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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1336/7/7/19

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 29th July 2026

Before:

James Wolffe KC
(Chair)
Keith Derbyshire
Professor Rachael Mulheron KC (Hon)
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Claimant

Mr Phillip Evans

v

Defendant

Barclays Bank PLC and Others

A P P E A R A N C E S

VICTORIA WAKEFIELD KC & DAVID BAILEY KC for Mr Phillip Evans

DANIEL BEARD KC, SARAH FORD KC & NATASHA SIMONSEN for Barclays Bank PLC and Others

Wednesday, 29 July 2026

(10.30 am)

THE CHAIR: Good morning. I will read the usual notice.

Some of you are joining the livestream on our website so
I must start therefore with the customary warning.

An official recording is being made and an authorised
transcript will be produced, but it is strictly prohibited
for anyone else to make an unauthorised recording, whether
audio or visual, of the proceedings. Breach of that
provision is punishable as a contempt of court.

Ms Wakefield.

MS WAKEFIELD: I am grateful.

THE CHAIR: I get the impression you have agreed who is
speaking first and you are kicking off.

MS WAKEFIELD: We are.

THE CHAIR: I do not know whether you have agreed a rough
allocation of the day between you?

MS WAKEFIELD: We have. On the assumption that that we do only
need today, I will be going until lunch time and then my
learned friend will take over and I will have some time in
reply.

THE CHAIR: Excellent. We will take the usual break around
about 11.40/11.45. If you could identify a point around then
that that is suitable to stop, that would be helpful.

(Inaudible)

1 Yes.

2 Submissions by MS WAKEFIELD

3 MS WAKEFIELD: May it please the court, I appear together with
4 Mr Bailey KC for the Proposed Class Representative, Mr Evans.
5 My learned friends Ms Ford KC and Ms Simonsen appear for the
6 Proposed Defendants.

7 As the Tribunal knows, this is the hearing of two
8 applications: a dismissal application brought by the banks
9 and my permission application. The orders which I seek are
10 set out in my draft order at tab 6 of the core bundle, which
11 is at page 60. I know the Tribunal will be very familiar
12 with this. Just to refresh our collective memories, on
13 page 60 you will see:

14 "1. The Dismissal application is dismissed.

15 "2. The Permission Application is granted. In
16 particular:

17 "(a) So far as the claims following on from the Three Way
18 Banana Split and Essex Express Commission Decisions are
19 concerned:

20 "(i) Mr Evans has permission to file and serve a revised
21 application for certification on an opt-in basis within five
22 months of the date of this Order.

23 "(ii) If no such revised application is filed and served
24 in that period, Mr Evans' application for certification in
25 relation to such claims shall be dismissed without further

1 order, save as to costs.

2 "(b) So far as the claims following on from the Sterling
3 Lads Commission Decisions are concerned:

4 "(i) Mr Evans has permission to file and serve a revised
5 application for certification on such basis as he may be
6 advised, within five months of the date of this Order.

7 "(ii) If no such revised application is filed and served
8 in that period, Mr Evans shall, by no later than five months
9 of the date of this Order, notify the Tribunal whether he
10 intends to pursue the Sterling Lads claims on the basis
11 currently pleaded in the Re-Amended Collective Proceedings
12 Claim Form. If he does, the stay shall be lifted so that
13 further directions can be made as appropriate. If he does
14 not, those claims shall be dismissed without further order,
15 "save as to costs".

16 So those are the orders which I am seeking today, sir.

17 In terms of the themes which unite both applications, as
18 you will have seen from our skeleton argument, we seek to
19 discern the themes of legal characterisation, abuse of
20 process, timing, merits and Sterling Lads and of course I am
21 very much in the Tribunal's hands in terms of what it would
22 be helpful for me to develop orally today, but my proposal,
23 left to my own devices, is to address first of all what
24 happened in the Original Tribunal; then the Court of Appeal;
25 then the Supreme Court; then I will address the material

1 change of circumstances; then I will address why did we not
2 apply to stay paragraph 411 earlier; then the other timing
3 points, essentially what has happened since the Supreme Court
4 judgment; then I will turn to the merits of the claims and
5 then once I have set out all of that factual background,
6 I will turn to the law on abuse, I will make my submissions
7 on abuse of process, I will then turn to the law on
8 an application to vary in particular, so rule 115(2), make my
9 submissions on the application and then, finally, I will get
10 to Sterling Lads. So that is my way through.

11 If I start, then, with the Original Tribunal, we applied
12 for an opt-out CPO in relation to Three Way Banana Split and
13 Essex Express issuing our claims on 11 December 2019. So if
14 we go to the claim form, that is in supplemental bundle,
15 tab 1, and if we go to page 40, you will see the class in
16 relation to which we brought the proceedings and the Tribunal
17 will see that for both Classes A and B it comprises all
18 persons who entered into one or more FX Spot Transactions
19 and/or FX Outright Forward Transaction(s), the difference being
20 the counterparties of those transactions and the difference
21 between Class A and Class B.

22 Now for present purposes the make-up of the class can
23 most conveniently be taken from the statement of facts and
24 issues in the Supreme Court. So that is at tab 39 of the
25 supplemental at page 1482, paragraphs 15 to 18 so we see.

1 THE CHAIR: Sorry, you said 1482.

2 MS WAKEFIELD: 1482 so we are in the SFI for the Supreme Court
3 proceedings. At 15 we see the estimate of the number of
4 class members is 42,000.

5 THE CHAIR: Yes.

6 MS WAKEFIELD: If you include private individuals, non-financial
7 class members with fewer than 50 employees, that will go up
8 to over 100,000. We see that -- if it is not here, we see
9 that in the judgment.

10 Just focusing on the 42,000, there are 18,000-odd
11 financial class members, that is in paragraph 16, of which
12 99.5% are SMEs, 23,000-odd non-financial class members, that
13 is in paragraph 17, of which 76% are medium. We excluded
14 small non-financial class members for these purposes, even
15 though they are in the class definition as you will have
16 seen. It is broad enough to encompass them. What we are
17 trying to do here is identify the main people who would be
18 likely to have suffered loss.

19 In terms of the claim value, we see this in 18 taken from
20 the minority judgment of Mr Lomas, 80% have claims of less
21 than 16,000, 44% claim value less than 10,000, and for the
22 non-financials, 77% have an average claim of less than 3,500.

23 There are also, as we know and as I set out in my
24 skeleton argument for this hearing at paragraph 15(a),
25 a small number of class members with very substantial claims,

1 including 342 institutions with an average claim size of
2 3.4 million.

3 In my learned friend's skeleton argument for this hearing
4 in paragraph 5, she says that Mr Evans expressly asserted
5 that opt-in proceedings were impracticable and the reference
6 given is paragraph 170(c) of my claim form. So if we go back
7 into the claim form at page 93 of the supplemental bundle, we
8 have the heading -- if I am going too quickly, please do say,
9 I know you are looking for the documents.

10 THE CHAIR: We have got the supplemental bundles divided into
11 two on our system, so if you hit a page number above 1262 would
12 have to check what it is, then we have to toggle between.

13 MS WAKEFIELD: So we are at page 93 of the supplemental bundle.
14 Above paragraph 169 you have got the headings "The Proposed
15 Collective Proceedings should be opt-in proceedings ..."

16 169, the identification of the two factors with which we
17 are very familiar now under rules 79(3) of the CAT rules,
18 strengths of the claims and:

19 "Whether it is practicable for the proceedings to be
20 brought as opt-in collective proceedings, having regard to
21 all the circumstances, including the estimated amount of
22 damages that individual class members may recover."

23 Then in 170, we submit that the application of those two
24 considerations support the proposed collective proceedings
25 being certified to proceed on an opt-out basis. In

1 particular, we run through prospects of success in (a), (b)
2 is the follow-on nature of the claims, and then (c) and this
3 is the one relied on against me:

4 "Paragraphs 146 - 150 above explain that it is
5 impracticable for proceedings to be brought on an individual
6 basis."

7 So that is just part of the test where the collective is
8 preferable to individual.

9 "Those same reasons explain why it is impracticable for
10 proceedings to be maintained on an opt-in basis. The
11 Proposed Class Representative notes that possible factors
12 identified in paragraph 6.39 of the Guide as indicating that an
13 opt-in
14 approach could be workable and in the interests of justice
15 were 'the fact that the class is small but the loss suffered
16 by each class member is high' or that 'it is straightforward
17 to identify and contact the class members.' Neither factor
18 applies to the Proposed Collective proceedings."

19 Then we say (i):

20 "... the size of the Proposed Classes is substantial and,
21 for certain class members, their *per capita* loss may be
22 relatively small; and

23 "(ii) It would not be practicable to identify and
24 contact the class members."

25 We explain how unrealistic that is.

1 So pausing there, stating the obvious perhaps at this
2 point, plainly this paragraph is looking at the class as
3 a whole, describing its numerosity, the low value of the
4 claims for many of them and how difficult it would be to
5 contact the class as a whole. When we say "impracticable" in
6 this context, plainly that is what we are talking about.

7 Pausing there, when we are going through my submissions
8 and extracting themes, I suppose, through the submissions,
9 one of the themes or one of the points to be alive to and to
10 note is the binary nature of the question posed by 79(3),
11 whether it is practicable for the proceedings to be brought
12 as opt-in collective proceedings.

13 When we think about that question if I might respectfully
14 ask you to be astute to the fact that at this stage when we
15 are talking about practicability, that is overwhelmingly what
16 we are talking about, the class as a whole.

17 So paragraph 171, still in the claim form, this is the
18 concluding paragraph:

19 "Accordingly, the Proposed Class Representative considers
20 that the only practicable, efficient and effective approach to
21 the Proposed Collective Proceedings is for them to be brought
22 on an opt-out basis."

23 So that is exactly the point I just sought to make. We
24 accompanied our application with various witness statements.
25 Some of them are set out in my learned friend's skeleton

1 argument at paragraph 6 and in my skeleton argument, for this
2 hearing I should say, at paragraph 15. I will take you to
3 them now. We have got Maton 4, that is in supplemental,
4 tab 29, page 1263. Second volume, I am told.

5 THE CHAIR: Thank you.

6 MS WAKEFIELD: So if we go to page 1265, heading A "Practical
7 difficulties with bringing Mr Evans' proposed proceedings on
8 an opt-in basis". Paragraph 7, which we both cite,
9 summarises his position. "I believe ..." This is the second
10 line down:

11 "I believe opt-in proceedings in this case would be
12 impracticable and expensive and would result in a low rate of
13 participation by eligible class members."

14 Then in paragraphs 8 through to 18, he sets out
15 Hausfeld's book-building attempts in the period 2014 to 2018
16 in relation to the FX misconduct. We see at paragraph 12 on
17 page 1267 the table setting out the results of that
18 book-building exercise, the number of organisations contacted
19 and the number of clients that signed a retainer. So 321
20 were contacted and only 14 signed a retainer.

21 If we flip through to paragraph 18:

22 "Hausfeld were instructed by [those] 14 ... after
23 investigation, it transpired that their combined claims were
24 not of sufficient size to bring a viable group claim bearing
25 in mind the costs of litigating complex claims against

1 several major banks. Many of the individual claims were
2 estimated to be in the low (single digit) millions or less."

3 That made it impossible to get funding.

4 In paragraphs 19 to 22, he addresses the unwillingness of
5 potential claimants to commit to opt-in proceedings. In 19
6 he identifies in (a) the problem with relational conflict
7 with the banks; in (b) internal administrative or reporting
8 burdens; in (c), concerns about confidentiality; and in (d),
9 getting the relevant records. Then in paragraph 20 he says:

10 "The lesson I drew from this experience was that the
11 cost/benefit analysis weighed heavily against pursuing claims
12 for most organisations with potential FX claims."

13 In 22, having addressed Allianz and the ECU Group
14 litigation, the concluding sentence of 22:

15 "By contrast, I would expect the majority of the class
16 members Mr Evans seeks to represent would face the
17 difficulties I have outlined at paragraphs 17(a) to (d)
18 above."

19 Paragraph 23, this is under the heading "It would be
20 impracticable for the proposed proceedings in the Evans
21 Application to be brought on an opt-in basis". Second
22 sentence:

23 "... there is a significant risk that only a limited
24 number of members of the proposed classes may opt in to those
25 proceedings based on the rationale I have explained above."

1 He lists those factors again. In 24:

2 "Moreover, the smaller a class member's claim, the less
3 likely it will be worth the time, expense and effort in
4 joining a collective action for damages."

5 He sets out Mr Ramirez's, our expert economist's, opinion
6 as to the average claim value and the smaller claim sizes.
7 Then we see in 30:

8 "Even if it were possible (contrary to my views set out
9 above) to encourage a sufficiently large number of class
10 members to opt in to Mr Evans proposed proceedings, I believe
11 that the proceedings would be much more resource intensive
12 and time-consuming ..."

13 He goes on to set out the less preferable nature of those
14 proceedings in any event. So that is Mr Maton's evidence.

15 Mr Evans' evidence is at tab 30, the next tab in the
16 bundle, which is page 1292. Paragraph 6 under the heading
17 "The practicability of bringing the Proposed Collective
18 Proceedings on an opt-in basis", the third sentence:

19 "In this section ... I explain why I do not believe that
20 it would be practicable or desirable to bring the Proposed
21 Collective Proceedings on an opt-in basis."

22 He then, under the italicised heading "My experience and
23 perspective on collective redress", sets out his abundance of
24 experience in the competition world, including the repeated
25 failures of opt-in proceedings to provide any kind of useful

1 redress at all. Then in paragraph 40, underneath the
2 italicised heading "Opt-in proceedings would not be
3 practicable in this case", he endorses the view of Mr Maton
4 in Maton 4 and Mr Chopin from the funder -- I am going to go
5 there in a moment -- which identify the practical
6 difficulties of trying to bring the proceedings on an opt-in
7 basis:

8 "I agree with Mr Maton's assessment that a significant
9 proportion of the potential class members are likely to be
10 disinclined to participate ..."

11 Then paragraph 41, first sentence:

12 "I am particularly concerned that if ... the Proposed
13 Collective Proceedings have to be brought on an opt-in basis,
14 only a small sub-set of claimants would obtain any redress."

15 Paragraph 42, you will see Mr Evans sets out the
16 diversity and numerosity of the class with which he is
17 concerned.

18 Paragraph 43:

19 "The picture that emerges is markedly different to the
20 one painted by the Proposed Defendants far from being attractive

21 or

22 practicable, I expect that majority of the members of the
23 Proposed Classes would not opt into the claim."

24 Then 44 over the page, second sentence:

25 "... there are a number of practical and financial

1 obstacles that would disincentivise a significant number of
2 members of the Proposed Classes from opting into any
3 collective proceedings. This would not provide an effective
4 means of redress."

5 Then if we go to Chopin 3, that is the statement on
6 behalf of the funder to which I referred a moment ago, that
7 is tab 31, page 1324, if we go to paragraph 15 underneath
8 "Funding structure for opt in collective actions". In
9 15, Mr Chopin says, which is certainly true, that the current
10 investment terms for an opt-out collective proceedings would
11 not be transferable to collective opt-in proceedings. Having
12 set out the various expenses and disincentives to opting in
13 to opt-in proceedings, in 21 through to 23 he describes how
14 viability turns on threshold criteria and of course I know
15 the Tribunal will be very familiar with this. So the
16 difference between opt-in proceedings that go ahead and ones
17 that do not go ahead are simply whether you have enough
18 people opting in to give rise to an aggregate claim size that
19 is fundable. That is the difference.

20 So Mr Chopin says, as is standard, one builds in
21 threshold breakpoints or criteria to say the numbers that
22 have to opt in by any particular point. So when one is
23 saying it will go ahead or will not go ahead, necessarily it
24 is an opinion or an assessment about how many will opt in and
25 the claim value. That is the difference between those two

1 versions of the world.

2 So Chopin 4, the fourth witness statement of the funder,
3 this is the last you will be pleased to hear of the witness
4 statements from the Original Tribunal, over the next tab,
5 tab 32, page 1335, section D which is above paragraph 15
6 "Economic viability of opt-in collective proceedings".
7 Paragraph 16, first sentence:

8 "It is not possible for me to say, in the abstract,
9 whether we would be able to fund an opt-in claim instead."

10 Then he goes on to say how it would inevitably be more
11 expensive and there is an apprehended lack of appetite.

12 So that is the witness evidence by reference to which
13 I fought the application at first instance. In my skeleton
14 argument for the CPO hearing, which you have at tab 34,
15 page 1360, if we start at paragraph 3, 1361. That is
16 page 1361, paragraph 3:

17 "As developed below, opt-in proceedings would be a poor
18 alternative. Impracticable at best, impossible at worst,
19 they would on any view present a victory only for the
20 Proposed Defendants. The strategy of the Proposed Defendants
21 is plain: unable properly to resist the applications for
22 a ... [CPO] on any other basis, they are deploying the
23 phantom prospect of opt-in proceedings, in the knowledge that
24 (if acceded to by the Tribunal) this would lead either to no
25 collective proceedings at all, or (if feasible, which is to

1 be strongly doubted) to some attenuated and limited opt-in
2 proceedings on behalf of a handful of entities."

3 Then in section C, which is on page 1365 onwards,
4 underneath the heading "Any opt-in proceedings would be
5 impracticable", we see I work through the numerosity of the
6 class, the features of the class, estimated value of the
7 claims -- one can turn the pages -- what it was I was
8 addressing under the heading "impracticable". I am sure you
9 will have the point by now that I was addressing the class as
10 a whole, impracticability, the fact that of those who may opt
11 in that would be a very limited subset, quite possibly not
12 enough to go ahead, but in any event when we are thinking
13 opt-in, opt-out, those are the options, opt-in is not in any
14 sense a feasible or realistic alternative.

15 Perhaps I will just take you to the conclusion.

16 Paragraph 38:

17 "In summary Mr Evans submits that ..."

18 Actually, I will go to 37 which is under "Economic
19 viability". 36, the banks say there would be economically
20 viable opt-in proceedings.

21 37 I say:

22 "All available evidence is to the contrary."

23 I set out Mr Maton. Mr Chopin's evidence, of course
24 including there that he is unable to opine in the abstract on
25 whether it may be possible to fund it or not, but the

1 increased costs and the new funding structure that would be
2 needed.

3 Then 38, having addressed all of the numerosity, claim
4 size, contactability, query viability at all, 38:

5 "In summary, Mr Evans submits that an opt-in action would
6 be impracticable and would fail to vindicate the PCMs' [that
7 is Proposed Class Members] rights to compensation (thus
8 shielding the Proposed Defendants). By contrast, [we] has
9 carefully designed an opt-out action that seeks to maximise
10 the PCMs' chances of securing redress."

11 Then if we go to the transcripts of the hearing, in
12 volume 1, the supplemental tab 2, page 240.

13 THE CHAIR: Ms Wakefield, can I just get in my head the
14 destination to which we are working. Are we going ultimately
15 to a proposition that the Class Representatives' position,
16 fundamental position, has not changed and what he is seeking
17 to do is to explore whether the limited and attenuated type
18 of action that he always envisaged, what you have shown us
19 could have been envisaged at that point, is in fact viable or
20 are you going ultimately to a position to show us the view
21 that was taken then with a view to explaining what has
22 changed?

23 Just helpful to understand what the sort of destination
24 point is that we are going through this material to
25 understand.

1 MS WAKEFIELD: Absolutely. So it is put against me that there
2 was a clear and consistent position the whole way through.
3 What I am seeking to develop orally is that the evidence and
4 the submissions below encompassed the following
5 characterisations, essentially: no proceedings at all may
6 happen or it is very unlikely that proceedings would happen,
7 or even if they did happen they would happen only for a very
8 small minority of the class, those with the biggest claim
9 sizes. We see that when we get to the judgment that you have
10 the judgment of the majority, which says no proceedings will
11 go ahead, and the judgment of the minority saying it is very
12 unlikely they go ahead and even if they will, it will only be
13 for a tiny subset. So we have all three of those
14 permutations which lie on top of my evidence and my
15 submissions perfectly because there is not much difference
16 between any of them.

17 So true it is, and we will come to the appellate stages,
18 that I absolutely use the language "will not go ahead". But
19 that was always to be understood against the backdrop of the
20 evidence and the submissions I made below. But it is also
21 quite good shorthand because when one is thinking about the
22 difference between opt-out and opt-in, the difference between
23 proceedings that conceivably might be able to go ahead on
24 behalf of some of the biggest class members, if enough of
25 them opt in and we manage to get funding, and no proceedings

1 going ahead at all is analytically and forensically very slim
2 and I do not want to trespass too much onto my later
3 submissions, but of course at the appellate level the core
4 thing we were doing was pointing out the starkly illogical
5 nature of the Original Tribunal saying it will not go ahead,
6 yet we give you permission; that even if it had been the
7 findings of Mr Lomas, right, so even if it had been it is
8 very unlikely to go ahead and it will only go ahead if it
9 does on behalf of a very small subset of the class, but you
10 have got permission to do it, that would still be incongruous
11 to say: well, it does not work for the class as a whole and
12 it may not happen. We do not know if enough people will opt
13 in, but if they do it will only be fifty maybe a hundred of the
14 very biggest class members and none of the others.

15 So first of all, I suppose to answer your Lordship's
16 question, it goes to clarity and consistency which I say is
17 being, I am sure entirely inadvertently, misportrayed. I am
18 taking you through the evidence so you see exactly what was
19 said and how it was summarised.

20 THE CHAIR: I am not trying to divert you from your course
21 at all, it is simply helpful to understand just what
22 the ultimate point and proposition is that you are working
23 towards.

24 MS WAKEFIELD: So it was not the clarity, but also there is not
25 the volte face or pivot between two important differences.

1 My submission is still, although I lost on it in the Supreme
2 Court, but it is impracticable for the class as a whole.

3 I say I lost in the Supreme Court, the Supreme Court agreed
4 it is impracticable for the vast majority of class members.
5 We can go there in due course. That is the core difference
6 for me, that was the core difference for me arguing it all
7 the way up and now I really am getting ahead of myself.

8 THE CHAIR: It is helpful and you can assume that we have
9 read into a certain extent and had some sense of where the
10 battle lines will be.

11 MS WAKEFIELD: Absolutely. When we get to material change of
12 circumstance, I think it is said against me rather than use
13 that shorthand, they are not going to go ahead. I say
14 "shorthand", but that we were not interested, they were not
15 going to go ahead. I think it is said against me in the
16 Court of Appeal and the Supreme Court I should have given
17 some kind of parenthetical running commentary saying one
18 particular thing has changed, one other particular thing has
19 changed, it is an accreted picture, Mr Maton still forms the
20 view it is very unlikely that people will sign up but we are
21 keeping it under review. That kind of thing on the way up
22 and I think actually that may be the gravamen of the change
23 of position that is alleged against me.

24 Obviously no complaint can be raised in relation to
25 anything that happened in the Original Tribunal, because they

1 reached the judgment they did by reference to the things
2 I said. So the complaint can only relate to the appellate
3 stages and then I think at the appellate stages it is said:
4 well, even though you were criticising the reasoning of the
5 Original Tribunal, you should have kept it under review and
6 kept us up to date the whole time. But even if that is
7 a good complaint, and I say it is a poor one, not least
8 because it is an accreted exercise, but even if it is a good
9 complaint, again, and we will get there in due course, the
10 question is what would have been different? What would have
11 changed in the Court of Appeal or in the Supreme Court if
12 I had said: oh, actually two things happened in Holland and
13 in Australia, which I am also not allowed to refer to because
14 of *Hollington v Hewthorn*, but imagine I was. If I said those
15 two things but it is still not enough for Mr Maton to change
16 his view at the moment, let us keep it under review, there
17 would have been no difference, no difference at all to the
18 outcome. Because in the Court of Appeal they found that even
19 if opt-in proceedings were totally off the table, that is
20 only a strong factor to be taken into account and the Supreme
21 Court said the Court of Appeal was right to say that and that
22 is what the Original Tribunal did.

23 So it would have changed nothing. Now I really have got
24 entirely ahead of myself in my submissions.

25 THE CHAIR: I took you there, Ms Wakefield.

1 MS WAKEFIELD: You can see where I am going, thank you.

2 THE CHAIR: Thank you.

3 MS WAKEFIELD: So transcripts of the hearing, tab 2, page 240, we
4 see between -- this is Mr Evans' evidence. Between lines 6
5 and 15, he is describing how opt-in proceedings can work very
6 well for a small class with a small number of harmed parties,
7 small number of cartel members and he says he is thinking of
8 the marine hoses cartel. But it falls apart very quickly
9 here and that is because of numerosity, that is what he is
10 getting at.

11 Page 279 to 280, again Mr Evans' evidence, line 7 onwards
12 when you think about the class you tend to think it is all
13 large corporates, large financial institutions, but actually
14 it is an awful lot of medium-sized ones out there ... pure
15 numbers:

16 "... an opt-in case may benefit a very small number of
17 very large, well funded companies. But this regime is not
18 designed to just benefit those who are most capable."

19 So he says 19 to 22:

20 "... on an ethical, moral and practical basis, I see very
21 little case for opt-in in the circumstances."

22 He thinks it is entirely the wrong way of bringing
23 proceedings.

24 Then in my submissions in the Tribunal, which are relied
25 on in my learned friend's skeleton argument, at page 362, so

1 this is from line 10 or about line 10 onwards, I had been
2 making legal argument. I say actually regardless of the
3 right legal approach:

4 "... even assuming that everything is against me as to
5 the law, so assuming that in every case, the tribunal must
6 determine whether collective proceedings should be opt-in or
7 opt-out, and even assuming against me that if proceedings on
8 an opt-in basis are practicable, there is a general
9 preference for them, the facts are such that I still win."

10 It is not a case where presumption can make any difference,
11 because opt-in proceedings are obviously not practicable, in
12 my submission.

13 At the top of the next page:

14 "... I will move on to in a moment, we have estimated --
15 ... only an estimate -- 42,000 class members, of whom we also
16 estimate -- it is only an estimate -- that tens of thousands
17 of them have claims worth an average of £3,500."

18 So again that contextualises my submission. I was not
19 saying no opt-in proceedings conceivably for anyone ever,
20 I was focusing on the class, the whole of the class, why it
21 does not work for them.

22 Then 365 and 366, again working through the low claim
23 value of class members, the non-financial class members with
24 £3,000. Then at the bottom of the page:

25 "...of course, I do accept the point against me made by the

1 Proposed Defendants that if one works down the rows in that
2 table the numbers get pretty big..."

3 But say there the "clear minority" at the top of the next
4 page, on page 366:

5 "So even if opting in might make sense to them -- and I
6 will return shortly to whether it may or may not make sense
7 even for them ..."

8 So that is the Maton evidence that we have been through:

9 "... even if they do have the financial incentivisation, I
10 say we cannot focus on the position of those [I think that
11 must be a reference to claim value perhaps, anyway] 700,000
12 class members perhaps to the exclusion of what the O'Higgins
13 claim refers to as 'the long tail'."

14 So this huge long tail of low value and the dog of high
15 value. Then this is the final reference that is referred to
16 in my learned friend's skeleton argument, page 373. Carry on
17 working through practicability, page 373, line 8:

18 "...my conclusions on practicability, in a sense, are pretty
19 straightforward because I say that every single indicator in
20 the rules and guide is in my favour. I say we have a claim
21 -- claimant class or classes which are highly diverse,
22 difficult to contact, difficult to identify, there are many
23 of them, and for many of them their claim size is small,
24 around £3,500 on our best estimate."

25 Those remain the factors that show that it is not

1 practicable for the entirety of the class.

2 So summarising all of that evidence and submission, our
3 core contention was that opt-in proceedings were absolutely
4 no kind of realistic alternative to opt-out proceedings for
5 the class as a whole.

6 Now if we go to the Original Tribunal's judgment, which is
7 in the authorities bundle, tab 65, page 2057. If we go to
8 page 2249 within the judgment, and if the Tribunal is there,
9 so we are in paragraph 372, we are in sub (2)(ii) and we see
10 the second sentence after the colon:

11 "... the litigation will, as the Applicants contend and
12 which we accept, end if we do not (as the Applicants seek)
13 certify on an opt-out basis."

14 So it is a finding that the litigation will end, it will
15 not go ahead. In paragraph 385, which is at page 22 --

16 THE CHAIR: Is it your position then that that was not
17 actually your contention?

18 MS WAKEFIELD: My position is that is a totally bearable
19 shorthand for the contention. We had no interest in opt-in
20 proceedings at the time, but you have seen the evidence and
21 the submissions that we made. Mr Bailey reminds me of
22 course, as I am going to do shortly, we will look at the
23 findings of the majority but then also the findings of
24 Mr Lomas saying not formally proved that it will not go ahead
25 but very unlikely to go ahead, but there is a cigarette paper

1 between the two. That is my core submission.

2 So 385, still in the majority, page 2259. So the first
3 sentence:

4 "The factors that point in favour of certifying on an
5 opt-out basis are those going to the point the Applicants
6 understandably emphasised, and which we have referenced in
7 paragraph 372(2) above ..."

8 That is the one we have just looked at:

9 "... which is that this is not a case where there is a
10 choice between opt-in and opt-out collective proceedings.
11 Rather, the choice is between opt-out collective proceedings
12 and no proceedings at all."

13 That is underlined. Then we go to Mr Lomas in the
14 minority, page 2286, paragraph 449, second sentence:

15 "It [our evidence] does not formally establish that an
16 opt-in CPO is formally impracticable (impossible), it does
17 establish (on a basis unchallenged by other evidence and
18 certainly unrebutted) that, at the least, it is very unlikely
19 that an opt-in CPO would proceed at all and certainly that a
20 large percentage of the 40,000 UK based PCMs would opt in."

21 So you see Mr Lomas has those three permutations in mind
22 and characterises our evidence as supporting very unlikely
23 and, even if it did go ahead, not for the vast bulk of the
24 class.

25 So you have my submissions on this stage of the

1 proceedings. Essentially we have those three
2 characterisations, no proceedings at all, very unlikely; even
3 if they did, for many PCMs they would not happen at all and
4 of course although there are differences between those
5 characterisations, of course there are, there is no
6 significant conflict, as I sought to explain. Saying that
7 proceedings will not go ahead or are unlikely to go ahead or
8 if they do go ahead, it will only be for a very limited group
9 are very close characterisations. The only difference of
10 course, as I sought to explain earlier in my submissions
11 today, is one of future fact, namely whether the handful of
12 entities which do opt in would amount to a sufficient
13 aggregate total claim that a funder might be willing to fund
14 them and that seemed very unlikely and was of no interest to
15 Mr Evans as class representative when he sought to achieve
16 justice, as he would see it for the class as a whole and saw
17 opt-out proceedings as wildly preferable on that basis.

18 So we are about to come to the Court of Appeal. One of
19 my grounds of challenge against that backdrop was that it was
20 surprising to see the permission given in paragraph 411 in
21 that context. We will go to 411 in a moment. Of course I do
22 accept that the logical dissonance is particularly acute when
23 the permission in 411 is contrasted with a finding that it
24 will not go ahead.

25 THE CHAIR: Unless that is to be understood as referring to

1 the class as a whole.

2 MS WAKEFIELD: Unless it is to be understood that way. That is
3 right, my Lord, but even if it is to be understood as meaning
4 it will not go ahead at all, there is that logical dissonance
5 that is particularly acute. But even if it is to be
6 understood as meaning it will not go ahead at all, but one is
7 to ask oneself what if in fact they had not said will not go
8 ahead at all and they had used the Lomas formulation and, as I
9 said earlier in my submission, the logical dissonance would
10 only have been slightly toned down. They still would have
11 said well it works but only for a very small minority. Still
12 I would have challenged it in the Court of Appeal, but of
13 course that is not what they said.

14 So 411, just so the Tribunal has it, I am sure you do
15 already, page 2267. So we are in disposition, paragraph 411:

16 "For the reasons we have given in this Judgment, the
17 Applications are both stayed, and the Applicants are given
18 permission (if so advised) to submit a revised application
19 for certification on an opt-in basis within three months of
20 the date of this Judgment."

21 It may be worth in this connection also just turning back
22 to paragraph 92, which is at 2103. Sorry to make you flip
23 around in your tab of documents. So in 2103 we have got
24 paragraph 92 and that is where the Tribunal explained this is
25 the course it would take if it was against me on opt-out. It

1 says:

2 "If we were satisfied that a CPO should be made ..."

3 Of course in this case they were, we passed the
4 certification criteria:

5 "... but on an opt-in and not an opt-out basis, we
6 consider that the appropriate course would be to stay the
7 Applications for a three or four month period to give each
8 Applicant the opportunity to consider, with their legal
9 advisers and funders, whether they wish to make an
10 application for an 'opt-in' CPO, on the basis that (without
11 fettering [discretion]) such an application could prima facie
12 be expected to be successful."

13 Then they considered that that would be more appropriate
14 than refusing or making CPO on an opt-in basis or making on
15 an opt-out basis, so they explain why they thought this was
16 the right course.

17 In paragraph 386, which is at page 2260, they describe
18 what they are going to do on the opt-in/out question:

19 "Accordingly, as regards both the O'Higgins PCR and the
20 Evans PCR, we will make a form of order as described in
21 paragraph 92 above."

22 So sitting behind 411 we have 92 and 386.

23 In the Court of Appeal, my learned friend says in her
24 skeleton argument for this hearing, paragraph 12, that:

25 "... it was accepted by the CAT that pursuing the

1 proceedings on an opt-in basis was "not possible".

2 If we go to the skeleton argument, it is at
3 supplementals, tab 38, I think that is probably in your
4 supplemental 2, at page 1450. So this is ground 2,
5 page 1462. This is one of my grounds of appeal.

6 "The majority of the CAT erred in law in deciding that
7 proceedings that should be certified and which can only be
8 brought on an opt-out basis, are not entitled to be certified
9 as opt-out proceedings."

10 It is absolutely right, that is the way I formulated it,
11 can only be brought on an opt-out basis. You will see in
12 paragraph 39 I set out those parts of the CAT judgment that
13 I just took you to. So the two parts from the majority, 372
14 and 385.

15 Then 415 I set out the view -- sorry, in (c) I set out
16 the view of Mr Lomas, characterising the view of the
17 majority, and then also his view at 449 and then I say at
18 paragraph 40 that dispute the majority's very clear findings,
19 it reached and I say "incongruous" conclusion that the
20 proceedings should be certified on an opt-in basis only,
21 which I say is a misdirection of law.

22 We see over the page in paragraph 44 that I rely when
23 explaining the access to justice impact of the legal error on
24 Mr Lomas' conclusion that:

25 "... the CAT cannot 'respect the interests of the PCMs

1 and the administration of justice by adopting a process that
2 we can only conclude is very likely not viable at all ...'."

3 So the argument runs, it is a logical inconsistency
4 argument, it runs by reference to either formulation,
5 proceedings definitely not going ahead or very unlikely to go
6 ahead.

7 Now, in the transcripts of the Court of Appeal --

8 THE CHAIR: In 45 you went on to say, to characterise the
9 only viable proposal as being to bring an opt-out claim and
10 you were running an argument that in effect in those
11 circumstances the Tribunal is obliged to certify on
12 an opt-out basis.

13 MS WAKEFIELD: Sorry, my Lord, could you just repeat?

14 THE CHAIR: If I understand that paragraph, you were
15 effectively running an argument that where proceedings pass
16 the test for certification and the only viable proposal is to
17 bring an opt-out claim, there is an entitlement to
18 certification on an opt-out basis.

19 MS WAKEFIELD: Absolutely.

20 THE CHAIR: So you were effectively saying opt-out is the
21 only viable proposition.

22 MS WAKEFIELD: Yes, absolutely.

23 THE CHAIR: The class has been certified therefore the Tribunal
24 has no option but to certify on an opt-out basis. That seems
25 to be the argument.

1 MS WAKEFIELD: That is absolutely the argument and it remains the
2 position that for the vast majority of the class, opt-out was
3 the only show in town, that is right, but it is absolutely
4 right, and I do not seek to withdraw from this at all, that
5 I expressed the position as being opt-in proceedings will not
6 go ahead and one sees that in particular in the transcripts
7 of the hearing in the Court of Appeal, excerpts of which are
8 set out in my learned friend's skeleton argument and she will
9 doubtless go to.

10 The high point I think of those transcripts is I say it
11 is common ground that no such application would be made in
12 relation to paragraph 411. Obviously, I in no sense seek to
13 distract from the submission I made. Those were the findings
14 of the majority. You have seen the evidence that we filed at
15 first instance, I have taken you through my submissions.
16 Frankly, opt-in proceedings were of no interest to us at that
17 point. We will come on to why 411 was not stayed earlier or
18 there was no application in relation to it earlier. Opt-out
19 proceedings were the only show in town for us, that is right.
20 But I hope I have sought to convey to you at least that the
21 difference between nothing going ahead at all and the low
22 prospect of a small and attenuated thing going ahead is
23 a slim difference analytically.

24 Of course I took -- I say of course, I think this should
25 come through the Court of Appeal judgment because they set

1 out Mr Maton's evidence in Maton 4, but I took the Court of
2 Appeal through Maton 4, as I have you. I took the Court of
3 Appeal through the evidence below so it was not as if
4 I junked, as it were, the complexity or the nuance or the
5 subtlety of the evidence below. They were familiar with it
6 and they were familiar with what I meant when I said it is
7 not going ahead.

8 I would say this, I hope it is unnecessary for me to say
9 but I will say it anyway. Obviously, or I hope obviously,
10 I would not make a submission which I suspected might be
11 factually wrong or which may be a mischaracterisation of
12 intention or opinion. There are some passages in my learned
13 friend's skeleton argument which do seem to come close to
14 making that allegation, bad faith or being misleading or
15 unprofessional conduct.

16 In paragraph 22, for example, of the skeleton argument,
17 it is said that the position that opt-in proceedings were not
18 desirable or practicable and would not be maintained --
19 pausing there for a moment, those three things are all quite
20 different anyway -- it was maintained in order to gain
21 an advantage that the CAT was wrong to refuse to certify on
22 an opt-out basis.

23 In paragraph 50, it is said that we wished to be able to
24 submit to the Court of Appeal and the Supreme Court that the
25 consequence of the decision was to bring proceedings to

1 an end, but I would, if I may, allow myself the opportunity
2 to say clearly in open court now that I did not and I would
3 not ever advance a factual position in court for strategic
4 purposes when I knew or had any doubt or any suspicions
5 at all about its accuracy.

6 Can I also say that my witnesses, Mr Maton and Mr Evans,
7 have given witness statements in support of this application.
8 We are going to come to them. They have offered to be
9 cross-examined on them. We will look at the parts of the
10 skeleton argument of my learned friend which are inconsistent
11 with their statements, but plainly any allegation of bad
12 faith, or lack of probity, of that they are not telling the
13 truth in those witness statements needs to be put to them.
14 They were tendered for cross-examination. That opportunity
15 has not been taken and that means that those allegations
16 cannot be pursued, if allegations they are and it may be that
17 I am reading too much into the skeleton.

18 THE CHAIR: Yes, you would not dispute, I take it, that and
19 it may be a factual proposition that it does not involve any
20 inference of bad faith or any particular motivation, but just
21 looking at the paragraph 45 that you were running a legal
22 argument on the footing that, and you have explained the
23 basis for the footing, that the only viable proposal was to
24 bring an opt-out claim. That is a matter of fact at that
25 time and that was the position.

1 MS WAKEFIELD: That was the position. That was the position, and
2 in fact in a witness statement that Mr Evans filed in support
3 of our application for judicial review he said it is not
4 going to go ahead, I am not going to bring an application on
5 an opt-in basis. But the difficulty I think is that many
6 different things are being conflated against me. One is
7 a clear and consistent position in court. So that is why
8 I took you through everything which was said at first
9 instance, which I repeatedly went back to in the Court of
10 Appeal, in the Supreme Court. That was the evidence on which
11 my application was brought at first instance.

12 There is also intention of the collateral rep. Are we
13 going to use the permission in 411? Is it possible? How few
14 people do we think will sign up? It is absolutely right in
15 the Court of Appeal I said "opt-out proceedings are the only
16 show in town" and the majority found that to be a fact.

17 It is a curious kind of abuse argument in a sense,
18 I think, that often the gravamen of an abuse argument I think
19 is that there was a position advanced at first instance or
20 a finding of fact at first instance that most supported
21 an outcome, but of course the finding at first instance is
22 that opt-in proceedings would not go ahead and yet
23 paragraph 411 was permission to bring opt-in proceedings so
24 it was a factual position least supportive of the thing that
25 I am now trying to do. So it is a kind of back to front

1 abuse in that sense.

2 THE CHAIR: It struck me, you and Ms Ford will correct me or
3 direct us collectively to the right approach, that this
4 argument may stand or fall on what we are to understand from
5 the LA Micro case.

6 MS WAKEFIELD: I think that is right.

7 THE CHAIR: That may or may not be right, but that was --
8 certainly as I read through it, that seemed to me the species
9 of abuse that seemed to be being alleged and you will no
10 doubt make submissions on that in due course and Ms Ford will
11 correct me if I am wrong.

12 MS WAKEFIELD: Absolutely, my Lord, I think that is right. As
13 part of the general broad multifactorial assessment, but of
14 course that is right. That is why I think it is all about
15 what happened on appeal, perhaps, but that is why we have to
16 ask ourselves what is it I should have been saying
17 differently on appeal it is said against me? Should I have
18 been reminding everyone of Maton 4? Well, I did the whole
19 time. Should I have been saying here is the accreted
20 exercise then set out in Maton 10, which you have had for this
21 hearing, running commentary? What would have been different
22 and what was the actual outcome in the Court of Appeal and
23 the Supreme Court? Well, no difference.

24 THE CHAIR: It may be, but again we will see how the argument
25 unfolds, a question of whether in effect the Class

1 Representative is to be treated as having elected not to take
2 up the permission that was granted when it was granted, not
3 to advance an appeal on the footing that that permission was
4 not something that was viable, and that may or may not be
5 the correct way to think about it and it may or may not
6 matter at the end of the day, but it certainly struck me as
7 I read as a question.

8 MS WAKEFIELD: I think it is a difficult kind of election,
9 my Lord, though because on the face of the Tribunal judgment
10 giving him the option, it says they will not go ahead. So it
11 is very strange, then, to read it as a single moment election
12 to say what you have to not appeal.

13 THE CHAIR: Well --

14 MS WAKEFIELD: I see, I see.

15 THE CHAIR: Precisely, you might well say well we are
16 appealing and you appeal on the basis -- on the assumption
17 that if you lose the appeal, at the end of the day, the
18 judgment is affirmed and of course the judgment includes that
19 permission and then the question may simply be whether you
20 should have taken steps at the time to do something about
21 time limit or not. These are the questions which have been
22 forming in my mind which I will be interested for you to help
23 us with.

24 MS WAKEFIELD: They are very good questions. Of course the
25 drafting of 411 is interesting in the sense that the Tribunal

1 imposes a stay and then there is a comma, reading the
2 paragraph as a true lawyer, they are stayed, comma, and
3 permission is given to bring the application in three months
4 so there is a genuine putting on ice of the judgment.

5 So, my Lord, I have addressed my submissions -- the
6 candour of my submissions in the Court of Appeal, the
7 shorthand nature, the not existing in a vacuum nature,
8 perhaps I can put it that way, of my submissions.

9 The second, and we have now explored that at some length
10 between us, is the benefit of that being the factual position
11 at the time, namely that it was anticipated that opt-in
12 proceedings would not happen and 411 would not be used. We
13 talked about the logical error which constituted ground 4,
14 which is stark on the face of the Tribunal's judgment and
15 which I could have appealed by reference to, even if I had
16 run some kind of parenthetical up-to-date commentary.

17 There was one other respect in which the findings of the
18 majority and the fact that an opt-in would not go ahead
19 featured in some of the arguments before the Court of Appeal,
20 which related to strength of the claims and our argument that
21 having elected not to strike out the claims on the basis that
22 that would be procedurally unfair, to bring proceedings to
23 an end principally by reference to merits was a strike-out by
24 another name. So it featured as part of that argument.

25 But otherwise, from an access to justice perspective, no

1 real difference between a limited and attenuated opt-in
2 proceedings being brought and nothing at all. You will
3 recall paragraph 3 perhaps of my skeleton at first instance,
4 I say repeatedly: well, it is impossible or impracticable or
5 no proceedings at all or only on behalf of a very small
6 subset. From an access to justice perspective, no difference
7 between the two and that feeds into the core question of
8 relative appropriateness of the two kinds of proceedings in
9 relation to which some kind of attenuated big class members
10 only opt-in was very much a sideshow to what we were trying
11 to do.

12 So if we go to the Court of Appeal's judgment, it is at
13 page 2349, it is going to be in the authorities bundle and if
14 we look at the grounds of challenge in paragraph 86, you will
15 see that my lovely ground 2 does not even feature in the
16 articulated grounds of challenge. (i) is the second life of
17 the point which I just adverted to, the turning merits into
18 a strikeout. Otherwise it is not there. So the turning
19 merits into a strikeout point is dealt with in paragraph 91
20 on page 2350. Alleged inconsistency. The learned judge
21 summarises my submissions and then in the penultimate
22 sentence of that paragraph says:

23 "I see the force in both those points."

24 It is really a kind of logical point. In paragraph 93,
25 this is under the heading "The failure to explain the linkage

1 between opt-in and the merits". At the end of 93
2 his Lordship says:

3 "... the basis for the CAT's decision reflects a view
4 that making the order will bring the claim to an end ..."

5 That should not have been a relevant consideration. So
6 that refers to the fact that the Tribunal said a claim that
7 is that weak should not go ahead, in its judgment.

8 If we go forward to paragraph 118 under "Practicability
9 and access to justice". Turning the page you will see 120,
10 that is a big extract from Maton 4, which you may recognise.
11 122: data about the different class sizes, and so on. 123:

12 "With respect to the CAT, it is now clear from case law
13 that where there would be no proceedings save on opt-out
14 terms, that is a powerful factor in favour of a claim being
15 certified as opt-out."

16 Then the conclusion in 134, so it was wrong to treat
17 their view as definitive. This is the strength of the claims
18 factor. Also failed to link strength of the claim to the
19 choice it had to make, strength of the claim is neutral,
20 there needs to be a relevant connection, should not be
21 a sliding scale. So all of those points have now been
22 overturned. Then in relation to practicability, statistical
23 evidence, unchallenged, it explains why opt-in is
24 impracticable.

25 So that statistical evidence, I took you to it too

1 briefly I think, but it was in paragraph 122. It is the
2 reference to the table which is appended to the judgment
3 actually. You have it in the judgment here at page 2381,
4 which we went through at some length in the hearing and which
5 the Court of Appeal addressed in its judgment and this is the
6 class members divvied up by size and class and likely claim
7 value, page 2381. So it is practicability across the class
8 as a whole, and no proceedings being viable on an opt-in
9 basis is just a powerful factor, and I referred to that
10 earlier in my submissions.

11 So by the time we get to the Supreme Court, this issue
12 is, as I say in my skeleton argument for this hearing, really
13 peripheral. As my learned friend says in her skeleton for
14 this hearing, we certainly did refer to non-viability of
15 opt-in proceedings in our written case, but we did not,
16 contrary to paragraph 16 of her skeleton, advance our case on
17 that basis, because it simply was not the material basis for
18 the issues which were before the Supreme Court.

19 So if we go to page 1538 of the supplemental bundle, this
20 is our written case for the Supreme Court. This is the end
21 of our addressing the ground of challenge in relation to
22 practicability, and in paragraph 98, we can read through the
23 previous parts, but essentially this again is numerosity,
24 claim size, claim value and so on. Also, of course, the
25 unlikelihood of even those with the biggest claims opting in.

1 That is the Maton 4 evidence. The proceedings not going
2 ahead, access to justice. As the Tribunal knows, this again
3 was run still on the basis that opt-in proceedings would not
4 be brought and were off the table, but in this context. That
5 is paragraph 98 which would bring proceedings to an end.

6 Then paragraph 103, this is in the context of statutory
7 purpose, and in 103 this relates to a particular point,
8 namely the Court of Appeal treating statutory purposes using
9 the word "in this case" as if they were not setting up
10 a general presumption in favour of opt-out proceedings and
11 I say it was a bad point because these proceedings have
12 the distinction of the opt-in decision being fatal to
13 proceedings going ahead. So that is absolutely the case,
14 that is how I was still putting it.

15 Then in the judgment itself it is right that we see, as
16 my learned friend points out, reference to proceedings not
17 going ahead. She lists four paragraphs in paragraph 18 of
18 her skeleton. I will take you to them quickly. So we are in
19 the authorities bundle now, paragraph 5, 2385. This is
20 simply a description of the Tribunal judgment. Then if we go
21 to 2401, this is paragraph 60. Again, this is a description
22 of the Tribunal judgment.

23 Paragraph 110, page 2414. So this is at the end of the
24 Supreme Court's consideration of the strength of the claims
25 factor. You can see that from the heading above. It is

1 addressing the Court of Appeal's view that I took you to at the
2 end of 93 that the CAT was deliberately shutting down a claim
3 which it saw as weak and it said that the Tribunal was right
4 to treat the claim not going ahead as a factor but not being
5 determinative. 385 is the paragraph I took you to before.
6 So essentially they were saying the Tribunal was right in its
7 treatment of this factor.

8 "The Tribunal rightly recognised ..."

9 This is at the end of the paragraph:

10 "... that the potential collapse of the case meant that
11 particular care was needed in assessing the strength of the
12 claim and deciding what weight to give it: see para 118. We
13 consider that the weight that it ultimately decided to give
14 that factor was well within its discretion."

15 We see there, my Lord, the use of the word "potential",
16 the "potential collapse of the case", and you will have seen
17 in my skeleton argument for this hearing, today's hearing,
18 that I set out various excerpts from the transcript in which
19 either my learned friend Mr Beard, representing the banks at
20 the time, or indeed Lady Rose asking the questions used the
21 words "will" or "may" or "likely" or "inevitably"
22 interchangeably when they were talking about the end of
23 proceedings. You will see on the skeleton argument. I do
24 not need to take you to them again. But even in this
25 paragraph when we see "would not go ahead" and "potential

1 collapse," I do not want to labour the point, but it is just
2 an indication of now the difference between it definitely not
3 happening and it very probably not happening is not a big
4 difference.

5 Then the final reference in my learned friend's skeleton
6 argument is paragraph 168, 2432. Again, this is a summary of
7 the Tribunal's view, (ii), which the Supreme Court upheld and
8 said it was entitled to. So again, thinking about our
9 classic shape of an abuse argument, it is those facts that
10 the Tribunal found inconsistent with 411. They said they
11 weighed to the extent they should have weighed it. Or it was
12 up to them to weigh it that way.

13 I see that it is nearly quarter to.

14 THE CHAIR: Shall we take a break then?

15 MS WAKEFIELD: Let us take a break then, then I have just got one
16 small point on the Supreme Court and then I can get onto
17 material change or circumstance. I am sorry I am going a bit
18 slower than I hoped but I will try and speed up as we get
19 towards the lunch break.

20 THE CHAIR: 15 minutes, shall we come back in 15 minutes.

21 MS WAKEFIELD: Can we say 10?

22 THE CHAIR: We can say 10. Certainly.

23 (11.44 am)

24 (Short break)

25 (11.56 am)

1 MS WAKEFIELD: Thank you. I have already mentioned this to my
2 learned friend, but I fear that I may well be going into this
3 afternoon with submissions.

4 THE CHAIR: What we wondered was whether we might take
5 a short lunch break, would it make life very difficult for
6 counsel if we had rose around 1, came back at 1.40.

7 MS WAKEFIELD: Not from my perspective but I do not know. Do you
8 mean we are divvying that up between us which is only fair?
9 I am not sure an extra 20 minutes will do everything we need it

10 to

11 but will go as quickly as I can.

12 THE CHAIR: We can then sit a bit late in the afternoon as
13 well.

14 MS WAKEFIELD: Okay I share the determination to finish today so
15 I will do my best.

16 THE CHAIR: It was allotted with a second day available.
17 When I read the case it struck me as one that really should
18 be done in a day and I would welcome counsels' assistance in
19 achieving that, but if turns out to be absolutely impossible
20 so be it. But let us see how we get on before we make that
21 decision.

22 MS WAKEFIELD: Thank you. So having said that I would look at
23 some more part of the Supreme Court, I will not, mindful that
24 I am going to drive ever onwards. I think you have my
25 submissions so let us turn to the evidence underpinning our

1 application today.

2 So that is evidence in support of in particular
3 Mr Maton's view, which he sets out in paragraph 29 of
4 Maton 10, which is this:

5 "I believe, looking at it in the round that as at
6 May 2026, as opposed to April 2021, April 2023 or April 2025
7 there is now substantially more prospect that it might be
8 possible to build an opt-in book of large corporates of
9 sufficient value set out against this, as I have described,
10 evolving landscape."

11 So you will have read I know because you have read the
12 applications and the evidence Maton 10. It is in the core
13 volume, tab 4, page 33 but that is his conclusion and that is
14 a pivotal support. Our application today is a material
15 change.

16 Now, my learned friend in paragraph 62 of her skeleton
17 argument, which is at page 77, says:

18 "Whether there has been a material change of circumstance
19 and/or whether the Evans Application is abusive falls to be
20 determined objectively in light of all the circumstances. It
21 does not turn on the subjective intentions or opinions of
22 either Mr Evans or Mr Maton ..."

23 It is open, she says, for the Tribunal to form a view on
24 those questions without the need for cross-examination. But
25 in the following paragraphs of the skeleton argument,

1 essentially the opinions, the bases, the factual bases for
2 Mr Maton changing his view are set out and criticised.
3 Criticisms are raised in relation to them of the nature that
4 would be put in cross-examination and then in paragraph 68,
5 it says:

6 "Standing back, the only material change since Mr Evans
7 declined the Original Tribunal's invitation to re-plead is:
8 his application for opt-out certification finally
9 failed."

10 So I do say that that is an invitation to this Tribunal
11 to disbelieve Mr Maton's evidence and to say in fact all that
12 has happened is opt-out has failed.

13 I do say that without putting those points to Mr Maton,
14 that is a conclusion which is simply not available to you.

15 I also say looking at each of the criticisms set out in
16 skeleton argument form rather than by way of
17 cross-examination none, of them hold water. So if we
18 start with the class outreach exercise. So you will have
19 seen it is addressed in paragraph 27 of Maton 10, page 40.
20 He describes the exercise in more detail, paragraphs 42 to
21 47. I know that the Tribunal will have read those. The
22 outreach material itself behind tab 41. In Maton 11, filed
23 with our skeleton argument, the number of indications of
24 interest now stands at 51. Yesterday, we filed Maton 12,
25 I think it has now gone up to 65. So those are class members

1 who by reference to the outreach materials have said, yes, we
2 are interested.

3 So my learned friend in her skeleton argument says it should
4 have
5 been undertaken, this exercise, but it would have been
6 obviously a waste of time to undertake it earlier when it
7 was hoped that we would win in the Supreme Court and we would
8 have opt-out collective proceedings. There was no need to
9 perform this exercise any earlier. She also says that it has
10 produced at the time only 31 expressions of interest out of
11 a class of 42,000 -- this is in her skeleton argument which
12 is put forward at 0.07% compared to Maton 4 with 14 out of
13 321. In fact even on the face of Maton 10, he sets out that
14 at least 434 organisations were contacted. Plainly we did
15 not contact 42,000 class members, not least since you have
16 seen my submissions they are not contactable, and we
17 contacted only the big ones.

18 So the success rate is now 60 out of 434 plus it is said
19 in Maton 11, I think, another few dozen have been contacted
20 since then. So it is a significant level of interest amongst
21 the class and those are, if I can put it this way, real
22 people. We spoke a lot in the Original Tribunal about the
23 difference between the PCR, Mr Evans, and the class
24 themselves and whose interests really are at stake and these
25 are entities who have expressed interest in being part of

1 opt-in proceedings and who if these claims are dismissed,
2 have no other way of bringing claims in this jurisdiction
3 because time expired back in 2021, and they presently have
4 live claims.

5 THE CHAIR: I do not think Mr Maton gives us any aggregate
6 value for those who are interested?

7 MS WAKEFIELD: No, those who have expressed interest have not been
8 asked to indicate value. So this is an iterative process. Of
9 course if we get the permission which we seek today, then the
10 next stages in the process will be seeking to form, seeking
11 to get funding in place and funding has that series of
12 thresholds where funding can be withdrawn if entities which
13 commit properly, opt in properly, if the aggregate does not
14 come up to the necessary threshold to get onto the next stage
15 So that is the class outreach exercise.

16 PROFESSOR MULHERON: May I ask you just a very quick question.
17 Just about that aggregation, obviously with the aggregate
18 claim as an opt-out you were referring to 47(c) (ii). If
19 this were to go forward as an opt-in, would you be seeking to
20 allege an aggregate sum based upon that provision, 47(c)
21 (ii)? The interplay between 47(c) (ii) and an opt-in
22 collective proceeding is, as I understand it, something which
23 is still developing but how -- maybe you cannot answer that
24 now, but it seems to me quite an important point were this to
25 be an aggregated opt-in class.

1 MS WAKEFIELD: I think that is an extremely interesting question,
2 if I may say. The interaction between the realities of
3 obtaining funding where one has to know the actual amount in
4 dispute and recoverable at the end, compared to the statutory
5 permission to have damages awarded without reference to the
6 position of class members is, as you say, professor, I think
7 entirely untested at present and so I simply unhelpfully do
8 not know the answer to that. But the reality is the funder
9 will need to know actual aggregate class value by reference
10 to some kind of records and it is of course the provision of
11 those kinds of records which is the very thing in Maton 4 we
12 found people were rather reluctant to give.

13 PROFESSOR MULHERON: Yes, because 47(c) (ii) specifically refers
14 to "represented persons" not to "class members", so it is
15 clearly focusing upon those who remain in the class and of
16 course the word "recoverable" I think also was mentioned
17 recently in Rowntree that that is what it means,
18 "recoverable" versus "irrecoverable". "Recoverable" relates
19 to the representative persons.

20 I just flag it up but I think it is something that the
21 Tribunal would have in mind were this to proceed.

22 MS WAKEFIELD: Of course I think that a person becomes -- I think
23 that person becomes a represented person once the CPO is
24 made.

25 PROFESSOR MULHERON: Yes, under 73(2) I think that is the

1 definition of a "represented person", yes, yes.

2 MS WAKEFIELD: One has these expressions of interest, then they
3 become retainers, we have the funding structure put in place,
4 we put in our revised application, we hopefully have the CPO
5 which is made, we have the opt-in process, hopefully those
6 who have retained us do the formal opt-in process. At that
7 moment, they change character and they go from "class
8 members", which they are just on the face of the nature of
9 our class description, and they become "represented persons"
10 and at that point we will be in the territory of an aggregate
11 damages award if that is something we need for the purpose of
12 damages limitation. I think that is the structure.

13 So that is class outreach, 63 and 64 of my learned
14 friend's skeleton argument.

15 65, the maturation of the collective proceedings regime.
16 Mr Maton's evidence is criticised as being vague assertion
17 and then the two cases in particular which are focused on are
18 CICC and the Trucks case. So the dates for CICC is that the
19 CPO was made on 9 August 2024. We see from the judgment that
20 entities which have opted in include EasyJet, Aer Lingus,
21 Saga, AMEX. This is in Mr Maton's witness statement. There
22 is no reason to say that that is irrelevant or should have
23 been known of at any particular earlier moment. It is an
24 obvious recent up-to-date indication of the appetite of big
25 entities to opt in.

1 The Trucks case is referred to in paragraph 65 as well.
2 It is said dismissively, well, this is obviously wrong
3 because that is just a correction under the slip rule. It
4 may be our fault perhaps on this occasion that Mr Maton's
5 statement is insufficiently well expressed, but the point is
6 the April 2026 judgment is the first thing that happened
7 after the opt-in proceedings, the opt-in process came to
8 an end so the date of certification of the RHA case is
9 5 August 2024, the end of the opt-in process was
10 28 February 2025, that having been extended by the CAT for
11 three months because it was so hard to get people to opt in.

12 Then the fact that this slip-rule correction happened in
13 2026 is the thing that has popped into the public domain to
14 allow Mr Maton to say: well, they must have got enough people
15 then to be carrying on because if not, they would not have
16 bothered going through this correction. So that is the
17 relevance of the Trucks point.

18 Hausfeld's experienced book-building in another claim is
19 just dismissed as being entirely irrelevant. I do not see
20 why. It is Mr Maton's evidence. He gives his evidence as
21 a very experienced professional and his own experience
22 through his own professional life is that currently
23 book-building is receiving significantly more success over the
24 last six months in relation to the large corporate clients
25 than he hitherto would have expected. He says:

1 "The experience has been more positive than I could have
2 predicted until recently ... and is a material factor [why
3 I have reached a] more considered view ...[as to] whether opt-in
4 proceedings might be viable for at least some members of
5 the class."

6 Then the final point is the limitation point which I have
7 referred to already. The claims -- fresh claims, follow-on
8 claims in relation to these decisions were time-barred in
9 July 2021. So if this Tribunal were to refuse my
10 application, grant the application against me, the
11 consequence is that there would be, in this jurisdiction at
12 least, no possible recovery in follow-on claims in which of
13 course liability has been established. It is said actually
14 by my learned friend that this is a point in the banks'
15 favour and it is put as some kind of accrued limitation
16 defence, but of course there is no accrued limitation defence
17 at all. I brought proceedings in time. There is no accrued
18 limitation defence and it is unusual, to say the least, to
19 hear a defendant applying essentially for summary assessment
20 for strikeout to pray in aid as a factor on favour: oh, if
21 you get rid of these guys, then I will be home free, there
22 will be no one else. That is a very unusual factor for
23 someone to pray in aid in favour of striking out timeously
24 brought proceedings, these were in time. It is true that if
25 they get rid of these then there is peace for them. That is

1 a poor argument.

2 So those are the paragraphs of my learned friend's
3 skeleton argument which I addressed simply because they
4 should, I say, have been put to Mr Maton, but my having gone
5 through them does not, I hasten to add, open the door for it
6 to said that they were properly explored with him. Plainly
7 his evidence is critical to the bringing of this application,
8 Maton 4 was before and Maton 10 is now.

9 So I say that is the material change of circumstance that
10 means that whereas in the Court of Appeal and in the Supreme
11 Court I said opt-in proceedings are of no interest to us
12 at all, I now say, by reference to that evidence and of
13 course the evidence of Mr Evans as well, things have changed
14 and they have changed for all of the reasons set out in his
15 witness statement.

16 As I said to you earlier this morning, if it is said:
17 well, look the picture is accretive, some things happened
18 really early, some things happened a bit later, some a bit
19 later than that, you have got Mr Maton's evidence, I started
20 my submissions after the transcriber break, paragraph 29 of
21 Maton 10. He says April 2021, April 2023, April 2025. It is
22 only now that his view has changed. That is his evidence.
23 If I were to run some kind of running commentary using up my
24 precious airtime about things that have changed but not quite
25 changed his mind yet, that would have changed nothing at all.

1 So moving to paragraph 411, why did we not apply to stay
2 permission earlier. So, it is a timing complaint in essence
3 of allegedly sitting on our hands. That is since the Supreme
4 Court judgment. I will deal with that shortly, but it is
5 a very poor complaint. There is also a timing complaint
6 about the currency or the lifetime of that three-month
7 permission in paragraph 411 and, in particular, the complaint
8 is we should have taken steps to preserve the position
9 earlier. We summarise in paragraph 40 of our skeleton
10 argument by reference to so many paragraphs, I am afraid,
11 paragraph 25 to 26 of our Application, paragraph 8 of our
12 Reply, and the reason in short that nothing was done in
13 relation earlier was, critically, the apparent non-viability
14 of opt-in proceedings at that time of course. Of course that
15 was a critical factor. It was of no interest to us, as
16 I have said through my submissions earlier today, against
17 that factual and that opinion evidence and my submissions
18 which I have now worked through ad nauseam and of course that
19 feeds into why the Maton 10 and the material change of
20 circumstance is so important.

21 It is also, however, also obviously true.

22 THE CHAIR: Would it be fair to put it this way but please do
23 tell me if it would not be fair. You say it was previously
24 of no interest to us. It has become of interest because
25 ultimately you failed in the Supreme Court and since then,

1 and there may be a discussion to be had about the timing of
2 the various steps and the point at which minds have been
3 applied and minds have changed, it is only in light of the
4 Supreme Court decision that it is of interest to investigate
5 opt-in proceedings, because up until that point the way you
6 put was it was not of interest for all the reasons that you
7 outlined to us at the beginning of your submissions.

8 MS WAKEFIELD: That is entirely right, my Lord, so our focus
9 was on opt-out proceedings and whilst there was a real
10 potential of opt-out proceedings, opt-in proceedings were of
11 no interest to us, practically speaking that is right, but on
12 occasion where in the course of the appellate process I have
13 to say: well, are opt-in proceedings even viable? Would they
14 happen, would they not happen if opt-out were off the table?
15 Of course I always said, no, they would not happen. We are
16 not interested in them. That I think is the nub of the
17 criticism against me, but that is another sense in which even
18 the question being put to me is relatively peripheral because
19 the focal point was on opt-out proceedings and talking about
20 practicability, and I know you have this point by now, but
21 practicability for the class as a whole, opt-out does
22 everyone, opt-in does either no one at all or a really slim
23 group of people who may or may not come forward in sufficient
24 numbers, who knows. We thought very, very probably they
25 would not and now we think, per Maton 10, quite possibly they

1 may, but still it is going to be a shadow of what opt-out
2 might have been.

3 So the main reason why we did not do anything about 411
4 earlier was because we were not interested in it and thought
5 it was unviable. But equally, well, not equally, but
6 obviously the right time for any application for opt-in
7 proceedings to be made, if it were to be viewed as viable and
8 of interest, would be after exhaustion of the appellate
9 process. It would have been totally redundant and
10 an absolute waste of everyone's time to do everything in
11 parallel. You will have seen in the documents our reference
12 to the shared understanding that that was the position, that
13 everyone thought we would be coming back to a resurrected
14 Tribunal judgment at the end of the appellate process. So
15 those points about the right time for this sort of
16 application and a shared understanding are obviously linked.

17 THE CHAIR: If that were and in effect the Tribunal judgment
18 is resurrected by the end of the appellate process, what the
19 Tribunal envisaged was an application for permission to amend
20 within three months. We will be interested to hear from you
21 about why -- because I think the Supreme Court decision was
22 in December, why we are here in July with an application
23 which is asking for another five months before we even see
24 an application for permission to amend.

25 MS WAKEFIELD: Quite, my Lord.

1 THE CHAIR: But you will no doubt come to that, but that is
2 something I would be interested to hear from you on.

3 MS WAKEFIELD: Just by way of -- I will come to that in due
4 course, but just by way of backdrop, the Original Tribunal
5 had no submissions on the appropriate length of time that
6 would be needed for an opt-in application so three months was
7 not something that was thought about and then set down in
8 that way. Also, I am coming to this, but of course the
9 position of the defendants was always, no, we are applying to
10 dismiss and that is why we made the application we need to
11 make in order to have the funding to do the preparatory work
12 in order to take advantage, if we can, of that permission and
13 you will have seen at the back end of Maton 10 why it is we
14 say we need five months, but in fact between the Order of the
15 Supreme Court in February and matters crystallising between
16 us really in March or April when happily we received the
17 Directions Order from this Tribunal, there was obviously,
18 this speaks for itself, a short period of time in which we
19 were under the threat of dismissal and getting this
20 application on, in accordance with the directions for this
21 hearing made by this Tribunal in the procedural order.

22 THE CHAIR: Taking that point at the end of Mr Maton's
23 statement where he explains why -- I think two things, one
24 why for understandable reasons he might -- the Class
25 Representative might not wish to undertake that work without

1 at least confidence that the Tribunal would entertain the
2 application, and secondly, why it is going to take
3 five months. It still does not answer the question why you
4 did not come to the Tribunal immediately after the Supreme
5 Court decision and ask the Tribunal the question you are now
6 asking at that point.

7 MS WAKEFIELD: Well, we will work through the timing perhaps
8 shortly of the judgment, submissions, the order made.

9 THE CHAIR: Because you have mentioned the directions
10 decision and it is fair to say those directions also
11 envisaged that you would be coming here with an application
12 for permission to amend and that was paragraph 1 of that
13 direction.

14 MS WAKEFIELD: Yes.

15 THE CHAIR: You are asking for another five months, and
16 I understand from Mr Maton's statement why you are asking for
17 five months, but I think it does beg some questions about why
18 that application is before us now and not at a much earlier
19 point in the process.

20 MS WAKEFIELD: Of course. I will get there very shortly. In
21 fact, I just want to address quickly the end point of 411
22 I think at the time. You have my point as to the shared
23 understanding and our apprehension that everything would be
24 revivified at the end of proceedings, which is something I am
25 going to come on to. It is said by my learned friend in her

1 skeleton, I think, that one of the kinds of prejudice that
2 they say -- the banks say they suffer is if I had made
3 an application to stay at the time, that would have had
4 an impact on the submissions I could have made in the Court
5 of Appeal and in the Supreme Court and so maybe pushed me
6 into some kind of qualification of the position, perhaps.

7 I say that is a bad submission, with respect, because
8 I would just have been asking the Tribunal to carry on
9 holding the ring. I would just say, Tribunal, you found as
10 a fact we will not go ahead, you gave us permission under
11 411, please preserve the continued effectiveness of your
12 decision until the appellate process is over. I could
13 obviously have applied for it in those terms and then made
14 the submissions I made, which I would have made in any event
15 because they reflected my understanding of the facts.

16 The second is a serious allegation, if I have understood
17 it correctly, namely that the banks appear to say that the
18 reason we did not do anything about 411 was strategic. So if
19 we go back into the skeleton argument and now we are at
20 paragraph 49 of my learned friend's skeleton. You will
21 see -- one can see at the top of the page actually he took no
22 steps "to seek either a stay of the Paragraph 411 Direction or
23 an extension of time to comply with it". Then in 49 it says:

24 "The reason for this approach was not that it would have
25 been inefficient to reformulate his claim while [it] was

1 [being] pursued ... Nor was it because of any shared
2 understanding ... Nor was [it kind of any] technical or
3 formal omission."

4 "50. Rather, the reason is that which was candidly
5 submitted ... [in] the Supreme Court."

6 So this was when I was saying to the Supreme Court that
7 the reason I was interested in pointing out that proceedings
8 would come to an end was that otherwise the risk is that 411
9 gives the impression that there is a choice for the whole
10 class essentially. I wanted to be able to make that
11 submission. But the allegation here is as if the evidence of
12 Mr Maton and Mr Evans, in particular about the shared
13 understanding, namely that the whole of the CAT judgment
14 would be revived and we would be able to take advantage if
15 at that point it made sense to us, the 411 at the end of the
16 appellate proceedings, that that evidence which is given in
17 terms in Maton 10 and in Evans 5 is untrue. Again, I say
18 that needed to be put to them directly.

19 Just for your note, in Maton 10, that is in paragraph 6
20 to 12, he concludes:

21 "Accordingly, no application to vary paragraph 411 was
22 made, because none was thought to be necessary. In any event,
23 such an application was not considered given Mr. Evans' view,
24 and mine, at the time that opt-in proceedings were not
25 viable."

1 Then Evans 5, paragraph 16, page 56.

2 So if I turn now to timing since the Supreme Court
3 judgment, which is the point that your Lordship just raised
4 with me, so in section B of Maton 10, which is I think in the
5 core, page 36, he sets out the steps taken since the Supreme
6 Court judgment. So, judgment was handed down on 18 December,
7 and on that same day we wrote to the banks to say the CAT
8 judgment had been restored and seeking an extension of
9 a further three months to give six months in total, which
10 would have expired on 18 June 2026. So that letter is at
11 tab 14, page 116. There is no need to go there, but it is
12 exactly as described.

13 On 23 December, tab 15, page 119, the banks reply saying,
14 no, the three months period to file a revised document
15 expired and expired back in 2022. There was further
16 correspondence between us, and then on 21 January both sides
17 filed submissions with the Supreme Court. So ours are at
18 tab 11 of the core bundle, this is at page 98. The Tribunal
19 will see, in particular at paragraph 4 and page 99, we are:

20 "... considering whether to amend [the] application ...
21 in light of the clarification of the law provided by the
22 Supreme Court, and in particular whether it is possible to amend
23 ...
24 to bring the claims on behalf of a narrower opt-out class
25 (possibly alongside an 'opt-in' class of larger class

1 members). In order ... to do so, the Tribunal's direction
2 ... would need to be varied ..."

3 So that is what we are asking the Supreme Court to do,
4 the Supreme Court directly to get into the Order, if I can
5 put it that way, and vary what the CAT directed. In fact
6 there was no relevant order following the CAT judgment, the
7 Original Tribunal judgment, despite indication that they
8 wished to have an order. That often happens, as you will
9 know from CAT judgments. So to get into the direction of 411
10 and vary it for us.

11 The banks' submissions are in tab 12, page 109. At
12 paragraph 5 onwards they say we should not be able to
13 reformulate the opt-out class. This is perhaps obvious, but
14 the Supreme Court judgment in the section on practicability
15 said it may well be possible to formulate the class
16 differently to remove those big players who they said should
17 be opting in and have an opt-out class for those for whom it
18 is impracticable.

19 In paragraph 8, they say the permission which was given
20 in the judgment expired, and it is not now open to him to
21 reopen that order. That is at the end of paragraph 8.

22 THE CHAIR: Is it not enough just to note there was
23 correspondence between the parties in which they rehearsed
24 their respective positions. Ultimately, the Supreme Court
25 has remitted the matter to us to decide whether or not or in

1 effect case manage and to decide what we do about the
2 direction of paragraph 411. I mean, I obviously do not want
3 to deter you from saying things to us that you feel we need
4 to know, but I wonder how much of the detail of the exchanges
5 are helpful to us.

6 MS WAKEFIELD: Well, I take that indication, my Lord, but the
7 reason why I suggest that this is helpful is the thing that
8 was live at this point was opt-out and that would always have
9 needed the Supreme Court to get into 411. So it was not
10 a mere resurrection of 411, that was not what we were
11 interested in, and in any event it would not have been
12 resurrected in that way until the Order of the Supreme Court,
13 it is not made on the handing down of the judgment of the
14 Supreme Court, but we were arguing about what happens next
15 and in particular remittal to this Tribunal and the Supreme
16 Court itself to modify 411. We had emails --

17 THE CHAIR: Sorry, just going to the headline, is the
18 headline point here that if it were to be said against you
19 that you should have come to the CAT after the Supreme Court
20 judgment in December, that would be not a fair comment
21 because you were engaging with the Supreme Court in order to
22 discuss between you the basis upon which the Supreme Court
23 would remit back to the Tribunal and it is only once that is
24 resolved that there is anything in a sense or you know what
25 the position is with the clarity that enables you to come to

1 us and ask us to do something.

2 MS WAKEFIELD: Absolutely so, my Lord, absolutely so and in fact
3 it would have been entirely improper, whilst we were engaged
4 in correspondence with the Supreme Court making submissions
5 to the justices who heard the appeal, for us in parallel to
6 go to the Tribunal and seek to do anything. The Supreme
7 Court was still seized of the case until the Order was made
8 so that of course is the big point which your Lordship
9 entirely grasped immediately and the second thing is the
10 point we were talked about at the time was opt-out so it was
11 a different thing anyway about the terms of the remittal,
12 what is going to happen, what directions are they going to
13 give and in fact via a series of emails, which you can see at
14 page 128 of the core bundle, they give us judgment on various
15 points.

16 So 133 "not open to Mr Evans to seek a CPO on an opt-out
17 basis in these proceedings", dismissed, Court of Appeal should
18 "have an opportunity to consider in light of the court's
19 judgment" whether to vary the claim. That is on 30 January
20 before the Order is handed down. Then we have further
21 submissions about Sterling Lads and the ruling of the court
22 on page 128, again given by way of email, is as regards the
23 claims following on from Sterling Lads, the panel accepts our
24 submissions that the court judgment does not determine those
25 claims. So we are engaged in this process backwards and

1 forwards. We keep on asking for an oral hearing, they say
2 no, put things in the papers, we get these emails. Then on
3 17 February we have the Order.

4 On 19 February, two days later, we inform the Tribunal of
5 the order and that we are going to liaise with the banks on
6 a proposed timetable. Of course you are very familiar with
7 the Order from the Supreme Court, but it is at tab 9 of the
8 core bundle, page 92, and it sets out the terms of the
9 remittal essentially. But of course interestingly, and
10 your Lordship the Tribunal is astute to this point, "(1) the
11 appeal is allowed and the decision of the CAT is reinstated."
12 So there we are. We know opt-out is off the table, 411 is
13 back. (4) Mr Evans' application is remitted to the CAT for
14 further case management to consider whether to vary the
15 direction at paragraph 411, make the submissions that I am
16 making today.

17 Just in terms of timetable, 19 March the banks wrote to
18 us. We wrote to them on the 24th proposing that we make the
19 present application by 19 May. 7 April they make their
20 application. 8 April we oppose.

21 THE CHAIR: Just so I am clear about what you were envisaging
22 by 19 May, am I right to understand that you were envisaging
23 at that point an application for permission to amend and not
24 simply an application for more time to consider whether to
25 bring forward an application to amend?

1 MS WAKEFIELD: I think at that point --

2 THE CHAIR: We can look at the correspondence if it is
3 helpful.

4 MS WAKEFIELD: We can look at the correspondence, but as soon as
5 the dispute between us about 411 became live and certainly as
6 soon as it became obvious that there was going to be an
7 application to dismiss against us, it became necessary for us
8 to have this sort of -- to make this sort of application in
9 terms of having funding for the work that we propose to do.
10 So paragraph 411 obviously gives us permission to file and,
11 as the Tribunal knows, the purpose of my application today is
12 to have that permission to file and as soon as it was known
13 that that was in dispute, it became apparent that that would
14 need to be resolved. I hope that is a helpful answer.

15 THE CHAIR: Yes, remind me, 411 was permission to file
16 an application to amend was what 411 envisaged.

17 MS WAKEFIELD: On an opt-in basis within three months, yes,
18 absolutely. As I took you to earlier, I think unhelpfully,
19 the first thing we did after we saw the judgment was ask for
20 the extension of time so that is the end of the Maton 10
21 point. So we knew that three months was not enough. We
22 asked for six months then, we say five months now, we have
23 really pulled it down as short as we possibly can. That was
24 always needed, but that was really just a pure two months
25 extra, three months extra point.

1 THE CHAIR: Well, you put it that way and you pointed me to
2 Mr Maton's statement who explains why five months is
3 required. It is five months now. You are asking for
4 a further five months on top of the five months since
5 February and if we wind forward, if we were to grant the
6 application and you come forward with an application to amend
7 in five months, let us say I appreciate that that would be
8 yet to be seen, the defendants would require time to respond
9 and we would be considering the application which the
10 Original Tribunal envisaged would be before it in
11 three months, sometime next year perhaps, a year after the
12 Supreme Court judgment was handed down.

13 MS WAKEFIELD: My Lord, that is probably right. We need five
14 funded months. That could have run from the date of the
15 order if it had been agreed between us or -- but we need to
16 have funding to do the work in order to bring on the possible
17 application. I do not know if it is of any assistance, my
18 Lord, but whilst of course it is true that 411 has
19 three months on its very face, the Original Tribunal granted
20 us permission. So very quickly it was obvious that things
21 were moving on, things were moving up and there was no way
22 any of us would have been hearing something in parallel to
23 that process.

24 THE CHAIR: Yes. Thank you.

25 PROFESSOR MULHERON: Ms Wakefield, I just want to just -- I am

1 just puzzling about the Supreme Court Order of 18 December,
2 paragraph 2, as you have taken us to, Mr Evans' application
3 for a CPO is dismissed insofar as it applies to the
4 certification on opt-out basis in respect of the Three Way
5 Banana Split and Essex Express decisions. So why then,
6 referring to paragraph 15 of Mr Maton's 10th affidavit, why
7 is it then still being considered that Hausfeld and Mr Evans'
8 primary focus in this period, which presumably postdates that
9 order, is on the possibility a narrower --

10 MS WAKEFIELD: Sorry to cut across you. So the dates are
11 confusing for Supreme Court orders. 18 December is the date
12 of the judgment at the top and then the date of the order is
13 over the page, 17 February.

14 PROFESSOR MULHERON: So can we take it that this consideration of
15 a possibly narrower opt-out is simply off the table then
16 sitting alongside?

17 MS WAKEFIELD: By 17 February. Yes, so the submissions that
18 I took you through earlier, you get the judgment, then we
19 correspond, we make submissions ultimately to the Supreme
20 Court saying please vary paragraph 411, because we are
21 considering bringing a different kind of opt-out and it is
22 an opt-out for a narrower class along the lines that you,
23 Supreme Court, identified in your judgment and the Supreme
24 Court then in the emails, which we just looked at, determined
25 those submissions at the very end of January. Until the end

1 of January that was our primary focus.

2 Then we said okay, but opt-out is still on the table for
3 Sterling Lads, because they have not been determined. The
4 banks said no, no, no, Sterling Lads actually sotto voce were
5 also determined in the Supreme Court. We have a round of
6 submissions on that. Then we have the final email from the
7 Supreme Court saying we are right on those submissions and
8 opt-out is still on the table for Sterling Lads, but it is
9 off the table for Three Way Banana Split and Essex Express or
10 at least Sterling Lads is remitted with the full panoply of
11 options to you.

12 Then we get this order on 17 February. In the period --
13 in the two-month period between judgment hand down or a bit
14 less than two months and 17 February, we are making
15 submissions, we are working out the scope and the
16 consequences of the Supreme Court judgment and our focus was
17 still is there an opt-out version of Three Way Banana Split
18 and Essex Express which we can apply for on remittal and we
19 thought there was and the Supreme Court, essentially
20 presumably for the Henderson v Henderson-type reasons,
21 essentially said, no, that is not gone now, even though there
22 would be a way in theory of our redesigning the class to
23 match the judgment in this case. They said no, no, that has
24 gone, but we are remitting you on the terms set out in this
25 Order and this happened on 17 February.

1 Then we had the correspondence between us and with the
2 Tribunal and of course it was on 21 April, so two months
3 later, that the Tribunal set down the timetable for this
4 hearing. So in the light of that frenetic degree of activity
5 and our I would say prompt proposal to pursue this sort of
6 application, now we know it to be necessary in this Tribunal,
7 proposed directions -- the directions which were in fact made
8 to the other side, the other side say, no, they bring on
9 their dismissal application, that is on 7 April, and very
10 quickly we have everything set down for this hearing and
11 obviously once things are set down for this hearing, we did
12 not in parallel purport to invoke 411, the very thing which
13 was the subject of this application and nor obviously could
14 it be said against me that that is some kind of a bar to this
15 application succeeding, the very premise of this application
16 being resolved fairly in this timetable.

17 THE CHAIR: So the technical point you are here seeking
18 variation of paragraph 411 direction and I think also you
19 must be seeking variation of paragraph 1 of the April
20 Directions Order being handed down. Because what that --

21 MS WAKEFIELD: I do not know if that is right, my Lord.

22 THE CHAIR: What that paragraph envisaged was an application
23 for permission to amend and, if I understand correctly, what
24 you are asking us to do is grant you more time in order to
25 bring forward an application for permission to amend.

1 MS WAKEFIELD: No, my Lord, I am seeking permission to refile or
2 to file a revised application and then the next thing that
3 will happen will be a certification hearing.

4 THE CHAIR: Well --

5 MS WAKEFIELD: So it depends perhaps how you read the words
6 "permission to amend", but certainly my intention was to
7 bring on proceedings giving me permission to amend in the
8 future to amend or to file an amended proceedings.

9 THE CHAIR: So what was envisaged was a -- because I now have
10 supplementary 1238 I think a letter from Hausfeld,
11 paragraph 5, where what is said is that Mr Evans "will apply
12 to the Tribunal for permission to amend his application to
13 an opt-in claim prior to preparing the substantive opt-in
14 application". So it is perhaps somewhat --

15 MS WAKEFIELD: I can only apologise for the lack of clarity of
16 language. I hope that you can see that it is a lack of
17 clarity, rather than my asking for a different thing.

18 THE CHAIR: I can understand exactly what you are asking for
19 today.

20 MS WAKEFIELD: That is what I intended or we intended to be
21 asking for then and permission to file it in the future and
22 I need to know that I am able to file the revised application
23 in order to have the funding to do the work to permit any
24 file -- any application to be revised in that way.

25 THE CHAIR: Yes, so actually the letter should have -- would

1 have been clearer had it said "permission to file".

2 MS WAKEFIELD: "Permission to file", absolutely that would have
3 been clearer and I can only apologise.

4 THE CHAIR: Yes, well there is no need to apologise. That is
5 helpful. Thank you.

6 MS WAKEFIELD: Thank you. So that is what has happened in the
7 Supreme Court process.

8 The merits of the underlying claims. So it is suggested
9 by my learned friend that eventual dismissal of the claims is
10 inevitable by reference to the strength of the claims is one
11 of the factors to be taken into account. That is in the
12 dismissal application paragraph 5.7(c). But that entirely
13 ignores, my Lord, the approach that was taken by the original
14 Tribunal. I know you have this point already, but if we just
15 go into the CAT judgment, it is at the end of the
16 authorities, tab 65, page 2130. Paragraph 147, we are in
17 (3)(iii) and at the top of 2130:

18 "... it is entirely fair to say that the Tribunal
19 was ..."

20 This is in correspondence with us:

21 "... more focussed on trying to understand the
22 Applicants' respective cases than on the technical question
23 of strike out ... It is also entirely fair to say that the
24 kind of discussion of the difficulties of pleading ... harm
25 ... never took place during the course of the ... hearings.

1 Our concerns ... were altogether less focussed."

2 So the purpose of this reference, I will take you to one
3 more, my Lord, or two more, is to show that the original
4 Tribunal, as the Tribunal knows, took the view that we should
5 be given an opportunity to re-plead to improve the strength
6 of the claims. That was their view having sat through
7 considerable evidence on the point.

8 Paragraph 240 and 241 of the CAT judgment, page 2196, 240
9 they say they are going to consider strikeout of their
10 own motion and they could be struck out. 241:

11 "We are in no doubt that they should not exercise that
12 jurisdiction."

13 Then (2):

14 "We accept that this is a new and (in pleading terms)
15 untested area."

16 You should not exercise strikeout in law that is subject
17 to uncertainty and there is ongoing development:

18 "... and not without the Applicants having the
19 opportunity to address the concerns we have articulated much
20 more clearly in this Judgment..."

21 So it is a fairness reason.

22 Mr Bailey points out to me, entirely correctly, that the
23 next sentence:

24 "... our attempts to understand the claims advanced by
25 the Applicants have caused developments in our thinking, and

1 it is entirely fair to say ..."

2 Over the page:

3 "... there has not been an opportunity, on the part of
4 the Applicants, to address our final thinking on the question
5 of pleading."

6 Of course, the Tribunal itself identified ways in which
7 it thought the pleading could be improved. We see that at
8 page 2181 under the heading italicised emboldened "Overcoming
9 the difficulties". 243(1)(iii) in the penultimate sentence
10 there is a reference to courts being receptive to experts'
11 statistical evidence in support of a pleaded case and then
12 critically on the next page, so we are in (3)(i), first
13 a statistical correlation between infringement and effect on
14 the market. Then over the page (ii) an articulation of the
15 links in the causal chain.

16 So taking the second one first, in paragraph 48(c) of our
17 skeleton argument we say that Mr Evans intends to consider
18 doing exactly that, further articulating the links in the
19 causal chain, and then as to the first of those (i) the
20 Tribunal will have seen the letter from our expert economist,
21 Mr Ramirez, filed in support of our application. It is at
22 tab 20 of the core bundle, page 141. He refers to this
23 paragraph in the Tribunal judgment and says it is feasible
24 for him to conduct a sort of regression analysis which would
25 give rise to the pleadability of this sort of statistical

1 correlation and whereas in our application before he gave
2 that sort of evidence in relation to what would be done in
3 the future, how we would prove our case at trial by reference
4 to different kinds of evidence, in particular disclosure from
5 the defendants, what he is doing in the letter is saying:
6 I can now at the pleading stage by reference to, in
7 particular, data held by Reuters do an early version of that
8 exercise to give rise to the kind of pleadable statistical
9 correlation that the Original Tribunal said was the sort of
10 thing it was looking for when it was looking at this kind of
11 pleading. So that is what we intend to do as part of our
12 revised applications.

13 Turning then having worked through everything that was
14 said before and the material change of circumstance and
15 timing and merits, I now get to the law on abuse of process.
16 So the central authorities are of course very well known. My
17 learned friend sets them out in her skeleton argument and we
18 know finality, bringing forward your whole case, not being
19 vexed twice in the same matter, broad, merits based,
20 multifactorial assessment like abuse of dominance, the
21 categories are not closed. We have taken a slightly
22 different approach in our skeleton and used the summary of
23 all the principles in the judgment of Mr Justice Andrew Baker
24 in the Gruber case. That is of some interest here because
25 that was alleged abuse within a single set of proceedings.

1 It is a split trial and everything that had been argued at
2 liability was held to apply for quantum. You can run new
3 liability points at quantum basically. But we know, we know
4 all the principles.

5 The core jurisprudential interest aspect of the
6 present case is exactly that which was raised by you, sir,
7 earlier today which is the LA Micro point. So if we turn
8 that up it is in the authorities bundle, tab 37, page 961.
9 Now the facts are mildly complicated or at least they were to
10 me at the end of the summer term, but I will purport to
11 summarise them as follows. Paragraph 1 of the judgment of
12 Sir Christopher Floyd, with whom we see at the end of the
13 judgment Lord Justice Newey and Lord Justice Lewison agreed.
14 The issue is whether a US company which is called "Inc" in
15 the judgment had a 51% beneficial interest in the shares of
16 a UK company or whether those shares were beneficially owned
17 by Mr Lyampert and Mr Bell, as they contended, and Judge
18 Jarman KC held that they were owned by Mr Lyampert and
19 Mr Bell.

20 In paragraph 5, in the 2015 proceedings which gave rise
21 to the 2017 judgment, it was held that the 2004 agreement was
22 that 51% of the share capital was to be owned by Inc. In
23 paragraph 9, there was a falling-out between the two
24 shareholders of Inc, Mr Frenkel and Mr Lyampert, in which
25 Mr Frenkel disclaimed Inc's beneficial interest in the UK.

1 That is in 2010.

2 In paragraph 16 we see the statements made by Mr Bell in
3 the 2015 proceedings that the owners of UK were him,
4 Mr Frenkel and Mr Lyampert via Inc and we see similar set out
5 in paragraph 17. So that is the kind of complex history,
6 which we will come back to when we are applying the
7 principles set out in the case.

8 So paragraph 18 under "Ground 1: estoppel by conduct".
9 The issue was whether Mr Bell was estopped from seeking the
10 declaration he did because of the statements he made in the
11 2015 proceedings. The law is set out.

12 So there are three cases, if we start with the Kok Hoong
13 case in paragraph 19, to which Sir Christopher comes back in
14 paragraph 22. Viscount Radcliffe's formulation is that a
15 party cannot take a position in court and procure from it
16 an order and then change position. In paragraph 22, just
17 focusing on this case, the first sentence of 22:

18 "The phrases used in these cases suggest that it is not
19 every change of position by a party or a witness which will
20 create this form of estoppel ... Viscount Radcliffe's
21 formulation requires (a) that the party's stance in the
22 earlier proceedings was the means by which he procured
23 an order, and (b) the circumstances must be such that the
24 court has no option but to hold him to his former stance."

25 So strict conditions there.

1 THE CHAIR: Is your short point, at the end of the day, you
2 lost in the Supreme Court so whatever position you adopted
3 did not procure any order at least from the Supreme Court?

4 MS WAKEFIELD: That is absolutely right, my Lord. We lost in the
5 Supreme Court, we lost at the first instance and my
6 submission is my compelling ground 2 was not even referred to
7 in the Court of Appeal judgment, which I did win but then it
8 was overturned.

9 Of course I am going to develop submissions on how these
10 points apply, but you have my point as well that there is in
11 reality no analytical difference or very little analytical
12 difference between this very slim kind of potential opt-in
13 going ahead and true practicable opt-in for the class as
14 a whole. You have that point.

15 So that is the Kok Hoong case. Then Gandy v Gandy, which
16 is paragraphs 20 and 21 and again Sir Christopher comes back
17 to it in 22. Gandy v Gandy is that a litigant could not take
18 advantage of a decision on one construction of a deed and
19 then turn round and win a suit on a different construction.

20 So perhaps if the Tribunal just reads 20 and 21. You
21 will see it is the language of Lord Justice Cotton but in
22 particular Lord Justice Bowen: having suggested one
23 construction in the old suit and succeeded on that footing,
24 you cannot turn around in a new suit and rely on
25 a diametrically opposed construction.

1 In 22, we see those parts of the judgment of
2 Lord Justice Cotton and Lord Justice Bowen set out.

3 "These phrases suggest it must be apparent from the
4 earlier judgment that the stance taken by the party was
5 a reason for the judgment which he obtained and that it would in
6 all the circumstances be unjust to allow the party to resile
7 from the stance taken earlier."

8 Then in 23 we have the US case, 23 and 24, New
9 Hampshire v Maine. It concerned a change of position in
10 relation to a marine boundary in which there was a prior
11 judicial pronouncement, endorsement of a prior judicial
12 pronouncement in Davis v Wakelee that when a party assumes a
13 certain position in a legal proceeding, and succeeds in
14 maintaining that position, you cannot change it subsequently,
15 in particular if it is to the prejudice of the party who has
16 acquiesced before.

17 Then there are three factors articulated. The later
18 position must be -- and this is in paragraph 24, I am sure
19 you are there already, halfway down:

20 "... a party's later position must be clearly
21 inconsistent with its earlier position ... the court may
22 enquire whether the party has succeeded in persuading a court
23 to accept the party's earlier position, so that judicial
24 acceptance of an inconsistent position in later proceedings
25 would create the perception that either the first or the

1 second court was misled."

2 Of course material change of circumstances is key to
3 that:

4 "Thirdly, the court may ask whether the party seeking to
5 assert an inconsistent position would derive an unfair
6 advantage or impose an unfair detriment on the opposing party
7 if not estopped."

8 Now, those three cases, it might be thought, suggest
9 differing articulations of the principles. The authors of
10 Spencer Bower & Handley, Res Judicata say there is no reason to
11 suppose

12 that there is any difference between those various tests.

13 In 26 Sir Christopher says:

14 "... it is clear, therefore, that this form of estoppel by
15 conduct is one which is approached by means of a broad,
16 merits-based assessment, and is not constrained by strict
17 rules (as, for example, issue estoppel). The matters to
18 consider include, but are not limited to, those enumerated
19 ... in the New Hampshire case. It is material to ask the
20 question whether it is apparent that the earlier decision was
21 obtained on the footing of, or because of, the stance taken
22 by the party in the earlier proceedings. Absent that factor,
23 whilst the change of position may affect the credibility of
24 the party or the witness concerned, there will not be an
25 impression that one or the other court was misled into giving

1 its decision, so that the administration of justice risks
2 being brought into disrepute."

3 So that is the thing that he is looking for. He is
4 elevating the importance of the thing in relation to which
5 the position was taken and its consequence for the judgment
6 of the court below and that is what he says is the core
7 factor. We see it is a core factor because when he applies
8 the test to this case in paragraph 29, he says he is unable
9 to accept the submissions that there is an estoppel in that
10 case. The events of 2010 were not directly in issue in the
11 2015 proceedings, they did not have to establish anything.
12 Then in the last sentence:

13 "It is not possible to say with anything approaching
14 confidence that he won before Miss Tipples [who was sitting
15 as a High Court judge] on the footing of or because of the
16 position he took in relation to continued ownership by Inc."

17 So even those he made those inconsistent statements in
18 the 2015 proceedings, because there was not that -- and they
19 are flatly inconsistent statements, frankly, of things in his
20 knowledge as a witness, right, but they say, well, it goes to
21 credibility sure, but because there is not that necessary
22 causal pathway from the position taken to the judgment that
23 was obtained, Sir Christopher says "no abuse". You can
24 change your position and you can argue on a different
25 position.

1 THE CHAIR: So the position on that analysis what constitutes
2 the abuse is procuring an outcome through the process of
3 the administration of justice on a particular footing.

4 MS WAKEFIELD: It does absolutely.

5 THE CHAIR: Which you then seek to resile from and a question
6 arises whether in effect by resiling from it you are in some
7 sense impugning the earlier judgment.

8 MS WAKEFIELD: Exactly so.

9 THE CHAIR: Because you are taking a different position.

10 MS WAKEFIELD: Yes.

11 THE CHAIR: That may not be quite the right way to think
12 about it.

13 MS WAKEFIELD: It is.

14 THE CHAIR: But as you are presenting it, that is the
15 critical feature that you need to see in order for it to be
16 (inaudible) process.

17 MS WAKEFIELD: That is the critical feature that we extract from
18 this case and this line of case law. There are other cases
19 which made the same point. It is pretty well established.

20 THE CHAIR: That is helpful. Shall we rise now and come back
21 at 1.40 and see how we get on. Thank you.

22 (1.01 pm)

23 (Short break)

24 (1.40 pm)

25 THE CHAIR: Ms Wakefield.

1 MS WAKEFIELD: Good afternoon. So I turn now to my submissions
2 on abuse of process. If I start with paragraph 411, it is of
3 course the case that our application for a CPO passed the
4 certification threshold. It was brought on only one basis,
5 namely seeking an opt-out. You have heard repeatedly now all
6 the evidence we filed and submissions we made in relation to
7 impracticability of an opt-in so the least favourable factual
8 support and then the Original Tribunal held that proceedings
9 would not go ahead and that we should have permission to file
10 an opt-in application.

11 What we are trying to do in the present application, of
12 course, is use the very permission which the original
13 Tribunal gave us. So when we think about concerns to do with
14 finality or being vexed twice in the same proceedings or
15 second bite of the cherry or the abuse of going back and
16 arguing it differently the second time around or doing
17 something different from the judgment, none of them apply
18 here. The concerns about finality just have no application
19 when what we are seeking to do is to pick up the order and
20 put it into effect, do the very thing which the original
21 Tribunal wished us to be able to do. Not only is there no
22 second bite at the cherry and no public interest injustice
23 and no re-litigation, but in fact it is furthering and
24 consistent with the outcome of the original judicial process.
25 It is my learned friends, I say, who are seeking to arrive at

1 an outcome which is contrary to the determination reached by
2 the Original Tribunal.

3 So that is point 1: consistency, the consistency of what
4 I am trying to do now with paragraph 411. Of course it is
5 consistent, I am going back into the paragraph and just
6 asking to do the same thing by reference to more time.

7 Secondly, delay or time expiring. The complaint against
8 us is that we let time expire, but in terms of the period
9 between the decision of the Original Tribunal and the end of
10 the appellate process, that is a submission with no
11 materiality at all. Because had a stay been applied for and
12 granted, particularly in the terms I outlined earlier this
13 morning a simple "please, Tribunal, hold the ring for us,
14 keep it on ice, let us just make sure you are keeping it on
15 ice for us" that stay would have been granted. The stay
16 would have been granted. This is the obvious time for the
17 permission which was given under 411 to be used. It is the
18 efficient and the practical and the cost effective and the
19 non-redundant moment for the opt-in option given to us by the
20 Original Tribunal to spring into life.

21 The submission about time expiring also ignores the
22 material change of circumstance. I will come on to that
23 separately in my submissions. But the thing which means that
24 this is a worthwhile application to pursue is the evidence
25 set out in Maton 10 and Evans 5 about the increased prospects

1 of an opt-in being viable.

2 The final timing or delay point is the one which we
3 explored together before the short adjournment, namely what
4 had happened between Supreme Court judgment and now.

5 I sought to set out to the Tribunal the various stages which
6 were happening all over the place between us and the Supreme
7 Court and then, as quickly as possible, to this Tribunal.

8 So I say there is no relevant time or delay point.

9 Material change of circumstance. You have got the
10 evidence of Maton 10, Evans 5. I know you have read both of
11 those and I took you through the outreach exercise,
12 Mr Maton's recent book-building experience, the change
13 litigation landscape and Mr Maton's view that proceedings are
14 more likely now to be viable than he thought hitherto.

15 THE CHAIR: In terms of the -- insofar as what you are
16 seeking is a variation of 411, the very fact there has been
17 an appellate process and ultimately the Supreme Court
18 decision is that something that you could point to as
19 a material change of circumstance? Insofar as let us say you
20 had come in March and said we were given three months but
21 that expired back then, and there has now been this appellate
22 process since then and that is a change of circumstance which
23 would justify you in effect transposing that to now, let us
24 assume that everyone assumed that that was what was going to
25 happen anyway does not fly, is that part of the argument?

1 MS WAKEFIELD: I think that could be part of the argument, of
2 course, because when we had the judgment the first time round
3 everyone knew that an appeal was going to be launched. We
4 had submissions about the appeal and then permission to
5 appeal was granted. That was plainly the next thing that was
6 happening in the litigation. To the extent that our failure
7 to apply for a stay at that time needs justification, it was
8 plainly everyone knew we were pursuing an appeal in relation
9 to the very thing that would render 411 redundant.

10 Now we know we have lost opt-out, 411 is not redundant,
11 the change of circumstance is that we focused back in on the
12 resurrected First Tribunal judgment. We see that in
13 paragraph 1 of the order of the Supreme Court. The decision
14 is reinstated so, yes, my Lord, I do say at that as well.

15 You have my submissions on material change of
16 circumstance, in particular that in relation to the
17 credibility or the honesty of Mr Maton's evidence or the
18 reasons he puts forward, my learned friend is willing to
19 wound but afraid to strike. She does not cross-examine him,
20 so his evidence has to be accepted.

21 My next point, no strategic advantage from the earlier
22 position. So as I sought to work through with you this
23 morning, first of all in the Original Tribunal the views
24 expressed by the majority were entirely unsupportive of the
25 permission being given in 411, it is the reverse abuse case.

1 Then the articulation of the position in the appeals as no
2 proceedings would be brought had no impact or a very minimal
3 impact. It was not a central plank of the argument at any
4 point. We have looked at this already, but the Court of
5 Appeal did not even address ground 2 directly and essentially
6 it was common ground between the Court of Appeal and the
7 Supreme Court that proceedings coming to an end was a factor
8 to be weighed in the balance but the Tribunal did it. So
9 essentially they looked at the Tribunal's reasoning, the
10 Tribunal's findings that proceedings would not go ahead,
11 compared it to 411 and said that the Tribunal was right or
12 was within the exercise of its discretion to do what it did.

13 As I said at some length earlier, if I had known and then
14 parenthetically added some words about the accretive nature
15 of the overall picture changing slightly but still not enough
16 for Mr Maton to change his view, that is unlikely to have
17 made any difference to anything that happened at the
18 appellate level.

19 The next point is: is strategic advantage even the right
20 test here? Because as we were exploring just before the
21 short adjournment, we have got the LA Micro test, which
22 posits a stricter standard for this kind of abuse. Although
23 we know abuse of process, we are looking at that broad
24 multifactorial picture, we are balancing private and public
25 interests, that is what Lord Bingham tells us to do in

1 Johnson v Gore Wood. We also know we have this line of
2 authority at Court of Appeal level saying if the particular
3 allegation is a change of position in litigation, then the
4 question that the Tribunal needs to ask itself is: was that
5 position something which gave rise to the judgment, and
6 classically judgment in its favour, and we do not have that
7 here. If that is the test, and I say it has to be the test
8 on the authorities, then I am the right side of that as well.

9 Turning to alleged prejudice to the defendants, now
10 obviously the defendants do not like --

11 THE CHAIR: Sorry, just so I understand where these
12 submissions slot in, at the moment are these all directed to
13 the abuse of process argument?

14 MS WAKEFIELD: They are, my Lord, and then I am going to come on
15 to rule 115(2), the variation argument, and again to give
16 a full taste of my submissions to come pretty quickly I hope,
17 I will be saying that essentially it is the same factors or
18 I have the same fact pattern, because although under Tibbles
19 material change of circumstance is elevated, I have that, and
20 it is a multi-factorial assessment and these are the factors.
21 So I am presenting it once this way and then I hardly need to
22 say it again and then I will say something quick hopefully on
23 Sterling Lads and then I will be able to sit down and let
24 Ms Ford begin.

25 THE CHAIR: The reason I ask was it struck me that the

1 LA Micro test which is -- assuming that is the test for abuse
2 of process in this sort of fact pattern, that strict
3 requirement might not be exhaustive of the extent to which
4 one might look at the whole circumstances in the context of
5 the exercise of a discretion to extend.

6 MS WAKEFIELD: I think that is right, my Lord, I put it both
7 ways, strategic advantage in LA Micro. The public policy
8 underpinnings of LA Micro are unlikely to be confined just to
9 abuse of process, in my submission. But it is true at that
10 they are most clearly articulated, to my knowledge at least,
11 in that case which relates to abuse, but we are in a world
12 here, as we all know, when we are talking about abuse, where
13 we are identifying public policy underpinnings, particularly
14 in relation to the proper administration of justice, those
15 sorts of concerns are likely to run through everything in the
16 same way.

17 Prejudice to the defendants. Obviously, the defendants
18 do not like being sued and they would rather that despite the
19 findings of liability against them that there are no actions
20 in damages, but plainly being sued in itself is not
21 a prejudice or not a relevant presently to be taken into
22 account here. So that answers some of the points in my
23 learned friend's skeleton argument. So for example in
24 footnote 14, and we do not need to go there, it is said that
25 all aspects of the overriding objective favour bringing these

1 proceedings to an end. It would be less expensive if they
2 stopped. That is true, but that is not how that factor is
3 meant to work.

4 THE CHAIR: Just going back to your point about those who
5 might choose to opt in and the question of limitation, your
6 analysis presumably would be that these are -- if there were
7 individual entities that chose to opt in, these are entities
8 with claims which have in effect already -- are already being
9 pursued because they are part of the class and the class is
10 simply the proceedings are simply the sum of all the claims
11 that are the claims of the individuals in the class and you
12 would say that if there are individuals who wish to take
13 those forward in the context of an opt-in and can secure the
14 means to do so, that there is a public interest factor in
15 those claims being ultimately adjudicated on.

16 MS WAKEFIELD: Absolutely, my Lord, I say there is a very strong
17 public interest factor and it is not just that they were in
18 effect timelessly brought, they were. That is what happens
19 under the statute. We filed our claim form and that
20 relevantly stopped time running for all the claims, those
21 identified in the class definition and that is the period we
22 are in now. Time has stopped running for their claims. They
23 have been properly brought, they are in time and for those
24 people who have indicated a preliminary interest in opting
25 in, they have a live claim here in this Tribunal now and that

1 is the claim which they would be vindicating.

2 THE CHAIR: You would say it is not their fault as class
3 members with claims that these proceedings have taken a very
4 long time to go -- it is no criticism of anyone -- through
5 a lengthy appellate process.

6 MS WAKEFIELD: It is not their fault at all. Although it has
7 been a long time, your Lordship has entirely the point. It
8 is the length of the appellate process. No one has been
9 sitting on their hands. Whenever it has fallen back to
10 either side, nobody has pursued what they should be doing
11 with anything other than proper expedition. We went to the
12 Court of Appeal, the banks then went to the Supreme Court,
13 and now we are back here and that is just how long it took to
14 get it all resolved.

15 THE CHAIR: Okay.

16 MS WAKEFIELD: That takes us nicely onto the first point in terms
17 of prejudice in fact. It is said by my learned friend that
18 proceedings have already dragged on for six years and that
19 the banks have incurred expense in addressing the proceedings
20 in the way that Mr Evans chose to advance them. Well,
21 six years is the length of the appeal. Costs were incurred
22 in relation to the opt-out application. Of course that has
23 failed. There are costs orders and we are now back seeking
24 to take advantage of the paragraph 411 permission. But
25 plainly the Original Tribunal knew the basis on which we

1 brought our application.

2 In fact an argument at first instance was whether that
3 limited their discretion so they could not order opt-in and
4 they said and, you have seen that in paragraph 92 of the
5 judgment, even though you have only brought it on that basis,
6 we are giving you permission to bring it on a different
7 basis. That was core to what they did. So both the length
8 of proceedings and the way in which we originally put our
9 application are irrelevant.

10 If it is said against me, as I think it may be, that
11 despite that obvious feature of the judgment at first
12 instance, namely that it was legitimate for us to pursue
13 opt-out and then to have an order on an opt-in basis, if it
14 is said that it is somehow contrary to Henderson v Henderson
15 for my client to have filed opt-in proceedings at the same
16 time, that is a very bad point that it is not expected in any
17 of the current hearings before the Tribunal that one is meant
18 to turn up with a panoply of different options and anything
19 else forecloses you in the future. That is now how it works
20 and the Court of Appeal held that regardless of the basis on
21 which an application is brought, the Tribunal has the
22 discretion to order that it should be brought on
23 an alternative basis. That is core to how the regime works.
24 So Henderson v Henderson would be a very bad point in that
25 context, if that is what is being said.

1 We have addressed the limitation defence. In 54 they say
2 well now the facts are a long time. The facts are a long
3 time ago. That is the consequence of the appellate process.
4 Plainly it does not mean they are un-triable. They are not
5 as long ago as all that.

6 THE CHAIR: We should remind ourselves, should we, that
7 liability is already established?

8 MS WAKEFIELD: It is established.

9 THE CHAIR: So it is essentially causation and quantum, which
10 is not to diminish the complexities that go into causation
11 and quantum.

12 MS WAKEFIELD: Exactly so and we have all the benefits of
13 an infringement which was investigated by the Commission
14 and access to the file and everything else so this is not
15 a case in which it would be unduly difficult to try it now
16 and plainly it would be an outrage to say that following an
17 appellate process that makes the facts so long ago that they
18 are no longer triable. It is a bad point. It is a bad
19 point.

20 Finally, public interest of the class members, which we
21 have already discussed. We now know 65 are the expressions
22 of interest. Of course the entire class could come forward,
23 but we know that is wildly unlikely. We do not know how many
24 more would be interested, but they have life claims and that
25 is why when we saw the dismissal application against us we

1 said that is an application for a strikeout. It is
2 an application for a summary determination of claims and
3 there is a heavy high threshold to be met, in my submission,
4 before this Tribunal could properly accede to the application
5 against me and forever get rid from this jurisdiction of
6 claims in relation to the loss suffered by those class
7 members.

8 THE CHAIR: Yes. Ms Ford will put me right, but my reading
9 of the basis for the dismissal application is (1) abuse of
10 process to now pursue opt-in at all and if that is right,
11 well I think you would have to accept that dismissal would
12 follow.

13 MS WAKEFIELD: It is a binary choice I think at this stage, yes.

14 THE CHAIR: Separately they say: well, you are well past the
15 time, at the time when they made the application, well past
16 the time allowed in 411. They invite me and the Tribunal not
17 to extend time and if we were not to extend time, again
18 dismissal would follow. So there are proper bases upon which
19 a Tribunal could dismiss, depending on its view of those
20 arguments, without grappling with the strikeout test.

21 MS WAKEFIELD: That is absolutely right, that is absolutely
22 right. One does not need to grapple with the strikeout test
23 and in a sense it is the binary flipside of my applications,
24 but it may be useful simply to have in mind the consequence
25 of refusal of my application and granting of my learned

1 friend's is definitively to put to an end those claims which
2 are currently live, they are stayed under 411. I do not need
3 an application in relation to the stay order. As part of
4 good administration and the Tribunal sorting out the cases on
5 its docket, it probably needs to work out what to do with
6 a permanently stayed case, but it is stayed in an unlimited
7 sense under 411.

8 So, in my submission, all of those factors under abuse of
9 process point in favour of there being no abuse in this case,
10 that broad multifactorial assessment where we have the
11 consistency with the original order of the Tribunal, we have
12 the protection of the position of the class members, we have
13 no delay other than in a purely technical sense in the point
14 that this was obviously the right moment for it, you have
15 that point, and material change of circumstance and we also
16 have the LA Micro point. It is either no strategic advantage
17 and/or here abuse of process, the stricter LA Micro test, not
18 the factual basis for any judgment in my favour before. So
19 all of those factors I rely on to say no abuse here.

20 Turning to 115(2), which I can, as I say, hopefully take
21 a little more quickly, as the Tribunal knows, 115(2) is the
22 power of the Tribunal to make an order or direction to vary
23 or revoke any order or direction of the Tribunal. It is
24 common ground that the Tribunal almost always, and I will
25 explain this in a second by way of footnote if nothing else,

1 adopts the approach taken under rule 3.1(7) of the CPR. The
2 footnote, in as much as we need one, is in the Kent v Apple
3 case. The Tribunal made clear that 115(2) can sometimes be
4 a bit broader when it needs to be, because you have
5 a statutory jurisdiction, sometimes it needs to mirror the
6 inherent jurisdiction of the High Court. That was what
7 happened in Kent v Apple, but broadly speaking and in this
8 case we are in a situation where 115(2) mirrors 3.1(7).

9 The main case then is the High Court case of Tibbles
10 which we have got in the authorities bundle, tab 18,
11 page 402. It is a judgment of Lord Justice Rix. Just for
12 your Lordship's note, for the Tribunal's note, in
13 paragraphs 28 through to 32, maybe 33, his Lordship is
14 considering some of the earlier case law on applications to
15 vary and paragraph 28, in particular the judgment of
16 Mr Justice Patten, as he then was, in the Ager-Hanssen case
17 in which we see the articulation of the classic two
18 circumstances in which the power should normally be
19 recognised either shows some material change of circumstance
20 or that the judge who made the earlier order was misled in
21 some way, whether innocently or otherwise, as to the correct
22 factual position before him.

23 Then 29 the Collier case in which the language is "only"
24 and I take you there simply because over the page in 31
25 his Lordship, Lord Justice Rix, explains that there is no

1 real inconsistency between the two and it is simply that
2 those two routes through are not and should never be put
3 forward as exhaustive. They are not exhaustive. They are
4 just the main two circumstances. So he reconciles the
5 earlier case law in that way and then if we get to
6 paragraph 39, which is the classic paragraph that one sees
7 cited in variation cases normally, we see in (1):

8 "The rule is apparently broad and unfettered, [with]
9 considerations of finality, the undesirability of allowing
10 litigants to have two bites of the cherry, and the need to avoid
11 undermining the concept of appeal, all pushing towards
12 a principled curtailment of an otherwise apparently open
13 discretion."

14 So pausing there for a moment, you will immediately see
15 the similarity between these principles and the ones which
16 underpin abuse, but also when we think about how they apply
17 here, finality, two bites at the cherry, undermining the
18 concept of appeal, we see immediately how inapposite they are
19 in the sense that this is a case in which there is no risk of
20 engaging those principles. It is nothing like an appeal
21 because we are not going contrary.

22 THE CHAIR: The question I was going to ask you is: is there
23 a difference between an application to change the substance
24 of a former order and an application which is simply seeking
25 to extend the time for compliance, or the time within which

1 something can be done? It strikes me that those
2 considerations are really directed to -- in most cases will
3 be directed to an attempt to change the content of the order.

4 MS WAKEFIELD: Absolutely.

5 THE CHAIR: Questions of the time within which something is
6 permitted to be done really raise rather different sort of
7 issues.

8 MS WAKEFIELD: Yes, absolutely.

9 THE CHAIR: Finality comes into it because one of the reasons
10 why courts and tribunals impose deadlines is to secure
11 finality, but it is a finality in a different sense I think.
12 It is finality in relation to the good administration of
13 justice and the good, fair and efficient conduct of
14 proceedings which are slightly different considerations,
15 I think.

16 MS WAKEFIELD: Absolutely, absolutely. I entirely agree with
17 that. The core circumstance in which the limitations on the
18 general power to vary are imposed is when you are trying to
19 go back and change, substantively change the outcome and this
20 is not that kind of case at all. That is why in my skeleton
21 argument we refer to the cases on relief from sanctions by
22 way of analogy and of course, as we know, the test there is
23 whether the breach is serious or significant, why the default
24 occurred and all the circumstances of the case so a broad
25 multifactorial assessment.

1 I also drew the Tribunal's attention to what we see in
2 paragraph 40 of Tibbles in which Lord Justice Rix says he is
3 left with the feeling that these cases that set out these
4 kind of -- these strictures and these rules may not reveal
5 the true core of circumstances for which the rule was
6 introduced and there are other rather different cases which
7 raise no problems, do not lead to disputed decisions.
8 A classic example there is liberty to apply in relation to
9 a CMC order.

10 When I argued a similar application to this in front of
11 the president of the Tribunal in a case called Cabo recently,
12 which I refer to in my skeleton argument, the President
13 refers to that category of decision. Of course, that is
14 going to be the rump of applications to vary when one comes
15 to court and says either if a deadline has passed, relief
16 from sanctions or if it is in the future, this is why I
17 am not going to be able to meet it. In those cases it would
18 not make any sense to say you need to show material change of
19 circumstance or why the facts have been misled. It does not
20 matter in the same way because you are just saying it was
21 still the right order, thanks, but actually can I do it now
22 not then? That is the thing you have justify and that is
23 what I have been focusing on.

24 THE CHAIR: Yes, the kind of case that Lord Justice Rix has
25 in mind is the kind of case where one of the concerns is that

1 you are effectively subverting the ordinary requirement to
2 appeal a decision if you want to change it, whereas the kind
3 of issue where it is simply a question of timing, that is
4 much more of a kind of case management-type decision.

5 MS WAKEFIELD: Exactly, exactly so, my Lord, exactly so. One
6 sees that through the cases. That cannot sit an appeal of
7 itself type reasoning comes through all of the cases in this
8 area.

9 So you have then my submissions on the law and turning to
10 the application of the law to the facts, essentially I adopt
11 all my submissions on abuse of process. The submissions on
12 material change of circumstance, if I have to get into that
13 gateway, I have, because of course that is a feature of this
14 case, but I say I do not even need to get through one of the
15 two Tibbles gateways to variation, even though they are
16 non-exhaustive even on their own face and instead it is
17 a multifactorial assessment. I am with the grain of the
18 earlier decision, I am bringing it at substantively the right
19 moment. No strategic advantage from the appellate position
20 or if there was minimal. Nothing like the LA Micro test,
21 assuming that the same principles of good administration of
22 justice should be reflected in both, no real detriment to the
23 banks, because this is the right time for this to be
24 happening and this is the very first thing the Tribunal
25 wanted to happen and the interests of the class members so

1 all of those factors.

2 So those are my submissions on the first part of the
3 order which I took you to this morning, the very first thing
4 of my submissions. I am turning now to Sterling Lads, which
5 I can hopefully take pretty quickly.

6 THE CHAIR: Your point on that is presumably that the Supreme
7 Court has remitted this back to us in effect on the basis
8 that it is for the Tribunal to decide whether opt-in or
9 opt-out proceedings should take place, and in effect we have
10 to give the Class Representative an opportunity to formulate
11 his position and present us with the material upon which we
12 can exercise that decision which the Supreme Court has
13 decided to remit to us. Ms Ford may characterise matters in
14 a different way but would I be right to anticipate that is
15 your --

16 MS WAKEFIELD: That is entirely right. That is my short point.
17 The claims have not been adjudicated. They arrived in 2024.
18 The first CPO Original Tribunal decision did not apply to
19 them. The Court of Appeal did not apply to them. We seek to
20 take advantage of the part of the Supreme Court judgment that
21 we were not allowed to take advantage of in relation to
22 Essex Express and Three Way Banana Split, namely to consider
23 bringing them on behalf of a smaller opt-out class. That
24 would improve practicability, if that is what we do. We seek
25 to improve them using the Ramirez approach. That will

1 improve strength of the claims and, if so advised, and we do
2 make that application, I would like to have a certification
3 hearing in front of you in which I argue in relation to that
4 improved practicability position, that improved merits
5 position and have an actual CPO judgment in relation to those
6 claims which were properly brought, which have been stayed,
7 in relation to which there has otherwise been no assessment.

8 THE CHAIR: Presumably a hybrid is an --

9 MS WAKEFIELD: Hybrid is an option, yes.

10 THE CHAIR: -- option too. Okay, that is helpful.

11 Is there more you want to say on Sterling Lads?

12 MS WAKEFIELD: That may be enough. I am being nodded at behind
13 me. I can sit down and then hopefully it is looking like
14 within a day should be.

15 THE CHAIR: I only have one question on that and I will check
16 whether my colleagues have questions, which is if we were
17 with you on Sterling Lads, does that have any impact on the
18 way we should approach the main question that you presented
19 to us?

20 MS WAKEFIELD: It does, my Lord, in the sense that both Mr Maton
21 and Mr Evans when considering viability of opt-in proceedings
22 for Essex Express and Three Way Banana Split refer to the
23 funding package applying across all of the claims which have
24 been brought and if there is an opt-out element of Sterling
25 Lads, that will increase the aggregate claim value for the

1 purpose of funding. So it renders Essex Express and Three
2 Way Banana Split more viable to have all of them together.

3 THE CHAIR: So you would say the only relevance is the extent
4 to which that makes it perhaps more plausible to think, if we
5 were with you on Sterling Lads, plausible to think that you
6 will be able to come back --

7 MS WAKEFIELD: It does.

8 THE CHAIR: -- with some sort of application in relation to
9 the rest.

10 MS WAKEFIELD: It increases prospects of success, if I can put it
11 that way, prospects of us being able to make the application
12 we wish to make. It also of course means that the banks to
13 the extent they rely on detriment of the proceedings still
14 existing and having to come here again and they would like it
15 all to be done, those objections which I have addressed
16 anyway and I say are not strong objections, but they will be
17 here for Sterling Lads anyway.

18 THE CHAIR: Okay, thank you.

19 (The bench conferred)

20 Thank you very much, Ms Wakefield.

21 Ms Ford.

22 Submissions by MS FORD

23 MS FORD: I will start by giving the Tribunal in a nutshell the
24 (inaudible) position. We say that Mr Evans made
25 an application for a (inaudible) order. It was litigated all

1 the way to the Supreme Court. It was unsuccessful. The
2 natural consequence of an unsuccessful application is that it
3 is dismissed; it is not that Mr Evans gets to amend the
4 unsuccessful application and start again from the beginning,
5 from square one, and have another go on a different basis.

6 We say that is particularly true when the different basis
7 is inconsistent with the position that has been adopted to
8 date. Mr Evans has stated at various stages during these
9 proceedings that they would not proceed on an opt-in basis.
10 He persuaded the Original Tribunal to accept his evidence at
11 first instance, and then he relied emphatically and without
12 qualification on that decision before both the Court of
13 Appeal and the Supreme Court. That is a position which we
14 say has undoubtedly been (inaudible) advantageous to him,
15 and, in our submission, it would be materially unfair to
16 permit him to resile from it now.

17 THE CHAIR: You would say that regardless of whether there
18 was any bad faith, or you do not need to go ...

19 MS FORD: Sir, absolutely. I can confirm it is no part of my
20 submission that there has been any bad faith or
21 unprofessional conduct. That is not the basis of the case
22 that we are advancing. We say that abuse of process is
23 an objective test, and I can show the Tribunal the relevant
24 authority which says that that sort of thing is not
25 a necessary part of the case, and it is no part of our case

1 either.

2 THE CHAIR: Yes. You say simply as a matter of fact it was
3 strategically advantageous (inaudible) lines of argument
4 being advanced expressly on the footing that opt-in was not
5 viable.

6 MS FORD: Sir, yes.

7 THE CHAIR: You say that is enough for your purposes in terms
8 of running these documents.

9 MS FORD: Absolutely, yes.

10 THE CHAIR: That is helpful.

11 MS FORD: We say the outcome I just outlined follows, whether one
12 looks at it through the lens of abuse of process, which, in
13 our submission, Mr Evans' application now amounts to, or
14 whether one looks at it by reference to the Tribunal's power
15 to vary or revoke an order or a direction. In either case,
16 in our submission, principles of proper finality and
17 principles of basic fairness mean that Mr Evans should not be
18 permitted to have a second bite of the cherry and he should
19 not be permitted to drag out these proceedings any further.

20 THE CHAIR: What do we make of the fact that the Supreme
21 Court remitted to us consideration at paragraph 411? You say
22 that is in entirely open-ended terms and leaving it to us to
23 determine the very question that you are bringing before us.

24 MS FORD: Sir, yes, in many respects it is unsurprising, because
25 the question of whether or not it was an abuse of process to

1 try to opt in was not before the Supreme Court.
2 Unsurprisingly it did not want to express a view on
3 (inaudible).

4 I am going to start with the principles on abuse of
5 process. We say the overarching concept of an abuse of
6 process is a very broad one and the key authorities that we
7 rely on are summarised in the judgment of the Court of Appeal
8 in JSC Bank, which is in the authorities bundle, tab 34,
9 starting at page 849. The Tribunal should have there
10 a heading "The law relating to abuse of process". The
11 classic statement of principle is the dictum of Lord Diplock
12 in Hunter, and that is what is set out at 47. I just
13 (inaudible) the Tribunal is familiar with it, but can I ask
14 the Tribunal to cast your eye over this (inaudible).

15 (Pause)

16 What you get from that is an abuse might arise either if
17 it is manifestly unfair to a party to litigation or if it
18 would otherwise bring the administration of justice into
19 disrepute and the circumstances in which that might arise are
20 varied and (inaudible).

21 We then have the famous statement from Lord Bingham
22 in Johnson v Gore Wood set out at 48. That is obviously
23 concerned with a particular form of potential abuse, which is
24 the Henderson v Henderson abuse where a party seeks to raise
25 a matter of proceedings which should have been raised in

1 previous proceedings. As explained in the first paragraph:

2 "The underlying public interest is ... that there should
3 be finality in litigation and that a party should not be
4 twice vexed in the same matter."

5 He does say partway down this section:

6 "I would not accept that it is necessary, before abuse
7 may be found, to identify any additional element such as
8 collateral attack on a previous decision or some dishonesty."

9 That is consistent with the submission I have just made.
10 It is not necessary to advance those sorts of elements.

11 He emphasises it is:

12 "... a broad, merits-based [approach] which takes account
13 of the public and private interests involved and also takes
14 account of all the facts of the case ..."

15 (Inaudible) all the possible forms of abuse, so it is not
16 possible to formulate any (inaudible). It is important to
17 emphasise referring to a public interest and not just the
18 interest of the litigant concerned, a public interest that
19 the party should not be twice vexed in the same proceedings.

20 We then have paragraph 49 --

21 THE CHAIR: What do you say "is a broad, merits-based
22 judgment which takes account of public and private interests
23 involved", what do you say are the public and private
24 interests involved in this issue that we should take into
25 account?

1 MS FORD: I can pick them up as we go through. I can just give
2 the Tribunal a flavour. We rely on, first of all, the broad
3 Hunter-type concept of abuse which is simply to ask is it
4 manifestly unfair or essentially -- looking at the correct
5 formulation before I misstate it:

6 "... manifestly unfair or otherwise would bring the
7 administration of justice into disrepute."

8 We also rely on the specific strands within the
9 Henderson v Henderson strand and the LA Micro strand. In
10 relation in particular to the Henderson v Henderson strand,
11 the public and private interests are essentially the same
12 because the interest in finality and legal certainty is one
13 which obviously benefits the party who is seeking to say
14 "enough is enough". But the important point to emphasise is
15 it is simply not self-interest (inaudible), it is a public
16 interest in finality and legal certainty.

17 As we go through, we will see the various other strands
18 of abuse we rely on also recognising that there is a public
19 interest in these matters not simply a self-interested
20 interest on the part of the litigant concerned.

21 I was just going to show the Tribunal the quotation from
22 Laing at 49. What we see there is, first of all, the
23 emphasis on the fact-sensitive inquiry, intense focus on the
24 facts of the case, whether in broad terms the proceedings
25 that it is sought to strike out can be characterised as

1 falling under one or other, and what it does is it then
2 reiterates the Hunter criteria: the rubrics of unfairness or
3 the bringing of the administration of justice into disrepute.
4 Then you get an independent summary from the Court of Appeal
5 as to what it draws out of it at 51. Again, consistent with
6 the submission I have just made (inaudible) an abuse of
7 process whether there has been no unlawful conduct, no breach
8 of relevant rules, no (inaudible) decision (inaudible).

9 THE CHAIR: I am very sorry, Ms Ford. Apparently there is
10 a problem with the microphones which means that we are going
11 to have to rise for perhaps five minutes, possibly less.
12 Apparently, without dealing with it, the transcriber is not
13 going to be able to take down your words and I am very keen
14 that he or she should be able to do so. Thank you very much.

15 (2.25 pm)

16 (Short break)

17
18 (2.28 pm)

19 MS FORD: I was just explaining that we rely on the broad rubrics
20 of unfairness and bringing the administration of justice into
21 disrepute, but obviously we have highlighted in our skeleton
22 argument the two particular recognised forms of abuse.
23 Dealing first with Henderson v Henderson, an example of that
24 in the competition law context is Sainsbury's v Mastercard in
25 the Supreme Court, which is in the authorities bundle,

1 tab 33, starting at page 830. This is particularly relevant
2 to the Tribunal's question about whether or not the fact of
3 an appellate process is capable of constituting a relevant
4 change in circumstance, because in this instance what
5 happened was that the relevant abuse was the decision
6 following an appeal up to the Supreme Court to remit the
7 matter back to the first-instance court in order to enable it
8 to be revisited.

9 So essentially one has an almost parallel situation where
10 it goes all the way to the Supreme Court and the Supreme
11 Court was asked in this instance -- in contrast to our case,
12 it was asked is it an abuse to remit this issue and have
13 another go and it is said yes, it was.

14 THE CHAIR: Could you show me that?

15 MS FORD: Yes, so starting at page 830. There is a heading
16 "Issue (V): the Remission Issue" and what we can see from
17 paragraph 227 is that these are multilateral interchange feed
18 proceedings. The Supreme Court in this judgment has held
19 that the default multilateral interchange feeds contravene
20 article 101(1)(i) and Mastercard wanted to argue that they
21 were exempt under article 101(3).

22 Paragraph 229 we see the Supreme Court recording that
23 Mastercard had had a full opportunity to present any evidence
24 it wished in support of its case at trial and the judge had
25 held in Mastercard's favour that they were exempt. We then

1 see at paragraph 230 the fact that the Court of Appeal
2 disagreed and it found that there was a critical gap in the
3 evidence concerning whether multilateral interchange fees had
4 been passed through to card holders.

5 Going over to paragraph 232, at the end of the paragraph
6 you see the Supreme Court emphasising again there has been
7 a full trial on the issue and on the evidence adduced at
8 trial the judge should have dismissed it.

9 233, instead the Court of Appeal remitted the proceedings
10 to the CAT for reconsideration and in that context, at 237,
11 we see the submission is made that that offended against the
12 principle of finality in litigation.

13 At 238, we see a reference to the overriding objective
14 under the CPR and the key reasoning is at 239. The Supreme
15 Court is saying:

16 "One such principle which is well established is that
17 there should be finality in litigation."

18 It refers to the Supreme Court case in Virgin Atlantic
19 Airways.

20 THE CHAIR: What stage had this reached at first instance by
21 the time it went on appeal?

22 MS FORD: There had been trials. So the Supreme Court has
23 emphasised twice that there had been a trial, Mastercard had
24 run the point at trial, it then went up to the Supreme Court
25 and Mastercard is now saying -- essentially defending the

1 position of the Court of Appeal that it needed to be remitted
2 back for reconsideration and the Supreme Court says no.

3 THE CHAIR: You say it makes no difference that that was
4 a decision after trial and this is an important issue, but
5 a fairly sort of preliminary interlocutory -- I am not sure
6 if "interlocutory" is quite the right term, but a preliminary
7 issue.

8 MS FORD: I do say it makes no difference. The reason -- first
9 of all, we can see that what is required is a determination.
10 If we look at in 239 opposite C, we can see:

11 "... parties are generally required to bring forward
12 their whole case in one action, and attempts to revisit
13 matters that have already been the subject of a determination
14 ... are liable to be barred as an abuse of process ..."

15 Citing Henderson.

16 THE CHAIR: Is your problem with that not that here there was
17 a determination at first instance that these should not be
18 opt-out proceedings, but that the class representatives
19 should be given an opportunity, if so advised, to come
20 forward with an application to amend.

21 MS FORD: Our submission on that is that actually it is
22 an aggravating factor, if I can say that.

23 THE CHAIR: Yes.

24 MS FORD: An aggravating factor in the abuse for this reason that
25 the class representative was given an opportunity to bring

1 proceedings at an early stage on an opt-in basis and it did
2 not avail himself of that opportunity and he did not purport
3 to preserve at that opportunity or preserve it or stay it or
4 anything of that sort and we are going to come on to at what
5 strategic in objective terms that state of affairs gave rise
6 to, but the submission that is made against me is, well, it
7 is not inconsistent with the Tribunal's judgment to be given
8 that opportunity. In my submission, it is inconsistent
9 because the Tribunal offered a time-limited opportunity, time
10 limited being important because it is consistent with
11 finality and legal certainty, not an open-ended at large
12 possibility of reverting and at no point was that actually
13 taken up. We say that is an important factor in the abuse
14 analysis.

15 THE CHAIR: Sorry, to keep on interrupting. Ms Wakefield
16 made a point about I think, if I understood correctly, that
17 it would make no sense in effect to bring an application on
18 alternative bases and I appreciate that on the facts of this
19 case, as they have been presented, it was thought at the time
20 opt-in was simply not an option which, at least for this
21 class, would be viable. But looking at it in the generality,
22 do you have any submission on how one thinks about
23 Henderson v Henderson-type abuse in a context where I suppose
24 formerly you could have raised -- brought proceedings on
25 a basis with a fallback position?

1 MS FORD: Sir, yes, in my submission, it falls clearly within the
2 principles that are being articulated in this judgment. If
3 we look at the indented citation, which is coming from the
4 Master of the Rolls as he then was in *Barrow v Bankside*:

5 "The rule in *Henderson v Henderson* ... requires the
6 parties, when a matter becomes the subject of litigation
7 between them in a court of competent jurisdiction, to bring
8 their whole case before the court so that all aspects of it
9 may be finally decided ... once and for all."

10 In my submission, if Mr Evans wanted to preserve the
11 possibility that in the alternative to an opt-out application
12 he also wanted to have the opportunity to come back and say
13 actually I will pursue an opt-in application, the rule in
14 *Henderson v Henderson* tells us that should have been brought
15 forward at the time so it may be decided once and for all.

16 Now the potential exception to that is if it can be shown
17 that the reason that it was not was because of a material
18 change of circumstances and I am going to come on to make my
19 submission that, in our submission, objectively judged there
20 simply is not a relevant and material change of circumstances
21 that justifies the change of position, but I do say that the
22 rule in *Henderson v Henderson* very clearly requires the
23 parties' entire case to be brought forward to be determined.

24 PROFESSOR MULHERON: Can I just ask very briefly, it is
25 interesting this *Barrow v Bankside* case, but it was a group

1 litigation case actually, first action 1 and then there was
2 an attempt to bring action 2. I thought that Sir Thomas
3 Bingham said that it mattered with respect to the group
4 litigation as to what should have been dealt with in the
5 first action not raised but actually dealt with. The fact
6 that the second theorem of liability raised in action 2 was
7 not to be dealt with in the first action meant that this
8 actually was a case in which action 2 was permitted to
9 proceed.

10 It just seemed to me that he said it actually I think
11 specifically that this could be an exceptional circumstance
12 to Henderson. I just wonder is there -- is there anything to
13 be drawn from that? This case was quite exceptional
14 I thought and concerned group litigation.

15 MS FORD: Well, we can certainly assume that had an opt-in
16 application been brought at the time, it would have been
17 dealt with by the Tribunal. The Tribunal would have
18 considered it in the alternative. Now, there is no doubt --
19 and we are going to come on to see the way in which Mr Evans
20 has put his case particularly on appeal -- it is in his
21 favour to say that these proceedings would not proceed if his
22 request for an opt-in -- sorry, an opt-out certification was
23 not granted. So if he wants to be able to say that, if he
24 wants to put the Tribunal essentially in the position that if
25 you do not grant opt-out then you are having no proceedings

1 at all, then he does not at the same time hold open the
2 possibility in the alternative that proceedings would be
3 brought on an opt-in basis.

4 PROFESSOR MULHERON: Going forward would that mean where any PCR
5 was uncertain or in most cases I suppose they would be as to
6 whether opt-out would be certified that they would be
7 compelled to articulate in the alternative an opt-in action
8 to the extent that they thought it was viable? Would that
9 put them to that position that they would have to articulate
10 that in their original CPO application?

11 MS FORD: In my submission, what the principle in
12 Henderson v Henderson means is that if you, the class
13 representative, wish to hold open a possibility that if your
14 opt-out is unsuccessful you will pursue opt-in in the
15 alternative, you need to say that at the outset. You need to
16 bring your whole case forward before the court, and I
17 am essentially reading the principles, so that all aspects of
18 it may be finally decided once and for all.

19 The reason for that, if we go to the end of this quote,
20 it comes back to the public policy reasons that I was
21 canvassing:

22 "It is a rule of public policy based on the desirability,
23 in the general interest as well as that of the parties
24 themselves, that litigation should not drag on forever and
25 that a defendant should not be oppressed by successive suits

1 when one would do. That is the abuse at which the rule is
2 directed."

3 So, in our submission, as I have indicated, the exception
4 is if it can be shown that there was a relevant change of
5 circumstances then it has to be a significant change of
6 circumstances precisely because of the weight of these public
7 interests in finality. If one can show a significant change
8 of circumstances, that would enable one to say: okay, well,
9 it is not abusive to go back. But insofar as submissions
10 were made this morning that essentially there was a cigarette
11 paper between the position that is now being run and the
12 evidence at first instance, if it were the case that the
13 evidence was nuanced and there was a possibility of running
14 opt-in, then it should have been run at the time.

15 PROFESSOR MULHERON: That would fundamentally change the way in
16 which the CPOs were pleaded going forward if that submission
17 was accepted.

18 MS FORD: It might well, but, in my submission, nobody to date
19 has actually tried to do this. Nobody to date has gone all
20 the way to the Supreme Court on the basis of an emphatic
21 submission that opt-out should be -- they should be certified
22 on an opt-out basis and the proceedings would not continue if
23 they were certified on an opt-in basis and then come back and
24 said: well, notwithstanding everything that we said, actually
25 we are now going to pursue opt-in.

1 So it is true that it may well be that going forward in
2 the light of the Tribunal's judgment, if the Tribunal were to
3 say: if you want opt-in to be considered you need to bring it
4 forward, otherwise it will be a Henderson v Henderson abuse
5 of process, then that would change the approach going
6 forward. That would be a positive change in this sense: that
7 the Tribunal could then grapple with the entirety of the case
8 before it at the first stage and not find itself in the
9 position that we are now in, which is that it has gone all
10 the way up to the Supreme Court and then comes back and
11 an attempt is made to say: okay, well now we need to start
12 again and think about it on an opt-in basis. That is a
13 deeply undesirable, in my submission, state of affairs.

14 THE CHAIR: Do you say the Original Tribunal was therefore
15 wrong to provide the opportunity to come back and seek
16 certification on an opt-in basis? Because if you are right
17 in the way you just put it, the Class Representatives should
18 have brought this whole case before the Tribunal at the
19 outset and the Tribunal on that analysis should have said:
20 well, we have determined what you brought before us, you have
21 not brought any alternative, we are not going to give you
22 another chance.

23 Now the Tribunal did not do that. You may well say it is
24 all fact-sensitive and you do not need to take issue with
25 what the Tribunal did because here there is the added

1 circumstance of going all the way to the Supreme Court and
2 arguing it in a particular way and that is the thing that
3 constitutes the abuse, but I am just interested in whether
4 the logic of your position is that what the Tribunal did here
5 in its original judgment in granting the opportunity to come
6 back cuts across these principles.

7 MS FORD: My submission is that it was a generosity that it was
8 not necessary for the Tribunal to offer. Had it not done so,
9 it could not have been criticised. I do not need to go so
10 far as to say it was positively wrong to do so, but what it
11 did do, and this is important, is that it did deliberately
12 say that any revised application should be made within
13 three months and that is important and that makes it much
14 more reconcilable with questions of finality and of fairness
15 to the defendants, because that means within a three-month
16 period they would have known whether or not they were going
17 to face an alternative claim or not.

18 THE CHAIR: Because I suppose Ms Wakefield would say, going
19 back to the discussion we had about Tibbles, that she might
20 say all she is looking for is the for the time for what the
21 Tribunal envisaged to be done and that it is you
22 who is inviting the Tribunal to change the substance of what
23 it is the Tribunal considered should be done. I suppose
24 there is an abuse of process argument to do with the
25 intervening events, but if it were not for the abuse of

1 process argument is there any force in that point?

2 MS FORD: Well, certainly that is absolutely the point that is
3 put against me. We say the same principles as the Tribunal
4 has been shown of finality and avoiding two bites of the
5 cherry underpin the exercise of the discretion under the
6 relevant Tribunal rules as well. So even in that scenario,
7 leaving aside abuse of process, the Tribunal still has to
8 consider should this litigant be entitled to have another go.

9 In my submission, the fact that the Tribunal envisaged
10 a short three-month period is particularly important in that
11 context. It is not consistent with the Tribunal's ruling to
12 leave the matter at large for a period of multiple years and
13 then come back and say: now I want to take up that
14 opportunity, having not in the meantime even taken steps to
15 preserve the possibility that they might in due course do so.
16 We do say that that is an aggravating factor and it
17 interrelates with the second strand of abuse we rely on,
18 because it is not simply you did not take up the opportunity
19 when it was offered to you. It is that at the subsequent
20 appellant stages, the case as presented was these proceedings
21 will not continue if you do not certify on an opt-out basis.
22 So it is not just you did not take it up, it is that the
23 whole of the case thereafter was positively inconsistent with
24 taking it up.

25 PROFESSOR MULHERON: Just taking your submission further just

1 with respect to Barrow v Bankside again, just to come back to
2 that, if the submission is that any PCR should bring
3 an opt-in case to the Tribunal at the same time as an opt-out
4 if they wanted to hedge their bets in that regard, it is
5 a whole different ballgame, is it not, under the
6 certification criteria of 79(2). The cost benefit analysis
7 is quite different surely when it comes to opt-in. It would
8 require proof of book-building very, very early on. The
9 aggregate assessment provision 79(2)(f) that I put to
10 Ms Wakefield this morning, that surely, I think, must operate
11 differently with an opt-in than it would with an opt-out.

12 It would have profound ramifications on the costs of
13 preparing these cases. Do I understand your submission
14 correctly that that is what you think should occur in order
15 to comply with the Barrow v Bankside-type test of abuse of
16 process here?

17 MS FORD: It might well have implications if that is
18 a possibility that the class representative genuinely wants
19 to preserve. Now, the factors that you have put to me might
20 well lead to the conclusion that actually they would prefer
21 to seek opt-out and they do not think opt-in is viable and
22 that is indeed the case that we understood we were facing all
23 the way up to the Supreme Court. What is objectionable is to
24 run that case on that basis all the way up to the Supreme
25 Court and only then at that point to say: actually, no, we do

1 want to run in an opt-in case as well.

2 In my submission, it is not at all unreasonable to ask
3 the class representative to decide at the outset do you wish
4 to preserve that possibility, taking into account the
5 potential downsides, or do you wish only to seek opt-out
6 certification and consistent with the principles in
7 Henderson v Henderson, if you wish to preserve that
8 opportunity, you need to say so at the outset to enable the
9 Tribunal to adjudicate on it. You cannot wait until
10 six years later before announcing that actually that is the
11 course of action you prefer to take.

12 THE CHAIR: Going to your point about treating paragraph 411
13 as a generous indulgence, you might characterise it as the
14 Tribunal had not done that. If the Tribunal had not done
15 that it -- I take it would not take the class representative
16 to bring forward a new application on an opt-in basis if you
17 are on your analysis, the Tribunal having already adjudicated
18 on an opt-out application or is that wrong?

19 MS FORD: It had not already adjudicated on it, because it
20 understood the factual position before it as indicated in its
21 findings to be that it was not being asked to do so. It
22 understood that it was being told the opposite which is that
23 these proceedings will not go ahead on an opt-in basis.

24 THE CHAIR: But if the class representative brings forward
25 an opt-out application and it is rejected, perhaps it comes

1 down to a limitation point. If there is no limitation issue,
2 the class representative could bring another application on
3 an opt-in basis at that point.

4 MS FORD: A separate set of proceedings?

5 THE CHAIR: Yes.

6 MS FORD: It could but, in my submission, it would meet
7 absolutely the same objection of a Henderson v Henderson
8 abuse.

9 THE CHAIR: Okay.

10 MS FORD: Because it should have brought them before.

11 THE CHAIR: Okay, okay. So Henderson v Henderson would
12 strike at -- even if there were no limitation issue, strike
13 at a new application brought on a different basis for
14 certification.

15 MS FORD: It absolutely would and indeed the suggestion is made
16 against me that it is somehow more difficult to establish
17 a Henderson v Henderson abuse within the context of the same
18 proceedings. So on that logic it would be easier to
19 establish it if they brought a different set of proceedings.
20 I am relying on Sainsbury's, apart from any other reason,
21 because it is an example of a Henderson v Henderson abuse
22 being found in the context of the same proceedings and in the
23 context of an appellate process and that did not preclude the
24 Supreme Court from saying you need to bring your full case
25 forward at the outset, you do not get a remittal to have

1 another go.

2 Just to complete the treatment of Sainsbury's, the
3 conclusion at 240 is in the Supreme Court's view:

4 "... the order made by the Court of Appeal to remit the
5 art 101(3) issue ... for reconsideration by the CAT is
6 contrary to the principle of finality in litigation as it
7 finds expression in the rule in Henderson v Henderson."

8 So that is the conclusion from the Supreme Court's point
9 of view.

10 Just to come back to the point that was put to me about
11 is it a problem that you do not have a trial, I have shown
12 the Tribunal the reference in the passage that I am quoting
13 to the need for a determination. In my submission, what is
14 required is a determination which is appropriate to the issue
15 that is being decided. So in the case of a substantive
16 defence, which was what Sainsbury's was concerned with,
17 an article 101(3) defence, that was a matter that properly
18 had to go to trial. They had gone to trial and they were not
19 allowed to open it up again.

20 In the case of a CPO application, a CPO application is
21 decided at a CPO hearing and indeed the class
22 representative's CPO application has been decided at a CPO
23 hearing. That, in my submission, is sufficient determination
24 for the purposes of engaging the Henderson v Henderson
25 principle.

1 Just for completeness before I move on from
2 Henderson v Henderson, a second example of a case which arose
3 in the context of the same proceedings, since the point was
4 taken against me, is in tab 13 of the authorities bundle and
5 it is the Seele Austria case and we rely particularly on some
6 words of warning that come from the court's judgment at
7 paragraph 107 of this case, page 339. This is in the context
8 of being satisfied that a Henderson v Henderson abuse arose
9 in the same proceedings. Halfway through paragraph 107, the
10 court says:

11 "... at the same time, the court should be astute to
12 prevent a claiming party from putting its case one way,
13 thereby causing the other side to incur considerable expense,
14 only for the claiming party to lose and then come up with a
15 different way of putting the same case, so as to begin the
16 process all over again. The Civil Procedure Rules are
17 designed to avoid the litigation equivalent of death by a
18 thousand cuts."

19 The court says on the facts of that case:

20 "I have no doubt that, on the basis of the facts as I
21 have summarised them ... it would be wrong and unfair to
22 allow the claimant in these proceedings to go back to square
23 one and attempt to run a case which could and should have
24 been raised years ago."

25 The Tribunal will appreciate that my submission is

1 exactly the same in the context of these proceedings.

2 So that is the first strand of abuse that we rely on, the
3 Henderson v Henderson abuse. The second is what is being
4 termed as estoppel by conduct. This is the LA Micro Group
5 case. I can take this quite quickly because Ms Wakefield has
6 dealt with it in some detail already.

7 It is in tab 37 of the authorities bundle. You have been
8 shown various paragraphs from this. I would particularly
9 highlight the end of paragraph 23, which is citing US
10 authority and it says --

11 THE CHAIR: What is the page number, please?

12 MS FORD: I am sorry, it is page 970. It is citing US authority:

13 "Where a party assumes a certain position in a legal
14 proceeding, and succeeds in maintaining that position, he may
15 not thereafter, simply because his interests have changed,
16 assume a contrary position, especially if it be to the
17 prejudice of the party who has acquiesced in the position
18 formerly taken by him."

19 Turning to what the Court of Appeal perceives as the
20 purpose of this rule in the following paragraph, it is said
21 to be to protect the integrity of the judicial process. Just
22 pausing there, the integrity of the judicial process is an
23 example of a public interest rather than an interest of
24 a particular litigant:

25 "... the integrity of the judicial process, by

1 prohibiting parties from deliberately changing positions
2 according to the exigencies of the moment and preventing
3 parties 'from playing fast and loose with the court'."

4 THE CHAIR: So you say that is a broader principle which does
5 not necessarily always at least require that the position
6 adopted initially has been successful in procuring
7 a judgment.

8 MS FORD: I absolutely do make that submission and I can find
9 support for it in two places. The first is at the beginning
10 of paragraph 26 where the Court of Appeal is saying:

11 "... this form of estoppel by conduct is one which is
12 approached by means of a broad, merits-based assessment, and
13 is not constrained by strict rules ..."

14 That is very much consistent with saying one does not
15 simply require the party who has changed their position to be
16 successful at the end of it. But also the subsequent part of
17 that paragraph where the question is being posed:

18 "It is material to ask the question whether it is
19 apparent that the earlier decision was obtained on the
20 footing of, or because of, the stance taken by the party in
21 the earlier proceedings."

22 Now, in my submission, if a judgment has been obtained on
23 the basis of the evidence that has been given by the party in
24 question, if it is the underpinning for that judgment, then
25 it is problematic if that party subsequently purports to

1 change the factual position. It is going to be problematic,
2 irrespective of whether that party is ultimately the
3 successful party, because it forms the foundation for the
4 basis on which the court was proceeding. To put it another
5 way, it cannot be right that if a party takes one position,
6 which is favourable to it but ultimately does not succeed
7 overall in the litigation, that party is home and dry in
8 terms of the inconsistency. In my submission that would not
9 be consistent with this broad merits-based approach.

10 THE CHAIR: So you would say -- I mean let us suppose
11 a proposition is put forward which a court rejects, the issue
12 would not arise -- at least it would not arise in quite the
13 way it is put here, but is your position that here the Court
14 of Appeal and the Supreme Court accepted the proposition that
15 opt-in was not viable.

16 MS FORD: They did and that underpins the approach that they
17 took. Ultimately it did not work.

18 THE CHAIR: Well --

19 MS FORD: It did not work.

20 THE CHAIR: You would say that is enough.

21 MS FORD: Yes.

22 THE CHAIR: That is enough in that they accepted the
23 proposition, proceeded on that as part of the analysis and
24 ultimately did not regard that as a trump card.

25 MS FORD: Absolutely that is enough and I will come to show the

1 Tribunal in particular the passages of the Supreme Court,
2 where the Supreme Court is taking that as the factual
3 position and it is endorsing the reasoning based on that
4 factual position and my submission would be it would be
5 fundamentally problematic to then depart from that factual
6 proposition, which has been endorsed by the Supreme Court and
7 forms the foundation for its reasoning notwithstanding that
8 ultimately Mr Evans was not successful.

9 I have addressed the two specific strands of abuse of
10 process we rely on, Henderson v Henderson and the estoppel by
11 conduct. I am coming on to simply add two non-specific
12 examples. We do emphasise that it is not necessary to fit
13 abuse into any tick box. So the Tribunal can approach the
14 issue by considering whether the Hunter categories are
15 present in all the circumstances of the case. We have cited
16 two examples where that has been the approach of the court in
17 the competition law context.

18 The first is the Bao Xiang International Garment Centre
19 case, which is in the authorities bundle, tab 24, starting at
20 page 504. The Tribunal should have there paragraph 1 which
21 explains what has been going on in this case. It was a claim
22 which was brought in the name of Bao Xiang International
23 Garment Centre of Beijing and 64,696 other claimants all
24 based in China. The claim was for damages arising from
25 an unlawful price-fixing cartel in relation to air freight

1 services supplied by the defendant British Airways and other
2 airlines due to the claimant.

3 If we turn to paragraph 25 within this judgment, we can
4 see the claims were ultimately struck out on the basis of
5 a lack of authority to bring them, but the court does then go
6 on to consider the position whether or not the facts amounted
7 to an abuse of process starting at paragraph 26. Note at
8 paragraph 27 what is cited by way of authority is the
9 Lord Diplock test in Hunter. Then the factors that the court
10 identifies as giving rise to an abuse, if we look at
11 paragraph 33:

12 "... the evidence ... as to how the ... claimants were
13 chosen shows that they had no grounds for believing at the
14 time they issued proceedings that any particular claimant had
15 shipped air freight over the relevant period."

16 Then paragraph 34, the evidence in the view of the court
17 was inadequate as to the basis of the belief that there was
18 authorisation to issue the proceedings.

19 Now, so far as I can tell from the judgment, this was
20 evidence which was given in written form. There was not
21 cross-examination. So the court has felt able to reach some
22 conclusions which were pretty adverse on the evidence without
23 the need to cross-examine and, in my submission, that is
24 entirely consistent with the proposition that the Tribunal
25 can consider objectively whether evidence is or is not

1 satisfactory and whether it is persuaded by or it is not
2 persuaded by it and that does not necessitate any exercise by
3 way of cross-examination.

4 If we just look at the conclusion of the court,
5 paragraph 40, at the end of the paragraph, it concluded:

6 "To allow this claim to proceed would, in my judgment, be
7 manifestly unfair to the airlines and would bring the
8 administration of justice into disrepute among right-thinking
9 people. It is an abuse of the process and should be struck
10 out for that reason."

11 So we rely on this as an example of those broad rubrics,
12 unfairness to the defendants and bringing administration of
13 justice into disrepute, being sufficient without having to
14 fit abuse into a particular box.

15 THE CHAIR: The facts are very far away from this one.

16 MS FORD: Absolutely, I fully accept that and of course we have
17 seen from the authorities it is a fact-specific assessment.

18 The final example is in the DAF Trucks case which is
19 authorities, tab 32 at page 718. The situation here was that
20 there were follow-on damages claims based on a European
21 Commission settlement decision and the particular issue was
22 concerned with the recitals of the decision which were not
23 binding as a matter of EU law and the question the Tribunal
24 was deciding was can the defendants deny facts in those
25 recitals that they have previously admitted in the context of

1 the proceedings before the European Commission that led to
2 the settlement decision.

3 So the factual background here has some elements of
4 attempting to relitigate something which has already been
5 litigated before in the sense of there had been proceedings
6 before the Commission and there were proceedings before the
7 domestic courts, but also some elements of taking
8 an inconsistent position because facts were admitted for the
9 interpretation of the settlement decision and then an attempt
10 was made not to admit them at the domestic level. So that is
11 the factual context for that.

12 We can see the principles are summarised at
13 paragraphs 100 to 107, starting at page 749, and they include
14 various of the authorities that we have already looked at,
15 including Hunter being cited at paragraph 101.

16 Then if we go on to paragraph 131, we can see the
17 Tribunal saying:

18 "...on the basis of the English authorities on abuse of
19 process discussed above, we apply a broad, merits-based
20 approach in asking whether it would bring the administration
21 of justice into disrepute and/or be unfair to the claimants
22 if the defendants are able simply to deny the facts which the
23 Decision records them as having admitted, or to 'not admit'
24 those facts in their defences to these claims and thus
25 require the claimants to prove them. In our judgment, it

1 would be an abuse of process here on both accounts."

2 So again the submission I make is that one can approach
3 this, if necessary, from the Hunter perspective of asking
4 whether it is manifestly unfair or brings the administration
5 of justice into disrepute. On the authorities on the power
6 to vary or revoke an order or direction, in our submission,
7 much the same principles apply and I do not actually
8 understand that to be in any way in dispute.

9 Ms Wakefield has shown you Tibbles v SIG, which is the
10 key authority. As you have been shown, just as with the
11 abuse authorities, the considerations of finality and the
12 undesirability of allowing litigants to have two bites at the
13 cherry feed into that exercise in exactly the same way and,
14 equally, just as with the abuse authorities, they do not
15 purport to define exhaustively the circumstances in which you
16 may or may not exercise that power.

17 So I am moving on to my submissions on abuse starting
18 with the first strand, Henderson v Henderson. In our
19 submission, for much the reasons that have already been
20 canvassed between myself and the Tribunal, we say that Mr Evans'
21 present application is an absolutely textbook example of a
22 Henderson v Henderson-type abuse of process. We say when
23 Mr Evans made an application for a collective proceedings
24 order he was obliged to bring forward his whole case in
25 support of that application so that it could be determined by

1 the Tribunal once and for all and had he wished to seek
2 certification on an opt-in basis by way of an alternative, he
3 should have done so at the outset.

4 We say that his application for certification of
5 collective proceedings has been the subject of an appropriate
6 determination. It was not on a summary basis. It was after
7 a lengthy five-day certification hearing and, by way of
8 bonus, it has been the subject of appeals to the Court of
9 Appeal and the Supreme Court. So on any view he has had
10 an appropriate determination of his application.

11 What the rule in Henderson v Henderson tells us is that
12 it is not now open to him to return to the Tribunal and
13 attempt to revisit the certification determination on a basis
14 which could and should have been advanced before.

15 The Tribunal has my submission that while, of course, the
16 Original Tribunal did offer him an opportunity to reformulate
17 his application that was a generosity. It was not obliged to
18 do so. It was an important aspect of that offer that it was
19 time limited and so it was consistent with the principle of
20 finality in a way that leaving it open and essentially at
21 large for a period of years is not consistent with the
22 principle of finality and it is not consistent with fairness
23 to the defendants.

24 THE CHAIR: If Ms Wakefield had come to the Tribunal in March
25 with an application to amend on an opt-in basis, so March of

1 this year, shortly after the Supreme Court judgment, you
2 would be running the same abuse argument.

3 MS FORD: Yes.

4 THE CHAIR: But if the abuse argument fell away, I suppose
5 you would still say it was a time-limited three-month and in
6 a sense it was that, no steps having been taken. But is that
7 realistic when parties are going through a lengthy appellate
8 process? We I think have seen something from the Tribunal
9 itself which looks as though the Tribunal assumed that that
10 was an opportunity that would in a sense fall to be
11 revisited.

12 MS FORD: I want to come back to that because we do not accept
13 that that is the correct understanding of that single letter
14 from the Tribunal.

15 THE CHAIR: That is helpful. How far is this a function of
16 the fact that we are now well after three months from the
17 date even of the Supreme Court Order, let alone the Supreme
18 Court judgment, and all that we have before us is
19 an application for another five months in which to
20 investigate matters?

21 MS FORD: Sir, that is absolutely a factor which we say feeds
22 into the abuse analysis because in all the circumstances,
23 given the period of delay, there was an obligation to act
24 expeditiously and on any view, in our submission, Mr Evans
25 has not done that, but I describe it as an aggravating factor

1 again, because we say the fundamental underlying point is
2 that he was offered this opportunity at the time and if he
3 had taken the view, as the Tribunal has just put to me, that
4 really it was a possibility but it needed to await the
5 outcome of the appellate process, then that is an argument
6 that could and should have been advanced in support of some
7 sort of stay or indeed he could have put in a protective
8 application and said: please stay my protective application
9 while I pursue my appeal.

10 Now, it is not necessary for the purposes of an abuse
11 argument to get into the subjective analysis of why that was
12 not done, but I do make a submission in the context of the
13 second strand of abuse, the estoppel by conduct, that the
14 objective result of him not doing that was that he was able
15 to advance his case on the most favourable factual
16 assumptions to him before the Court of Appeal and the Supreme
17 Court, namely that there was no alternative: either you
18 certify on the opt-out basis or there will be no claims. My
19 submission will be that was clearly an advantageous position
20 to him to adopt and it is one that he could not have
21 maintained had he at the same time purported to preserve the
22 possibility that he might come back and try opt-in instead.

23 So when it comes to the discussion about what was the
24 advantage and what was the corresponding prejudice to the
25 defendants, the defendants have had to beat a case that has

1 been put at its absolute highest and that is a relevant
2 prejudice to the defendants, but I am going to come on to
3 elaborate on that when I deal with the three criteria from
4 LA Micro. I am just finishing off our submissions on
5 Henderson v Henderson.

6 I would like to clarify what we say is the prejudice and
7 it is, consistent with the submissions I have just made,
8 a prejudice which is not only to the Proposed Defendants but
9 to the public interest. The prejudice is litigation which
10 drags on forever, to use the phrase in the authorities. So
11 instead of achieving finality at the end of six years of
12 litigation and a costly trip all the way up to the Supreme
13 Court, instead we face the prospect that matters go back to
14 square one and start again and, in our submission, that
15 really is oppressive to the Proposed Defendants and it is
16 contrary to the public interest. Now that is not, as the
17 submission was made, simply a function of the appellate
18 process. It is not right to suggest the reason it has taken
19 so long is because we were pursuing a lengthy appeal and they
20 take time. If anything that is precisely the point because
21 if these points had been raised at the right time, if opt-in
22 had been raised at the right time, then we would pursue
23 a lengthy appeal and then we would know the answer, then
24 there would be no further litigation one way or the other.
25 Obviously it is possible that the opt-in proceedings might go

1 ahead on that basis, but what we would be facing would be the
2 prospect that the question of opt-in starts again from the
3 beginning after six years of litigation. That is the
4 prejudice and that is what it is intended to avoid the rule
5 in Henderson v Henderson.

6 THE CHAIR: You would say it is not symmetrical. If you had
7 lost the appeal, obviously we would be back here, but we
8 would not be having to address issues of certification. The
9 litigation would not be very far on, it would not quite be at
10 square one. It might be at square two.

11 MS FORD: Had the defendants lost the appeal?

12 THE CHAIR: Yes, but you would say it is not symmetrical
13 because it is not that anyone would be coming forward with
14 a new basis of the case, it would simply be the case that had
15 gone up to appeal and come back.

16 MS FORD: Had the defendants been unsuccessful, yes, it would
17 have proceeded on an opt-out basis and then the matter would
18 have gone on from certification to essentially presumably
19 directions to trial.

20 THE CHAIR: You would be at square two, not square one.

21 MS FORD: Indeed, and it is no doubt that it is a long road, but
22 the whole point of the Henderson v Henderson abuse is that
23 one should not be back at square one again. Had it been done
24 correctly, questions of certification would have been
25 resolved one way or the other. Instead what is being

1 suggested is that after six years and lengthy appeals they
2 are not resolved and we are starting again. That is the
3 prejudice. In our submission, that is exactly the scenario
4 that the court warned about in the Seele Austria case that
5 I showed the Tribunal, where a claiming party puts its case
6 one way, causes the other side to incur considerable expense,
7 only for the claiming party to lose and then come up with
8 a different way of putting the same case and bringing the
9 process all over again. In our submission, that is exactly
10 what is going on here.

11 In our submission, the present circumstances also engage
12 the concept of estoppel by conduct, as we have seen in the
13 LA Micro case. Addressing the three indicative questions
14 that were identified in that authority starting with the
15 question of inconsistency, in our submission, there is a very
16 clear inconsistency between the position which Mr Evans
17 adopted all the way to the Supreme Court, which was
18 an assertion that proceedings would not proceed if they were
19 certified on an opt-in basis, and the position he now
20 adopts, which at least raises the prospect that claims might
21 proceed on an opt-in basis. We say that there is a clear and
22 striking inconsistency between those two positions.

23 Now, an attempt has been made both in Mr Evans' skeleton
24 and orally to play down that inconsistency. It is said that
25 the differences between opt-in proceedings not going ahead

1 at all and opt-in proceedings possibly being able to go
2 ahead, but only on a limited basis for a tiny proportion of
3 class members, in my submission is not a point in Mr Evans'
4 favour that this application is being advanced on such
5 an ambivalent and unconvincing basis. If anything, the fact
6 that the party that is advocating this course of action is
7 unable to speak in its favour with any degree of conviction
8 means it is not a course of action that should be commending
9 itself to the Tribunal, in our submission.

10 But in any event we say there is no getting around the
11 fact that a clear representation was made that these
12 proceedings would not proceed if certified on an opt-in
13 basis. To the extent that attempts are now being made to
14 procure that they will or might proceed, there lies the
15 inconsistency.

16 The submission was made that there is a slim difference
17 analytically between those two positions. In our submission,
18 it is not a slim difference from the perspective of the
19 Proposed Defendants. It is not a slim difference at all to
20 compare we will not proceed on an opt-in basis with we will
21 go all the way to the Supreme Court and then we will try to
22 start matters again by proceeding on an opt-in basis. That
23 is not a slim difference. It is a fundamental difference and
24 that we say is potentially abusive.

25 It is worth picking up what is said in the evidence of

1 Mr Evans and Mr Maton about the extent of the inconsistency
2 because, in my submission, what one sees is that there is no
3 particular attempt to suggest that there is not
4 inconsistency, rather the gravamen of the evidence is that
5 there are reasons for changing their respective minds.

6 If we could just look at Mr Evans' statement in core,
7 tab 5, page 53, please. He has summarised the positions that
8 he has taken in the evidence in paragraph 4 and they include
9 at subparagraph (c):

10 "In my witness statement for the judicial review
11 proceedings, I said that the practical implication of the
12 Tribunal's refusal of opt-out certification was that I would
13 not be able to bring collective proceedings in this case.

14 "(d) In submissions before the Supreme Court, my legal team
15 said that it was common ground that no opt-in application
16 would be made on the basis of the proposed classes as then
17 constituted."

18 What he says at paragraph 5 is:

19 "I acknowledge that those positions were stated in clear
20 and emphatic terms, and that bringing the present application
21 now will give rise to the question whether it is consistent
22 with my previous position. I recognise that the present
23 application calls for an explanation of why, having taken
24 that position, I consider it appropriate to seek time to
25 assess whether opt-in proceedings can in fact be brought."

1 In my submission, he is not attempting to suggest that
2 there is no inconsistency, what he goes on to address is why
3 on the basis of his evidence he says he has changed his mind.

4 The same, in my submission, applies to Mr Maton's
5 evidence. It is in tab 4 in the same bundle, page 37. This
6 is under the heading "C. Basis on which the Permission
7 Application is made". He introduces it at paragraph 20 by
8 saying:

9 "I am fully aware that the Permission Application is
10 being made notwithstanding the evidence I gave in Maton 4 on
11 23 April 2021 that opt-in proceedings ... would be
12 impracticable."

13 The Tribunal has been taken through in some detail what
14 he said in that respect. What he says about it is at
15 paragraph 22:

16 "I accept that my prior evidence was given clearly and
17 without qualification, and that supporting the Permission
18 Application now will give rise to the question whether it is
19 consistent with the position I previously took. The view I
20 expressed in Maton 4, particularly at paragraphs 19 and 23,
21 reflected my considered view at the time, supported by our
22 bookbuilding experience and based on the litigation landscape
23 as it then stood."

24 So again the gravamen of his evidence is not to suggest
25 there is not an inconsistency, it is to say there are reasons

1 why he has changed his views. So, in my submission, the
2 first limb of the test under LA Micro is made out, there is
3 a clear inconsistency in position.

4 The second element, in my submission, is whether the
5 party has succeeded in persuading a court to accept the
6 party's earlier position. Mr Evans has succeeded in
7 persuading the Original Tribunal to accept the position he
8 originally advanced and then he has relied on that finding
9 before the appellate courts. Again, you have been shown in
10 some detail what was said in the evidence. We know that that
11 was accepted and relied on by the Original Tribunal. Just to
12 pick up the relevant passages again, it is authorities 65,
13 starting at page 2249. The first one is paragraph 372(2)
14 (ii). Part way down that paragraph you have the finding that
15 you have already been shown:

16 "...the litigation will, as the Applicants contend and which
17 we accept, end if we do not (as the Applicant seeks) certify
18 on an opt-out basis."

19 At the end of that paragraph we see the Tribunal saying
20 that is a factor which the Tribunal considered has
21 significant weight and it is the factor that in this case
22 weighs strongly in favour of certification on an opt-out basis
23 and that is in essence why we make the submission that it was
24 advantageous for Mr Evans to adopt this factual stance for
25 precisely the reasons the Tribunal has given there: it weighs

1 strongly in favour of certification on an opt-out basis.

2 Then 385 on page 2259. We have fairly emphatic
3 conclusions being expressed with underlining:

4 "...this is not a case where there is a choice between
5 opt-in and opt-out collective proceedings. Rather, the
6 choice is between opt-out collective proceedings and no
7 proceedings at all. As we have said, this is a factor that
8 points

9 strongly in favour of certifying on an opt-out basis ..."

10 Then over the page subparagraph (1):

11 "We accept that not certifying on an opt-out basis means
12 that, based on the evidence put forward in the Applications,
13 the claims articulated by the Applicants will not proceed."

14 So, in our submission, the Tribunal has relied on the
15 evidence which was placed before it and it has approached its
16 assessment of whether to certify on an opt-in basis or
17 an opt-out basis on the basis that the claims will not
18 proceed if they are certified on an opt-in basis. The fact
19 that the Tribunal accepted and relied on that evidence was
20 then prayed in aid by Mr Evans in support of his appeal in
21 the Court of Appeal and we have seen some of that earlier,
22 but to turn it up again, supplemental bundle-tab 38 starting
23 at page 1454. We start at paragraph 13 which records:

24 "Mr Evans wishes to bring these collective proceedings on
25 an opt-out basis..."

1 The submission is made -- sorry, I should make clear I
2 am reading from Mr Evans' skeleton argument:

3 "An opt-out CPO is the only practicable way of providing
4 effective access to justice for up to c. 100,000
5 claimants. Indeed, as developed below, it was accepted by
6 the CAT that pursuing the proceedings on an opt-in basis was
7 not possible."

8 Then if we go to page 1462. This is ground 2, the
9 heading "The majority of the CAT erred in law in deciding
10 that proceedings that should be certified and which can only
11 be brought on an opt-out basis, are not entitled to be
12 certified as opt-out proceedings."

13 Paragraph 39 is citing the findings of the Tribunal that
14 I have already shown you.

15 Paragraph 40 then relies on those findings to make the
16 submission that there has been a misdirection in law.

17 Then paragraph 45, which the Tribunal has already seen,
18 a strong submission that:

19 "Where collective proceedings pass the test for
20 certification and the only viable proposal is to bring
21 an opt-out claim, there is an entitlement to certification on
22 an opt-out basis."

23 So essentially the point of law that is being put forward
24 is there really is no choice in the circumstances of the
25 factual findings that have been made by the Tribunal.

1 The Tribunal's findings on the evidence were also then
2 prayed in aid by Mr Evans in resisting the banks' appeals to
3 the Supreme Court. If we look in this bundle, tab 40,
4 starting at page 1538. The first paragraph is paragraph 98
5 where it is submitted, and this I make clear is Mr Evans'
6 case before the Supreme Court, his written case:

7 "For the class members in the present case, the CAT's
8 decision to order that proceedings go ahead on an opt-in
9 basis, which would bring the proceedings to an end, was
10 plainly contrary to access to justice (and indeed to
11 facilitating the vindication of rights, and to deterring
12 wrongdoing, as addressed in Ground 3)."

13 Then paragraph 102, 1539, it is being said that a point
14 that has been taken by the appellants is:

15 "... a particularly bad point in the present case since the
16 Rule 79(3) decision had the effect of bringing proceedings to
17 an end. For the Appellants to seek to assert that such a
18 decision should not be viewed as impacting on the vindication
19 of rights and the deterrence of wrongdoing is particularly
20 stark."

21 It is then submitted at 103:

22 "[This] feature of the present case also answers the
23 complaint -- ... that the Court of Appeal were wrong to
24 confine their conclusions with the words 'in this case',
25 since in reality their approach was not specific to these

1 proceedings. That is obviously a bad point, since these
2 proceedings have the distinction of the opt-in decision being
3 fatal to proceedings going ahead."

4 So that was the position in writing. We say that the
5 transcript of what was said orally before the Supreme Court
6 is also particularly relevant, for two reasons. Firstly, it
7 is a statement of position from Mr Evans which is essentially
8 the latest in time. So it is particularly relevant when we
9 come to asking has there been a relevant change of
10 circumstances to see what was said most recently on his
11 behalf in the Supreme Court. Secondly, it contains what we
12 submit is an important submission about the basis on which
13 Mr Evans wished to advance his case both before the Court of
14 Appeal and the Supreme Court.

15 So if we can turn to, please, supplemental bundle,
16 tab 12, starting at page 1179. The Tribunal will see this is
17 a passage which we quoted in our skeleton argument. If we
18 can start, please, at the transcript page 131. There is
19 a reference to paragraph 385 of the CAT judgment, page 131
20 starting at line 19, and that is the relevant paragraph that
21 I have just shown the Tribunal. It is suggested by reference
22 to that paragraph, beginning of page 132:

23 "...my learned friend was perhaps slightly coy about whether
24 opt-in proceedings would go ahead, but the Tribunal found as
25 a fact, in fact, that they wouldn't."

1 Then at line 15:

2 "...that is the factual premise on which the appeal was
3 argued and on which this appeal should be being argued. It
4 was a finding of fact."

5 This is the passage which then goes on to make the
6 submission that it is, in those circumstances, surprising
7 that the claim was then stayed for three months to enable
8 a reapplication on an opt-in basis. That of course is
9 precisely what Mr Evans is now attempting to do, but at the
10 time it was surprising.

11 Then page 133 --

12 THE CHAIR: Can I just ask you, the reference to was it
13 yourself being slightly coy?

14 MS FORD: I was instructed to attend. Mr Beard KC was making the
15 oral submissions.

16 THE CHAIR: Okay, okay.

17 MS FORD: But I was part of the team.

18 THE CHAIR: What was the defendant's position before the
19 Supreme Court on the question of whether opt-in proceedings
20 would go ahead?

21 MS FORD: I confess I am not sure on what basis the submission
22 was made that we were being coy. I do not think we were
23 attempting to --

24 THE CHAIR: It is perhaps unfair to ask you since it was
25 a submission that Ms Wakefield made, but I was just wondering

1 whether it is of any relevance at all for us to understand
2 whether the defendants said anything about the issue.

3 MS WAKEFIELD: If it helps, it is really the passages set out in
4 paragraph 27 of my skeleton for this hearing where Mr Beard
5 said there might actually be no proceedings at all, so the
6 language of "might" or "may" and there is nothing more than
7 that.

8 MS FORD: I am grateful.

9 THE CHAIR: That is helpful. Thank you.

10 MS FORD: In any event, the submission that was made on behalf of
11 Mr Evans was not "might" or "may", it was essentially that
12 there had been a finding of fact that they would not.
13 Lord Leggatt then on page 133, starting at line 3, was asking
14 essentially -- he starts off by saying:

15 "...I suppose it might be a change of mind ... if they
16 thought it wasn't in principle right to strike out the claim,
17 then perhaps... "

18 Then he essentially says it was a waste of time
19 anyway to do that and that characterisation of the
20 position is then accepted. It was a waste of time to offer
21 Mr Evans the possibility of bringing an opt-in claim.

22 Page 134, Lord Sales, starting at line 10, is suggesting
23 that reserving the position in relation to opt-in was
24 an option which was available to the class representative.
25 In our submission, what is being suggested there, and what is

1 then accepted, is that an option was being offered, not that
2 Mr Evans was ever actually reserving the possibility of
3 availing himself of that option. That would have been
4 inconsistent with accepting the suggestion it was a waste of
5 time and it would also have been inconsistent with the
6 submission which is then made, starting at line 18,
7 Lord Sales is suggesting that it was not a detriment to the
8 class representative for that option to be offered to him.
9 So the point he is putting is he is contrasting an option
10 which may or may not be accepted with a concrete detriment.
11 The submission is made at 134, line 22:

12 "It's not a detriment. To the extent that if it were to
13 obscure the fact, and we will come on to this with the
14 strength of the claims ... if it were to obscure the fact
15 that the consequence of the CAT's decision was to bring the
16 proceedings to a conclusive end, then that would be a
17 detriment to me, because I want to be able to say to this
18 court, as I did in the Court of Appeal, the consequence of
19 the CAT's decision on opt-in/opt-out was to bring proceedings
20 to an end."

21 Now, we do place a certain amount of emphasis on this
22 statement. We say it is clearly a categoric statement that
23 the consequence of the CAT's decision was to bring the
24 proceedings to a conclusive end and it is also a categoric
25 statement about the basis upon which the case on behalf of

1 Mr Evans is being advanced. We say there is no doubt
2 whatsoever in the light of that submission that it is hugely
3 advantageous for Mr Evans to advance his case on the factual
4 basis that the consequence of the CAT's decision on
5 opt-in/opt-out was to bring proceedings to an end.

6 THE CHAIR: I suppose you can say, looking at it objectively,
7 it is an acknowledgement if the paragraph 411 option were to
8 obscure what was being presented as a fact that opt-in
9 proceedings would come to an end, that would be a detriment
10 and you would say, objectively, that is an acknowledgement it
11 is advantageous to be able to advance that submission in the
12 context of the Supreme Court case.

13 MS FORD: Sir, yes, the reason it would be a detriment is because
14 Mr Evans wants to advance his case on the premise that there
15 is no choice but to certify on an opt-out basis. If you do
16 not certify on an opt-out basis, proceedings will come to
17 an end.

18 THE CHAIR: Yes, and whether he wants to do it or not, it puts
19 his case -- it is a stronger position to be able to adopt and
20 taking it that opt-in were not regarded as viable, it would
21 be a detriment if the availability for that option were to
22 lead people to think, contrary to what was then Mr Evans'
23 view, that opt-in was in fact a potential viable position.

24 MS FORD: I understand that to have been the submission that was
25 made, yes.

1 THE CHAIR: Thank you.

2 MS FORD: Unsurprisingly, the submissions that the Supreme Court
3 received about the findings that have been made by the
4 Tribunal on the evidence underpin what the Supreme Court then
5 proceeds to say in its judgment. You have been shown the
6 paragraphs we rely on here, but I will come back to them
7 briefly for the purposes of making some submissions on them.

8 Authorities bundle, tab 67, starting at 2385. So it is
9 right to say the first two references are examples of the
10 Supreme Court recording its understanding of what the
11 evidence was and so subparagraph (5) towards the bottom of --
12 sorry, paragraph 5 on page 2385, towards the bottom of that
13 paragraph, it is recording the evidence showed that
14 proceedings would not in fact be brought on that basis so on
15 an opt-in basis.

16 Then page 2401, paragraph 60, again, it is recording the
17 findings of fact of the majority that proceedings would not
18 go ahead on an opt-in basis.

19 Paragraph 110 is different, in our submission, if we go
20 to that. This does form part of the Supreme Court's
21 reasoning and it is headed "Conclusion on this issue". It
22 first states:

23 "The Tribunal took the applicants' assertion that the
24 claim would collapse if certified as opt-in at face value and
25 viewed this as 'a factor that points strongly in favour of

1 certifying on an opt-out basis'. But in our view the
2 Tribunal was right not to treat this factor as if it were a
3 trump card. There are obvious dangers in allowing applicant
4 class representatives to make such an assertion in terrorem
5 if that stance clinches for them and for the
6 principal members of the class the advantages of the opt-out
7 process. The Tribunal rightly recognised that the potential
8 collapse of the case meant that particular care was needed in
9 assessing the strength of the claim in deciding what weight
10 to give it ... We consider that the weight that it ultimately
11 decided to give that factor was well within its discretion."

12 In our submission this is an important paragraph for two
13 reasons. The first is that the Supreme Court is recording
14 the Tribunal's finding that the claim would not proceed if
15 certified as an opt-in and it is endorsing the Tribunal's
16 reasoning in the light of that finding so this is the factual
17 position which now underpins the Supreme Court's judgment and
18 which underpins its' endorsement of the reasoning. In our
19 submission, it would be fundamentally problematic now to
20 proceed on a different and inconsistent factual position.

21 Secondly, this paragraph shows that the Supreme Court is
22 rightly alive to the possibility that a class representative
23 might be incentivised to threaten the possible collapse of
24 proceedings in order to try and secure opt-out certification.
25 It makes clear that that would be a self-serving stance and

1 that needs to be treated with caution. We make the point
2 that it would run counter to the Supreme Court's warning here
3 if a class representative were to be permitted to disclaim
4 any intention to rely on opt-in proceedings when it suits
5 them and then only later to attempt to resurrect that
6 possibility if opt-out proceedings are unsuccessful. In our
7 submission, that would be inconsistent with the clear warning
8 that the Supreme Court is giving in this paragraph.

9 So I have been addressing the second factor under
10 estoppel by conduct and, in my submission, the second factor
11 is satisfied because the factual position Mr Evans adopted
12 has been endorsed and applied and has now become part of the
13 reasoning of the Supreme Court.

14 THE CHAIR: Ms Ford, I wonder if we might just take a very
15 short break for the benefit of the transcriber at this point.
16 If we take five to ten minutes, how are you getting on?

17 MS FORD: I am making reasonably good progress. There is
18 obviously a series of fairly short and sharp points I need to
19 deal with along the lines of the alleged change in
20 circumstances, the position on timing, the position on the
21 merits, the position on Sterling Lads, those nature of
22 points.

23 THE CHAIR: Yes.

24 MS FORD: But I am making good progress with the core of my
25 submission about abuse of process.

1 THE CHAIR: That is helpful and, Ms Wakefield, you will want
2 a reply. At the moment, is there much that you feel you will
3 need to come back on?

4 MS WAKEFIELD: I do need to come back on some points, but if we
5 say 15 minutes for my reply and hopefully I will be shorter
6 than that.

7 THE CHAIR: That is very helpful. Again, if we could come
8 back just after quarter to that would be helpful. Thank you
9 very much.

10 (3.40 pm)

11 (Short break)

12 (3.49 pm)

13 MS FORD: Sir, I am moving on to the third element of the factors
14 relevant to estoppel by conduct which is the unfair advantage
15 or unfair detriment arising from the change of position. The
16 Tribunal essentially already has my submissions on this. We
17 say that in the present case Mr Evans did gain a very
18 significant strategic advantage by putting his case the way
19 that he did. He obliged the Tribunal and the appellate
20 courts to grapple with opt-in versus opt-out on the extreme
21 assumption that if they did not certify on an opt-out basis,
22 as they were being asked to do, then there would be no claim
23 and we say that, on any view, adopting that chance and
24 requiring the issue to be considered on that basis was
25 clearly strategically favourable to him. We say that there

1 is then a corresponding detriment to the defendants, because
2 they had to meet and defend the application on that basis, so
3 a choice between opt-out and no claim, and that is the basis
4 on which we make the submission that it would be manifestly
5 unfair to the defendants to permit Mr Evans to maintain that
6 extreme stance when it suited him and require the proposed
7 defendants to meet and defend that application on that basis
8 and then to be permitted to resile from it and then say the
9 opposite.

10 This does in fact tie into the exchange I was having with
11 the Tribunal about whether it is necessary for the class
12 representative to bring forward the entirety of their
13 proposed opt-in proceedings at the point when we seek
14 certification. In my submission, it would be sufficient for
15 the class representative to be open about the position. So
16 if the class representative wished to say I am prioritising
17 my opt-out certification application, but I wish to reserve
18 the possibility that if that is unsuccessful then I will seek
19 funding on an opt-in basis in the alternative, that would be
20 acceptable because it is essentially being candid about the
21 possibility that matters might go further and the Tribunal can
22 then deal with that appropriately and make appropriate
23 case-management directions as to how it thinks that could be
24 resolved.

25 THE CHAIR: Practicability of opt-in is quite a -- is one of

1 the two key factors that have to be taken into account when
2 deciding whether to certify on an opt-out basis and there
3 might be something -- it ought to be in a way an issue that
4 would be canvassed at that point in any event.

5 MS FORD: At the very least insofar as it is being said I want to
6 hold open that possibility --

7 THE CHAIR: Yes.

8 MS FORD: -- that is clearly a factor that the Tribunal ought to
9 be able to weigh when it is exercising its discretion as to
10 whether to certify on an opt-in or an opt-out basis and one
11 of the real problems that we say arose in this case is that
12 that position was consistently abjured right up to the point
13 when opt-out was unsuccessful and then it came back in again.

14 I am turning to address the matters that are relied on in
15 Mr Maton's 10th statement to suggest there has been
16 a relevant change of circumstances and the Tribunal will have
17 well in mind this issue fits into the debate in two ways.
18 First of all, it might be advanced as a reason why the
19 Tribunal should now vary the Original Tribunal's paragraph
20 411 direction out of time, relying on rule 115(2) and the
21 reference to the material change of circumstances in the
22 Kerilee line of authorities and then, alternatively, as it
23 advances a reason why there is in fact no
24 Henderson v Henderson abuse of process, because it is said,
25 well, there has been a relevant change of circumstances so we

1 could not bring it forward at the time.

2 The way it is put in Mr Evans' skeleton argument at
3 paragraph 35 is that the Tribunal should be taking into
4 account material factual changes since the issue of the CPO
5 application in December 2019 and the CPO hearing in
6 July 2021. In our submission, that stance is an additional
7 factor that feeds into the abuse analysis because, as I have
8 just shown the Tribunal, as recently as 2 September 2025, so
9 Day 2 of the Supreme Court hearing, the categoric submission
10 was being made on behalf of Mr Evans that the consequence of
11 the CAT's decision was to bring the proceedings to
12 a conclusive end. Yet what we are being shown now is
13 evidence seeking to suggest that there had been relevant
14 changes going back to 2019 or 2021, which were not put before
15 the Supreme Court and which were not used to clarify or to
16 qualify what was being said to the Supreme Court, but which
17 are now relied on before this Tribunal. In our submission,
18 the Tribunal should not countenance one thing being said to
19 the Supreme Court and something else now being said below.

20 Dealing in turn with the points that Mr Maton identifies
21 in his witness statement, the first matter he relies on is
22 limitation has expired. That is his paragraph 24. As has
23 been floated already, we say that, if anything, that is
24 a factor which militates in favour of the proposed
25 defendants. The Tribunal will be well familiar with all the

1 authorities that say that amendments should not be lightly or
2 routinely permitted when they would deprive the defendants of
3 a limitation defence. We say the whole point of limitation
4 rules is to protect defendants from the injustice of stale
5 claims and, as with the abuse of process principles more
6 generally, that is a consideration that is not just in the
7 defendants' interests, that is recognised in the authorities
8 to be in the public interest and it reflects a legislative
9 judgment that causes of action should be litigated within the
10 limitation period, even if that would result in the defeat of
11 a good cause of action.

12 We rely on that because we say the fact that limitation
13 has expired really does underline the injustice to the
14 defendants of Mr Evans only raising now something which we
15 say ought to have been raised for the first time back in
16 2019. We say that the expiry of a limitation period is
17 something which was foreseeable and predictable. Mr Evans
18 could, had he wished, have brought opt-in proceedings within
19 time on a protected basis and we say circumstances which are
20 known and within the control of the party in question do not
21 amount to a material change in circumstances.

22 The second matter relied on is purported developments in
23 the litigation landscape. I should make clear in relation to
24 both this and essentially all the points that are advanced,
25 in our submission, what the Tribunal has to do is assess on

1 an objective basis whether or not it is satisfied that the
2 matters identified constitute a material change in
3 circumstances so I am not making a submission that one should
4 in any way doubt the veracity or the truthfulness of the
5 evidence that has been given, I am saying that the Tribunal
6 can assess and reach its own view as to whether it is
7 satisfied that the matters relied on do constitute a material
8 change of circumstances or not.

9 The Tribunal may have seen that there were two versions
10 of a chronology filed, a version which was an agreed version
11 and a version which had certain entries which the defendants
12 had sought to include which were not agreed by the claimants.
13 The difference between us was that we wanted to include
14 various events which we say appear in the witness evidence
15 and submissions on behalf of Mr Evans and are relied on as
16 giving rise to a material change of circumstances and we
17 thought that it would be helpful for the Tribunal to be able
18 to see those events in the context of the progression of
19 events in these particular proceedings.

20 So the chronology that we have lodged that has those
21 additional elements in it is behind -- the Tribunal has
22 an additional bundle with the skeleton arguments in. I do
23 not know if it has made its way to you.

24 THE CHAIR: We have got a joint chronology including unagreed
25 entries --

1 MS FORD: Maybe we can just pick it up from that.

2 THE CHAIR: -- in a third supplementary bundle at page 9.

3 MS FORD: That is the one, yes. Thank you. The headline point
4 that we draw out is that virtually all of the matters that
5 are relied on predate the Supreme Court's judgment.

6 Running through them very quickly, the first item
7 identified is the Dutch FX proceedings. They were issued on
8 10 December 2021 so that is line 22 of our chronology. They
9 predate the Original Tribunal CPO judgment which was
10 31 March 2022, chronology line 25. Now insofar as what is
11 being relied on is the fact that they were jurisdictional
12 difficulties encountered in the Dutch proceedings and so
13 there was the possibility that some or all of the Dutch
14 claimants might consider proceedings in the UK to be an
15 alternative route to recovery, which is a suggestion that is
16 made in paragraph 50 of Mr Maton's statement, the adverse
17 judgment of the Amsterdam District Court on jurisdiction was
18 29 March 2023. We put that in chronology line 36, although
19 it will be appreciated that the defendant banks would have
20 actually made their jurisdiction challenges prior to that
21 judgment. So on any view that is an eventuality which
22 pre-dated the hearing of the appeal to the Court of Appeal,
23 which was on 25 to 28 April 2023, so we say it is hardly
24 a new development.

25 The next matter that is relied on is the Australian FX

1 cartel proceedings. That is Mr Maton's 10th statement
2 paragraph 25B. It is common ground those were opt-out
3 proceedings rather than opt-in proceedings and they were
4 filed on 27 May 2019. We put that in our chronology line 11.
5 So they predate Mr Evans' own application. What we
6 understand Mr Evans relies on is the settlement of those
7 proceedings and the fact that market participants were
8 prepared to come forward to participate in a court-approved
9 settlement. A settlement was reached on 27 February 2024 and
10 it required participants to come forward by 12 August 2024 so
11 we have included that in the chronology at line 52. The
12 Tribunal will see they predate -- those events predate the
13 grant of permission to appeal by the Supreme Court on 17
14 April 2024, which was chronology line 53, and then the
15 settlement was approved by the court on 15 August 2025 and we
16 have included that in the chronology at line 71.

17 Given that these were opt-out proceedings, we say
18 stepping forward to claim a share of a settlement pot that
19 has already been agreed is, in our submission, very different
20 than signing up for opt-in proceedings. In our submission,
21 what this is really about is the progress of a distribution
22 of a settlement that was achieved in an opt-out claim so it
23 is difficult to see that this eventuality has justified
24 a major reassessment on the part of Mr Evans.

25 THE CHAIR: Can I just double-check, on paragraph 25(b) of

1 Mr Maton's 10th statement, about the sixth line, it says
2 settlement was reached in February '25 and I think your
3 chronology line 52 says -- is that the same settlement,
4 February '24? I just want to make sure. Is that the same
5 date or is that --

6 MS FORD: So our understanding is that the settlement was
7 approved in 2025 on 15 August, but the actual --

8 PROFESSOR MULHERON: Yes, it says here settlement was reached in
9 February 25 and approved by Justice Beach in August 25.

10 MS FORD: Well, the settlement was reached on 27 February 2024 --

11 PROFESSOR MULHERON: 24, right.

12 MS FORD: -- is my understanding. Maybe that is a typo. Perhaps
13 that --

14 MS WAKEFIELD: A bit unconventional but I am reading from the
15 Maurice Blackburn website here. April 24 Justice Beach makes

16 class

17 closure order requiring group members to register if they
18 wish to seek the benefit of settlement. February 25 the
19 parties reached an in-principle agreement at mediation to
20 settle for 59 million Australian dollars.

21 August 25 the Federal Court approve the settlement was
22 fair and reasonable. April to June 26 the dispute
23 administrator made final distribution payments to 484
24 eligible class members and we can send that round after court
25 today.

1 MS FORD: I am grateful. It may be that the typo then is in our
2 chronology. We did seek to try and agree these, but we did
3 not get engagement on the actual detail of the matters that
4 are unagreed.

5 PROFESSOR MULHERON: Thank you.

6 MS FORD: But the Tribunal has my overarching point, which is
7 that what is going on here is the distribution of a
8 settlement achieved in an opt-out claim.

9 Subparagraph 25(c) of Mr Maton's statement identified
10 developments in the UK collective proceedings regime and two
11 examples are given. The first is the class representative in
12 Commercial and Interregional Card Claims Limited being given
13 permission for opt-in proceedings. We have marked the
14 relevant events in relation to that in the chronology. So it
15 was an application for opt-in certification which was made in
16 August 2022 so we put that in chronology line 31. Then
17 certification was originally refused on 8 June 2023, which is
18 chronology line 39 and it was successfully certified on
19 27 February 2024, chronology line 59.

20 We understand from Mr Maton's evidence that he is relying
21 on a judgment of 2 March 2026 and that was a judgment which
22 identified various commercial entities that had chosen to opt
23 in, but the submission that we would make is that it would
24 have been evident from the fact an application had been made
25 for certification on an opt-in basis at all back in 2022 that

1 the class representative in that case had taken the view that
2 they had sufficient commitment from potential class members
3 to make an opt-in application viable. We say it is not
4 necessary for the actual names of class participants to be
5 recorded in a judgment in order for that to be evident.

6 Needless to say, the fact that entities were prepared to
7 opt into a different claim in relation to interchange fees
8 says very little about the willingness or otherwise of them
9 to opt into these particular claims so, in our submission,
10 the CICC claims are not some sort of watershed moment in the
11 context of these proceedings.

12 The second UK development that is relied on is the Trucks
13 collective proceedings and the fact that in 2026 the Tribunal
14 confirmed that the Road Haulage Association would continue to
15 act as class representative in opt-in proceedings in respect
16 of the Trucks cartel. The Trucks opt-in claim was filed in
17 July 2018 and we have put that in the chronology in lines 7
18 and 8 so it pre-dated Mr Evans' own application. It was
19 certified on 8 June 2022, which we have included in the
20 chronology possibly in line 22 -- 28, I am grateful. That
21 was shortly after the certification judgment in these
22 proceedings on 31 March 2022, which we have included in
23 chronology line 25 so approximate in time to the original
24 certification in these proceedings and then the Court of
25 Appeal upheld the opt-in certification in Trucks on 25 July

1 2023.

2 Now the particular event that Mr Maton is pointing to is
3 an order that is dated 21 April 2026 and it was amended under
4 the slip rule on 5 August 2026 and it is made by consent and
5 it was making certain amendments to the CPO order, but we say
6 that that particular order is not a material development in
7 the context of opt-in proceedings that have been on foot
8 since 2018 and were certified in 2022.

9 Paragraph 25(d) is concerned with securities group
10 litigation by institutional investors and it is evident from
11 the terms of Mr Maton's evidence that the fact of securities
12 group litigation is not itself a new development.
13 Proceedings were filed against RBS in 2013. We have included
14 that chronology line 5. Proceedings were filed against Tesco
15 in 2016, chronology line 6 and Mr Maton has mentioned that
16 proceedings against Standard Chartered Bank were settled in
17 2025, but they were issued in 2020. That is line 14. He
18 also mentions proceedings against Glencore which are ongoing.
19 Those were issued in 2022 and there are also ongoing
20 proceedings against Boohoo, which were issued in 2024 and
21 that is line 56 in the chronology.

22 We also make the point that those examples, securities
23 group litigation, are not factually close to the present
24 proceedings. At most, it might be thought to be examples of
25 a willingness on the part of financial institutions to engage

1 in litigation and that we say is not a particularly new
2 development.

3 Paragraph 25 (e) identifies follow-on litigation against
4 major cartels by sophisticated claimants and the examples
5 that are given here are essentially follow-on competition
6 claims including in Trucks and in interchange fees and they
7 are described as de facto opt-in actions by groups of
8 corporates. The reality is they are run-of-the-mill
9 competition claims and the notion that corporate claimants
10 might bring competition proceedings is not, in our
11 submission, at all new.

12 So, in our submission, there is nothing here which comes
13 close to representing a material change in circumstances
14 sufficient to justify the change of position on behalf of
15 Mr Evans, and still less is there a material development
16 which postdates what was said to essentially the opposite
17 effect in the Supreme Court.

18 THE CHAIR: Your second form of abuse, the estoppel by
19 conduct, does material change of circumstances arise at all
20 if we were with you on that submission?

21 MS FORD: I am just thinking through the logic of it.

22 THE CHAIR: Or are you simply estopped by reason of the
23 outrage to the administration of justice, if that is the
24 right way to think about it?

25 MS FORD: Since the problem is that one ends up with a judgment

1 which proceeds on a factual basis which is then changed,
2 I would anticipate that there would then have to be
3 an enquiry as to whether or not there was a justification for
4 the change such that the difference between the factual
5 premise that the judgment proceeded on was not problematic.

6 THE CHAIR: So on that basis you are not resisting at the
7 level of principle the possibility that there could be
8 a change of circumstances that would justify the change of
9 position and which would be relevant not only to -- because
10 it is responding to the way you put the submission a moment
11 ago where you referred specifically to the Henderson abuse.
12 That is why I am addressing whether the same point applies to
13 the estoppel by conduct argument.

14 MS FORD: It would have to be a change which was of sufficient
15 moment to mean it is not problematic that the Supreme Court
16 had been invited to proceed on a particular factual basis and
17 did in fact proceed on a particular factual basis in
18 expressing its conclusions and its reasoning. In my
19 submission that would have to be a fairly significant change
20 and, as the Tribunal will anticipate, my submission is
21 nothing even approaching that in the matters that have been
22 advanced.

23 THE CHAIR: Yes, and I suppose we do not need to -- if we
24 were to accept that, then in a sense we do not have to
25 resolve whether as a matter of principle there might be cases

1 where a change could justify -- could be (inaudible) estoppel
2 and it might be dangerous to do so because, as you reminded
3 us, it is a broad fact-specific assessment in circumstances
4 where there are no close categories.

5 MS FORD: Sir, I think that must be right. One is always
6 exercising that broad merits-based assessment and so in that
7 context one would not want to be prescriptive.

8 THE CHAIR: Thank you.

9 MS FORD: Ms Simonsen is reminding me that unfairness is a factor
10 that feeds into the LA Micro assessments and so that would be
11 another factor which would be taken into account in deciding
12 whether or not the matters that were relied on to justify the
13 inconsistency in reality could do so.

14 THE CHAIR: That is very helpful.

15 MS FORD: I am just working through the factors identified in
16 Mr Maton's statement. At paragraph 26 he relies on
17 Hausfeld's book-building exercise. This is a different
18 matter and it is an unidentified group litigation matter in
19 relation to which the evidence is that the experience was
20 more positive than Mr Maton could have predicted until
21 recently. In our submission, what undermines the relevance
22 of this evidence is that we are not told what the claim is,
23 we are not told whether it is in any way related to or
24 relevant to the present claim, we are not told whether it is
25 even under the collective proceedings regime, we are not

1 given any concrete details about the degree of success in
2 book-building and what we are told essentially is that it was
3 more positive than expected. So in our submission this
4 evidence is not capable of having any relevant bearing
5 on the circumstances of this matter.

6 The final matter relied on is what is described as
7 a preliminary class outreach exercise. We have not been told
8 exactly when this exercise commenced. We only know it was
9 following the Supreme Court's order of 17 February 2026.
10 I am taking that from Mr Evans' statement. We say it could
11 and should have been done earlier and we say an exercise of
12 this sort does not show that there has been any relevant
13 change of position just because the exercise itself has been
14 started in the last few months. The results, in our
15 submission, are frankly underwhelming. By the time of
16 Mr Maton's 10th statement on 19 May 2026, it had produced in
17 principle indications of interest. That in itself
18 is something of a woolly description of the product of this
19 exercise, but it had produced in-principle indications of
20 interest from 31 organisations. Two months later by the time
21 of Mr Maton's 11th statement the number is said to be 51 and
22 then yesterday we received Mr Maton's 12th statement which
23 increased the number to 65 out of a proposed class of up to
24 42,000. Again, in our submission, these sorts of numbers
25 really do not move the dial, particularly when there is no

1 good reason why this exercise could not have been done much
2 earlier. In our submission, the fact that we are now
3 receiving a flurry of last minute updates rather underlines
4 the impression that this really is an extremely recent
5 afterthought.

6 Finally, I would draw the Tribunal's attention to what is
7 said by Mr Maton in paragraph 29 of his statement. He says:

8 "I should be clear: I am not saying that the structural
9 disincentives I identified in Maton 4 have been resolved, nor
10 that they will necessarily be capable of being overcome in
11 the present case."

12 Now we have been taken to everything Mr Maton said about
13 structural incentives in his statement -- sorry, structural
14 disincentives and that was included in Mr Evans' Supreme
15 Court case at paragraph 89. In our submission, nothing that
16 has been identified in his evidence in terms of general
17 trends in the litigation landscape make any difference to
18 those concrete factors that were identified by Mr Evans as
19 providing an obstacle to opt-out in this particular claim.

20 Now, recalling why this relevant change of circumstances
21 test is applied at all, it is because of the public interest
22 in the finality of litigation, apart from other things. It
23 is because we know that litigants should not be obliged to
24 fight endlessly the same battles and defendants should not be
25 twice vexed in the same matter and we say that given that

1 those are powerful public interest imperatives, there must be
2 significant changes in circumstances to justify reopening
3 a previous decision and our submission is those simply have
4 not been shown here. It is striking that even Mr Evans and
5 Mr Maton themselves are not able to state with any degree of
6 conviction that matters have in fact changed so we would
7 invite the Tribunal to reject the suggestion that there has
8 been any relevant material change of circumstances.

9 Turning to the timing issue, there are two aspects to
10 that. There are the reasons advanced by Mr Evans as to why
11 he permitted the initial opportunity to amend to plead
12 opt-in to expire. That is the first element and then there
13 is the fact that, in our submission, there has been
14 a distinct lack of urgency even following the judgment of the
15 Supreme Court.

16 On the first question, why the three-month opportunity
17 offered by the Original Tribunal was permitted to lapse, I am
18 going to address very briefly the reasons that were addressed
19 in Mr Evans' skeleton at paragraph 40, but I can take it
20 very briefly because these have largely been canvassed
21 already. The first was the apparent inviability of opt-in
22 proceedings at the time. The Tribunal has our submissions
23 that that was the stance Mr Evans adopted right up to the
24 Supreme Court and it is not fair to permit him to resile from
25 it and, plus, you have our submission that there are no

1 material changes in circumstances anyway.

2 Second is the submission that the right time for any
3 application for opt-in proceedings to be made would be after
4 the exhaustion of the appellate process. We say if that was
5 Mr Evans' thinking at the time, it should have been advanced
6 in support of an application for a stay or an extension of
7 time. One does not simply just let the three-month period
8 lapse.

9 The third is the apparent shared understanding that time
10 to file any such application should run from the end of the
11 appellate process. We have been quite clear that there was
12 no such shared understanding and we do make the submission
13 that any such shared understanding is not credible. The
14 Tribunal will be well aware that the usual position is that
15 one does not have a stay of any part of the order pending the
16 outcome of an appeal unless there is an actual application
17 made for a stay. There is no automatic stay pending appeal
18 and there is authority in the bundles to that effect if it
19 should assist. It is the FIPO v CMA case, authorities bundle
20 tab 23, page 497. So the default position would have been
21 that the three-month time limit runs unless Mr Evans
22 positively applied for it to be stayed and, in our
23 submission, there was no good reason to assume anything to
24 the contrary.

25 The Tribunal raised with me earlier that Mr Evans relies

1 on that particular letter from the Tribunal. Perhaps we can
2 turn it up. It is core, tab 13, page 114.

3 THE CHAIR: 114?

4 MS FORD: 114, yes.

5 THE CHAIR: Thank you.

6 MS FORD: So the first point is this is a letter dated
7 14 November 2022. So this is after the three-month time
8 limit had already been permitted to expire. So it is
9 difficult to understand how it could be said that this letter
10 could form the basis for any shared understanding.

11 The second point to emphasise is this is not a letter
12 that is concerned specifically with the period of time the
13 Tribunal had made available to bring in an alternative opt-in
14 claim. It is actually dealing with a separate question,
15 which is the question of whether permission to appeal had
16 been granted on the carriage dispute. So it is not actually
17 engaged with the issue we are concerned with at all.

18 In that context, the relevant passage is the one towards
19 the bottom of the first page:

20 "The president considers that it is clear from the face
21 of the Tribunal's Reasoned Order that permission to appeal
22 was given in respect of the carriage issue. It should be
23 noted that that issue arises only contingently."

24 So permission to appeal on carriage arises only
25 contingently:

1 "On the basis of the Tribunal's decision, both the
2 O'Higgins PCR and the Evans PCR can proceed with opt-in
3 collective actions, and they can do so in parallel."

4 Now, our understanding is that the fact that the Tribunal
5 used the present tense here, "they can proceed with opt-in
6 actions", is what is relied on to say there was some sort of
7 shared understanding. What the Tribunal goes on to say is:

8 "It is only if the Tribunal's decision on opt-in/opt-out
9 is wrong, that the carriage issue arises."

10 Now, in our submission, all the Tribunal is saying here
11 is that it has given permission but it has given permission
12 contingently in the sense that that permission does not arise
13 at all if the Tribunal were to be right about opt-in versus
14 opt-out, because opt-in actions could conceivably exist in
15 parallel. So it is saying it is only if the Tribunal were
16 found to be wrong in its judgment about opt-in/opt-out that
17 it becomes necessary to consider the carriage issue. Now, in
18 our submission, the Tribunal does not have to be assuming
19 that the parties were still in time to bring opt-in
20 proceedings for this letter to make sense, because what it is
21 doing is making a point based on the logic of its own
22 reasoning and the logic of its own interrelated exercises of
23 discretion and it actually goes on to spell that out towards
24 the bottom of this paragraph. It says:

25 "In such a case -- given the interconnectedness of the

1 discretionary elements in the decision under appeal -- the
2 Tribunal's contingent decision on carriage would doubtless be
3 re-considered by the Court of Appeal".

4 So, in my submission, it is not necessary for this letter
5 to make sense for the Tribunal to assume that everybody is
6 still in time to apply. What it says is I made a judgment
7 on opt-in versus opt-out, I made a judgment on carriage, it
8 is only if I am wrong on opt-in/opt-out that it becomes
9 necessary to consider carriage.

10 THE CHAIR: In any event, you would say the Tribunal
11 really were not focused at all on the question that we are
12 having to focus on.

13 MS FORD: Not at all. Mr Evans has complained that at no time
14 did the Proposed Defendants suggest that time had been
15 irrevocably expired for Mr Evans to bring opt-in proceedings
16 and that is his skeleton, paragraph 42. The short answer to
17 that is why on earth would we have felt the need to make that
18 clear when our understanding of his position was that he had
19 no intention whatsoever of bringing opt-in proceedings?
20 Mr Evans' position in paragraph 43 of his skeleton is that
21 the natural moment for the exercise of permission granted by
22 the Original Tribunal is the end of the appellate process.
23 We do say he is out of time even on the logic of his own case
24 and this does require looking very briefly at some of the
25 correspondence.

1 If we look over the page in the bundle, core 14,
2 page 116, this is Mr Evans' letter of 18 December 2025
3 referring to the Supreme Court's judgment. The relevant
4 paragraph is paragraph 7 where he says:

5 "It follows from the Supreme Court's judgment that the
6 CAT's decision not to certify Mr Evans' application on an
7 opt-out basis will be reinstated, with the consequence that
8 the application will remain stayed for the three-month period
9 that will now run from the handing-down of the Supreme
10 Court's judgment today."

11 So his position first off was the three-month period is
12 now running.

13 THE CHAIR: That is from December.

14 MS FORD: That is -- I think I am right in saying it is the date
15 of the Supreme Court's judgment, 18 December. That was his
16 stated position but he did not then proceed to make
17 an application within three months of the Supreme Court's
18 judgment, that expired on 18 March 2026. We then responded
19 on 23 December at tab 15 and I think you have been shown
20 this letter. It was suggested in Mr Evans' skeleton at
21 paragraph 42 that at no point before the dismissal application
22 dated 7 April 2026 did the Proposed Defendants suggest that
23 time had irrevocably expired for Mr Evans to seek permission
24 to bring opt-in proceedings. That is not correct, because we
25 spelled it out in this letter, essentially in response to the

1 first time that Mr Evans gave any indication that he had an
2 interest in bringing opt-in proceedings. The relevant
3 paragraphs are paragraphs 2 and 3. We say the:

4 "The Appellants fundamentally disagree with the premise
5 on which your letter is based ... the CAT gave permission for
6 the Respondent to submit a revised application for
7 certification on an opt-in basis within three months of the
8 date of the CAT Judgment ... That three-month period lapsed
9 on 30 June 2022. The Respondent did not submit a revised
10 application for certification on an opt-in basis within that
11 period, nor did he (during those three months or at any time
12 since) request for the deadline to be extended or stayed."

13 Then he says:

14 "It is therefore untenable that, three and half years
15 after the expiry of the deadline, you now seek to assert ...
16 [that] remains stayed ... "

17 So we have put our position very clearly. One might have
18 thought that that might have prompted an application in short
19 order essentially on a protective basis since that is the
20 point at which we said: well, no, we do not agree with your
21 assumption. No application was made. You have been shown
22 the email of 30 January 2026 which was the one the Supreme
23 Court directed the CAT should have the opportunity to
24 consider in the light of the court's judgment whether to
25 grant Mr Evans a further opportunity to amend his application

1 to seek a CPO on an opt-in basis. No application was then
2 filed within three months of that date.

3 Then the Supreme Court's final order you have also been
4 shown, 17 February 2026, core tab 9 at page 92 and, as it
5 happens, the present application was not even filed within
6 three months of that date, it was filed two days later on
7 19 May. The Tribunal already has the point that most
8 fundamentally what is now filed is still not an application
9 to amend to seek a CPO on an opt-in basis. In our
10 submission, it is an application for a yet further period of
11 five months from the date of any order the Tribunal now
12 makes. That is in circumstances in which there appears to
13 have been what we would describe as a distinct lack of
14 urgency in taking steps to even investigate the viability of
15 opt-in proceedings.

16 I have made the point that we were not even told when
17 a survey was first sent out to class members, but it does
18 appear to have been a very recent development. We have not
19 been told exactly when Mr Ramirez was instructed to consider
20 whether he would be able to undertake further analysis in
21 support of Mr Evans' claim. Again, one can infer that is
22 a pretty recent development and we understand that neither
23 funding nor ATE insurance is presently in place in relation
24 to potential opt-in proceedings.

25 So the overarching submission that we make is given the

1 extent of delay since 2022, it was particularly incumbent on
2 Mr Evans to act expeditiously in this regard and he simply
3 has not done so. We say the extent of the ongoing delay is
4 a yet further factor that has to be factored into the abuse
5 analysis, which we say should lead to the refusal of the
6 application.

7 I am turning to deal with the merits, the merits and
8 Sterling Lads, and then I can allow Ms Wakefield the reply.

9 On Mr Evans' attempts to rehabilitate the underlying
10 merits of his claims, the Original Tribunal considered that
11 the claims were so weak that they were liable to be struck
12 out. That was paragraph 375 of its judgment. The difficulty
13 they identified is that they could see no way in which
14 Mr Evans could prove a causal link between the Commission's
15 findings of infringements by certain individual traders and
16 loss from unrelated transactions alleged suffered by wide
17 segments of the market. That was in essence the problem that
18 the Tribunal was identifying. The reasons why it
19 declined to strike out had nothing to do with the underlying
20 merits. They were, and you have been shown this paragraph,
21 paragraph 241, the concerns that the claims raised novel and
22 untested questions and the Original Tribunal reasoning had
23 developed over the course of the hearing and while drafting
24 its judgment.

25 The Tribunal's assessment that the merits were extremely

1 weak was upheld by the Supreme Court. If we can turn up,
2 please, authorities bundle, tab 67 at page 2406.
3 Paragraphs 81 to 83 are summarising the Tribunal's concerns
4 as expressed in its judgment about causation. At
5 paragraph 84 what the Supreme Court does is consider how
6 provisional that assessment of the merits actually was. It
7 makes two points. First of all it says that:

8 "These are follow-on actions relying solely on the
9 infringements found by the Commission ... It took three years
10 of investigation into the foreign exchange markets before the
11 Commission formally opened proceedings. The findings set out
12 in the decisions are the totality of the infringing conduct
13 that the Commission determined had been committed by the
14 addressees of the decisions."

15 So its first point is to emphasise that given the length
16 of time the Commission investigated, one can assume it has
17 identified everything that was potentially problematic. Then
18 it goes on to say and this is its second point:

19 "Mr Evans is advised by an expert and experienced team of
20 lawyers and economists who having had sight of the unredacted
21 versions of the Commission's decisions, should have
22 constructed the strongest case that can plausibly be put
23 forward out of the material they have before they brought the
24 proceedings. The Tribunal was therefore entitled to expect
25 that by the time of the hearing of the application for a

1 collective proceedings order, the case would be far enough
2 advanced for the nature of the causal link between the
3 infringements relied on and the billions of pounds of loss
4 claimed to be explained. But what was still missing, in the
5 Tribunal's view, was any properly pleaded case as to how the
6 infringements were alleged to have caused the loss."

7 So it also makes the same point at 86 where it says:

8 "The Tribunal made it very clear that the applicants were
9 ... 'in the "last chance saloon"' and that, absent
10 significant amendment and revision, a future strike out
11 application 'may very well be on the cards.'"

12 Then it says:

13 "The Tribunal nonetheless considered, perhaps generously
14 to the applicants, that it should not exercise its power to
15 strike out the claims without giving them a yet further
16 opportunity to attempt to plead a plausible case on
17 causation."

18 So, in my submission, what the Supreme Court is
19 essentially saying is that the merits, as they are presently
20 expressed, are likely to be as good as they get.

21 It then goes on at 96, part way down the paragraph, three
22 lines down:

23 "The Tribunal analysed the pleaded causes of action with
24 care, in the light of Mr Evans' proposed economic theory of
25 harm. Having done so, it concluded that the pleaded case on

1 causation was both intrinsically weak and that it lacked the
2 necessary particularity ... On the basis that the pleaded
3 claims suffered from such fundamental weakness, we consider
4 that the Tribunal majority were right to regard this as 'a
5 powerful reason against certifying on an opt-out basis.'

6 So it has endorsed the Tribunal's view of the merits
7 there. It also comments on what the Court of Appeal said
8 about the merits. So paragraph 106 on page 2413, what the
9 Supreme Court is doing is summarising the view of the Court
10 of Appeal on the merits. The Court of Appeal took the view
11 that maybe some disclosure of data would assist. We can see,
12 for example:

13 "Mr Evans said in his claim form that his expert witness
14 would use multiple regression analysis using data from the
15 Proposed Defendants, multi-bank platforms, CLS Bank
16 International ... and other inter-dealer trading platforms.
17 The Court of Appeal suggested that such material might
18 provide a basis, for example, for comparing the profitability
19 of the defendants' trading during periods when they did or
20 did not participate in infringements and when the
21 infringements were or were not taking place."

22 It is fair to say the Supreme Court was unconvinced that
23 that would be a useful exercise and it explains that in
24 paragraph 107. It says:

25 "These comments do not give sufficient credit to the

1 rigorous analysis of Mr Evans' case on causation which the
2 Tribunal majority carried out. Further, they do not address
3 the fundamental difficulty identified by the Tribunal,
4 consisting in the mismatch or gap between (1) findings that
5 information exchanges may occasionally have enabled
6 participating traders to increase their spreads for
7 particular transactions and (2) a claim predicated on an
8 assumption that spreads were increased on every FX G10
9 transaction entered into by the bank employing that trader
10 with every client of the bank throughout the period of the
11 trader's membership of the chatroom."

12 So it has considered the possibility that a further
13 regression analysis might assist, which was the Court of
14 Appeal's view, and the Supreme Court says it is not going to
15 resolve this fundamental problem.

16 Then finally, paragraph 111, they are expressing the
17 view:

18 "The Tribunal's conclusion that Mr Evans' claim was weak
19 and that this was a powerful factor militating against
20 certification of the proceedings on an opt-out basis was
21 fully and convincingly reasoned and there was no ground on
22 which the Court of Appeal was justified in interfering with
23 it."

24 So, in our submission, the Supreme Court has both
25 emphatically upheld the Tribunal's assessment that this was

1 a weak claim and expressed a clear view that in its view it
2 is unlikely to get any better.

3 Now, we know that Mr Evans is now seeking to rely on
4 a three-page letter from Mr Ramirez. We can turn to that.
5 It is core, tab 20, page 141. The submission we make about
6 this is it is very short, it is very vague and it is based on
7 the very same econometric analysis which was already before
8 the Tribunal the first time round so it is not particularly
9 promising by way of starting points.

10 Then if we can look at what is being proposed at
11 paragraphs 4 and 5, Mr Ramirez is pointing out that he
12 discussed in his first report, which was obviously before the
13 Tribunal the first time round a regression analysis that
14 could potentially be employed to quantify any overcharge the
15 proposed classes incurred during the cartel eras. That is
16 precisely the sort of exercise that was being canvassed by
17 the Court of Appeal and which the Supreme Court we say took
18 the view was not going to be enough.

19 The short point we would make about this in addition is
20 that the time for Mr Evans to do this sort of work expired
21 four years ago when the Tribunal envisaged that it might
22 receive a reformulated claim. In essence we say that
23 Mr Evans is in stronger position in seeking to redress the
24 very weak merits of his claim than in relation to any other
25 aspect of it. We say it is far too late to be trying to do

1 this and it is an abuse for all the same reasons.

2 Finally and very briefly in relation to the position on
3 Sterling Lads, perhaps you could keep the Supreme Court
4 judgment open because I will show you briefly what the
5 Supreme Court said about it but, first of all, can we look at
6 what Mr Evans said in support of his application to amend to
7 plead Sterling Lads. It is in supplemental bundle, tab 36
8 and the relevant paragraphs are, first of all, paragraph 35
9 on page 1410 and the relevant passage is halfway down this
10 paragraph where it says -- he is pointing out in this
11 paragraph:

12 "The ... Proposed Defendants ... do 'not object' to
13 Mr Evans amending his claim to include new follow-on claims
14 based on the Sterling Lads Settlement Decision against the
15 addressees of that Decision."

16 Then this:

17 "In Mr Evans' submission, they are right to do so. The
18 proposed claims are materially identical to those which
19 already form part of the proceedings (namely the follow-on
20 claims in relation to the EE and TWBS Decisions) and have the
21 same real prospects of success."

22 I would interject "or lack of real prospects of success".

23 It is also relevant to look at paragraph 38 at the bottom
24 of that page, right at the bottom of the paragraph. Mr Evans
25 is making a submission about the approach that has been taken

1 to the pleading of these claims and he says:

2 "In particular, Mr Evans has taken the same approach to
3 pleading the Sterling Lads Settlement Decision as he did to
4 the EE and TWBS decisions, namely that there is such
5 significant common ground and common drafting across the
6 Settlement Decisions that the pleading generally treats them
7 compendiously, but plainly treats them differently where
8 there is a difference."

9 So, Mr Evans' own position when he was seeking permission
10 to amend was that these claims are materially identical and
11 that he has adopted the same approach to pleading them.

12 THE CHAIR: That might take you to the point you just made
13 about merits. Does it follow that any of the rest of the
14 argument applies? Sterling Lads was not part of the case
15 that was before the Supreme Court.

16 MS FORD: Yes, that is true.

17 THE CHAIR: Does the abuse of process argument apply to the
18 Sterling Lads claims then?

19 MS FORD: I do not presently make that submission on the basis
20 that we have identified essentially two strands of abuse,
21 there is the Henderson v Henderson abuse that it should have
22 been raised earlier, which does not apply at this stage with
23 the same force in relation to Sterling Lads, and I make the
24 point about the inconsistency and that does not apply.
25 I should reserve the position. Of course we have not seen,

1 if it were to happen, how it might be pleaded and I do not
2 want to shut out any argument that actually the way it is
3 being advanced is capable of being an abuse. I certainly
4 would not shut out the possibility of making that submission.

5 THE CHAIR: I understand that, but at this point you will
6 have heard the exchange I had with Ms Wakefield and on the
7 face of it we have a remit from the Supreme Court to us in
8 relation -- in which they appear to be accepting, at least in
9 the email exchange that came from the Supreme Court, that the
10 question of the basis of certification of the Sterling Lads
11 claim is a matter that is still live for this Tribunal to
12 determine and given that those claims were not any part of
13 the appeal process, the question I have is that not something
14 we simply have to get on and deal with, recognising that
15 there is a point about the merits which will feed into that
16 ultimate assessment?

17 MS FORD: Well, I am going to come on to make the submission that
18 actually the way in which they have been joined acknowledges
19 that the Sterling Lads claim should stand or fall with the
20 claims to which they have been joined and I am going to develop
21 that submission.

22 THE CHAIR: I had better let you just get on with it.

23 MS FORD: I would like to show you what the Supreme Court said
24 before coming on to deal with it. So we are looking at
25 authorities 67 at 2431, paragraph 163 he is referring to what

1 was said by the Supreme Court about Sterling Lads:

2 "... although the Sterling Lads ordinary decision did not
3 contain any findings about the actual effects of the
4 infringements found, [according to the Court of Appeal] it
5 contained findings that harmful effects were likely to have
6 occurred; and this provides a basis for inferring that
7 similar harmful effects probably occurred as a result of the
8 infringements by object found in the Essex Express and Three
9 Way Banana Split decisions."

10 The Supreme Court disagrees with the Court of Appeal
11 about that and it spells that out in 164. It says:

12 "Although the Sterling Lads ordinary decision examines
13 the exchanges of Information that occurred in the relevant
14 chatroom in much more detail than the three settlement
15 decisions ... it is not clear to us that the Commission's
16 findings about the effects of those exchanges differ
17 materially from the findings made in the settlement
18 decisions."

19 "Settlement decisions" plural, so all of them. It goes on
20 to talk about what the Tribunal identified had been the
21 problem in 165:

22 "The Tribunal did not doubt that there would be
23 reasonable grounds for alleging that the exchanges of
24 information admitted by the defendants enabled them to make
25 money on specific trades. That is the possibility

1 contemplated by the Commission in the passage we have quoted
2 above from the Sterling Lads Decision."

3 THE CHAIR: Is the problem with relying on these passages not
4 that this is the Supreme Court, if I understand it but you
5 will correct me if I am wrong, addressing reliance by the
6 Court of Appeal on the Sterling Lads decision as a basis for
7 taking a view that that decision somehow reinforced the
8 merits of the case. But the issue we are having to think
9 about I think is a slightly different one, because would
10 I not be right to understand that by amending in the Sterling
11 Lads case and the follow-on claims that followed from it
12 there was brought into these proceedings claims potentially
13 by claimants who were not already part of the existing class,
14 but in any event claims by claimants which are follow-on from
15 the Sterling Lads decision, but do not follow on from the
16 other two?

17 MS FORD: It is certainly right that separate addressees were
18 brought in. I am hesitating over the suggestion that
19 different claimants were brought in and the reason I hesitate
20 is that I think it is right in saying --

21 THE CHAIR: Well, it is a market.

22 MS FORD: -- that the pleaded case essentially did not
23 distinguish between the effects and the submission -- this is
24 the oddity about the entirety of the Sterling Lads case, it
25 had previously been Mr Evans' case that all the effects that

1 he was able to ascertain or to discern in the market were
2 attributable to the Three Way Banana Split and EE
3 infringements and then he amends to plead Sterling Lads and
4 he is essentially saying that the market-wide effects are now
5 attributable to the three infringements and so it is not
6 clear that he is actually identifying any additional
7 claimants or any additional effects or what the
8 interrelationship is between them.

9 THE CHAIR: But at least to -- and perhaps it is pointed out
10 by the fact there are new addressees -- that at the level of
11 sort of analysis this is a tranche of new claims which have
12 not previously been adjudicated on.

13 MS FORD: That is true. My submission is that we saw the way in
14 which Mr Evans applied to admit them: he applied to admit
15 them on the premise that they were materially identical and
16 he applied to admit them after the certification decision in
17 these proceedings. My submission will be that, having taken
18 the advantage to him of joining them to an existing claim,
19 meaning he did not have to bring a new claim and he did not,
20 importantly, have to have another certification hearing, he
21 has done so on the basis that they stand and fall with the
22 claims he has chosen to join them to. So he takes the
23 benefit of that.

24 If he had won in the Supreme Court, he would be saying
25 "We do not need another certification hearing, we can just

1 now carry on with Sterling Lads because I have joined them to
2 this claim and they stand or fall together". We say he has
3 to acknowledge the burden of that, which is if the claims he
4 has chosen to append them to fall because, in our submission,
5 they are transparently abusive, then so too do the Sterling
6 Lads claims.

7 THE CHAIR: So what do we make of the Supreme Court's --

8 I think it was not actually in the order, was it, it was
9 an email that the Supreme Court sent in which the Supreme
10 Court said:

11 "As regards the claims following on from the Sterling
12 Lads settlement decision and the Sterling Lads ordinary
13 decision, the panel accepts Mr Evans' submission that the
14 court's judgment does not determine whether those claims
15 should be certified on an opt-out or opt-in basis. That
16 issue, together with the case management of those claims in
17 light of paragraphs 160 to 167 of the judgment ..."

18 To which you have just referred us:

19 "... remain to be considered by the Tribunal."

20 I recognise that is not in the court's order but it is in
21 an email from the Supreme Court and perhaps tells us what the
22 Supreme Court thought was still live for us to address.

23 MS FORD: Yes. There is no doubt first of all that Sterling Lads
24 was not addressed in the original CPO decision because the
25 application to amend to plead it was not until afterwards.

1 THE CHAIR: Yes.

2 MS FORD: There is no doubt that the Supreme Court has therefore
3 remitted that matter to this Tribunal. In my submission, we
4 are not shut out from making the submission that because
5 Mr Evans elected to join them in this way by taking the
6 benefit of not having a further certification proceedings and
7 joining them to an existing claim, he also has to take the
8 burden, and they will stand and fall with the claims he has
9 joined them to.

10 THE CHAIR: Yes. I certainly was not suggesting you were
11 shut out from making any submission, Ms Ford; it is more out
12 of interest in what your submission is in answer to what the
13 Supreme Court said.

14 MS FORD: Just before I move away from it, I wanted to just
15 highlight what was said in 166 of the Supreme Court's
16 judgment, because it is quite striking on the merits of these
17 underlying claims. It says:

18 "The points made by the Court of Appeal with reference to
19 the Sterling Lads ordinary decision do not suggest any basis
20 on which the claim pleaded by Mr Evans might be reformulated
21 in a way that might survive a strike out application."

22 So in the Supreme Court's view, nothing in the Sterling
23 Lads decisions is any more likely to survive a strikeout
24 application than the Three Way Banana Split and Essex Express
25 claims.

1 In the light of that we make three points on Sterling
2 Lads, of which number two has already been fairly extensively
3 canvassed. The first is that on any view the fact that
4 Mr Evans has joined the Sterling Lads claims into his
5 existing claims cannot leave him in any better position in
6 relation to those existing claims. So if the Tribunal were
7 otherwise satisfied that those claims should be dismissed,
8 then the fact that the Sterling Lads claims have then been
9 joined to them does not somehow rescue the underlying claims.
10 That is the first point.

11 The second is the one that I have already made to the
12 Tribunal: we say if Mr Evans elected to take the advantage of
13 not seeking independent certification for Sterling Lads and
14 simply attaching them to the existing claim, then it also has
15 the consequence that the claims stand and fall together.

16 So if those underlying claims to which he has attached
17 these claims fall, then so too, in our submission, do the
18 Sterling Lads claims.

19 The third point is that, as Mr Evans himself has
20 asserted, the Sterling Lads claims are materially identical
21 to the existing claims and they are pleaded by him in the
22 same way. Now, that means that they suffer from the same
23 fundamental weaknesses as were identified by the original
24 Tribunal and the Supreme Court, and by that I mean the same
25 weaknesses in terms of the merits and the same weaknesses in

1 terms of whether they ought to be certified on an opt-in or
2 opt-out basis. We do make the point that, having litigated
3 those points all the way to Supreme Court and been
4 successful, it would be very unsatisfactory to have to go
5 through that process again in relation to what is described
6 by Mr Evans himself as a materially identical claim.

7 So, in all the circumstances, we say that the Sterling
8 Lads claims are not a reason for these proceedings to be
9 perpetuated any longer.

10 Unless I can assist further, those my submissions.

11 THE CHAIR: Thank you very much, Ms Ford.

12 (The bench conferred).

13 Thank you very much, Ms Ford. That is very helpful.

14 Ms Wakefield.

15 Submissions in reply by MS WAKEFIELD

16 MS WAKEFIELD: Thank you. Well done for getting us to finish
17 within a day. I am sure we are all very grateful.

18 THE CHAIR: I am grateful to counsel for approaching the
19 matter in the way that they have, and I am looking forward to
20 hearing you for the next ten minutes.

21 MS WAKEFIELD: I know, exactly. Rushing through. So, first of
22 all, Henderson v Henderson, one of the two species of abuse
23 identified by my learned friend. Now, there was a bit of
24 a nuancing in my learned friend's position after the
25 transcriber break, so perhaps this point becomes of less

1 relevance, but the way it was put in her opening was that
2 there was an obligation on proposed class representatives to
3 present opt-in proceedings and opt-out proceedings to the
4 Tribunal when making that application for a CPO.

5 That is, in my submission, absolutely inconsistent with
6 the way that the regime is understood. One finds it nowhere
7 on the face of the legislation, the rules, the guide. It is
8 also enormously burdensome: there is a different funding
9 package one would need to have in place for each of them; one
10 would need to do book-building, which could be entirely
11 redundant and a waste of time. These are the points which
12 the Professor began to outline, I think, in some of the
13 questions. So that would be entirely wrong.

14 I think the way that it is put now is something a bit
15 different, namely that one has to, in the course of the
16 application for opt-out, address opt-in. But, of course, one
17 has to do that anyway under the regime, and I took you at
18 enormous length this morning through the various ways in
19 which we did that.

20 THE CHAIR: Yes. It is one of the issues that the Tribunal
21 specifically has to (inaudible) --

22 MS WAKEFIELD: You specifically have to take it into account.

23 THE CHAIR: -- when deciding whether or not to allow opt-out
24 proceedings, and indeed if opt-in proceedings are practicable
25 then that is a matter of some significance.

1 MS WAKEFIELD: It is. It absolutely is. That is right, my Lord.

2 So if I just put on your radar, if I may, the fact that at
3 first instance and in the Court of Appeal there was an issue
4 which was live which then fell away before the Supreme Court,
5 which was whether, if we had not applied for an opt-in CPO,
6 the Tribunal could give us 411, so could say "I would like to
7 certify you on an opt-in basis or I would like to invite you
8 to make that reformulated application". At the time, it was
9 the banks' positive submission that the Tribunal was under
10 a duty to ask itself that question. So if I just take you to
11 one place in the transcripts, it is page 432 of the
12 supplemental bundle. At the bottom of 431, Mr Kennelly is
13 making the submissions for the banks at the time, and they
14 say it is a:

15 "... bold submission from the PCRs ..."

16 From me, in fact:

17 "... that you are barred from even considering whether
18 opt-in is practicable because [we] have not put it before
19 you, and we say, far from that being permitted by the
20 legislation, the legislation specifically directs you to
21 consider that issue. So it is not, we say, a dereliction of
22 duty, as O'Higgins says, for you to order opt-in ..."

23 This is when they were thinking of positively making
24 an order; we did not have funding, nothing in place for it:

25 "... you are specifically directed to consider whether

1 [they] would work ... [Y]our legal duty ... is to be open to
2 [it]."

3 So the thing that is now said to be abusive is a thing
4 that at the time the banks were saying you are compelled to
5 consider doing.

6 Of course, the CAT then in its judgment says, "We have
7 discretion to do exactly what we did in 411"; and the Court
8 of Appeal, although it heard developed legal argument on it,
9 addressed that in one paragraph and said, "Of course you have
10 a discretion to grant an order on or to give permission for
11 an application to be made on a basis that it has not been
12 made". That entirely disposes of the higher formulation of
13 Henderson v Henderson as it was advanced when my learned
14 friend began her submissions. So the legal position is the
15 opposite of the one for which she contended.

16 The second species of abuse developed on behalf of the
17 banks is the LA Micro abuse and it is worth very quickly just
18 going back there. So that is tab 37 of the authorities
19 bundle, page 961. I know that you will have picked this up
20 already, but if we just go back into the body of the case, we
21 have been here a few times now, 969. It is paragraphs 18
22 through to 26 where Sir Christopher develops the law. I know
23 you will have picked this up, but the three factors which my
24 learned friend applied throughout her submissions were the
25 American factors in paragraph 24 from the New Hampshire case.

1 Of the three cases which Sir Christopher works through, that
2 is the Kok Hoong case and then the Gandy v Gandy case, then
3 New Hampshire, it is the one which least requires the
4 connection between the position and the order or decision
5 obtained. We see that his Lordship does the exercise of
6 reconciling those three different articulations for us,
7 because in paragraph 26 the Court of Appeal directs courts
8 and tribunals posed with this problem to ask the question
9 whether it is apparent that the earlier decision was obtained
10 on the footing of, or because of, the stance taken by the
11 party in the earlier proceedings. So that is the question
12 which he distils from those three articulations. Then he
13 says:

14 "Absent that factor, [what do you do?] whilst the change
15 of position may affect the credibility of the party or the
16 witness concerned, there will not be an impression that one
17 or other court was misled into giving its decision, so that
18 the administration of justice risks being brought into
19 disrepute."

20 So that is the ratio. One cannot just go back into one
21 of the three judgments which is considered on the way to
22 getting there, the US proceedings, in fact the dictum of
23 Justice Ginsburg in a late 19th Century American case, and
24 take those three factors as if that is what we should get
25 from LA Micro. That is wrong, in my submission.

1 Your Lordship asked whether material change of
2 circumstance should run in this case in the LA Micro change
3 of position case. My learned friend very fairly accepted
4 that it can do and it depends on whether I suppose it is
5 an assertion as to historical fact or something in relation
6 to ongoing intention. We of course are in the second
7 category. What is your current intention? Not to bring
8 opt-in proceedings, they would not be viable. Four years
9 later, how is it looking now? Things have changed, things
10 have moved on, material change of circumstance.

11 Of course that runs and of course it goes to whether the
12 administration of justice is brought into disrepute or
13 whether there was a risk of an earlier court being misled,
14 because the explanation is that they were not misled. That
15 statement was true at the time it was made; this statement is
16 true at the time it is made. It is a statement of opinion or
17 intention.

18 Material developments. In paragraph 13 of my skeleton
19 argument for these submissions, I set out the parts of
20 Mr Maton's evidence, the factors relied on by Mr Maton which
21 postdate the Supreme Court -- sorry, in our reply, in our
22 reply which is in the core bundle.

23 As to the chronology, and we did some of this of course
24 with my reading from a tablet, it is important working
25 through the chronology also to look at the dates which are in

1 Maton 10, the core things which gave rise to his change of
2 view. So, for example, in the Dutch proceedings there were
3 two further waves in 2023, 2025, not just the initial ones.
4 RHA was actually certified 2024. One can go through and see
5 those dates if they are of interest. But, of course, his
6 evidence, his unchallenged evidence, is that it is his view
7 now that there is accretively, taking all of that into
8 account, his past six months book-building, the outreach
9 exercise, it is now that he has formed the view that
10 proceedings are viable and he did not hold that view before.
11 That is his evidence, it is not challenged.

12 I have to say, treating it as objective or subjective
13 does not really make sense, in my submission. Of course one
14 can assess some abuse of process cases objectively, but it is
15 his evidence which we relied on at first instance and here,
16 and he says it has just changed now.

17 THE CHAIR: Would it be fair to say that until the Supreme
18 Court decision there would have been no reason, from the
19 perspective of the Class Representative, for Mr Maton, or
20 Mr Evans for that matter, to apply his mind to the question;
21 and that what has really changed, not to say nothing else has
22 changed in the environment, but what really changed was you
23 lost the appeal and that led, you put it in the course of
24 your submissions, that we had no interest in opt-in until
25 ultimately the Supreme Court decision, you lose in the

1 Supreme Court, and then people start applying their minds to,
2 well, what does it look like now? Would that be a reasonable
3 inference?

4 MS WAKEFIELD: Maybe. I am in difficulty of giving evidence
5 for Mr Maton. Of course there is a focusing of minds
6 at that point, but I go back to, I think it is paragraph 29
7 of his statement, where he asks himself whether -- whether in
8 April 2025 he asked himself the question or not, I do not
9 know, and of course that could have been put to him, but what
10 he is saying now is "I look at what I knew in April 2025 and
11 there has been a significant change since that point". So
12 whether he did or did not in a sense does not matter.

13 THE CHAIR: It is an accumulative set --

14 MS WAKEFIELD: It is an accumulative set of thing, an accretive
15 thing.

16 THE CHAIR: -- of circumstances, and I suppose unless you
17 show me something different, what one can say is there is no
18 evidence that either he or Mr Evans applied their mind to the
19 question before the Supreme Court judgment came out.

20 MS WAKEFIELD: That is not covered in either of the witness
21 statements, that is right.

22 THE CHAIR: That is helpful.

23 MS WAKEFIELD: That is right. In the Supreme Court, you were
24 taken to those pages in the transcript which were set out in
25 my learned friend's skeleton argument. Were you to have

1 nothing else to do over the long vacation, one could read the
2 entirety of the transcript of my submissions on Day 2 which
3 covered ad nauseam the diversity of the class and the low
4 claim size and everything else you would expect to be covered
5 in the course of those submissions. Also covered in Maton 4
6 again.

7 So this was a short passage of play, if I can put it that
8 way, and it is in the context actually of strength of the
9 claims. When you go back to the Supreme Court judgment, you
10 will see paragraph 111 is at the end of addressing issue 1,
11 which is strength of the claims. So it really it relates to
12 part of the context of that issue, which is that procedural
13 unfairness point which I sought to advance. But you see it
14 nowhere in the consideration of the correct legal approach to
15 merits, or indeed the Supreme Court's consideration of the
16 actual merits.

17 So to turn the basis on which I was advancing anything in
18 the Supreme Court would be wrong, in my submission. It was
19 simply not of that sort of importance, even leaving to one
20 side the fact that I obviously lost and so did not obtain
21 an order by reference to it, and in fact the approach of the
22 Original Tribunal was upheld, as we know, and the Court of
23 Appeal saying "If proceedings are not going to go ahead
24 at all, that is just a powerful factor", and that is all it
25 is, which is all it has ever been the whole way up. In fact

1 all of the courts are ad idem on that issue.

2 I should say as well, I do not know if my learned friend
3 sought to give the impression going through that part of the
4 Supreme Court's judgment that in some sense they had
5 overruled the part of the Tribunal judgment saying that
6 I have permission to go back and improve merits rather than
7 being struck out immediately. That is certainly not what the
8 Supreme Court is saying. You do not find that in the
9 paragraphs. Even if they say the Tribunal was being
10 generous, the Tribunal said what it said and that is the
11 permission that I have.

12 In terms of timing since judgment, I will go quickly now,
13 just two more points, timing then Sterling Lads. I know we
14 have spoken about this at some length now, what happened
15 since the Supreme Court's judgment, but the position, just to
16 get this firmly in our minds, is the Supreme Court was seized
17 of the case still until it gave its Order on
18 17 February 2026. It belonged to the Supreme Court at that
19 point. Then we had the order, and then this Tribunal, on
20 21 April, two months later, gave the directions to this
21 hearing with which we have complied. Against that backdrop,
22 I do say it is impossible to say that we have sat on our
23 hands or that we have allowed any three-month period to
24 expire or to run at any point. There was at most a two-month
25 block between the order and the directions to this hearing,

1 during which we were corresponding with one another and
2 a dismissal application was made.

3 Finally on Sterling Lads, the three points. You have my
4 submission already on the impact on Essex Express and Three
5 Way Banana Split. The reality is that it is going to be
6 easier to get funding with Sterling Lads in the mix.

7 The second point is a point about certification. I think
8 there has been a confusion, perhaps, on the part of the
9 banks, but it was never our intention that there would not be
10 a certification process for Sterling Lads. That was not the
11 point of pleading everything together. Everything was
12 pleaded together because it would be absolutely ridiculous
13 for us to issue separate proceedings in relation to a cartel
14 where there is an identically worded settlement decision and
15 then apply to have them joined. We would need a
16 certification process, not least because we need funding and
17 ATE to be approved. It may be it would go through more
18 easily, but that is yet to come and it would always have been
19 needed. We never sought to gain an advantage by pleading
20 that way.

21 Then the final point I think is the standing or falling
22 point, but obviously that was essentially determined by the
23 Supreme Court when they sent it back to you. They have
24 considered our submissions, relying on Sterling Lads ordinary
25 decision to assist with the merits of Essex Express and Three

1 Way Banana Split. They said that does not work. The banks
2 said: ah, as a necessary consequence, in their submissions,
3 it is in the supplemental bundle, as a necessary consequence
4 Sterling Lads has surely gone and the Supreme Court said no,
5 and that is why we are back here arguing about Sterling Lads.

6 So those are my three points on Sterling Lads. I have
7 spoken for a bit longer than I said I would. Thank you very
8 much.

9 THE CHAIR: Not at all, Ms Wakefield.

10 (The bench conferred).

11 Questions by THE TRIBUNAL

12 PROFESSOR MULHERON: Ms Ford, I just wondered if I could just
13 double-check one quick question about 411. You probably
14 covered this and I apologise. If Mr Evans had done precisely
15 what the Tribunal invited him to do, and that is to file
16 a revised certification on an opt-in basis within the
17 three months, is it your submission that nevertheless that
18 would have amounted to an abuse of process on one of those
19 three grounds that you mentioned: Henderson, estoppel by
20 conduct or the broad Hunter rule? Is that your submission at
21 its highest?

22 MS FORD: No. I think we would concede that if he had exercised
23 that opportunity at that stage at the Tribunal's invitation,
24 there would not be a Henderson v Henderson abuse because the
25 Tribunal had invited him to do so. I do not go so far as to

1 say the Tribunal was wrong to do so, albeit I do make the
2 submission it was generous of it to do so.

3 As to whether or not any of the other grounds of abuse
4 would apply, it would depend how Mr Evans presented his case.
5 Because the other strand of abuse obviously relies on the
6 inconsistency between his stated position, and one does not
7 know in that scenario how he would have expressed himself in
8 the appellate process. Certainly the Tribunal has my
9 submission that it was objectively the case that by not
10 exercising the Tribunal's invitation to hold opt-in as
11 a possibility, he was then in the position to put his case on
12 opt-out on the strongest available basis for him, and that
13 was an advantage to them and a disadvantage to us which is
14 relevant to the second strand of abuse. So it is speculative
15 how he would have conducted himself in that context.

16 Of course, the Tribunal also has my submission that one
17 does not necessarily have to put these things into a box.
18 There is a question of fundamental fairness and bringing
19 justice into disrepute that comes from the Hunter criteria,
20 and again it is somewhat speculative what world we would have
21 been in in that scenario. But what he does do there is take
22 out the essence of the Henderson v Henderson abuse, which is
23 you must bring forward your entire case at the appropriate
24 time.

25 PROFESSOR MULHERON: Thank you.

THE CHAIR: Yes, thank you. The Tribunal is very grateful to
counsel for their submissions and also to everyone else who
has been involved in the preparation of these applications.
The Tribunal knows that a lot of work goes in behind the
scenes, so we are grateful for that. We are also grateful to
the Tribunal staff for accommodating a slightly late hearing
today. We will reserve judgment. Thank you.

(5.10 pm)

(Hearing concluded)

I N D E X

Submissions by MS WAKEFIELD	2
Submissions by MS FORD	103
Submissions in reply by MS WAKEFIELD	195
Questions by THE TRIBUNAL	206