 to take-up, but everyone agrees that the level of  
21 take-up is likely to depend on the per capita sum  
22 available, and we do not at all know what the per  
23 capita sum available will be, because we do not know  
24 what the average loss you will find in a couple of  
25 years in a trial will be. But we also do not know

1           whether -- when you approve a distribution following a  
2           settlement or a judgment -- the amount that class  
3           members will be allowed to receive will be capped at  
4           the average per capita loss or, as in Merricks, whether  
5           it may be many times higher than that, and clearly that  
6           would affect willingness to come forward and claim.

7           May I show you, while we are in the notice and  
8           administration plan, the proposals that Angeion has put  
9           forward? It is really important to measure them  
10          against the only distribution plan that is so far being  
11          criticised by the Tribunal at the certification stage,  
12          which was in Spottiswoode, whereas I showed you from  
13          Spottiswoode, there effectively was no plan. There was  
14          nothing on notice, it seems, from the judgment. There  
15          was nothing on notice, and there was no plan for  
16          distribution. This is in quite a different league in  
17          that respect. Perhaps one starts with the notice  
18          provisions, and they start at page 106. Section 5.5.3  
19          on page 106 gives a list of the ways in which Angeion  
20          proposes to communicate with the class. If I could ask  
21          you to read that.

22       THE CHAIR: Sorry. Page 106?

23       MS ABRAM: 106, yes. 5.3 --

24       THE CHAIR: We have read this already. Yes. I have got  
25          this in mind.

1 MS ABRAM: I am very grateful. The point I was making about  
2 that is that, as in relation to Angeion's distribution  
3 proposals -- when I come to them -- this is not a case  
4 where there is any criticism at all from the proposed  
5 defendants of the notice --

6 THE CHAIR: Okay. But, again, I just want you to -- you  
7 have got to satisfy us. It is not just an adversarial  
8 matter.

9 MS ABRAM: Of course, but --

10 THE CHAIR: I would just like you to keep that in mind with  
11 your submissions on this point.

12 MS ABRAM: Of course. I hear that, sir --

13 THE CHAIR: So, the fact that the defendant does not happen  
14 to not criticise them does not mean we are not going to  
15 have regard to them.

16 MS ABRAM: Of course, sir. Of course. I am grateful. If  
17 one skips on to section 10, which starts on page 123 --

18 THE CHAIR: So, did you want to say anything about page 106,  
19 having gone here?

20 MS ABRAM: So, I would ask you to have a look at --

21 THE CHAIR: Did you have any submissions? I think we have  
22 read it.

23 MS ABRAM: -- paragraph 5.3. Yes. The point that I am  
24 making there is that Angeion is proposing to  
25 communicate with the class by all of these different

1 means listed in 5.3. So, the normal formal notices --  
2 the minimum that you require -- is (a), so that is not  
3 very interesting. The media campaign, including press  
4 releases, online advertisements and print  
5 advertisements is (b). The claims website -- Again,  
6 that is a normal part of these proceedings now, and  
7 then search engine marketing as well, the purpose of  
8 which is to funnel people to make sure they get to the  
9 right website. The point that I would make about this  
10 is -- these are the ways of communicating with class  
11 members, so in terms of notice, these are all the  
12 available ways, and so --

13 THE CHAIR: Remind me, how does this compare with what was  
14 done in -- contrast with what was done in Gutmann?

15 MS ABRAM: So, in Gutmann, from recollection, when the  
16 claims were first certified, these cases were at a much  
17 earlier stage.

18 THE CHAIR: No, I mean at trial. They obviously got a very  
19 low uptake in Gutmann. How do these differ from the  
20 sort of communications that took place in Gutmann?

21 MS ABRAM: Let me show you what the Tribunal had to say  
22 about --

23 THE CHAIR: Just tell me how they differ.

24 MS ABRAM: So, the answer is that take-up, it is clear from  
25 the judgments and post-distribution in Gutmann -- and I

1           was for the settling defendants in Gutmann, so --

2       THE CHAIR: Right. So you have got it in mind. Yes.

3       MS ABRAM: Some lived experience of that. There is a

4           passage that I would like to show you in the

5           distribution judgments --

6       THE CHAIR: Yes. But if you just could maybe answer my

7           question first, that's all.

8       MS ABRAM: Where the Tribunal says that the CR and their

9           team, the claims administrator, underwent several

10          significant changes in their approach to distribution

11          in the course of the distribution process. So they had

12          to relaunch their claims website in a way that was

13          easier to use --

14       THE CHAIR: Okay. But you are arguing your case, could you

15          just tell me -- just to answer my question -- what

16          different methods were used in Gutmann to here, how

17          this differs from the methods used in Gutmann?

18       MS ABRAM: So, the publicly available materials in Gutmann

19          do not give a full list of everything that was done in

20          Gutmann in order to enable the distribution to take

21          place, so I am limited in what I can tell you, but what

22          I can tell you is what changes had to be made in the

23          course of the distribution process in order to address

24          the problems that had arisen at the start of that

25          distribution process.

1 THE CHAIR: Right. Well, that is a different point. So,  
2 you do not know -- it is not possible to tell whether  
3 these are different approaches taken in Gutmann.

4 MS ABRAM: There is not publicly available information on  
5 the basis of which I can answer that question.

6 THE CHAIR: Yes, obviously.

7 MS ABRAM: But what I can say is that these are all the  
8 methods of communication that are out there. So,  
9 Angeion is proposing to do everything there is. So,  
10 there are no additional methods of communication that  
11 it could be said against me, "Well, look. Angeion is  
12 not bothering to do X, Y or Z. It is not proposing to  
13 do these things." Because these are the ways that are  
14 at PCR's disposal, or a claims administrator's  
15 disposal, for communicating with the class. So one  
16 asks, rhetorically, "Well, what more could be done?"

17 THE CHAIR: So, what do we get out of this quite long  
18 analysis by Angeion? What do we get out of it? Beyond  
19 saying that if you want to bring something to people's  
20 attention, try a website, try a search engine and try  
21 putting something in the newspapers. I mean, that  
22 scarcely needs some experts to come along and tell us  
23 that.

24 MS ABRAM: Yes, and Angeion is going to do everything that  
25 is available is what we are told.

1 THE CHAIR: Right.

2 MS ABRAM: If we had not put in --

3 THE CHAIR: But they have -- As I understand, reading their  
4 blurb and things, they seem to have considerable  
5 expertise. What they have not done, you say, is give  
6 even an estimated fingers-crossed figure for what  
7 uptake will be.

8 MS ABRAM: There is no estimated figure for what take-up has  
9 been. I can tell you that in any case that has been  
10 certified or in which an application for certification  
11 has been made, so far as I am aware, there has never  
12 been a request for the PCR to undertake a study of what  
13 take-up will be in that case. So, in Gutmann, a note  
14 was requested about take-up in US proceedings, but  
15 there has never been any suggestion in any other  
16 certification case that there should be a survey  
17 carried out, for example, to find out what take-up will  
18 be --

19 THE CHAIR: You want --

20 MS ABRAM: -- and --

21 THE CHAIR: Sorry.

22 MS ABRAM: I do want to show you to McLaren, for example,  
23 because that is an example at the other end of the  
24 telescope where a settlement proposal was approved  
25 without any information as to what actual take-up was

1           likely to be. So, applying that standard to  
2           certification would be radically new, particularly  
3           given that guidance from Lord Briggs in Merricks --

4   THE CHAIR: Yes.

5   MS ABRAM: -- that distribution is not in general a matter  
6           for the certification stage.

7   THE CHAIR: So, did you want to go to Guttman next -- You  
8           said you wanted to show us something in Guttman, or do  
9           you want to go to McLaren or --

10   MS ABRAM: I do want to go to Guttman; I am very happy to go  
11           to McLaren. But perhaps while we are in the notice and  
12           administration plan --

13   THE CHAIR: Yes. There is something else --

14   MS ABRAM: -- we should finish looking at that. So, if we  
15           look at section 10 of the notice and administration  
16           plan, so that starts at page 123, and this deals with  
17           the distribution stage, so this deals with notification  
18           to the class at the distribution stage.

19   THE CHAIR: Yes, we have read all this. We have got this in  
20           mind. Yes.

21   MS ABRAM: I am very --

22   THE CHAIR: So is there anything you want to add to --

23   MS ABRAM: I am very grateful for that, and the point that I  
24           make there, again, is that these are all the means that  
25           are available for a claims administrator to communicate

1           with a class.

2       THE CHAIR: Yes, you have made that submission.

3       MS ABRAM: So, Angeion will do everything that is available.

4           Then, to take you on to section 11, page 125, it is  
5           important to start with the first sentence of paragraph  
6           11.1. This section sets out a provisional proposal for  
7           how any aggregate award of damages might be  
8           distributed. This is, of course, totally routine in  
9           NAPs at this stage. What the claims administrator is  
10          doing is setting out its provisional proposal for  
11          distribution, and that may change in the course of  
12          proceedings, it may need to change for various  
13          different reasons, and the Tribunal will, of course, be  
14          the ultimate decider of what distribution arrangements  
15          are made.

16                 11.3 is a paragraph where Angeion records that, in  
17                 most cases, proposed class members will not have  
18                 evidence of their purchases. So it recognises that  
19                 point that I have shown you in Spottiswoode and I have  
20                 shown you in the certification judgment in Gutmann,  
21                 where the Tribunal's concern was, "Look, well, take-up  
22                 might be really low if you are asking people to prove  
23                 what train tickets they bought 10 years ago, or what  
24                 electricity bills they paid 20 years ago," and Angeion  
25                 is saying, "Look, we recognise that, and so what you

1           need is an approach that involves self-certification."  
2           Then at paragraph 11.5, that proposal is set out  
3           in a bit more detail, and you see that there is a  
4           proposal to divide the claims into Tier 1 and Tier 2,  
5           with those who have evidence of their purchases being  
6           paid first -- that is fair, given that they have  
7           evidence of their qualifying purchases -- and then  
8           those who are self-certifying being able -- in Tier 1,  
9           it is called -- to claim an amount up to the average  
10          per capita loss, without any evidence, on the basis of  
11          just self-certification. That addresses the point.

12        THE CHAIR: Yes, right, but what sort of evidence do they  
13          have in mind that people will have?

14        MS ABRAM: I am sorry. In Tier 1 or Tier 2?

15        THE CHAIR: Tier 1.

16        MS ABRAM: In Tier 1. So no documentation required. So  
17          that is --

18        THE CHAIR: Sorry, I meant Tier 2. I beg your pardon. Tier  
19          2.

20        MS ABRAM: Tier 2. So, you see, at the end of the first  
21          line:

22                "Proposed class members will need to supply an  
23                itemised receipt or equivalent documentation which  
24                shows the amount spent on Atlantic salmon purchases."

25        THE CHAIR: Leaving aside the large purchases -- like the

1 restaurants -- I mean, it is sort of inconceivable that  
2 individuals -- I mean, this is going to be two or  
3 three years from now, probably, so they will be 10  
4 years old -- their receipts for when they went to  
5 Sainsbury's and bought their salmon.

6 MS ABRAM: So two points about that. The first is that in  
7 paragraph 11.3 on the previous page, you see that  
8 Angeion says that they anticipate that less than 2 per  
9 cent of claims of damages will include documentation  
10 --

11 THE CHAIR: Yes.

12 MS ABRAM: -- for exactly the reason that the Tribunal has  
13 identified. So that is absolutely right.

14 THE CHAIR: 2 per cent seems a generous figure, but yes.

15 MS ABRAM: It may be right or it may not but, in any event,  
16 we are all on the same page that the very great  
17 majority is going to be self-certifying.

18 THE CHAIR: Right.

19 MS ABRAM: The second point that I should make, sir, just to  
20 be clear as to the scope of the claim -- You had in  
21 mind the idea that restaurants might have itemised --

22 THE CHAIR: They will not be included. Yes. Yes. Sorry.  
23 Yes. Good point.

24 MS ABRAM: Not at all.

25 THE CHAIR: Yes.

1 MS ABRAM: So 11.5 addresses the point in Gutmann -- the  
2 point in Spottiswoode -- about the need for  
3 documentation. 11.6 to 11.9, could I ask you just to  
4 remind yourselves of those paragraphs, which are about  
5 methods of filing a claim?

6 THE CHAIR: (Pause for reading). Right. Yes.

7 MS ABRAM: So the point that is being made there is to  
8 address the need for simplicity in the evidence  
9 required of class members, and I will show you in  
10 Gutmann why that addresses one of the problems that  
11 arose in the Gutmann distribution exercise, where it  
12 appears that the claim form was so complicated that it  
13 had put people off from claiming.

14 So two means: online form and paper form. Both of  
15 them will be simple. Most people are expected to use  
16 the online form, but a paper version will be available  
17 where that is appropriate, and they will be kept  
18 simple. There are also protections, safeguards against  
19 class members making mistakes. For example, you see,  
20 in 11.7, Angeion make the point that people will not be  
21 able to submit incomplete forms by accident, so they  
22 will be prompted to fill in any missing fields if that  
23 is a problem. So, again, that issue about simplicity  
24 of ability to take up the award is something that is  
25 going to be addressed in that case.

1           Could we measure that against what happened in  
2           Gutmann to the extent that that is possible, based on  
3           publicly available information? So, we can see the  
4           Gutmann judgment on distribution in authorities bundle  
5           2, tab 21, and the relevant passage is at page 981.

6           MS FARRELL: Sorry, which page?

7           MS ABRAM: 981.

8           MS FARRELL: Thank you.

9           MS ABRAM: Could I ask you to have a look at paragraphs 65  
10           and 66, please.

11           THE CHAIR: (After a pause) Sorry, 66 --

12           MS ABRAM: 65 and 66.

13           THE CHAIR: Yes.

14           MS ABRAM: I am very grateful. So the starting point is  
15           underlined by the Tribunal, actually, in the following  
16           paragraph at 67. You see, on the fifth line down, the  
17           Tribunal says:

18                   "The level of uptake by the class of assessment  
19                   has been extremely disappointing."

20                   Clearly that is right, with a level of take-up  
21                   that was below 1 per cent, but there are three key  
22                   differences between this case and Gutmann, even before  
23                   we start considering the potential level of the award  
24                   by class members, that we say reflects why the outcome  
25                   in Gutmann is not at all a good guide to what is likely

1           to happen here.

2       THE CHAIR:  Yes.

3       MS ABRAM:  The first difference is reflected in paragraph 65

4           of the judgment, and you see that --

5       THE CHAIR:  I am just slightly mystified as to the methods

6           of distribution.  Why are they not known in Gutmann?

7       MS ABRAM:  So --

8       THE CHAIR:  The methods of advertising the claim --  Why is

9           that sort of --  The way you phrased it almost sounds

10          like it was confidential information or something.

11       MS ABRAM:  Well, that is fair, and there is no reason why it

12          should be confidential information.  So --

13       THE CHAIR:  Is it not in any of the publicly available

14          documents?

15       MS ABRAM:  So I do not know the answer to that, and of

16          course, I am astute to make sure that I do not

17          accidentally tell you something that I only know --

18       THE CHAIR:  Yes.  No, that is fair enough.  Yes.

19       MS ABRAM:  What must be known -- because, of course, this

20          was publicly advertised, so by definition it cannot be

21          confidential what was done -- is that there was a

22          claims website in Gutmann, where people were invited to

23          submit their claim.  Of course, there were the usual

24          Tribunal notices.  They may not perhaps attract the

25          widest audience.

1 THE CHAIR: Mm-hmm.

2 MS ABRAM: There was some online advertising, and then there  
3 was some what is called "out-of-home" advertising.  
4 Paragraph 65 of the judgment is really informative  
5 about that, sir, because you see that the CR in Gutmann  
6 says that:

7 "The poor level of uptake was despite considerable  
8 efforts made throughout the claim processing period to  
9 improve the claims process."

10 What that shows, sir, is that those steps that we  
11 will go on to have a look at in paragraph 65 had to be  
12 taken in real time by the CR in Gutmann when they  
13 realised that the level of take-up was likely to be so  
14 lamentably low that they had to take remedial steps.

15 THE CHAIR: What was the extensive "out-of-home" advertising  
16 campaign on the London Underground? Do you know what  
17 that was?

18 MS ABRAM: It was adverts on the Tube, which were -- and you  
19 can see from this paragraph -- were added in to the  
20 process during the course of the claims process.

21 THE CHAIR: Right.

22 MS ABRAM: So what happened was that the claims process  
23 started. People were, in principle, invited to claim  
24 and take up their share of the award, but the problems  
25 were so profound that all of these changes had to be

1           made in the course of that period that people had to  
2           take up their share of the award. You see how  
3           important they are from the final sentence:

4                     "...re-launching the claims website with a more  
5           user-friendly interface."

6                     Well, that is polite lawyers' language to say the  
7           claims website was made much simpler.

8   THE CHAIR: Yes. Well, I mean, that seems very sensible.

9           If you are not getting uptake, you try and say, "What  
10          can we do to improve the uptake?" That seems very  
11          sensible, but the fact is, even after those  
12          improvements, the uptake was still very poor.

13   MS ABRAM: That is absolutely right, sir. A couple of  
14          points about that. The first is, I have shown you, you  
15          remember, section 11 of the notice and administration  
16          plan, and that is something that Angeion are very, very  
17          alive to in this case, so not a problem that will recur  
18          here. Second is that if one imagines a class member --

19   THE CHAIR: But it is a problem that is fixed; it is not a  
20          problem that --

21   MS ABRAM: Well, if I may dig into that a little, sir. If  
22          one imagines a class member who goes to a claims  
23          website and tries to submit a form but is put off by  
24          how complicated it is, how is the class member to know,  
25          "Well, perhaps I should check back two weeks or a month

1 later or three months later and see if they have  
2 changed the form to make it simpler"? By that time,  
3 you have already given up and walked away from the  
4 process. So, doing it during the course of the claims  
5 process is clearly -- with no criticism to the claims  
6 administrator in Gutmann, who was doubtless trying  
7 their best -- a very inadequate alternative for getting  
8 it right from the beginning.

9 THE CHAIR: What was wrong with the original claim form was  
10 people had to put their address in and their bank  
11 account details, was it?

12 MS ABRAM: So there were a number of problems. One of them  
13 related to confidence in the claims website as an  
14 interface --

15 THE CHAIR: Yes.

16 MS ABRAM: -- and you see that from the following section.  
17 That is likely to be a particular feature of the first  
18 distribution process and is not necessarily something  
19 that will port across to the future.

20 THE CHAIR: Sorry, there is probably a limit to how much we  
21 can get out of this but, in this case, will people not  
22 have to provide their bank account details?

23 MS ABRAM: They will.

24 THE CHAIR: Right.

25 MS ABRAM: Well, that may not be right, in fact, sir,

1           because there are, as time goes on, increasingly  
2           numerous ways of enabling payments to be made to  
3           consumers without full bank details having to be  
4           provided. So, in some cases, that might not be  
5           necessary. So, I do not commit to that.

6           THE CHAIR: But you do not have an alternative proposal at  
7           the moment?

8           MS ABRAM: I do not have --

9           THE CHAIR: When people have to provide their address --  
10          Will you need to know who is claiming and --

11          MS ABRAM: So it is true that class members will need to  
12          provide sufficient information to ensure that fraud is  
13          detected -- so to avoid duplication of claims, or  
14          claims by bots, for example -- but what that will  
15          require in a particular case will be subject to later  
16          analysis. What would say --

17          THE CHAIR: I thought you had already -- they had been  
18          through this, and they have come up with a simplified  
19          form and realised the problems in Gutmann. You are not  
20          able to tell me whether people are going to have to  
21          provide their address on the simplified form?

22          MS ABRAM: So the form has not been created to generate the  
23          claim. I mean, if money had been spent on that, at  
24          this stage in the proceedings, the Tribunal might want  
25          to ask some questions about that, sir. The problem

1           that arose in --

2       THE CHAIR: Is it going to be expensive to design this form?

3       MS ABRAM: Well, if one looks at the costs claimed in

4           Gutmann, it appears that the claims administration

5           process is surprisingly expensive, but the point that

6           is made actually in this passage, Sir, is not about the

7           problem of providing the address. If you look at

8           paragraph 65, the problem in Gutmann was the proof of

9           residency documentation requirement that was imposed at

10          the beginning of the claims process. So people were

11          asked to provide evidence of where they lived. So

12          that, for example, might be a utility bill or a council

13          tax bill or whatever.

14       THE CHAIR: Right.

15       MS ABRAM: That was removed, and again --

16       THE CHAIR: But you are not going to have a proof of

17          residency? Well, you say you do not know.

18       MS ABRAM: Well, it is unclear why it should be required for

19          a self-certifying applicant.

20       THE CHAIR: Right, but you have not addressed your mind in

21          what way your form is going to be simpler in this case;

22          you are just asserting it is going to be simpler.

23       MS ABRAM: Well, could I come, actually, in a moment, to why

24          we know it will be simpler than the form in Gutmann, by

25          reference to the nature of this claim compared to the

1 nature of that claim, and just while we finish on those  
2 paragraphs.

3 THE CHAIR: Well, I was just focusing, really on --  
4 Obviously, in any claim you need to identify the bank  
5 account the money is going into. You need to identify  
6 the person who it is going to so you do not have one  
7 person making 30 claims. This is all fairly basic and  
8 these were the problems that were identified -- proof  
9 of residency -- these were the problems that were  
10 identified in Gutmann, and as I understand, you have  
11 not got anything to say about those specific problems  
12 today.

13 MS ABRAM: Well, so if I may, that is not quite right.

14 THE CHAIR: Right.

15 MS ABRAM: So, in relation to proof of residency, one does  
16 not see -- as I think I have said, one does not see why  
17 proof of residencies would be required for a  
18 self-certifying claimant. In relation to --

19 THE CHAIR: So, you will not be seeking proof of residency?

20 MS ABRAM: Well, although I do not have any specific  
21 instructions on that question, I cannot see why that  
22 would be a necessary stage in a self-certifying  
23 application.

24 THE CHAIR: All right. Maybe you would like to take  
25 instructions on that in due course. We will be having



1           involve. Maybe --

2       MS ABRAM: Should I show you one case where that has been

3           attempted at the distribution stage, the settlement

4           stage, sir, which may be the McLaren case that you had

5           in mind --

6       THE CHAIR: Right.

7       MS ABRAM: -- a little earlier? There are quite a few

8           judgments from McLaren in the bundle, so I am not

9           totally certain I have the one you had in mind, but let

10          me show you this one, and --

11       THE CHAIR: So, the recent one was the one that I had in

12          mind.

13       MS ABRAM: This is a recent one, yes. It is in authorities

14          bundle tab 23 and we can pick it up on page 1115.

15       THE CHAIR: So, what date is this case? Sorry, you are

16          going to the middle of it. Oh, I do not have --

17       MS ABRAM: So, this is 15 January this year. It is the most

18          recent.

19       THE CHAIR: Yes, okay. Yes, that is the one I had in mind.

20       MS ABRAM: This case is relied on by the proposed defendant.

21          The context in which the judgment is given is that it

22          is a proposed settlement approval application. Spoiler

23          alert, the Tribunal does approve the proposed terms of

24          the settlement.

25       THE CHAIR: Mm-hmm.

1 MS ABRAM: The point that I am seeking to draw out of this  
2 is that it approves the proposed settlement, even at  
3 the settlement stage, so at totally the other end of  
4 the telescope, despite not having the sort of  
5 information as to take-up of the award that the  
6 Tribunal is asking about in this case. The point that  
7 I want to make is that if a settlement can be approved  
8 without that kind of information, then an a fortiori  
9 right must be the case, particularly given what Lord  
10 Briggs said in Merricks about distribution not  
11 generally being an issue at the certification stage.  
12 It must be the case that this information is not  
13 required at the certification stage, and so one can  
14 see, picking it up at paragraph 132, perhaps, at 1114,  
15 so the CR in that case considers that:

16 "A distribution plan can only be prepared  
17 meaningfully once the total funds available for  
18 distribution are known."

19 So it proposes to do further work on distribution  
20 if the settlement was approved. Then, the following  
21 paragraph 133, the Tribunal expresses dissatisfaction  
22 with that, it is fair to say, so:

23 "The Tribunal is in a difficult position as it  
24 expected clearer evidence on the likely range of  
25 take-up in monetary terms, [and] the CR having taken

1 expert advice maintains it is not yet in a position to  
2 provide a meaningful estimate of likely take-up or the  
3 amounts likely to be to be claimed."

4 You can see that the Tribunal had asked for that,  
5 had asked for that information. Then, we go over, as  
6 an illustration of the sort of material that might be  
7 made available, to paragraph 138, and you see the tables  
8 that are introduced at 1117, so page 1117, which gives  
9 the estimated take-up for consumers based on various  
10 scenarios, so the Tribunal have that.

11 THE CHAIR: Mm-hmm.

12 MS ABRAM: You can see from, for example, table A, which is  
13 the consumer table, that if you look at line 5, the  
14 willingness to claim is variable depending on the  
15 amount available, so the average across the scenarios  
16 is 1 per cent likelihood to claim in that case.  
17 Scenario A, where the amount available is £5, is lower,  
18 and, of course, as it gets higher, the amount willing  
19 to claim increases as well. This is the information,  
20 the sort of information the Tribunal had in front of it  
21 when it was considering whether to approve the  
22 settlement in McLaren. The punchline that the Tribunal  
23 comes to is at paragraph 150 on page 1121, where the  
24 Tribunal says:

25 "The material now before it provides only a

1 preliminary indication for the potential range of  
2 recoveries per vehicle and overall take-up, necessarily  
3 provisional, the evidence demonstrates both the  
4 substantial uncertainty inherent in forecasting  
5 participation rates and the importance of the  
6 forthcoming distribution plan."

7 That did not stop the Tribunal from approving the  
8 settlement, so that information was not available to  
9 the Tribunal, even at the absolute other end of the  
10 case, the very final bit of the case, and although the  
11 Tribunal says it would have liked to know more about  
12 likely take-up, it approves the settlement regardless.  
13 It would be a very significant departure from that  
14 decisional practice if the Tribunal were to require  
15 information as to take-up to be produced at the  
16 certification stage as well as pulling against that  
17 indication in value (inaudible).

18 THE CHAIR: Should we have a look at paragraph 196 just at  
19 the end of that?

20 MS ABRAM: 196, yes. This is the paragraph relied on by the  
21 proposed defendants. It is 1137.

22 THE CHAIR: Is this not suggesting that we should be looking  
23 at take-up certification?

24 MS ABRAM: Well, it says that. It certainly expresses a  
25 reservation about certification in relation to take-up,

1 but it is not clear what that actually means.

2 Obviously, whatever it means has to be subject to what  
3 Lord Briggs said in Merricks because the Supreme Court  
4 is, by definition, in charge, and --

5 THE CHAIR: Are you saying this is -- Tell me what your  
6 submission is as to what this means and whether it is  
7 contrary to what Lord Briggs said.

8 MS ABRAM: So, in order for it to be consistent with what  
9 Lord Briggs says, then it --

10 THE CHAIR: That is not an answer to my question. What does  
11 it say? What is your construction of what it means,  
12 and then --

13 MS ABRAM: My construction of what it means is consistent  
14 with what the Tribunal did in Spottiswoode, which is to  
15 say, "Well, the cost-benefit analysis is relevant when  
16 it interacts with suitability, when there is a question  
17 of whether there will be a real benefit to the class as  
18 a result of the proceedings," and as in Spottiswoode,  
19 for example, no notice --

20 THE CHAIR: That is not what this says at all, and can you  
21 just focus on it, please:

22 "There is no doubt there are lessons to be learned  
23 at the certification stage, particularly regarding  
24 likely take-up by RPs."

25 My understanding of what that meant is that we

1           should be looking at take-up at the certification  
2           stage. Are you submitting that it means something  
3           else?

4   MS ABRAM: I absolutely accept that take-up is capable of  
5           being relevant to the question --

6   THE CHAIR: No, I am asking you what you are saying this  
7           means.

8   MS ABRAM: So --

9   THE CHAIR: That is your submission. You are giving me  
10           submissions about it not being consistent with Lord  
11           Briggs and so forth, so just to establish, first of  
12           all, what you say, what your submission is as to what  
13           the Tribunal was saying here.

14   MS ABRAM: What must be meant is that the Tribunal can look  
15           at take-up at the certification stage as part of the  
16           cost-benefit analysis insofar as that is necessary to  
17           determine whether the proceedings will deliver a real  
18           benefit to the class. So, take-up is obviously part of  
19           that assessment because in order for proceedings to  
20           deliver a benefit to the class, then they need to be  
21           taken up by the class, so it is --

22   THE CHAIR: So, we do need to look at take-up at the  
23           certification stage.

24   MS ABRAM: It is obviously part of that picture. That is  
25           definitely right, but there is a question about then

1           what the Tribunal looks at and what questions it asks  
2           in relation to take-up, and what I say there is the  
3           Tribunal is absolutely entitled to demand that there is  
4           a proper notice plan, as I have shown you that there is  
5           here, unlike in Spottiswoode, absolutely entitled to  
6           demand that the evidential requirements for class  
7           members are not so unreasonable that people are  
8           unlikely to have them, which was the concern in  
9           Spottiswoode, was the concern in Gutmann, but is  
10          addressed here by the provision for self-certification.

11                 So, it is absolutely entitled to do those things,  
12          but what is not a meaningful exercise at the  
13          certification stage is to ask the PCR to purport, to  
14          put forward some refined analysis about exactly what  
15          amount is going to be awarded to class members.

16   THE CHAIR:  Is that not what the "likely take-up" means;  
17                 estimates or educated estimates as to the likely  
18                 take-up?

19   MS ABRAM:  It does not have to be expressed in a numerical  
20                 sense, sir, and could I show you why I say that it  
21                 would not be meaningful to seek, at the certification  
22                 stage, to put a number on what the amount claimable by  
23                 each class member definitely will be, and therefore on  
24                 what take-up?

25   PROFESSOR SMITH:  Sorry, I thought the Chair's question was

1           about the take-up rate?

2       MS ABRAM:  Sorry, I did not --

3       THE CHAIR:  Yes, we are asking about the take-up rate, not

4           the amount.

5       MS ABRAM:  Yes, yes.  I hear that.  I hear that, sir, and if

6           the point that is being put against me -- being put to

7           me --

8       THE CHAIR:  All I was putting to you is what you said.  You

9           said, "This sentence needs to be read in the light of

10          what Lord Briggs said, because the Supreme Court trumps

11          this Tribunal," which, of course, it does and I was

12          trying to get from you what this meant.  That was the

13          point we were on, and I was not putting anything else

14          to you beyond that.

15       MS ABRAM:  No, and what I say it does not mean is that the

16          PCR at the certification stage has to tell the Tribunal

17          what the percentage take-up will be, because that

18          requires a crystal ball as to how the award will be

19          divided between the class members, and we know --

20       THE CHAIR:  Yes.  I think we have got your submissions on

21          that now, yes.

22       MS ABRAM:  So, if it were to be the case that a CR could get

23          a settlement approved without proposals --

24       THE CHAIR:  Yes, you have made that point as well, yes.

25       MS ABRAM:  Yes, so that cannot be required at the

1           certification stage, but let me show you what may  
2           happen at the --

3       PROFESSOR SMITH:  So, before you move on, can I go back,  
4           with apologies, 10 minutes or so, and take you back to  
5           the Angeion table --

6       MS ABRAM:  Yes.

7       PROFESSOR SMITH:  -- where you explained that you did not  
8           have the data to just translate that into take-up  
9           rates, and I just want to be clear that I understand  
10          now what the previous paragraph on page 127, paragraph  
11          11.6 says:

12                 "In Angeion's experience, this is ubiquitous in  
13           consumer product litigation and has not been a barrier  
14           to recovery."

15                 Should we read the table as being a table of  
16           Angeion's experience or are these products -- is this  
17           table a table resulting from cases in which Angeion was  
18           responsible for the recoveries?

19       MS ABRAM:  Yes.

20       PROFESSOR SMITH:  But you are saying Angeion does not know  
21           the size of the target audience that it was targeting?

22       MS ABRAM:  It does not know the class size, yes, that is  
23           right, sir.

24       PROFESSOR SMITH:  Well, it does not know how many people --  
25           I am not necessarily asking about the class size.

1           Angeion presumably had a target audience to focus its  
2           efforts on, and it must have had some sense, in each of  
3           those cases, what the target audience was. Thinking of  
4           internal reporting within Angeion, the people running  
5           these campaigns ought to have been able to say to  
6           Angeion's management, "We were targeting 20 million  
7           people and we got 200,000," or, "We were targeting  
8           500,000 people and we got 200,000." So even if in a  
9           legal sense they did not know what the claimant class  
10          was, they must have had a sense of their own target.

11       MS ABRAM: So, of course, it is right that a claims  
12          administrator needs to know who they are targeting in  
13          the sense that they need to know what products the  
14          people purchased in order to be able to target them.  
15          It does not necessarily follow they need to know what  
16          the maximum number of potential claimants is in order  
17          to do that job because unless the class members are  
18          taking a share of a pre-assessed total pot, if each  
19          class member gets a dollar amount that they are  
20          entitled to, it does not matter what the maximum  
21          potential number of claimants is. So, in that sense,  
22          the US regime works differently from the UK regime.

23       THE CHAIR: Sorry, I am still a little confused. So, here,  
24          we do not know how many people eat salmon, but people  
25          are making estimates.

1 MS ABRAM: Yes.

2 THE CHAIR: Your economists are making estimates and maybe  
3 it is 80 million households, or 35 million people or  
4 something, so presumably you can do the same and make  
5 estimates for any of these. You have to know what they  
6 are talking about and these very short indications may  
7 not be sufficient. You need to know the geographical  
8 area and what the population is. But, here, we have  
9 got a claim in salmon; we have got a claim in non-dairy  
10 drinks; we have claim in almond milk; and can one not  
11 make back of the envelope estimates as to what the  
12 class size is here, just as much as -- I mean, we do  
13 not know what it is here either. I mean, I do not get  
14 what is different about the United States that you  
15 cannot make those back of the envelope calculations.

16 MS ABRAM: It is a fair point. If one had the information,  
17 presumably one could do it. I am told that, in  
18 general, Angeion have that information, but I can give  
19 an illustration --

20 THE CHAIR: But do not have what information?

21 MS ABRAM: As to a known class size, but I can, for example

22 --

23 THE CHAIR: But we do not know the class size in this case  
24 either.

25 MS ABRAM: No. Well, that is a fair point, although you

1 have got some pretty good calculations from Oxera  
2 giving a good starting point. But can I just give an  
3 illustration of what we do know for one case, which may  
4 be helpful to illuminate what we know? So on salmon,  
5 for example, just taking that as a reference point, I  
6 am instructed that that case was available. Taking up  
7 a share of the award was available to all US consumers.  
8 So it was a pan-US case, but the only people who could  
9 take up a share of the award were those who purchased a  
10 Ducktrap brand of Maine smoked salmon products, and  
11 that produced an estimated class size of thousands to  
12 hundreds of thousands. One can see that that must be  
13 right because there were 160,000 claims received in  
14 that case. So, on the back of the envelope level, one  
15 can do that. But what Angeion tell us that they cannot  
16 do is work out the percentage of the class that, in  
17 that case, 160,000-odd represents.

18 THE CHAIR: Right.

19 MS ABRAM: Just on Gutmann, before I move on from that, a  
20 point that you made to me, sir, before the  
21 transcriber's break was that I was not able to say  
22 that, for example, concerns about providing bank  
23 details would not be an issue in this case. Of course,  
24 the same point could be made to any PCR or CR in any sets  
25 of collective proceedings because if those collective

1           proceedings are successful then, ultimately, a claim  
2           will need to be capable of being lodged. So my primary  
3           --

4       THE CHAIR: Your submission was that this is different to  
5           Gutmann because - I'm sorry, I am probably  
6           misremembering exactly what you said, but because of  
7           various factors. I said the factors that were focused  
8           on in Gutmann were bank account details and addresses.  
9           That is how we arrived at the -- So I do not  
10          understand your submission that in every claim somebody  
11          will have to provide those sorts of bits of  
12          information. So, what --

13       MS ABRAM: In relation to bank account details, for example,  
14          the point that we are making is that if any the  
15          collective claim is successful, then class members will  
16          be able to need to have some way of recovering their  
17          share of - -

18       THE CHAIR: That is exactly what I was putting to you.

19       MS ABRAM: Yes.

20       THE CHAIR: Yes. Yes. (Inaudible).

21       MS ABRAM: Of course, that cannot be a show-stopping point  
22          for the collective regime.

23       THE CHAIR: That is not what we are discussing here. We are  
24          not saying, "Providing bank account details is a  
25          show-stopping point," but we are discussing whether

1           this is going to be materially different to Gutmann.

2       MS ABRAM:   Yes.

3       THE CHAIR:   That is the point we are discussing.

4       MS ABRAM:   Absolutely.  One of the reasons why it will be  
5           different in relation to the proof of residency  
6           requirement is, as I say, we see no reason why a proof  
7           of residency requirement should be required.  That is  
8           actually the problem that was identified in Gutmann  
9           that we say is different here.  But it also must be the  
10          case that in this case, as in all other collective  
11          proceedings, practice will develop and ways of enabling  
12          class members to have the confidence to put their  
13          claims forward will also develop.

14                So, for example, various initiatives are being  
15          undertaken, including the development of the class  
16          representatives network website, which is going to be  
17          -- which is already in fact a central authoritative  
18          source that will give class members confidence that  
19          what appears to be a successful collective claim is in  
20          fact a real thing rather than just a scam and will give  
21          them the confidence to take up their share of the  
22          award, so giving the confidence to avoid the sort of  
23          problem that arose in that first case, being a problem  
24          that pervades the collective regime and logically could  
25          prevent all collective claims.  So, we say the --

1 PROFESSOR SMITH: On proof of residence, I understand why on  
2 Gutmann people had to provide evidence that they lived  
3 within London in the claim. But in this case, they  
4 will need to provide evidence that they live in the UK  
5 because that is the class. It is the UK consumers of  
6 salmon, is it not?

7 MS ABRAM: So, on an opt-out basis, that is correct. On an  
8 opt-in basis, if you are domiciled outside the UK, we  
9 propose that you ought to be able to opt-in if you can  
10 --

11 PROFESSOR SMITH: Okay.

12 MS ABRAM: There is a balance to be struck in all of these  
13 cases between preventing fraudulent claims.

14 PROFESSOR: But all I am saying is the balance is the same  
15 as in Gutmann, is it not?

16 MS ABRAM: It is. In Gutmann the way that it was struck was  
17 not to require proof of residence because the residence  
18 requirement was preventing people from taking up their  
19 share of the award. So the same issue did, in  
20 principle, arise and the answer was not to require that  
21 evidence because it was disincentivising take-up.

22 THE CHAIR: So we have been round this loop quite a few  
23 times now. Is it time to move on to costs? Is there  
24 anything else you --

25 MS ABRAM: Yes, I would like to make a couple more points on

1           benefits, if I may, and just before I move on from  
2           Gutmann, I would like to make another point on that,  
3           please.

4       THE CHAIR: Right, let us try and pick up the pace.

5       MS ABRAM: Then I would like to make a point on Merricks as  
6           well, please.

7       THE CHAIR: Right.

8       MS ABRAM: So on Gutmann -- Another difference between the  
9           claim in Gutmann and this case is that the nature of  
10          the claim in Gutmann is, or was, much more obscure and  
11          much more complicated than the nature of the claim in  
12          this case. So, in this case, in essence, you are in  
13          the class if you are a consumer and you bought salmon  
14          between 2015 and 2019 and a couple of points are made  
15          around the edges of that class definition but,  
16          essentially, it is a very, very simple claim category,  
17          and the same was not at all the case in Gutmann, and  
18          that may have been a significant factor to pressing  
19          uptake in Gutmann that would apply generally, in fact,  
20          in collective claims. You can see that from the class  
21          definition in Gutmann, which is in the certification  
22          judgment in authorities bundle 1, tab 5, and if you go  
23          to page 202. Could I ask you to read the proposed  
24          class definition, which is at paragraph 4?

25       THE CHAIR: Right, yes.

1 MS ABRAM: So to be a class member under that claim, you had  
2 to have owned a travel card.

3 THE CHAIR: Yes, we have read it. Yes.

4 MS ABRAM: If I could just pull together the criteria that  
5 it reflects, though, because it is really complicated.  
6 You have to have owned a travel card. You had to have  
7 travelled from within the London fare zones covered by  
8 your travel card, using a fare other than a boundary  
9 fare out of London on one of two specified rail  
10 networks during the relevant period. Then of the three  
11 defendant groups that were initially sued in those  
12 proceedings, only one defendant, which is my client,  
13 was a party to the settlement. So, it was a further  
14 subcategory of that claimant class that was entitled to  
15 lodge a claim, which was people that had travelled on  
16 the South Western Rail network, as it is defined, and  
17 essentially that involves travelling southwest from --

18 THE CHAIR: I know very much what the South West Rail  
19 network involves, yes.

20 MS ABRAMS: You may be one of my 1 per cent that took up a  
21 share of the award -- Who travelled on that particular  
22 network from trains that basically start at Waterloo  
23 and go southwest and only between October 2015 and  
24 August 2017 when my client stopped operating the  
25 franchise. Frankly, you almost need a law degree to

1 work out whether you are in --

2 THE CHAIR: Yes, okay. That seems a stronger point than

3 your point on the form, I think. So you say this is a

4 very -- So it is not a readily understandable claim in

5 the way that "Did you buy salmon?" is.

6 MS ABRAM: Exactly.

7 THE CHAIR: Yes.

8 MS ABRAM: It is an extremely recondite class definition,

9 really hard to know whether you fall within it and, add

10 to that, distribution took place in 2020, '24 to '25,

11 so between eight and ten years later after the relevant

12 period. So even working out whether you are a member

13 of the class, before you even get to thinking about

14 submitting a claim requires a really sophisticated

15 analysis and the same just does not apply in this case.

16 THE CHAIR: Yes, we got that point now. Yes. So you wanted

17 to go to -- What was the other case you wanted to go

18 to? You said --

19 MS ABRAM: I'd like to show you Merricks for what the

20 potential award is, and that is in the bundle 2, tab

21 17. The point that I want to make here --

22 THE CHAIR: Page number --

23 MS ABRAM: Oh, sorry. If we could start at page 787.

24 THE CHAIR: 787?

25 MS ABRAM: Yes. The point that I am aiming at making here

1 is that the amount that each class member is entitled  
2 to receive in the distribution, whether following a  
3 settlement or a judgment, is not necessarily connected  
4 to the loss suffered by that class member, or the  
5 average per capita loss of the class members across the  
6 board. What the Tribunal did in Merricks was, it said,  
7 "Well, in order to incentivise take-up, we are going to  
8 cap the total maximum that class members can recover  
9 much more than their average per capita loss." I will  
10 show you; it is about 15 times more than their average  
11 per capita loss. That is an important lever that the  
12 Tribunal -- It is not just a matter for the parties,  
13 it is a matter for the Tribunal to decide whether to  
14 pull in order to satisfy that Spottiswoode test of  
15 whether the proceedings deliver a real benefit to the  
16 class.

17 THE CHAIR: Okay.

18 MS ABRAM: So if we start -- If I just show you the way  
19 that that works on the numbers in Merricks. You can  
20 start at 787 and look at the bottom of the page,  
21 paragraph 97. So the Tribunal is saying, "Given the  
22 issues" -- the issues on the merits discussed above in  
23 the judgment:

24 "...in our view the likelihood of judgment being  
25 obtained for an amount significantly in excess of £200

1 million was low."

2 So the starting point is that the Tribunal is  
3 taking the view that loss across the whole class seems  
4 unlikely to be more than £200 million. Then we see how  
5 that loss is going to be shared out between the class  
6 members. You can see the start of that discussion at  
7 page 798, paragraph 126.

8 On the bottom of the page, the Tribunal does the  
9 sums and says:

10 "However, if the amount that any CM could recover  
11 was limited to a simple per capita division of the  
12 total sum, that would produce an entitlement of just  
13 £4.50 each."

14 So that is the average loss per class member. The  
15 Tribunal's already made the point that actually the  
16 individual loss of individual class members will be  
17 extremely variable depending for example on how old you  
18 are and, therefore, how many purchases you have made  
19 during the relevant period but average of £4.50.

20 Could I ask you to read paragraph 127 which posits  
21 a higher take-up level -- a higher maximum level?

22 THE CHAIR: (Pause for reading). Right.

23 MS ABRAM: So it was proposed by --

24 THE CHAIR: Yes, we have read that. Yes.

25 MS ABRAM: -- Mastercard that the maximum amount that class

1 members should be able to claim is £45 and Innsworth,  
2 who was the funder, said, "Well, no, because that is an  
3 arbitrary amount." The Tribunal says, "Well, actually,  
4 so is an average per capita loss, because that is not  
5 likely to be what any individual class member actually  
6 lost," but what it does is it shows -- it reflects an  
7 amount that will incentivise take-up, produce a  
8 meaningful return without enabling any one person to  
9 get --

10 THE CHAIR: Yes. Yes, we have read that. Yes.

11 MS ABRAM: -- more than is fair. Then you can look over the  
12 page again to 131 at page 800 and see where the  
13 Tribunal ended up. If you look halfway up, paragraph  
14 131, you can see the Tribunal's responding to Mr  
15 Merricks' proposal that the maximum amount recoverable  
16 by any class member should be £70. Do you see, "Mr  
17 Merricks has proposed £70"? The Tribunal works out  
18 what that would mean and then says:

19 "In our view, this strikes a fair and reasonable  
20 balance between the objective of distributing at least  
21 half of the damages to CMS and the need to avoid  
22 excessive distribution to individual CMSs..."

23 This is all -- The point I am making is this is  
24 all in the Tribunal's gift at the distribution stage.

25 It is for the Tribunal, obviously together with

1 the parties, to look at how -- bearing in mind the size  
2 of the class, bearing in mind the total amount of  
3 damages available, whether after a judgment or in a  
4 settlement, what the best way is of making sure that  
5 the proceedings do deliver a real benefit to the class.  
6 So our provisional proposal, as you have seen, is that  
7 take-up should be -- for the self-certifying class  
8 members, should be by reference to average per capita  
9 loss. But there is no reason why -- there is no a  
10 priori reason why that has to be the way that it is  
11 done.

12 The difference between £4.50, the average loss  
13 here and £70 is a factor of 15 times, so the Tribunal  
14 in Merricks has --

15 THE CHAIR: Yes. We have got the point. This is not in  
16 your skeleton, is it?

17 MS ABRAM: It may not be in the skeleton, but it is a really  
18 important lever that the Tribunal will be able to pull,  
19 and if one kind of takes a step back and thinks about  
20 where it fits into the case, the point that is made  
21 against me, fundamentally --

22 THE CHAIR: So you are submitting that we will come up with  
23 a figure, quite simply done: we work out the amount of  
24 the pass-through and the value. The current proposal  
25 at the moment is to divide the pass -- you know, divide

1           it so that everyone gets the same figure. We do not  
2           know what that figure will be, but everyone will get  
3           the same figure. So, what are you saying we should do?  
4           We should now tell people they are going to get a  
5           higher figure?

6           MS ABRAM: I am saying that it is open to the Tribunal to do  
7           that. Yes.

8           THE CHAIR: No, it is not. It is not true. Sorry, if you  
9           are saying, if we have arrived at the fact that  
10          everyone is going to get £5, on what basis would the  
11          Tribunal order you to say, "Fill in this form because  
12          you might get £50"?

13          MS ABRAM: So we know that can be done, either after a  
14          judgment or after a settlement. After a settlement, we  
15          know it can happen from Merricks, because that is  
16          exactly what we have just seen here. After a judgment  
17          -- that is what Lord Briggs says in Merricks, in fact,  
18          in the Supreme Court. I could show you those passages  
19          again from Merricks, if that would be helpful.

20          THE CHAIR: But here we are arriving at a very simple  
21          figure, which is the same for everybody.

22          MS ABRAM: Yes.

23          THE CHAIR: We tell people they can get a larger figure  
24          after we have arrived at that figure, and it is in our  
25          judgment.

1 MS ABRAM: Yes. Yes. So the starting point for that -- it  
2 is important --

3 THE CHAIR: Right.

4 MS ABRAM: -- is that the average figure -- Sorry. To  
5 address it as a point of principle and then as a point  
6 of process, the average figure, as the Tribunal makes  
7 clear in Merricks, is in itself not a statement of any  
8 individual class member's loss, because you are not  
9 necessarily an individual class member.

10 THE CHAIR: Sorry, it is probably my fault, I may be getting  
11 confused. So are we going to have an average figure  
12 for consumers here?

13 MS ABRAM: So, if this results in a judgment, it may very  
14 well be the case that it will result in a judgment  
15 finding the average loss per class member. That is  
16 absolutely something that could --

17 THE CHAIR: That is all people can claim?

18 MS ABRAM: Not so, sir, because, after a settlement, we know  
19 from Merricks that the --

20 THE CHAIR: Just forget the settlements for the moment,  
21 because I am getting confused enough as it is. So, in  
22 this case, we go through to trial -- Maybe I had  
23 misunderstood -- and it will not be my fault -- that  
24 you would arrive at a figure for each person who is a  
25 consumer of salmon, £5 per person, let us say, for

1 argument's sake. Am I wrong about that? I may be  
2 misunderstanding.

3 MS ABRAM: You may very well produce an average, yes. That  
4 is definitely right.

5 THE CHAIR: But it is an average figure.

6 MS ABRAM: Well, what you will not produce is an  
7 individualised loss to say that --

8 THE CHAIR: So either everyone gets £4.50, or everybody gets  
9 £5, or everybody gets £6. Is that right?

10 MS ABRAM: Yes, that --

11 THE CHAIR: That is the current proposal, and you are saying  
12 in those circumstances, the Tribunal could order that  
13 people are told they are going to get more than that,  
14 just to encourage them through the door.

15 MS ABRAM: Or they could receive an amount up to a greater  
16 maximum, yes, as in Merricks.

17 THE CHAIR: But they will not be able to, in this case,  
18 because they will be getting £4.50 or £5.

19 MS ABRAM: Not necessarily, sir. So you may decide --

20 THE CHAIR: I thought that was what you were proposing. Of  
21 course, that is the premise your case is operating on  
22 today, as I understand from your accountancy evidence  
23 -- economic evidence, apologies.

24 MS ABRAM: So it is right that the total amount of loss --  
25 and this is how aggregate loss is always calculated,

1 from a top-down perspective -- will be calculated on a  
2 class-wide basis, and it might be, just using the  
3 figures --

4 THE CHAIR: I mean, I understand all that, I understand  
5 that, but in the end you will be seeking an order that  
6 everybody gets the same amount of money.

7 MS ABRAM: Not necessarily, sir, because Lord Briggs ruled  
8 in --

9 THE CHAIR: No, I am not talking about Lord Briggs in Merricks  
10 , I am talking about what you put forward in  
11 your expert evidence.

12 MS ABRAM: So the expert evidence talks about what loss each  
13 class member suffered. It does not talk about what  
14 each class member should be able to claim, which is a  
15 different question, and the critical thing that  
16 Merricks, in the Supreme Court, is authority for is  
17 that --

18 THE CHAIR: At the moment, I do not want to get distracted  
19 by going to what the authorities say. I just want to  
20 know how this claim is going to work as a practical  
21 matter. I had understood, and apparently  
22 misunderstood, that at the end of this trial everyone  
23 who consumed salmon would be entitled to the same  
24 amount of money.

25 MS ABRAM: So, subject to the self-certification versus

1 evidence point, of course --

2 THE CHAIR: Yes, the 2 per cent. Yes.

3 MS ABRAM: Yes, the 2 percent. As to the self-certifying

4 claims, let us imagine that you produce a judgment that

5 says that the class-wide loss is, let us say £500

6 million, and a claim for an aggregate amount of damages

7 does work on that basis, so it starts from the

8 class-wide points.

9 THE CHAIR: Yes, I understand that. You have made that

10 point several times. Yes, I understand that point, but

11 --

12 MS ABRAM: Then, of course, it would be possible to divide

13 that total amount by the number of class members to

14 work out how much each class member was entitled to

15 receive.

16 THE CHAIR: Right. Are you proposing any alternative way of

17 distributing them?

18 MS ABRAM: I am proposing an alternative, that is right.

19 THE CHAIR: Where is this in your evidence, this alternative

20 way?

21 MS ABRAM: So our provisional proposal, which I have shown

22 you in the notice and administration plan, is for

23 distribution on the basis of the average per capita

24 amount, which is the point that you are putting to me.

25 THE CHAIR: Yes. Same for everybody. That is what you have

1           advanced in your notice of administration --

2       MS ABRAM:   We have --

3       THE CHAIR:   -- not an alternative way.

4       MS ABRAM:   It is not an alternative way, no.

5       THE CHAIR:   But you are now proposing an alternative way, on

6           the hoof, today, without any evidence, as a sort of

7           "Roll up, roll up, you could win the Mini Metro and a

8           holiday in Spain and" --

9       MS ABRAM:   I fear those expectations might be overstated,

10           but a couple of points.  The first is that this

11           possibility emerges from Merricks in the settlement

12           approval decision, which post-dates the notice and

13           administration plan.

14       THE CHAIR:   No one is suggesting there are not other ways

15           that you could do it, but the way you propose doing it

16           is, as this Tribunal understands, that everyone gets

17           the same amount of money.  That is what is in your --

18           Yes.

19       MS ABRAM:   To be clear, we are not proposing something

20           different than everyone gets the same amount of money

21           here.  It is just that the amount of money they would

22           get would not necessarily be the average per capita

23           loss.  So in Merricks, the average per capita --

24       THE CHAIR:   Yes, but I do not want to get distracted by

25           Merricks.  I really want to pin you down on what you

1           are submitting is going to happen in this case, not  
2           what happened in Merricks. So, can you be -- At the  
3           moment we have one, as I understand, proposal that  
4           everyone gets the same sum of money, and I think you  
5           have confirmed that in your evidence you have not  
6           suggested any other ways of dealing with this claim.

7           MS ABRAM: We have actually proposed this approach in our  
8           skeleton.

9           THE CHAIR: Okay. Let us have a look.

10          MS ABRAM: It is at footnote 37 to our skeleton. So this is  
11           not new. Sorry, it is in paragraph 49, really, rather  
12           than --

13          THE CHAIR: Paragraph 49?

14          MS ABRAM: -- rather than the footnotes.

15          THE CHAIR: (Pause for reading). Right, that is -- All  
16           right, I think that is a different point, but there we  
17           are. We understand your submission.

18          MS ABRAM: Yes.

19          THE CHAIR: Where do we go next?

20          MS ABRAM: So could I just illustrate that using some  
21           numbers, just in case it is helpful to --

22          THE CHAIR: Illustrate what is --

23          MS ABRAM: -- make it really clear?

24          THE CHAIR: -- in paragraph 49, or what you are saying about  
25           an alternative way of distributing the sums?

1 MS ABRAM: Yes, and the point about the Tribunal's ability  
2 to control the returns to the class is this point. It  
3 is the same point, sir, because the point that the  
4 Tribunal made when approving the settlement in Merricks  
5 is that the amounts potentially receivable by each  
6 class member does not need to reflect the average loss  
7 of each class member. So, in my submission, it is the  
8 same point, and I am sorry if it is not put very  
9 clearly, but it is the same point.

10 In practical terms, it might mean, for example,  
11 that you decide that aggregate loss across the whole  
12 class is 500 million, the loss per class member on  
13 average is £10, just to use some round numbers, but  
14 that, as in Merricks, instead of pinning the maximum  
15 amount claimable by each class member to £10, in order  
16 to incentivise take-up, then you say, well, obviously  
17 depending on how many people claim and how many people  
18 take up their share of the available pot, the maximum  
19 amount available might be four times that -- for  
20 example, just to pluck a figure out of thin air, £40.  
21 In Merricks it was 15 times the average loss. Those  
22 are levers that the Tribunal can pull in order to  
23 ensure that proceedings deliver a real benefit to the  
24 class in the terms envisaged by the Tribunal in  
25 Spottiswoode.

1 PROFESSOR SMITH: And this larger sum would be a sum that  
2 everyone who claimed got?

3 MS ABRAM: On a self-certifying basis, yes. Yes, sir. Yes.

4 PROFESSOR SMITH: It is not that they are self-certifying  
5 that they eat a lot of salmon. It is just -- I am a  
6 salmon consumer, and I understand that the Tribunal is  
7 offering more money to people who submit claims than  
8 they would be offering if they believed that everybody  
9 would submit claims.

10 MS ABRAM: Yes, that is it, "I ate salmon between these  
11 periods, and I claim my share of the award. I do not  
12 know, until percentage take-up is known what my share  
13 of the award will be, but instead of capping that at  
14 the average per capita loss, one caps it, as the  
15 Tribunal has in Merricks, at some higher figure."

16 THE CHAIR: Okay.

17 MS ABRAM: The challenge that I think you may have been  
18 making to me a little while ago, was whether that could  
19 lawfully be done following a judgment of the Tribunal  
20 on liability and quantum, and the authority that that  
21 can be lawfully done is paragraph 77 and 80 of Lord  
22 Briggs' judgment in Merricks where he talks about how  
23 individualised damages in this context do not need to  
24 be compensatory in nature. They may be compensatory,  
25 but they do not need to be compensatory in nature.

1           Again, that is fundamentally tied to the challenge that  
2           you have made to me, sir, about the information  
3           regarding take-up at the certification stage and that  
4           is part of Lord Briggs' reasoning as to why take-up is  
5           not usually a question or distribution is not usually  
6           an issue at the certification stage.

7           So that is what we say about take-up. I should  
8           turn to address costs as well, and I am also very happy  
9           to address the points that are made on the merits of  
10          the claim, if that would be convenient.

11       THE CHAIR: On the --

12       MS ABRAM: On the merits of the claim.

13       THE CHAIR: No, you do not need to address the merits of the  
14          claim. You just need to focus on costs.

15       MS ABRAM: On costs. I am very grateful. So the starting  
16          point on costs is that actually there is no criticism  
17          at all of the proposed costs or the funding  
18          arrangements in and of themselves. So it is not  
19          suggested that the costs budget is unrealistic or that  
20          the return to the funder is unreasonably high or above  
21          market levels or that there is any deficiency in the  
22          arrangements for the PCR to fund the litigation. So  
23          those are not criticisms that are made. What is said  
24          is that the costs are high relative to likely take-up.

25       THE CHAIR: I think the Tribunal may have some questions on

1 the costs. First of all, how have you managed to spend  
2 1.6 million so far on -- That seems just an  
3 extraordinary figure. There are complicated trials  
4 done for that much. Solicitors' fees to date, 1.1  
5 million. This seems extraordinary just for a  
6 certification hearing.

7 MS ABRAM: I am now in the litigation budget, which I think  
8 is probably what you have got in mind, sir. If there  
9 are specific questions on items in the litigation  
10 budget, there are absolutely points that we will be  
11 able to answer. I am unlikely to be able to give the  
12 kind of detail on my feet, but we absolutely can answer  
13 them if helpful.

14 THE CHAIR: Just in broad terms, as I understand, obviously  
15 there has been a -- It is very difficult to tell from  
16 this where the money has gone, because we do not have,  
17 really, sufficient information. Obviously, we have got  
18 the cost of the experts, which we can see.

19 Then there is the -- Obviously very little work  
20 has been done, as I understand, on the merits of the  
21 claim so far, in terms of investigations. Information  
22 seems to be taken from other sources. It is not a  
23 criticism; it is just where we are. So, it is very  
24 difficult to know why the solicitors have spent 1.1  
25 million on this claim. It may be the litigation

1 funding agreement involved a certain amount of money,  
2 but you do not have details of that.

3 So, in response to your suggestion that there is  
4 no criticism of any of the figures, can I just say, at  
5 the moment these figures seem extremely high to date.  
6 You cannot do it on your feet, but to date we have had  
7 no explanation as to how, you know, 1.951 million of  
8 what ultimately belongs to the class, if you are right  
9 in this action -- why that has been spent even just to  
10 get here today?

11 MS ABRAM: One of the things that we perhaps could do is  
12 provide the Tribunal some reassurance of the  
13 reasonableness of these figures relative to other costs  
14 that have been incurred in other sets of collective  
15 proceedings because these are, I can assure you, at a  
16 high level, very much market standard, and that is --

17 THE CHAIR: Well, I do not think knowing what market  
18 standard is has got to do with anything, really. In  
19 some of these certification cases, there are some very  
20 complicated issues that need to be dealt with, so they  
21 are not all comparable.

22 Just also while we are here, just the class  
23 representative seems to be charging quite a lot of  
24 money, bearing in mind this is a sort of quasi-public  
25 service role. I think our hourly rate is here, and

1           just seems very high to me and the total figure seemed  
2           very high. What is the justification for that and what  
3           is the reason for that?

4       MS ABRAM: So, the class representative is being remunerated  
5           appropriately to her experience and, again, on a basis  
6           that is very consistent with the hourly rates paid, as  
7           we understand it, to class representatives in other  
8           cases, and --

9       THE CHAIR: Oh, no. That has not certainly not been this  
10          Tribunal's experience at all.

11       MS ABRAM: Perhaps that is something that we can provide  
12          some information on in that case.

13       THE CHAIR: I mean, I have seen figures, they are in the  
14          reports, have been capped at £800 a day, is one figure  
15          I just -- I did have a look before I came in, £300 an  
16          hour is a lot more than that. Another one, I think, that has  
17          been referred to is capped at £3,000 a month, I think  
18          it is, £3,000 a month, which you could get through in a  
19          day, at the moment, so these seem very high, and this  
20          is not meant to be a just a money-making exercise for  
21          the solicitors or the class representative.

22       MS ABRAM: It is important that I reassure you on behalf of  
23          my client that there is absolutely nothing further from  
24          anyone's mind than seeking to use this claim as a  
25          money-making exercise.

1 THE CHAIR: So, who scrutinises the class representative's  
2 fees?

3 MS ABRAM: So, in terms of --

4 THE CHAIR: Because the class representative is scrutinising  
5 everyone else's fees, but cannot scrutinise her own, so  
6 --

7 MS ABRAM: It is a fair point, and it is for the Tribunal to  
8 raise any questions as to it at this stage, and we can  
9 certainly write to the Tribunal to explain how those  
10 rates compare to other rates and other collective  
11 proceedings, and why they have been set as they are.

12 THE CHAIR: Is that just what the class representative --  
13 and this is a general question, is the class  
14 representative there to make a good living and set  
15 their rates to be competitive with other class  
16 representatives? Is that how the system is meant to  
17 work?

18 MS ABRAM: Well, the class representative is absolutely not  
19 there to make a good living, and I can show you, if  
20 useful, in Ms Heal's witness statement the clear  
21 evidence that she is motivated in this case to act in  
22 the interests of the class. She has a long career  
23 dedicated to public service and has taken on numerous  
24 roles that involve advocating for consumers.

25 THE CHAIR: What we do not know is what her other roles in

1 public service have paid her.

2 MS ABRAM: How they pay, and that is a fair point, and so  
3 what one needs to do is compare the rate being paid to  
4 the class rep in this case to the rates being paid to  
5 the class reps in other cases, so I accept that.

6 THE CHAIR: No, no, no. That was not the point I made. So,  
7 the class representative, you say, has worked in public  
8 service, but we do not have an indication as to what  
9 rates she was accustomed to receiving when she was  
10 working in public service, what her --

11 MS ABRAM: Yes. If that is information that the Tribunal  
12 would wish to receive, then I am sure that that can be  
13 provided.

14 THE CHAIR: Well, we are just looking. We are looking at  
15 the costs, and this seems to be very high, particularly  
16 considering where we are on this claim, so that is an  
17 observation we make and --

18 MS ABRAM: So, if it would be useful, we can certainly write  
19 to the Tribunal after the hearing to answer the  
20 questions, which I think are, "How do the rates payable  
21 in this case compare to other amounts the class" --

22 THE CHAIR: I am sorry, that is not what I just put to you.

23 MS ABRAM: Sorry, I thought you were putting the point about  
24 how the amounts received in this case compared to other  
25 roles, the class representatives.

1 THE CHAIR: Well, there is a transcript. Have a look at  
2 what I said in the transcript. Maybe, if you are going  
3 to write to the Tribunal, you can deal with that.

4 MS ABRAM: Yes.

5 THE CHAIR: I think we have already made -- Well -- (Chair  
6 conferred sotto voce). Do you want to ask her a  
7 question?

8 MS FARRELL: Yes. I think we were just wondering, looking  
9 at the cost budget, the total fees, so in looking we  
10 have got three figures there. The total on the top is  
11 18.9, I think. 18.9 million, the total.

12 MS ABRAM: Yes.

13 MS FARRELL: That does not include ATE premium?

14 MS ABRAM: Yes.

15 MS FARRELL: So, are we able to get a total including ATE  
16 premium?

17 MS ABRAM: I see no reason at all why that should not be  
18 possible.

19 MS FARRELL: So, you can provide us with details, and then  
20 the total non-contingent fee on contingency, I am  
21 assuming -- What does the contingency cover? That is  
22 deferred fees for --

23 MS ABRAM: For counsel, for solicitors and so on, of course,  
24 experts working on a full rate as normal, but counsel  
25 and solicitors working on partial CFAs.

1 MS FARRELL: Okay, and that total is a final total, there is  
2 no further contingency that might be introduced at a  
3 later stage, because I think that has happened in past  
4 cases?

5 MS ABRAM: By "contingency," do you mean additional items of  
6 costs?

7 MS FARRELL: Additional uplifts, or success fees, or  
8 something like that.

9 MS ABRAM: So, it is right that there are success fees in  
10 the CFAs, and they are provided for in the waterfall in  
11 the deed of priorities, which I can show you.

12 THE CHAIR: Sorry, but that is for the litigation funding.  
13 I think we are referring to the solicitors, the  
14 counsel, that sort of --

15 MS ABRAM: Yes, they also fall within the waterfall, in  
16 fact. They take their place in the waterfall, and I  
17 can show you where they come in, if that would be  
18 useful.

19 PROFESSOR SMITH: Are they all included in this table?

20 MS FARRELL: Would that change the overall total, is our  
21 question, really? Because at the moment, we've got  
22 18.9 without premia, and so it could be higher than  
23 18.9, and then, is there anything over and above that  
24 in terms of success fees or other uplifts that might be  
25 applied?

1 MS ABRAM: We will take instructions on that and come back  
2 to you. I mean, just to be clear about the basis for  
3 calculating this figure, the amount that we are looking  
4 at here is the amount of which recovery may be sought  
5 from the proposed defendant, so we are looking at the  
6 costs kind of unit of the costs of the proceedings as  
7 opposed to the success unit of the costs of the  
8 proceedings.

9 THE CHAIR: Ah right, well, we will need the total.

10 MS ABRAM: Yes, yes, understood.

11 THE CHAIR: Do you want to show us the waterfall while we  
12 are on it?

13 MS ABRAM: Yes, so that is behind the litigation funding  
14 agreement in tab 14 of the supplemental bundle, and the  
15 waterfall appears at pages 201 to 202, and it is clause  
16 3 of that priorities deed.

17 THE CHAIR: (Pause for reading) So, the remainder of the  
18 legal representatives' deferred fees.

19 MS ABRAM: In 3.4 (c), yes.

20 THE CHAIR: Yes. We do not know if they are included in the  
21 table at the moment, or they are not included in the  
22 table, one or the other, and the legal representatives'  
23 success fees.

24 MS ABRAM: So, my understanding is that the basis on which  
25 these are usually -- these cost budgets are usually

1           drafted, is that deferred fees are included, but the  
2           success fees are not included --

3   THE CHAIR:   Okay, but if you could --

4   MS ABRAM:   -- in those figures.

5   THE CHAIR:   I do not want to make you do this on your feet,  
6           but if, over the adjournment, you could give us the  
7           figures including the -- so we have got all the  
8           deferred fees and all the success fees and --

9   MS ABRAM:   I will do, sir.

10   THE CHAIR:  -- on one piece of paper, so to speak, it would  
11           be very helpful.

12   MS ABRAM:   We can do those calculations, yes.

13   THE CHAIR:   Thank you very much.

14   MS FARRELL:  And the ATE premiums.

15   THE CHAIR:   And the ATE premium.

16   MS ABRAM:   And the ATE premia, yes, understood, understood.  
17           We can do that.

18   THE CHAIR:   (To the Tribunal) Did you have any other  
19           questions on that?

20   MS FARRELL:  No.

21   THE CHAIR:   We do not have any other questions on the costs.

22   MS ABRAM:   Could I then make my submissions on how the costs  
23           compare to the benefits of the proceedings? So, it is  
24           important to take the costs themselves and the return  
25           to the funder in stages, because the way that the

1 argument is presented is as if they are both a kind of  
2 single undifferentiated mass, which does not actually  
3 reflect the different ways in which the costs and the  
4 funder's fee will be paid. So, starting with the costs  
5 of the proceedings, you have seen that the litigation  
6 costs budget envisages costs up to trial of about 17  
7 million, and we say that is quite clearly in the  
8 proportionate range, relative to the value of the case,  
9 so it is about 4.5 per cent, the total highest  
10 estimated claim value of £382 million.

11 I showed you at the start, Which? and Qualcomm,  
12 the certification judgments in Qualcomm, in which the  
13 budgeted costs up to trial were about £25 million, and  
14 that was about 5 per cent.

15 THE CHAIR: Okay, but that was a very, very different case,  
16 and you are assuming we did not have concerns about  
17 costs in the Qualcomm case.

18 MS ABRAM: So the Tribunal found, in fact, that in the  
19 Qualcomm case, the level of costs relative to the value  
20 of the claim was reasonable and proportionate. Should  
21 I show you that?

22 THE CHAIR: No, no, no. I have got it in mind, so how do we  
23 assess whether costs are -- So, two questions. First  
24 of all, bearing in mind that the funder is clearly  
25 going to be entitled to the funder's fee if the funder

1 is successful, how do we decide whether costs are  
2 proportionate, including the funder's fee? Do we look  
3 at this figure? Do we look at this figure plus the  
4 five times for the funder's fee? Then how do we tell  
5 they are proportionate? If they are the same, are they  
6 proportionate? If the costs are more than what is  
7 being claimed, is it disproportionate? Just give us a  
8 sort of framework with which to look at this.

9 MS ABRAM: So, you look at it in two stages.

10 THE CHAIR: Yes.

11 MS ABRAM: First, you look at the costs that are potentially  
12 recoverable from the adverse side, the opposing side,  
13 in the case of success, and they are the costs that Ms  
14 Farrell asked me about in the litigation budget, so the  
15 17-odd million. We say that those costs are clearly  
16 proportionate relative to the overall potential claim  
17 value, and that is where the 4.5 per cent or 5 per cent  
18 figure comes in. Then, you look at the costs that  
19 stand to be recovered in the event of success, because  
20 they are costs that will not be recoverable directly  
21 from the proposed defendants, and that is where the  
22 funder's fee comes in, and the other profit elements in  
23 the waterfall in the deed of priorities that I've shown  
24 you.

25 The bottom line there that the Tribunal has found

1           repeatedly at the certification stage that, in general,  
2           the details of those costs arrangements are not matters  
3           for the --

4       THE CHAIR: Right, sorry. Let us assume that the estimated  
5           award is £10 million, let us assume. How do we decide  
6           if these costs are reasonable or proportionate in those  
7           circumstances? What is the calculation we do, what is  
8           the juggling that we do? I got a little lost. We look  
9           at the funder's fee, their success fee?

10       MS ABRAM: Yes.

11       THE CHAIR: Yes.

12       MS ABRAM: You weigh up whether it is a reasonable sum to be  
13           recovered relative to the benefit to the class, and  
14           that takes into account --

15       THE CHAIR: So, the funder's fee in this case, if we get to  
16           trial and you are awarded 10 million, what is the  
17           figure that we use?

18       MS ABRAM: It would depend on the outlay, on the funder's  
19           outlay.

20       THE CHAIR: Yes. Let us assume that outlay is the sums  
21           here, if I times that --

22       MS ABRAM: So, it is subject to the Tribunal's review.

23       THE CHAIR: I know it is subject to Tribunal's review.

24       MS ABRAM: So, the contractual documents provide that the  
25           funder may, subject to review by the Tribunal, receive

1 a return of up to five times its outlay, or an amount  
2 resulting in an internal rate of return of 30 per cent,  
3 if that is greater than twice the outlay. Now, those  
4 are completely market standard terms. They have been  
5 --

6 THE CHAIR: Well, that is -- I am not on that point at all.  
7 I am just trying to understand how we decide if this is  
8 proportionate. I am not here discussing whether the  
9 funding arrangement is the market rate, that is an  
10 entirely separate thing. We are trying to establish if  
11 this is proportionate, so if it is 10 million, you said  
12 first of all, I think, I look at the budget here, which  
13 is 18 million; I look at that figure first.

14 MS ABRAM: So, is 10 million the amount that the class is --

15 THE CHAIR: I am assuming your claim is for 10 million, just  
16 -- 20 million, if you prefer, but I am just picking 10  
17 million as a figure. The costs here are going to be  
18 18.9 million, so the costs are more than the money to  
19 be recovered. On this hypothesis, how does the  
20 Tribunal, before we even get to the funder's fee,  
21 decide whether that is proportionate or not?

22 MS ABRAM: Well, on that hypothesis, you take into account  
23 whether it is reasonable for the funder to receive any  
24 return -- or what level of return they should receive.

25 THE CHAIR: No, I am saying -- Put the funder to one side

1           for the moment, just for the moment. We will come on  
2           to the funder. First of all, you have got costs of 18,  
3           ordinary piece of litigation -- costs of 18, nearly 19  
4           million or 17, whatever. You have got those costs and  
5           you are going to get an award of 10 million. That is  
6           what your claim is. How do we decide if that's  
7           proportionate?

8           MS ABRAM: You consider who the winner is and who the loser  
9           is, and in a claim that, we say --

10          THE CHAIR: No, you are the winner. So the assumption --  
11          Sorry, my fault. The assumption is you have a claim  
12          for 10 million, that is in your claim form, and we are  
13          going to assume you are going to win that claim. Is it  
14          proportionate to spend 17 million or 18 million trying  
15          to chase a £10 million claim?

16          MS ABRAM: If the claim were for £10 million, it would -- an  
17          advocate would be in difficulty persuading the Tribunal  
18          that the costs should be double that.

19          THE CHAIR: Right.

20          MS ABRAM: Here, the claim is --

21          THE CHAIR: So how does one -- At what point does one say  
22          that is disproportionate, just as a question  
23          mathematics?

24          MS ABRAM: It must depend on the relative quantum of the  
25          costs and the potential recovery.

1 THE CHAIR: So the claim has to be larger than the costs?

2 MS ABRAM: Larger than the actual costs incurred. That  
3 would seem reasonable. Here, of course, this claim is  
4 for up to 400 --

5 THE CHAIR: I just want to focus on this question for the  
6 moment before we go off to another argument. So if the  
7 claim is for 10 million and the costs are for 17  
8 million, I think you say that would be difficult to say  
9 that is proportionate. I was saying, "Okay, that is  
10 one example." Where do you put the boundary? Is it  
11 when the costs -- the boundary -- the point at which  
12 the costs exceed the value of claim?

13 MS ABRAM: The costs -- the recoverable costs, the cost of  
14 actually pursuing the case, I mean, it may be the case  
15 that --

16 THE CHAIR: Not the recoverable costs, the costs. The  
17 costs.

18 MS ABRAM: It may well be the case that if you incur costs  
19 of £17 million in order to recover £20 million, you may  
20 have difficulty to justify that as well. I do not  
21 suggest it is a one-to-one question --

22 THE CHAIR: No, I understand. I understand. Then, when you  
23 bring in the funder's fee, how does that fit into that  
24 equation?

25 MS ABRAM: When you bring in the funder's fee, the answer is

1           that it is absolutely for the Tribunal to weigh up.

2       THE CHAIR: Yes, but that is not the point I am on. Okay,

3           the funder -- let us say the funder charges three times

4           -- three times the damages award. The Tribunal says,

5           "That seems very reasonable. That is in accordance

6           with the market rates." Just to be absolutely clear,

7           these are figures; I am not suggesting that is the

8           market rate. Now you have costs of 17 million, plus

9           three times 17 million, and your total costs are --

10          whatever the maths is -- 50-odd. Do you then -- Is

11          that the figure you then compare to the damages?

12       MS ABRAM: Just to get into that world on those sums, sir,

13          and the reason for that is that the funder's fee is

14          only payable out of undistributed damages in this case.

15          So you have got a pot of £10 million on your hypothesis

16          that is available to pay the class and then pay the

17          funder's fee. So you are not in a world, on your

18          scenario, sir, if I may say so --

19       THE CHAIR: But we have to determine proportionality. So,

20          you say, "We ignore the funder's fee"?

21       MS ABRAM: For the purpose of determining the cost-benefit

22          analysis?

23       THE CHAIR: Sorry, this seems to be getting more complicated

24          than I intended. On the one hand, the costs of the

25          litigation; on the other hand, the benefits of the

1           litigation. I am saying when I am looking at the  
2           costs, do I include the funder's fee or do I ignore the  
3           funder's fee?

4   MS ABRAM: It is reasonable to take into account the return  
5           to the funder --

6   THE CHAIR: Right.

7   MS ABRAM: -- as part of that analysis and -- But in  
8           general, the Tribunal's case law is that, in general,  
9           except for in an extreme case -- and I can show you on  
10          the case law that we are nowhere near an extreme case  
11          --

12   THE CHAIR: Yes, I am not dealing with the reasonableness of  
13          the funder's fee. That is not the point I am on if you  
14          are going to refer to that case law.

15   MS ABRAM: Yes.

16   THE CHAIR: Yes. No. No. As I said I have made clear  
17          several times, I am not talking about that. I am just  
18          asking when it is dealing with proportionality, do we  
19          have to take into account the very reasonable funder's  
20          fee?

21   MS ABRAM: I am afraid to say that that case law actually is  
22          relevant to the answer to the question because what the  
23          Tribunal has said is that, in general, it does not take  
24          into account questions about the size of the funder's  
25          fee at the certification stage barring extreme cases

1           that are worthy of being called out as the language --  
2           is the language being used at the certification stage.  
3           So, in general, the case law is that that particular  
4           proportionality question that you are positing, sir, is  
5           left to the distribution stage. So it does --

6       THE CHAIR: Yes, but I am doing it on the assumption the  
7           funder's fee is reasonable -- in fact, extremely  
8           competitive. So that was the assumption I was making  
9           for the purpose of that, but I understand your  
10          submissions. Thank you. Should we say five past two?  
11          How are we doing, by the way? Do you have much -- You  
12          should not have much more to cover on this point.

13       MS ABRAM: So I do not have very much left on costs, and  
14          then, really, I am in the Tribunal's hands as to which  
15          of the other issues you would like to hear me on.

16       THE CHAIR: Yes, I think -- I mean, there are some issues  
17          on the details of litigation funding agreement. You do  
18          not seem to have picked up all the recent case law on  
19          what should be there and what should not be there, but  
20          I will draw that to your attention and then maybe you  
21          could have a look at the details of the funding  
22          agreement in due course.

23       MS ABRAM: I am very grateful.

24       THE CHAIR: Ms Ford, we think we ought to be able to finish  
25          this today. We are really on one point -- one and a

1 bit point.

2 MS FORD: I am grateful, sir.

3 THE CHAIR: So let us see if we can work to that. If we  
4 cannot, we cannot, but let us try and work to that. We  
5 will see you at five past two.

6 (1.04 p.m.)

7 (Adjourned for a short time)

8 (2.07 p.m.)

9 MS ABRAM: Well, I think, subject to anything else you want  
10 to hear from me, I have got three things left to do:  
11 address the level of return to the funder -- so that  
12 aspect of the costs of the proceedings; the LFA; and  
13 then just to pull the threads together. So, just to  
14 start with the level of return to the funder, there are  
15 already three headlines on this bit of the application.  
16 The first is that the level of return is well below the  
17 level that has been approved by the Tribunal in --

18 THE CHAIR: Yes, and I do not -- I mean, I think the  
19 Tribunal has observed before, we cannot really take a  
20 view. We do not have enough information to take a  
21 view. As you rightly observe, this sort of arrangement  
22 is not uncommon in terms of multiples of return. Just  
23 on the priorities, we do not actually have a lot of  
24 detail in the priorities as to how much is getting  
25 returned at each stage.

1 MS ABRAM: In a money -- In pound terms, you mean, sir?

2 THE CHAIR: Yes, or relative terms. Yes.

3 MS ABRAM: Mm-hmm.

4 THE CHAIR: Is that -- Oh. That is all there is. Is that  
5 right?

6 MS ABRAM: This just provides for the order in which the  
7 payments will be made, and then it needs to be put  
8 together with the pound sums that are elsewhere in  
9 order to work out what that means. Obviously, where  
10 you get to on the waterfall depends on: first, how big  
11 the pot is that you are taking from; but, second -- and  
12 this is actually the second point that I was about to  
13 make in relation to the funder's return -- it always  
14 depends on the Tribunal's control, so --

15 THE CHAIR: Well, we know that. Yes.

16 MS ABRAM: -- it is always subject to that.

17 THE CHAIR: We know that.

18 MS ABRAM: So, yes, that is right. We have heard that you  
19 would like further information about some of those cost  
20 items, and we will write in with those. I should just  
21 make one point, which is that there is an established  
22 line of authority in the Tribunal that says that a PCR  
23 or CR should not be required to disclose to the  
24 opposing party elements of its costs items that would  
25 disclose its own evaluation of the risks of the

1           proceedings, and so -- This is not something that  
2           needs to be determined today but, of course, we can  
3           provide information like ATE premia to the Tribunal, if  
4           that is something the Tribunal wishes to hear, but we  
5           would not wish to and we would say --

6           THE CHAIR: But why --

7           MS ABRAM: -- not be required to.

8           THE CHAIR: Why is the class not interested in what the  
9           premium is --

10          MS ABRAM: The --

11          THE CHAIR: The "premia," plural, you say?

12          MS ABRAM: Yes. Premia, for example, under ATE policies.

13                 So, there have been a couple of cases in which this  
14                 point has been explored. We do not have them in the  
15                 bundle because we were not expecting to deal with this  
16                 point, but what the Tribunal has said when defendants,  
17                 for example, have asked for this information is, "Well,  
18                 you do not have to give this information to defendants  
19                 because it will disclose how risky you think" --

20          THE CHAIR: I know that has been said, but I am not sure it  
21                 has really been fully argued before.

22          MS ABRAM: Well, it may be that this is the case for that  
23                 argument --

24          THE CHAIR: I mean, it seems -- I am somewhat curious as to  
25                 how it would give information. Obviously, you have

1           paid -- you have got litigation funding, so presumably  
2           the funder has taken a view on the merits. I am not  
3           sure how the value of the premium really is -- The  
4           insurers charge you a high premium because -- I mean,  
5           who knows why. I mean, there are all sorts of reasons,  
6           but the suggestion is that they have taken an  
7           alternative view of the merits to the funder. Where  
8           does that -- How is that useful information to anyone?

9           MS ABRAM: My Lord, yes, that is a fair point, but that is  
10           the approach which insurers apply in order to decide  
11           how high the premium should be relative to the amount  
12           insured. Similarly, the same point can be made about  
13           the amount on risk in counsel's partial CFA. So when  
14           counsel -- solicitors, potentially -- are thinking  
15           about whether to accept proceedings, accept  
16           instructions --

17           THE CHAIR: But all those points can be made on the  
18           litigation funding agreement anyway.

19           MS ABRAM: In relation to the LFA, the position has been  
20           that that level of return can be made public but, so  
21           far, applications for the ATE premia, for example, to be  
22           told to the opposing party have been rejected. But we  
23           can -- As I say, we do not have the cases on that in  
24           the bundle because we were not expecting to come to  
25           argue this point. We can set that out. We have got no

1 objection to providing this information to the  
2 Tribunal, for the avoidance of doubt.

3 THE CHAIR: We may have to give argument on whether that is  
4 --

5 MS ABRAM: Of course. Of course. I am just flagging that,  
6 that is all. So, is that the point on the deed of  
7 priorities of --

8 THE CHAIR: I think so. Did anyone else have any questions  
9 on that? No.

10 MS ABRAM: So, to return, then, to the level of return to  
11 the funder --

12 THE CHAIR: I do not think we -- What point are we dealing  
13 with now? You have made your submission that this is  
14 all very commonplace. The authorities say we cannot  
15 really take a view on this. Does not fall outside the  
16 normal run of things, subject to anything the report  
17 says.

18 MS ABRAM: The third headline that I was going to give you,  
19 but -- When you are looking at the level of return to  
20 the funder against the value of the case -- so, the  
21 proportionality point that you were making to me before  
22 the short adjournment -- the point that is well heard,  
23 and which we respectfully agree with is that it is very  
24 difficult for the Tribunal to take a view at this stage  
25 about the merits of the case in terms of what the

1           likely outcome is going to be, whether we are going to  
2           end up with a £400 million judgment or an £80 million  
3           judgment in big picture terms --

4       THE CHAIR: Well, you have given a range from your evidence.

5       MS ABRAM: We have given a range. What certainly could not  
6           be assumed at this stage, since no view can be taken,  
7           is that the answer will not be £400 million, for  
8           example.

9       THE CHAIR: Well, that is not what you put in your evidence,  
10          is it?

11      MS ABRAM: I do not think you can assume the answer will not  
12          be £400 million.

13      THE CHAIR: No, but we have got to decide proportionality on  
14          the basis of evidence. We cannot say, "Well, it could  
15          be £20 billion, so, you know, we cannot form a view on  
16          proportionality." We have to work with some figures,  
17          and we have got figures that are in Mr Noble and Mr  
18          Bell's report, and we are going to work with those  
19          figures, surely?

20      MS ABRAM: Yes, and that range --

21      THE CHAIR: Subject, again, to anything the defendants  
22          submit on that.

23      MS ABRAM: That range -- up to the end of 2024, because that  
24          is where we cut off the interest calculation -- goes up  
25          to £400 million.

1 THE CHAIR: Right. Okay.

2 MS ABRAM: So the outcome of these proceedings could well be  
3 a finding of liability and loss in £400 million, plus  
4 whatever additional interest is needed to add to that,  
5 and that proportionality assessment needs to be carried  
6 out in the light of that figure.

7 So I have heard what you say about accepting that  
8 the funder's return is reasonable, but the Tribunal  
9 cannot take a view on that, and that it is for the  
10 Tribunal to determine what the return should be at the  
11 time of distribution. I was going to show you  
12 Professor Andreas Stephan v Amazon.com, Inc & Ors,  
13 which makes those points, paragraphs 62 to 64, and I  
14 was going to show you a different McLaren judgment --  
15 one of the many McLaren judgments -- at tab 14, at  
16 paragraphs 17 to 21, for those points.

17 THE CHAIR: We will see, maybe, if Ms Ford makes any  
18 progress on that. Obviously, you can address it  
19 further, but at the moment I do not think we need to  
20 hear any more on that aspect of your case.

21 MS ABRAM: I am grateful. That takes us then to the LFA. I  
22 am conscious that you mentioned you had some points on  
23 that. There is one point that has been discussed  
24 between the parties in the lead-up to the hearing. I  
25 think it is now resolved, but I should take you through

1           the position on that, if that would be helpful.

2       THE CHAIR: This is the undistributed damages?

3       MS ABRAM: It is, sir, yes.

4       THE CHAIR: Right, and what happens if you come up with a

5           scheme where there are not any undistributed damages?

6       MS ABRAM: If we come up with a scheme where there are not

7           any -- I am sorry, I do not follow the --

8       THE CHAIR: You come up with a scheme where there are not

9           any undistributed damages. Suppose you devise a method

10          of distribution where there are not any undistributed

11          damages. How is that going to work?

12       MS ABRAM: Yes. I mean, it is --

13       THE CHAIR: Or are you now incentivised not to do that?

14       MS ABRAM: Well, that is absolutely not --

15       THE CHAIR: Okay, so why are you limiting the payment to

16          undistributed damages?

17       MS ABRAM: So, sir, it is absolutely right that if there

18          were a means of direct return to the class, as the

19          Tribunal posited in Spottiswoode through electricity

20          bills, and was also considered in BT Group Plc &

21          Another v Justin Le Patourel, for example, through

22          phone bills, it is right that, in those circumstances,

23          some other mechanism would need to be found to pay the

24          funder's fee, and that has been held both by the

25          Tribunal and the Court of Appeal and I do not think

1           there is anything controversial about that. It is  
2           right that the terms of the LFA do deal with the kind  
3           of usual or default situation where you get a monetary  
4           award that people need to come forward to claim, and  
5           then there is an undistributed sum. That is the  
6           premise upon which the point was raised by the proposed  
7           defendants, to be fair. They said, "Well, hang on. Is  
8           it possible" --

9       THE CHAIR: That was not my question. My question was, how  
10           is that going to work if you come up with an effective  
11           way of distributing all the sums?

12       MS ABRAM: So I have to show you the paragraph in  
13           Spottiswoode, if that would be helpful. Just as the  
14           Tribunal --

15       THE CHAIR: No, that would not be helpful. No, it was just  
16           a straightforward question to you. Can you answer the  
17           question? If not, I am not going to ask it again.

18       MS ABRAM: So, just as the Tribunal envisaged in  
19           Spottiswoode --

20       THE CHAIR: Yes.

21       MS ABRAM: -- I think, from memory, it might be paragraph 55  
22           -- there would be --

23       THE CHAIR: I am not really interested in the case law.  
24           This is a question of how you are going to deal with  
25           it. If you come up with a scheme where there are no

1 undistributed damages, how is it going to work? How is  
2 the litigation funding agreement going to work?

3 MS ABRAM: So in those circumstances it would be necessary  
4 for the parties to apply to the Tribunal for a  
5 variation of the arrangements to enable the funder to  
6 get their fee, or whatever amount of it the Tribunal  
7 considered appropriate, out of the sums that were  
8 available. So the arrangements would need to be varied  
9 in those circumstances.

10 THE CHAIR: So the payment coming out of undistributed  
11 damages is going to be written into the litigation  
12 funding agreement?

13 MS ABRAM: If there were circumstances in which --

14 THE CHAIR: No, no, no. The current position, which is that  
15 the funder's fee will come out of undistributed damages  
16 -- That is going to be written into the agreement, is  
17 it?

18 MS ABRAM: Well, we say that is what --

19 THE CHAIR: Yes, well, it is not clear enough at the moment,  
20 so if that is your position it would need to be  
21 explicit.

22 MS ABRAM: So everyone agrees that the PCR does not intend  
23 to make an application for the payment of --

24 THE CHAIR: Do you have an objection to writing it  
25 explicitly into the agreement?

1 MS ABRAM: (After a pause) Frankly, it is not a point that  
2 we have previously considered, as you can probably  
3 tell, because it is not the basis on which we discussed  
4 this point with the proposed defendants, and we seem to  
5 have reached a landing, actually, between the parties.  
6 So it is a new question to us. We cannot immediately  
7 see a reason why we would object to it, but it just is  
8 not a question that we --

9 THE CHAIR: What possible reason could there be?

10 MS ABRAM: As I say, I cannot see what the reason would be,  
11 at first flush. So, would it be helpful if I showed  
12 those bits. It sounds like you have got them well in  
13 mind already.

14 THE CHAIR: If that clarification could be made, there is no  
15 need to show us, I do not think.

16 MS ABRAM: Then that leads us to where are we on benefits  
17 and on costs, and to pull those threads together. So  
18 what we know is that there will be a claim by the  
19 supermarkets -- there is a claim by the supermarkets  
20 that is in process, and you have rejected the  
21 jurisdiction challenge to that claim. So, the  
22 supermarkets, who are obviously well able -- as you  
23 observed in the jurisdiction judgment -- to fund their  
24 own litigation if they choose to do so, will be  
25 bringing a claim to recover compensation for any

1 damages that they suffered. It is possible that in  
2 that trial the Tribunal may find that there is a very  
3 substantial level of pass-on by the higher levels of  
4 the supply chain, including the supermarkets, to the  
5 class and, as I say, this application needs to be  
6 considered on the basis that loss to the class may be  
7 up to £400 million.

8 So, if these proceedings were not to be certified,  
9 one possible outcome would be that, while the  
10 supermarkets recovered their loss, UK consumers would  
11 receive no compensation at all, potentially to the tune  
12 of many hundreds of millions of --

13 THE CHAIR: Yes, I think you have made the submission.

14 MS ABRAM: -- of pounds, by contra-distinction, for  
15 example, to US direct and indirect purchases, to whom  
16 the proposed defendants have already paid settlements  
17 of over \$100 million. The circumstances are very close  
18 to what the purpose of the collective proceedings  
19 regime -- particularly the opt-out collective  
20 proceedings regime -- was designed to be. That is,  
21 that those who can fund their own claims for damages do  
22 so. Those, particularly in mass consumer claims --  
23 tens of millions, in this case, of consumer claims --  
24 with a low per capita value, where the consumers are  
25 unlikely to be able to -- certainly would not be

1           proportionately able to -- fund individual claims, are  
2           able to club together and bring those claims together.  
3           That is why this kind of case is seen as a paradigmatic  
4           case for collective proceedings.

5           THE CHAIR: Yes, you have made these submissions,  
6           several times, I think. I think we are getting to  
7           a point of diminishing returns on this particular  
8           topic.

9           MS ABRAM: I am --

10          THE CHAIR: So, on the LFA, if you could just have a look --  
11          not now, but in due course -- at, obviously: the  
12          "Professor Carolyn Roberts v Severn Trent Water Limited  
13          & Others case, paragraphs 87 to 89; I think Bulk Mail  
14          Claim Limited v International Distribution Services Plc  
15          (formerly Royal Mail Plc), paragraph 36; and I think  
16          also have a look at Roger, 59 to 60. I think that  
17          there are probably some amendments that could be made  
18          to bring the LFA in line with those cases, but these  
19          are not major points. I am sure they are points that  
20          can be fixed, if not.

21          MS ABRAM: I am very grateful. I --

22          THE CHAIR: We will not do it on the hoof at the moment. I  
23          am sure somebody got them. There is a transcript, if  
24          not. Is there anything else you want to deal with now?

25          MS ABRAM: No, sir. That is it from me for now. Thank you.

## 1 Submissions by Ms FORD

2 MS FORD: Sir, members of the Tribunal, I am proposing to  
3 start with some observations on the legal framework. I  
4 am then going to address the costs and benefits of the  
5 present proceedings on the proposed class  
6 representative's best-case scenario. My submission on  
7 that will be that, even making every possible  
8 assumption in favour of the proposed class  
9 representative cost-benefit analysis in this case so  
10 clearly weighs against certification that the claims  
11 are not suitable to be brought in collective  
12 proceedings.

13 THE CHAIR: It could be helpful to go through those figures.  
14 Yes, I agree.

15 MS FORD: Sir, yes. Finally, I propose to then invite the  
16 Tribunal to look at the cost benefit from what we say  
17 is a more realistic perspective, which is recognising  
18 that it is unlikely that the proposed class  
19 representative will succeed universally across the  
20 board on all disputed issues between us, and we say  
21 that when one takes that perspective, the position is  
22 even more stark.

23 So, starting with the legal framework, as the  
24 Tribunal is aware, this is a regime which is in its  
25 relative infancy, and what we have seen relatively

1 recently is that some of the claims that were first  
2 certified in the wave that followed Merricks are now  
3 starting to reach the distribution stage for the first  
4 time. With the benefit of increased experience over  
5 that period, at the end of the process what is coming  
6 through is a growing recognition that more attention  
7 needs to be paid to matters such as the cost-benefit  
8 analysis and matters such as the likely take-up by  
9 class members at the certification stage.

10 The classic example of that is the Gutmann case  
11 that the Tribunal has already canvassed at some length.  
12 Can I ask the Tribunal to turn it up behind tab 5 of  
13 the authorities bundle?

14 THE CHAIR: You had better give us a page number. Which  
15 page do you want to go to?

16 MS FORD: Page 199 is the beginning of the judgment, and I  
17 go to that simply to point out that this is a claim  
18 that was certified in 2021 --

19 THE CHAIR: Yes. yes.

20 MS FORD: -- so it is immediately following Merricks in  
21 2020. We can then go to where they deal with  
22 cost-benefit, which is at page 266. The Tribunal was  
23 shown the first paragraph in this section, 165, for the  
24 proposition that the Tribunal looks at the proposed  
25 class representative's figure when doing this exercise.

1           In my submission, there is a bit more nuance to it  
2 than that. What we can see if we look, for example, at  
3 the eighth line in paragraph 165 is the Tribunal  
4 observing that the number it has been provided with by  
5 the proposed class representative is very uncertain.  
6 In that case, as in this case, the class representative  
7 had set out high, central and low estimates based on  
8 various assumptions. What the Tribunal does by way of  
9 a guide is to focus on the central assessments, central  
10 estimates for the total claims. So the Tribunal is  
11 emphatically not approaching cost-benefit in this case  
12 on the basis of the proposed class representative's  
13 best-case scenario.

14           We can see the central estimates are recorded  
15 there. It is £29 per claimant on the South West  
16 Network, £43 per claimant on the South East Network,  
17 and then those sums increase to £33 and £55 if the  
18 estimates are restricted to members of the opt-out  
19 class only. So, we are already starting with figures  
20 which are considerably higher than those that are being  
21 advanced by the class representative on their best-case  
22 scenario in this case.

23           Paragraph 166, the Tribunal takes into account  
24 costs. In that case, it was 11 million. Paragraphs  
25 167 to 168 are giving brief consideration to issues of

1 distribution, and we can see at the end of 168 the  
2 submission being recorded that in all likelihood very  
3 few of the millions of supposed class members will ever  
4 claim. 169 over the page, the Tribunal is giving  
5 consideration of potential returns to the funder. The  
6 Tribunal was asking my learned friend Ms Abram if she  
7 accepted that that was a factor that could be taken  
8 into account in the cost-benefit analysis. It is clear  
9 that the Tribunal in Gutmann was factoring this into  
10 its analysis at the invitation of counsel for the  
11 defendants in that case.

12 The sums that it is factoring in there were the  
13 higher of 21 million or 34.5 per cent of total damages.  
14 Paragraph 170, you see the Tribunal directing itself to  
15 what was said by the Supreme Court in Merricks, that  
16 the proposed method of distribution need not  
17 necessarily be based on individual loss. I flag this  
18 up merely because the class representative seems to  
19 have alighted for the first time in this hearing on the  
20 notion that distribution might not be  
21 compensation-based, but I do emphasise that that was  
22 evident in Merricks and it was taken into account in  
23 Gutmann as well.

24 Paragraph 171 might be thought to be somewhat  
25 prescient, in the light of what happened at the end of

1           these proceedings, because we see the Tribunal saying:

2                        "We would be concerned if it appeared that  
3           collective proceedings would be likely to benefit  
4           principally the lawyers and funder as opposed to the  
5           members of the class. Such proceedings are hugely  
6           expensive for the parties and also demanding on the  
7           resources of the Tribunal."

8                        That is, in our submission, the relevant enquiry.  
9           Are these proceedings likely, principally, to benefit  
10          lawyers and funders, rather than the class? Paragraphs  
11          172 to 174 are addressing the fact that the proposed  
12          representative in these proceedings had prepared their  
13          distribution plan before they heard what the Supreme  
14          Court said in Merricks, and so the way they addressed  
15          that was to put forward evidence of what tends to  
16          happen in the US and Canada.

17                        In particular, what they moved to in the light of  
18          that was the possibility that one could make a formal  
19          declaration rather than adducing documentation, so by  
20          the time the Tribunal in Gutmann was talking about  
21          cost-benefit analysis it was also grappling with the  
22          possibility that one could use a self-certification  
23          mechanism in the same way as the proposed class rep in  
24          these proceedings is proposing some form of  
25          self-certification to overcome documentation type

1 issues.

2 It is informative to see what sort of percentage  
3 take-up rates the Tribunal was being offered,  
4 suggested, in the evidence from the US proceedings. If  
5 we look end of 174, there is a statistic that says 14  
6 per cent to 33 per cent of class members applied for  
7 overcharges in one of the examples that the Tribunal  
8 was given there. So it was being given a somewhat  
9 rosier picture about the possibility of take-up rates.  
10 Nevertheless, we see in 175, it is acknowledging that  
11 there was force in the respondents' point that even  
12 recalling specific journeys and travel card details  
13 going back up to eight years for the purposes of a  
14 formal declarative claim may be onerous and deter many  
15 from claiming, if that is ultimately the basis of  
16 distribution. So, even moving from a documents  
17 evidence-based approach to a self-certification type  
18 approach, the Tribunal is still saying, "We are  
19 concerned," and they say at the end of this paragraph:

20 "Altogether we find it difficult to speculate in  
21 the present actions as to what the likely uptake would  
22 be and recognise the appreciable risk that it might be  
23 very low."

24 Paragraph 177 is a paragraph that was cited by the  
25 proposed class representative in their skeleton

1 argument at paragraph 162, and they cite it for the  
2 proposition that one measure of benefit in these cases  
3 is behaviour modification. We can see that the  
4 Tribunal in Gutmann didn't consider that to be a factor  
5 which particularly tipped the scales, if we look at  
6 what it says at 178:

7 "Having regard to all these considerations, and  
8 notwithstanding the benefit of behaviour modification,  
9 in our view the cost-benefit analysis comes out  
10 slightly against the grant of a CPO in that case."

11 Now, we have heard the submission today that the  
12 class representative, the proposed class representative  
13 relies on this case for the proposition that an  
14 unfavourable cost-benefit analysis does not necessarily  
15 mean you do not go ahead and certify, and that is, of  
16 course, in principle correct because the Tribunal did  
17 proceed to certify in this case despite the fact that  
18 it had reached the conclusion that a marginally  
19 unfavourable cost-benefit analysis came slightly out  
20 against granting a CPO, but what we see is that when  
21 this case comes to distribution at the other end of the  
22 process, the Tribunal is saying, "Well, actually, on  
23 reflection, more attention needs to be paid to likely  
24 take-up and how damages might be distributed at the  
25 certification stage." We see that in another judgment

1           that the Tribunal has already looked at, which is at  
2           tab 21 in the bundle, please.

3       THE CHAIR:  If you could give us the page number you want to  
4           go to.

5       MS FORD:  It starts at 945, so this is the 2025 judgment  
6           that there have been some exchanges on already, and  
7           then, can we start within it, please, at 952?  I am  
8           simply flagging up the final sentence of paragraph 14  
9           which is one that tells us what was the outcome in  
10          Gutmann at the end of it all.  There were, in total,  
11          7,290 claims validly submitted during the claim period  
12          and the total value of those claims was £216,485.  So,  
13          as a proportion of the total settlement sums which were  
14          available in that case, which was 25 million, the  
15          uptake was 0.86 per cent, so it is a pretty  
16          unsatisfactory outcome.

17                 It is perhaps unsurprising in that context that  
18           the parties in this case felt it appropriate to agree  
19           that a certain amount of the recovered damages should  
20           be donated to charity.

21       THE CHAIR:  What about this point that one of the options  
22           could be that you could then say, "Well, this is the  
23           number of people who have come forward, I am going to  
24           give them more"?  Is that even --

25       MS FORD:  Yes.

1 THE CHAIR: Is that permissible? Is that --

2 MS FORD: It is.

3 THE CHAIR: We have had a reference to Lord Briggs, I think.

4 MS FORD: It is, in theory, in principle, permissible and I

5 have shown the Tribunal that it was a possibility that

6 was recognised even in the Gutmann judgment, so one of

7 the earlier judgments, that was recognised as a

8 possibility. In my submission, the real problem for

9 the class representative in this case is that they put

10 forward their notice and distribution plan and they

11 have explained what it is that they are proposing to

12 do, and their evidence was very clearly not that we are

13 going to try and approach it in that manner. Their

14 evidence, and we can go back and look at it, is that

15 Angeion are proposing to offer a fixed rate based on

16 the estimates that were provided in Mr Noble and Mr

17 Bell's report. So, that is simply not the evidence

18 that they have brought to the Tribunal about what they

19 are going to do.

20 THE CHAIR: So, you have got no evidence at this point if it

21 is £5, or if it is £10, or if it is £15, whether that

22 makes any difference in the -- Obviously, if it is

23 £500, I am sure it makes a difference, but we do not

24 have any evidence as to at what point people's heads

25 start to turn and forms become less onerous.

1 MS FORD: Absolutely. The obligation of the class  
2 representative to satisfy the Tribunal that there is  
3 going to be sufficient take-up, that the benefits of  
4 these proceedings will make their way to the class, and  
5 even if one were to say, "Okay, well, the class  
6 representative has at this hearing floated the  
7 possibility that we might offer individual levels of  
8 recovery, which are higher than the purely  
9 compensatory" we still do not have any evidence as to  
10 whether and at what point that actually will affect  
11 take-up sufficiently.

12 THE CHAIR: What about there is this claim -- that the legal  
13 basis of the claim, to explain to consumers at least,  
14 was much more complicated in Gutmann? This is much  
15 simpler, just, "Have you ever bought a piece of salmon?  
16 Get your £10 here."

17 MS FORD: I am going to come on to show the Tribunal what is  
18 the class definition in this case and what is being  
19 said to the class, what is being proposed to be said to  
20 the class in the noticing in this case, and our  
21 submission will be, it is far from clear, and certainly  
22 --

23 THE CHAIR: Okay. Well, I am not sure the class definition  
24 helps particularly, but what is going to be said to the  
25 class would seem to be the real factor here.

1 MS FORD: Yes, well, I can show the Tribunal that. We were  
2 dealing with the remedial measure that was taken by the  
3 parties in the Gutmann case, which was to recognise  
4 that the outcome in terms of distribution was very  
5 unsatisfactory, and what they want to do, at paragraph  
6 20, is to propose that there then be a payment to  
7 charity, and what the Tribunal says about that at the  
8 end of paragraph 20 is that:

9 "This avoids the wholly unsatisfactory outcome in  
10 a case where substantial sums were made available by a  
11 defendant in settlement, that the vast majority of that  
12 ends up in the hands of the stakeholders and not class  
13 members or a charity for the benefit of others."

14 So, what we are trying to avoid is that outcome  
15 where these sums are recovered, but they do not make  
16 their way to the class. The class representative has  
17 suggested in its reply that the fact that sums in this  
18 case were donated to a charity in some way suggests  
19 that when you are doing this cost-benefit analysis, you  
20 do not just take into account sums to the class. You  
21 can take into account the possibility of a charitable  
22 donation as well.

23 In our submission that is not the correct  
24 conclusion to draw from this case. The reason I say  
25 that is because this is quite clearly a retrospective

1 remedial measure which was taken in recognition of the  
2 unsatisfactory fact that these proceedings had already  
3 been litigated to settlement, huge costs had already  
4 been occurred, and virtually none of the benefit was  
5 making its way to class members. It is certainly, in  
6 our submission, no endorsement of the idea that the  
7 Tribunal should be certifying proceedings despite low  
8 anticipated take-up rates.

9 What we see is that, on the contrary, although  
10 this payment to charity avoids what the Tribunal says  
11 is a wholly unsatisfactory outcome, the Tribunal still  
12 goes on to give some recommendations about what should  
13 be done in the future to avoid ending up here again.  
14 The next paragraph, paragraph 21, is where it makes  
15 clear, in line 9 that it perceives it to be "the  
16 overall lack of success" in these proceedings in terms  
17 of outcome for class members, notwithstanding this  
18 donation to charity. Then, paragraph 35 on page 961,  
19 this is a paragraph where the Tribunal is acknowledging  
20 the importance of the role of funders to this regime  
21 and the class representative has quoted an earlier  
22 passage from the same judgment to the same effect in  
23 their skeleton, at 16.1.

24 In our submission, there is no tension between, on  
25 the one hand, recognising the importance of funders to

1           this regime, and on the other hand, as the Tribunal  
2           goes on to do in this judgment, emphasising that even  
3           so, collective proceedings should not be solely for the  
4           benefit of funders and lawyers. Paragraph 67: we see  
5           the Tribunal reiterating again its view, "This case  
6           cannot be considered a success overall." This is the  
7           passage where it says:

8                     "The level of uptake by the class of the  
9                     settlement has been extremely disappointing."

10                    Which is the passage you have already been shown,  
11                    and this is --

12       THE CHAIR: Sorry, which page are you on?

13       MS FORD: I am sorry. I am on page 982, paragraph 67.

14       THE CHAIR: I find these electronic things very inefficient.

15                    Yes.

16       MS FORD: This is one of the paragraphs the Tribunal has  
17                    already been shown and we see it is flagging up, part  
18                    way down this paragraph:

19                    "In future, far more work needs to be done on the  
20                    likely level of uptake at the stage of settlement  
21                    approval, and in appropriate cases at the earlier  
22                    certification stage."

23                    That is a recommendation that it then builds upon  
24                    in its 183 in this judgment, which is at page 1015, so  
25                    183 begins on 1015, but the relevant passage for our

1 purposes is over the page, 1016 and this is where the  
2 Tribunal is saying:

3 "There are certainly lessons to be learned, if not  
4 already learned in terms of the management and  
5 settlement of collective proceedings at the CPO stage,  
6 and certainly at the collective settlement approval  
7 order stage. More work in the future needs to be done  
8 on likely take-up of the settlement amounts by class  
9 members and how any damages may be distributed."

10 It goes on to say:

11 "In LFAs and settlements placed before the Tribunal,  
12 the ability to pay sums out of unclaimed damages to  
13 charity or *cy-près* should be expressly covered. Outcomes  
14 which appear to be predominantly for the benefit of  
15 stakeholders rather than class members or charity are  
16 not in the public interest or for the benefit of the  
17 collective settlement regime which is there to make  
18 justice available for those who cannot afford to bring  
19 such claims on their own."

20 So, this is the message which is coming through  
21 fairly consistently from these authorities. The  
22 Tribunal should be avoiding a situation where the  
23 benefit is to stakeholders rather than class members.  
24 Gutmann is not an isolated example. We saw that  
25 similar sentiments were expressed in the McLaren

1 judgment which the Tribunal has also seen this morning,  
2 at tab 23. This is the --

3 THE CHAIR: The paragraph we looked at -- 2026?

4 MS FORD: That is the final one. There were a couple I was  
5 to pick up on the way --

6 THE CHAIR: Sure, yes.

7 MS FORD: -- if I may. Paragraph 59 on page 1095.

8 THE CHAIR: That is the same judgment, is it?

9 MS FORD: It is the same judgment.

10 THE CHAIR: It is the 2006 judgment.

11 MS FORD: 2026, yes.

12 THE CHAIR: Sorry, I meant 2026, apologies, yes. So which  
13 paragraphs?

14 MS FORD: Paragraph 59 is where the Tribunal is expressing a  
15 view about what constitutes success in the context of  
16 collective proceedings, and it says:

17 "Success is not limited to funding arrangements  
18 but includes the proceedings delivered meaningful  
19 benefit for the class, considering damages available,  
20 likely and actual take-up, and treatment of unclaimed sums -  
whether by reversion, charity, or *cy-près*  
21 distribution."

22 We see the same sentiment coming through that I  
23 have shown the Tribunal already in 60:

24 "Ultimately, collective proceedings are intended  
25 to benefit class members rather than just stakeholders.

1           The Tribunal will necessarily be mindful to avoid  
2           outcomes where class members receive little or nothing,  
3           and stakeholders become the main beneficiaries."

4           That then leads us on to the paragraph that the  
5           Tribunal has already canvassed with my learned friend,  
6           which is at 196. I would just pick up, in passing,  
7           paragraph 86, which is where the Tribunal records its  
8           view of the merits in this particular claim.

9           PROFESSOR SMITH: Which page (inaudible)?

10          MS FORD: Paragraph 86 is on 1102, and the Tribunal says it  
11          considers that the class rep has a strong case on  
12          liability and causation, and so this is, in the  
13          Tribunal's view a meritorious claim, but even in that  
14          context, it is putting down a marker when we get to  
15          196, even in that context, take-up needs to be  
16          addressed at the certification stage. That is the  
17          paragraph that, sir, you have been canvassing with my  
18          learned friend. In my submission, the construction of  
19          that paragraph is very clear. It is saying that  
20          take-up by represented persons needs to be addressed at  
21          the certification stage and it is recognising the  
22          growth in the experience of the Tribunal over the six  
23          years since certification.

24          ^Gutmann and McLaren are obviously the cases where  
25          these points are coming to the fore towards the end of

1 proceedings.

2 THE CHAIR: The change in the funding regime is relevant to  
3 some extent because in the days when funders were just  
4 getting a percentage of damages --

5 MS FORD: Certainly, R (PACCAR Inc) v Competition Appeal  
6 Tribunal and others has intervened.

7 THE CHAIR: Pre PACCAR. This problem does not really arise  
8 in the same way in that they are taking the risk  
9 alongside the -- you are looking doubtful -- they are  
10 taking the risk alongside the litigant.

11 MS FORD: The reason I am hesitating is because whichever  
12 way the funder received their returns and however --

13 THE CHAIR: You end up receiving 10 million and you are  
14 getting 20 per cent of the -- 25 per cent of the  
15 damages, funders taking that risk. Oh, would the --  
16 ICB total damages from an uptake, that is the problem.  
17 Yes, sorry. Sorry. Sorry.

18 MS FORD: That was the point, sir, yes.

19 THE CHAIR: Yes, okay. I am with you, yes.

20 MS FORD: Because of course, even if the Tribunal were  
21 completely satisfied that the funders return was in  
22 accordance with market rates and proportionate --

23 THE CHAIR: I am sorry. That was a bad point, yes.

24 MS FORD: -- it might not make its way down to the class. I  
25 was about to come on to an example of where the

1 Tribunal, with the benefit of this experience, is  
2 requesting a more rigorous assessment of these issues  
3 at the certification stage and that is the Spottiswoode  
4 claim that the class -- proposed class representative  
5 has shown you. Authorities bundle, tab 12, starting at  
6 page 591, please. This is the Tribunal where it is an  
7 application for a collective proceedings order in  
8 relation to cartel in high voltage cables and it is  
9 contended that that had the effect of raising prices  
10 for electricity for consumers. Paragraph 42 is the  
11 point where the Tribunal raises the issue of the need  
12 for a distribution plan and paragraph 43 is an  
13 important statement of principle. It says:

14 "It is axiomatic that, in order for collective  
15 proceedings to fulfil their primary objective of  
16 compensating members of the Class, there must be an  
17 effective method of distribution, enabling members of  
18 the Class to be identified and contacted and maximising  
19 the take-up of compensation."

20 I do place a degree of emphasis on what the  
21 Tribunal says here about the primary purpose of  
22 collective proceedings being compensatory because, at  
23 many places, particularly in their written submissions,  
24 in their skeleton and in their reply, the proposed  
25 class representative comes close to saying, "It does

1 not matter that we have not put forward an effective  
2 means of getting these benefits to class members  
3 because we could conceivably make a payment to charity  
4 at the end of these proceedings." That, in our  
5 submission, is absolutely not the right starting point.

6 THE CHAIR: You have made that point already, yes.

7 MS FORD: The primary objective, as the Tribunal says here,  
8 is compensatory.

9 Paragraph 45 over the page, the challenges the  
10 Tribunal is identifying in this paragraph about the  
11 difficulties of recall and the modest awards are ones  
12 that rear their head again in these proceedings. Now,  
13 the PCR has made the submission that the concern here  
14 is all about the requirement for excessive  
15 documentation and the suggestion has been made that if  
16 you adopt some sort of self-certification process, all  
17 these concerns fall away. In my submission, that is  
18 not the core of the concern that the Tribunal is  
19 expressing in this judgment overall and in this  
20 particular paragraph. What it says, in particular, at  
21 the end is:

22 "It would obviously be unattractive if tens of  
23 millions of pounds of legal and funder's fees, and lots  
24 of Tribunal time, are spent on complicated proceedings  
25 only to find that few consumers actually come forward

1 to claim damages. If that were the outcome, it might  
2 fairly be said that the litigation has benefitted  
3 no-one but the lawyers and funders."

4 That is the relevant concern.

5 Paragraph 50, the proposed class representative in  
6 that case tried to suggest, well, it is "premature to  
7 consider" matters of distribution and cited Lord Briggs  
8 in Merricks. The Tribunal will appreciate that the  
9 same point has been taken by this proposed class  
10 representative today. The Tribunal here was  
11 unpersuaded. We can see that from paragraph 51. What  
12 they say is Lord Briggs was considering questions of  
13 "fairness as between members of the Class..." Those  
14 questions of fairness between members of the class can  
15 wait until distribution. But what it says at the end  
16 of 51 is the Tribunal is not concerned at this stage  
17 with fairness between members of the class. It is  
18 concerned with what it described as:

19 "...a more fundamental question as to whether the  
20 proposed collective proceedings offer a real prospect  
21 of benefit to members of the Class as distinct from  
22 lawyers and funders."

23 It comes back to that point at paragraph 53, where  
24 it says:

25 "The issue raised by the Tribunal in this case is

1 not as to whether the amount of damages received by  
2 class members will accord with common law principles  
3 but as to whether a practical and effective process  
4 will be found for distributing a settlement or damages  
5 award to the class as a whole."

6 It makes the point:

7 "This is relevant to its assessment of 'the costs  
8 and the benefits of continuing the collective  
9 proceedings' (Rule 79(2)(b))... The absence of an  
10 effective method of distribution to the Class would  
11 call into question the suitability of the claims to be  
12 brought in collective proceedings."

13 It cites what is said in Qualcomm.

14 There was a second attempt by the PCR to downplay  
15 the issue in this case, recorded at 54. It was noted  
16 that:

17 "...following Merricks, the question whether the  
18 proceedings are "suitable" for collective proceedings  
19 engages considerations of 'relative suitability'..."

20 Now, the Tribunal will have seen paragraph 14.2 of  
21 the class rep skeleton argument in this case, which  
22 cites Merricks and emphasises that it is a question of  
23 relative suitability. The Tribunal in Spottiswoode  
24 says that does not answer the question of cost-benefit  
25 analysis. I am taking this from the middle of

1 paragraph 54, it says it:

2 "...does not answer the Tribunal's point. If only a  
3 small proportion of the Class take up any damages  
4 award, or if no viable method of distribution can be  
5 found other than a payment of relatively small sums to  
6 members of the Class on production of compendious  
7 documentation establishing entitlement to those sums,  
8 these proceedings would compare unfavourably with  
9 individual proceedings even in a relative sense as they  
10 would involve the expenditure of large legal and  
11 funder's fees without much practical benefit."

12 So it is no answer, according to the Tribunal, to  
13 point to the fact that it is about relative  
14 suitability.

15 Finally, 55, we can see the Tribunal saying that:

16 "Having regard to the novelty of Collective  
17 Proceedings, the possible difficulties in distributing  
18 a settlement or damages award to the Class in this  
19 case..."

20 THE CHAIR: Okay, we can read this ourselves, Ms Ford.

21 MS FORD: I am grateful.

22 THE CHAIR: (Inaudible) paragraph.

23 MS FORD: Would the Tribunal then read paragraph 55, please?

24 Thank you. (Pause for reading). Two points to draw  
25 out from it. First is the Tribunal saying:

1           "...the PCR should give detailed consideration to  
2 plans for the distribution now..."

3           They are saying, "Now is the time at the  
4 certification stage":

5           "It would be unsatisfactory to defer consideration  
6 of proposals for distribution until after an award has  
7 been made..."

8           Second point to emphasise here:

9           "The Tribunal does not regard the current absence  
10 of a developed plan for distribution as precluding  
11 certification..."

12           One can see why it might have taken that position  
13 in Spottiswoode because this was essentially the first  
14 time that the Tribunal had put a shot across the bows  
15 of a proposed class representative to say, "You need to  
16 recognise the need to address these matters." So it is  
17 understandable that it took the view that it was not  
18 going to say, categorically, no at that stage. What we  
19 will see is that the PCR in these proceedings was well  
20 aware of what the Tribunal had specifically said in  
21 Spottiswoode, not least because they have referred to  
22 it in their notice and distribution plan. So it was  
23 not an unexpected development from the perspective of  
24 this PCR.

25           THE CHAIR: But there is a plan for distribution in this

1 case.

2 MS FORD: There is a document that is headed, "Notice and  
3 Distribution Plan," yes.

4 THE CHAIR: No, we are a step further down. We are trying  
5 to consider whether that is sufficient in all the  
6 circumstances.

7 MS FORD: Yes, but one can infer that the presence of  
8 something that was just described as a distribution  
9 plan is insufficient because the Tribunal is saying  
10 what it needs is to make a properly informed assessment  
11 of the cost benefit balance as the proceedings  
12 progress. So that is the function that this document  
13 needs to perform. I am going to come on to deal  
14 briefly with Qualcomm because that is a judgment that  
15 the proposed class representative has put some reliance  
16 on. It is authorities bundle, tab 9, starting at page  
17 416.

18 THE CHAIR: 416, did you say?

19 MS FORD: 416, yes. So paragraph 102.

20 THE CHAIR: Yes.

21 MS FORD: 416, I am sorry.

22 THE CHAIR: 416 is not the start but the bit you want to go  
23 to?

24 MS FORD: Yes.

25 THE CHAIR: Sorry. Yes.

1 MS FORD: So as the Chair is well aware, having been on the  
2 panel, this was decided in 2022. So it is two years  
3 before the Tribunal's warning in Spottiswoode and it is  
4 before the adverse distribution outcome in Gutmann and  
5 an illustration of that, perhaps one can see from the  
6 second half of paragraph 102, the proposed defendants  
7 in that case were pointing to a 2019 FTC report:

8 "...which found a median uptake of damages from  
9 class action settlements of 9% and a weighted mean of  
10 4%."

11 They were making the submission based on that,  
12 that there was a risk of low uptakes. We of course now  
13 know, in the light of Gutmann, that there is a risk of  
14 very considerably lower uptakes than were within the  
15 Tribunal's inflation at this stage. Paragraph 105,  
16 over the page, they are referring back to Gutmann.  
17 They are saying:

18 "...it is relevant to consider whether the proposed  
19 collective proceedings are likely to benefit  
20 principally the lawyers and funder..."

21 They say:

22 "...we do not exclude that in a particular case the  
23 cost-benefit analysis might so clearly weigh against  
24 certification that this might in itself be a ground for  
25 finding that the claims were not suitable to be brought

1 in collective proceedings."

2 So the first point to emphasise, in an appropriate  
3 case, cost benefit alone might be a basis for refusing  
4 certification, and it will not surprise the Tribunal to  
5 hear that my submission is that this is such a case.  
6 Paragraph 106, this is the one that you have been shown  
7 already by the proposed class representative where the  
8 Tribunal said:

9 "We do not consider, however, that the facts of  
10 the present case come close to representing such a  
11 case."

12 Two points that we would draw out to this  
13 paragraph. The first is that the PCR has made the  
14 submission that the economic climate remains similar.  
15 The Tribunal's referred to the "current economic  
16 climate" and they say the economic climate has not  
17 changed. What, in my submission, has moved on in the  
18 meantime is the Tribunal's own accumulated collective  
19 experience of these types of proceedings. Because this  
20 judgment was prior to the extremely disappointing  
21 take-up in Gutmann and because it was prior to the run  
22 of judgments that I have just shown the Tribunal --

23 THE CHAIR: Do we know what the total claim was? It was  
24 much bigger, was it not, in Qualcomm?

25 MS FORD: I imagine it is recorded.

1 THE CHAIR: Is it recorded somewhere? My recollection --  
2 and it is a long time ago -- is it was sort of 700  
3 million.

4 MS FORD: My learned friend is suggesting it may be in 109.  
5 Yes:  
6 "...the total estimated claim value of £482.5  
7 million."

8 THE CHAIR: Okay. Okay. Yes.

9 MS FORD: Not a million miles away (inaudible).

10 THE CHAIR: No, not so different to this one. Yes.

11 MS FORD: Interestingly, though, that is the aggregate claim  
12 value. The per class member average claim that the  
13 Tribunal is looking at is £16 to £17. So that is  
14 coming up to three to four times larger than the  
15 midpoint estimates that the class representative is  
16 putting forward in this case. The Tribunal there is  
17 also taking into account the possibility that those  
18 amounts -- the value of individual claims will continue  
19 to rise as the proposed collective proceedings  
20 progress. So we are there looking at potential  
21 individual claims which are materially larger.

22 Third point to draw out, paragraph 107, we can see  
23 that one of the reasons the Tribunal took a degree of  
24 comfort that take-up of damages in Qualcomm was likely  
25 to be limited-- sorry, was unlikely to be limited was:

1            "...that smartphones are significant purchases, made  
2            relatively infrequently for most consumers and in relation to  
3            which consumers are  
4            therefore likely to be able to provide documentation  
5            from their bank records or electronic receipts."

6            Contrast the present case --

7            THE CHAIR: Well, they do not provide anything in this one,  
8            they just say, "I bought some salmon." That is easier.

9            MS FORD: Well --

10          THE CHAIR: That is a point against you, is it not?

11          MS FORD: I am going to come on to address that it is in no  
12          way as simple as, "I bought some salmon." But the key  
13          point is, this is a low value, everyday grocery item.  
14          It contrasts negatively, in my submission, with an  
15          exceptional, significant smartphone purchase.

16          THE CHAIR: There is a limit to how much we can get out of  
17          comparing these cases because you then just end up in a  
18          massive backwards inquiry as to what happened in  
19          Qualcomm, what the evidence was and so forth. This is  
20          dealt with relatively shortly, so will you need to move  
21          on to the facts of this case to me? Unless you have  
22          any more authorities you need to look at.

23          MS FORD: I would like to make three brief points on Evans  
24          and then I will and move on to the facts.

25          THE CHAIR: Yes, yes.

            MS FORD: Evans is behind authorities bundle, tab 22,

1 starting at page 1051.

2 THE CHAIR: Yes.

3 MS FORD: (After a pause) Sorry, much shuffling of pages.

4 Proposed class representative has shown the Tribunal  
5 paragraph 116 and they have emphasised the passage  
6 where the Supreme Court says that small sum claims for  
7 ordinary consumers are a:

8 "...paradigm type of case in which opt-out  
9 proceedings are likely to be justified."

10 The simple point I make in relation to this is  
11 that what the Supreme Court had before it and what it  
12 was considering was whether to certify on an opt-out  
13 basis or an opt-in basis. It was not considering  
14 questions of cost-benefit analysis. It was not  
15 considering the prior question of whether one should  
16 certify at all if there is insufficient certainty that  
17 the benefit to the claim will actually make their way  
18 down to the class.

19 What their Lordships did do, in our submission, is  
20 to make two points which are relevant to the regime  
21 generally, and which we say are pertinent to these  
22 proceedings. First one is in paragraph 115 on the  
23 previous page. That is where the Supreme Court says:

24 "The regime provides additional opportunities for  
25 claims to be brought and vindicated, but it does not

1           guarantee that this will be possible in every situation  
2           where there has been a breach of competition law."

3           That, in my submission, is quite an important  
4           statement because the tenor of the submissions that are  
5           made on behalf of the proposed class representative is  
6           if you do not certify these claims, then there will be  
7           no remedies for the alleged breaches of competition  
8           law. But what the Supreme Court is saying here is that  
9           it is no part of the function of this regime to  
10          guarantee a remedy for a breach of competition law. It  
11          provides additional opportunities if the requisite  
12          conditions are present, but it is not inconsistent with  
13          this regime to find that the requisite conditions are  
14          not present and to decide not to certify on that basis.

15          The second point we flag up is made at paragraph  
16          104. This is the passage where the Supreme Court says:

17                 "We would expect that by the time of the  
18                 certification hearing the Tribunal will be able in  
19                 many, if not most, cases to form a view (even if  
20                 provisional) of the merits of the claim and, where it  
21                 is able to do so, the merits should not be a neutral  
22                 factor for the reasons we have given."

23          I raise this to meet a particular point that is  
24          taken in the class representative's reply, and again in  
25          their skeleton argument, where they say that the

1 Tribunal is not in a position to adjudicate on the  
2 merits of the proposed claims because it does not have  
3 sufficient evidence before it to do so.

4 Now, we simply draw attention to what is said by  
5 the Supreme Court in this passage to say that is not  
6 right. Now, we recognise that there is a separate  
7 question, which I will come on to, about the extent to  
8 which it is appropriate for the Tribunal to be taking  
9 those factors into account when it is trying to apply  
10 the cost-benefit analysis. But insofar as the  
11 submission is made that this Tribunal is simply unable  
12 to take a view about the merits at this stage, we say  
13 that that is clearly wrong, as comes through from  
14 paragraph 104.

15 So, I am moving on to deal with the ratio of cost  
16 to benefits in the present case. I am going to start  
17 off with the relevant costs and I can take those fairly  
18 quickly because they have largely been canvassed with  
19 my learned friend already.

20 We have seen the costs budget that is exhibited to  
21 Ms Heal's statement. The figure that we have focused  
22 on for the purposes of our calculations is the box at  
23 the bottom right, total funded costs of some 17.2  
24 million odd. We are obviously conscious that it has  
25 come through in exchanges that there may be additional

1 costs to be added on. Certainly, it might be said that  
2 we have taken a relatively conservative approach  
3 because the approach we have focused on is the 17.2  
4 million figure.

5 THE CHAIR: We can extrapolate your submissions once we have  
6 the updated figure.

7 MS FORD: Indeed. We then come on and look at the funding  
8 costs. I do not think the Tribunal has actually been  
9 shown the relevant paragraph of the funding agreement.  
10 It is in supplemental bundle 14 at 171, and it is  
11 clause 9.2.

12 THE CHAIR: Yes, we have got this in mind.

13 MS FORD: Yes.

14 THE CHAIR: What was your submission on it?

15 MS FORD: Well, the Tribunal is well aware that there are  
16 two possibilities and the funder is entitled to the  
17 greater of either five times the funder's outlay or an  
18 amount which results in a rate of return of 30 per  
19 cent. I come to this to explain where the figures come  
20 from that we have been applying in our calculations.

21 The funder's outlay is defined by reference to  
22 action costs, and it is essentially legal and other  
23 costs incurred by the funder, including sums it may be  
24 ordered to pay by way of security. So, if one assumes  
25 that the whole litigation costs budget sum of 17.2

1 million in funded costs is spent, then the five times  
2 funder's outlay will give £86 million. It is possible  
3 that we could end up with a higher figure if the 30 per  
4 cent internal rate of return produces a higher sum, but  
5 for the purposes of our weighing in the balance, we  
6 have assumed 86 million in terms of the funder's  
7 return.

8 So 17.2 million plus the 86 million in returns to  
9 the funder equate to total costs of the litigation in  
10 the region of 100 million. That is what we say is the  
11 figure that needs to be weighed in the costs side of  
12 the scales when the Tribunal is doing the exercise of  
13 the cost-benefit analysis. Much of the --

14 THE CHAIR: Yes, I mean, that is one where that is taking  
15 the maximum. Of course, as you say, we have some  
16 control over that and it is possible that, even in a  
17 successful claim, that will be cut down.

18 MS FORD: It is absolutely right that the Tribunal has an  
19 oversight and a discretion to try and maintain the  
20 proportionality of costs. In my submission, it is not  
21 appropriate for a PCR at this stage, when inviting the  
22 Tribunal to approve an application for certification,  
23 to try and rely on the possibility that the Tribunal  
24 might cut down their costs at a subsequent stage  
25 because it has taken the view that it is not actually

1           proportionate.

2       THE CHAIR: We have that point.

3       MS FORD: Indeed. The other submission that has been made  
4           on behalf of the PCR is to say, "Well, these are  
5           proportionate, these are equivalent to market rates.  
6           No challenge has been made to the amount of these." We  
7           say that that is really missing the point in the  
8           context of this exercise, because what we are doing is  
9           weighing up these projected costs against the projected  
10          benefits. So there would be no justification for  
11          incurring these costs, no matter how proportionate they  
12          are, and no matter how within market norms they are, if  
13          it cannot be shown that incurring those costs gives  
14          rise to sufficient benefits.

15       THE CHAIR: (Inaudible). So then if we go on to the  
16          benefits.

17       MS FORD: Turning to benefits, we look at it on two bases.  
18          We start with what I term the "headline benefits," by  
19          which I mean the projected recoveries before you take  
20          into account how they get down to the class and then we  
21          will go on to look at what actually makes its way to  
22          the class.

23                So headline benefits, we have taken from table 8.3  
24          in the Noble and Bell report so it is supplemental  
25          bundle, tab 19, at page 475.

1 THE CHAIR: Mm-hmm.

2 MS FORD: Tribunal, you can see at the top of this table  
3 that we are given a range in class size in thousands,  
4 so the upper bound class size is some 44 million and  
5 the lower bound class size is 35.6 million. We then  
6 see that the PCR is advancing a range of possible  
7 outcomes in terms of recovery, a low scenario, a  
8 mid-scenario and a high scenario, and it is also  
9 differentiating according to whether interest is  
10 awarded at 8 per cent or base rate plus 2 per cent. So  
11 to identify what is the PCR's absolute best case, it is  
12 the high scenario --

13 THE CHAIR: Yes, 44.

14 MS FORD: -- 8 per cent interest, lower bound class size,  
15 and on that basis, the average loss per class member is  
16 £10.71. The Tribunal has the point that even that  
17 absolute best case scenario is materially lower than  
18 what we were looking at in Qualcomm, the £16 to £17,  
19 likely to go up over the course of the proceedings.  
20 You have then got a mid-case scenario and that varies  
21 between £4.34 and £6.58 per class member, depending on  
22 what assumptions you make about interest and class  
23 size.

24 Then you have got a low scenario and that is  
25 between £1.61 per class member and £2.44 per class

1 member. Now, that low scenario equates to estimated  
2 damages of between 71 million and 87 million, depending  
3 on interest.

4 THE CHAIR: Mm-hmm.

5 MS FORD: So, if the aggregate damages are on the PCR's own  
6 low case scenario, then the costs of 100 million of  
7 pursuing these proceedings already exceed the aggregate  
8 benefit, even before we turn to look at likely take-up  
9 rates. Looking at likely take-up rates, the Tribunal  
10 then has to ask how much of that headline recovery  
11 figure will actually make its way down to members of  
12 the class? I have shown the Tribunal that is a  
13 critical part of the inquiry on the authorities.

14 THE CHAIR: But we have not been provided with a figure by  
15 the class representative.

16 MS FORD: Well indeed, and that is a fairly fundamental  
17 failing, in our submission. I was going to show the  
18 Tribunal what the class representative has said by way  
19 of evidence --

20 THE CHAIR: I think you should do that, yes.

21 MS FORD: It is in Ms Heal's statement, paragraph 61.

22 THE CHAIR: I am sorry, just remind me, which tab?

23 MS FORD: Supplemental bundle, tab 1, page 23.

24 THE CHAIR: Give me that page number.

25 MS FORD: I am sorry, it is page 23.

1 THE CHAIR: Okay.

2 MS FORD: We are looking at paragraph 61, and we are looking  
3 at the final sentence.

4 THE CHAIR: Hold on.

5 MS FORD: This is what she says about likely take-up rates:

6 "As set out in more detail in the notice and  
7 administration plan, the distribution and notice  
8 mechanisms will be designed to ensure that any  
9 aggregate award of damages is made available to members  
10 of the proposed class who claim their share of the  
11 compensation."

12 That is the totality of the evidence that the  
13 class representative has adduced on this issue and  
14 there is no additional evidence from the class  
15 representative to provide any degree of reassurance  
16 about how compensation will be distributed and what  
17 proportion of the class can be expected to actually  
18 come forward and make a claim.

19 Now, she is cross-referring to the notice  
20 and administration plan, which the Tribunal has already  
21 looked at behind tab 9. If we can start, please, at  
22 page 94. Turning over to 2.1, this is the explanation  
23 of what Angeion's experience is, the basis on which  
24 they are giving this evidence, and they explain they  
25 are:

1            "...an experienced class action notice and claims  
2            administration company formed in 2013 by a team of  
3            executives with extensive experience at five other  
4            nationally recognised claims administration companies in  
5            the US. Collectively, the management team at Angeion  
6            has overseen more than 2,000 class-action settlements  
7            and distributed over US\$ 15 billion" --

8            THE CHAIR: There is no need to read it out, yes. We have  
9            read that, yes.

10          MS FORD: I am grateful. Turning then to section 11, which  
11          begins at 125.

12          THE CHAIR: Yes.

13          MS FORD: Tribunal's already been shown paragraph 11.1 where  
14          it emphasises that it is a provisional proposal.

15          THE CHAIR: Yes. We have read all this quite carefully.  
16          Was there anything you wanted to make --

17          MS FORD: Yes.

18          THE CHAIR: -- submissions on? Go straight to those.

19          MS FORD: The context in which this has been advanced,  
20          Angeion is saying it has given careful consideration to  
21          its proposal for the distribution of damages, having  
22          regard to the recent decision of the Tribunal in  
23          Spottiswoode, and in particular, the Tribunal's  
24          observation that:

25                "There must be an effective method of distribution

1 which enables members of the class to be identified,  
2 contacted, and maximises the up of the compensation."

3 So, what follows in this document has been  
4 formulated specifically bearing in mind the Tribunal's  
5 expressed concerns about the need to address take-up in  
6 Spottiswoode, so this is, we are entitled to assume, as  
7 good as the PCR's distribution plan is going to get  
8 because it has been done with specifically the  
9 Tribunal's concerns in mind.

10 We are told at 11.2 that:

11 "Angeion has efficiently administered hundreds of  
12 similar consumer settlements in its multi-jurisdictional  
13 practice and has drawn on that experience in  
14 formulating its recommendations."

15 11.3 is expressly recognising some of the  
16 challenges that will arise in seeking to distribute a  
17 claim in proceedings such as this: low-value items,  
18 potentially poor documentation, and so the plan is,  
19 says Angeion, to assume over 98 per cent of claims will  
20 be based on self-certification. Over the page, 11.5  
21 (a) and (b) are the Tier 1 and 2 proposals that the  
22 Tribunal has already been shown, and the submission was  
23 made today, "Well, we do not know what per-class member  
24 sum will be used" and reference is made to the Merricks  
25 settlement judgment. Angeion do seem to have received

1 instructions about what the per member recovery they  
2 should use should be, and what they are doing is  
3 referring to the sums in the Noble and Bell report.

4 THE CHAIR: Sorry, where are you looking at?

5 MS FORD: I am looking at sample Tier 1.

6 THE CHAIR: Oh, yes, yes, sorry, you are still on that.

7 Yes, yes, okay. I have got that point, yes.

8 MS FORD: I am just emphasising that it is not being said,

9 "We do not know." Angeion is saying, "We are assuming  
10 that the 98 per cent who are self-certifying will receive a  
11 predetermined award amount based on the average loss  
12 during the relevant period."

13 THE CHAIR: Yes, okay, so they know the average loss, yes,  
14 but we need to go on to --

15 MS FORD: 11.6 --

16 THE CHAIR: -- the recovery, do we not? Yes.

17 MS FORD: -- is the paragraph which recognises that the  
18 approach may result in relatively modest payments for  
19 the majority of eligible claimants, but what Angeion is  
20 doing is offering the Tribunal a degree of supposed  
21 reassurance about that point, because they go on to  
22 say, in their experience:

23 "This is ubiquitous in consumer product litigations  
24 and has not been a barrier to recovery in US consumer  
25 product litigations."

1           In that context, they are then setting forward the  
2           chart, which appears at paragraph 128, showing their  
3           experience of product litigations.

4       THE CHAIR: I have just noticed there are two paragraphs,  
5           11.6.

6       MS FORD: Yes.

7       THE CHAIR: If I am following you now, yes?

8       MS FORD: Yes, that is true. Sorry, I was referring to the  
9           first one.

10      THE CHAIR: Yes.

11      MS FORD: So, what one can see from the first 11.6 is that  
12           Angeion is putting forward this table expressly as  
13           supposed reassurance to the Tribunal about likely  
14           take-up rates. That is the function of putting forward  
15           these statistics, and they are saying, "Look, it was  
16           not a barrier to recovery in US consumer product  
17           litigations."

18      THE CHAIR: Yes, but the point that is obviously made is we  
19           do not know the 422,000 ramen soup bowls case could be  
20           out of a total of 500,000. It may be a very good  
21           take-up. We just do not have that information.

22      MS FORD: Sir, that point is now taken. In my submission,  
23           given that we raised this at the response stage, had it  
24           genuinely been an answer to the concerns we raised to  
25           say, "All of these are surprisingly narrow class

1 definitions and therefore the figures that you are  
2 relying on actually do not make the point that you're  
3 making," it would have been said at the time, in my  
4 submission.

5 THE CHAIR: But we just do not know and we are trying to  
6 arrive at a figure for any of these, whether it is a  
7 good point or bad point for anyone. We just do not  
8 know what the percentage uptake is.

9 MS FORD: Well, in my submission, we know that Angeion is  
10 putting these forward, having been invited to address  
11 the Tribunal's concerns about take-up in Spottiswoode,  
12 given their extensive experience.

13 THE CHAIR: Yes. No, I understand the submission that you  
14 say this is not a good enough job. I understand that  
15 submission, but we --

16 MS FORD: That is not --

17 THE CHAIR: -- do not actually have the figure for the  
18 take-up for any of these cases. We simply do not know  
19 whether it's 1 per cent, 2 per cent, 3 per cent, 4 per  
20 cent, 5 per cent, or much higher. We just do not know.  
21 We cannot draw any conclusion as to the percentage  
22 uptake, because that has not been provided.

23 MS FORD: It has not been provided, although --

24 THE CHAIR: You have not dug around. I mean, I imagine a  
25 lot of these are public disputes. You have not dug

1           around and come up with figures either.

2           MS FORD: Well, certainly, the point that these might not be  
3           representative because we do not know the class size is  
4           a point which has been raised for the first time  
5           already at this hearing.

6           THE CHAIR: Well, it is not that they are not  
7           representative. We just do not know what the take-up  
8           is.

9           MS FORD: Well, we do know what the take-up is. What we do  
10          not know is what that is as a proportion of the class.

11          THE CHAIR: As a percentage, sorry. I was using --

12          MS FORD: Yes, but in my submission Angeion would not have  
13          put these forward as illustrative of the likely take-up  
14          rates had they not been broadly representative, and  
15          that is the context in which these figures are being  
16          advanced. The PCR --

17          THE CHAIR: But broadly representative of what?

18          MS FORD: Well, supportive of the conclusion that they say  
19          can be drawn from this table in 11.6, which is, they  
20          say:

21                 "As illustrated in the chart below, it is  
22                 commonplace in US consumer product litigations to  
23                 receive hundreds of thousands of claims for  
24                 self-certifying purchasers who can only receive a  
25                 modest sum of damages."

1           They are putting this forward, having been asked  
2           to reassure the Tribunal.

3       THE CHAIR: Well, we cannot -- I mean, fruit cups, one  
4           imagines, I don't know, in the state of California, if  
5           we take that as a similar size to the UK, one imagines  
6           there are not 35 million people consuming fruit cups,  
7           so when you get 260,000, I do not know what that means.  
8           I do not know how many are sold. Some of these, we do  
9           not know if they are particular brands. We do not  
10          know. I mean, what is unusual about this case is it  
11          seems, at least, on the way the case is put, it  
12          includes Atlantic salmon, includes Scottish salmon, so  
13          it is pretty much anyone who consumes salmon in the UK.

14                 For these things, they may be very specific  
15          products, specific trademarks being sold under, maybe  
16          relatively small. We just do not know. We just cannot  
17          -- I take your point they have been put forward, these  
18          figures have been put forward, but is the better  
19          submission not that these figures are meaningless,  
20          rather than these figures tell us about a particular  
21          uptake level?

22       MS FORD: Certainly, in circumstances where the class  
23           representative is now saying, "Even the figures that we  
24           have put forward are essentially meaningless," in my  
25           submission, there is clearly insufficient evidence for

1           the Tribunal to be satisfied.

2       THE CHAIR: About that submission, yes.

3       MS FORD: I have well in mind the Tribunal's concerns about  
4           the utility of these figures that have been put  
5           forward. At the very least, what is being said is that  
6           you can expect hundreds of thousands of claims. That  
7           is the proposition that they are being put forward for  
8           and so the exercise that we have done is to assume in  
9           the class representatives' favour, that you get the  
10          absolute top number of -- top example of valid claims  
11          that they have identified in any other example.

12       THE CHAIR: No, but the trouble is this is not a perfect  
13          science, and I have no doubt that with the benefit of  
14          hindsight, one could have found someone to say, "I  
15          reckon we can get uptake up to 25 per cent if we do  
16          this and we do that," and you would say -- you would  
17          call someone along who says, "I think you would be  
18          struggling to get it above a per cent because that is  
19          my experience," and, you know, where does that leave  
20          the Tribunal? This is not a science where you can say  
21          what it will be, so are we in the situation where we  
22          simply do not know what the uptake level is? Although  
23          one might say there is a burden to address it, in the  
24          end, in the final analysis, one is just sticking a  
25          finger in the air and going, you know, "We will have to

1           see."

2       MS FORD: Well, one is led, then --

3       THE CHAIR: It depends. I mean, if you spend enough on  
4           advertising, if you advertise it on all radio stations  
5           three times a day for three months, presumably, the  
6           uptake is going to be much, much higher than if it gets  
7           advertised on a radio station twice a day for a week.

8       MS FORD: Whether it would be high enough is a very  
9           different question, because the Tribunal has to be  
10          satisfied, and all the authorities say that it has to  
11          be satisfied now, it cannot leave this until another  
12          day. It has to be satisfied now that the uptake will  
13          be sufficient, that the benefits make their way to the  
14          class. Now, the Tribunal has said to me, "Well, you  
15          could bring somebody along to say -- what the class  
16          representative has come along to say is that you can  
17          look at, let us assume, 422,000 valid claims." They  
18          have come along and they have said, "This is a  
19          representative example of what you might expect in a  
20          consumer product litigation."

21       THE CHAIR: Yes, but what figure are you submitting we  
22          should be working on? You have put in your skeleton 1  
23          per cent. How did you arrive at that?

24       MS FORD: We have taken, in the class representative's  
25          favour, the highest number of valid self-certifying

1 claims received in any of the US litigation that they  
2 have identified. So we took the highest 422.557 figure  
3 and we assumed in the class representative's favour  
4 that the smaller of her class size estimates is the one  
5 to take, so we assumed the 35.6 million.

6 THE CHAIR: I mean, you would fail your GCSE maths if you  
7 tried to calculate take-up in salmon in the UK by  
8 reference to ramen bowls in the US, would you not? I  
9 mean, it is --

10 MS FORD: Well --

11 THE CHAIR: -- just not a legitimate exercise. I understand  
12 it is a forensic point that you can make, but we cannot  
13 seriously say, "Well, we would expect" -- We would  
14 have to guess what the size of the ramen class is, and  
15 it is a complete guess because no one has actually  
16 taken the trouble to have a look, and then ask what  
17 fraction 422,000 is of that unknown class, and then say  
18 the same would apply to extremely different  
19 circumstances in a different country. We do not have  
20 any information about exactly what went on in the  
21 ramen. Was it on the radio once? Was it on the radio  
22 every hour for months? I mean, we have no idea. We  
23 have no idea of any of this, so we cannot --

24 MS FORD: No, because the class representative has not told  
25 us.

1 THE CHAIR: -- we cannot -- Yes. Well, you can make those  
2 -- As I say, these may be very powerful forensic  
3 points, but in terms of expecting us to write a  
4 judgment where we say we thereby calculate that the  
5 uptake will be forwarding 422,000 over 30-odd million,  
6 and this is the percentage, that is just -- As I say,  
7 it would not pass GCSE maths.

8 MS FORD: Sir, perhaps not, but what the Tribunal could do  
9 is to say in its judgment, "This is the best that I was  
10 provided with by the class representative," and making  
11 assumptions in their favour, for example, taking the  
12 highest figure and the lowest estimate of class size.  
13 The figure that we come up with doing that exercise in  
14 the class representative's favour is 1.18 per cent of  
15 the class coming forward to claim their share of  
16 damages.

17 THE CHAIR: Yes, well, I mean, we understand the forensic  
18 point.

19 MS FORD: It is important to put that in context. I have  
20 shown the Tribunal that this is proceedings estimated  
21 costs up to 100 million. Best case aggregate damages  
22 award, assuming individual recovery of 10.71, is 382  
23 million. Of that sum, if you assume that 422,000  
24 people came forward and claimed it, then you get total  
25 sums paid out to the class of 4.5-odd million out of --

1 THE CHAIR: At its highest.

2 MS FORD: That is on the highest total recovery.

3 THE CHAIR: Well, we do not really need to bother with other  
4 figures if that is at your highest, so 100 -- If that  
5 is the right analysis, 100 as against 4.5 million, that  
6 is --

7 MS FORD: That is our submission, that one does not really  
8 need to go any further at all.

9 THE CHAIR: We can do the maths for the rest if that is in your  
10 submissions,  
11 yes.

12 MS FORD: I think the Tribunal then has my submission, that  
13 is absolutely an archetypal example of a claim which  
14 only benefits lawyers and funders and should not be  
15 certified. A less generous approach would be to take  
16 the figures for salmon in this table and to adjust them  
17 to reflect the fact that the total population of the US  
18 is some five times larger than the total population of  
19 the UK.

20 THE CHAIR: But what if we take the Qualcomm figure of 5 per  
21 cent, sorry, that will leave us -- If we take the  
22 salmon figures and assume a 5 per cent uptake, I mean,  
23 obviously we can do the maths ourselves. It is 11  
24 million or something, is it not?

25 MS FORD: I am afraid I cannot do it on my feet.

THE CHAIR: You would say even with a 5 per cent -- No. It

1           is a bit more than that, is it not? It is --

2       MS FORD: Where is the Tribunal getting the 5 per cent from?

3           Is it the 2019 FTC?

4       THE CHAIR: I am -- Well, it was a figure in Qualcomm.

5           That seemed to be the evidence in Qualcomm.

6       MS FORD: The 2019 FTC report, the mean?

7       THE CHAIR: Yes, yes.

8       MS FORD: Right, okay.

9       THE CHAIR: Sorry, so it will be 5 times 4.5 million, 22

10           million, and it is -- Have I got it wrong?

11       MS FORD: I am told that it may be around 19 million if one

12           assumes 5 per cent.

13       THE CHAIR: I assume it -- Okay.

14       MS FORD: Of course.

15       THE CHAIR: But even with that 5 per cent figure --

16       MS FORD: It is way off the mark.

17       THE CHAIR: -- and you are still looking, if you count the

18           funder's fee, and that is going to happen, you are

19           still in difficulty, you would submit?

20       MS FORD: Fundamental difficulty, and, in my submission, the

21           5 per cent figure is not a realistic one to take in the

22           light of the more immediate experience in Gutmann. We

23           know that it was not 5 per cent in Gutmann, it was 0.86

24           per cent.

25       THE CHAIR: Yes, but you were going to show us what the

1 communication is going to be to meet the Gutmann  
2 (inaudible) --

3 MS FORD: I was.

4 THE CHAIR: -- which was much more complicated. Is now a  
5 convenient time to go over that, or --

6 MS FORD: It is. Can put it in context by showing the class  
7 definition because, of course, understandably, the  
8 communication to the class is by reference, in part to  
9 the class definition. So starting, please, in the  
10 collective proceedings claim form, core, tab 3, at page  
11 73, and the definition is in paragraph 29.

12 THE CHAIR: Yes. I have read that.

13 MS FORD:

14 "Class members: persons who purchased salmon  
15 products."

16 The definition of "salmon products" is relevant.  
17 That is over the page, page 74. At the top of the  
18 page:

19 "All products sold by grocery retailers which  
20 contain 50 per cent or more Atlantic salmon content by  
21 mass."

22 Then we are told Atlantic salmon means:

23 "Primary processed, farmed Atlantic salmon. For  
24 the avoidance of doubt, Atlantic salmon does not  
25 include Pacific salmon or wild Atlantic salmon."

1           So there are at least three relevant components to  
2           satisfying this definition. There is a mass-based  
3           criterion, "Did what I buy have more than 50 per cent  
4           by mass of salmon?"

5           Then there is a geographic origin question, "Was  
6           the salmon I bought Atlantic salmon or was it Pacific  
7           salmon?"

8       THE CHAIR: Obviously, consumers will not know that.

9       MS FORD: Well, indeed. It is a difficult question for  
10       them. Then there is a farming requirement, "Was the  
11       salmon farmed or wild salmon?" So those are the  
12       criteria for the class definition. The Tribunal is  
13       rightly making the point to me that this is a legal  
14       document. It is not intended to be --

15       THE CHAIR: One can look at that at -- We know the  
16       approximate figures for Atlantic salmon. We know the  
17       approximate figures for farmed salmon. That does not  
18       need to be that -- they do not have to self-certify  
19       those aspects. We can just take a view -- it was 95  
20       per cent and 80 per cent, or whatever the figures are  
21       -- and that would be calculated into the into the  
22       damages. So then you just say to the class, "Have you  
23       bought any salmon?"

24       MS FORD: Well, if we look at what the proposed class  
25       representative is envisaging saying to the class, it is

1 not, "Have you bought any salmon?" If we look at tab  
2 12 in the supplemental bundle, page 148.

3 THE CHAIR: 148?

4 MS FORD: 148, yes, and tab 12. This is the draft notice of  
5 collective proceedings. So this is intended to be a  
6 consumer-facing document. If we look over the page,  
7 page 148, heading 8, "Who is the class in this claim  
8 and is anyone excluded?" It says:

9 "In order to meet the criteria set out in the  
10 proposed definition, the salmon products that you  
11 purchase" --

12 THE CHAIR: We can read this for ourselves, yes. (Pause for  
13 reading) Yes. So where they have put in the Atlantic  
14 or wild Pacific salmon, that might be -- I mean, this  
15 does read as if it has been drafted by a lawyer. It  
16 has to be said. Yes.

17 MS FORD: One assumes it was.

18 PROFESSOR SMITH: But when you say it is a consumer-facing  
19 document, this is not the document that goes out to  
20 people when you are trying to administer the claims.  
21 This is a legal document (inaudible) that informs people  
22 who might be interested in (inaudible), yes, in  
23 (inaudible) getting out of the claim, giving them more  
24 information about the claim. This is not the  
25 information that a member of the public needs after

1           they have seen the advertisement in The Sun or whatever  
2           newspaper, to decide whether they can claim.

3       MS FORD:  Yes.  Well, it may well be that the class  
4           representative in due course wants to say, "Actually,  
5           we would say something else at that stage," although  
6           this is what has been formulated to be provided to the  
7           public to notify them of the claim.  So it is intended  
8           to be a public-facing document.  Again, there is no  
9           evidence as to how these difficulties would be overcome  
10          in practice when you are looking to distribute to the  
11          class.

12       THE CHAIR:  Of all the problems in this case, it seems one  
13          that could be readily fixed if there is a problem there  
14          at all, really.

15       MS FORD:  It is important because you have the class  
16          representative saying, "Well, Gutmann is not  
17          representative.  You do not have to worry about what  
18          happened in Gutmann because it will not happen in our  
19          case, because Gutmann was extremely complicated.  Look  
20          at the class definition."  In my submission, Gutmann is  
21          no more complicated than asking a consumer to say,  
22          "Well, did you buy 50 per cent or more Atlantic salmon  
23          content by mass?" providing this degree of guidance as  
24          to how to determine that.  So you have got the mass  
25          definition there.  They are told it would generally

1 include, for example, whole salmon, salmon fillets,  
2 etc. So it is not --

3 THE CHAIR: What is wrong if the notice just says, "If you  
4 had bought salmon -- by salmon, we mean whole salmon,  
5 salmon fillets, smoked salmon and tinned salmon, and we  
6 do not mean fish cakes, fish pies and ready meals --  
7 you are entitled to claim, full stop"? That seems  
8 pretty simple.

9 MS FORD: Well, first of all, that does not factor in the  
10 Atlantic salmon, the Pacific salmon factor.

11 THE CHAIR: We can take care of that at the damages stage  
12 before -- That does not have to be a matter for  
13 distribution. Distribution is not going to be so  
14 precise that that small percentage -- What is the  
15 percentage of people that buy Pacific salmon?

16 MS FORD: I have in my head 4 per cent, although --

17 THE CHAIR: Yes. I mean, really, is that what -- is this  
18 your best point?

19 PROFESSOR SMITH: And wild salmon is tiny.

20 MS FORD: I am sorry, sir, I did not hear.

21 PROFESSOR SMITH: Wild salmon is so small, it is irrelevant.

22 THE CHAIR: By the time you get to trial, it will be even  
23 smaller, unfortunately.

24 MS FORD: That may may well be the case. I make it as a  
25 responsive point because, in my submission, it is not

1 right to suggest that the difficulties that Gutmann had  
2 to overcome were materially different than the  
3 difficulties that this class representative has to  
4 overcome. Finally, I would just like to look very  
5 briefly at what the PCR skeleton argument has said  
6 about expected take-up rates and cost-benefit analysis.

7 THE CHAIR: Yes.

8 MS FORD: The reason I do so is because the proposed class  
9 representative has been on notice.

10 THE CHAIR: I am very sorry to interrupt you, but you are  
11 just going on to a new topic. We have not had a break  
12 for the stenographer, if I remember. So can we just  
13 take five minutes -- a prompt five minutes, please?

14 (Short break)

15 MS FORD: Sir, I was about to address briefly what the class  
16 representative says in its skeleton argument.

17 THE CHAIR: Yes.

18 MS FORD: The class representative has been on notice of the  
19 need to address likely take-up rates since Spottiswoode  
20 and has acknowledged that by recording it in the notice  
21 of administration plan, but in any event we did raise  
22 this issue squarely in our response back on 5 December  
23 2025.

24 THE CHAIR: Can you just give me a reference for that  
25 please?

1 MS FORD: In the administration plan?

2 THE CHAIR: Oh, it was the 5 December response --

3 MS FORD: Oh. In the response? I am sorry. It is core --

4 THE CHAIR: Oh, just in your formal response.

5 MS FORD: Core, tab 5, and it is the entire document

6 essentially, but starting at 123. So what we might

7 have expected to see in their reply is the PCR saying,

8 "Yes, I can see that what I have done so far in terms

9 of addressing concerns about take-up rates is very

10 thin. I will adduce some further evidence," or, "I

11 will conduct some empirical research," or, "I will

12 address how the funder's returns might differ according

13 to take-up rates. I will take steps in order to seek

14 to address the concerns that have been expressed."

15 Now, that is not actually what happened. If we

16 look at the way it is dealt with in the skeleton

17 argument, there is a reference at paragraph 7, final

18 line. So this is core, tab 1, page and we are told

19 there, "There is good reason to believe that consumers

20 will take up a damages award" --

21 THE CHAIR: Sorry. I am just writing a note. Just give me

22 the reference again.

23 MS FORD: I am sorry. It is core, tab 1, page 6 and

24 paragraph 7 of the skeleton.

25 THE CHAIR: The PCR's skeleton?

1 MS FORD: Yes.

2 THE CHAIR: Bundle (inaudible) paragraph 7. Yes.

3 MS FORD: So, we are told:

4 "There is good reason to believe that consumers  
5 will take up a damages award of that nature for the  
6 reasons explained at paragraphs 35 - 38 below."

7 So if we go to paragraphs 35 to 38, you first get  
8 at the beginning of paragraph 35 this statement:

9 "Absent certification, the proposed class members  
10 will not receive any compensation for their losses  
11 caused by the PDs' unlawful collusion."

12 Now, two points to make about that: first, that  
13 would be true of any collective proceedings if you do  
14 not certify the proceedings will not go ahead and the  
15 proposed class members will not receive a payment. So  
16 that cannot be an answer to the cost-benefit test  
17 analysis because every single proposed collective  
18 proceedings would pass it and the test would be  
19 rendered meaningless.

20 Secondly, there is quite an important assumption  
21 which underlies this statement which is that if,  
22 conversely, you do certify, the assumption is that the  
23 class members will receive compensation for their  
24 alleged losses and that is, in our submission, exactly  
25 what the proposed class representative is failing to

1 show. If we go on to look at what she says about it,  
2 you have got in the second half the assertion again:

3 "There is good reason to believe that consumers  
4 will take up a damages award, in circumstances where  
5 the estimated average loss per proposed class member is  
6 £6.58 on the mid-point and £10.71 on the high  
7 estimate..."

8 That is a pure assertion. We have then got  
9 paragraph 35.1, which is relying on the circumstances  
10 of Qualcomm. Now, sir, you fairly put to me when we  
11 were discussing Qualcomm that there is a limited return  
12 to trying to read across.

13 THE CHAIR: I have dealt with that. Yes.

14 MS FORD: So that really, in my submission, provides nothing  
15 in support of the class representative and I have  
16 addressed why its circumstances materially changed  
17 since Qualcomm in any event. We then get paragraphs 36  
18 to 38, which are expressing reliance on the experience  
19 of Angeion and its notice and administration plan.  
20 Now, we have seen that if anything, that predicts very  
21 low take-up rates and in any event the class  
22 representative has essentially retreated from any  
23 reliance on what is said in that document during the  
24 course of the hearing.

25 Then we have paragraph 38, final sentence, where

1 it says:

2 "There is a long road between certification and  
3 distribution, during which technological developments  
4 facilitating class engagement and effective  
5 distribution will continue to progress at pace."

6 So this is essentially hoping that something will  
7 come up in the meantime and that something is a very  
8 vague hope. We are not given any indication of what  
9 technological developments might crop up or how it is  
10 said they might affect distribution rates. In our  
11 submission, this approach runs directly counter to the  
12 growing body of learning that I have shown the Tribunal  
13 that indicates that take-up rates need to be addressed  
14 now at the CPA stage, and not hoping that something  
15 might come up in the future.

16 We do say that whereas in this case, the proposed  
17 class representative has not shown that the proceedings  
18 would in practice benefit anyone other than lawyers and  
19 funders, then the Tribunal needs to grasp the nettle  
20 and decline to certify now. Final reference, at  
21 paragraph 40, we are told:

22 "...the estimated average loss per proposed class  
23 member ... does not support the PDs' suggestion that  
24 take up by proposed class members will be low:  
25 paragraphs 35 - 35.1.1 above are repeated."

1           Well, we have seen those, so that really is all  
2 there is and in our submission it is a surprisingly  
3 casual approach given the position on the authorities  
4 about the need to address this up front, even if it had  
5 not been done at the point the proceedings were first  
6 issued. In our submission, it should have been done by  
7 now.

8           In our submission, in many respects, there is no  
9 need to go any further. We say even adopting the  
10 assumptions most favourable to the class representative  
11 in terms of likely recovery, the only true beneficiary  
12 of these proceedings is likely to be lawyers and  
13 funders because it has not been shown that there is any  
14 realistic prospect that any sums recovered will  
15 actually make their way to members of the proposed  
16 class. So we say the cost-benefit test is demonstrably  
17 not satisfied.

18           We do go further in this sense: we say if the  
19 Tribunal were to adopt a more realistic perspective on  
20 the PCR's likely prospects of success, then the picture  
21 becomes even more stark. The Tribunal will have  
22 gathered that there is a difference of principle  
23 between us as to the extent to which the Tribunal can  
24 take a realistic view for the purposes of applying this  
25 test and we say the Tribunal both can and should.

1           In terms of the Tribunal being able to take a view  
2           at the CPO stage, I have shown you paragraph 104 in  
3           Evans, which is the Supreme Court saying the Tribunal  
4           is perfectly able to form a view on the merits but the  
5           next question is, to what extent should it properly do  
6           so for the purposes of the part of the statutory test  
7           where the rules are saying you must conduct a  
8           cost-benefit analysis?

9           In our submission, the position that the class  
10          representative has been driven to take is extreme. I  
11          am looking at paragraph 44 in their skeleton argument  
12          and their submission is the proposed defendants'  
13          "submissions that the PCR is unlikely to achieve its  
14          best-case outcome at trial are misguided." So what  
15          that appears to be saying is that even in circumstances  
16          where the class representative itself has presented a  
17          range of possible outcomes, nevertheless for the  
18          purposes of the cost-benefit analysis test, the  
19          Tribunal has to proceed on the assumption that the  
20          class representative will achieve its best-case outcome  
21          at trial.

22          In our submission, one doesn't even need to get  
23          into the specifics of this particular case to know that  
24          that is inherently improbable. It would be a bizarre  
25          approach to the rules, in our submission, to require

1           the Tribunal to approach the test on such a consciously  
2           unrealistic basis and I have shown the Tribunal the  
3           passage in Gutmann that, there, they took the class  
4           representative's central estimates. They did not  
5           constrain themselves to look solely at the class  
6           representative's best-case scenario.

7       THE CHAIR: It does not make any difference which one we  
8           look at.

9       MS FORD: I say that they do not pass the test, even if you  
10           make every assumption in their favour. I do --

11       THE CHAIR: Regardless, the differences are relatively  
12           small in the overall scheme of things compared to the  
13           costs.

14       MS FORD: It does not help them to look at their best-case  
15           scenario. I certainly strongly make that submission.

16       THE CHAIR: Yes. I think we have got that point.

17       MS FORD: I do want to emphasise we are not inviting the  
18           Tribunal to determine any issues on the merits. We are  
19           not suggesting that one has to apply something akin to  
20           a strikeout test or any sort of merits threshold. All  
21           we are saying is that it would be surprising, in  
22           circumstances where the PCR has itself rightly  
23           recognised that there are different ranges of potential  
24           outcomes, to suggest that the Tribunal has to approach  
25           this test on an avowedly unrealistic basis.

1           We have, in our response, set out a summary of the  
2           various factors that we say feed into the assessment of  
3           the class representative's case and why we say that the  
4           top end is not a realistic basis. I am proposing to go  
5           through those very briefly, because we do not ask the  
6           Tribunal to determine them.

7           THE CHAIR: Right. They are set out in your skeleton?

8           MS FORD: They are.

9           THE CHAIR: Just remind us of the paragraph numbers.

10          MS FORD: So the first one is "Liability" and that starts at  
11          skeleton paragraph 50. 50 addresses liability and --

12          THE CHAIR: Which?

13          MS FORD: 50.

14          THE CHAIR: Which page number?

15          MS FORD: Page number 53. So the Tribunal has --

16          THE CHAIR: You are asking if we can read that. You are not  
17          asking us to make a ruling on that, Ms Ford?

18          MS FORD: I am not asking the Tribunal to rule on any of  
19          these points. What I am seeking to draw out are the  
20          moving parts which go into the best-case scenario. I  
21          do say the Tribunal is able to take a view, using its  
22          own experience, on the likelihood that the class  
23          representative is going to achieve a best-case  
24          scenario.

25          So the first one is liability. The Tribunal has

1 well in mind that this is not a follow-on claim. The  
2 proposed defendants deny that there has been any  
3 unlawful conduct.

4 THE CHAIR: (Inaudible) you say you are asking us to make a  
5 ruling on it today, so -- there (inaudible).

6 MS FORD: The second point, then, is the level of estimated  
7 overcharge on Norwegian-farmed Atlantic salmon and if  
8 we look, please, at what the class representative's  
9 economists have said about that, it is in their report.  
10 Supplemental bundle, tab 19, at 431.

11 THE CHAIR: Yes.

12 MS FORD: Paragraph 4.101, and what they do is they quite  
13 properly indicate a range and the range is between a  
14 lower bound of 10 per cent and 20 percent. So in order  
15 to achieve the best-case recovery of £10.71, the  
16 proposed representative would have to establish the  
17 very top end of the range, so a 20 per cent overcharge.

18 Again, one does not need to get into the  
19 specifics of this case to know that that is higher than  
20 found in recently decided cases. There are UK Trucks  
21 Claim Ltd, 5 per cent; cables, 5 per cent; and  
22 Granville Technology Group Ltd v LG Display Co Ltd  
23 between 4 and 14 per cent. We obviously accept that  
24 there is a limit to the extent to which one can read  
25 across overcharges from other cases.

1 THE CHAIR: You cannot read across at all, can you?

2 MS FORD: Well, we simply make the point that 20 per cent is  
3 ambitious.

4 THE CHAIR: Ambitious, but we cannot make a ruling on that  
5 today.

6 MS FORD: No, I am not inviting the Tribunal to rule on it.  
7 What I am asking --

8 THE CHAIR: You are trying dangle it in front of us and hope  
9 we go, "They are not going to take that."

10 MS FORD: I am seeking to give the Tribunal an appreciation  
11 of all the moving parts that would need to fall in the  
12 class representative's favour to get that £10.71 --

13 THE CHAIR: Yes, to hit the maximum and one can take the  
14 view that it is extremely unusual for a claimant to  
15 achieve their maximum claim in almost any litigation  
16 but still I am not sure we can adjust the figure. We  
17 can obviously look at the range, but ultimately you say  
18 none of this matters.

19 MS FORD: My primary submission is that you do not get home  
20 even if you --

21 THE CHAIR: But it is not making that much difference.

22 MS FORD: It may be that that is true. I can take this  
23 extremely quickly on that basis.

24 THE CHAIR: Yes. Well, we have read your skeleton, but we  
25 will consider these paragraphs carefully again, but we

1           understand the point. Obviously, we are having to make  
2           a lot of assumptions in your favour to get to the top  
3           level and we know that the experts have done their best  
4           to get to the highest bit of the range and very fairly  
5           down the lowest bit of the range as well, in accordance  
6           with their duties.

7           MS FORD: The Tribunal has seen that in our response we have  
8           included a table which seeks to indicate what claim  
9           values might look like if some of the more optimistic  
10          assumptions that have been made might be adjusted --

11          THE CHAIR: That is okay. I think we have got this point.  
12          Yes.

13          MS FORD: Can we then just briefly look at where we would  
14          come out if we were to look at some of the lower end of  
15          the class representative's --

16          THE CHAIR: Well, we can just do the maths ourselves, can we  
17          not? Do we need you to walk us through it?

18          MS FORD: I am very content for the Tribunal to simply look  
19          at the maths.

20          THE CHAIR: Well, I --

21          MS FORD: We have set it out in our skeleton. There is a  
22          mid-point scenario and a low-point scenario.

23          THE CHAIR: I do have a question for you and do not read  
24          anything into it. Let us assume we are with you on the  
25          fact that there is not sufficient evidence on uptake in

1 the documents that we have. The consequence of that  
2 may be that -- and assume against yourself that indeed  
3 there is an abuse and there has been an overcharge. In  
4 those circumstances, when it gets to arguing pass-on  
5 with the supermarkets, you are going to be, I have no  
6 doubt, vigorously arguing that the supermarkets have  
7 suffered no loss, all the losses have been passed on to  
8 consumers. In those circumstances, I mean, that does  
9 not seem -- if we arrive at that position, that does  
10 not seem like a just result. You then end up pocketing  
11 the overcharge, essentially. So, what, in those  
12 circumstances -- if we were with you today on the  
13 question of there being insufficient uptake to deal  
14 with the questions of proportionality, where does that  
15 leave the class?

16 MS FORD: In my submission, if you were with me on that, you  
17 should decline to certify. The position in relation to  
18 the retailer claims makes no difference at all, and the  
19 reason is this: the scenario that the class  
20 representative is positing is that in the retailer  
21 claims, the Tribunal will decide that some proportion  
22 of the loss was passed down to the class. However,  
23 this class representative has not shown that if they  
24 were certified, that proportion of the loss that was  
25 passed down to the class would actually make its way to

1           them. So it fails because they have not satisfied the  
2           cost-benefit test, and it makes no difference  
3           whatsoever --

4   THE CHAIR: It would be open to the class, either through  
5           this class representative or another class  
6           representative, to make a further claim, to have  
7           another bash --

8   MS FORD: If the Tribunal --

9   THE CHAIR: -- with a different distribution --

10   MS FORD: If the Tribunal took the view that there was an  
11           infringement, which the Tribunal is fully aware we deny  
12           --

13   THE CHAIR: Of course, of course.

14   MS FORD: -- and if the Tribunal were to find that there was  
15           a degree of pass-on from supermarkets to consumers --

16   THE CHAIR: We will not know that until trial.

17   MS FORD: We will not.

18   THE CHAIR: Then what about limitation?

19   MS FORD: Well, limitation will apply, yes.

20   THE CHAIR: So, if this does not get certified -- and  
21           realistically, we are not going to have a trial for a  
22           couple of years -- the Limitation Act is going to bite,  
23           is it not?

24   MS FORD: The Limitation Act will apply as it would in any  
25           event, but my fundamental submission about this is that

1 is no answer whatsoever to the cost-benefit analysis  
2 point because you, sir, are concerned that the class  
3 loses out on receiving a payment that it might  
4 otherwise have got. But the reason that the Tribunal  
5 would be declining to certify, in those circumstances,  
6 is because the class representative has not shown that  
7 any such payment would actually make its way to the  
8 class. They have not shown that.

9 THE CHAIR: I appreciate that, but it may be there are other  
10 ways, more imaginative ways of ensuring that 100 per  
11 cent of the class, say, receive money.

12 MS FORD: Well, another class representative might actually  
13 apply their mind to this.

14 THE CHAIR: Not 100 per cent, the entire damages are  
15 distributed, sorry, is what I meant to say. I do  
16 apologise.

17 MS FORD: Another class representative might have done a  
18 legitimate job of applying their mind to that  
19 possibility. Our submission is that this class  
20 representative has been fully on notice since  
21 Spottiswoode and, in any event, since our response that  
22 this is a concern and they have not demonstrated that.

23 THE CHAIR: Okay, we have got that point. Thank you.

24 Submissions in reply by Ms ABRAM

25 MS ABRAM: Just a small number of points by way of reply.

1 First, I just want to address the question that you  
2 just raised at the end. So the dawn raids, the  
3 Commission dawn raids in this case took place in  
4 February 2019, and they were public at the time that  
5 they were made. These proceedings were issued in the  
6 middle of 2024, so within limitation -- there is no  
7 disagreement about that -- and they have been ongoing  
8 since then. There are no other pending consumer  
9 proceedings and so if, for example, certification were  
10 refused in this case and the whole thing went on ice  
11 for, I do not know, four years, for example, until a  
12 judgment on liability, there would be --

13 THE CHAIR: Limitations.

14 MS ABRAM: -- there would be, well, very significant  
15 limitation issues.

16 I would make two points about what I apprehend may  
17 underlie the Tribunal's question. The first is if the  
18 problem is that insufficient information has, in the  
19 Tribunal's view, been given in relation to take-up in a  
20 numerical sense, then the appropriate response would be  
21 either, as in Spottiswoode, to certify and require  
22 further information to be provided, or to require  
23 further information to be provided before you reach a  
24 final ruling on certification.

25 The reason that is all the fairer in this case is

1 -- and I will just come back to this in a moment -- but  
2 the chronology in which the notice and administration  
3 plan was produced is that Spottiswoode was mid-2024,  
4 and that was the first occasion on which these points  
5 about distribution were ever raised, as is common  
6 ground. The notice and administration plan was  
7 produced almost immediately, almost right then. It was  
8 before the judgments in Gutmann, for example, after the  
9 settlement distribution, it was before the judgments in  
10 McLaren and that settlement approval.

11 THE CHAIR: (Inaudible).

12 MS ABRAM: So that is the point that is made against me but  
13 what I would say about that is that -- So, those  
14 judgments -- just to give you the dates -- Gutmann is  
15 November '25, McLaren is January '26, so recent  
16 judgments. This is the first hearing at which, so far  
17 as I am aware, it has been suggested even that a PCR  
18 might do more, might need to come up to a higher  
19 standard in this particular respect than was suggested  
20 in Spottiswoode. In my submission, it would be frankly  
21 unfair, actually, for a PCR in the first ever case  
22 where that was suggested, to have their application,  
23 and therefore the chance of consumer redress, dismissed  
24 on a basis that certainly the class and the PCR had no  
25 prior notice of. That is what I say the response to

1           that should be, if that is a concern.

2           The second point, allied point, goes to the  
3           interaction with the supermarket claims. As I said  
4           this morning when you asked me about the interaction  
5           with those claims, we have not seen the documents in  
6           the supermarket claims. I think you know, sir, from  
7           the correspondence with the Registry, that the reason  
8           for that is that the proposed defendants in this case  
9           have refused to agree under Rule 102 of the rules for  
10          the documents to be shared between the two claims  
11          already. I am not criticising that -- at the minute,  
12          at least -- but what I will say is that that meant it  
13          has been impossible for this PCR so far to think about  
14          how it might be able to work together with the  
15          supermarkets on the detail of the claim.

16        THE CHAIR: That is a staggering submission.

17        MS ABRAM: Nonetheless --

18        THE CHAIR: You have completely ignored the other actions.  
19            You have not filed a litigation plan which says, "We  
20            are going to have to think of this and this and this,  
21            and our costs might be very different because of that  
22            reason. We could piggyback, we do not need to deal  
23            with disclosure." You have not done any of that at  
24            all. You have not said, "These are all things we are  
25            thinking about but we need to engage, we need to get

1           this certified so that we can then engage with other  
2           defendants." You have just completely ignored it.

3       MS ABRAM: So that is another point that goes to a  
4           chronology, in fact. So again, these proceedings were  
5           issued in the middle of 2024. I think, from  
6           recollection, you heard the jurisdiction challenge in  
7           the supermarket claims at the beginning of last year  
8           and then produced a judgment promptly thereafter. It  
9           has not actually, so far, been suggested in these cases  
10          that the PCR should, in the run-up to a CPO hearing,  
11          have a go at amending its litigation plan, litigation  
12          timetable, for example, litigation budget, all these --  
13          notice and administration plan, obviously a candidate  
14          in this case, to reflect developments --

15       THE CHAIR: It is not for this Tribunal to nanny you through  
16          to get us to an appropriate position. You have spent a  
17          staggering 1.5 million in this claim already. These  
18          things should have been addressed.

19       MS ABRAM: I am very grateful for that indication, and  
20          doubtless that will be heard by this PCR and by others.  
21          This case has been unusual, to be fair, in the light of  
22          the amount of time that is passed between when the  
23          claim was issued and this hearing, and that has partly  
24          been due to the issues around service of these  
25          proceedings. Again, I am not here to criticise those

1           today, but it has had that exceptional characteristic,  
2           so more water has passed under the bridge or upriver,  
3           upstream, perhaps in this case than might normally be  
4           so between issue and the CPO hearing. It is not to  
5           excuse anything, but it is to explain why what has  
6           happened here is new and is different from what has  
7           happened in other cases. But in my submission, that  
8           would be the appropriate approach.

9           Of course, if these proceedings are certified and  
10          are case managed together with the supermarket claims  
11          -- as I know the Tribunal provisionally has in mind  
12          and, as I say, we agree with that proposal -- then of  
13          course it would be for the PCR and the supermarkets to  
14          work together in a way that avoids duplicating costs.  
15          So none of that is at all -- There is no pushback from  
16          here against any aspect of that, sir. So that is what  
17          I say about that, that question that you put to my  
18          learned friend, just for what that is worth. I know it  
19          was not directed at me, but just to make that point.

20          Then just a few points by way of reply; the first  
21          in relation to the funder's fee. So, a point that was  
22          made was that it was not open to the PCR at the  
23          certification stage to ask the Tribunal to take a view  
24          about the level of the funder's fee that might be  
25          recoverable, whether it would be the full amount or

1           whether it would be a lesser amount. In fact, there  
2           are examples of the PCR inviting, and the Tribunal  
3           precisely taking notice of, the fact that it may, at  
4           the time when costs come up for the payment and reduce  
5           the level of the funder's fee. So, that is a proper  
6           matter for the PCR to bring in at the certification  
7           stage. One example of an authority for that principle  
8           is Professor Andreas Stephan at paragraph 64.

9           THE CHAIR: Sorry, give me the tab number?

10          MS ABRAM: Oh, yes. So, it is authorities, tab 18, page  
11           853. We can look at it if that is useful but I was  
12           just intending to give you the reference.

13          THE CHAIR: Let us have a quick look.

14          MS ABRAM: So authorities, page 853, tab 18. It is  
15           paragraph 64, if you would like to read that.

16          THE CHAIR: This is not -- We are not dealing here with a  
17           poor result, though, are we? We are envisaging a  
18           situation where your claim is successful -- however one  
19           defines success -- and the funder might quite  
20           reasonably say, "I should be getting something close to  
21           my maximum. You may cut it down a bit; we would have  
22           to look at what the market rates are," and all those  
23           sorts of things. But not quite the same, is it?

24          MS ABRAM: The point I was taking you to this for was just  
25           to respond to this idea that the question mark over the

1 Tribunal's ability to control the return to the funder  
2 is not a matter for certification. So that is the  
3 point that I was going to this for.

4 The point that you are making, sir, I respectfully  
5 agree that there is a range of what success might mean  
6 in this case, in the contractual documents as against  
7 the real world outcome of the case, and that the  
8 response to that, in terms of the level of return that  
9 the funder receives might be different. The point that  
10 is put against me in the extreme scenario is imagine  
11 the funder's return is 86 million on the contractual  
12 documents. Imagine that the damages recovered are  
13 70-odd million, so the funder's return is greater than  
14 the damages. You know that I say that that is not the  
15 scenario we should be looking at.

16 In that scenario, first point, the funder is not  
17 going to be getting its full level of return anyway  
18 because the first thing that happens is the money goes  
19 to the class, and so you are looking at the change from  
20 the 70 million that is left for the funder to get in  
21 the form of undistributed damages, so you are already  
22 eating away at the funder's return. The second is that  
23 we would be the first to accept, as the parties did in  
24 Gutmann at the costs stage, that the level of the win  
25 is relevant to the level of the funder's return. You

1 saw in Merricks, just to take an example that's in the  
2 settlement judgment there, the Tribunal provided for --

3 THE CHAIR: But, sorry, I think problem is, success, I  
4 assume, is not defined by reference to uptake.

5 MS ABRAM: It is not defined by reference to uptake, it just  
6 means receiving money at the end of the trial,  
7 effectively. But what I am saying --

8 THE CHAIR: So we are not, at the moment, considering you  
9 being unsuccessful -- We are assuming you are  
10 successful and we are assuming your economist, Mr  
11 Noble, has got the ballpark right, so that is what you  
12 achieve. Then on what basis would we be cutting it  
13 down just because the uptake is bad? You say you want  
14 the money to come out of undistributed damages, so the  
15 funder comes along and says, "We took a real risk on  
16 this litigation. We asked for five times; that is  
17 below market rate. Look at the evidence. This is  
18 absolutely proportionate," and we agree with that --

19 MS ABRAM: I think to be fair, sir, the point might be put  
20 --

21 THE CHAIR: But the uptake is very poor. So it is not like,  
22 "Well, if the litigation is unsuccessful, you,  
23 litigation funder, have to take it on the chin. That  
24 is the business you're in." But here, the litigation  
25 has been successful. The uptake has been poor.

1 MS ABRAM: I think a stronger point might in fact be put  
2 against me in that scenario, what might be said in that  
3 world is although there has been success in the  
4 contractual sense, in the sense that money has been  
5 received by the class, and therefore the contractual  
6 entitlement of the funder is triggered to receive its  
7 fee, actually, it is a bit like, depending on the  
8 numbers, of course, Merricks where the Tribunal said,  
9 "Well, look, even though the class has got 200 million,  
10 that is a small proportion of what the claim was  
11 initially said to be worth. The funder's return needs  
12 to be seen in the light of that," and they gave a 1.5  
13 times return instead of the return that was  
14 contractually provided for.

15 Now, one cannot debate the figures in the  
16 abstract, but that is the point that was against me,  
17 even in a world where there was success in the sense of  
18 a dollar sum being received. So that is the relevance  
19 of the funder's fee. The next point in relation to the  
20 Angeion notice and administration plan, this is the  
21 point that I wanted to underline the chronology in  
22 relation to, because the criticism of Angeion is the  
23 lack of a plan that includes figures as to potential  
24 take-up. I have made the point about the chronology  
25 with which the plan developed, and, in my submission,

1           there should not be criticism of Angeion, certainly in  
2           that respect.

3           The third point in relation to the uptake figures  
4           in Qualcomm, just to make sure that the Tribunal has  
5           the points of reference right, the percentage figures  
6           of uptake from Qualcomm. I think the Tribunal may have  
7           had in mind a different metric.

8       THE CHAIR: Let's just read it.

9       MS ABRAMS: Yes, so it is authorities bundle tab 9, page  
10           416, and I think it is paragraph 102, the end of  
11           paragraph 102.

12       THE CHAIR: Yes:

13           "Consumers and Class Actions: A  
14           Retrospective and Analysis of Settlement Campaigns which  
15           found a median uptake of damages from class action settlements of  
16           9 per cent..."

16           Oh, sorry, " ...and a weighted mean of 4 per cent."  
17           So it was the 4 per cent I had in mind. It wasn't 5  
18           per cent, sorry.

19       MS ABRAMS: I think the figure you might have had in mind  
20           was what the percentage of costs were to the value of  
21           the claim in Qualcomm, sir.

22       THE CHAIR: Maybe, maybe.

23       MS ABRAMS: So, if one applied just these as just a very  
24           rough guide, 9 per cent might imply a level of take-up  
25           of around 40 million in this case and 4 per cent, about

1 half that, but what I would also say by way of caution  
2 about these figures, and indeed all figures that are  
3 thrown about in relation to take-up in this and other  
4 contexts in this case, is that what is not said here is  
5 what kind of cases that analysis related to. So, for  
6 example, you do not know whether this related to  
7 self-certifying consumer claimants, and the  
8 self-certifying element is very important here, so that  
9 is a differentiator there.

10 Then the next point in relation to the complexity  
11 of the class definition. The Tribunal has the key  
12 points here, I know, but just to make another point in  
13 relation to that, and this point is about wild Atlantic  
14 salmon and Pacific salmon, and the possibility that  
15 consumers might have bought some of either of those.

16 Now, consumers would only be --

17 THE CHAIR: (Inaudible).

18 MS ABRAMS: Just to be clear on the class definition  
19 though, sir, that consumers would only be outside the  
20 class definition if they had only bought salmon other  
21 than --

22 THE CHAIR: Yes, no. I understand that.

23 MS ABRAMS: That was the point that I wanted to make sure  
24 was clear. Then, in relation to the relevance of the  
25 merits to this stage of the analysis, and my learned

1 friend made two points about the --

2 THE CHAIR: Again, Ms -- If you are just trying to show  
3 that there is complexity and depends which figures you  
4 select, depends where you end up on the range, which is  
5 common ground. She has not invited us to make a ruling  
6 on the merits, and so we are not going to.

7 MS ABRAMS: I am very grateful, and we say, as you know,  
8 that the Tribunal is not entitled to take into account  
9 a view on the merits at this stage for the cost-benefit  
10 analysis, and that is paragraphs 59 to 60 of Merricks.  
11 I should say that unlike the PDs, we have not in our  
12 skeleton gone through the points on liability,  
13 overcharge and so on, and, clearly, we have not  
14 responded to those because they were set out in the  
15 skeleton, although they were presaged in the response.

16 THE CHAIR: You have heard my observations to Ms Ford  
17 about that.

18 MS ABRAMS: I am very -- We would have wanted to respond,  
19 but I am very grateful for that indication. That is  
20 all I wanted to say, sir.

21 THE CHAIR: Obviously, we will reserve judgment. I  
22 anticipate whatever we decide, obviously, we have not  
23 decided, there may be a need for a further hearing in  
24 the light of whatever we decide, dealing with  
25 consequences and detail and things like that, but I

1 think it is probably important to deal with this major  
2 issue first, and then sort of work backwards from that  
3 when we know where we are.

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6 (4.19 p.m.)

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