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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1644/7/7/26

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

7th September 2026

Before:

Sir Peter Roth
Charles Banks
Keith Derbyshire

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Robert Hammond & Professor Andreas Stephan

Class Representatives

v

Amazon.com, Inc. & Others

Defendants

A P P E A R A N C E S

Kieron Beal KC and Christopher Monaghan (Instructed by Geradin Partners) on behalf of
Professor Andreas Stephan

Daniel Piccinin KC and Kristina Lukacova (Instructed by Covington & Burling) on behalf of
Amazon.com, Inc. & Others

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(10.33 am)

THE CHAIR: These proceedings, like all proceedings before this tribunal are being live streamed and an official recording of the proceedings is being made. It is strictly prohibited for anyone to take any visual image of the proceedings or make any unauthorised recording of what takes place. To infringe that prohibition constitutes a contempt of court. You have been warned.

We've read, of course, the skeleton arguments of the two parties. We've also read carefully the Supreme Court judgment in Evans. Counsel, you can make reference to that, but no need to (inaudible) passages from it.

There is certain material that's been marked as commercially confidential, so one will wish to take care not to speak in court about what are particular numbers or figures where that is the case.

I don't think this is an application where I need to go into closed session (inaudible). It is important that commercial confidentiality is restricted, to that which is truly confidential. We have some concerns about that.

Mr Piccinin, if you look at your skeleton argument which tracks on confidentiality, I think the witness statement --

MR PICCININ: Yes.

THE CHAIR: -- in paragraph 21 --

MR PICCININ: Yes, sir.

THE CHAIR: -- the opening of paragraph 21, there are three companies referred to. There are quotations of their revenue, which so far as I can see comes from their published reports.

MR PICCININ: Absolutely, sir.

THE CHAIR: Why is that marked as confidential?

1 | MR PICCININ: And also, of course, the fact that those people operate on Amazon is
2 | also not confidential.

3 | THE CHAIR: Anyone can see that.

4 | MR PICCININ: The issue is that -- and this explains quite a lot of the confidentiality
5 | claims that we've made -- what that would reveal, the fact that we're talking about
6 | them, tells you where they are in our ranked list of the 3P Sellers --

7 | THE CHAIR: Does it say where they are on the list?

8 | MR PICCININ: -- because it tells you that they're in the list that we've produced.
9 | If you look at the beginning of paragraph 21, you can see many of these 3P sellers
10 | make very substantial sales. So what that tells you is that they are on the list that
11 | we're talking about here. So what that will reveal is not precisely where they sit, but
12 | that they sit in that top subset of our (inaudible).

13 | THE CHAIR: Yes. So it's the names that are confidential, you say?

14 | MR PICCININ: That's why we've --

15 | THE CHAIR: Because the revenue is not confidential, is it?

16 | MR PICCININ: No, that's right. Provided that you didn't do anything that revealed
17 | who they were.

18 | THE CHAIR: Yes, you could say "X took revenues of (inaudible)".

19 | MR PICCININ: The problem is the reverse engineering that might then take place.
20 | Ultimately, we're in your hands, but that's the reason why.

21 | THE CHAIR: Well, you are in our hands, because it's a decision for us --

22 | MR PICCININ: Exactly, sir. Yes.

23 | THE CHAIR: -- not for any party.

24 | MR PICCININ: That's the reason why we've done it, because of the inference that
25 | could then be drawn about --

26 | THE CHAIR: Well, you stated the -- obviously, because you have to, what is the

1 | division you wish to make, the 10 million GMS over the relevant period.

2 | MR PICCININ: But what we've not said is how many --

3 | THE CHAIR: Well, that was the next thing.

4 | MR PICCININ: Yes.

5 | THE CHAIR: I mean, if you look at paragraph 22, not to have a ballpark approximate

6 | figure of the number of people who would be affected in the class size is -- you're

7 | actually very close to the estimate that Stephan was able -- sought to provide on its

8 | own, which was about 200,000 (inaudible) what you're saying. How many would be,

9 | on your proposal, opt-in makes it very difficult to have any sensible discussion.

10 | MR PICCININ: Yes, sir. It's --

11 | THE CHAIR: I mean, you needn't have the precise number, which anyway, you say,

12 | might need refinement. But the figure in paragraph 22, which is a round figure, second

13 | line.

14 | MR PICCININ: Yes.

15 | THE CHAIR: Why is that confidential?

16 | MR PICCININ: Although it's a round figure, it's not very rounded. That provides quite

17 | a bit of information about the distribution of commerce on our platform. It's one thing

18 | to do it in adjectival terms, but it's another thing to give a figure that is that precise. I'm

19 | sure you could find a range. You can always solve these problems with ranges, sir.

20 | And we envisage that when you come to write a judgment, you can do that. But for

21 | the purpose of the hearing, what I was envisaging was we all know what the number

22 | is. We could make the submissions and then you can come to whatever range seems

23 | sensible to you.

24 | THE CHAIR: I think we will definitely want to range --

25 | MR PICCININ: Yes, of course.

26 | THE CHAIR: -- because just to put "redacted", that makes it very hard to make any

1 | sense for anyone reading the judgment.

2 | MR PICCININ: Yes, I understand that, Sir.

3 | THE CHAIR: Yes. And, I think one can say that similarly for paragraph 21 (inaudible)

4 | X (inaudible) and hundred whatever it is.

5 | MR PICCININ: Exactly, yes.

6 | THE CHAIR: Yes.

7 | MR PICCININ: I'm sure that's fine.

8 | THE CHAIR: Very well. Proceed on that basis.

9 | MR PICCININ: It may be, sir, that what you're saying as well is that in future, in

10 | skeleton arguments, it would be helpful if we solved the range problem.

11 | THE CHAIR: Well, yes, because we can then have a sensible discussion without

12 | having to figure in (inaudible).

13 | MR PICCININ: Exactly, whereas we've just drafted it and then highlighted the

14 | particular numbers that are confidential. I see that.

15 |

16 | Housekeeping

17 | MR PICCININ: Sir, in terms of housekeeping, I appear with Ms Lukacova for Amazon

18 | and my learned friend Mr Beal KC appears with Mr Monaghan, for the Class

19 | Representative.

20 | I hope you've got bundles running from A to E. D is the authorities and

21 | E is the skeletons and some other assorted documents. (Pause)

22 | I've just been told that for paragraph 22 of the skeleton --

23 | THE CHAIR: Yes.

24 | MR PICCININ: We're fine to let that number in, the roughly 1,000.

25 | THE CHAIR: Thank you.

26 | MR PICCININ: In terms of timing, I hope to finish around lunch depending on how we

1 | go with questions. So hopefully we can finish today.

2 | THE CHAIR: I would have thought so.

3 |

4 | Submissions by MR PICCININ

5 | MR PICCININ: What I'd like to do is start by explaining as crisply as possible why

6 | we're making this application, what it's about.

7 | As you know, the Class Representative's claim is brought on behalf of third-party

8 | sellers on Amazon, and Amazon's position is that it has a good relationship with sellers

9 | and that many of them would be unlikely to be participating in this claim if they were

10 | aware of its existence, particularly if they were required to give it active consideration

11 | and to make a decision one way or the other.

12 | THE CHAIR: Are they not now aware of it?

13 | MR PICCININ: They may or may not be, sir. Some of them may be, but others may

14 | not be. They've not received any individual communications notifying them of the --

15 | THE CHAIR: Some have opted out?

16 | MR PICCININ: That's right. I think it's two. So those ones are aware of it, but the

17 | ones that haven't opted out we don't know.

18 | THE CHAIR: A bit odd if there are two fairly small companies say they're the only

19 | people --

20 | MR PICCININ: I didn't say that. I didn't say --

21 | THE CHAIR: There must be quite a large number that are aware --

22 | MR PICCININ: There will be some that are aware of it and there may be some that

23 | aren't. But --

24 | THE CHAIR: There are obviously quite a lot aware of it and have not opted out?

25 | MR PICCININ: But that might be right, Sir. We don't know because there hasn't been

26 | a --

1 THE CHAIR: Well, as I say, it would be extraordinary if only these two small
2 companies.

3 MR PICCININ: Only these two.

4 THE CHAIR: Of 200,000.

5 MR PICCININ: I would agree with that, Sir.

6 THE CHAIR: So there must be significantly more. (Overspeaking) that's right.

7 MR PICCININ: But being required to make a decision about it one way or the other is
8 something further. Our position is that it's likely that if they thought about it, many of
9 them would choose not to.

10 If we're right about that, then we say it's unfair that the Class Representative should
11 be permitted to use the opt-out procedure to pursue claims on their behalf. The
12 reason --

13 THE CHAIR: You say "if we're right about that". How do we know?

14 MR PICCININ: We'd find out by running an opt-in process, sir. That's what I was
15 coming on to. Opt-in --

16 THE CHAIR: Do you say it would be unfair?

17 MR PICCININ: Yes.

18 THE CHAIR: If they would be unlikely?

19 MR PICCININ: No, the thing that would be unfair is Professor Stephan being able to
20 pursue claims on behalf of people who, if they were given a proper opportunity to
21 consider it for themselves and required to make a decision, would choose not to
22 participate. That's what the unfairness is. The way to find out whether the factual
23 position is that they would decide not to participate is to run an opt-in process.

24 THE CHAIR: Would not the large companies be the ones most likely to be aware of
25 this?

26 MR PICCININ: I don't know about that, sir.

1 THE CHAIR: Don't they have in-house counsel, these very large companies?

2 MR PICCININ: That's right. Some of them are very large, and Amazon is not a very
3 large part of their businesses. Some of them are large and Amazon is part of their
4 businesses. There's a diversity there. But in any event, there is a difference between
5 opt-out and opt-in as a procedure. We'll see this when we go through Evans. You
6 can't treat an opt-out process as being equivalent to opt-in. A decision not to opt-out
7 is different from a decision to opt-in. That's the whole point of the decision that the
8 Tribunal is called upon to make at the certification stage between those two ways of
9 running the claim.

10 We say it's unfair. The reason it's unfair to have these people in the class, if in fact
11 they would not opt-in given the choice, is that Amazon is facing claims that have an
12 asserted value that has been inflated by the inclusion of claims from people who would
13 not want those claims to be asserted if they had been asked to make a choice. That's
14 unfair because what it does, and we'll see this in the Supreme Court's analysis, is that
15 it puts additional commercial pressure on Amazon that is not justified and is
16 disproportionate. That is a legal value judgment that the Supreme Court has made
17 and has found is inherent in the legislation and the rules that this Tribunal is required
18 to apply.

19 So, as I said, the great merit of an opt-in approach is that it provides a straightforward
20 and fair test of whether Amazon is right about that or not. Professor Stephan will have
21 an opportunity to set out his pitch and persuade sellers to opt-in. But if they're not
22 persuaded, then Professor Stephan will be prevented from using their commerce to
23 inflate the value of his claim against Amazon. That is what this application is about.

24 I don't shy away from the fact that our hope and expectation is that many sellers, given
25 that choice, will choose not to participate and that this will reduce the claim value.

26 The Class Representative seems to think that any outcome that results in fewer class

1 | members bringing their claims is ipso facto a bad outcome, or at least not a good one.

2 | You can see that in paragraph 51 of their skeleton argument, which is in the E bundle,
3 | tab 2 at page 43, if you want to turn it up, where they begin, in paragraph 51, by asking
4 | the question: and for what benefit? For what benefit would we carry out this exercise?
5 | They conclude that the only effect, other than the cost and the time, would be
6 | a reduction in the size of the claim. If you look at the end of the paragraph, they seem
7 | to think that that doesn't count because it only benefits Amazon and not the class.

8 | But as I'll show you by reference to Evans, that analysis is actually wrong in law. If an
9 | opt-in process results in some class members -- who are well placed to decide for
10 | themselves -- that results in those class members deciding not to opt-in, then that's
11 | good, a good outcome. It means that the class has had stripped from it claims that
12 | shouldn't be there. It removes the source of unfairness and injustice that the opt-out
13 | regime otherwise has a tendency to bring with it.

14 | Because one thing that we take from the Supreme Court's decision in Evans is the
15 | recognition that it is unjust to require defendants to face claims that have been inflated
16 | by the inclusion of claims that class members would not have chosen to pursue if
17 | they'd been required to choose. Sometimes that injustice is unavoidable because
18 | opt-in is just impracticable. In that case, we just have to live with it. But in cases where
19 | it is avoidable, it should be avoided. That's a proposition of law that I take from Evans.

20 | Of course, the logical conclusion.

21 | THE CHAIR: Right. In all cases, is what you say, where the class members may
22 | choose not to opt-in, should not be opt-out, is what you're saying, because that's
23 | unjust?

24 | MR PICCININ: No, not quite, sir. In all cases, there is an injustice.

25 | THE CHAIR: In all cases there is an injustice?

26 | MR PICCININ: That's right. If you have claims being pursued where the class

1 | members would not have pursued those claims if put to an election, then it's unjust for
2 | them to be included. There is an injustice that is being worked there.

3 | THE CHAIR: Mm.

4 | MR PICCININ: But in some cases you do that anyway. There may be various reasons
5 | why; the most obvious reason why is because opt-in is impracticable. In those
6 | circumstances, you're choosing between one injustice and another. But there may
7 | also be other circumstances. We'll see when we get to paragraph 125, maybe 126, in
8 | Evans that the Supreme Court talks about a situation where there may be a small
9 | rump of large class members and then a mass of small class members. They say, if
10 | it's the case that the small rump doesn't make much difference, it's not really inflating
11 | the claim by much, it doesn't add up to much, then you might just decide to opt-out for
12 | everything. So I'm not --

13 | THE CHAIR: (Inaudible) their message, in all cases there is an injustice, claims are
14 | pursued which would not be pursued if the claimants were put to an election. But in
15 | some cases one has to accept this injustice where opt-in is impractical.

16 | MR PICCININ: Or for other reasons, and I'll come on to those.

17 | THE CHAIR: Other reasons?

18 | MR PICCININ: Practicability is ultimately one factor amongst others. I'm not
19 | suggesting that this is a simple black and white mechanistic approach in every case.
20 | I'm not saying that. You'll see all of this when I take you through.

21 | THE CHAIR: Yes. Well, we've read it, as I say.

22 | MR PICCININ: I know you -- I'm conscious that --

23 | THE CHAIR: What we are trying to see is what is the proposition you derive from it?
24 | Obviously --

25 | MR PICCININ: Yes.

26 | THE CHAIR: That's not the wording in Evans.

1 MR PICCININ: I'll give those to you. But I am afraid I am going to need to go through
2 it. I'm not going to read it all out, but I am going to need to go through it in some detail,
3 because some of the subsequent cases in the Tribunal that have dealt with it, well,
4 I don't need to say that they were wrongly decided. There were lots of factors at play.
5 But their characterisation of the Supreme Court's decision is either wrong or
6 incomplete in a way that's material to this application. That's why I do need to go
7 through it carefully. I can't just take a pithy summary of it, or take it as read.

8 As you've seen, we accept on this application that in this case there needs to be an
9 opt-out element because a significant portion of the claim value resides in the claims
10 of small class members. It's not just a case of a tail relative to a dog. So having
11 considered the reasoning of the Supreme Court in Evans, it therefore seems to us that
12 a hybrid approach is called for, and so that gives rise to a question as to where to draw
13 the line.

14 As you've seen, we've suggested drawing the line at £10 million of GMS over the
15 relevant period. That covers roughly 40 per cent of the class by value, but roughly
16 a thousand, as we've seen, class members, which is a small and manageable number,
17 we say.

18 I'll come on to explain why we say that's a sensible place to draw the line. But of
19 course, as with any line-drawing exercise, we recognise that it's not the only place that
20 the Tribunal could rationally draw the line. It's open to the Tribunal in the exercise of
21 its powers to draw it somewhere else, having heard the parties' submissions.

22 Given the centrality of Evans in my submissions, what I want to do next is take you
23 through that to identify the propositions we take from it. Then I'll show you what this
24 Tribunal has said about Evans in Ennis and also in Rodger. Those seem to me to be
25 the ones that are most relevant. Then I'll briefly address the Class Representatives'
26 argument on abuse of process. In a nutshell, just so you know where I'm going with

1 | that, the short point is that if I'm right about Evans and the propositions that Evans
2 | establishes, then it will follow that there has been a significant change in the law, and
3 | so there is no abuse of process in us making this application.

4 | If I'm wrong about Evans, then my application is going to fail for that reason. It's still
5 | not an abuse because my argument is expressly an argument about a significant
6 | change in the law. That is, by its nature, not an argument that I could have made last
7 | time.

8 | THE CHAIR: When you did reserve the right to come back to make legal submissions.

9 | MR PICCININ: Exactly. That's right. Exactly, Sir. That's right. Which is also relevant,
10 | we say, and distinguishes Rodger. But in any event, abuse adds nothing. Because,
11 | as I say, if I'm wrong about Evans, I'm going to lose. You are going to need to decide
12 | whether I'm right or wrong about Evans, one way or the other.

13 | Then finally, after I've done that, I'll turn to the facts and explain why we say that the
14 | outcome should be a cut off at the £10 million level. I make my submissions on the
15 | facts on practicability.

16 | So with that introduction, I would like to go to Evans now. It's in D/21. It begins at
17 | 1236, but I want to pick it up from 1241.

18 | THE CHAIR: Yes, we've got it loose. Just give us the paragraph.

19 | MR PICCININ: Very good. I'll be picking it up from paragraph 4. But before I do that,
20 | what I want to tell you is three particular propositions to watch out for as I go through.

21 | These are three particular propositions that are not reflected in the Tribunal's decisions
22 | in other cases, or at least not fully reflected. So I want to highlight them.

23 | One is that if opt-in is practicable for a significant part of the claim, then that is
24 | a powerful reason in favour of ordering opt-in for that part of the claim, even if the claim
25 | is relatively strong.

26 | To continue that same proposition --

1 THE CHAIR: A particular part of the claim?

2 MR PICCININ: Yes, a particular part of the class is what I meant, Sir. Sorry.

3 THE CHAIR: Part of the class. Yes.

4 MR PICCININ: But even if the claim is relatively strong in its merits. To continue that

5 thought, if the Tribunal finds itself still ordering opt-out in almost all non-striable cases,

6 even where opt-in is practicable, that would be an error of law, and that would be

7 inconsistent with the guidance that the Supreme Court has given us. That's the first

8 point.

9 The second point is that when you come to assess practicability, you should consider

10 distinguishing between larger and smaller class members. That is so even if there is

11 no difference, no significant difference, between class members who fall just on one

12 side of the line you're drawing, or just on the other. That's because that would be

13 virtually every case, including Evans, as we'll see. I'm going to come on to look at the

14 facts in evidence and show you where a line was drawn for the purpose of analysis,

15 and that there's no real difference on one side of the line and the other. Neither the

16 Tribunal nor the Supreme Court thought there was anything wrong with that.

17 The third point --

18 THE CHAIR: (Inaudible) distinguishing between larger and smaller class members,

19 even if --

20 MR PICCININ: Even if there's no significant difference between the last class

21 members above the line and the first class members below the line.

22 The third proposition is that if you are going to take strength into account as a factor

23 in favour of opt-out -- it's not entirely clear to me whether that is what

24 Professor Stephan is saying you should do here -- but in any event, if you were going

25 to do that, it's not enough to say that the claim is above the summary judgment

26 threshold. That is a low --

1 THE CHAIR: You're not clear from showing that; I mean the statute says that.

2 MR PICCININ: No, no, sorry. It's not clear to me that he is saying that this is a case
3 where you should treat it as being a strong claim.

4 THE CHAIR: You've not argued that it's a defect --

5 MR PICCININ: That it points the other way. No, no. Exactly. That's right. I'm saying
6 that strength is just neither here nor there on this application; that you're in the zone
7 where you can't tell the difference which side of the line. That's because the line where
8 it tips over from being a factor in favour of opt-in to being neutral and then over again
9 into it being a factor in favour of opt-out is significantly above the summary judgment
10 threshold, which is a very low threshold.

11 So in order to give weight to strength as a factor in favour of opt-out, you need to make
12 a much more precise assessment of strength and a much more positive assessment
13 of strength than saying that it gets over the summary judgment threshold.

14 MR BANKES: So you are going to come back to this point?

15 MR PICCININ: Yes. I'm going to show you where it comes from in the judgment, and
16 then I'll make my submissions on it.

17 THE CHAIR: To make a precise assessment of --

18 MR BANKES: Precisely (inaudible).

19 THE CHAIR: Yes. You're saying you need to make a precise assessment?

20 MR PICCININ: Much more precise than just saying it's somewhere north of summary
21 judgment.

22 THE CHAIR: Well, how precise?

23 MR PICCININ: I'll show you what the Supreme Court says about that. They don't
24 quantify it for you.

25 THE CHAIR: I accept that but I want to get your proposition.

26 MR PICCININ: My position --

1 THE CHAIR: If there's a more precise assessment of strength than summary
2 judgment, then how precise, is my question?

3 MR PICCININ: There is no adjectival answer that's been given, or quantitative answer
4 that's been given in the Supreme Court's judgment.

5 MR BANKES: No, but my point --

6 THE CHAIR: No, but what's your proposition? Because we're having to do this.

7 MR PICCININ: It would need to be in the realms of saying that they've got the better
8 of the argument than (overspeaking).

9 MR BANKES: So when you stated your proposition for the second time, you inserted
10 the word "significant".

11 MR PICCININ: Yes.

12 MR BANKES: Which suggests that there's a range of strength which is above the
13 summary judgment threshold, but below significant.

14 MR PICCININ: That's right, Sir.

15 MR BANKES: In which we should simply ignore strength?

16 MR PICCININ: No, no, no. Actually, there's a range above summary judgment where
17 it's actually still a weak claim and it's a factor in favour of opt-in. Then you have
18 a range where it's neutral, and then you have a range where it's positive. That's the
19 way it works. And that's something that's been missed in -- or at least not addressed
20 in -- the earlier Tribunal decisions. The other Tribunal decisions sometimes give the
21 impression that once you're above the summary judgment threshold, then you're
22 dealing with a case where strength is a factor in favour of opt-out. And that's not
23 correct. If that is what they intended to say, it's wrong. And I'll show you that.

24 So, those are the three propositions to watch out for because they're different from or
25 go further than what the Tribunal has said in the recent cases.

26 But now I need to go through the judgment with some care, beginning with

1 paragraph 4, and you'll see there that the court notes that, as you know, any CPO
2 must specify whether proceedings are to be opt-in or opt-out. And we're told around
3 the letter D that rule 79(3) expressly stipulates that two matters in particular are
4 relevant: strength and practicability.

5 Paragraph 5, we're told that the appeal is concerned with the significance of those two
6 matters: strength and practicability. Then we have a high-level summary of the
7 Tribunal's and Court of Appeal's decisions that we don't need to read, as you've
8 already read it.

9 On paragraph 7 over the page, we have a summary of the appellant submissions that
10 is actually quite important:

11 "On this appeal the appellants argue that the Court of Appeal was wrong to overturn
12 the Tribunal's decision. They submit that, in doing so, the Court of Appeal improperly
13 interfered with the discretionary case management role of the Tribunal ..."

14 That's one thing that the case was about. But more than that, that the Court of Appeal
15 had:

16 "... adopted an approach to the criteria of strength and practicability which, if generally
17 applied, would permit all or virtually all collective proceedings, unless struck out or
18 summarily dismissed as having no real prospect of success, to be pursued on an
19 opt-out basis."

20 That's what the appellants were saying. And the Supreme Court said that:

21 "These arguments raise questions of general importance in the developing field of
22 collective proceedings."

23 And then goes on to identify an additional question that arose, which is the
24 Hollington v Hewthorn point.

25 So you can see that the way the Supreme Court understood the argument, there were
26 two distinct complaints in relation to each of strength and practicability. One complaint

1 | was about interference with the Tribunal's exercise of discretion, but the other
2 | complaint was substantive, and it was about an approach to the criteria that, if
3 | generally applied, would result in virtually every non-strikable claim being certified on
4 | an opt-out basis. And the Supreme Court regarded both of those points as being
5 | points of general importance.

6 | My submission is going to be that in answering them, the Supreme Court actually gives
7 | clear guidance on the approach to both strength and practicability that makes clear
8 | that there really should be cases where the answer is not opt-out, cases that are
9 | non-strikable, that are above the summary judgment threshold. It's not only weak
10 | claims that should be opt-in. And if you're exercising your discretion in a way that, if
11 | applied generally would result in virtually all non-strikable cases that are likely actually
12 | to be brought in practice to be opt-out, then you're doing something wrong.

13 | THE CHAIR: Well, it can't be any (inaudible).

14 | MR PICCININ: Yes.

15 | THE CHAIR: (Inaudible).

16 | MR PICCININ: Yes.

17 | THE CHAIR: And anything else the Tribunal thinks.

18 | MR PICCININ: Yes. One does need to be careful that one is considering those factors
19 | and weighing them in a way that doesn't have the dice loaded against opt-in or hybrid
20 | as a solution. That is my suggestion.

21 | THE CHAIR: There's no presumption --

22 | MR PICCININ: Exactly. One way or the other. That's right. But before you get to the
23 | facts, yes.

24 | If we could go on to 1255. I don't need all the background, paragraph 75. This is in
25 | the section "Issue 1: the relevance of strength of the claims ...". At the bottom of the
26 | page, you can see from paragraph 75, that the Court of Appeal had found that the

1 Tribunal erred in two respects. They're set out over the page. The first is that the
2 Court of Appeal found that it had been:

3 "... unfair for the Tribunal to treat its provisional view of the merits as being definitive ..."

4 And the second was that:

5 "The Tribunal had also failed to explain how the merits were relevant ..."

6 When, in fact, strength was neutral. And then, at paragraph 76, you can see that the
7 Court of Appeal went on to express its own view on strength which was more
8 favourable to the Class Representative than the Tribunal had done.

9 The court deals with the first of those points about the provisional nature of the
10 assessment in paragraphs 77 to 87, and I don't need to trouble you with that section,
11 save to note that the court rejected the Court of Appeal's criticisms of the Tribunal's
12 reliance on its provisional views. And then from paragraph 88 -- for those in the
13 bundles, that's page 1258, the court deals with the relevance of merits to the choice
14 between opt-in and opt-out.

15 THE CHAIR: They say don't they, in 87(b) the Tribunal was entitled to take the view
16 that even if they thought unlikely (inaudible) case which did not deserve to be
17 (inaudible) prospects of the (inaudible).

18 MR PICCININ: That's right. Yes. So that was on the first point.

19 The second point, which is as to why that matters, is dealt with from paragraph 88.
20 And you can see below H, the third last line, you can see that the court says that
21 there's no mystery to the relevance of it, because if a claim is weak, that militates
22 against opt-out.

23 And in the paragraphs that follow, there's a discussion of the leveraging effect of
24 opt-out proceedings, which creates incentives to settle even weak claims. We see
25 that at paragraph 90, for example.

26 And then at paragraph 91, the court sets out what is a proposition of law, which is that

1 | if the merits are very weak, as they were in that case, where essentially the claims had
2 | no real prospects of success, then it's unlikely that the Tribunal will be justified in
3 | awarding opt-out status. And it's important to note, for my purposes, that statement is
4 | independent of the assessment of practicability. So even if opt-in would be
5 | impracticable, still it's likely to be wrong to certify a hopeless case on an opt-out basis.
6 | And the court goes on to explain why. We don't need to trouble ourselves too much
7 | with that, because I'm not making a merits point today. I'm just showing you this
8 | because it's relevant to the structure of the judgment, that they're dealing with strength
9 | and practicability separately.

10 | So over the page in paragraph 95, the court also makes clear that the assessment of
11 | strength is not all or nothing. There is a sliding scale. You see that at the end of
12 | paragraph 95:

13 | "It is indeed appropriate, in our view, to view the strength of the claim in terms of
14 | a sliding scale."

15 | And then if you go on to page 1262, so this is the end of paragraph 100. We see that
16 | the court acknowledges, at the top of that page, that:

17 | "It is certainly true that in cases where the Tribunal concludes that it cannot form a view
18 | of the merits at the certification stage, it may be unable to place any weight on this
19 | factor at all when choosing between opt-in and opt-out."

20 | So it's acknowledging that you may not be able to form a view.

21 | THE CHAIR: In 99, they say there's no general presumption either way.

22 | MR PICCININ: That's one of the places they say it. Yes.

23 | THE CHAIR: The stronger the claim, the greater the confidence.

24 | MR PICCININ: That's right. And that's the point about the sliding scale. That's right.

25 | But then in paragraph 101, this is the point that is the answer to your point, sir,

26 | Mr Bankes, about the sliding scale and about where it tips over. Paragraph 101 makes

1 clear that if the claim is not only non-strikable, but it is strong, that points in the direction
2 of opt-out. But, equally, even if the claim is above the strike-out standard, it may still
3 be regarded as weak, such that it's a pointer against opt-out.

4 And you can see the point being made in the middle of paragraph 102. So perhaps
5 it's worth looking at the whole of 102. So:

6 "The Court of Appeal in Le Patourel had difficulty in making sense of the Tribunal's
7 reasoning ... The difficulty stemmed from the Court of Appeal's view that 'finding that
8 a claim has a realistic prospect of success and is not fanciful and is more than
9 arguable, logically precludes a conclusion that it is simultaneously "very weak.'" We
10 disagree. Surviving strike-out or summary judgment is a low bar and the merits of the
11 claim may not be the only factor at play when summary disposal is rejected. There is
12 nothing illogical in finding that a claim is not susceptible of being struck out or
13 summarily dismissed, and yet finding also that the claim appears to be very weak. Nor
14 is there any illogicality in treating the weakness of the claim as pointing against opt-out
15 proceedings even if it is not so weak as to be struck out. Indeed, that is precisely what
16 rule 79(3) contemplates in specifically identifying the strength of the claim as a factor
17 relevant to the choice between opt-in and opt-out ... That choice only arises where the
18 claim has not been struck out or summary judgment not granted."

19 So that's the point I was making.

20 THE CHAIR: (Inaudible).

21 MR PICCININ: Exactly. That really is my third --

22 THE CHAIR: It's not just (inaudible) struck-out. What if it could be?

23 MR PICCININ: Exactly.

24 And just to reiterate it, because I was maybe not very clear at the outset, but the way
25 that works is there's the strike-out zone, which is where we were in FX. Then above
26 the strike-out zone, there's still a very weak -- and it must follow beyond that -- there's

1 | a weak stage. And in that zone, it's a factor in favour of opt-in, a factor against opt-out.
2 | There's then a zone where -- I suppose one way of putting it is you can't tell which side
3 | of the line it is, and there it's neutral. You don't give it any weight at all. That's the
4 | very top of the page.
5 | And then only after that there is a zone where it is strong in the relevant sense. And
6 | that's actually a factor in favour of opt-out. And you pressed me as to where exactly
7 | that line is, and that's entirely fair. And I've said it must be somewhere north of better
8 | of the arguments. But the Supreme Court doesn't actually tell you exactly where the
9 | line is drawn. That's the truth of it. So that's something that, realistically, is going to
10 | have to be worked out on a case-by-case basis, but it's not something I've seen in any
11 | of the decisions so far.
12 | And my submission to you is going to be, it actually doesn't matter in this case,
13 | because there's no material on which you could conclude that it's in the strong zone
14 | here. And I'm not asking you to find --
15 | THE CHAIR: (inaudible) these other decisions.
16 | MR PICCININ: Which are not admissible. Yes.
17 | THE CHAIR: Well, they've come in. You didn't object to them.
18 | MR PICCININ: We have, Sir.
19 | THE CHAIR: We had a hearing.
20 | MR PICCININ: I know that, Sir. But as a result of the Supreme Court's decision in
21 | Evans, they're not admissible for --
22 | THE CHAIR: That's not changed the law on admissibility.
23 | MR PICCININ: Hollington v Hewthorn?
24 | THE CHAIR: Evans hasn't. Evans has not changed the law --
25 | MR PICCININ: Evans?
26 | THE CHAIR: -- on admissibility of other decisions. Just the rule in

1 | Hollington v Hewthorn.

2 | MR PICCININ: Yes, it overturned the Court of Appeal's decision which had found that
3 | other decisions were admissible and found then that they're not. So perhaps we
4 | should look at that when we come to it, too.

5 | THE CHAIR: Yes. But, I mean, no reliance was placed on the Court of Appeal in
6 | Evans.

7 | MR PICCININ: There was no argument about it because we had Evans. That was
8 | the law as it stood. But in any event, Sir, those commitments decisions can't help you,
9 | even if you could take them into account, which you can't. They can't help you to find
10 | now that these claims are strong.

11 | THE CHAIR: But we're bound to take them into account aren't we by (audio distortion).

12 | MR PICCININ: No, Sir. The finding in Evans is that you can't take them into account
13 | as --

14 | THE CHAIR: But that doesn't override the --

15 | MR PICCININ: It's talking about a --

16 | THE CHAIR: -- directive of the Court of Justice?

17 | MR PICCININ: In Evans, it was talking about an infringement decision.

18 | THE CHAIR: Yes, but I'm talking about commitments --

19 | MR PICCININ: Yes.

20 | THE CHAIR: -- where there's binding European authority, as you know. We have to
21 | take these into account.

22 | MR PICCININ: Sir, my submission is that you can't follow Evans. But in any event,
23 | there's nothing in them that will help --

24 | THE CHAIR: Evans is anyway. It's only about findings of fact.

25 | MR PICCININ: That's right.

26 | THE CHAIR: Decisions on the ruling(?)

1 | MR PICCININ: That's right. It's about the decisions. It's about the evaluative
2 | judgments that are being made.

3 | THE CHAIR: But the finding of abuse --

4 | MR PICCININ: Which there isn't in the commitments decisions.

5 | THE CHAIR: No, but there is in the Italian one.

6 | MR PICCININ: That's right, yes.

7 | THE CHAIR: So that clearly is admissible because you can rely on judgments of other
8 | courts saying certain conduct is an abuse. We do it all the time.

9 | MR PICCININ: You can rely on it for the law.

10 | THE CHAIR: Yes. And the question of whether conduct constitutes a breach of the
11 | abuse of dominance prohibition, that's a legal decision.

12 | MR PICCININ: Well, it's --

13 | THE CHAIR: We always refer to judgments of other courts in other cases as to
14 | whether certain conduct violates Article 102 or the Chapter 2 prohibition. That's how
15 | our law operates. No doubt you will be citing judgments of other courts --

16 | MR PICCININ: Of course, sir, yes.

17 | THE CHAIR: -- on what is an abuse and what isn't.

18 | MR PICCININ: But there is a distinction between the legal propositions which one can
19 | take from them -- that's governed by stare decisis and all of that. That's different.
20 | That's fine. But the question of whether a particular set of conduct constitutes an
21 | abuse is not just a question of law. It's a mixed one of law and fact, that involves
22 | a characterisation exercise and a factual analysis of what's been done. And the facts
23 | on the ground --

24 | THE CHAIR: All the decisions that are cited before us of other courts on the arguments
25 | in Article 102 are evaluating facts.

26 | MR PICCININ: That's right.

1 THE CHAIR: (Inaudible).

2 MR PICCININ: But all you can take from --

3 THE CHAIR: What you can't do it for is factual findings, but you can -- if there is -- does
4 this conduct constitute an abuse if it existed? That's a question of law.

5 MR PICCININ: That's right. As long as the "this conduct" bit is sufficiently specific.

6 THE CHAIR: Yes. So if it's the same conduct of Amazon behaving in a certain way
7 and it's not safe for the fifth abuse here.

8 MR PICCININ: Well, not quite, Sir. Let me just explain why with an example.

9 So in relation to the question of discrimination in the FMA, for example. Of course
10 there's a factual question, like a primary factual question, about what actually were the
11 criteria that fed into it and what were the weights. That's obviously just a pure question
12 of fact.

13 But there is then a further, more evaluative factual question about why Amazon is
14 using those criteria. Amazon's case is that it's using those criteria from time to time,
15 doing its best to identify the product that the customers would be most likely to choose
16 if they considered them all. That's what Amazon's case is on the facts. Now that's
17 a factual issue.

18 If the Italian authority reaches a decision on that point, that factual question is not
19 binding, or even admissible.

20 THE CHAIR: The decision is admissible, but not to establish what are the facts of
21 reference --

22 MR PICCININ: Exactly.

23 THE CHAIR: -- that Amazon uses.

24 MR PICCININ: But also not to establish that last point, the characterisation of what
25 Amazon is doing and why it's doing it. The characterisation as discriminatory relies
26 on an evaluative judgment about what else Amazon could have done, about why it's

1 | doing it.

2 | THE CHAIR: But all decisions of abuse involve some evaluation. On that basis, the

3 | Tribunal would never look at another judgment.

4 | MR PICCININ: No Sir, that's not my submission at all. Because what you can do -- this

5 | is what you do , of course, when you're making submissions on other authorities like

6 | this one -- is you take the facts as stated in the decision, and you extract a legal

7 | proposition which is that if those are the facts then it will be an abuse of dominance.

8 | So if this Tribunal finds that, I don't know, Amazon was adopting criteria that were

9 | objectively discriminatory and that it was doing that for a discriminatory purpose,

10 | say -- I'm just doing this hypothetically -- then if you've got a decision that says those

11 | two things happened and therefore infringement, then of course you can take --

12 | THE CHAIR: So you can look at the attachment?

13 | MR PICCININ: Yes.

14 | THE CHAIR: So it is admissible?

15 | MR PICCININ: Only for the legal analysis, sir, not for the factual analysis.

16 | THE CHAIR: So it's not that we can't look at it?

17 | MR PICCININ: No, I'm sorry, Sir.

18 | THE CHAIR: I thought you said it's inadmissible?

19 | MR PICCININ: Yes, I meant the rule in Hollington. What I meant was the rule that

20 | they're inadmissible, for the truth of any facts which include any evaluative factual

21 | findings.

22 | THE CHAIR: It's admissible to show that there was evidence in Italy --

23 | MR PICCININ: That's right.

24 | THE CHAIR: -- establishing those facts.

25 | MR PICCININ: That's right, it is. It is admissible to show -- so you can read the

26 | decision and you can say where the Italian authority says there was evidence of

1 | something that there was evidence. That there --

2 | THE CHAIR: There was evidence.

3 | MR PICCININ: Or there's likely to be evidence.

4 | THE CHAIR: Yes.

5 | MR PICCININ: Then at trial you can see whether there really was or wasn't. All of

6 | that is true, but --

7 | THE CHAIR: The commitments we also have, as I say, the Court of Justice saying

8 | that the national court must take commitments decision into account.

9 | MR PICCININ: But --insofar as we're talking about legal analysis, then I would agree

10 | with that and to the same extent. But insofar as what you're saying is that there is an

11 | evaluative factual analysis in there --

12 | THE CHAIR: As I say, to show there's a prima facie case.

13 | MR PICCININ: On the facts. That is actually inconsistent with what the

14 | Supreme Court --

15 | THE CHAIR: (Inaudible) considered the decision of that commitments decision at all.

16 | MR PICCININ: No, Sir. It didn't consider them specifically. It was more general than

17 | that. It gave the full effect of Hollington v Hewthorn, which is about decisions of any

18 | kind made by regulators or by courts, indeed. All of them are caught by the ruling in

19 | Hollington.

20 | But I'm not sure any of that matters because nothing that's in any of these decisions

21 | can take you so far as to say that the claims against Amazon are strong in the relevant

22 | sense, tipping over into better of the argument, particularly when you realise that you

23 | also need to go on to deal with effects and causation and quantum before you get --

24 | THE CHAIR: (Inaudible) abuse, not (inaudible) of loss.

25 | MR PICCININ: Exactly. They don't deal with that at all. There's actually

26 | been -- there's no material in front of you of any kind on those points that would enable

1 | you to conclude that this was a strong claim in the relevant sense.

2 | THE CHAIR: (Overspeaking) the detailed report of the expert.

3 | MR PICCININ: That's right, setting out a methodology that he proposes to deploy at
4 | trial. But we don't know what any of that is going to show. And, of course, we've made
5 | many criticisms of it. Our defence is full of points that haven't been answered in the
6 | reply. You're just not in a position to reach a conclusion on any of that. Nor has
7 | Professor Stephan done the job in response to this application of going through our
8 | defence and trying to explain why it's weak in the relevant sense and why his answers
9 | to it are strong in the relevant sense. We're left where we were at the certification
10 | stage, which is there's just nothing you can do on strength one way or the other. That's
11 | my submission. I'll come back to that. I was just dealing with the law for now. But
12 | that's my position. So that, I think, is all I need to do on strength from Evans.

13 | The part of the judgment that we're more interested in is, is the part that's dealing with
14 | practicability. That begins in paragraph 112, page 1264. The very first sentence of
15 | that paragraph is important. The court says that:

16 | "... if it is practicable for the proceedings to be brought as opt-in proceedings, then
17 | generally speaking they should be."

18 | So that's not an absolute mechanistic thing that they must be in all cases. But that is
19 | a general proposition of law that is stated without prejudice to or without regard to the
20 | strength of the claim. If it's practicable, then, generally speaking, it should be done on
21 | an opt-in basis. That was not the prevailing interpretation of the rules before this
22 | decision. What the court is doing here is answering the appellant's question that we
23 | saw way back in paragraph 7, is that it is wrong to take an approach to Rule 79 that
24 | results in, essentially, every case being dealt with on an opt-out basis, every
25 | non-strikable case, or even every strong case. There may be exceptions for
26 | exceptional reasons, but you should generally be ordering opt-in where you can.

1 | That's the principle.

2 | THE CHAIR: Well, they go on to say:

3 | "As with the strength of the claim, this is only one factor ..."

4 | MR PICCININ: Absolutely, sir. And I'm coming on --

5 | THE CHAIR: "...which feeds into the overall evaluation ..."

6 | MR PICCININ: That's right. But all of that is subject to the point in the first sentence.

7 | So it's important not to lose sight of the first sentence. I am going to deal with the rest

8 | of it. There's lots of scope for discretionary decision-making, depending on the facts

9 | in the case. It is only one factor, but it's a sufficiently important factor that that first

10 | sentence, as stated by the Supreme Court, is true. And, of course, that we're all bound

11 | by that.

12 | The rest of the paragraph is important too, because it explains why that principle is

13 | correct. The principle is clear. That's what it says in the second sentence:

14 | "...if it is practicable for claimants to bring opt-in proceedings, it is unlikely to be

15 | proportionate to confer upon them the additional advantages associated with the

16 | opt-out procedure and unlikely to be reasonable to expect the defendants to have to

17 | face the additional commercial pressures to settle the claims regardless of their true

18 | merit which that would involve."

19 | The important point -- this is why it needs to be read with care -- is that that is actually

20 | true, that the logic there applies, irrespective of what the merits are, unless it's

21 | 100 per cent prospects of success.

22 | MR BANKES: And to what extent is that logic impacted by a hybrid certification?

23 | MR PICCININ: I'm going to come on to the hybrid point. But, effectively, my

24 | submission is that you deal with the opt-in bit of it in the same way. If we've got

25 | a section which is a significant portion of the claim, it's not a small rump. If you've got

26 | a section of the class where they can look after themselves, they can make a decision

1 | for themselves, if that adds up to a significant portion of the claim, then, generally, you
2 | should treat them on an opt-in basis. What you do for the rest will depend on the rest
3 | of the distribution. That's what we'll see when we get to paras 124 to 126.

4 | The Supreme Court sets out a schema for us. It's only a rough schema, but it's
5 | a schema that is important.

6 | Even for a strong claim in the relevant sense, in the sense I've defined, if it is
7 | practicable to do opt-in, it is unlikely to be proportionate to order opt-out, and that's
8 | because it is still disproportionate to confer additional advantages on the class
9 | members beyond the merits of their claim, and additional commercial pressures on
10 | the defendants, beyond the merits of the claim in circumstances where the class
11 | members are able to decide for themselves whether to opt-in.

12 | And, as we'll see in a moment, the court expands on that, on what that additional
13 | commercial pressure is further down.

14 | Now, Justice Roth, you've made the point that, in the rest of the paragraph, the court
15 | makes clear that practicability is only one factor amongst others. And of course, it's
16 | not necessarily binary, either. So, in some cases there may be a weighing that needs
17 | to be done. If, for example, it's barely practicable, then it's opt-in. But you can see in
18 | the parentheses, around halfway between E and F, that the court is placing emphasis
19 | on the fact that practicability has been singled out as an important factor. And so the
20 | general principle that is stated at the start of that paragraph is a principle of law that
21 | applies across the board.

22 | Then in paragraph 113, again, the court explains why opt-in is to be preferred where
23 | it's practicable. It points out that the opt-in versus opt-out choice carries risks of
24 | injustice in both directions. If opt-in results in rights not being duly enforced, that is
25 | unjust to prospective claimants, who miss out. But, equally, if opt-out proceedings
26 | result in defendants paying off claims which, in reality, are not valid, then that is unjust

1 too.

2 And that's why I say that, unless the claim is so strong that it has a 100 per cent
3 chance of success, that second factor about that injustice --

4 THE CHAIR: (Inaudible).

5 MR PICCININ: No, exactly. Which is why it's stated as a general principle, because
6 it will, in general, apply. Because even if you have a claim that has, say, a 70 per cent
7 chance of success on liability, that's still a 30 per cent chance of failure. And so when
8 you settle that claim, there is a 30 per cent chance that you are paying off a claim
9 which, in reality, is not valid. And even if the claim is valid from the perspective of
10 infringement, causation and quantum are often highly uncertain.

11 So, again, there is always a very significant risk that a settlement will involve significant
12 overpayments. There could also be underpayments, but there is a significant risk that
13 you're paying more than you are validly required to pay.

14 Now, of course, that risk of injustice for defendants is an ordinary incident of civil
15 litigation. But what the court is pointing out is that, as a consequence, when the
16 Tribunal makes a decision to allow opt-out proceedings, it is deciding to expand that
17 risk of injustice to defendants. And that is why my learned friends are wrong to say
18 that there is no benefit to weeding out the claims of sellers who would not opt-in if they
19 were put to an election. There is a benefit. It is the removal of that injustice.

20 And that is the rationale that the court is telling us drives the point of principle that they
21 stated back in the first sentence of paragraph 112. That's why it is a general principle
22 that applies even if the claim is strong.

23 It's actually impossible to read these paragraphs as only applying in very weak claims.
24 There would actually be no need for this whole section of the judgment, because we've
25 already been told that in very weak claims, you wouldn't be ordering opt-out anyway.
26 This is being conducted independently, this analysis, independently of the strength of

1 the claims.

2 And then in paragraph 114, the court explains that the Tribunal has a wide discretion
3 and is needing to trade off different aims, which is obviously right.

4 And then paragraph 115 is also important. The court is explaining that:

5 "The regime provides additional opportunities for claims to be brought and vindicated,
6 but it does not guarantee that this will be possible in every [case] ... [It is intended] to
7 provide a reasonable opportunity ... for a group of claimants to club together ... or to
8 be grouped together ... [It] is not intended to immunise them completely from the usual
9 commercial considerations which have a role in determining when proceedings are
10 thought sufficiently viable to be worthwhile."

11 Paragraph 116: the court distinguishes the reasonable opportunity, which is provided
12 by the legislation, from an absolute or specially privileged right to do so, which is not.

13 And then in the rest of 116 to 117, the court sets out two ends of the spectrum of
14 practicability. There's consumer claims for small sums, where an opt-out is the only
15 basis on which it is practical to bring proceedings. That's one end. And then at the
16 other end, we have large commercial organisations, well capable of looking after their
17 own interests. In those cases, it may not be appropriate for collective proceedings to
18 be brought at all, not even on an opt-in basis. And if it is, it's likely to be only on an
19 opt-in basis.

20 And, again, all of that is stated independently of the strength of the claims. Those
21 principles.

22 Then, over the page on paragraph 119, the court says that in assessing practicability,
23 an objective assessment is called for, and it should not depend on evidence about the
24 subjective state of mind of individual claimants. That's for practical reasons, because
25 you would need a waiver, and, in any event, it's impossible to assess the states of
26 minds of a large class of potential claimants.

1 | And then paragraph 120 is important too. It's relevant to consider the composition of
2 | the class, that's what it says, including by reference to the different size of potential
3 | claim. You see that wording? It's the fourth line, at the end of the fourth line.

4 | And that's important for my second proposition, because doing that is almost always
5 | going to involve a line-drawing exercise. And around F --

6 | MR BANKES: Although we've got the word "distinctive".

7 | MR PICCININ: That's right, Sir. Yes. That's fair.

8 | But I'll come back to what they're actually talking about on the facts and we'll see --
9 | how distinct it is. You get a clue for what they must mean by that, by what they then

10 | tell you to do with the exercise though, Sir. Because, around F, it says that where the
11 | Tribunal identifies groups with distinct profiles that are relevant to that assessment, it
12 | should consider practicability for each group separately. If that yields a different
13 | conclusion, then you need to stand back. And we'll come back to how they do that.

14 | And over the page, at the top, there is one further important point of principle about
15 | how that should be done, which is when you've identified groups that it is appropriate
16 | to view as distinct, ordinarily you should analyse each category by reference to
17 | a typical member in it. That's because you're going to have diversity within the groups
18 | as well. Almost always. And what you do is you compare typical members in them.
19 | And so, in particular, when you've organised them by size, you don't compare the
20 | member at the bottom of the top list with the member at the top of the list of smaller
21 | claimants. That's not how you do the exercise. You look at the typical claimant in
22 | each group.

23 | And then we come to the application to the facts, which is very important because it
24 | provides an illustration of how these general principles apply. And it contains further
25 | important statements of principle, about how they should be decided.

26 | In paragraph 122, the court takes paragraph 381. You can see that in the --

1 THE CHAIR: 122.

2 MR PICCININ: Sorry, 122. I'm sorry. Yes. The court takes paragraph 381 of the
3 Tribunal's decision as its starting points on the facts. And we need to read this
4 carefully. It says that:

5 "... there is a group of financial institutions and fairly large commercial entities [that's
6 the way it's described], likely to be sophisticated potential litigants, which have
7 allegedly suffered what on average are significant losses. There is also a very large
8 number of individuals and smaller entities who have allegedly suffered loss, but only
9 in very small amounts. [And then it says around C, towards the end of the line that]
10 there are members of the former group [that's the big group] who, given their
11 sophistication and size ... would be in a position to bring claims on an opt-in basis, if
12 they so chose."

13 And it is clear, in my submission, from that wording that they're not saying all members
14 of the large group would be able to do that. But there are some members of the large
15 group that would be able to do that. And you'll see when we look at the numbers, why
16 that must be right.

17 And then, in respect of the small group of entities, the Tribunal accepted, we're told at
18 paragraph 381(10), that it would not be practicable for them to pursue opt-in
19 proceedings.

20 I want to pause there and look at those facts in slightly more detail by going back to
21 the earlier judgments, because it's really important that we understand, for calibration
22 purposes, what the Supreme Court is talking about here. Now, the CAT judgment is
23 in tab 9, and it's paragraph 381 that we need, and that's on page 726 of the bundle.
24 Page 726. Right at the bottom of that page.

25 MR BANKES: 726 of the authorities bundle?

26 MR PICCININ: 726 of the authorities bundle.

1 | MR BANKES: I've got it. I'm halfway through Higgins at that.

2 | THE CHAIR: Yes.

3 | MR PICCININ: You are halfway through?

4 | MR BANKES: Higgins.

5 | THE CHAIR: Yes. I don't think --

6 | MR PICCININ: Higgins. Yes, exactly. That's the CAT's decision.

7 | THE CHAIR: Yes. Okay.

8 | MR PICCININ: Yes. Higgins, Evans. It's the same case. Yes. And you can see at

9 | the bottom of the page, there's 381, which is the paragraph that the Supreme Court

10 | just referred to. I'm just showing you that to orient.

11 | THE CHAIR: Where they say:

12 | "This involves consideration of the composition of the class ..."?

13 | MR PICCININ: Exactly. That's right. And then (1) begins: Mr Ramirez, who was the

14 | expert for the Evans PCR.

15 | Over the page, I want to pick it up from subparagraph 2, where the majority in the CAT

16 | notes that Mr Ramirez had estimated a class size of 42,000 members, of which -- it's

17 | important to just make a mental note of these numbers, because we're going to look

18 | at a different table that's got other numbers, and you need to -- I'll remind you. But if

19 | you just make a note, 42,000 members in total is what Mr Ramirez estimated, of which

20 | 18,000 are financial institutions and 24,000 are non-financial customers.

21 | And then you can see at (3) there's a quotation from his report. And that in making

22 | that estimation of the class size, Mr Ramirez has actually himself applied a cut off that

23 | wasn't part of the class definition. So in the middle of the quote, you can see that he

24 | has excluded small enterprises with 10 to 49 employees. So his 24,000 figure for

25 | non-financial customers are actually just the non-financial enterprises with more than

26 | 50 employees, 50 or more employees.

1 | Now, just note that, because there is obviously a degree of arbitrariness to that cut off,
2 | like any cut off. There's no real difference between an enterprise with 50 employees
3 | and an enterprise with 49 employees. There's obviously a huge difference between
4 | an enterprise with 20 employees, on the one hand, and an enterprise with
5 | 10,000 employees on the other hand. You have to draw the line somewhere to do any
6 | kind of analysis. And that's what he's done. Neither the Tribunal nor the
7 | Supreme Court sees anything wrong with that.

8 | THE CHAIR: The two kinds of class member.

9 | MR PICCININ: That's right. So there's the 42,000 which consists of two parts. One
10 | is the financial institutions, which is 18,000, and then the other ones are the large
11 | commercial entities, which are 24,000; entities that have 50 or more employees.
12 | They've drawn the line there, even though the class actually includes more than that,
13 | the class size is actually 100,000. You can see that around the letter E, but that would
14 | be including enterprises with fewer than 50 employees.

15 | THE CHAIR: That's summarised in subparagraph 4, isn't it?

16 | MR BANKES: Yes. Which also contains a justification why he's taken that.

17 | MR PICCININ: That's right. That is, of course, all correct. But my point, the point that
18 | I'm just trying to highlight at the moment, is that, of course, the cut off of 49 to 50, if
19 | you took the smallest large commercial enterprise, the one that has 50 employees,
20 | and compared that to the largest small commercial enterprise, which had 49
21 | employees, there wouldn't be much difference between them. But still we're drawing
22 | the line and one of them gets lumped in with the big boys, you know, with Tesco, and
23 | is being treated as a large entity; the other one is being lumped in with the smaller
24 | ones including sole traders.

25 | MR BANKES: That's true, although we don't see the distribution, we don't see how
26 | close they are to the line.

1 MR PICCININ: No, all we know is that there would be 100,000 in total. So there are
2 60,000 of these small guys. If there are 60,000 of them, it's a fair inference that
3 someone is going to be quite close to the line. No one expresses any concern about
4 that at all.

5 Over the page in subparagraphs 7 and 8, we have the majority's assessment of
6 practicability for the 42,000. That is for the 50 plus commercials and for the 18,000
7 financial institutions. They make the point that this is a very different group from the
8 Merricks type of consumer class. They say that this group will, on the whole, be
9 sophisticated potential litigants capable of looking after themselves, certainly when
10 their claims are of value. So in subparagraph 9, they conclude that although it's
11 possible that these class members would not have opted in and have not expressed
12 interest because they're scared of suing their banks, that's possible. It's not said to be
13 fanciful. But that was not a conclusion that the Tribunal could reach, and they could
14 see no reason why it's not practicable for the putative class to join on an opt-in basis.

15 THE CHAIR: This is a sophisticated (inaudible).

16 MR PICCININ: Then at 10, they deal with the rump, which is actually the majority of
17 the class by number, 60,000. These are the enterprises with fewer than 50 employees
18 plus any individuals. Here they conclude, unsurprisingly, that this group is more like
19 Merricks, and for that group opt-in would not be practicable. So a line has been drawn
20 and those small guys are said to be not practicable. As I said, they make up the
21 majority of the class by number. So that's the factual analysis that the Supreme Court
22 was referring to.

23 I also want to show you one more point about the facts, which is discussed later in the
24 Supreme Court's judgment. This one comes from the Court of Appeal's judgment. In
25 the bundles, it's page 950, but don't turn it up because it's illegible there. So what I've
26 done -- my learned junior has done it, is printed out legible copies of that. So I'll hand

1 a few of those up. (Handed)

2 THE CHAIR: This is the Court of Appeal.

3 MR PICCININ: Court of Appeal.

4 THE CHAIR: That's not in our bundle?

5 MR PICCININ: It is in your bundles. But this sheet is, you'll probably recognise it Sir,
6 having spent time staring at this at one point or another. This was the analysis that
7 the Court of Appeal set out in its judgment in relation to practicability, and it's
8 discussed in the Supreme Court judgment too here. So what we have here is a table
9 showing class-number size and claim size for a subset of the large part of the class
10 that was the focus of the CAT's analysis. So it's a subset of the 42,000. It's actually
11 just the financial institutions, the 18,000. You can see that in the heading, which refers
12 to financial class members. You can also see that in the third row from the bottom,
13 where you've got the total number of class members, and it's 18,000. So this does not
14 even include the 24,000 commercial enterprises with greater than 50 employees.

15 What you can see here is that even just looking at the financial institutions, the
16 overwhelming majority of them are small and have small claims. You can see in the
17 third row that 15,000 -- nearly 16,000 of them have turnover of less than half a million
18 pounds per annum. The third column at the bottom, under the word "total". The
19 bottom three rows are the only ones I really need. They deal with the total number of
20 financial institution class members, and you can see they are divided by turnover.
21 Then we also have information on their claim values. In that column number 3, that is
22 turnover of up to half a million. That is where you can find 16,000 of these financial
23 institution class members. Their claim size, their average claim size in that group, is
24 just £16,000.

25 I also note that that group, the small financial institutions, add up to a pretty significant
26 sum. They add up to a quarter of a billion pounds, roughly ten per cent of the overall

1 | claim value for these financial institutions. These people are all included in the group
2 | that the Tribunal concluded were appropriate to lump together and say that, on the
3 | whole, they're capable of deciding for themselves what to do.

4 | Just while we're here, I'll skip ahead and just tell you where the group that we are
5 | proposing should decide for themselves sits in this kind of analysis. As you know, our
6 | proposed cut off is ten million GMS, which you can think of as turnover on Amazon
7 | over the relevant period. Even if you ignore the fact that those class members will in
8 | many cases have other sources of turnover, that puts them in the category of having
9 | well over £1 million of turnover per year.

10 | Of course, much of the commerce is concentrated in the bigger ones that will have
11 | much, much, much more than that, as we'll see when we get to the facts. But even
12 | the very bottom of our group by turnover, with, by turnover, being in the middle of this
13 | chart.

14 | Then you get claim size. If you go to paragraph 22 of our skeleton, you can see that
15 | highlighted figure in the middle of that paragraph, that's page 12 of bundle E.

16 | THE CHAIR: Sorry, you're at?

17 | MR PICCININ: Our skeleton argument.

18 | THE CHAIR: Which paragraph?

19 | MR PICCININ: Paragraph 22. You can see the number of pounds in the middle of
20 | the paragraph. That number is the very bottom; that's the very last opt-in class
21 | number. You can see that, if you go back to the –hand-up I gave you, the Evans
22 | hand-up, that is getting close to the average claim value in the third largest -- I'm trying
23 | to use ranges here, working with you; the third largest category.

24 | Our opt-in class is sitting on, whether you look at it by turnover or by claim size or both,
25 | it's basically sitting in the right-hand side of this chart. All of this chart is sitting within
26 | the 42,000 that the Tribunal in the Supreme Court recognised could look after

1 | themselves, taken as a whole. I don't think the Supreme Court was saying, and I don't
2 | think the Tribunal was saying, that every single one of these entities could be expected
3 | to make a decision for themselves, but they were treated as a group, and overall,
4 | looking at the typical members, like the Supreme Court tells us to do, you conclude
5 | they can look after themselves.

6 | I wonder if that's a convenient moment for a break. I should say I'm not making as
7 | much progress as I thought I would. I'm sure that's my fault. But it may be that we
8 | speed up after we get out of Evans.

9 | THE CHAIR: Mr Piccinin, can we ask you a bit about this table, which we haven't
10 | considered before and, of course, had no advance notice of.

11 | MR PICCININ: As I say, it's in the authorities bundle.

12 | THE CHAIR: Yes, but we haven't read all the authorities in the authorities bundle.

13 | MR PICCININ: Of course, Sir, yes.

14 | THE CHAIR: Nor were we asked to.

15 | MR PICCININ: No.

16 | THE CHAIR: Just looking at it, it says the first category is non-reporting banks.

17 | MR PICCININ: Yes.

18 | THE CHAIR: Are you saying what this is saying is that there are over 500 banks with
19 | an annual turnover as a bank of less than half a million?

20 | MR PICCININ: That is what it says.

21 | THE CHAIR: Well, it says annual turnover, but is it the turnover of the bank as such?
22 | Was it turnover of some activity of the bank?

23 | MR PICCININ: I understand it to mean the bank as such is described as firm size.

24 | THE CHAIR: 7,000 hedge funds, seven -- hedge funds with a turnover of less than
25 | half a million?

26 | MR PICCININ: That's what it says.

1 THE CHAIR: Well, we haven't seen the source of this figure. One of the criticisms, of
2 course, of the Court of Appeal by the Supreme Court is that they engaged in
3 a fact-finding exploration exercise which they shouldn't have done at all. I don't think
4 this is in the Tribunal's judgment, is it?

5 MR PICCININ: No. It is discussed in the Supreme Court's decision, and I'm going to
6 come on to that (overspeaking).

7 THE CHAIR: Yes.

8 MR PICCININ: You'll have seen it there.

9 THE CHAIR: But we just find without seeing --

10 MR PICCININ: The number surprising, yes. We'll see if we can dig out the --

11 THE CHAIR: Very surprising. We find it hard to -- I mean, what sort of bank has
12 a turnover of less than half a million? It doesn't make sense.

13 MR PICCININ: I don't know, sir. We'll see if we can find the paragraph.

14 THE CHAIR: I mean, it's not in the -- I think the Court of Appeal went into the expert's
15 report, didn't they?

16 MR PICCININ: I think, yes, I think Lord Justice Green does explain where he gets it
17 from.

18 THE CHAIR: Yes. I think it's the expert report.

19 MR PICCININ: Yes.

20 THE CHAIR: Which we don't know, we haven't got that.

21 MR PICCININ: Which we don't have, no, of course not, no.

22 THE CHAIR: So I don't --

23 MR PICCININ: But this is the material that was considered by the Court of Appeal and
24 it was then considered by the Supreme Court, and I'll show you that.

25 THE CHAIR: Well, does the Supreme Court rely on these numbers?

26 MR PICCININ: Yes, it discusses them, because it dismisses an argument based on

1 | them.

2 | THE CHAIR: Yes.

3 | MR PICCININ: Because Ms Wakefield for Evans took those numbers out, took the
4 | 16,000. You'll see there's reference to that. They were called the missing middle.

5 | THE CHAIR: Yes.

6 | MR PICCININ: And said, well, even if Lord Justice Green was wrong to go off on one
7 | and do his own thing, still the Tribunal was wrong not to do an analysis of this kind and
8 | look at the 16,000, who are smaller. Essentially what the Supreme Court says is, well,
9 | it was a matter of judgment.

10 | THE CHAIR: Are you saying the Tribunal was wrong not to do this?

11 | MR PICCININ: Exactly. That's right.

12 | THE CHAIR: Where is that?

13 | MR PICCININ: We're coming to it, sir. It is down around, I think 134 or so, but I'm
14 | going to show it to you.

15 | THE CHAIR: Okay. Well, you do it in your own time.

16 | MR PICCININ: If you want to see where the table comes from, it comes from --

17 | THE CHAIR: Well, we know it's the annex to the Court of Appeal judgment.

18 | MR PICCININ: I know, but how it's described in the judgment.

19 | THE CHAIR: Yes.

20 | MR PICCININ: So if we turn to page 933 of the authorities bundle, and it's
21 | paragraph 122.

22 | THE CHAIR: Yes.

23 | MR PICCININ: And what Lord Justice Green says is that:

24 | "Data before the court places the issue into context. A table (see annex B...) drawn
25 | from expert evidence tendered on behalf of the Evans team, provides a breakdown of
26 | the average claim per class member both on an aggregate basis but also divided up

1 | into categories based upon the type of financial institution concerned [so that must be
2 | the non-reporting banks, institutional, et cetera] and annual turnover."

3 | That's what's said about them. And no one suggests that it's wrong. There's no
4 | suggestion in the Supreme Court that it's wrong. So my submission is it actually
5 | doesn't matter whether it's right or not; that is the analysis, the description that this
6 | class having these characteristics was suitable for opt-in on the whole is the analysis
7 | that the Supreme Court reached. The legal analysis is what matters, not whether they
8 | were right or wrong, not whether Lord Justice Green was right or wrong about the
9 | facts. Maybe there's some funny definition that's been used, I don't know, but it doesn't
10 | matter.

11 | The one other thing I wanted to say, just to avoid any confusion, you may have seen
12 | reference in the class definition to class A and class B in the Evans case. And you
13 | can just ignore that. Class A and class B, both are the same size. They're the 100,000
14 | or the 42,000, depending on the way you look at it. The distinction between A and B
15 | is between people who dealt directly with the defendants, traded directly with the
16 | banks on the one hand, and people who traded through an intermediary on the other.
17 | And the reference for that, just so you have it, is paragraph 277 in the CAT, and it's
18 | bundle D, page 698.

19 | THE CHAIR: I think that's explained the Supreme Court as well, isn't it? It goes
20 | through the facts of Evans that we skipped over.

21 | MR PICCININ: Yes, I think that is right. The only point that matters is it's not germane
22 | to any of the points I've been making. I've been talking about the aggregate of the
23 | two, which is the way the issue was analysed.

24 | So if we could go back to the Supreme Court's judgment, please, paragraph 122. For
25 | anyone in the bundles, that's 1267. And we were looking here at paragraph 122.

26 | By coincidence, and I noted before the break, that around C in that paragraph, the

1 Supreme Court had concluded that there are members -- I read it as: there are some
2 members of the 42,000 that would be in a position to bring claims on an opt-in basis.

3 Not all of them, but some of them.

4 And at the end of that paragraph, again, I said before, the court referred to the
5 60,000-strong group of small enterprises with fewer than 50 employees, and said that
6 it would not be practicable for them to pursue.

7 Then, at paragraph 123, the court records the majority's decision in the Tribunal that
8 the tail shouldn't wag the dog. So that's referring to the 60,000-strong group of small
9 enterprises. But, logically, it must also be true of the smaller end of the large
10 enterprises who might not have been able to make an opt-in decision for themselves
11 either.

12 Then what we have is the really critical set of paragraphs for my purposes, which is
13 124 to 126. And in 124, the court begins by saying that:

14 "It is difficult to see why the financial institutions and the large entities [which must be
15 the 50 plus] with substantial claims should be allowed to proceed by way of opt-out
16 collective proceedings. The additional leverage this would give them cannot be
17 justified ... They [can't be allowed] to bolster their position ... by bundling [their claims
18 with those] of a different profile who, for [other reasons], are not able to bring their
19 claims."

20 And the group with a different profile must be the commercial enterprises with fewer
21 than 50 employees. That is described as a group having a different profile, even
22 though, as I've said, no one is saying there's any difference between an enterprise
23 with 49 employees on the one hand, and an enterprise with 50 employees on the
24 other.

25 Still, it's described as a group with a different profile, and that's because it is a group
26 with a different profile. It's obviously a group with a different profile. There's a massive

1 | difference between anyone, actually, in that set, particularly the typical member in that
2 | set, and Tesco. Or even the typical member in the universe of companies with more
3 | than 50 employees. The line has been drawn so that a comparison can be made. It's
4 | not the only place you could have drawn the line, but it was a convenient place in that
5 | case, I imagine because it's easier to find data on that. I think, from memory, that
6 | might be the cut off for the audit exemption or something like that, but it doesn't really
7 | matter why for our purposes.

8 | What does matter is that that is being analysed as a group that we call the
9 | impracticable group, because it's not practicable for them to do opt-in. And the other
10 | group is being lumped together as a whole. And so, on the whole, it is practicable,
11 | then, for that group. They can look after themselves.

12 | And then in paragraph 125, the Supreme Court introduces the concept of a hybrid
13 | approach. It doesn't use the word hybrid, but that's what it's talking about. It says that
14 | it would be possible -- and this follows logically from what they've just said about the
15 | two groups. It would be possible, in principle, to design a class which did not include
16 | the large financial institutions -- and one must think, also, the large commercial
17 | entities -- to seek opt-out authorisation for the smaller group of firms and individuals.
18 | 60,000. It would be possible in principle to do that, and obviously that would involve
19 | drawing a line somewhere, either at that level with the 50 employees or somewhere
20 | else. But anywhere you drew it, there would be arbitrariness around the boundary.

21 | And the Supreme Court is saying that that's the thing that you could do in principle.
22 | But what it goes on to say is that although that kind of approach would have been
23 | acceptable in principle in Evans, you could have said that all of the big guys are opt-in,
24 | and the 60,000 with fewer than 50 employees opt-out, that wasn't likely to be fundable
25 | in that case, because the 60,000 don't add up to anything. And it says that's fine as
26 | an outcome, because the collective proceedings regime is not meant to be a panacea

1 | for access to justice in every case.

2 | And then over the page in 126, the court gives further guidance. And, here, the court
3 | is moving away from the facts of the case in front of it. It's providing general guidance
4 | for the Tribunal to be taken into account and applied. It's not talking about a very weak
5 | case here at all. In 126, what they're saying is that there is another category of case
6 | that is useful to think about in this schema, and that is where:

7 | "... the main core of the value of the class action [the way it's described] [consists] in
8 | a mass of small claims by consumers equivalent to those in Merricks but with a small
9 | rump of bigger claims."

10 | And in that type of case, the main core and small rump, it might be sensible to deal
11 | with the whole thing on an opt-out basis. The reason for that, the reason why that's
12 | acceptable, is given around B, where they say that:

13 | "... the incidental advantage the claimants in the rump [large claims] might thereby
14 | gain did not significantly distort the balance of procedural advantage as between the
15 | claimants and the defendant."

16 | But what that must mean is that the small rump is small enough that it's not going to
17 | significantly inflate the overall claim value in a way that is going to put significant
18 | additional pressure on the defendant. It's about the size of the small rump relative to
19 | the size of the claim. And, actually, when you read the whole of 124 to 126, what you
20 | see is a schema of three different types of cases. It's like I said before, only a schema.
21 | It's not supposed to be an exhaustive categorisation.

22 | But the way it works is that you've got some cases where the overwhelming majority
23 | is concentrated in a small number of people for whom it's practicable. The
24 | overwhelming majority is in the practicable box, but you've got a little tail of people for
25 | whom it's impractical. And that tail is not worth anything in aggregate. In that kind of
26 | situation, what you do is you say, I'm refusing opt-out certification and it's just being

1 | dealt with on an opt-in basis. That was the decision in Evans. That was the decision
2 | that was upheld by the Supreme Court.

3 | In the middle ground, you've got a set of cases where there is a significant number of
4 | people who should be able to look after themselves on the whole, but there's also
5 | a significant number of small claims that add up to something. That impractical group
6 | adds up to something big, such that it would be wrong to exclude them. And in that
7 | situation, what you do is a hybrid. You draw the line somewhere sensible, and on one
8 | side it's opt-in: those people can look after themselves on the whole. And on the other
9 | side of the line, you've got the people who can't, and they just get swept in.

10 | And then the third category is the 126 category, which is where it's the other way
11 | around. It's overwhelmingly concentrated in the small guys, but there's a few -- you
12 | can imagine how this happens. It's basically a consumer claim, but you've got a small
13 | number of businesses that have purchased something. And the small number of
14 | businesses might add up to only, I don't know, 5 per cent of the claim value, because
15 | overwhelmingly it's a consumer product. And in that type of situation, if it's not making
16 | much difference to the overall value, there's no point going through the hybrid
17 | procedure and having an opt-in for the big guys, because doing it the other way, doing
18 | the opt-out approach, is not going to significantly distort the position of the parties.

19 | So that's the way it works. That's the guidance that's being given by the
20 | Supreme Court across all cases. And it's got nothing to do with the merits of the claim.
21 | That's where you're talking about strong claims or weak claims.

22 | And then at 127, we have the point that the majority's assessment in the Tribunal was
23 | within the ambit of the judgment open to it. And I'm going to come on to explain what's
24 | meant by that, because we see some debate about it. And that's the next thing I want
25 | to show you, which is what the Supreme Court said about the group of claimants we
26 | were discussing before, which are referred to in the case, in the Supreme Court

1 judgment, as the missing middle.

2 And if you go to paragraph 133 on page 1269, you can see that the court has just been
3 talking about the table. You can see that in paragraph 131. You can see the court is
4 talking about the table that we were discussing. And, again, the court refers to the fact
5 that they've got modest annual turnovers, under half a million. And the court doesn't
6 seem confused or troubled by that, rightly or wrongly.

7 Then you can see in 133 that the Supreme Court acknowledges that there is room for
8 disagreement about what inferences should be drawn from the data, but it wasn't for
9 the Court of Appeal to substitute its judgment for that of the majority. So that's one
10 point that they're deciding. As you said, Sir, he should have left it to the Tribunal. But
11 then at paragraph 134, you can see in the second sentence that counsel for Mr Evans
12 argued in the Supreme Court that the CAT erred in law by focusing on the average
13 claim value of the whole group of large class members, the 42,000, rather than
14 considering that subgroup, the missing middle of 16,000, which is obviously large in
15 number. And what the Supreme Court says about that in paragraphs 135 to 136 is
16 that the majority in the Tribunal were obviously aware of all of this, and they thought
17 about it, and they reached the conclusion that the missing middle should just be
18 lumped in together with the big ones in their assessment, rather than being treated as
19 a separate group, which the Tribunal should have concluded that opt-in would have
20 been impracticable. That would obviously have been another way of doing it, of
21 treating -- and that might have changed the analysis in some ways, because then
22 you've got £250 million residing in people that you're classing as impracticable rather
23 than practicable. And the Supreme Court is saying is that that is a question of
24 judgment on which reasonable people can differ.

25 That really illustrates the point that we were discussing earlier, which is that this is all
26 a complex exercise of discretion. I don't shy away from that. In particular, where you

1 draw the line is a complex exercise of judgment precisely because at the boundaries
2 it will always be arbitrary. You could draw it the way that the Tribunal drew it. You
3 could have drawn it in different ways that might have led to different outcomes.

4 But at the same time, there are principles which the court has stated with clarity in the
5 passages that we've just been looking at, particularly 124 to 126, as to what you do
6 once you've carried out that line-drawing exercise which you have to do, because you
7 have to consider whether there is a difference in the groups.

8 So there is judgment about how to characterise the particular set of data on class
9 composition. But you do need to think, in my submission, now about how the data sits
10 with, or how they sit in relation to, the categorisation that the court has given in this
11 case, and that the Tribunal had given in this case. You need to ask yourself whether
12 this is a case where the overwhelming majority of the claim resides in class members
13 that should be opt-out, impracticable class members, such that the small rump of
14 larger class members can just be left in there without inflating the value too much. In
15 that case, dismiss my application, leave it as opt-out.

16 Or is this the case where there is a significant fraction of the claim that resides in class
17 members who are big enough to look after themselves, so should in principle be opt-in
18 and sweeping them in on an opt-out basis would inflate the value of the claim against
19 Amazon materially? That's the question. In answering that question, well, of course,
20 you shouldn't take Evans as establishing any particular turnover or claim value
21 threshold that should just be mechanically applied from one case to the next all the
22 same.

23 It is useful -- in fact, it's more than useful -- it's very important that you use the numbers
24 that we've looked at in this case, in Evans, to calibrate, roughly speaking, your thinking
25 about what size of class member and claim is in the ballpark of "you should have to
26 make this decision for yourself", because we can't have a situation where some

1 Tribunal members form the view they've got in their mind that "big" means, you know,
2 you've got billions in turnovers, and someone else is thinking "big" means you've got
3 51 employees. Because if that's the way this system works, we're going to have
4 radically -- that's not law at that point, that is radically different outcomes being given
5 depending on who happens to be hearing the case.

6 It's important that cases are being dealt with consistently, roughly speaking, because
7 otherwise really there must be something wrong in principle that has happened that
8 has led you to a radically different conclusion.

9 So I do say that it's useful to look at the numbers in Evans, not to say that anyone in
10 that set -- and that's not what we've done. We've not said anyone, of that sort of size,
11 should be in the opt-in group. On the contrary, as I'll show you, we've taken
12 a conservative approach and our opt-in class is on the right-hand side of that table.
13 They are big guys. Even within the set of big guys in Evans.

14 Yes, Sir.

15 MR DERBYSHIRE: On this particular table then, because it does look mysterious that
16 we have low-turnover banks and hedge funds. And if you look along the rows, the
17 actual average claim per class member rises in proportion to the turnover figure --

18 MR PICCININ: Yes.

19 MR DERBYSHIRE: -- which you might expect. But if it was turnover on foreign
20 exchange only, you would get that result consistently across the columns. You see
21 that the claim value rises with the turnover?

22 MR PICCININ: Yes.

23 MR DERBYSHIRE: Yes. It seems to me that the relationship is so strong that that
24 turnover is probably foreign exchange turnover?

25 MR PICCININ: Well, this is what I was saying before. It actually doesn't matter
26 whether it was or it wasn't, because the Court of Appeal dealt with it on the basis that

1 | what it said was an accurate description. Then the Supreme Court dealt with it on that
2 | basis. But beyond that, sir, there is another point, which is that, of course, my metric
3 | isn't turnover. As I said before, my metric is GMS, which is turnover on Amazon. So
4 | even if that is FX turnover, it's still comparable in that sense because we're talking
5 | about the level of turnover.

6 | THE CHAIR: Well, we don't know, because for online retailers that might be
7 | 90 per cent or 100 per cent of their turnover. Obviously, for some of the others, the
8 | very large ones you've named, it won't be.

9 | MR PICCININ: That's true.

10 | THE CHAIR: So we just don't know.

11 | MR PICCININ: That's true, Sir. But you do have also the claim size point, and the
12 | claim size comparison is one that you can make cleanly, whatever you think of the
13 | other point. And as I say, on that we're actually even further to the right.

14 | Then in addition what I would say is that, as I said at the beginning, it's ultimately up
15 | to you where to draw the line. You can draw it in a different place without there being --

16 | THE CHAIR: (Inaudible) an application.

17 | MR PICCININ: Well, that's right, sir. We've made the application on the basis that we
18 | think is right. That's the best we can do, what we've done. But it is for the Tribunal to
19 | decide where the line is drawn. It's not a binary thing, just as an application for
20 | certification, a CPO application, is not binary either. Never.

21 | The other point to bear in mind is that you do have the data point on the large
22 | commercials side as well. So there I don't think the Court of Appeal gives us turnover
23 | figures, but you do have -- there they've used employees and that their threshold is
24 | 50, which again, is not massive. I don't know how that would apply to the Amazon
25 | context, it probably isn't as useful a threshold. But again, it gives you a sort of
26 | calibration that you can do, and you can do that one more reliably because there's no

1 | doubt at all about what is meant by that. If you just think about an organisation with
2 | 50 employees versus much larger organisations that there are in the country that gives
3 | you a feel for what we're talking about. We're not talking about drawing the line at kind
4 | of mega corporations or even multinationals.

5 | THE CHAIR: But we don't know, do we, what -- (inaudible) on sales on Amazon?

6 | MR PICCININ: Of course we --

7 | THE CHAIR: The number of employees they've got?

8 | MR PICCININ: No we don't. I'm just asking you to calibrate your thinking by reference
9 | to the information that we have.

10 | THE CHAIR: Yes.

11 | MR PICCININ: That's what I'm asking. That's what I've got to say about Evans.

12 | Of course, this application isn't the first application by a defendant in collective
13 | proceedings asking the Tribunal to reconsider an opt-out certification. As I said, I'm
14 | not going to go through all of them, but I do want to show you Ennis and I want to show
15 | you Rodger, because there is discussion in there that's relevant.

16 | If we pick up Ennis -- we can pick that up in the authorities bundle from page 1419.

17 | (Pause)

18 | That's right. Sorry, Sir. Are you in hard copy without page numbers?

19 | THE CHAIR: (Inaudible).

20 | MR PICCININ: Okay. Fair enough. That's useful to know.

21 | Paragraph 56, we've got the heading:

22 | "Discussion.

23 | "(1) The Tribunal's power to vary or revoke the CPO."

24 | At paragraph 56, the Tribunal noted the importance that the Supreme Court had
25 | attached to the Tribunal's gatekeeper function.

26 | At paragraph 57, the Tribunal introduced the rule that provides for the power to vary

1 | or revoke CPO. We don't need to go through all of this. It's Rule 85, of course.

2 | Over the page at subparagraph (7), right at the very top, Tribunal notes that the rules
3 | suggest that:

4 | "... the Tribunal should consider ... whether there has been a change in circumstances
5 | which means that the criteria for certification ... no longer apply 'in the same way' ..."

6 | That includes as to the question of opt-in or opt-out. That's what Tribunal thought you
7 | need to do on an application to vary of this kind.

8 | Then in paragraph 58, we can see the Tribunal agreed with counsel for Apple that the
9 | gatekeeping role is a continuing one, and it can even be exercised by the Tribunal on
10 | its own initiative. So it's not right that you're limited to the particular application that's
11 | been made. It's something that you actually have a -- you can, and then also because
12 | of the importance of the gatekeeper function, you should do what the Tribunal thinks
13 | is right, irrespective of what I've been saying.

14 | Paragraph 59, nevertheless, "considerations of consistency ... and finality dictate that
15 | something must have happened to justify a change." And we accept that.

16 | But we also accept paragraph 60, that it would be wrong to just keep having the same
17 | argument again and again in the absence of any change that justifies
18 | a reconsideration.

19 | Then continuing the theme over the page, the Tribunal considered the basis,
20 | discussed the basis for reconsideration, from paragraph 62 onwards. You can see the
21 | conclusion that it reached at the end of paragraph 62, which is that it should consider,
22 | in light of evidence, whether to exercise the power to revoke. I don't think it was put
23 | in terms of an abuse of process on that gating question of whether enough has
24 | changed to warrant a reconsideration -- potentially with the same outcome, but at least
25 | a reconsideration -- the Tribunal's conclusion was that, yes, Evans does constitute
26 | a big enough change to warrant looking again. You can see why it said that, in the

1 following subparagraphs.

2 I should note, I mean, essentially what it was, is that it is a significant development in
3 the law. It's fair to note, as the Tribunal said in subparagraphs (3) and (4), that the
4 original certification decision in Ennis had positively relied on the Court of Appeal's
5 decision in Evans. So that was an additional factor in that case that isn't present in
6 our case. But as the Tribunal says at subparagraph (4) in the first sentence, power to
7 vary or revoke is an original jurisdiction, not a review. So it's not essential that I show
8 that you made some error in the first decision.

9 In any event, what they say over the page is equally true here. This isn't a criticism,
10 by the way, obviously. This Tribunal did not give weight to the competing policy
11 considerations as identified by the Supreme Court either. And it couldn't have done,
12 because at that stage this Tribunal was bound by Evans in the Court of Appeal. It
13 would have been an error of law to do that.

14 So we say the same analysis applies here, that the change in the law is sufficient to
15 justify reconsidering the issue. As I said in my submission at the start, my submission
16 that is almost tautological in the sense that if Evans does what I say it does, and it
17 dictates a radically different answer to this case, or if it leads you to a radically different
18 answer if you apply it properly, then it's obviously a big enough change in the law to
19 justify looking again. If I'm wrong about that, and it leads to the same sort of answer
20 as before then, and to the same sort of conclusions, then I'm going to lose anyway.
21 So the abuse point is really one that is neither here nor there.

22 I should show you the core of the Tribunal's reasoning on why the opt-out certification
23 was left in place in Ennis as well, because Ennis is the case where Apple's argument
24 actually was in the first category in the Supreme Court schema. So that was the case
25 where the overwhelming majority, the overwhelming mass of the claim is concentrated
26 in the big guys, and you shouldn't let the tail wag the dog, and so the application was

1 | for decertification then. They said that there shouldn't be an opt-out class.

2 | So I should show you why the Tribunal rejected that. If we pick it up at 1427,
3 | paragraph 82, you have the Tribunal's, or part of the Tribunal's answer on the facts.
4 | They referred to a very significant group, is the way they put it, of developers with
5 | claims worth between £10 and £10,000. The Tribunal's view was that those are
6 | collectively worth pursuing. That's rejecting the submission that it's a tail situation like
7 | in Evans, saying that actually those small ones are worth pursuing collectively.

8 | In addition, the Tribunal referred to a further group with claims worth between £10,000
9 | and £100,000, which likewise it said go in the impracticable box. Pausing there,
10 | anyone with claims at or near that level is going to be an opt-out class. That's why the
11 | facts are different in this case. That's why I say you don't actually need to decide that
12 | Ennis is wrongly decided. It just doesn't arise.

13 | So then at paragraph 84, the Tribunal acknowledges the fact that the bulk of the claim
14 | is -- this was the point in Apple's favour -- the bulk of the claim was in relatively large
15 | claims that could be pursued on an opt-in basis. It acknowledged that that was
16 | a material factor but it decided against decertification anyway in view of the overall
17 | balance of justice. That was for the reasons that are given in the subparagraphs of
18 | paragraph 84.

19 | The first point is that the claims are said to be unusually strong. Obviously, that's
20 | a specific point about Ennis, so I won't get into the rights or wrongs of the Tribunal's
21 | reasoning in relation to that. I'll deal with strength in relation to our case.

22 | Over the page, at subparagraph -- the one point I would just make there, though, is
23 | that at the end of subparagraph 1, where they say:

24 | "... We are dealing with claims which are quite different, as regards strength, from
25 | those at issue in Evans."

26 | There are various other points where they do this too, where it sounds like they're

1 | saying, "Well, it's more than non-strikable", and different language is used in different
2 | parts of the judgment. It doesn't matter for my purposes, or the only thing that does
3 | matter is that this Tribunal is clear on the law, which is that, as I said before, the point
4 | where you tip over into strong is a long way north of summary judgment.

5 | THE CHAIR: Yes, (inaudible) quite different.

6 | MR PICCININ: Exactly. Maybe that is, I don't -- that's right. I'm not here to argue that
7 | Ennis is wrong. I'm just picking up the points that actually matter for me.

8 | So at subparagraph 2, there's the point that the class is homogeneous, in the middle
9 | at around B, so that there's no obvious distinction to be drawn other than by reference
10 | to size, and there's no obvious point at which to draw the line without arbitrary or unfair
11 | consequences.

12 | I acknowledge that a similar point has been made by the Tribunal in other cases too.
13 | My submission is that that's just wrong in law as a factor. It's not the only factor that's
14 | relied on. So again, I don't need to get into whether the decision is right or wrong, but
15 | that analysis is wrong in law. It will almost always be true that where you have a big
16 | class, as in a large number of class members, which we have to be talking about for
17 | opt-out, we need to be in issue anyway --it's always the case that where you're drawing
18 | a line by reference to size, that's true, whether it's the undertakings or the claim value,
19 | the distribution of class members is going to follow, broadly speaking, what's called
20 | a Pareto distribution or a Power Law. It's that, trying to draw it from your perspective
21 | -- I think like that -- concentration of claim value amongst the big guys, and then it
22 | diminishes and diminishes and diminishes as you go further down the distribution.

23 | What that means is that the large claims will tend to be many times larger than the
24 | small claims. But it's also true just by virtue of having large numbers, that there will
25 | be no real difference. It doesn't matter where you draw the line, there'll be no real
26 | difference between the last one above the line and the next one below the line. It's

1 true. Even if you draw it right at the very top, if you've got large enough numbers, that
2 will be true. Immediately on either side of any line, you're likely to find points. You
3 may not, in practice, if you go to the very, very, very, very beginning, there may be
4 a bigger jump, just because there's a small number there. But the principle is the
5 same.

6 Indeed, as I've said, that was true in Evans. I made that submission by reference to
7 the number of employees, and that's not a point that's discussed here.

8 Now, as I said, it's not clear how central that was to the result in Ennis, but whether
9 it's central or not, it's not binding on you. The Supreme Court's analysis is. That's
10 what I'm relying on.

11 Then at 3, the Tribunal makes its --

12 THE CHAIR: You say it's wrong?

13 MR PICCININ: Yes. Yes, I do say it's wrong.

14 At 3, the Tribunal makes the point that full decertification would result in a significant
15 cohort with small claims missing out. It says at D that the access to justice of those
16 claimants is a significant consideration in favour of opt-out. That is actually another
17 error of law then, because the benefit to those claimants is offset by the detriment to
18 the defendants. There's injustice either way. I showed you that analysis in the
19 practicability set. But actually it doesn't matter for my purposes because we're not
20 seeking full decertification, and so that means that the opt-out claim can continue.

21 So all of the type of class members that the Tribunal was worried about in Ennis are
22 fine in my case. If you grant my application, those people still have the benefit of the
23 opt-out certification.

24 Point 4 is a continuation of the same point.

25 Point 5 asks whether it is unfair on Apple, with a mass of small class members, to be
26 given the benefit of encompassing the large claims, which could proceed on an opt-in

1 basis. The Tribunal says no, because the claims are not unmeritorious, unlike in
2 Evans. Again, that seems to be importing the first point about the strength of the
3 claims. I'll make my submissions as to why it doesn't apply here. But in any event, if
4 that is intended to be a finding that the Supreme Court's analysis of practicability was
5 limited to cases that are weak, in the sense described by the Supreme Court, that's
6 wrong. I've shown you that in the judgment itself.

7 I also just note that the last sentence of 5 is also inapplicable here because in our
8 case, the numerically large cohort of smaller claimants get their claims heard on an
9 opt-out basis anyway. That's the point I made before.

10 THE CHAIR: They get funding?

11 MR PICCININ: Sir, I don't think there's any evidence to suggest that that claim is not
12 fundable. But I'll get on to the size of it shortly.

13 Then over the page, there are some further points which also don't apply here. At 86
14 to 87, the point was made that significant work had already been done in that case,
15 with more than 1.7 million documents having been disclosed, and if the whole case
16 had been decertified, much of that work would have been wasted, and there would
17 have been at least a significant pause in work towards trial. Again, that's not
18 applicable here because the opt-out bit can keep going, and the opt-in bit won't require
19 any different or additional work for trial 1, which is about liability.

20 In those paragraphs, the other point that's made is that the current funder would not
21 support opt-in proceedings, and so the Tribunal accepted the Class Representative's
22 submission that decertification would have brought the proceedings to an end. Again,
23 as we'll see here, there's no evidence for you to accept to reach that finding here.

24 At 88 there's a reference to Rodger which it says explains how hybrid applications
25 should be approached in paragraphs 40 to 41 of that judgment. You can see the
26 Tribunal said that didn't apply in Ennis because the application was all or nothing.

1 | That's the way the Tribunal understood it.

2 | THE CHAIR: You say that's wrong as well, I'll take it?

3 | MR PICCININ: If you're asking me an exam question about whether --

4 | THE CHAIR: (Inaudible) exam question, because you started off saying that the

5 | recent judgments post-Evans are wrong in various respects.

6 | MR PICCININ: Yes.

7 | THE CHAIR: As I understand what you're saying the inference is that the Tribunal's

8 | conclusion in paragraph 88 is also wrong because you say -- you tell me if that is what

9 | you say?

10 | MR PICCININ: Yes.

11 | THE CHAIR: It doesn't matter what the application is. The Tribunal has to reconsider

12 | that. Is that right?

13 | MR PICCININ: That is right, sir. That follows from actually what the Tribunal itself had

14 | said earlier in the judgment which I showed you. But it doesn't arise. I've been trying

15 | to focus as much as I can on the points that are wrong in Ennis that are relevant to

16 | this application, and that isn't one. Because this isn't an all-or-nothing application for

17 | decertification. This is an application for hybrid.

18 | SP06: Did you say this judgment is under appeal?

19 | MR PICCININ: So what I --

20 | THE CHAIR: Application for permission, I think.

21 | MR PICCININ: There was an application to the Tribunal.

22 | THE CHAIR: An appeal which it refused and it's being renewed.

23 | MR PICCININ: I can't say whether it has been or hasn't been.

24 | THE CHAIR: Yes. It's an application that's not been (inaudible).

25 | MR PICCININ: That's Ennis.

26 | I should also show you Rodger, particularly because that was a hybrid application. But

1 | that was a very different case because the application, the variation, was heard in June
2 | of this year in circumstances where the trial was due to commence in September. It's
3 | fair to say that the Tribunal gave the Supreme Court's decision in Evans a narrower
4 | interpretation in Rodger, which was, of course, handed down without the benefit of
5 | Ennis. If you look at page 1392.

6 | THE CHAIR: Just one moment.

7 | MR PICCININ: The bundle, picking it up at para 25. Just for example, the Tribunal
8 | says that the Supreme Court judgment does not even suggest a different approach to
9 | the assessment of practicability than the approach adopted by the Tribunal at
10 | certification. The Tribunal seems to have proceeded on the basis that all we get from
11 | the Supreme Court's ruling is that you need to stand back and make an overall
12 | assessment of the balance of justice.

13 | I don't want to be unfair to the Tribunal. I'm sure this is a short version of its reasoning.
14 | I don't know what analysis of the judgment lies behind that. But if that was what was
15 | meant, and that is literally all we take from it, then it's obviously wrong for the reasons
16 | that I've already given. It's an assessment that seems to have been given without any
17 | detailed analysis of the reasoning in Evans. No doubt due to the urgency of the
18 | judgment. Certainly nothing that grapples with the points that I've made today by
19 | reference to the detail of the reasoning in the Supreme Court. I don't know whether
20 | those points were made or not by Google.

21 | You can also see in the next paragraph that Google was focused on the top 25
22 | developers, which it said were large and sophisticated. But then it seems that the
23 | Class Representative in that case argued that seven of them were in fact SMEs,
24 | although we don't have any data to see what was meant by that. So there's nothing
25 | we can do by way of comparison with our case.

26 | Then in paragraph 27, running over the page, reference is made to the evidence from

1 | the Class Representative explaining concerns that it seems had actually been
2 | expressed by developers about retaliation by Google. The Tribunal, taking everything
3 | into account, decided to stick with opt-out. But then it went on in the following
4 | paragraphs to explain that given the extraordinary timing of that application, it would
5 | also have derailed the trial. That application was made, I think I said before, in June
6 | when the trial was due to commence later this month. That's obviously not a point that
7 | applies in our case.

8 | But then I should also show you the particular points that were made about hybrid
9 | proceedings. So if you go to 1396, para 39, there are general remarks about hybrid
10 | proceedings -- the Tribunal says that:

11 | "... the Supreme Court did not say that an assessment must inevitably involve a binary
12 | choice ..."

13 | I agree. Indeed, that is a significant understatement. As we've seen, the
14 | Supreme Court expressly contemplates the Tribunal making hybrid decisions. That's
15 | not something that's wrong, to be clear. I'm just saying that it is actually a bit stronger
16 | than what's said there.

17 | Then in paragraph 40, the Tribunal says that:

18 | "... if a hybrid [approach] is to be adopted in a particular case, the Tribunal must be
19 | satisfied that ...[it's] both just and workable. It will need to work out how the division is
20 | drawn, how notice and participation are to be managed, [and] what consequences
21 | follow if some ... opt-in and others do not, and how the revised structure fits with the
22 | management of the proceedings as a whole."

23 | My submission to you is going to be that in this case all of that ought to be
24 | straightforward because the proceedings are at, for these purposes, a relatively early
25 | stage, and the Tribunal has decided that trial 1 should address liability and not
26 | quantum. Because of that, the issues concern the legality of Amazon's conduct and

1 | its impact on the market. We don't need to worry in trial 1 about making findings about
2 | the particular effect on the opt-in or opt-out groups.

3 | There is also reference in paragraph 41 to the unhappy experience --

4 | THE CHAIR: Will there be any disclosure for trial 1?

5 | MR PICCININ: I'm going to come on to deal.

6 | THE CHAIR: On this point you've just made, are you envisaging what there may be
7 | for trial 1 disclosure?

8 | MR PICCININ: Yes, definitely, sir.

9 | THE CHAIR: Yes. That's what I thought.

10 | MR PICCININ: That's right. And I'm going to come on to explain how we can deal
11 | with that.

12 | THE CHAIR: Yes. So when you say the Tribunal hasn't got to be concerned with
13 | actual effects?

14 | MR PICCININ: That's right. You don't need to make findings about the impact on
15 | particular claimants, the particular class members. The question is going to be -- the
16 | effects question is going to be at the level of the market rather than -- but absolutely
17 | you're right, sir, we will need disclosure. That is an issue that needs to be thought
18 | about. I was going to address you on how we deal with that. There is time, is the
19 | short answer. That we can deal with the opt-out ones, essentially, now, in a broad
20 | sense in geological time, and we can deal with the opt-in ones once they've opted in
21 | the idea.

22 | There's also reference in paragraph 41 to the unhappy experience in CICC. Just in
23 | case the Tribunal doesn't know about that, the problem in that case was that the Class
24 | Representative took the quite extraordinary view that it didn't need to identify the legal
25 | entities that were opting-in, and it could just identify them by their broad business
26 | names or as an undertaking. That's obviously not good enough. But now

1 | that -- I mean, that should never have happened at all, but now that it's been clarified
2 | in a judgment, one hopes it won't happen again. It's certainly not a problem that arises
3 | here where we've actually --

4 | THE CHAIR: It was a much smaller opt-in class.

5 | MR PICCININ: Well, actually that, Sir, is a misleading, and I don't mean intentionally
6 | misleading, point in my learned friend's skeleton because what he --

7 | MR BANKES: I think you've described it either as "deeply" or "seriously" misleading.

8 | MR PICCININ: Yes, but not deliberately.

9 | The comparison --

10 | THE CHAIR: What is the size of the opt-in class?

11 | MR PICCININ: The opt-in class is all undertakings that have more than £100 million
12 | in turnover that --

13 | THE CHAIR: I meant the number, the numerical number of opt-in.

14 | MR PICCININ: We don't have one, sir.

15 | MR BEAL: It was 208, and it's gone down.

16 | THE CHAIR: Yes. I mean, it's discussed in the judgment, isn't it?

17 | MR PICCININ: That's the number of people that opted in. So you can't compare that
18 | to the 1,000 that we've got. The 1,000 isn't the number that will opt-in, we hope. That's
19 | the total universe of them. If you want to compare the class sizes to see how big the
20 | book building job is, you need to compare the universes.

21 | THE CHAIR: Yes, I see. The 208 is the number that opted in?

22 | MR PICCININ: That's right. But there are likely to be many more than that.

23 | THE CHAIR: The certification judgment didn't consider the size of the opt-in class?

24 | MR PICCININ: I couldn't tell you off the top of my head, Sir. I can't recall.

25 | THE CHAIR: Yes. I can have a look. Yes.

26 | MR PICCININ: It's a slightly difficult thing to put a number on because it's

1 | organisations with more than £100 million turnover that accepted commercial cards.

2 | THE CHAIR: Yes. But generally you'll have an estimate of the class size.

3 | MR PICCININ: Generally, that's right.

4 | THE CHAIR: Indeed. You're supposed to provide one when --

5 | MR PICCININ: But in this case they have what nobody could give them in that case,

6 | which is a list. We've given them the list of the names which includes virtually all of --

7 | THE CHAIR: The list doesn't get back to the start of a period, because Amazon hasn't

8 | got records for the period from June 2018 to sometime in late 2019?

9 | MR PICCININ: That's right. There is an issue about the list of professional sellers.

10 | But we have a virtually complete list.

11 | THE CHAIR: With about eight or nine months missing. Is that right?

12 | MR PICCININ: Let me double check that over the lunch break and I'll get back to you

13 | with the exact position. But even if it's not a perfect list, it is a list that has, we've now

14 | set out, about a thousand --

15 | THE CHAIR: Perhaps Amazon's figures --

16 | MR PICCININ: -- names.

17 | THE CHAIR: -- and it may be that some of the class have -- figures are often disputed.

18 | MR PICCININ: That's right, Sir. So you could have a normal book-building exercise

19 | where you've got publication and if anyone who's not on our list thinks that they should

20 | be, they could respond to that in the normal way. And of course --

21 | THE CHAIR: Would you accept that for everyone on your list, those figures are right?

22 | So you won't dispute --

23 | MR PICCININ: Yes.

24 | THE CHAIR: That's on your list. Is that right?

25 | MR PICCININ: That is another way that you could do this if you wanted to do it

26 | differently.

1 THE CHAIR: I'm just asking you.

2 MR PICCININ: Yes.

3 THE CHAIR: Would you accept those figures are correct, so that if somebody on that
4 basis seeks to opt-in, you won't then say, "Ah, but in fact"?

5 MR PICCININ: Let me take instructions over the break. But I think the answer to that
6 is yes. In any event, a different way you could do this if you were worried about this
7 issue -- I just note that in Evans, of course, they didn't have the benefit of anything like
8 this, but the Supreme Court didn't seem to be concerned about that.

9 THE CHAIR: Well, they didn't get into detail of how it would work. They just said --

10 MR PICCININ: They didn't.

11 THE CHAIR: -- the Tribunal was right not to, on the facts to decide, there should --

12 MR PICCININ: None of the principles -- we looked at the principles because the
13 Supreme Court was very concerned to provide guidance --

14 THE CHAIR: Yes, to provide detail of a hybrid application, how it might be formulated.
15 They didn't get into any of that.

16 MR PICCININ: But that's true, Sir. But what I would say is that an alternative way of
17 formulating the class would be to use the list, so we could just --

18 THE CHAIR: That wasn't my question. My question was if someone who's on the list
19 says this is --

20 MR PICCININ: Would we accept it? I will answer that question. But the other point
21 I'm making, which is a different one but related, is that you could just do it by reference
22 to the list and say that the people we're excluding them from the opt-out class are the
23 people on this list.

24 THE CHAIR: Yes.

25 MR PICCININ: My point is that there isn't likely to be a big difference between them.
26 There may be some people further down the list that properly belonged in the top

1 | 1,000 too because of the duplication problem. I was going to show you all of this. But
2 | that is another way you could do that if you were worried about the uncertainty. That
3 | way, no one needs to -- there's really no risk to Professor Stephan in that sense,
4 | because he's got the list. He's got the company numbers, virtually all of them.

5 | THE CHAIR: Yes.

6 | MR PICCININ: We've said that we would be willing to help contact them. It's hard to
7 | imagine how it could be easier then than what we're talking about here.

8 | MR BANKES: We're concerned about justice, not only for Professor Stephan but also
9 | the class members --

10 | MR PICCININ: That's right.

11 | MR BANKES: -- and the potential class members. So if we accept the list is not fully
12 | grounded in data, but is in some extent arbitrary.

13 | MR PICCININ: Yes, the list is fairly robust. I was going to take you through
14 | Ms Freeman's statement to show you how robust it is. But, as I said, if you're worried
15 | about that, because of course there are wrinkles. Our systems are not set up to simply
16 | take the class definition that Professor Stephan has used and spit out numbers in that
17 | way, so we've had to make assumptions. But if you're worried about that, the solution
18 | is just use the list. That's the set of people who are --

19 | MR BANKES: Except the list bakes in our concerns?

20 | MR PICCININ: Only in that there are some other people who will be left in the opt-out
21 | class.

22 | MR BANKES: Potentially in the opt-in class.

23 | MR PICCININ: No, Sir. Because the people who are in the list have earned more
24 | than ten --

25 | THE CHAIR: (Overspeaking). Well, they say they didn't.

26 | MR PICCININ: Yes, I see. Well, you could provide for that as well. That is, with

1 | respect Sir, a little bit difficult to understand how that could happen given the
2 | transactions will take place through Amazon. We're talking about Amazon GMS so --

3 | MR BANKES: Let me give you one example. The claim form defines relevant period
4 | differently for Scots law. Have you identified those claims which are subject to Scots
5 | law?

6 | MR PICCININ: No.

7 | MR BANKES: So there are some claims where it's only a five-year period, not
8 | a six-year period? Those could be in the list, by mistake, because if you make their
9 | turnover or Amazon sales --

10 | MR PICCININ: It's not a five-year period.

11 | MR BANKES: -- that would fall below the threshold.

12 | MR PICCININ: Sir, in my submission, that misunderstands the nature of the exercise.
13 | If you go back to the approach that the Supreme Court articulated in Evans, it wasn't
14 | trying to come up with a group of people where every last one of them was definitely
15 | big enough to make the decision for themselves. Nor does whether you're big enough
16 | to make a decision for yourself turn on fine details like that, like one additional year of
17 | claim value. We're just trying to draw a line in a rough-and-ready way. The £10 million
18 | figure itself is a rough-and-ready figure. We're just trying to do a rough-and-ready
19 | exercise to identify a group of people who, on the whole, to use the Supreme Court's
20 | words, can be left to look after themselves. That's what we're trying to do.

21 | MR BANKES: Justly left?

22 | MR PICCININ: Yes, exactly. But on the whole, not every last one of them. So that's
23 | why, Sir, I say that we have drawn the line in an appropriate way.

24 | Finally -- so this isn't finally in my submissions, but finally on Rodger that we've got
25 | here -- the Tribunal mentions the Ad Tech case where there was a hybrid class. In
26 | the end, nobody from the opt-in class wanted to participate. One opted in and then it

1 | withdrew. No particular point is made about that in the judgment in Rodger that we're
2 | looking at. It's not suggested that there was anything wrong with the process that led
3 | to that conclusion.

4 | But my submission is that that tells you exactly why opt-in procedures should be used
5 | where opt-in is practicable, because if the Class Representative in that case had been
6 | given an opt-out approach for the whole of the class, all of those claims would have
7 | been included and would have inflated the value of the claims against Google in
8 | circumstances where the relevant class members didn't actually want to opt-in. That
9 | is precisely the injustice that the Supreme Court warned against in Evans. It may well
10 | be that exactly the same thing happens here: that nobody wants to participate. That's
11 | one possibility. And if that's the position, then it really would be unjust to inflate the
12 | claim size by 40 per cent.

13 | THE CHAIR: So what do you say is wrong in Rodger? You said these decisions are
14 | wrong.

15 | MR PICCININ: I said aspects of them are wrong. The thing that's wrong that's relevant
16 | is in paragraph 25, where it said that the judgment of the Supreme Court doesn't
17 | suggest a different approach to the assessment of practicability. If that is intended to
18 | mean that all we take from the Supreme Court is that the Tribunal should stand back
19 | and make an overall assessment of the balance of justice, and there's no other
20 | guidance there, then that would be wrong.

21 | I'm not sure -- I don't think that is what is meant, because if you read paragraph 24,
22 | the Tribunal accepts that the Supreme Court sets out a somewhat different approach
23 | to the assessment of practicability by comparison with the approach of the
24 | Court of Appeal. Really, the issue with this judgment is that, from my perspective, it
25 | just doesn't get into -- it's one of incompleteness. It doesn't get into any of the detail
26 | of what the Supreme Court held.

1 | But if you read that as saying that there's nothing in Evans at all, it's just do the overall
2 | assessment and that was it, that would be wrong.

3 | THE CHAIR: And are you saying the outcome decision in Rodger is wrong?

4 | MR PICCININ: I'm not interested in whether the outcome in Rodger is right or wrong,
5 | any more than I'm interested in the same question in relation to Evans. I'm not arguing
6 | either of those cases.

7 | THE CHAIR: You're not arguing that the outcome's wrong?

8 | MR PICCININ: I don't need to. It wouldn't be appropriate for me to get into my
9 | personal views on it. Well, no.

10 | THE CHAIR: I know it's a matter of law that in such a case, it's clear that it should
11 | have been a hybrid. That's what the Supreme Court is saying.

12 | MR PICCININ: The outcome of that case was that the application for a hybrid class
13 | was rejected in circumstances where the application was being heard in June, and the
14 | trial was going to commence in September. So I'm not going to say that the Tribunal
15 | got that wrong. That's just a fact that has nothing to do with the application I'm making
16 | today.

17 | That's why I say I don't need to get into the question of whether these cases were
18 | rightly decided in terms of their outcome or not. The outcome is consistent with either
19 | view of the law, but that insofar as any of these cases say anything different from what
20 | I've said the Supreme Court says, it follows, I'm saying, that they are wrong in law. I'm
21 | not here to do the homework-marking exercise of identifying everything that's right or
22 | wrong in all of them. If my learned friend wants to draw anything further by way of
23 | authority from any of these, then I'll deal with that in reply.

24 | That's all I was going to say on the authorities.

25 | THE CHAIR: Would that be a sensible point for a break?

26 | MR PICCININ: I think that is a sensible point. I probably need another half an hour,

1 | let's say, after lunch.

2 | THE CHAIR: We'll return at 2.00.

3 | (1.01 pm)

4 | (The short adjournment)

5 | (2.00 pm)

6 | MR PICCININ: Getting to my submissions on the facts, in relation to abuse of process,

7 | I don't think there's much more I need to say beyond what I've already said. I think

8 | the only point I haven't picked up is the complaint from Professor Stephan that we're

9 | now relying on data that we didn't rely on, we didn't put forward, at the certification

10 | stage. Obviously, we're not relying on the creation of the new data as a change in

11 | circumstance that is justifying the reconsideration, but the change in circumstance that

12 | we're relying on is Evans. Evans provides the different legal framework that we now

13 | use and the data that we've now produced, which, of course, we could have produced

14 | earlier, but it's now relevant to the argument that we're running based on evidence.

15 | So there's nothing in the point that we didn't produce the data earlier. It was difficult

16 | data to produce. It wasn't easy. And it was proportionate to do it now, now that we

17 | have a proper legal basis for the submissions that we're making. So that's really all

18 | I want to say. Ultimately, it comes down to: if I'm right about Evans, then there needs

19 | to be a reconsideration. And that's true, actually, even if you only go as far as Ennis

20 | went in the interpretation of Evans.

21 | So that's abuse. In relation to practicability, I wanted to begin by just picking up the

22 | questions that the Tribunal fairly asked me just before the break about the way the

23 | data are put together. So if we go to the core bundle A, page 21. I'm going to pick up

24 | your point, Sir, about the missing data. Sorry, I was a bit confused before the break

25 | as to exactly what we were talking about.

26 | But if you look at footnote 7, just to clarify one point, the missing data isn't GMS. I don't

1 | think you were saying it was, either. But just to clarify, the missing data isn't GMS.
2 | We have GMS for the whole of the relevant period. And what we're missing is the
3 | binary data on whether someone who has incurred this GMS was classed as
4 | a professional seller in the period before 2 November 2019. And so, just to think about
5 | how that could make a difference -- because you're right, Sir, that in theory it
6 | could -- what you would need to have is someone who has less than £10 million in
7 | professional seller period GMS from November 2019 onwards. So they've got less
8 | than £10 million there and, therefore, they shouldn't be on our list. They should be in
9 | the opt-out class. But when you include the additional data we have on their GMS,
10 | that they actually earned in the period before November 2019, but without
11 | a professional account, well, then there wouldn't be above £10 million. Or rather, that
12 | is what pushes them above £10 million, wrongly pushes them above £10 million.
13 | That's likely to be a very small number of people.

14 | And we do say, even then, what's the worst that can happen? The worst that can
15 | happen is they actually receive -- they actually get sent an opt-in notice. And when
16 | they get sent that, all they have to do is opt in. And, actually, it would be better for
17 | them to opt in than to argue that actually their turnover is lower, because if their
18 | turnover is lower, their claim value is going to be lower. And so they don't want to say
19 | that their turnover is lower. If they want to participate in this claim, all they have to do
20 | is opt in. But it's not really an issue that goes anywhere.

21 | But I did want to also return to the revised offer that I was putting forward before the
22 | break, just to make this as absolutely ironclad as I can, to make this as easy for class
23 | members and generous to class members as we can do it, while still respecting the
24 | Supreme Court principles. What we're talking about doing today is getting an order
25 | that excludes people from the opt-out class. That's what we're doing. And so what
26 | we need to do is define the set of people that we're excluding from the opt-out class.

1 And, as I said before, we could limit the exclusion to the people on the list. So that
2 would eliminate the possibility of any sort of unfairness to someone who we argue later
3 should have been on the list, because actually once you did --

4 THE CHAIR: You would have to be annexed, then, to the CPO and it would be public.

5 MR PICCININ: Yes.

6 THE CHAIR: That's the only way.

7 MR PICCININ: The list of the names. Yes. Perhaps I can come back to that. I'm not
8 sure that is actually the only way you could do it because what is necessary, for
9 fairness, is actually only that each of them is contacted and receives the opt-in.

10 THE CHAIR: I think it's fair that all class members should know what the class is,
11 who's got to opt-in?

12 MR PICCININ: Yes. It's just having the names, Sir, would involve publishing their
13 names, which seems like information that belongs to them that you might not want to
14 publish. And I think you could achieve the same outcome in terms of fairness to those
15 individual class members without disclosing their names, because we have contact
16 details for them. And all you would need to do is have them be contacted and notified.
17 And what I was going to say is that it's only those who are on the list, so only those
18 who received the notification, who are excluded from the opt-out class. And, even
19 then, I think the point made by both Sir Peter and Mr Bankes, if someone wants to
20 argue that, in fact, their GMS in the relevant period, properly defined, including Scots
21 law, sir, is less than £10 million, such that they should be in the opt-out class, and
22 provided that they actually do meet the class definition, in its other respects, then they
23 would be in the opt-out class.

24 THE CHAIR: That puts the onus on them.

25 MR PICCININ: For that bit of it. Yes, that's right.

26 So it doesn't put the onus on them, Sir. It gives them an additional option. They can

1 | just opt-in. They don't need to say that. Like I said, you might expect --

2 | THE CHAIR: If they are in the opt-out class properly --

3 | MR PICCININ: Yes.

4 | THE CHAIR: -- the whole idea is they shouldn't have to do anything.

5 | MR PICCININ: They shouldn't have to. That's right. And that's why we're giving them

6 | the option to take that approach if they prefer. It's up to them.

7 | MR BANKES: If you follow this model, the claimant has reserved the right to extend

8 | the relevant period at a later date. If the relevant period were to be extended, you

9 | wouldn't want to reopen the list.

10 | MR PICCININ: No, no. We're using it as a cut off at this point in order to create a class

11 | of people who are being excluded from the class, but then we're taking it against

12 | ourselves. So this is actually a respect in which our approach is conservative. We're

13 | ignoring the fact that the claim values are actually higher, or may be higher, because

14 | the claim period is longer than the relevant period as we've defined it, whereas

15 | Professor Stephan has defined it in his claim form. That is a respect in which our

16 | approach is conservative, because the truth is that the claim values that they might

17 | assert may be greater. Some of them.

18 | So, in relation to practicability, again, most of what I've got to say I've already said, but

19 | I just wanted to show you the spreadsheet just to see how much information the

20 | Tribunal actually has now. Because we've provided it to you. If you take page 85 of

21 | the core bundle, I don't know whether that's legible in your -- it's fine electronically,

22 | obviously. But perhaps I can just tell you what it says anyway, because the details

23 | don't really matter. But we've given the MCID name, which is the merchant ID; we've

24 | given the business name and company number where available, and that's almost all

25 | of them; we've given information on whether they're dissolved for the top 1,100 of

26 | them -- the reference for that is para 21(c) of Ms Freeman's statement -- whether

1 | they've opted out; and then information on their individual GMS and on the aggregate
2 | GMS for all sellers at that level and above; and then the same information in relation
3 | to Professor Stephan's estimated damages.

4 | So if you wanted to do something different from what we're advocating, you've got
5 | a fairly rich set of information with which you could form your own judgment about what
6 | to do. But as for what we've done, we've picked a number, the £10 million GMS over
7 | the relevant period, which is not scientific, I stress that. It's not a scientific process.
8 | It's just an exercise of judgment.

9 | THE CHAIR: Yes.

10 | MR PICCININ: We're trying a rough and ready figure, where it's enough money at
11 | stake that you would think that these class members would be able to make a decision
12 | for themselves. The very smallest of them must have earned at least £1.6 million
13 | per annum on average on Amazon each year. If they have sales through other
14 | channels, then obviously their --

15 | THE CHAIR: How much per year?

16 | MR PICCININ: 1.67.

17 | THE CHAIR: Dividing by six.

18 | MR PICCININ: Exactly. Of course, if they've been on Amazon for a shorter period of
19 | time, then their average sales must also be more; that's just arithmetic. The logic of
20 | using GMS is that it doesn't just tell you something about the scale of the organisation.
21 | It tells you something about that, but not everything, because they could be bigger, but
22 | it also tells you something about their claim size, taking Professor Stephan's case as
23 | to how the claim works. I showed you before the claim value that even the smallest
24 | class member in our set would have -- that was really on the right-hand side of the
25 | page, very far on the right-hand side of the page -- as to the comparable numbers in
26 | Evans.

1 | In aggregate, they come to 40 per cent of the total GMS, and that's how we decide
2 | whether we're in paragraph 125 of Evans or paragraph 126 of Evans, to put it crudely.
3 | 40 per cent is a lot.

4 | MR BANKES: Sorry, 40 per cent of?

5 | MR PICCININ: Of the total GMS, and therefore of the total claim size.

6 | THE CHAIR: If we're looking at your page 85, that's the end of the table, is it? That's
7 | the last, the smallest one?

8 | MR PICCININ: Yes. These ones are not in the set, right. We provided information
9 | that goes beyond the end of our total.

10 | THE CHAIR: Right. Thank you. So the --

11 | MR PICCININ: What we did --

12 | THE CHAIR: Did the approximately 1,000 end --

13 | MR PICCININ: Exactly.

14 | THE CHAIR: -- end where?

15 | MR PICCININ: Yes. I'm sorry.

16 | THE CHAIR: Do you know that, or?

17 | MR PICCININ: Yes. So, well, if you go to page 72, for example, you will see the
18 | number 1,000 on it. So if you want to use that as rough and ready then --

19 | THE CHAIR: Oh I see. That's rank, yes. There's the ranking, yes.

20 | MR PICCININ: Exactly. Because they're in order.

21 | So in terms of whether this is a small rump, paragraph 126 of Evans, we say it's not.

22 | THE CHAIR: No, it's not.

23 | MR PICCININ: Because -- no, exactly. In terms of whether it's fundable on its own, if
24 | you just take 40 per cent of the total asserted claim value, you get above £1 billion,
25 | which is also a lot. Then thinking about the debate in Evans about the missing middle,
26 | we've put them in the opt-out class, as I said. The people who you might argue about

1 | whether those sort of claim values fall on one side of the line or the other, at least for
2 | where there was argument about that in Evans, which was people with claim value of
3 | about £16,000, you can see from just looking at this that, you know, those people are,
4 | if you just look at the individual estimated damages on page 72, it won't get anywhere
5 | near £16,000. You need to do an awful lot of flicking.

6 | In fact, I think if we go to page 85. Yes, indeed. If you go to page 85 and look at the
7 | end. It's still not down there. As I said, this is obviously not the whole set of class
8 | members. What we did was we provided 2,000 and then we did some deduplication
9 | just within the 2,000.

10 | THE CHAIR: Yes.

11 | MR PICCININ: So that's the logic of our submission. We say that leaves
12 | Professor Stephan with a very manageable set of class members and a set of contact
13 | details for them. With the company numbers, and we have them for all but 12, you get
14 | the UK addresses. Then we also have VAT numbers or foreign company numbers for
15 | a further eight. But beyond all of that, we would be willing to provide
16 | Professor Stephan with contact details, or to contact them ourselves, which might
17 | help, in a form of words that is approved by the tribunal, of course, which might help
18 | in just avoiding anyone thinking it's a scam. We can obviously communicate with our
19 | sellers and would be prepared to do that.

20 | This is a case where it really should not be difficult to conduct an opt-in exercise.
21 | I accept that contacting the relevant class members is not the whole of the opt-in
22 | exercise; it's the beginning of the opt-in exercise. But it's a very significant part of the
23 | enterprise. It's a part of the exercise where the most people are likely to get left off,
24 | and here we can do it in a way that doesn't have that risk.

25 | As I said, the Supreme Court in Evans said everything it said about opt-in, about how
26 | you should use opt-in where it's practicable. It said that without reference to the issue

1 of whether you'd be able to contact them or not. Even in cases where you don't have
2 contact details for them, still the principles articulated in Evans apply.

3 The overall picture here is much more practicable than litigation of the kind that often
4 takes place even in the High Court, without any class action regime at all. In our
5 skeleton argument at paragraph 25, if you just want to turn it up --

6 THE CHAIR: No, you referred to some High Court cases.

7 MR PICCININ: You saw them, indeed.

8 Yes, the other point that's important is that we note that unlike in Rodger and in Ennis,
9 Professor Stephan has not adduced evidence from a funder to the effect that it would
10 not fund the claim. What we have, and I want to look at it with you, is an assertion
11 from Professor Stephan's solicitor that the funder would not have been willing to fund
12 if it had been done on a hybrid basis from the outset.

13 Let's look at that. It's in bundle A at page 111, paragraph 11. You can see it's how
14 it's framed from the outset.

15 "If Professor Stephan had chosen to pursue the proceedings on an opt-in basis in
16 respect of the Proposed Opt-In Sellers (or, probably, any subset of the total class) and
17 an opt-out for smaller class members, it is unlikely that the funder would have been
18 prepared to offer funding. This is due to the following reasons:

19 "pricing is structured differently and ...[it might have been higher] ...

20 "in opt-in claims ...[there are often] bookbuild 'milestones' [in opt-in claims]..."

21 "in opt-in claims different funding structures are common, such as the use
22 of ... DBAs ..."

23 Then in paragraph 12:

24 "Funders typically expect that, where an opt-in case is run for larger claimants in
25 parallel ... the combined budgets are significantly higher than just running one case or
26 another, although... there may be efficiencies] ... [and that also tends to increase

1 | funding..."

2 | Then there's a statement in paragraph 13:

3 | "There is no funding available ..."

4 | So it's a statement of present fact.

5 | "There is no funding available for a hybrid opt-out / opt-in case, nor any allocated

6 | budget at this stage to bookbuild or contact opt-in members."

7 | There are three problems with that. Problem number one is that it's telling that they've

8 | not adduced evidence from the funder itself. It's hard to understand why the funder

9 | would not want to add this commerce back into the case if it believes in the case. It's

10 | telling that we've not had any statement from the funder.

11 | Second, is that the proposition that what the funder is now considering is materially

12 | better than the proposition that it would have been considering at the outset, which is

13 | the frame for all of this evidence that you've seen. Stephan has already overcome

14 | a carriage dispute, and he's already overcome certification. That makes it a less-risky

15 | proposition, significantly less risky, having defeated the carriage dispute, because that

16 | was viewed as a toss of a coin, compared to right at the outset.

17 | The third thing that's critical here is what's not said. Not even Professor Stephan's

18 | solicitor is willing to say that the opt-out proportion of the claim will stop here if you

19 | grant this order. That's not their position, and obviously not, because we're still leaving

20 | 60 per cent of the claim intact, which is even further north.

21 | MR BANKES: Paragraph 13 says, "There is no funding available for hybrid

22 | opt-out / opt-in case"?

23 | MR PICCININ: No. That's saying that there is not currently, so it has not asked for

24 | and obtained any funding for a hybrid opt-out / opt-in case. But they're not saying that

25 | they can't continue with the opt-out without the opt-in because they could --

26 | THE CHAIR: It would have to be renegotiated, wouldn't it, the funding, because the

1 | funding is for total opt-out?

2 | MR PICCININ: That's right.

3 | THE CHAIR: So this doesn't cover; it reduced (overspeaking).

4 | MR PICCININ: But there's no evidence to suggest that having come this far, so having

5 | defeated the carriage dispute and having obtained certification, now having pleaded

6 | out the case, that removing the 40 per cent would leave the rest of the claim, which is

7 | well over £1 billion in their telling, that the funder would pull the plug. They just aren't

8 | saying that, and that's something they could say if it were true, but they're not saying

9 | it.

10 | THE CHAIR: But the funding will have to be renegotiated, clearly, because the existing

11 | funding agreement does not cover?

12 | MR PICCININ: Yes, it may be renegotiated. It may not have to be. It may well be

13 | that they reach the same conclusion, that the existing terms, which are based on

14 | a multiple of what they spend -- if I remember correctly -- exactly the same as they

15 | were. What difference does it make?

16 | THE CHAIR: I don't know, but --

17 | MR PICCININ: Because of course the multipliers should be nowhere near. They're

18 | not going to get paid £1 billion, are they?

19 | THE CHAIR: The funders also know that the Tribunal exercises control over

20 | (overspeaking).

21 | MR PICCININ: That's true, that's true.

22 | THE CHAIR: That if there is a lower recovery, then the Tribunal may not allow funders

23 | to take a very large proportion of the amount of damages.

24 | MR PICCININ: That's true. But the amount claimed here is so large, that it's --

25 | THE CHAIR: All I'm saying is that the existing funding will have to be revisited. I --

26 | MR PICCININ: I understand that.

1 THE CHAIR: You say in response, "Well, the funder may agree to the same
2 (inaudible)".

3 MR PICCININ: That's all I'm saying.

4 THE CHAIR: They may or they may not, or they may, as said here, if they typically
5 may then ask for more. But can I ask you, because clearly they'll have to go back to
6 the funder and the ATE insurer.

7 MR PICCININ: Yes.

8 THE CHAIR: If the terms are exactly the same, there's no problem. If the terms
9 change in any way, the Tribunal would have to consider that.

10 MR PICCININ: Yes.

11 THE CHAIR: Would Amazon undertake not to oppose any revised funding agreement
12 or ATE insurance?

13 MR PICCININ: Without seeing -- carte blanche, you mean?

14 THE CHAIR: Well, I mean otherwise -- yes. On the basis if there is funding and if
15 there is insurance, for this revised claim, it can go ahead.

16 MR PICCININ: Sir, I can take instructions on that and let you know.

17 THE CHAIR: Yes.

18 MR PICCININ: But obviously whether Amazon opposes it or not, it's ultimately
19 a question for the Tribunal, and any submission from Amazon that changes, that are
20 justified by the change in structure that Amazon itself has asked for, if they really are
21 justified by that change in structure, inappropriate and not worthy of certification would
22 be difficult.

23 THE CHAIR: Well, I'm just trying to think through.

24 MR PICCININ: Yes.

25 THE CHAIR: Because it will be for the Tribunal, of course, to decide whether it is
26 appropriate.

1 | MR PICCININ: Of course.

2 | THE CHAIR: But the procedures are rather different. If Amazon seeks to challenge
3 | aspects of the funding agreement.

4 | MR PICCININ: Yes.

5 | THE CHAIR: As opposed to simply saying it's neutral.

6 | MR PICCININ: From a procedural perspective, our position is that it can all be done
7 | on the papers and this year, so.

8 | THE CHAIR: That will depend on what the grounds -- if, as I say, if you undertake not
9 | to challenge, and just to remain neutral; that's much easier to do on the papers. But
10 | if there may be challenges, it will depend. One might need a hearing. That's why I'm
11 | asking.

12 | MR PICCININ: I understand the question, sir, and I'll take the instructions. (Pause)
13 | I'm told that we would leave it to the Tribunal to determine, the interests of the class
14 | and justice in relation to funding and ATE, so we wouldn't take a point on the funding
15 | and ATE.

16 | THE CHAIR: Is it your submission that we could proceed with the case, not the trial,
17 | but all the work to be done on the trial?

18 | MR PICCININ: Yes.

19 | THE CHAIR: Where we have funding in place for the opt-out rump, but we're unclear
20 | about the funding of the opt-in? Wouldn't that distort the funding between the opt-in
21 | and the opt-out? Wouldn't we have to stop until we know what the opt-in class looks
22 | like and how it's funded? Because the work is the same for both classes, and if it's all
23 | funded by the opt-out funding but the opt-in benefit, that's a distortion, isn't it? So we'd
24 | have to stop everything until opt-in is clear and fully funded.

25 | MR PICCININ: We say not, sir. We're envisaging that the Class Representative would
26 | be the same, and I've not heard any suggestion that Professor Stephan would not be

1 willing to be a class representative.

2 THE CHAIR: It would be the same class representative.

3 MR PICCININ: It would be.

4 THE CHAIR: The point is that we couldn't do anything until the funding was sorted,
5 because until there was funding class representatives' funders can't act. So there
6 would have to be -- that would have to take place. If it's revised, we would have to
7 consider it. You say you would undertake to remain neutral.

8 MR PICCININ: Yes.

9 THE CHAIR: And that the Tribunal would have to either approve it or require changes.

10 MR PICCININ: That's right. It's a fair point, of course. But my submission is that that
11 is the kind of point that can be dealt with. But Professor Stephan and the funder both
12 have a shared interest in getting this resolved promptly.

13 MR BANKES: But my point is you have separate funding for the opt-in.

14 MR PICCININ: Yes.

15 MR BANKES: Two funding arrangements feeding into a single action. The funder is
16 clearly going to want to ensure that the burden falls equally and therefore the opt-out
17 funder is going to be unlikely to allow matters to progress until they know what the
18 opt-in funding and contribution is, the overall cost of Professor Stephan's case.

19 MR PICCININ: The question of how those costs are shared as between the two
20 classes -- I mean, massively simplified, if it's the same funder.

21 MR BANKES: Could be.

22 MR PICCININ: It might not be, I accept that it's a possibility. But if you think about it,
23 let's think it through for a moment. If it's the same funder, there isn't actually any
24 additional work that is material for trial 1 that needs to be done for the opt-in class. So
25 it's difficult to see why there should be any issue here at all. The work is the same.
26 The costs being incurred are the same.

1 THE CHAIR: Well, no, the costs are then the costs of engaging with a 1,000,
2 approximately --

3 MR PICCININ: Yes, that's true.

4 THE CHAIR: -- and answering their queries.

5 MR PICCININ: That's true. Yes.

6 THE CHAIR: Talking to -- many of these won't have, just looking at that list, probably
7 90 per cent of them or more won't have in-house lawyers, so they'll want to instruct
8 their lawyers to advise them. They'll ask for a period to instruct them. The Class
9 Representative will have to then correspond with their lawyers about what this
10 involves. So the costs are significantly changed. They're dealing with 1,000 individual
11 new entities.

12 MR PICCININ: There are costs like that, that are specific to the opt-in.

13 THE CHAIR: Yes.

14 MR PICCININ: Of course, that's assuming that there are 1,000 of them in.

15 THE CHAIR: Not assuming, they opt-in. They have to be contacted, and that's
16 assuming that they show some interest.

17 MR PICCININ: Yes. That's true. So there are costs that are specific to the opt-in,
18 which will obviously be for the opt-in class. But for the costs of actually running the
19 proceedings there may be some elevated costs in terms of the kind of dialogue with
20 opt-in class members, questions that are asked from time to time. They're not
21 material, they're not likely to be material to the scale of the work that needs to be done
22 in the litigation, in terms of taking a case like this to trial.

23 We can't see any reason why anything that needs to be done -- we've got a CMC in,
24 I think it's in October, isn't it? Yes.

25 THE CHAIR: That couldn't take place, clearly, because we wouldn't have any funding?

26 MR PICCININ: That depends, sir, on when you give judgment. We're envisaging that

1 | it could take place and that if you give judgment --

2 | THE CHAIR: Do you have to renegotiate a funding rate?

3 | MR PICCININ: For the opt-out class we would -- we'll see how it goes. But our position

4 | is that we would have expected that to be done in time.

5 | THE CHAIR: You haven't put in evidence about that.

6 | MR PICCININ: Well, Sir, obviously we don't know what the discussion between the

7 | funder and --

8 | THE CHAIR: We do have evidence from the Class Representative's solicitors that it

9 | will take longer.

10 | MR PICCININ: That's true. All I can do is -- but that's not based on discussions.

11 | THE CHAIR: That doesn't surprise us, I have to say.

12 | MR PICCININ: That's not based on evidence from the funder.

13 | THE CHAIR: No, but it's based from evidence from an experienced solicitor bringing

14 | class actions he's negotiated --

15 | MR PICCININ: That's true.

16 | THE CHAIR: -- a number of agreements with funders, and himself worked for funder

17 | previously.

18 | MR PICCININ: That's true.

19 | THE CHAIR: So he has relevant experience --

20 | MR PICCININ: (Overspeaking) his relevant experience .

21 | THE CHAIR: -- and he says it's a much more time-consuming exercise. There's no

22 | basis for us to go behind that, because it doesn't strike us as a strange, surprising

23 | piece of evidence. He's not saying it can't happen, and I take your point, he's not

24 | saying that it can't be achieved, but he's just saying that it's a more time-consuming

25 | process to get there.

26 | MR PICCININ: Yes. The submission I would make about that evidence is that it is

1 | geared towards book-building exercises done ex-ante. This is a very different situation
2 | because it's a situation where you already have the pleadings and the certification
3 | expert report done. You already have the benefit of the carriage judgment and you
4 | have the benefit of the certification judgment. So you have a whole lot of material to
5 | show both the funder and class members about the case, which is very different from
6 | the standing start kind of situation that he's really talking about there.

7 | But ultimately -- so the submission I make is that we're working towards a trial 1 in
8 | April 2028. If we can resolve the funding position this year and get the opt-in class
9 | certified this year, then the opt-in notice, that communication, can go out at the start
10 | of next year if not before. We've suggested a four month process - they suggest that
11 | that might take longer.

12 | THE CHAIR: Well, six months is normal for opt-in.

13 | MR PICCININ: Six months is normal, Sir, but this is not a normal situation because
14 | normal would involve you don't have a list of the names. You don't have any of the
15 | advantages that I keep referring to. That's why we say four months ought to be
16 | possible.

17 | THE CHAIR: Also because of the time people take to consider --to get advice.

18 | MR PICCININ: Yes.

19 | THE CHAIR: But you say four months?

20 | MR PICCININ: But even if it's six months, then, there's certainly no need to wait that
21 | long before continuing with the disclosure exercise and continuing towards evidence.

22 | THE CHAIR: Talking about time, why did you take so long to issue this application?

23 | MR PICCININ: Evans was handed down just before Christmas last year, and we
24 | issued this application in May. It was a lot of work to get from one to the other --

25 | THE CHAIR: But --

26 | MR PICCININ: -- because, Sir, of the data issues. We haven't gone through the detail

1 | of the work that had --

2 | THE CHAIR: But Ennis did it in February. Rodger did it in February.

3 | MR PICCININ: Sir --

4 | THE CHAIR: Why did you take so long?

5 | MR PICCININ: In Ennis the data was already there because in Ennis the argument

6 | had been run the first time around. So that was already --

7 | THE CHAIR: Are you saying a company like Amazon couldn't --

8 | MR PICCININ: It was a lot of work.

9 | THE CHAIR: It takes four months to produce a list of the value of sales on Amazon?

10 | MR PICCININ: Then the other point I was going to make is that we were working

11 | towards a deadline for submission for applications for the CMC that was scheduled to

12 | take place, the one we had on the other side of the summer. So --

13 | THE CHAIR: It's an extraordinary length of time for such a well resourced company,

14 | which, and I say this is as a credit to your clients, who have a great reputation for

15 | efficiency.

16 | MR PICCININ: They certainly do so, Sir. But it was not an easy task to put that

17 | together. It was five months, including the Christmas break.

18 | THE CHAIR: I say it seems reasonable that Ennis and Rodger took February to bring

19 | their application.

20 | MR PICCININ: But they didn't need to put together the evidence base. And, of course,

21 | there's lots else going on in this case as well, preparing for the CMC- again, points

22 | that didn't apply in, certainly in Ennis, I don't know about Rodger. But we are where

23 | we are on that.

24 | But we did file -- the aim was to have this dealt with. I mean, our position was to have

25 | this dealt with at the last CMC. But Professor Stephan said he didn't have time to

26 | respond. The Tribunal decided to put it off. And so that's where (audio distortion).

1 | We're not in a position where the trial date should be scuppered with active case
2 | management. Whatever the difficulties are and whatever the dates that we end up
3 | with, that's not the position we're in. We should be able to manage this. We say it is
4 | practicable, and you're not in a Rodger type situation of the application being
5 | considered in June for a trial in September. That's not the situation at all.

6 | That takes me to the other factors, factors other than practicality. One of those -- just
7 | picking up the ones that are mentioned in my learned friend's skeleton, from
8 | section D.2. onwards. First one is strength. You've heard my submissions on
9 | strength --

10 | THE CHAIR: Yes. We've dealt with that.

11 | MR PICCININ: -- which is that it's neither here nor there. As I said, there are
12 | numerous points that are made in our defences that haven't been answered on the
13 | basis that they don't have disclosure. That's precisely why the Tribunal is not in
14 | a position to form a view of them one way or the other.

15 | I've already dealt with their submissions on practicability.

16 | There is one small point I should deal with from paragraph 48 of their skeleton. There
17 | is a particular issue that has come up concerning a subset, a very small number, of
18 | people who might be said to be class members and do appear in our list. Our position
19 | is that they're not class members. That's still being discussed between the parties,
20 | but it's a very -- you can see what it's about. It relates to the particular terms on which
21 | that a very small number of Amazon -- and it makes no difference to the overall
22 | analysis of the points that --

23 | THE CHAIR: But if you accept that no one who's on your list needs to (audio
24 | distortion).

25 | MR PICCININ: Exactly. That's right.

26 | THE CHAIR: (Inaudible) even if they fall within the --

1 | MR PICCININ: If they --

2 | THE CHAIR: Even if, in fact, their turnover might be higher, they wouldn't have to opt
3 | in, as I understand it? Do you accept that the only people who have to opt in are those
4 | on your list?

5 | MR PICCININ: They are actually on the list. That's the point. They would have to opt
6 | in, those ones, if they wanted to say that they were in, as they would have the
7 | additional hurdle of showing that they are actually class members in circumstances
8 | where we --

9 | THE CHAIR: But this particular company, they're not on your list?

10 | MR PICCININ: It is on the list.

11 | THE CHAIR: Oh, it is on the list?

12 | MR PICCININ: Yes, it's very much on the list. (Pause)

13 | THE CHAIR: Yes.

14 | MR PICCININ: But I didn't want to say --

15 | THE CHAIR: Yes. But we haven't identified --

16 | MR PICCININ: No, we haven't identified them. Yes.

17 | Then on page 44 we have section D.4., which is fear of retaliation, which is based on
18 | nothing more than pure speculation from --

19 | THE CHAIR: That I think can't be argued now. That was raised last time and we ruled
20 | on that. No change in the law.

21 | MR PICCININ: No I --

22 | THE CHAIR: That's covered by our judgment, isn't it?

23 | MR PICCININ: Yes. I mean, the one point I would make is that, of course, in Evans
24 | there was actually evidence of --

25 | THE CHAIR: No. But I say we have dealt with that --

26 | MR PICCININ: Yes, I agree.

1 THE CHAIR: -- and I think that's determined. We can't have that.

2 MR PICCININ: That's right. And what you said about it was that it was not fanciful,
3 but that you couldn't make any findings beyond that. And my submission to you is
4 that, on the law, that takes my learned friends nowhere.

5 THE CHAIR: Well, I'd say we have dealt with that.

6 MR PICCININ: I agree.

7 THE CHAIR: And I don't think it's open to you to make further submissions on that.
8 Nothing in evidence has changed.

9 MR PICCININ: There's nothing in evidence.

10 THE CHAIR: It's just not open at the moment.

11 MR PICCININ: Yes. Those are my submissions.

12 THE CHAIR: Can I ask you this?

13 MR PICCININ: Yes.

14 THE CHAIR: We haven't got a draft order. Yes. So what order are you proposing we
15 make?

16 MR PICCININ: That's what I was explaining before, that all we're actually doing
17 today -- we're not dealing with the opt-in application, which would be made
18 subsequently by Professor Stephan. All we're doing from today is seeking an order to
19 exclude the people that we're describing from the opt-out class.

20 THE CHAIR: I thought you were saying that you're seeking a hybrid. You're
21 supporting a variation of the CPO. So it's a hybrid?

22 MR PICCININ: That's right. In the sense that we're saying we're not opposed to those
23 people who are being excluded from the opt-out class being dealt with on an opt-in
24 basis. But the order for the notice, for the dates by which they've got to opt-in, all of
25 that is a matter to be dealt with in Professor Stephan's application, which he would
26 make in light of the judgment. That's the way it works. That's what I've been trying to

1 | do in my submissions today, to define and justify the set of people that should be
2 | excluded from the opt-out class.

3 | In theory, it would be open to Professor Stephan not to pursue the opt-in.

4 | THE CHAIR: Well, that would -- then the order would then record an undertaking from
5 | Amazon not to oppose an application that those who have been excluded from the
6 | opt-out class can be certified on an opt-in basis.

7 | MR PICCININ: Yes, certainly -- let me just turn around.

8 | THE CHAIR: Otherwise we're not ending up with a hybrid.

9 | MR PICCININ: In practice, ultimately --

10 | THE CHAIR: No, we're just ending up with a reduced --

11 | MR PICCININ: Not ending up there because an application can then be made for the
12 | opt-in basis. But if you just allow me to turn around for one moment. (Pause)

13 | On the basis that it's the same claim, that the new application is not made for some
14 | different claim.

15 | THE CHAIR: Yes, sure.

16 | MR PICCININ: On the basis that it's the same claim on the same evidence, then yes.
17 | And we've already said, in terms of funding. But in terms of what the draft order is --

18 | THE CHAIR: Yes, it would be an undertaking Amazon wouldn't oppose.

19 | MR PICCININ: That's right.

20 | THE CHAIR: An application for those excluded by this order to be certified on an opt-in
21 | basis for the same claim. (Pause)

22 | Yes.

23 | MR BANKES: Can I ask one question?

24 | MR PICCININ: Of course.

25 | MR BANKES: You've not mentioned the Hammond claim.

26 | MR PICCININ: No.

1 | MR BANKES: That is an important factor of this claim, which makes it unlike any other
2 | claim, because we will still have to define the totality of the loss on abuses 2, 3 and 4,
3 | irrespective of whether the Stephan --

4 | MR PICCININ: Actually, only two and three, isn't it?

5 | MR BANKES: Okay. Well, on some part of the claim. Do you have anything to say to
6 | us about how we should factor the existence of that into our analysis and thinking of
7 | how we deal with this?

8 | MR PICCININ: Yes. It doesn't make any difference at all. But what you need to
9 | define, what you need to do to decide the Hammond claim is exactly the same as what
10 | you currently need to do to decide the Hammond claim. Then the only thing that will
11 | change is on the Stephan claim where, again, there's not really any change in relation
12 | to trial 1, but when you get to trial 2, other than in relation to disclosure as to who gives
13 | it then, but in relation to trial 2, then there'll need to be a methodology to deal with the
14 | losses suffered by the opt-in class members. That's all that changes.

15 | And whether that is just individualised and/or whether that is also an aggregate
16 | approach will just depend on how many there are. Because if there's only a handful
17 | of them, might do it individually, if there's a lot of them, they might do it differently.
18 | That's all to be seen. It doesn't make any difference to the Hammond claim other than,
19 | potentially, if you're right that funding can't be done by October and that the
20 | October CMC needs to move to January or February or whenever it is. Then that's
21 | a potential knock-on. (Pause)

22 | Anything else?

23 | THE CHAIR: I think that covers everything. Thank you.

24 | MR PICCININ: I'm very grateful.

25 | THE CHAIR: Yes, Mr Beal.

1 Submissions by MR BEAL

2 MR BEAL: If it pleases the members of the Tribunal, my submissions are going to be
3 in three parts. Firstly, is the application an abuse of process? Secondly, if not, has
4 there been any material change so as to justify revisiting this panel's earlier decision
5 to certify on an opt-out basis? If so, if there's been a material change, should the
6 proceedings be re-certified on a hybrid basis?

7 Can I just indicate where we are at present in the light of your decision, which we can
8 see at bundle B, tab 1, page 60 of the hearing bundle. And there this Tribunal dealt
9 with the question of opt-out or opt-in. At paragraph 148, it was noted that Amazon's
10 submission was that if the claim were to be certified at all, it should proceed only on
11 an opt-in basis.

12 At paragraph 150, the Tribunal rightly noted that no submission had been made on the
13 strength of the claims. That's by Amazon, I should say, not by us, because we said
14 the claims were strong.

15 Paragraph 151: Amazon emphasised that the prospective class members, now the
16 class members, are businesses, not consumers, which was correct. But nonetheless,
17 it was suggested that there were a very small number of class members with much
18 larger claim values, who must cumulatively account for a significant bulk of the claim
19 value, and it's striking that none of them have chosen to bring their own claims. So it
20 was then suggested, and the submission was made, they should be put to their mettle.
21 They should have to indicate whether or not they actually want to pursue this claim,
22 and that it was on that basis that the whole matter should be certified only on an opt-in
23 basis.

24 It was then said at paragraph 152, this Tribunal found that:

25 "The fact that the PCMs comprising Professor Stephan's class are diverse, and the
26 fact that a very small minority of them have much larger claims than the rest are very

1 | likely to be correct. The same points can be made in many collective cases, but they're
2 | not the primary consideration ... A decision whether to certify as opt-out or opt-in is
3 | a multifactorial assessment ... One aspect is the practicability ..."

4 | And this Tribunal then cites from a passage in the Court of Appeal's decision in
5 | Le Patourel, which is untouched by the Evans decision in the Supreme Court.

6 | At paragraph 153, the Tribunal then set out a series of factors which told in favour of
7 | opt-out certification rather than opt-in certification. Firstly, the fact that the PCMs were
8 | businesses, not consumers, and that they could potentially be contacted individually
9 | with assistance offered by Amazon did not mean it was necessarily practicable to
10 | proceed by way of opt-in proceedings.

11 | Firstly, there was a very large number of them, estimated to be around 211,000.
12 | Amazon had not sought to contest that figure. And unlike in Trucks, for example,
13 | there's no trade association here that can be prayed in aid. This Tribunal recognised
14 | that a minority of the PCMs are large merchants, but most are small ones. Dr Houpis
15 | had estimated that only about 2 per cent have monthly sales over US \$250,000.

16 | The third factor was this was not a case where the individual claims are for loss on the
17 | sale of a purchase of a few items involving large capital outlay. The average per PCM
18 | was around 13,000. That's obviously in the context of some of the minority of
19 | claimants having been recognised to have substantially larger claims. And, again, this
20 | Tribunal then cited from Le Patourel and from Lloyd v Google, noting that:

21 | "The practicability of collectively organised litigation might favour an opt-out solution
22 | where there are large numbers of potentially affected parties and relatively small sums
23 | at stake ..."

24 | And that test was met.

25 | "Professor Stephan then had submitted that since many PCMs need to continue to
26 | sell on the UK Amazon Marketplace, they may be intimidated to take active steps ...

1 | or put their head above the parapet. The Tribunal rightly said it wasn't in a position to
2 | evaluate this concern, but we accept it's not fanciful."

3 | And there was evidence before the Tribunal below dealing with that.

4 | Taking all of these matters into account, it was appropriate for it to proceed, like the
5 | Hammond action, on opt-out proceedings. That was clearly a decision that was
6 | reached by this Tribunal exercising a gatekeeper function. It was a multifactorial
7 | assessment.

8 | The position articulated by my learned friend in his closing submission a moment ago,
9 | I'm afraid, is one that I had not understood to be the position, which is that he seeks
10 | an immediate order from this Tribunal that 1,000 or so of that 211,000 no longer have
11 | claims, even though those claims were certified over a year ago. And the effect of that
12 | will be to require those 1,000 persons who have been recognised to have claims, we
13 | say strong claims, for damages against Amazon on the basis of persistent and
14 | continuous anti-competitive behaviour are frozen out of the process.

15 | THE CHAIR: Well, I think it's not quite that, is it? I think it would be an order that
16 | would vary the previous order, so as to exclude them from the class on the undertaking
17 | by Amazon, that if an application is made for them -- for the certification to allow them
18 | to opt-in, Amazon will not oppose that.

19 | MR BEAL: Well, that's recognising, speculatively, that an opt-in claim can and will be
20 | brought on that basis, and that those people will themselves then opt-in.

21 | THE CHAIR: No, it's not recognising that they all will opt-in, but it gives them the
22 | chance to opt-in. And one assumes that if, subject to the funding point, which you may
23 | come on to deal with, there would be no reason why an opt-in application cannot be
24 | made.

25 | MR BEAL: I'll come on to deal with the practicalities, but --

26 | THE CHAIR: I don't think they're being, as it were, frozen out.

1 MR BEAL: Well, the position would be this: at the moment they have claims and they
2 have recognised claims, and they stand to receive, in a distribution, an assessment of
3 damages on an aggregate basis to which they can share. So they have a share in the
4 pot of an aggregate damages claim that is put at around 2.8 billion, in terms of the way
5 that the claim is articulated. The effect of the order that this Tribunal is being invited
6 to make today is that 1,000 of that class will no longer have that entitlement. So it's
7 stripping them of an entitlement they currently have. And by way of introductory
8 observation, can I start with the approach that Lieutenant Detective Columbo in the
9 1970s detective series might have posited? Cui bono, who is actually drawing
10 a benefit from this application? But the answer is obviously not the 1,000 people who
11 suddenly find themselves without an entitlement that they had up until today. No, the
12 only people who would benefit are Amazon, and, with respect, they've been perfectly
13 candid about that. They want to reduce the value of this claim by 40 per cent.

14 But the extraordinary thing is that we still have -- a claim on their case will be going
15 ahead for approximately 60 per cent of 2.8 billion or so. So a claim for 1.6 billion is
16 going to be run on their case, come what may, because they say, "Well, you'll continue
17 with the opt-out claim, come what may." But (a) that assumes that funding will be
18 available for a continued opt-out claim on that basis, and of course, that's very much
19 a matter that has to be determined in due course if it proves necessary to do so.

20 But also, more importantly, it means that the existing trial 1, - if the trial date can be
21 maintained, and we respectfully suggest it wouldn't be able to be maintained, - that's
22 going to go ahead on any view, and that will require disclosure, factual evidence,
23 expert evidence to be considered alongside legal submissions. Costs are therefore
24 necessarily going to be incurred by the CR if the claim remains viable to take it through
25 to trial 1 liability and that trial is listed for April 2028. So the relevant work is going to
26 be done with common issues of law, fact and economics determined in trial 1.

1 But rather extraordinarily, at paragraph 47 of their skeleton argument, whilst Amazon
2 graciously accepts that we can continue business as normal with the same legal team
3 and experts, which of course is correct in principle, subject to funding, they then say
4 there should be no significant increase in work or costs. With the greatest respect,
5 there's simply no evidential basis for that assertion. It's not supported by
6 Ms Freeman's witness statement. It doesn't seem to have been asserted by anyone
7 who has identifiable experience in book building for claimants in large, complex group
8 litigation. Ms Freeman herself has sensibly not made any assertions as to what such
9 litigation might involve. Nobody in Amazon's team that we're aware of has acted for
10 claimants in the CICC case where the hybrid approach has been adopted, nor were
11 they involved in the book-building team in Ad Tech, which we've seen has been
12 unsuccessful.

13 Weighed against the speculative nature of the assertions that are made, we have the
14 evidence of Mr Gallagher, who, as the Tribunal rightly pointed out, is a very
15 experienced solicitor in group litigation. He's acted on both sides of the fence
16 for years.

17 THE CHAIR: I think Mr Piccinin rowed back from that and accepted that there will
18 be -- he may not have agreed it significant, but there will be a considerable amount of
19 work in corresponding with these 1,000 and their solicitors during questions and so
20 on. So there will be additional work. He accepts that.

21 MR BEAL: Very substantial additional work.

22 THE CHAIR: Then we have the evidence, as you say, of your solicitor. So we, I think,
23 can see that. For my part I can see that it needs more than four months, and
24 six months is more realistic.

25 At the same time, you do start with a list of the specific people and their addresses,
26 which is a help. But there will be delay and there will be additional costs.

1 | MR BEAL: But can I just say what we say the facts are and why those facts speak for
2 | themselves?

3 | THE CHAIR: Yes.

4 | MR BEAL: If the application is accepted, there will be a complex procedural stage that
5 | will need to be undertaken, which we say will take at least nine months. That is not
6 | a figure I've plucked from the air. It's a figure that is derived from the lived-in
7 | experience in the CICC proceedings, where six months clearly was not enough, and
8 | where, in subsequent cases, I think Rodger in particular and potentially Ennis, it's been
9 | recognised that a longer period than six months is necessary.

10 | Secondly, that procedure will be very expensive. It's no simple matter.

11 | THE CHAIR: Every case is different. I'm not sure, speaking for myself, why it would
12 | take more than that in this case where you have 1,000 more or less, people. I don't
13 | know if you know the number in CICC? There was some discussion about that earlier.
14 | What the total size of the opt-in (overspeaking) --

15 | MR BEAL: At the time of the judgment that was delivered in February there were,
16 | I think, 94 group entities reflecting 208 separate -- group undertakings, corporate
17 | groups reflecting an individual list of about 208 legal entities. That's diminished since
18 | because of the ruling, so it's now much smaller.

19 | THE CHAIR: But those were the people -- the potential opt-in class or the numbers
20 | who actually opted-in?

21 | MR BEAL: Those were the people who had opted-in. In terms of the potential class,
22 | I couldn't find in the certification judgment any indication of how big the class was.
23 | What had happened was that Marcus Parker in that case had been corresponding with
24 | members of the proposed class for a considerable period of time, so there was always
25 | already a sort of rapport and a contact list which my instructing solicitors in that case
26 | were able to rely upon.

1 | There may well have been evidence in that certification. I'm afraid I didn't do
2 | certification for that claimant. There may well have been evidence as to what the
3 | anticipated size of the class was, but I don't have it at my fingertips. But.

4 | The point is that -- how can I put this, the 208 versus the 1,000-or-so-odd, we are
5 | assuming that all of those 1,000 will want to opt-in, because these are strong claims
6 | and they're claims that they already have. And if we write to those people -- and we've
7 | been in communications with -- we sent out an email distribution last week in order to
8 | start the claimant outreach process. Assuming that those 1,000 want to opt-in, we
9 | have to budget for and assume that we will be spending money on getting 1,000
10 | claimants across the line for the opt-in. And the deadline can't be, with respect, until
11 | the funding is sorted, because part of the problem here is that --

12 | THE CHAIR: I can see that, because you can't proceed until the funding is sorted.

13 | MR BEAL: And the funding is likely to depend as well on the level of sign up in the
14 | opt-in process, because that's -- we can look at it if we need to. But there's a transcript
15 | of the opt-in application that's now being made in the FX case, where there's quite
16 | a lot of evidence from Mr Maton of Hausfeld in that case as to why funders require
17 | funding in tranches depending on the level of take up. The obvious reason is the more
18 | people you have, the greater the claim value. The greater the claim value, the greater
19 | the return that the funder would expect. But at the same time, you have a minimum
20 | level of return that you need for committing the capital in question, and the funders are
21 | an essential part of the way that this regime works.

22 | THE CHAIR: So there will be first stages to get a funding agreement, which will give
23 | you the budget for stage 1, first tranche, which is to correspond with 1,000 (inaudible)
24 | with. But then depending on the level of take up, that may enable funding to go
25 | forward?

26 | MR BEAL: With respect, sir, there's no evidence about any of this currently before

1 | this Tribunal.

2 | THE CHAIR: I thought that's what you were just telling me?

3 | MR BEAL: No, I was telling you how the funding was working in a different case, which
4 | is the Evans route reborn case, if you put it that way. Evans' application for an
5 | extension of time within which to make an application to bring a claim on an opt-in
6 | basis, which is the procedural step that that's been reached there.

7 | The evidence that is before this Tribunal, for the purposes of this application, is
8 | contained in the witness statement of Mr Gallagher. You read it a moment ago. It is
9 | that, in his experience, funding these hybrid claims is very difficult, and he wouldn't
10 | expect a funder to willingly engage in that process as a funder. There is simply no
11 | evidence either way as to what the attitude of Innsworth would be if this Tribunal were
12 | suddenly to strike-out, effectively, 1,000 of the class members representing
13 | 40 per cent of the value of the claim. If that were the order that results from this
14 | hearing, then I anticipate that they would want to understand in detail what the
15 | implications of that were. But there's absolutely no evidence that they would blithely
16 | continue funding the opt-out claim in circumstances where the metrics of the claim
17 | have changed.

18 | THE CHAIR: As you say, we don't know.

19 | MR BEAL: No. There's simply no evidence one way or the other. But given that the
20 | status quo is that there is a fully funded claim for all of these claims, and that
21 | status quo, if it is disturbed, will lead to greater costs for less recovery for the class,
22 | then the only consequence of the application that my learned friend is seeking is that
23 | Amazon has a reduced exposure for its liability for anti-competitive conduct, and those
24 | people who remain in the opt-out class receive less for a higher cost.

25 | This suggested route comes only with additional costs and delay. The cost per pound
26 | recovered necessarily will be higher, and substantially fewer class members will

1 | achieve redress, because Amazon's been candid that that's its aim. It wants to slash
2 | 40 per cent of the claim from the process.

3 | And on what basis? Well, they say, "Well, we need to test whether or not these
4 | particular larger entities might or might not have an appetite for bringing the claim".

5 | And in circumstances where, if one looks at the figures, there's already a very
6 | substantial claim going ahead anyway, to the extent that it's relying on Evans for the
7 | proposition that there's somehow an incremental leveraging effect, that comes about
8 | in Evans because of the inherent weakness of the claim. The key point of distinction
9 | with Evans is that was a claim which was recognised by the Tribunal to be strikable.

10 | No application had been made for strike-out, and the Tribunal didn't think it could
11 | comfortably decide to strike it out of its own volition, even though it had that power.
12 | But the inherent weakness of the claim was what gave rise to the concern about
13 | leveraging.

14 | It can't sensibly be suggested that a legitimate and strong claim against a large
15 | corporation that has engaged in anti-competitive conduct somehow deserves to avoid
16 | a claim because it might be forced to settle a strong claim. That isn't the law post
17 | Evans, and it wasn't the law pre Evans. So the key distinction with Evans is the
18 | underlying merits of the claim. That is what runs like the wording in a stick of rock
19 | throughout the Evans judgment.

20 | So this particular outcome and the facts I've outlined make no sense except in a world
21 | in which Amazon is very keen to reduce its exposure for liability for anti-competitive
22 | conduct. Of course, that has a knock-on effect on the countervailing public law
23 | consideration of deterrence, which is --

24 | THE CHAIR: Yes, obviously Amazon makes this application its own commercial
25 | interests.

26 | MR BEAL: Yes.

1 THE CHAIR: Defendants always do, and obviously it's hoping that that will reduce the
2 size of the claim, not necessarily by 40 per cent, but by something perhaps up to
3 40 per cent maximum. Some will opt-in.

4 But that's not really relevant. What's relevant, it seems to me, is has anything changed
5 in the approach to certification as a result of Evans such that it's right for us to revisit
6 our decision? That really depends on Evans and what it means.

7 If something has significantly changed such that the basis on which we certify should
8 be reconsidered, then we have to reconsider it, whatever the effect --

9 MR BEAL: Can I then --

10 THE CHAIR: -- it has on various people, because that's the law. Some people may
11 lose out. If nothing's changed, then we don't, whether it's tough on Amazon or not.
12 So that's really the underlying question for us, isn't it?

13 MR BEAL: Could I start with the abuse of process point?

14 THE CHAIR: Yes.

15 MR BEAL: Logically it comes first. So I'm sure this Tribunal is very familiar with the
16 principles of law summarised by Lord Bingham. Could I invite you, please, just to
17 consider one paragraph in a judgment of Lord Justice Popplewell in the Koza case.
18 That's bundle of authorities D, tab 6, starting at page 461.

19 THE CHAIR: Yes.

20 MR BEAL: There's just one --

21 THE CHAIR: Don't forget we're not all lawyers on the Tribunal, and it's not
22 everyone's ...

23 MR BEAL: Yes, of course. I'm conscious of that.
24 So page 461. There's just one paragraph, please.

25 THE CHAIR: Yes.

26 MR BEAL: That's paragraph 42.

1 THE CHAIR: 42, yes.

2 MR BEAL: If you'd be kind enough to just read that paragraph. (Pause)

3 Now, in this case, the merits of opt-out versus opt-in were fully addressed at the CPO
4 hearing. On the pleadings, the matter was also dealt with. In our amended claim form,
5 which is bundle A, tab 10, page 390, there was a long section devoted to opt-in versus
6 opt-out. That's paragraphs 43 to 50. That section dealt both with the merits of
7 collective proceedings generally, and also then with costs and benefits in due course,
8 and it was clear that we were contending for certification on an opt-out basis.

9 Paragraph 43 to 44, in particular dealt with class composition, and on the basis of
10 evidence from Dr Houpis identified that 78 per cent of class members, around 165,000
11 sellers, assuming a class size of 211,000, may have claims of less than £13,000.

12 Then it was recognised in 44 that 2 per cent of third-party sellers in the US had monthly
13 sales of over \$250,000. And applying a similar proportion here would mean it was
14 recognised, as we recognised, that there would be some class members with larger
15 claims and that they will be able to opt-out if they wish to. The mere fact we said that
16 some class members might have large claims does not render opt-out collective
17 proceedings inappropriate. That was especially the case given that the lion's share of
18 the class was reflected by small class members with low value claims. And that
19 remains the same then as now.

20 Amazon's response can be seen at tab 11, page 506. At paragraph 88, Amazon set
21 out the statutory test. That hasn't changed. At paragraph 89, it cited from the Court
22 of Appeal in Le Patourel. That hasn't changed. Le Patourel is in fact endorsed in the
23 Supreme Court decision in Evans.

24 Then at 90, it was suggested that the correct approach to exercising the discretion
25 whether to order opt-in or opt-out, is currently under consideration by the
26 Supreme Court in Evans.

1 "Amazon reserves the right to address any developments in the law in due course."

2 Now, my submission to you in due course, when I get to the second part of my
3 submission, will be that Evans has recognised, and the learned president in Rodger
4 has made the same observation, that whereas previously the Court of Appeal in Evans
5 thought that the strength of the claim would be a neutral factor, the Supreme Court in
6 Evans has recognised that it's not a neutral factor, it's an important factor. That must
7 necessarily go for both in favour and against opt-in, depending on the strength of the
8 claims themselves.

9 The second aspect that is new is a recognition that there is a countervailing public
10 policy justification in favour of opt-in proceedings if the weakness of the claim and/or
11 the relative strength of the claim means that there's a risk of a defendant being
12 leveraged, not by the merits of the claim themselves, but by the process. So if opt-in
13 / opt-out proceedings would put an unfair or oppressive burden on the defendant to
14 settle an unmeritorious claim, then that speaks in favour of opt-in. Or indeed with
15 a very weak claim, not having collective proceedings at all. So we recognise that those
16 two nuances build on the previous jurisprudence in cases such as Le Patourel which
17 indeed Amazon had cited.

18 But they do not change the legislative framework and they do not change the essential
19 question, which is: What is the just and fair way of proceeding once it's accepted
20 collective proceedings are appropriate, which here they are; what is the just and fair
21 way of proceeding for the class as a whole?

22 One sees in Evans in due course that the approach is to step back and have an overall
23 assessment, multifactorial assessment based on all of the circumstances of the case.
24 That's exactly the same then as now.

25 What did Amazon rely upon at page 507? Well, two things. First, it was said that the
26 proposed class members are businesses. Whilst that's not always a decisive factor in

1 |favour of the opt-in model, it's significant. Just pausing there, the businesses here, as
2 |we've seen, 210,000 of them are recognised by Amazon not to be capable, in a sense
3 |of being practicably able to opt-in to the claim.

4 |That is, with the greatest respect, because they are small and medium sized
5 |businesses who are likely not to have the resources to be able to engage to the extent
6 |necessary in the complexities of what is, on any view, a complex case.

7 |The second point Amazon made is that given that class members are current or former
8 |third-party sellers, Amazon could make convenient means available for the PCR to
9 |make direct contact with them.

10 |We've accepted that, yes, Amazon is in a position where it can give us such
11 |information as it has about everyone in the class. But the reality is that it significantly
12 |downplays the level of work that has to go in. Making an initial contact is one thing.
13 |Getting the people signed in to opt-in litigation is a very different beast. The
14 |speculative response from Amazon, through my learned friend today, is this is all very
15 |easy: you don't need to worry about it, it can be dealt with in a matter of weeks and it
16 |won't cost any money, I'm afraid is simply divorced from reality; especially for those of
17 |us who, for the most part, work on this side of the fence in terms of claimant versus
18 |defendants. I remember my first bookbuilding experience was football shirts, which
19 |was not a happy one.

20 |So that's the two points that Amazon was making. But then paragraph 91, they then
21 |said, and this remains the core theme of their submission before you today:

22 |"In a case as speculative as this one, I'll put that to one side, and in which the funder
23 |is seeking very significant returns... Amazon submits that it is worth the time and effort
24 |to run a proper process of engagement with class members, in which they can vote
25 |with their feet as to its merits and take their own view of the funding terms on offer."

26 |So it was being suggested then, as now, that it was appropriate to test the willingness

1 of prospective class members to sign up to the litigation, rather than simply having
2 them folded into the litigation from the start.

3 Now, our response to that was contained in our reply. That's bundle E, tab 12, starting,
4 please, at page 435. Our response specifically on the opt-in point ran from about
5 paragraph 122 to paragraph 132.

6 THE CHAIR: Which document are you in?

7 MR BEAL: I hope you have -- it was included in the updated bundle E on Friday. It
8 might be electronically available to you. Does your bundle go to page 435, 436?

9 THE CHAIR: Supplemental bundle, 435. Yes. This document is?

10 MR BEAL: That's the reply to Amazon's response for the certification.

11 THE CHAIR: Yes.

12 MR BEAL: So we see that there's then a section dealing with a number of class
13 members. The relevant principles are dealt with. Then overleaf really starts the
14 application to the facts, paragraph 127. We pointed out that the 211,000 figure had
15 been based on Dr Houpis's estimate, and that Amazon had not provided any
16 countervailing figure. We also made the point about difficulties in contacting them, the
17 risk of class inertia, the hassle factors as a deterrent to opting in, fear of reprisals, and
18 the cost and time required to build a book. All of those points are made there.

19 The comparison that's drawn with the Evans/FX case is in fact with the CAT decision.
20 It's not with the Court of Appeal. We haven't cited the Court of Appeal in support of
21 our case, other than paragraph 130, which dealt simply with the average claim size
22 point.

23 So we're contrasting the time and effort needed to build a book with the failed
24 bookbuilding exercise that had been reported in the Evans CAT decision, where the
25 evidence showed that over 6,000 hours was spent by Hausfeld seeking to get 321, as
26 it turned out, class members to engage with the process.

1 Paragraph 128, we noted the class composition. 78 per cent had suffered less than
2 £13,000 loss, 2 per cent.

3 THE CHAIR: All of this is in the context of a total opt-in, isn't it?

4 MR BEAL: Yes. Why I'm showing you this is to show you the underlying data that
5 was before the Tribunal and the underlying arguments that were being made.

6 THE CHAIR: Yes.

7 MR BEAL: It is absolutely right that Amazon did not advance a hybrid approach. It
8 wasn't something that they suggested should be done.

9 Paragraph 129, we relied on Le Patourel, which is untouched by Evans. At 130, we
10 cited, Sir, your decision in Gutmann to the effect that it's one thing getting somebody
11 to sign up for prospective and uncertain litigation, and another to get them to sign up
12 for a distribution where there's a pot of gold awaiting them. That's also something that
13 was featured in the Brook case.

14 Paragraph 131 admittedly looked at the position for the class as a whole, but we
15 recognise that there were a smaller number of PCMs with materially larger claims. So
16 the fact that there was this tranche of what is now said to be a thousand people who
17 have very substantial claims. That was always apparent on the face of the data that
18 was put before this Tribunal.

19 The question really becomes, well, is there a reason why the hybrid solution was not
20 put forward? Amazon's skeleton argument, just for your note, that's bundle A, tab 12,
21 page 557, dealt with opt-in. Again, it was suggested you had to test the individual
22 class members' appetite for bringing the claim. They cited the data in class
23 compositions which we had made in our reply.

24 THE CHAIR: I'm sorry to interrupt you, Mr Beal, but doesn't it come down to this. If
25 the only changes made by Evans were the two that you identified a short while ago,
26 then there's no material change affecting this case.

1 | MR BEAL: It's true.

2 | THE CHAIR: In that case, whether it's treated as an abuse of process or the
3 | alternative, simply dismissed because there's no material change of circumstances,
4 | may not particularly matter.

5 | MR BEAL: Yes.

6 | THE CHAIR: Because it fails. If, on the other hand, as Mr Piccinin has forcefully
7 | argued, Evans made a number of significant changes to the approach and test that
8 | should be applied for certification, then it's not an abuse to look at that. One then has
9 | to apply those changes and see where we end up. But it's not an abuse of process.

10 | MR BEAL: The statutory framework hasn't changed.

11 | THE CHAIR: No, the statutory framework. But the interpretation.

12 | MR BEAL: The data in the class composition has been evident throughout.

13 | THE CHAIR: Yes. The question is whether the interpretation given to the statutory
14 | framework has changed by reason of the binding decision of the Supreme Court.

15 | MR BEAL: Well, in my respectful submission, even if the Supreme Court decision is
16 | properly to be read as indicating that there has been a change of approach, query to
17 | what extent that is a change of approach. If, as we submit, it's right, the hybrid
18 | approach could have been taken in May 2025. Then, given that the underlying data
19 | has not changed and the underlying class composition has not changed, and that was
20 | all perfectly well known, and if it were the case that the hybrid approach had been
21 | adopted in previous cases, then, in my respectful submission, there is nothing of
22 | a sufficient change in Evans to suddenly say hybrid is the way forward and you must
23 | all do hybrid, to mean that there has been a material change sufficient to prevent the
24 | abuse of process doctrine applying.

25 | THE CHAIR: That seems to me the key question. Clearly it could have been put
26 | forward in CICC. There's nothing in the statute or the rules that said there cannot be

1 a hybrid.

2 MR BEAL: No.

3 THE CHAIR: So it could, in theory, have been put forward. The underlying data,
4 there's more detail now, but as you point out, it was always known that there were
5 some large claims and smaller ones. So it takes one back to Evans as to whether
6 there's been a change such that it's now appropriate to consider the hybrid approach
7 in different interpretation of legislation.

8 MR BEAL: Could I make two short points about the facility with which this argument
9 could have been articulated, and therefore why we say it should have been
10 articulated? First, and I mean this in no way as a personal observation, but my learned
11 friend Mr Piccinin was in fact counsel instructed in the CICC case, and he appears in
12 the list of representatives acting for the defendants in that case, that's D tab 15,
13 page 1042.

14 The second point is that Mr Kennelly KC, in the Stasi case, advanced a hybrid
15 approach before the Evans Supreme Court judgment was handed down. He did so in
16 argument on 11 and 12 December 2025. That is D24, page 1331. Whereas Evans
17 was handed down on 18 December. So before the Supreme Court judgment was out,
18 Mr Kennelly was able to -- if I could take you please to page 1335 of the bundle of
19 authorities.

20 THE CHAIR: But as I say, clearly, it could have been put forward.

21 MR BEAL: Yes.

22 THE CHAIR: I don't think anyone would say it was impossible precluding the matter
23 of law.

24 MR BEAL: In my respectful submission, once you have the data established and once
25 it's recognised that it's a plausible argument that could have been deployed, the
26 criteria for requiring a party to bring forward their submissions at the first available

1 | opportunity and not holding something back for deployment in due course is a highly
2 | salient factor.

3 | THE CHAIR: If the law's materially changed through an interpretation of the
4 | legislation, particularly where the party has reserved their right to come back because
5 | they knew there might be such a change, I personally find it hard to see that it's in any
6 | way abuse of the process of the tribunal for them to do that, and argue that the law
7 | has materially changed. The argument might be a bad argument, but to run it doesn't
8 | seem to me an abuse.

9 | MR BEAL: I think you have my submission.

10 | THE CHAIR: I've got your submissions, yes.

11 | MR BEAL: In terms of the data aspect, it's comforting. I did have some submissions
12 | to make as to show you how Amazon had not been cooperative in the provision of
13 | data and has become cooperative with the provision of data when it suits it. But I don't
14 | think I need to take that point for the simple reason that my learned friend accepts that
15 | the data position hasn't changed, and it was always available to them to make the data
16 | points that they want to make on the data that was available.

17 | So his entire case is premised on the fact that Evans ruled in favour of an approach
18 | which was wholly different to the approach that was going before.

19 | THE CHAIR: Well, different in material respects.

20 | MR PICCININ: Yes.

21 | THE CHAIR: Yes, it is. It is absolutely premised on that.

22 | MR BEAL: But my submission -- you have it, I'm not going to labour it, but my
23 | submission remains that, because the data was there and because the legal argument
24 | was available, notwithstanding whatever Evans may have done, it is an abuse to have
25 | a second bite at the opt-in cherry.

26 | Now, can I then move on to what I anticipate is where the Tribunal wishes me to move

1 | more quickly than I otherwise would have done, which is the no material change in
2 | circumstances. So what we do say, and this is addressed in our skeleton at
3 | paragraphs 20 to 30, is that Evans does not represent a material change in the
4 | relevant circumstances for this case. Now, the test for certification following Evans has
5 | not changed. Choice of opt-in versus opt-out remains a multifactorial exercise of
6 | judgment, and the Tribunal must take into account all the circumstances. All of that's
7 | exactly the same before and after Evans. And, in fact, with respect, the Tribunal has
8 | already found on at least two occasions that the Evans approach does not move the
9 | dial in opt-in versus opt-out, depending on the facts of the case, i.e. where you don't
10 | have a very weak claim.

11 | Could I start, please, with Rodger? This is in the bundle of authorities, tab 25. That's
12 | D 25, starting at page 1389. And paragraph 15.

13 | THE CHAIR: Yes.

14 | MR BEAL: I see the time. Perhaps, if I could just deal with Rodger and then we can
15 | take the transcriber break.

16 | Paragraph 15 says that even if the Tibbles line of authority does not strictly apply in
17 | the Tribunal, for the purposes of the application of Rule 85, nonetheless, questions of
18 | finality, delay and prejudice remain highly relevant. So the fact that we had an express
19 | determination of opt-in versus opt-out remains a highly relevant factor. The question
20 | for this Tribunal, which was being invited to revisit the certification decision, was
21 | whether or not the Tribunal should now vary the existing CPO in light of the relevant
22 | circumstances of the case.

23 | At paragraph 18, the Tribunal noted that as far as the strengths of the claim is
24 | concerned, there was no basis for concluding that the claim should now be viewed
25 | materially differently. And, indeed, at that stage, the Tribunal took the view that the
26 | claims were strong ones. Google did not suggest otherwise, and notably did not seek

1 | either strike-out or summary judgment. All of that applies here.

2 | We would invite you to find that the claims are strong ones because of the consistent
3 | regulatory record against Amazon, and because of the commitments' decisions, both
4 | at the CMA and EU level. And one of the key issues at certification was the fact that
5 | the PCR at that stage was going to be able to rely on a before-and-after analysis of
6 | Amazon's conduct pre- and post- the commitments that it had entered into and the
7 | impact on the market of that change of behaviour. Clearly, that regulatory precedent
8 | supports a strong case of conduct having taken place, which was then changed.

9 | Paragraph 20, we see that Google's application instead turned not on the strengths of
10 | the case, but on contending that a very substantial proportion of the aggregate claim
11 | value is concentrated in a small number of developers who could, in Google's
12 | submission, opt in to the proceedings.

13 | Just pausing there. In fact, if we look at paragraph 15(c) of my learned friend's
14 | skeleton, this is not the case that Amazon articulates because it recognises it can't go
15 | that far. Under (ii) they recognise:

16 | "... where the main core of the value of the proceedings consists of a mass of small
17 | claims, with a small rump of bigger claims, [it's] open to the Tribunal to decide that the
18 | entire set of claims should be grouped together and certified on an opt-out basis."

19 | And then at footnote 18, back at page 8:

20 | "While Amazon noted, as part of its submissions at the CPO Hearing, that certain data
21 | indicated that there was a small number of class members with large claim values ...
22 | it did not run the argument, advanced in Ennis, that the 'vast majority' of the claim is
23 | concentrated in a small number of class members. Amazon was right not to do so:
24 | this is not that type of case (and that argument is not being run now either)."

25 | So, Rodger, at face value, is being argued by Google on the basis that a substantial
26 | proportion of the claim is concentrated in a very small number. And the point that is

1 taken by the learned president at paragraph 21 is that that is not a new point:

2 "The problem with that submission is that that proposition ... it's not a new one: it was
3 always the case from the outset of certification... Professor Fletcher's first expert
4 report said in terms that 'A small number of developers earn a large share of total
5 developer revenue' and that either 2 per cent or 3 per cent of the class suffered
6 damages in more than £1 million."

7 So Professor Fletcher, in that case, had undertaken an analysis similar to Dr Houpis.
8 The figures change and I'm not going to go into the figures obviously, but the analysis
9 remains the same that in our case it can't be said that the bulk or, indeed, the vast bulk
10 of the claim value is in a limited number of claimants. Here, it is said that at least
11 60 per cent of the claim is held by 210,000. So Rodger was a stronger case in favour
12 of the argument that's now being deployed or not deployed, depending on whether
13 you take footnote 18 at face value by Amazon.

14 Paragraph 22 then pointed out that Google did not rely on any new factual material. It
15 relied on its own transaction data, and it always had that and could have relied on that
16 at certification stage.

17 Paragraph 23: what was said to have changed was the decision in Evans from the
18 Court of Appeal to the Supreme Court. And then, crucially, we get into the Tribunal's
19 analysis at 24 and 25 of what exactly does the Evans Supreme Court do? Please
20 could I invite you to read 24 through to 27? (Pause)

21 THE CHAIR: Yes.

22 MR BEAL: Paragraph 28: the Tribunal then reaches the conclusion that, based on
23 those factors, the balance of justice continued to favour the existing opt-out structure.
24 And we say, with respect, those factors all apply with equal vigour, if not more vigour,
25 here. The difference is that we have a much larger proportion of the claim value,
26 a significant majority, i.e. 60 per cent at least, covered by the opt-out class as posited,

1 | and the value attributable to the smaller class that is being sought to be excluded from
2 | the claim is much less significant. It was only after that that the Tribunal also took into
3 | account other factors. So they'd already concluded that they were going to continue
4 | with the existing structure.

5 | And then as another factor, paragraphs 30 and 31 recognise that the opt-in procedure
6 | would have a significant disruptive effect on the trial. Now, true it is that the trial was
7 | not very far away in that case. But we have a listed trial 1 for April 2028. And what we
8 | see is that Mr Gallagher then, as now, a witness giving evidence about the opt-in
9 | process. There would need to be a process by which developers could take advice
10 | and decide whether to opt-in, followed by contractual arrangements and negotiations
11 | in relation to funding and representation. All of that imposes a substantial additional
12 | burden. Admittedly, in that case, at a time when they were leading up to trial.

13 | It's then noted that the opt-in proceedings had allowed six months, but this Tribunal in
14 | the 2026 judgment had recognised, paragraph 104, that it wasn't enough time.

15 | Even if the relevant developers were now identifiable, the point made by Mr Gallagher
16 | is that considerable time would be required for the process of renegotiation between
17 | Professor Rodger, funders and ATE insurers; consideration by the opt-in class
18 | members, et cetera, potentially requiring board and shareholder approvals. If they did
19 | seek to do so, then negotiations between those opt-in class members and solicitors
20 | as the basis of their representation. And that's a vast amount of additional work, just
21 | to get those claims up and running.

22 | Paragraph 32 recognised that there was no certainty that replacement funding or
23 | ATE insurance would be available at short notice or on what terms. And Mr Chopin,
24 | in that case, for the funder, had given evidence that it was unlikely the funder would
25 | be prepared to provide funding for opt-in claims at the present stage, the main reason
26 | being the difficulty of building a book of claims with a high enough value to warrant it.

1 THE CHAIR: Yes.

2 MR BEAL: So that was the position.

3 What we then see at paragraph 39 through to 41 is, in essence, it's a recognition that

4 hybrid proceedings generally can be established in principle if it's part of the overall

5 assessment, that that's what justice and fairness requires. However, and there is

6 a salutary warning given at paragraphs 40 and 41, that this Tribunal has to be satisfied

7 that the approach is both just and workable. It needs to work out how the division

8 between the classes is drawn, how notice and participation has to be managed, and

9 what consequences follow if some entities opt-in and others do not. And the learned

10 president then refers directly to the CICC proceedings and the AdTech proceedings.

11 And I think it's fair to infer that they're not being cited with strong enthusiasm in favour

12 of the hybrid approach.

13 THE CHAIR: Would that be a sensible moment for a short break?

14 MR BEAL: Yes. Yes, please. Yes. I'll see how I get on, but I'll see how I get on.

15 THE CHAIR: Yes. I mean, it looks as though we'll spill into tomorrow.

16 MR BEAL: I think that's right.

17 THE CHAIR: But I would expect to be over by lunchtime tomorrow, if not mid-morning.

18 Yes.

19 (3.33 pm)

20 (A short break)

21 (3.44 pm)

22 THE CHAIR: Yes. Mr Beal.

23 MR BEAL: The next decision I'd invite the Tribunal to consider is the Ennis case.

24 That's D26, tab 26 starting at page 1411.

25 THE CHAIR: Yes. Again, if you could give us the paragraph number. Yes.

26 MR BEAL: Paragraph 33.

1 THE CHAIR: Yes. Thank you.

2 MR BEAL: What we have there is a breakdown of the 13,000-odd UK domiciled app
3 developers in the proposed class by reference to bands of what their claims are worth,
4 going from very small amounts under £10 to sizable amounts between £100,000 and
5 £1 million. Then developers over £1 million is the top of the next page.

6 There was also witness evidence in that case as to whether or not the proceedings
7 should be recertified. And that evidence included from Mr Geradin, who is a solicitor,
8 at Geradin and Partners, mostly about app developers and the way of working.

9 There was also evidence from Mr Mansfield, which we can pick up at page 1413. He
10 was the solicitor who was acting for the class representative in these proceedings. He
11 set out a procedural history, but he also gave evidence about the practicalities of opt-in
12 collective proceedings, noting that, that involves the class members "placing their
13 heads above the parapet", which I think is an expression I'm afraid I've used as well.
14 He described the process of book building and his reference to his own experience,
15 which he characterised book building as "lengthy and resource intensive".

16 It's one thing, he noted, to try and book build from the start, which we've seen, for
17 example, Hausfeld attempted in the Evans case. But if it suggested that book building
18 should be required now for an opt-in approach, that would almost certainly lead to the
19 adjournment of the trial. I've just checked, and I think the trial in Ennis is set for
20 December 2027.

21 What he confirmed was that the CR's funding arrangements expressly contingent on
22 those being opt-out proceedings, and his expectation was that the funder would
23 withdraw funding if the proceedings ceased to be opt-out. It doesn't look as though
24 there was any evidence directly from the funder on that point, but I'll be corrected if I'm
25 wrong. It's possible. Mr Oliver Way, sorry.

26 THE CHAIR: There was evidence from Mr Way --

1 | MR BEAL: Yes. Mr Way from Harbour. I beg your pardon.

2 | THE CHAIR: Yes.

3 | MR BEAL: Mr Mansfield was giving his evidence separate from that.

4 | We then see that he thought that:

5 | "... his ... experience of dealing with litigation funders [top of the next page] ... was that

6 | a change to opt-in proceedings midproceedings would, 'in [terms] of the risk-based

7 | analysis that litigation funders and ATE insurers take towards protecting their

8 | investments [would be seismic]."

9 | "'... 'it ... should not be assumed that funding for an opt-in case could be obtained'.

10 | Larger developers might choose not to opt-in with a view to free-riding on a case

11 | brought on behalf of smaller developers. It assumes that smaller developers would

12 | opt-in despite the practical challenges ... Mr Mansfield ... [was] 'far from certain'."

13 | He described some other barriers which you can then see, and he referred to material

14 | in the public domain, which raised the risk of a detrimental impact of relations between

15 | Apple and a given developer if they "stuck their head above the parapet".

16 | So that was the evidence that was before the Tribunal in that case. Paragraph 57,

17 | page 1419 for those following electronically. The Tribunal set out the criteria

18 | governing an application to vary or revoke a CPO. It's a broad discretion taking into

19 | account all the relevant circumstances. There were a number of matters that the

20 | Tribunal was required to pay regard to.

21 | First of those at subparagraph (6) was:

22 | "... whether the criteria for certification of claims set out in Rule 79 still apply or apply

23 | in the same way as when the order was made ..."

24 | So that's a reference to the statutory framework, which of course we know has not

25 | changed.

26 | And then:

1 | "(b) whether the class representative continues ...

2 | THE CHAIR: I'm so sorry. My mistake. Where are you now?

3 | MR BEAL: Subparagraph (6) of paragraph 57. Right at the bottom of that page. I'm

4 | sorry, I don't have the internal page numbers.

5 | THE CHAIR: Paragraph 57.

6 | MR BEAL: I do, it's 1372 of the report.

7 | THE CHAIR: Yes. Well, we know Rule 85. Yes.

8 | MR BEAL: We then see paragraph 59 that the Tribunal was:

9 | "... concerned with the power to 'vary or revoke' an order which the Tribunal had

10 | already made. [However] Considerations of consistency, legal certainty and finality

11 | dictate that something must have occurred - some change of circumstances relevant

12 | to the question of certification - which justifies the Tribunal in varying or revoking the

13 | order it's previously made."

14 | That was important because of the statutory framework which required the Tribunal to

15 | consider whether the certification criteria still applied or applied in the same way as

16 | when the order was made.

17 | That leads to the conclusion at paragraph 60 that it's not enough simply to form a view

18 | that a different view could be taken, and that the Tribunal might have reached

19 | a different conclusion on the basis of the updated position:

20 | "... if the tribunal [for example] has simply changed its mind or would now balance the

21 | relevant considerations differently from the Tribunal which had made the CPO.

22 | [I must] exercise the power ... in light of the overriding principles set out in rule 4 ..."

23 | It was also relevant to take into account the fact that it shouldn't be capable of simply

24 | being relitigated time after number every time there is an alleged change in material

25 | circumstances. So there needs to be a process of bringing the thing to a halt.

26 | We then see there's a reference to the Stasi decision of the Tribunal, which confirms

1 | that:

2 | " ...the tribunal 'must strive to achieve an outcome which is fair and proportionate
3 | between the parties, consistent with the overall obligation rule 4(1) to deal with cases
4 | justly and at proportionate cost'. [That's] no less true when [it's] considering whether
5 | to vary or revoke ..."

6 | In the present case, what Apple relied upon to vary, see paragraph 62, was the
7 | decision of the Supreme Court in Evans. The Tribunal held that:

8 | "Clarification of the law in an appellate judgment will not necessarily, or even generally,
9 | justify revisiting a CPO ... The power to vary or revoke ... is not a substitute for a timely
10 | appeal."

11 | That goes to my point that if, in fact, the argument on the law for a hybrid approach
12 | was available, and if the data remains the same, then whereas here Amazon didn't
13 | deploy the hybrid approach and chose to appeal but not on the certification on an
14 | opt-out basis, that's something that tells very heavily against varying or revoking the
15 | order in this case.

16 | It's right to note that Mr O'Donoghue KC, on behalf of Ennis did not suggest that
17 | a change in the law could never justify revocation. That would be too extreme. What
18 | actually persuaded the Tribunal to revisit the order in this case was not so much the
19 | fact that the Evans Supreme Court decision had overturned the Court of Appeal
20 | decision, but the fact that Evans Court of Appeal had been relied upon quite heavily in
21 | the certification decision. Because it had featured large in the certification hearing, the
22 | Tribunal thought it was appropriate to revisit the question.

23 | However, in terms of what has changed, the Tribunal did identify the key themes
24 | emerging from the Supreme Court's decision. Please can I invite you to read
25 | paragraph 65 through to 68? (Pause)

26 | THE CHAIR: Yes.

1 | MR BEAL: The Tribunal then went on at paragraph 76, page 1425 to unpack some
2 | further guidance from the Supreme Court on the statutory test. They referred to
3 | paragraph 112, which my learned friend took you to earlier. They referred at
4 | paragraph 77 to paragraph 116 of the Supreme Court's decision:

5 | "... that the regime is designed to accommodate a wide spectrum of cases, with
6 | different features ... [one can have] on the one hand, a large class of ordinary
7 | consumers affected by a breach of competition law, where each claim is for a small
8 | sum ..."

9 | Just pausing there, if I might add, small and medium sized enterprises are, if not
10 | equities' darling, then at least similar to a consumer in the eyes of competition law.
11 | Therefore, there isn't a material distinction to be drawn between a large consumer
12 | claim and a large SME claim.

13 | And on the other hand, you can have a situation where:

14 | "... claimants are large commercial organisations, well capable of looking after their
15 | own interests, where the sums involved are large enough to make it financially viable
16 | for these organisations to pursue them ..."

17 | The Tribunal then cited paragraph 120, dealing with the importance of class
18 | composition. It was the identification there of distinct groups of claimants which would
19 | be a matter for evaluative assessment:

20 | "'In our view, where the Tribunal identifies groups of claimants with distinct profiles
21 | relevant to the assessment to be made, it should consider the practicability of bringing
22 | an opt-in claim for each group separately ..."

23 | Now here, we say there is no different class of claimant. The claim is homogeneous.
24 | It involves people who are third-party sellers, and if you were to look on the
25 | spreadsheet that was exhibited in Ms Freeman's witness statement. The difference
26 | between person at 1,000 and person at 1001 in that list is negligible. The only

1 | difference between them is the claim value.

2 | Paragraph 79, the Tribunal then said:

3 | "... where the class comprises different groups, and the Tribunal concludes that the
4 | practicability of bringing opt-in claim differs as between those groups, the Tribunal
5 | must then stand back and 'make an overall assessment ...'"

6 | So that remains the core test, as indeed the learned president said in Rodger. That is
7 | the core test. That was the core test that was applied at certification.

8 | "If there are a group of claimants for whom opt-in proceedings are practicable and
9 | a group for whom they're not practicable, it would follow ... that the 'proceedings' as
10 | a whole ... [are not] practicable on an opt-in basis."

11 | But what you need to do is identify what it is about the group that you say it's
12 | practicable for opt-in distinguishes it from the group that is for whom it's not practicable.

13 | If that's simply the size of the claim, then that's arbitrary. And I would invite you to look
14 | at PCM number 1,000, who would be deprived of their status of an active claimant, or
15 | somebody who would have an entitlement to a claim for damages, as it stands, and
16 | 1,001 who would retain that entitlement. The difference between them in terms of their
17 | GMS is virtually zero.

18 | But you still have to stand back and make an overall assessment of the balance of
19 | justice. What the Tribunal then looked at was whether or not composition in Ennis in
20 | terms of claim values and numbers was -- what difference that made. Please, could
21 | I invite you to read paragraphs 80 to 83 (sic) where the composition is looked at in
22 | some detail, and the dividing line, such as it could be distinguished, such as it could
23 | be drawn is, is a matter of some analysis. (Pause)

24 | Then at 84, relying on paragraphs 124 and 126 of Evans which my learned friend took
25 | you to, Apple invited a mechanistic approach.

26 | THE CHAIR: Yes. I think we've been through this before, haven't we?

1 | MR BEAL: When one looks at the factors, what I invite the Tribunal to consider is how
2 | this is a stronger case for opt-in certification than the one before this Tribunal today.

3 | So when one sees the relevant factors that are looked at, the first factor is that the
4 | claims were strong and had at the very least realistic prospects and they had not been
5 | struck-out. As far as strength was concerned, the case was measurably different from
6 | the case in Evans, and we would invite the same conclusion here.

7 | Secondly, the class is homogeneous. All of its members had entered into substantially
8 | the same contract. That's exactly the same with Amazon. Nor was there an obvious
9 | point at which you could draw a line between those for whom it would be practicable
10 | and those who would not. It would be arbitrary and have potentially unfair
11 | consequences. We say the same applies here.

12 | Thirdly, this is a point of distinction. The application was for decertification of the class
13 | as a whole, not as a hybrid solution, but nonetheless that was advanced on the basis
14 | of the overwhelming concentration of claim value in the larger claim class members.

15 | There was then some suggestion that decertification would mean that the proceedings
16 | would come to an end. Because Mr Mansfield's evidence was accepted that it was
17 | highly plausible that no opt-in proceedings would ever get off the ground; even if they
18 | were to eventuate, that would not assist the large cohort of claimants already referred
19 | to who would not be able to join.

20 | The real question, then, at subparagraph 5 was:

21 | "... whether ... the overwhelmingly greater number of the class members could not
22 | reasonably pursue their claim, other than on an opt-in basis, it imposed an unfair
23 | litigation burden on Apple ..."

24 | And the conclusion reached was that it wouldn't. It's a case where the certification of
25 | the class as a whole secured access to justice for the numerically large cohort of
26 | claimants with viable and serious claims, which could not proceed any other way. So,

1 the fairness to Apple argument was rejected.

2 And, then, at paragraph 86 for completion, the Tribunal also recognised the disruption
3 to the timetable that would arise. The timetable had been fixed with a view to trial in
4 early 2028. In fact, we've confirmed, I think it's December 2027. But to revoke the
5 CPO now would result in the procedure taking place thus far being wasted. And, at
6 the very least, there would be significant pause while everything was put in place. And
7 we say that that must necessarily follow here as well.

8 MR BANKES: Can I ask you one question?

9 MR BEAL: Yes.

10 MR BANKES: We've heard quite a lot about the disruption that will be caused to re-
11 funding the opt-in part of the hybrid claim. I've heard much less about the extent to
12 which the funding of the right to opt-out element will be disrupted, and how quickly you
13 think you could resolve whether or not that bit will continue to be funded.

14 MR BEAL: Well, there's simply no evidence that there would be a revisiting of the
15 funding arrangement before this Tribunal.

16 MR BANKES: I'm aware of that. I can't believe you're here today without having had
17 some discussions, or have some idea of how long it would take to get the opt-out, or
18 whether it's possible to get the opt-out part of the claim, back on the rails.

19 MR BEAL: Well, my funders have not taken a view. And it would be covered by
20 privilege. So, I'm in some difficulty in answering that question without being accused
21 of waiving privilege, which I'm afraid I'm loath to do. But I think, in fairness to my duty
22 to the Tribunal, I can say that the funders have not engaged specifically, to my
23 knowledge, with what would be required, because they've taken the view that they
24 have funded an opt-out claim which has been certified. And therefore, there's simply
25 no evidence that the funding position would be revisited. The funding agreement is
26 funded on opt-out only. And so that needs to change. That would have to change

1 | come what may.

2 | But it would be a difficult and lengthy discussion with the funders as to what they
3 | wanted to do and how they wanted to do it. And I'm not in a position, I'm afraid, today
4 | to say what their position on that is for the simple reason that the agreement says
5 | they've got a funded case on an opt-out basis. And that has not yet changed.

6 | THE CHAIR: Yes. We don't know how lengthy it will be.

7 | MR BEAL: You have the evidence of Mr Gallagher.

8 | THE CHAIR: Well, he's dealing also with funding the opt-in, case.

9 | MR BEAL: If I can say this.

10 | THE CHAIR: Without fear of contradiction.

11 | MR BEAL: I think it's highly unlikely that the funding issues would be dealt with
12 | separately.

13 | THE CHAIR: The opt-out. Yes, it would be done together. Yes.

14 | MR BEAL: Now, we respectfully suggest there's nothing in either Rodger or Ennis that
15 | suggests either case is wrongly decided. In each case, the Tribunal considered the
16 | impact of the Evans Supreme Court decision, and, in each case, it recognised that the
17 | statutory test remained, unsurprisingly, the same. The nuance, as the learned
18 | president put it in Rodger, is necessarily to do with leveraging and the countervailing
19 | public policy consideration that weak claims will exert some pressure on defendants
20 | to reach nuisance settlements, which is a feature simply of the procedure under the
21 | regime, rather than the intrinsic merits of the claim. That necessarily means that where
22 | you have strong claims which are recognised to be appropriate for being brought on
23 | a collective basis, the test is whether or not it's fair and just in the interests of the class
24 | for those proceedings to proceed on an opt-out versus an opt-in basis. That's the first
25 | question. And that necessarily invites the consideration of opt-out versus opt-in for
26 | the class as a whole.

1 | There's then a residual question, which is: if not the class as a whole, is there a distinct
2 | cohort whose situation or circumstance makes it clearly different from the rest of the
3 | class on an objective basis, such that it's more practicable for them to opt-in rather
4 | than the class as a whole, at which point it's been well established that the hybrid
5 | approach can be adopted? And that's exactly what the Tribunal in Rodger recognised,
6 | but with the caveat that the hybrid approach comes with attendant dangers in terms of
7 | additional costs and delay, which must be factored into the equation. (Pause)

8 | In terms of Evans in the Supreme Court, I would just like to pick up, if I may -- I'm
9 | conscious that the Tribunal has read this decision thoroughly, and was taken through
10 | it with some care by my learned friend, but I would like to just pull out one or two points
11 | that he didn't necessarily touch on. The first is at page 1252, paragraph 52 of the
12 | Supreme Court's judgment. The class sizes that the Supreme Court had before it in
13 | terms of estimation from Mr Evans was somewhere between either 14,000 or 27,000
14 | and about 42,000 members. At paragraph 95, which is at page 1260: having
15 | concluded at paragraph 94:

16 | "... the claim is very weak, it is likely to be more difficult to justify the resort to the
17 | opt-out procedure as striking a fair procedural balance ... It is ... likely to be difficult to
18 | justify resort to the opt-out procedure as a proportionate way of providing access to
19 | the Tribunal for the vindication of such a claim."

20 | It then recognised at 95:

21 | "The assessment involved is not all or nothing. The detriments and potential
22 | unfairness to a defendant of opt-out ... are real, and do not drop out of the picture just
23 | because the claims have some merit. The less the Tribunal has confidence about
24 | that, the harder it is to conclude that imposing the additional detriment on the
25 | defendant is a fair price worth paying ... but strength of the claim [is on] a sliding scale."

26 | Now, clearly where you have, as we say here, a strong claim which has been properly

1 certified, it's not simply a question of: there was no strike out. We have explained at
2 length, in our very detailed claim form and in the very detailed evidence from
3 Dr Houpis, why this is a good claim for a substantial sum of money. And those
4 arguments found favour of certification.

5 At paragraph 99, as the learned chairman picked up in the course of my learned
6 friend's submissions, there is no statutory presumption one way or the other as to
7 whether the matter should be opt-out or opt-in. There's no legislative presumption. At
8 the same time, when considering opt-out versus opt-in, Rule 79(3) encourages this
9 Tribunal to consider both strength of the claim and practicality. So:

10 "The object of these procedures is to promote access to justice for claimants while not
11 imposing a disproportionate burden on defendants."

12 Just focusing on that equation for a moment, on the facts of this case: the opt-out
13 claim, as it stands, is promoting access to justice for the entire cohort of the claim, and
14 that is being dealt with at, we say, proportionate cost, and we have a cost budget.

15 And that cost budget explains how the claim will be brought. The consequence of the
16 order that my learned friend seeks is that fewer claimants will be getting access to
17 justice, and the costs for everyone will be higher. And we say, therefore, that is not
18 compatible with the balancing exercise that is identified in paragraph 99. We then see
19 at paragraph 100 the endorsement of the approach taken in *Le Patourel*. So,
20 *Le Patourel* remains a good law for these purposes. And it's recognised, of course, in
21 paragraph 100, that you can't necessarily determine the merits in every case, but you
22 should be able to, by the time of certification, take a reasonable view as to what the
23 merits are. The conclusion that was reached at paragraphs 109 and 111 at
24 page 1263, was that there was no justification for the Court of Appeal to have
25 impugned the tribunal's approach at first instance.

26 Strictly speaking, whatever is said about the legal guidance that is given here, the ratio

1 of the decision remains that the Court of Appeal didn't identify an error of law sufficient
2 to justify interference with the Tribunal's decision at first instance, which was an
3 exercise of discretion by that Tribunal on the basis of all the circumstances before it.

4 And we see in particular, at paragraph 111:

5 "... the Tribunal's conclusion that Mr Evans' claim was weak and that this was
6 a powerful factor militating against certification of the proceedings on an opt-out basis
7 was fully and convincingly reasoned and there was no ground on which the
8 Court of Appeal was justified in interfering with it."

9 So, the recurring theme throughout the judgment of Lord Sales and Lord Leggatt is
10 that the weakness of the claim is a significant factor, which the Court of Appeal erred
11 in law in saying was neutral and it wasn't neutral. It was a powerful factor militating
12 against certification of proceedings on an opt-out basis, and that was specifically
13 identified to be because of the leveraging effect that would come from a weaker claim.
14 And one gets that. I've jumped to the conclusion, but I'm now going to jump back, if
15 I may, to paragraphs 89 to 92 to show why that concern arose. That's at page 1259.

16 We now see how the leveraging position arose. And so there's a recital of the decision
17 of the minority, as it turned out, in Merricks, where, it is pointed out that class action
18 procedure provides a potent means of achieving justice for consumers, but it's also
19 capable of being misused. The ability to bring proceedings on behalf of what may be
20 a very large group of persons without obtaining their consent gives rise to a substantial
21 administrative burden and litigation costs. The risk that the enormous leveraging effect
22 which such a class action device creates may be used oppressively or unfairly is
23 exacerbated by opportunities that it provides for profit."

24 Now, the key concern there is that this procedure can be a force for good, but if it's
25 used oppressively or unfairly in the circumstances of a case, it will be a force for things
26 that aren't good, a cause for concern, understandably. What their Lordships then

1 identified at paragraph 90 was that the Tribunal itself, in the decision in 2022, spelt out
2 the leveraging effect of opt-out proceedings, explaining the incentives they created to
3 settle even weak claims for more than merely nuisance value, and hence to bring weak
4 claims as opt-out claims. So it was that leverage that is being identified as the
5 mischief.

6 It then says at paragraph 91:

7 "If the merits of the claim are very weak, as the Tribunal assessed them to be in this
8 case, it is unlikely the Tribunal will be justified in conferring on the proposed class of
9 claimants the significant leveraging advantage associated with opt-out proceedings."

10 So it's recognising that, yes, you can certify class action proceedings, where, for
11 example, there's a large group of consumers or, I would add, SMEs who are being
12 given access to justice, and it wouldn't be practicable for them to bring the claim any
13 other way. And this is the only way they can get redress. That's one case.

14 And then you have a case where a weak case is brought by people who can stand on
15 their own two feet, and it produces the unjust or oppressive approach. And it's in that
16 context, and again, see paragraph 92, it's the risk of unmeritorious claims, or claims
17 that don't have clear merits, being used to try and justify the case that is the concern.
18 And the concern is that the opt-out proceedings are then not being used to vindicate
19 meritorious claims. And that feeds into the proportionality. It's not proportionate to
20 spend a lot of money dealing with unmeritorious claims. So it's in that context that the
21 Supreme Court was recognising that the strength of the claim is key. The
22 Court of Appeal had downplayed the strength of the claim, and that was a relevant
23 basis for intervening with the Court of Appeal's decision and overturning it.

24 Page 1264, paragraph 112, the Supreme Court then went on to make some
25 observations about practicability.

26 THE CHAIR: This is part that Mr Piccinin relies on?

1 MR BEAL: Yes. It's right that he's taken you through paragraph 112 and 113. 113
2 adds, well, 112 says in terms practicability, like strength or the merits of the case, is
3 one factor to be weighed in the overall balance. So that confirms that, yes, the
4 statutory framework is that you look at strength, the strength of the claims, and you
5 look at the practicability of bringing opt-in or opt-out claims, and that feeds into the
6 overall assessment. But it therefore emphasises that the overall test to be applied is
7 the overall assessment based on all the circumstances of the case.

8 Then 113 shows that there are risks of unjust outcomes on both sides. One of those
9 unjust outcomes is if claimants can't practicably bring opt-in proceedings, then
10 certifying on an opt-in basis will not give them access to justice.

11 At paragraph 117, the Supreme Court identified two different separate types of case,
12 and they identified them as being ends of the spectrum. One end of the spectrum is
13 obviously the consumer/SME, large number of claimants, et cetera, which even
14 Amazon here recognises is appropriate for an opt-out claim. At the other end of the
15 spectrum is a small number of large claimants with large claims, and they're capable
16 of looking after themselves.

17 In paragraph 118, interestingly, the Supreme Court thought that the present case fell
18 between those two poles. Nonetheless, we then see in paragraph 120 that the
19 composition of the class --

20 THE CHAIR: It's interesting that, despite what they said before, in 116, they are saying
21 that --

22 MR BEAL: Merricks is identified.

23 THE CHAIR: They are inferentially saying that Merricks was a strong case, or not
24 a weak case, but they don't actually refer to the strength of the case in clear terms.
25 Large number of consumers.

26 MR BEAL: I think the fact that Merricks has settled, albeit perhaps not for as much as

1 | they hoped, indicates that it was a meritorious claim.

2 | THE CHAIR: Well, settled for such a small proportion of the claims and only a very
3 | fraction of the area of loss that they were aiming for.

4 | MR BEAL: That was in part after the pass-on issue had arguably not gone as well as
5 | Mr Merricks might have hoped.

6 | THE CHAIR: No, it was before the decision on pass-on, but in any event they seem
7 | to say they, they justify(?)

8 | MR BEAL: Yes, sir, you're quite right. It was, it was in the middle of the pass-on trial
9 | that the Merricks case (inaudible). I'm sorry, I misspoke.

10 | So we then, at paragraph 120, come on to look at the composition of the class.
11 | "... It is relevant to see "whether it is relatively homogenous or comprises potential
12 | claimants of different types and with different sizes of potential claim."

13 | That implies not simply that if you have a homogenous class that just happens to have
14 | different claim values, that's still going to be a homogenous class. It's the fact that you
15 | have potential claimants of different types.

16 | "The identification of distinct groups of claimants is a matter for evaluative assessment
17 | by the Tribunal depending on the particular facts ..."

18 | Now, with the greatest of respect, there is nothing objectively, and it's an objective
19 | test, see paragraph 119. There is nothing objectively to distinguish putative claimant
20 | number 1,000 from putative claimant number 1,001, or indeed a claimant who has
21 | earned £10.1 million in the last six years through GMS sales, and one who has earned
22 | £9.9 million over the same period.

23 | I should add that whilst my learned friend says, "Well, that shows that they're earning
24 | at £1.6 million a year". Statistically, that is of course correct. But £1.6 million a year
25 | in revenue is not the same as profitability. It tells you nothing actually about the
26 | resources available for those members. It doesn't tell you whether they've got a large

1 | number of personnel who are capable of entering into DBAs, looking at ATE cover,
2 | receiving independent legal advice, and so on. With the greatest of respect, a revenue
3 | cut-off of that sort of size would bring within it quite a lot of defendant silks at the
4 | competition bar.

5 | So the suggestion that these are all big businesses able to stand on their own two feet
6 | needs to be approached with some caution. That's speculative, and there's no actual
7 | evidentiary basis to support that. You may well have a trader who has got a very
8 | profitable business in reselling, who makes a tiny margin on what is being sold but
9 | generates high turnover precisely because he is selling on a tiny margin. That doesn't
10 | indicate somebody whose pockets will be deep and well-filled.

11 | Coming back, if I may, to paragraph 120, the identification of distinct groups is a matter
12 | for the evaluative assessment by the Tribunal, depending on the facts. Well, here this
13 | Tribunal had the composition of the group, such as it is, when it made the certification
14 | decision, and it looked specifically at the practicability of bringing an opt-in claim.

15 | The reason why it didn't look at different cohorts within that group was because no
16 | different cohorts could be discerned on the basis of objective criteria. What this
17 | Tribunal did, pursuant to paragraph 120, was stand back and make an overall
18 | assessment of the balance of justice, having regard to the underlying assessments of
19 | the evidence. So there is nothing here in Evans suggesting that the approach that
20 | was adopted below was inappropriate or wrong. One sees at 121 that in fact what you
21 | need to do is to take a step back and look at what's appropriate for the class.

22 | "[The class it is recognised] may be diverse, with claims of very different sizes or
23 | members with varying degrees of knowledge and experience ..."

24 | There is no evidence here to suggest that whilst, yes, of course they have different
25 | claim sizes, but is there any evidence to suggest that member number 1,000 has
26 | a sufficient degree of personal knowledge and experience to be able to bring a claim

1 | on an opt-in basis and get a DBA signed and enter into the ATE arrangements and so
2 | on, whereas member 1,001 doesn't. There's simply no evidence to that effect.

3 | What the Tribunal had done in Evans was actually go in detail through the composition
4 | of the different subclasses. In a sense, the table that my learned friend produced from
5 | the Court of Appeal judgment helps make the point that 10 per cent or so of the claim
6 | value is held by 15,000-odd members of the class. But the vast bulk of the claim value
7 | is then held by a much smaller number of the class members.

8 | I mean, admittedly, this is simply for the financial institutions rather than for the
9 | non-financial institutions. But on any view, looking at this in terms of distribution so far
10 | as one can discern, it looks as though the vast bulk of the claim is indeed held by
11 | a much smaller cohort of people.

12 | The conclusion therefore that that was a claim where the preponderance of the claim
13 | value was held by a relatively small number of financial institutions was, the
14 | Supreme Court found, an assessment that was open to the Tribunal at first instance.

15 | What the Tribunal then did at paragraph 122 to 124 was to apply those principles to
16 | the case. My learned friend took you through that with some care earlier, and I'm not
17 | proposing to invite you to repeat that.

18 | THE CHAIR: I couldn't quite catch the last point. What was the proportion of claim
19 | value?

20 | MR BEAL: Well, I'm simply doing the maths on the table. All I did was look at the
21 | bottom three rows of the table. Class members is 18,000 in total, 15,684 for those
22 | with less than £500,000 a year in terms of claim -- is that claim values? Average claim
23 | values. So the average claim value was under £500,000, I think. Oh. Sorry. It's
24 | turnover. It is annual turnover. Under £500,000 turnover. But then the claim value
25 | attributable to that is effectively £250 million, as opposed to a total claim value of
26 | £2.4 billion. So I'm assuming that, doing basic maths, that about ten per cent of the

claim value is held by, 15,684 out of 18,154 class members. So, in other words, ten per cent of the value is held by the smaller entities and 90 per cent of the claim value is held by a much smaller number of financial institutions, with turnover exceeding £500,000 a year. (Pause)

Paragraph 125 recognises it's possible to design a class which did not include large financial institutions and for an applicant to seek authorisation on an opt-out basis, i.e. you could carve out the large financial institutions. That, of course, we knew was a possibility because it was an approach that was adopted in CICC.

On the other hand, we then see in paragraph 126 that:

"One can imagine a case where the profile of the claims was different with the main core of the value of the class action, consisting in a mass of small claims by consumers, equivalent to those in Merricks."

Now, we say that's our case. We have 210,000 entities, which Amazon accepts cannot practicably opt-in to proceedings, and whose claim on any view will be going ahead. And those entities are exactly the type of entities that should get the benefit of an opt-out certification.

The Supreme Court then recognised:

"It would be open to the Tribunal to decide that the entire set of claims should be grouped together and be brought in one set of proceedings on an opt-out basis [because] the incidental advantage [here to the 1,000 or so] did not significantly distort the balance of procedural advantage as between the claimants and the defendant."

And we say that's a very important conclusion because whereas here the claim is going ahead anyway, if we take the claim value as roughly £2.8 billion and 60 per cent of that is jeopardy already for Amazon, that's £1.6 billion that they're already facing by way of opt-out proceedings. And their case seems to be well, because we're facing a claim for £2.8 billion, if we were facing a claim for £1.6 billion, we would do

1 something differently. Or it's not oppressive to be facing a claim for £1.6 billion, but it
2 is oppressive to be facing a claim for £2.8 billion.

3 And with the greatest of respect, we simply fail to understand, especially in the
4 absence of any evidence from Amazon to this effect, how it can be said that opt-out of
5 the entire claim is oppressive or unjust in circumstances where, on their own case,
6 they're already going to be facing a very substantial claim by 210,000 entities on an
7 opt-out basis for £1.6 billion.

8 If I may just quickly finish off Evans and then I can start afresh tomorrow with my third
9 tranche of my submission application to the facts, if you're minded to revisit. We then
10 see at paragraphs 129 to 130 an endorsement of the Le Patourel. And, in particular,
11 the conclusion that the concept of practicability is highly fact and context sensitive.
12 Broad analysis: it's a broad multifactorial exercise for this Tribunal, which has
13 a growing depth of expertise. Now, all of that applies to this Tribunal when they heard
14 the opt-in submissions by Amazon in May 2025, and the Tribunal then, as now, has to
15 look at what is just and fair for the proceedings in terms of how they are to continue.
16 And Le Patourel was the case that we had principally cited in support of the opt-out
17 approach. We then see paragraph 131, I think, has some data analysis, which the
18 Tribunal went through, and essentially drew different conclusions or rather considered
19 that Lord Justice Green shouldn't have been drawing conclusions from that data,
20 which were different from the conclusions that were drawn from the Tribunal, if I can
21 put it that way.

22 But we then see in paragraph 138 that the other matter that the Court of Appeal had
23 erred upon was reliance on the public policy consideration of deterrence and
24 vindication of rights without taking into account what might be thought, the
25 countervailing consideration of the need to safeguard the rights of defendants.

26 The safeguarding of the rights of defendants at paragraph 138 in context is against

1 | the leveraging effect of oppressive and unjust procedures, where, essentially, a weak
2 | claim is being used to leverage a nuisance settlement, or a settlement which is even
3 | beyond a nuisance settlement, but is being used unjustly and oppressively to get
4 | a benefit that the claim does not deserve. So that's a countervailing public policy point
5 | that the Court of Appeal hadn't taken into account, but it doesn't suggest, with the
6 | greatest respect, that the statutory framework has changed, that the test to be applied
7 | has changed, or that the considerations cited in *Le Patourel* don't still give good
8 | guidance as to the approach that should be adopted.

9 | The nuance, as I've indicated at the start, is, firstly, the strength of the claim is not to
10 | be treated as neutral, but is a significant factor, and secondly, the countervailing risk
11 | of weak claims being used oppressively is something that should be at the forefront of
12 | the Tribunal's consideration. That second consideration wasn't dealt with by the
13 | Court of Appeal, and it was relevant because the claims were weak. This Tribunal
14 | when it certified did not have to worry about that consideration because these claims
15 | are not weak and it wasn't being suggested, and, with respect, cannot sensibly be
16 | suggested, that the strong claims that the Class Representative here is bringing are in
17 | any way oppressive or unjust. We're going to cower Amazon into submitting to
18 | a settlement that it otherwise would be loath to enter into. This isn't a case where
19 | Amazon is being cowed by the procedure under the new regime. Far from it.

20 | If I may, I will finish the rest of my submissions on the third part of my case tomorrow.
21 | That will look at the *Stasi* decision and the *Brook* decision, which were not
22 | recertification applications, but plain vanilla certification.

23 | THE CHAIR: So tomorrow we'll have *Stasi* and *Brook*. Will that conclude? Is there
24 | anything else?

25 | MR BEAL: After that I will simply go through aspects of Mr Gallagher's statement and
26 | make some factual points.

1 THE CHAIR: Yes. How long do you expect to be?

2 MR BEAL: I would hope to be done, with a fair wind, in about half an hour, 40 minutes.

3 THE CHAIR: So we should clearly conclude by -- even if you went to 11.30, we'll

4 conclude by lunchtime. So we'll say 10.30. I don't think there's any need to sit early.

5 10.30 tomorrow.

6 (4.38 pm)

7 (The hearing adjourned until 10.30 am on

8 Tuesday, 8 September 2026)

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?