

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1644/7/7/26

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

8th 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

Digital Transcription by Epiq Europe Ltd
Lower Ground, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400
Email: ukclient@epiglobal.co.uk

(10.30 am)

(Proceedings delayed)

(10.33 am)

THE CHAIR: Yes, Mr Beal.

MR BEAL: I don't know if you need to give the usual warning again, or whether the warning you gave yesterday carries on?

THE CHAIR: I don't do it every day.

Submissions by MR BEAL (continued)

MR BEAL: Could I please draw together some threads from the second part of my submissions, namely material change of circumstances from yesterday.

We saw from Evans paragraph 112 that if opt-in proceedings are practicable for the claim as a whole, then there's no reason to certify the proceedings on an opt-out basis.

Here, of course, the Tribunal rightly found opt-in was not practicable for the class as a whole, and Amazon has not challenged that.

We know from Evans at paragraph 120 that this Tribunal also should consider the composition of the class and any distinct group within it, but those groups have to be distinct in terms of their objective characteristics and in terms of their respective practicability for opting-in.

As the Tribunal observed in its certification decision, any claim that is certified for collective proceedings is likely to have a diverse range of claimants within it, with different claim values. So merely having some larger claimants with bigger claims is not a reason for directing a hybrid solution, otherwise, that would introduce a de facto requirement for a hybrid approach in every case. We know from Evans that the legislative regime does not sanction a presumption of opt-in or opt-out. That's left to

1 the discretion of the Tribunal.

2 Now, as a matter of fact, there is no case where this Tribunal has ordered a hybrid
3 approach against the Class Representatives' opposition. True it is that a hybrid
4 approach has been adopted in CICC and I'll come on to look at that shortly, and there
5 have been cases where claimants domiciled outside the jurisdiction have been
6 required to bring an opt-in claim because that's what the statute requires. But beyond
7 that, and beyond Ad Tech, there are precious few examples of a hybrid approach
8 being used. In fact, there are no other examples of hybrid being used.

9 As the Tribunal recognised in Rodger, a hybrid approach is, of course, possible but
10 needs to be carefully assessed given the inevitable issues that arise with costs, delay
11 and procedural complexity.

12 We saw that Evans at paragraph 126, recognised that opt-out remained appropriate
13 even where there were large claims for larger claimants if the core of the claim covered
14 a large number of smaller claims by consumers. We would add that reasoning should
15 also apply to SMEs, small and medium-sized enterprises.

16 We saw from Rodger and from Ennis that neither Tribunal in those cases considered
17 that Evans had changed the legal landscape so as to require opt-in or a hybrid for
18 claims, even where the concentration of those claims was with the large claimants.
19 So Ennis and Rodger were cases where, in fact, the concentration of the claim was
20 with larger claimants. That isn't our case. The concentration is with the volume of the
21 210,000 smaller claimants, who Amazon accept can't practicably opt-in to the
22 proceedings.

23 What the acceptance, therefore, of the defendant's application would mean is
24 a distinct departure by this Tribunal from the previous practice of the Tribunal so far.
25 We say that's confirmed when I move on now to look at the third segment of my
26 submission, which is what does this look like if you do it from scratch? So if you're

1 | against my submission that there hasn't been a material change of circumstance with
2 | Evans, and the Tribunal considers appropriate to revisit the certification issue, then we
3 | end up in the position that the Tribunal was in Stasi and in Brook. And it's those
4 | decisions I would like to turn to now.

5 | THE CHAIR: Is that quite right?

6 | MR BEAL: Subject to the finality point.

7 | THE CHAIR: Even if there's a material change, we are still seeking -- we've still got
8 | the question of whether we should vary where proceedings have started and have
9 | been going for many months.

10 | MR BEAL: Yes.

11 | THE CHAIR: That is different from Stasi and Brook.

12 | MR BEAL: And I've also in that submission --

13 | THE CHAIR: And I think something that you've relied on?

14 | MR BEAL: Yes. What I'm trying to do is to change the focus from being -- Ennis and
15 | Rodger were applications to vary the existing CPO proceedings. What I'm now looking
16 | to do is what approach to Evans has the Tribunal taken when it's doing it from scratch?
17 | The inappropriate part of the submission I just made is that this Tribunal is not doing
18 | it from scratch. It has to take into account the factors in Rule 85, and it has to recognise
19 | the importance of finality. Therefore, there has to be a material change of
20 | circumstance, but that doesn't mean that you simply ignore everything that's happened
21 | to date. I fully accept that.

22 | Please, may I turn to Stasi. I showed you yesterday where Mr Kennelly had jumped
23 | the gun on Evans and contended for a hybrid approach at the hearing. Please could
24 | we turn to page 1367 in the bundle, paragraph 114 of the decision. (Pause)

25 | Here we have the Tribunal setting out essentially the guidance from Evans in the light
26 | of the statutory regime. We see:

1 "... that the question of opt-out versus opt-in is an exercise of evaluation. The Tribunal
2 must strive to achieve an outcome which is fair and proportionate between the parties,
3 consistent with the overall obligation to deal with cases justly and at proportionate
4 cost."

5 Then recognises in paragraph 115:

6 "There is a balance to be struck ..."

7 Perhaps I can invite you to read paragraph 115. It shows the competing interests.

8 (Pause)

9 Paragraph 117 over the page, the Tribunal summarised relatively succinctly the key
10 takeaways, we submit, from the Evans decision. Please would the Tribunal read that.

11 (Pause)

12 There was then a discussion about the strength of the claim, and cutting to the
13 outcome of that discussion at page 1370, paragraph 125, the Tribunal formed the view
14 that:

15 "... the claim comfortably crosses the hurdle of having a real prospect of success, and
16 so [it could not be described] as weak; but neither do we think we can characterise it
17 as obviously strong. We would describe it as an apparently viable claim with a good
18 prospect of success."

19 That was the assessment of the strength of the claim.

20 Then moved on to look at practicability. At 127 we see how Microsoft had framed its
21 case. Please could the Tribunal read paragraph 127. (Pause)

22 THE CHAIR: That's almost the same as Amazon's submission in this case, isn't it?

23 MR BEAL: Yes. Exactly.

24 At 129, page 1371, there were identifiable problems with the data which:

25 "... [made] it difficult to have confidence [on drawing] a reliable distinction between
26 claimant sub-groups with [different] profiles."

1 | And there was some concern as to -- essentially what Microsoft had done was it had
2 | relied on a proxy from a different customer database to indicate what the likely profile
3 | of the customer database would be here. Now, obviously, we don't have that data
4 | issue, but nonetheless we also see at paragraph 133, the general gist of the argument
5 | was that you could break down the claims into a series of brackets of spend, and the
6 | line was drawn in the sand by Microsoft, a spend over US\$100,000 per annum. Please
7 | can I invite you to read paragraph 133, because ignoring the actual difference of where
8 | the line is drawn in the sand, ultimately the argument is pretty much identical to the
9 | argument that Amazon is now running.

10 | Then at 134, the Tribunal explains why it doesn't accept that submission. (Pause)

11 | THE CHAIR: Do you want us to read 134 as well?

12 | MR BEAL: Yes, please. In fact, would you mind reading down to 139?

13 | THE CHAIR: Yes. (Pause)

14 | MR BEAL: So if I may summarise the key takeaways, it wasn't clear why the line
15 | should be drawn at customer spend of US\$100,000 per annum. Annual spend was
16 | too crude a measure and could not be used as a proxy for the practicability of opting-in.
17 | There was a need to stand back and make an overall assessment. The core reasoning
18 | was distilled from the Evans decision, which, as I submitted yesterday, was essentially
19 | predicated on the strength of the claim being a very significant factor, and the risk of
20 | leveraging being something that had to be taken into account by the Tribunal. But the
21 | Tribunal saw no parallel with the facts of the Evans case in the Stasi claim, and we
22 | respectfully submit that that reasoning applies with equal force here.

23 | When one looks at paragraph 140, the Tribunal also took into account the fact that the
24 | collective proceedings brought on an opt-out basis enabled a single proceeding to be
25 | brought for everyone's claim in circumstances where those claims were identified to
26 | have a real prospect of success. So viable claims were being brought. And at

1 paragraph 141, the Tribunal noted that if it were to refuse certification on an opt-out
2 basis, the present funding arrangements would need to be revised and depending on
3 how the proposed class was reconstituted they would carry the risk that the funding
4 arrangements would collapse entirely.

5 Now, just pausing there, I made it clear yesterday that, in our submission, the opt-out
6 proceedings are going to go ahead come what may. That's a highly relevant
7 consideration when one's considering leveraging or risk of leveraging. So it's not our
8 case that the funding would collapse entirely. But I hope I've made clear in my
9 submission that funding arrangements would need to be revisited and potentially
10 renegotiated if there is a separate opt-in categorisation. The costs incurred to date
11 would need to be considered. The funding arrangements for that opt-in portion would
12 need to be considered, and the funder would need to take a view as to whether it was
13 worth proceeding with funding for an opt-in claim. All of that would take time.

14 The reason I make that clear is my learned friend has kindly indicated to me overnight
15 that he's proposing to draw your attention to the funding agreement, but, with respect,
16 I don't see a point of difference between us on this. We're not saying that the funding
17 agreement would be terminated if you make the direction that he seeks. What we're
18 saying is that the funding would have to be revisited for commercial reasons. We're
19 not saying that the opt-out claim wouldn't persist.

20 THE CHAIR: Well, they clearly have a -- I've obviously not looked at the funding
21 agreement since the qualification hearing.

22 MR BEAL: No.

23 THE CHAIR: I'd be astonished if it doesn't allow the funding to be negotiated if there's
24 a very material change in arrangements.

25 MR BEAL: There are clauses that --

26 THE CHAIR: I'd imagine that if a significant part, 40 per cent it's said in value, was

1 | excluded from the opt-out claim. They would have a right if they wished to negotiate.

2 | MR BEAL: It's unclear, with respect, whether or not the clause in question would be

3 | triggered by the --

4 | THE CHAIR: Yes.

5 | MR BEAL: If 60 per cent of the claim value is, for the sake of argument, 1.7 billion,

6 | then the funder's return on committed capital I think it has a right to revisit if it's not

7 | likely to get three times. I don't want to --

8 | THE CHAIR: I don't want to go down --

9 | MR BEAL: No.

10 | THE CHAIR: Usually, from my experience of looking at these things, it's not just the

11 | return. If there's a general provision that if there's a very material change in the

12 | economic reality of the case, that gives them a right to (overspeaking) again.

13 | MR BEAL: So long as the Tribunal understands it's not my submission the litigation

14 | funding agreement would be terminated by the funder in the event that it's only the

15 | opt-out claim that goes ahead. My submission is the opt-out claim will go ahead come

16 | what may.

17 | THE CHAIR: On the same terms?

18 | MR BEAL: No. Because it seems to me, well, one would need to consider

19 | commercially what the arrangements were.

20 | THE CHAIR: Yes. That's all right. I'm not saying that they would terminate in the

21 | sense of dropping it.

22 | MR BEAL: No.

23 | THE CHAIR: But that they would have a right to vary some of the terms potentially.

24 | Is that correct?

25 | MR BEAL: I'm not going so far as to say that they would have a contractual entitlement

26 | to variation. But as a matter of commercial reality, seeing as the opt-in claim would

1 | then be -- how can I put this -- at large, they would have a commercial right to
2 | determine whether or not to fund the opt-in claim, and the Class Representative would
3 | have to consider whether he wanted to carry on with the opt-in claim as well, because
4 | it comes with significant additional costs and a great deal of extra procedural
5 | complexity, for reasons that I'll come on to.

6 | THE CHAIR: Yes.

7 | MR PICCININ: I hesitate to interrupt, but just to avoid back and forth later on, just to
8 | clarify my position on that, following the discussion that I had with Mr Bankes
9 | yesterday on this topic. The important point is that the funder has no right to cease
10 | funding the opt-out claim. Of course, there could be a renegotiation when they
11 | consider what the terms of the opt-in claim should be and whether they want to do
12 | that. But the funder has no right to pause funding under the opt-out, and therefore
13 | there's no need for the Stephan team to down tools, and the CMC can go ahead.

14 | As far as the opt-out proceedings are concerned, the CMC can go ahead in October.
15 | There's no right to renegotiate just because 40 per cent of the claim value has been
16 | removed. I can show you the provisions later.

17 | THE CHAIR: Well, if that's common ground.

18 | MR PICCININ: If that's common ground, then there's no difficulty.

19 | MR BEAL: I think that's all I need to draw from Stasi. Please could I then move on to
20 | Brook, page 1447, paragraph 40.

21 | The Tribunal accepted the evidence from Mr Teague of Geradin Partners as cogent
22 | and reliable, coming as it did from a solicitor at a firm with a lot of experience in
23 | collective proceedings and the challenges involved in putting together opt-in claims.
24 | At paragraph 44, the Tribunal accepted the submission I made where I had pointed
25 | out that there was a world of difference between communicating with a proposed class
26 | member for the purpose of encouraging them to opt-in as opposed to contacting them

1 | once a pot of money was available and you were offering them distribution from a pot
2 | of damages. That submission was derived from, Sir, your judgment in Gutmann.

3 | The Tribunal agreed with that and said it can reasonably be expected, at
4 | paragraph 45, that individual PCMs will be far less attracted by a communication which
5 | requires them to consider joining a legal action with uncertain and rather distant
6 | prospects, and to take steps committing themselves to some further action than they
7 | would be by a communication at the distribution stage, which simply requires them to
8 | accept money, or even easier to accept what would amount to a refund from Google
9 | if they are continuing account holders.

10 | THE CHAIR: Just to pause, and put this in context. This was a case where I think it
11 | was Google saying it should be all opt-in?

12 | MR BEAL: Yes.

13 | THE CHAIR: There was no question of qualification?

14 | MR BEAL: They had not sought to draw a clear line in the class, and I'll come on to
15 | show you where that was. In fact, that's the next point I'm going to, page 1452. Please
16 | can I invite you to read paragraph 60 to 62, in fact through to 64, please. It will save
17 | my voice and your ears. (Pause).

18 | THE CHAIR: Yes.

19 | MR BEAL: So, Ms Abram is a diligent counsel. If she had been able to find a dividing
20 | line in that class, I have no doubt that she and her team would have done so. They
21 | didn't. They didn't suggest that there was a practical way of distinguishing between
22 | the very large majority of the claim value being attributed to the small number of larger
23 | claimants and any particular line in the sand that could be drawn.

24 | It was also notable that the only consequence of ordering opt-in would be that a large
25 | number of the claims were not brought at all. Then there's some -- the evidence was
26 | accepted about the considerable effort: well over a year, perhaps two, for the book-

1 building exercise.

2 THE CHAIR: But of course that was a much, much larger number.

3 MR BEAL: It was 880,000.

4 THE CHAIR: Including some very small ones.

5 MR BEAL: Yes.

6 THE CHAIR: So it is rather different.

7 MR BEAL: With the scale is different, certainly, yes.

8 THE CHAIR: Therefore the time is different.

9 MR BEAL: Sorry, forgive me a moment. (Pause)

10 Paragraph 67 then identifies a series of other factors which told against certification
11 on an opt-in basis. First, that the claims were not weak ones. Second, the Stopford
12 proceedings are going to be decided, and there would be a risk of inconsistency. That
13 applies here with the Hammond proceedings. Third, opt-out would increase the size
14 of the claims within the proceedings. That will increase Google's overall exposure, but
15 nonetheless --

16 THE CHAIR: It's not the same as Hammond because Hammond are going along with
17 this.

18 MR BEAL: Yes. The submission I'll be making is that the time required for the opt-in
19 certification process and then the opt-in procedure itself, which is separate, will be
20 such that the viability of our participation in trial 1 would be jeopardised.

21 THE CHAIR: Trial 1 would have to be before the trial.

22 MR BEAL: Trial 1 would have to be put back in circumstances where this Tribunal has
23 already said that the proposed timetable at the I think it was the last CMC was already
24 too distant.

25 Those are the points I wanted to drive from Brook. Could I now please invite you to
26 consider the evidence from Mr Gallagher of my instructing solicitors? It's bundle A,

1 | tab 6. Picking it up, please, at page 108. In paragraph 4, he sets out the ambit of his
2 | evidence. He essentially says that, "Amazon's application is not workable and would
3 | significantly disrupt the orderly progress of the proceedings".

4 | "[It would] require complex, resource-intensive steps that would take a considerable
5 | amount of time to complete and for which there's no budget ..."

6 | Paragraph 8 sets out the steps that would be required, so you would have to bring the
7 | matter back before this Tribunal for certification. There would then be an opt-in notice
8 | that would have to be issued. He then sets out in paragraph 8 the further procedure
9 | that would be needed to get the thing up from scratch: putting in place funding and
10 | insurance arrangements; economic input on the potential need for damages
11 | methodology; consulting with the advisory panel; and then, once it's back before the
12 | Tribunal, then having the Tribunal's scrutiny of the proposed opt-in proceedings.

13 | Paragraph 10 confirms that Innsworth:

14 | "... had analysed and priced their funding in the proceedings only on the basis of an
15 | opt-out case ... [and there's] no provision in the agreement for funding opt-in
16 | proceedings ..."

17 | At paragraph 11, he expresses the view that it was unlikely that a funder would have
18 | been prepared to offer funding if a hybrid solution had been proposed at the start, and
19 | he sets out the reasons for that.

20 | THE CHAIR: I'm not sure how that assists. You told us they will continue with the
21 | opt-out and they're not considering it from the start. So the question is funding for the
22 | opt-in.

23 | MR BEAL: But I'm afraid there's simply no evidence on that, as I indicated yesterday.

24 | THE CHAIR: Yes. And how long.

25 | MR BEAL: So we then see in paragraph 12:

26 | "Funders typically expect that, where an opt-in case is run for larger claimants in

1 | parallel with an opt-out claim for smaller claimants, the combined budgets are
2 | significantly higher than just running one case or the other, although some efficiencies
3 | can be achieved (and therefore the budget is not double that of just running one or
4 | other case). This also tends to increase pricing: in general, and all else being equal,
5 | a professional investor must charge a higher fee for committing a larger portion of its
6 | available funds to the same investment ..."

7 | "[13] There is no funding available for a hybrid opt-out / opt-in case, nor any allocated
8 | budget... "

9 | He then goes on to look at the damages methodology and explains why a new
10 | damages methodology might be needed. That could be complex here, because there
11 | would need to be work out whether an opt-in claimant was an FBA or FBM merchant,
12 | or had fulfilment from both routes, and it would be a risk that a bespoke damages
13 | assessment might be needed for each entity.

14 | Paragraph 19. He notes that time would need to be allowed for the Tribunal's scrutiny
15 | of the new arrangements. Then at paragraph 20 through to paragraph 23, I don't know
16 | whether the Tribunal has had a chance to read this witness evidence. He goes into
17 | detail about the length of time that might well be needed for building a book. He does
18 | so by reference to the experience and the CICC proceedings, where I think it's fair to
19 | say that the six months directed by the Tribunal didn't prove to be enough for
20 | a satisfactory book-build to take place. There were problems with it, and he
21 | describes --

22 | THE CHAIR: I mean there is a difference here. One knows that certification is going
23 | to be granted, subject --

24 | MR BEAL: Well.

25 | THE CHAIR: I mean, that was.

26 | MR BEAL: I'm not sure that that --

1 THE CHAIR: One knows that an opt-out claim is proceeding.

2 MR BEAL: Yes.

3 THE CHAIR: And that the Tribunal has reviewed the methodology and so on.

4 MR BEAL: Well, it's reviewed the methodology that's provided for an assessment of
5 aggregate damages for the opt-out claim. As I've indicated, there is an issue. I'm not
6 aware of Amazon saying that they will take no points on methodology full stop. What
7 they've said is they won't oppose, they won't object to, the thousand shown on the list
8 being in the opt-in class. But I hadn't understood that they were saying that the claim
9 can be certified regardless of how it's formulated. In any event, of course, the
10 Tribunal --

11 THE CHAIR: You're saying they won't, but Mr Piccinin clarified they won't take points
12 on the funding agreement or the ATE insurance.

13 MR BEAL: I hadn't understood that they were essentially waiving through certification,
14 regardless of what form the application may take. But perhaps he can come back to
15 that in reply.

16 THE CHAIR: It doesn't mean the Tribunal won't.

17 MR BEAL: No.

18 THE CHAIR: We'll have to look at those, but (overspeaking).

19 MR BEAL: The Tribunal couldn't, I'm afraid, at this stage prejudge the issue because
20 of its gatekeeping rule.

21 At paragraph 25 and 26, he explains the complexities that --

22 THE CHAIR: Did they know the number in CICC with whom the book-building exercise
23 was undertaken?

24 MR BEAL: We don't know how many people Marcus Parker approached.

25 THE CHAIR: Exactly.

26 MR BEAL: But they had approached a number of people over a number of years, and

1 | they had an ongoing list of interested persons who they kept in the loop with the
2 | progress of the litigation.

3 | THE CHAIR: I can't see why it would need more than six months.

4 | MR BEAL: Well, because it's not simply a question of contacting them saying, "Here
5 | you go, you've got nothing to do other than sign this form". You have to get the funding
6 | arrangements in place. You have to get --

7 | THE CHAIR: The funding arrangements is before the six months. Funding
8 | arrangements have to be in place before certification.

9 | MR BEAL: The funding arrangements would have to be in place during the course
10 | of --

11 | THE CHAIR: Before the six months start, wouldn't they?

12 | MR BEAL: Well, in my respectful submission, not, because the six-month period is for
13 | people to notify an intention to opt in to the class. And it's through that process, they
14 | say, "Yes, I want to be involved in that". And in the course of that six-month or
15 | nine-month or whatever period it is, they have to enter into the DBA and the ATE cover.
16 | They have to have the case explained to them. They frequently will get their own
17 | lawyers involved, especially at the larger end of the companies. They won't sign off
18 | on anything simply on the say-so of my instructing solicitors. They'll get their own legal
19 | team involved to consider it, and all of that takes a significant amount of time.

20 | THE CHAIR: I understand that. But I thought that the funding, which the Class
21 | Representative has to bring for the opt-in, that would come first.

22 | MR BEAL: I was talking about the damages-based assessment with --

23 | THE CHAIR: The damages-based agreement.

24 | MR BEAL: Yes, with the -- sorry, the agreement with the individual client. That's what
25 | has to be negotiated.

26 | THE CHAIR: It would be on a DBA basis, not on a funding basis?

1 MR BEAL: They would be funding to allow the opt-in claim to be brought. But what
2 typically has happened, and certainly it happened in CICC, was that damages-based
3 agreements needed to be entered into with the business. We can see that at
4 paragraph 24.5 in Mr Gallagher's witness statement: after a business has opted in, it
5 was contacted by the solicitors and required to enter into a DBA to engage the
6 solicitors to act on its behalf. Each DBA identified --

7 THE CHAIR: All done on a funding basis.

8 MR BEAL: That claim was not, no. That claim was subject to funding arrangements
9 for the opt-in claim. But there was a separate overlay of DBAs with each individual
10 business.

11 MR BANKES: And at what stage would you come back with a finite list of parties who
12 joined into (inaudible)?

13 MR BEAL: That would be at the expiry of the opt-in period where you would have
14 a class register which reached finite form. And that's one of the issues in CICC. There
15 were a whole bunch of people who didn't make it in time and then wanted to be joined
16 to the register, and the Tribunal said, "No, sorry, the time has passed".

17 THE CHAIR: I appreciate that it's not a case of simply writing and saying, sign this
18 form, send it back. It's much more complicated. And that they will want to instruct
19 their solicitors and solicitors may raise questions, and so on. I'm just surprised that it
20 can't be done in six months.

21 MR BEAL: Well, the experience to date has been that it can't be.

22 THE CHAIR: Well, the experience is based on what, CICC?

23 MR BEAL: Yes.

24 THE CHAIR: Which was a much larger class.

25 MR BEAL: And also in -- well --

26 THE CHAIR: I don't know if it hugely matters whether it's six or nine months. I'm with

1 | you personally, I can't speak for my colleagues, that it would take six months. And to
2 | suggest, as I think Amazon does, that it could be four months is unrealistic. But
3 | whether it makes a great difference to what we have to decide, whether it's six or
4 | nine months, I'm not sure.

5 | MR BEAL: I'll come on to deal with the limitation --

6 | THE CHAIR: In any event, you'll need time to put it all together, put funding together
7 | for opt-in. That will take a little while, and then you have the start of the period
8 | for -- then it's got to get approved by the Tribunal.

9 | MR BEAL: Yes.

10 | THE CHAIR: And get the CPO varied again. And then this opt-in period begins of six
11 | or nine months.

12 | MR BEAL: Yes. So, realistically, in my respectful submission, the thing isn't going to
13 | be settled until the beginning of 2028. And that, I'm afraid, is born of not simply the
14 | CICC experience, which I have to some extent lived through, but also the evidence
15 | that has been produced by Mr Maton, in Hausfeld, of the length of time it's taken him
16 | to try and build a book in the Evans case. And I'll come on to take you to aspects of
17 | that transcript where he explains what was done.

18 | We then see in paragraph 20 --

19 | THE CHAIR: In Evans, that was before certification at all of the claim as being --

20 | MR BEAL: He spent a considerable --

21 | THE CHAIR: -- being suitable to be brought and having approval. So, here, all that's
22 | behind you.

23 | MR BEAL: I'll say that the damages methodology would need to be revisited.

24 | THE CHAIR: Yes. But we know that there is a methodology that, in broad terms, it
25 | might need some reconsideration, but which the Tribunal -- contrary to all the
26 | opposition of Amazon arguments about conflicts and all that, all that's been rejected.

1 | So the methodology has been approved. So they might need some adjustment. It
2 | does seem to me just a rather different situation from what Hausfeld was seeking to
3 | do in Evans before the certification hearing at all.

4 | MR BEAL: Well, I've taken the Tribunal in each of the authorities that we have.

5 | THE CHAIR: Yes.

6 | MR BEAL: So the evidence from a series of different claimant solicitors, Mr Mansfield,
7 | there was a solicitor from Ashurst who was giving evidence, I think, in the
8 | Spottiswoode case. There's a variety of people who've been engaged in this, and all
9 | of them say a book-building process takes a lot of time. And in the CICC, the Tribunal
10 | directed that the opt-in process should be six months. But that was in contrast to the
11 | nine months that was requested. And, as we'll come on to see at paragraph 104 of
12 | the February judgment, the Tribunal recognised that six months hadn't, in fact, been
13 | enough.

14 | So I showed you in Brook where it was recognised, admittedly with a larger class
15 | where well over a year would be needed. So with the greatest of respect, I'm not trying
16 | to push for too big a period, but I'm simply recognising practically that I don't think this
17 | would be done and dusted much before the beginning of 2028, which is obviously very
18 | difficult if you've then got a trial on liability starting in April.

19 | Now, at paragraph 26, Mr Gallagher explains how he had suggested that a group of
20 | 208 legal entities is roughly five times lower than 1,000, to use a number that we've
21 | been going on in these proceedings.

22 | THE CHAIR: But that's not the comparison. The 208 are the people who have opted
23 | in.

24 | MR BEAL: Yes.

25 | THE CHAIR: Not the number that contacted.

26 | MR BEAL: But as I've indicated, Marcus Parker already had a list of the people that

1 | they were going to contact.

2 | THE CHAIR: Well, you will have a list.

3 | MR BEAL: Well, we have a list of names. We don't have a list of contacts at the
4 | moment.

5 | MR PICCININ: We'll provide that.

6 | THE CHAIR: We'll have a list of names and addresses, put it that way. Not individuals
7 | within the company.

8 | MR BEAL: No. And cold writing to somebody isn't necessarily going to produce the
9 | sort of response one would need to have a rapid opt-in to complex litigation. So it's
10 | not getting you into the people you specifically need to talk to in these businesses to
11 | be told where their registered office is.

12 | At paragraphs 31 to 32 --

13 | THE CHAIR: Sorry, can I interrupt you? I keep coming back to that. You were in
14 | CICC.

15 | MR BEAL: I was instructed post certification to deal with matters. Yes.

16 | THE CHAIR: Does the claim form they sought in the CICC (inaudible)?

17 | MR BEAL: They did.

18 | THE CHAIR: Doesn't the claim form give an estimate size of the two groups?
19 | Because I think it's a requirement, isn't it? The claim form should give an estimate
20 | size of the class. What I'm on about what was the size of the --

21 | MR BEAL: I have a copy.

22 | THE CHAIR: Is it not in the claim form? That's what I'm just wondering.

23 | MR BEAL: I have a copy on my computer.

24 | THE CHAIR: Don't let me take you out. But if that is in the claim form, perhaps you
25 | could inform us tomorrow. Just form your --

26 | MR BEAL: I'll inform you this afternoon, after we have the break.

1 THE CHAIR: Just of the figure, because that will put it in context. Yes.

2 MR BEAL: Paragraphs 31 to 32, Mr Gallagher explains how book-building efforts by
3 Geradin Partners have shown that it's a complex matter and takes significant periods
4 of time.

5 At paragraph 38, he explains, having set out the procedure in these proceedings to
6 date, the steps that have been taken. He explains how the introduction of a hybrid
7 structure at this stage would have significant procedural implications for the future
8 conduct, and could extend the timetable by several additional years. He referred to
9 the fact that this , Tribunal, at the June CMC, had made it clear that the timetable
10 envisaged was already very distant and extended.

11 Paragraph 42 deals with the complication of opt-in disclosure, and then paragraphs 45
12 to 46 deal with the fear of retaliation, which, in the light of your comments yesterday,
13 I don't detect to be an issue for today.

14 The next piece of evidence I wanted to show you was tab 8 of bundle A, please. The
15 Frontier letter, page 366.

16 THE CHAIR: Yes, we've looked at that. (Pause)

17 MR BEAL: Mr Gallagher was just reminding me that his witness evidence -- given
18 time is advancing, I haven't dealt with every point -- but he reminds me that in Rodger,
19 there are only 25 opt-in claimants being suggested by Google. And so that's a fraction
20 of the number that are being posited by Amazon here. And the Tribunal still found that
21 the practicability of a hybrid solution was not met. The practicability requirement was
22 not met. The Frontier letter shows the distribution of claims.

23 THE CHAIR: Yes, we've looked at that.

24 MR BEAL: Thank you.

25 The CICC experience is addressed in the February judgment that I've referred to.

26 If you'd be kind enough, please to turn to page 1308 in the authorities bundle. One

1 | sees categories of opt-in members who were accepted by the schemes in that case
2 | to validly opted in, but then there were a series of categories of claimants who hadn't,
3 | on the schemes' case, validly opted in. They included late entities; people who had
4 | opted out rather than opting-in; a couple of other corporate groups, including EasyJet,
5 | who had expressed an interest but not discharged the requirements that were needed.
6 | And then there was an argument about non-UK domiciled entities, which needn't
7 | detain us.

8 | At page 1312, paragraphs 34 to 36, we see detailed evidence was given by the class
9 | representative as to the steps that had been required, and there was a witness
10 | statement from Mr Robinson of Marcus Parker explaining what the book-building
11 | phase had required: interactions with senior individuals and businesses within a group.
12 | And then he explained in 35 and 36 the steps that had been taken internally within the
13 | Class Representative's team to weed out ineligible claims and to ensure that people
14 | understood what they were opting into.

15 | So it is a very detailed process. I should say, for the avoidance of doubt, there was
16 | an issue raised here as to limitation in circumstances where people had not opted in in
17 | the time available, and I'll come on to deal with limitation in a moment, but it wasn't
18 | actually resolved by this decision. So the limitation issue is still up in the air to some
19 | extent, where one is in an opt-in regime. That's paragraph 89, for your note,
20 | page 1322.

21 | And, finally, page 1324, paragraph 104 contains the recognition that six months had
22 | not been enough time. The Tribunal said this:

23 | "We accept, and have some sympathy, for the extent and complexity of the task faced
24 | by the Class Representative and their advisers in 'building the book'."

25 | THE CHAIR: Yes. You quote that.

26 | MR BEAL: Yes, yes. So that's that.

1 | So can I please then, having set out some of the case law that has looked at this issue,
2 | just make some now some evidential points as to why we say opt-in would produce
3 | significant complexity cost for no tangible benefit in circumstances where there are
4 | already viable claims within the class that are covered by the opt-out direction.

5 | Amazon suggested that there wouldn't be any similar difficulties with class definition
6 | here, but of course "class definition" is defined as "sellers" at page 382 of our claim
7 | form, and what Ms Freeman, in her first witness statement at paragraph 15 has
8 | referred to are merchant ID numbers. Now, it's apparent from her evidence that
9 | merchant ID numbers aren't necessarily a guarantee of who the legal entity is, and
10 | some entities have more than one merchant ID number.

11 | It's worth noting that Amazon has got itself into something of a pickle about whether
12 | particular resellers are professional resellers or not. We're not inviting you to
13 | determine that issue. I'm simply pointing out by reference to bundle E, page 363, that
14 | there's been correspondence on whether certain people on the list are indeed resellers
15 | or not. So all of that would have to be resolved in the course of an opt-in procedure,
16 | and therefore the risk of satellite litigation as to whether or not people are or are not
17 | members of the class is high, we would submit, but at the very least, it can't be ruled
18 | out.

19 | It's also apparent that the records of merchant ID records, are not necessarily entirely
20 | reliable if they contain duplicate ID numbers, which have had to be de-duplicated in
21 | the data sift that Amazon has performed.

22 | The upshot of all of this is that the opt-in procedure will build in considerable delay and
23 | considerable cost. It brings low rewards to fewer members of the class, and risks
24 | a number of them being left without redress. The basis upon which it might be
25 | suggested opt-in would be appropriate in the light of Evans would be if there was a risk
26 | of Amazon somehow being leveraged into a settlement of a weak claim. That's the

1 mischief that is aimed at by the Evans ruling. That is not this case.

2 Amazon is already facing and will face a claim for £1.7 billion-odd even on its even if
3 its application is accepted, and the suggestion that somehow there is additional or
4 incremental leveraging is, with respect, not serious. The people who are caught by
5 the arbitrary threshold set by £10 million over six years are not, we would submit, large
6 claimants. A revenue of £1.6 million, £1.67 million a year is not a high level of
7 revenue, especially if you are a reseller with very low profit margins. The metric
8 reveals nothing to this Tribunal about the profitability, the personnel that they have
9 access to, the legal services that they have at their disposal, or the cash reserves that
10 they have to deal with complex litigation. You simply cannot tell from the metric that
11 has been suggested what the practicability of those claimants opting-in to the claim
12 would be.

13 My learned friend's skeleton at paragraph 50 relies on certain work not being required
14 until trial 2, but this points, actually, in favour of not ordering opt-in, because what's
15 the point of ordering opt-in for a substantial amount of work to be done if at trial 1
16 Amazon is successful in its defence on liability? When considering the proportionality
17 of the costs, one needs to think what is the benefit of spending this extra money and
18 having this increased complexity? Certainly, at this stage it makes no difference to
19 what is actually being directed, which is trial 1 in April 2028.

20 We respectfully suggest it will be much easier to have distribution dealt with across
21 the class, precisely because there's no rational division between recovery of a share
22 of aggregate damages for a reseller, £10.1 million worth of GMS and one with
23 £9.99 million.

24 You've got my point that there's a risk of substantial delay, and that delay risks
25 jeopardising trial 1, even though that will be dealing with common issues of liability.

26 The Tribunal has expressed concern about the timetable. That's, for your note,

1 bundle E, tab 8, page 109.

2 I did say I'd refer briefly to the transcript in Evans to show you the evidence from

3 Mr Maton of Hausfeld. Please could you look in bundle E, tab 9, page 200. (Pause)

4 At the bottom of the page.

5 THE CHAIR: This is page 200, wherein this is part of what?

6 MR BEAL: This is part of a transcript of an application that was made by Mr Evans for

7 his collective proceedings to be certified on an opt-in basis. He wasn't actually --

8 THE CHAIR: Following?

9 MR BEAL: Following the remittal to the Tribunal from the Supreme Court decision. In

10 fact, the application formally was for an extension of time within which to file an opt-in

11 claim, because the Tribunal had initially directed that it should be filed within

12 three months.

13 THE CHAIR: And the date of this is?

14 MR BEAL: This is, I think, from 29 July.

15 THE CHAIR: Which is the first page?

16 MR BEAL: 154.

17 THE CHAIR: Thank you.

18 MR BEAL: 29 July 2026.

19 We see that the outreach material was considered. This is, I think in the course of

20 submissions by Ms Wakefield on behalf of Mr Evans.

21 THE CHAIR: What we're reading here is?

22 MR BEAL: It's a submission from Ms Wakefield, referring to evidence that was filed

23 in the Tribunal.

24 THE CHAIR: (Inaudible) counsel to the Class Representative.

25 MR BEAL: It is counsel for the Class Representative, referring to evidence filed by

26 her instructing solicitor, Mr Anthony Maton, in Maton 11 filed with the skeleton

1 | argument:

2 | "... the number of indications of interest now stands at 51. Yesterday ... [it had] gone
3 | up to 65. So those are class members who by reference the outreach materials, have
4 | said, yes, we are interested [in the claim]."

5 | There's then at page 201.

6 | THE CHAIR: Just a second. (Pause)

7 | MR BEAL: Page 201. Halfway down the page, between 13 and 17 sets out what it
8 | seems had been done. It wasn't that 42,000 class members were contacted because
9 | many of them were not contactable. They only contacted the big ones, but they ended
10 | up contacting 434 organisations, which produced expressions of interest at 65 or so.

11 | At page 202, Ms Wakefield says:

12 | "... those who have expressed an interest have not been asked to indicate value ..."

13 | Whilst they were expressing their interest, they weren't being asked what their claim
14 | value would be.

15 | "Of course, if we get the permission we seek today, then the next stage will be to seek
16 | [from and] get funding in place and funding has that series of thresholds where funding
17 | can be withdrawn if entities which commit properly, opt in properly, if the aggregate
18 | does not come up to the necessary threshold ..."

19 | So she's there describing the funding process that was being conducted. There wasn't
20 | funding in place at this stage. They had to reach a certain number of committed people
21 | before the funding would kick in.

22 | And we see at page 203 at line 8 to 10:

23 | "... the reality is the funder will need to know actual aggregate class value by reference
24 | to some kind of records and it is ... the provision of those kinds ... [that] is the very
25 | thing [Mr Maton] in Maton 4 found people were ... reluctant to give."

26 | Getting people to explain through their data records what their claim value would be

1 | can be pretty painful.

2 | Page 204. Ms Wakefield then goes on to explain about the expressions of interest
3 | and the formal opt-in process.

4 | Then at 205, at lines 6 to 9, she refers to the fact that in the Trucks case the opt-in
5 | process came to an end. So the date of certification of the Trucks case RHA is
6 | 5 August 2024. The end of the opt-in process was 28 February 2025, that having
7 | been extended by the CAT for three months because it was so hard to get people to
8 | opt-in. So that's some experience of lived process in the Trucks case, where, of
9 | course, the claim was certified on an opt-in basis because that was the application the
10 | RHA made, and it won the carriage dispute.

11 | It's fair to say that one detects at the bottom of paragraph 209 a degree of regret that
12 | the claim is having to be brought on an opt-in basis rather than opt-out basis, because
13 | I think it was put as being a shadow of what opt-out might have been. That's at the
14 | top of page 210.

15 | Where I have shown you evidence that is properly before the Tribunal or recorded in
16 | a decision, all of that evidence has been to effect that an opt-in process is costly,
17 | complex and causes delay. This has a significant impact in this case for the 1,000,
18 | depending on the terms of the order that are made. But in the terms of the order that
19 | are seemingly sought, there will be a direction with effect from a given date, sooner
20 | rather than later, that 1,000 people who have claims currently don't have claims
21 | anymore. They don't have a claim unless and until an opt-in claim is separately
22 | brought before this Tribunal and is certified.

23 | The consequence of that is that for each of those 1,000 claimants' limitation now bites,
24 | and whereas previously they were able to have a claim going back to 2018, the opt-in
25 | certification claim will mark the end of the limitation period running. That hasn't been
26 | filed yet, and therefore we will only be able to go back to, conceivably, 2021 because --

1 THE CHAIR: Doesn't that depend on that provision in schedule 8, the effect of varying
2 and the six-month grace period?

3 MR BEAL: If one looks at that provision, that's dealing with a situation in which the
4 CPO is varied so as to permit opt-in claims at the same time. So that's in the bundle
5 of authorities. Tab 30, I think it is, page 1472. (Pause)

6 Paragraph 23 of schedule 8 -- I think it's schedule 8A actually:
7 "Where a competition claim is made ... this paragraph applies for the purpose of
8 determining the limitation ... [prescription].

9 THE CHAIR: For the claim --

10 MR BEAL: I should say this submission is made on the basis of English law. Scots
11 law has a provision in it from the 1973 Act that doesn't start time running until the
12 conduct is infringing, conduct has ceased. So there would be a different analysis for
13 Scots law claims is my understanding. I'm not a Scottish lawyer, but that's some
14 advice we've received in the case.

15 THE CHAIR: This paragraph reply applies to Scottish claims as well. That's why it
16 deals with the prescriptive period, I think.

17 MR BEAL: Yes, it does, but the difference is that --

18 MR PICCININ: Sir, I hesitate to (inaudible). I just want to save everyone some hassle.
19 This is not "gotcha" litigation. We're not going to be taking a point on incremental
20 limitation (overspeaking) point if it's done in the timeframe that we're talking about.

21 THE CHAIR: What does that mean?

22 MR PICCININ: If they file the application with a view to it being decided this year,
23 then -- obviously it would be different if they waited six years and filed it then. But if
24 they file it on the timeframe that we've been talking about here, we're not going to be
25 taking--

26 THE CHAIR: Final application, what, by the end of 2026?

1 | MR PICCININ: Let's say that. I mean, I hope they'll file it more quickly than that, but
2 | yes.

3 | THE CHAIR: Yes, Amazon would undertake not to raise any limitation objection?

4 | MR BEAL: Can I just say whilst at face value that's helpful, it's entirely unrealistic that
5 | a funded claim for opt-in certification would be up and running by December this year.

6 | THE CHAIR: All you need is the funding, isn't it?

7 | MR BEAL: The funding would have to be renegotiated.

8 | THE CHAIR: Yes.

9 | MR BEAL: The methodology needs to be revisited. The negotiations with the funder
10 | need to take place. The negotiations with the ATE cover need to take place. DBA
11 | agreements would need to be drafted in principle. And it would --

12 | THE CHAIR: Why would they have to be drafted?

13 | MR BEAL: So that the solicitors know on what basis they're going to be retained.

14 | THE CHAIR: Funding won't cover?

15 | MR BEAL: The interaction between the DBAs and the funding will have to be a matter
16 | for negotiation. So the particular steps that are put in place will vary depending on
17 | what the arrangements commercially agreed are.

18 | THE CHAIR: I don't know how this works, but the DBA: is it a standard-form DBA
19 | that's produced and then members of an opt-in class, potential members, are asked
20 | to sign up to that? Is that how it works?

21 | MR BEAL: Yes. My instructing solicitor would draft their desired DBA. And then there
22 | would be individual negotiation during the opt-in period from individual claimants
23 | saying, "We like this" or "We don't like this".

24 | THE CHAIR: Yes, but that's in the opt-in period.

25 | MR BEAL: That's in the opt-in period. But my solicitors --

26 | THE CHAIR: But for the application to certify or be varying the CPO to make it a hybrid

1 bringing in opt-ins, for that, one would need to see the funding agreement. I don't think
2 the Tribunal would need to see the DBAs agreements and the ATE policy, and any
3 varied methodology.

4 MR BEAL: Yes.

5 THE CHAIR: And why could that not all be done by the end of the year?

6 MR BEAL: Well, in my respectful submission, these things take longer than that to put
7 together. One has detailed discussions that will take place and will be covered by
8 privilege between the funders, the ATE insurers, and those who sit behind me. And
9 they take time. They've always taken time. They take time when you're trying to get
10 one of these things off the ground.

11 THE CHAIR: Well, that's more difficult to know what the outcome will be. Here, you
12 know that there will be certification if it's a reasonable LFA. So it is a very different
13 starting point. And you know that the case is going ahead. Again, a very different
14 starting point, when you start from scratch and people don't know what might happen
15 with the case. It's a wholly different position in which to negotiate.

16 MR BEAL: I apologise, would you just give me a moment?

17 THE CHAIR: Yes, sure. (Pause)

18 MR BEAL: Yes. My instructing solicitor helpfully pointed out that the anticipation
19 would be that the Tribunal would want to have an idea of what the proposed DBA
20 arrangements were, because it goes to how much the opt-in claimants will be agreeing
21 to surrender from the eventual recovery to cover the costs, at least in part, of the claim.

22 THE CHAIR: Although we don't really have any supervision over --

23 MR BEAL: No, that's true. But --

24 THE CHAIR: What do you think is a reasonable period required for that process to
25 enable Professor Stephan to make an application to the Tribunal for opt-in
26 certification?

1 | MR BEAL: May I just take instruction?

2 | Mr Gallagher told me we would need to take instructions from Professor Stephan on

3 | that, because he would need to indicate roughly how long he thinks would be needed

4 | in accordance with the legal team and potential discussions with funders.

5 | THE CHAIR: But he'd be advised by --

6 | MR BEAL: Yes, he will be advised on this --

7 | THE CHAIR: Can you just say it will take longer than the end of the year? But at the

8 | moment, I have no idea if you're saying it will take until the end of April or until the end

9 | of January, or -- I just want some sense. And, surely, your solicitors are experienced

10 | in all this. I mean, the negotiations of the LFA on behalf of Professor Stephan, I'm

11 | sure your solicitors will be involved, and they know far more about this landscape than

12 | he does.

13 | MR BEAL: So let me take instructions again, Sir. (Pause)

14 | Mr Gallagher's witness evidence is that the book-building experience in the

15 | Netherlands required 18 months to get.

16 | THE CHAIR: The book building is getting the --

17 | MR BEAL: I appreciate that. That's the evidence.

18 | THE CHAIR: (Overspeaking) the first stage before that starts.

19 | MR BEAL: If I were to hazard a guess, and it would be me giving evidence to this

20 | Tribunal.

21 | THE CHAIR: Well, I'd rather you didn't hazard a guess. I'd rather you got instructions

22 | of how long you think is a realistic -- you're not going to -- there's not going to be any

23 | order to that effect. But if you can give an indication of -- after all, he's putting in

24 | evidence of what's happened in other cases. He says it's long and complex. He must

25 | have a view, I would expect, of how long is likely to be needed in this case.

26 | MR BEAL: Could we take the ten-minute break now?

1 THE CHAIR: Yes.

2 MR BEAL: And hopefully I can come back with a more helpful answer.

3 THE CHAIR: This goes to two points, but one is specifically limitation, which you've
4 raised. I mean, if he shows, actually, we'll need till the end of March, then I can ask
5 Mr Piccinin will Amazon undertake not to take any limitation point if it's done by the
6 end of April? He doesn't want to waive limitation if it might take you two years to do
7 this, which I'm sure it wouldn't. I'm sure you won't say two years. So we just want
8 some guidance, and I'm sure that experienced solicitors like those instructing you are
9 able to give that.

10 I will take our ten-minute break.

11 MR BEAL: Thank you.

12 (11.43 am)

13 (A short break)

14 (11.53 am)

15 MR BEAL: So, could I please explain what I've been told on instructions and if I can
16 put it this way how it works? Can I do that first by showing you how it worked in the
17 CICC claim, but going back again, please to page 1306 in the bundle of authorities.
18 We see in paragraph 14 at the bottom of that page a reference to Mr Robinson's
19 statement, as I explained, the book-building process. And he identifies how
20 Marcus Parker had first sought to gauge interest by large corporate groups to
21 participate in the proceedings in advance of the CPOs being made. So the first CPO,
22 I think, was applied for in about 2022, 2023. It was rejected. And so the book-building
23 process had been going on for that length of time.

24 After the CPOs were made, there was a process of re-engaging with those who had
25 previously expressed an interest. And this is the standard way in which funders are
26 approached too -- funders need to know what the aggregate claim value is likely to be

1 | for an opt-in claim before they will fund it. That's unsurprising. In order to know what
2 | the aggregate claim is likely to be, they generally require an engagement process to
3 | have been conducted to secure expressions of interest from the people who will be
4 | within the opt-in class. And that de facto amounts to an attempt to go out and build
5 | a book of expressions of interest, even if they aren't firm commitments to opt-in to the
6 | proceedings that are then brought.

7 | And as we saw in the transcript of the Evans hearing from July, that process of
8 | securing expressions of interest can take a very long time. And the upshot of all that
9 | is that even in a case where there is an opt-out claim going ahead, you can't duck the
10 | process of securing expressions of interest from potential opt-in claimants in order to
11 | determine whether you can get a claim off the ground that is viable.

12 | And the upshot of that is that Mr Gallagher stands by his assessment of 12 to
13 | 18 months for that process to take place in order to convince a funder that there's
14 | a viable opt-in claim worth its salt, which will produce an aggregate claim value of
15 | sufficient value to justify the commitment of substantial funds by the funder for that
16 | lengthy and costly additional process of bringing claims for the thousand people that
17 | Amazon are now suggesting should be excluded from the claim that's already been
18 | certified.

19 | So the short answer to your question, Sir, is 12 to 18 months.

20 | The other point I said I would go away and research: I have had a look at the opt-in
21 | claim, which I think is a public document. I hope it is, in light of what I'm about to say.
22 | Paragraph 61 of the Mastercard opt-in re-amended claim. I imagine it's available on
23 | the Tribunal's website. Paragraph 61 gives a figure for the proposed class members
24 | across both opt-out and opt-in. It doesn't seek to distil a separate figure for the opt-in
25 | class.

26 | But I reiterate that the evidence from Mr Robinson was that he had secured

1 | expressions of interest from a book that he was keeping, and then there was
2 | a re-engagement process with those people to get it. So he had already done
3 | a substantial amount of work over a period of some years. That tallies with the
4 | evidence from Mr Mansfield in the Ennis case and with Mr Maton in the Evans case.
5 | These book-builds securing expressions of interest, getting a funder to think that
6 | there's enough in it to justify a funding agreement inevitably takes a considerable
7 | period of time. And all of that is before the opt-in process can then be formally started,
8 | assuming that this Tribunal agrees to certify the claim as presented on an opt-in basis.

9 | THE CHAIR: Yes, you said 12 to 18 months.

10 | MR BEAL: Yes.

11 | THE CHAIR: Yes.

12 | MR BEAL: That, I hope, deals with the answers that the Tribunal wanted from me.
13 | You have my core submission that this involves considerable complexity, delay and
14 | cost.

15 | THE CHAIR: Yes, we've got that.

16 | MR BEAL: So, unless I can assist any further, those are my submissions.

17 |
18 | Reply submissions by MR PICCININ

19 | THE CHAIR: Yes, Mr Piccinin. We don't need you to address abuse of process as
20 | a distinct objection.

21 | MR PICCININ: I'm grateful. Does that also extend to no change in circumstances or
22 | shall I address you briefly on that?

23 | THE CHAIR: Well, I think you said that if Evans constitutes significant change, then
24 | it's within Rule 85. And if it doesn't, then you can't succeed. So you have really
25 | addressed that.

26 | MR PICCININ: Yes. The only other point I was going to address on that submission

1 | that Mr Beal made that I need to show that there was something wrong in the first
2 | decision. And that's not correct, because this is a de novo exercise. But in any event,
3 | I could show you what was wrong in the first decision in light of Evans, but it's not
4 | necessary to do that.

5 | So I'll move on. I can be quite brief, I should say today. I hope it will be 20 minutes or
6 | so. The first topic I want to address is the most important one, which is Evans, and
7 | does Evans do what I say it does? And you'll recall that yesterday I set out three key
8 | propositions that were really decisive and that you don't find in the subsequent Tribunal
9 | decisions. And to the extent that any subsequent Tribunal decisions are inconsistent
10 | with those propositions, they're wrong. That was my submission and that's why I took
11 | you through Evans so carefully to make each of those propositions good.

12 | My learned friend didn't specifically respond to those propositions and say he
13 | disagreed with any of them, really. And he certainly didn't engage with the analysis
14 | that I presented of the reasoning in Evans, which supported each of those three
15 | propositions. In particular, I would highlight that he ignored my point that the whole of
16 | the practicability section of the Supreme Court's judgment in Evans is written without
17 | any caveat by reference to the strength of the claim, and large parts of it are expressly
18 | drafted as generalised guidance not limited to the facts of the case.

19 | And that reflects the fact that we saw at the outset of the judgment, the Supreme Court
20 | itself recognising the general importance of these points for the regime, and
21 | specifically the concern that the appellants in that case, in Evans, had raised that the
22 | rules were being applied in a way that would just lead to opt-out in virtually every case,
23 | and that that was wrong. My submission is that Evans, properly interpreted, does
24 | support the appellants on that. It is wrong to reach the opt-out conclusion, in every
25 | case, or in every case of a non-strikable or reasonably strong claim.

26 | He also ignored my analysis of the rationale for that principle, for the principles about

1 | practicability and why it's important. He tried, a bit like some of the tribunal judgments
2 | do, to characterise the only rationale of the analysis in Evans as being limited to the
3 | leveraging effect that is described in the strength part of the Supreme Court's
4 | judgment, which is the leveraging of weak claims by expanding the number in it. That's
5 | not the rationale for the practicability guidance that was given by the Supreme Court.

6 | Whether they're weak claims or strong claims, it is unfair for Amazon, or any
7 | defendant, to face a claim that has been significantly inflated by including, on an
8 | opt-out basis, the claims of people who could reasonably be asked to decide for
9 | themselves. That is a very significant unfairness in this case. It may not be in every
10 | case. I'll come on to the idea of the small rump. But starting with the claim that we
11 | accept should be opt-out, it's actually a two-thirds inflation of the size of that claim,
12 | going from 60 per cent to 100 per cent. That is really very large.

13 | My learned friend tried to squeeze that into the small rump scenario from
14 | paragraph 126 of the Supreme Court's judgment. But he was wrong to do that. I just
15 | want to look at that with you again, because I think he did it without the paragraph
16 | being open. I might be wrong about that. But, either way, I'd like to go back and look
17 | at it. It's paragraph 126 of Evans.

18 | Because one could also imagine a case where the profile of the claims was different
19 | from Evans, because clearly this isn't confined to the facts of Evans. It's going off to
20 | provide you with general guidance that the Tribunal is to follow. You're imagining
21 | a case where the main core of the value of the class action consists in a mass of small
22 | claims by consumers, equivalent to Merricks, but with a small rump of bigger claims,
23 | a small rump.

24 | "...It would be open to the Tribunal to decide that the entire set of claims should be
25 | grouped together and be brought in one set of proceedings on an opt-out basis ... [this
26 | is the important bit] and that the incidental advantage the claimants in the rump might

1 | thereby gain did not significantly distort the balance of procedural advantage as
2 | between the claimants and defendant ..."

3 | So the question is essentially how big is that rump relative to the overall size of the
4 | claim?

5 | If you go back to paragraph 112, which was the beginning of this section, where the
6 | general principle was stated that if it is practicable for the proceedings to be brought
7 | as opt-in proceedings, then generally speaking, they should be. You go back to the
8 | rationale there, it makes good what I said before about inflation.

9 | They said that:

10 | "... If it is practicable for claimants to bring opt-in proceedings, it is unlikely to be
11 | proportionate to confer upon them the additional advantages associated with the
12 | opt-out procedure and unlikely to be reasonable to expect the defendants to have to
13 | face the additional commercial pressures to settle the claims regardless of their true
14 | merit which that would involve ..."

15 | That is, as I said yesterday, the proposition that applies whether the claim is very weak,
16 | moderate, quite strong or very strong. Because in every case, it's one thing to face
17 | the claim for £1 billion, something else to face a claim for £1.6 billion. Whether it's
18 | strong or weak, you shouldn't have to face -- that extra two thirds, effectively. If those
19 | people are able to look after themselves on the whole, and if they had been asked,
20 | they would have chosen not to opt-in. Those are the principles that I take from the
21 | Supreme Court's judgment. Mr Beal just did not address any of that analysis at all.

22 | The other critical point that Mr Beal failed to address was my submissions on the
23 | question of what "distinct profiles" means. Remember, he has this point that there's
24 | no distinct profiles in this case; that the whole class, when you look at the class, and
25 | you want an adjective to describe this class, he reaches for "homogeneous". He says
26 | that you can say it's homogeneous, the whole class is homogeneous, because the

1 | 1,000th claimant is quite similar to the 1,001st claimant. That's the analysis. That is
2 | an abuse of language.

3 | As I said yesterday, when you look at what the Supreme Court said, it is actually
4 | entirely consistent with what I said. Now, he has the benefit of several decisions of
5 | this Tribunal that do take that approach, but every one of them is wrong and none of
6 | them, in that respect -- I'm not saying wrongly decided. But in that respect, in their
7 | legal analysis, they are all wrong and none of them contain any answer to the points
8 | that I have made to you based on what the Supreme Court has actually said to us.
9 | I just want to show you that again because it's so important.

10 | If we go to paragraph 120.

11 | "This does not require the Tribunal to assume that the position of all potential claimants
12 | is the same ..."

13 | The "this" there is the standing back and making an objective determination.

14 | "... It is relevant to consider the composition of the proposed class and whether it is
15 | relatively homogeneous [as in whether the whole class is relatively homogeneous;
16 | that's the question] or [in contradistinction, whether it] comprises potential claimants
17 | of different types and with different sizes of potential claim ..."

18 | Then it says that that exercise of identifying distinct groups is a matter for the
19 | evaluative assessment of the Tribunal.

20 | THE CHAIR: There's different types.

21 | MR PICCININ: Well, I'm going to come on to see how it's applied in that case.
22 | Because it may be, in some cases, it may be whole different categories of class
23 | members. We saw that in one of the Google cases, I think. That's one possibility. But
24 | it can just be size.

25 | THE CHAIR: That says "different types and".

26 | MR PICCININ: That true, Sir. That is why it's important to come on to look at how it's

1 | applied, and I'll show you that again.

2 | THE CHAIR: Well, what do you say "different types" means?

3 | MR PICCININ: "Different types" can mean like a different type of business. But it can
4 | also mean -- it's enough, in my submission, to have claimants of different sizes.

5 | THE CHAIR: But they said --

6 | MR PICCININ: It's wrong, Sir, to read it in that way, like a statute, as if there's a roman
7 | (i) next to types and then roman (ii), and then cumulatively --.

8 | THE CHAIR: Well, it could say "all".

9 | MR PICCININ: That's right; it could say "all". But we'll come on to see how it was
10 | applied, Sir, and we'll see that that is not the way that the Supreme Court understood
11 | its own words.

12 | But my learned friend grasped on to the words immediately under F, where they talked
13 | about identifying groups of claimants with distinct profiles. You can see that the
14 | Supreme Court is, as is common in judgments, using different formulations to cover
15 | the same kind of thing. They're not setting out a rigid mechanistic approach for you.
16 | So "groups of claimants with distinct profiles" is the other phrase that is used. When
17 | you go on to paragraph 124, which is in the application section, you can see that turn
18 | of phrase come up again.

19 | "It is difficult to see why the financial institutions and large entities with substantial
20 | claims should be allowed to proceed by way of opt-out collective proceedings. The
21 | additional leverage that this would give them cannot be justified ... The Tribunal was
22 | entitled to conclude that they should not be permitted to bolster their position by
23 | pointing to and bundling themselves together with another group of potential claimants
24 | with a different profile who, for quite separate reasons, are not able to bring their
25 | claims ..."

26 | That group with a separate profile was non-financial institutions with fewer than 50

1 employees. That's what we looked at yesterday. So you had my submission that
2 a line has been drawn for non-financial institutions at 50 employees. Those below that
3 are being characterised as having a different profile from those above. They are
4 a distinct group. Maybe the same type in the sense that they're non-financial
5 institutions, but a line has been drawn, and it's perfectly ordinary use of language to
6 say that enterprises with fewer than 50 employees, taken as a whole, taken as
7 a group, looking at the typical one of them, have a distinct profile from enterprises with
8 more than 50 employees. But if you go right down to the ones that are 50 and 49, you
9 won't see any difference between them. But that's no part of the analysis.

10 If that were the analysis, then there would be virtually no cases in which you would
11 arrive at this kind of looking at separate groups situation. That's not what the
12 Supreme Court is saying. It's inconsistent with what the Supreme Court is saying.

13 I would also just note, just for your reference, it's paragraph 152 of the certification
14 judgment, which is at B60. You said that it was very likely to be correct that the PCMs
15 in the class are diverse, the word you used, "diverse", not "homogeneous". That was
16 obviously the right word to describe them because it's not a homogeneous class, not
17 in any sense that's meaningful.

18 So those are my submissions. But overall, in relation to the other cases, the other
19 Tribunal cases, you've got my point that if they're inconsistent with what I've just said,
20 they're wrong. Some of them, some of the passages that my learned friend took you
21 to today have the air of saying that Evans should be confined to its facts. My
22 submission to you is that that is no way to treat an authority of the Supreme Court of
23 this jurisdiction, and particularly one which I showed you. That's why I showed you
24 the introduction, which expressly wasn't making a decision that was confined to the
25 facts. It was providing general guidance which it said was of particular importance for
26 this developing regime. It needs to be treated as such. So that's all I've got to say

1 | about Evans.

2 | In relation to strength, it wasn't entirely clear where my learned friend was pitching
3 | strength because he didn't engage with my submission at all, that what the
4 | Supreme Court told us in Evans is that the point where it tips over into being a factor
5 | in favour of opt-out is significantly north of summary judgment.

6 | Sir, you haven't had any submissions on the facts in this case. All you had was the
7 | reference to the decisions, most of which are commitments decisions, and then a plan
8 | to establish loss by showing the difference between the world post-commitments and
9 | pre-commitments. But that's a hope. That's not analysis. No one's done that work.
10 | It's not before the Tribunal. You may well find when you look at it, and there are lots
11 | of reasons we've pleaded in our defence I don't have time to take you through, as to
12 | why when you do look at that, you might find that even the points that have been
13 | identified wrongly as discriminatory just weren't making any difference. There's just
14 | no basis for you to make any findings on that.

15 | The next topic is whether we've pitched the cut-off at the right level. Our cut-off is
16 | £10 million, which adds up to, we all agree, £1.67 million GMS per annum, or quite
17 | a lot of claim value; I won't say the number. But you saw what it was. It was quite
18 | a significant number, much larger than what we see in other cases, right at the very
19 | bottom of our cut off.

20 | My learned friend says that someone earning that much revenue through Amazon
21 | might not be sufficiently sophisticated to take a view on whether to opt-in. That, I'm
22 | afraid, is patronising and unrealistic. Anyone who can make that kind of money selling
23 | anything is sophisticated. Mr Beal's example of, I think it was a defence competition
24 | silk, was telling. One wonders, is he really saying that a competition silk couldn't make
25 | a decision as to whether to opt-in to a class action? That would be surprising.

26 | But focusing on this case, someone who can navigate Amazon systems and all of the

1 | tax and regulatory and commercial challenges needed to run a business where you
2 | are selling that volume of anything on Amazon, is a person who knows the system well
3 | and has real commercial nous. It doesn't matter what their profit margins are because
4 | they're not being asked to fund this litigation. All they're being asked to do is decide
5 | whether they want to participate in it. Again, I won't go through them, but I refer you
6 | back to our skeleton argument, where we showed you the general attitude of the courts
7 | to this kind of issue, and the general success that claimant firms have in bringing
8 | claims, even of unsophisticated claimants.

9 | One of the examples we gave was the litigation by black cab drivers against Uber.
10 | Now, black cab drivers don't earn anything like £1.67 million in turnover each year, but
11 | 13,000 of them signed up individually to bring a claim in the High Court against Uber.
12 | This is not unusual.

13 | Here, it's actually easier because you're not getting involved in complex litigation. You
14 | don't become a party to the litigation. The party to the litigation will be
15 | Professor Stephan. All you're doing is you're presented with an offer which is no win,
16 | no fee, which has ATE insurance in place, and the question is whether you want to
17 | opt into that or not.

18 | That takes me to my final topic, which is the logistics issues. Much of what my learned
19 | friend says about how difficult it all is, is actually legally irrelevant. Insofar as what he's
20 | saying is there are costs involved and there is time involved and there is effort involved
21 | in opt-in, that's always true. Notwithstanding that, the Supreme Court has said that
22 | opt-in is preferable where it's practicable. So that actually just doesn't matter. And
23 | the reason why it's true is that -- you can see it from the facts of this case just how
24 | worthwhile the exercise is, because what we're trying to do in this case is work out
25 | whether £1 billion or so in asserted damages belongs in this litigation or not.

26 | Now, I accept that it's going to take those sitting on that side of the court quite a bit of

1 | work to figure out who wants to join, if anyone. But that work is well and truly justified
2 | by the benefit of determining whether that £1 billion or so, north of £1 billion, belongs
3 | in the claim or not. It is more than proportionate to do that work then.

4 | So in order to make these points about the difficulty relevant, my learned friend needs
5 | to connect it to something about the stage of the litigation that we're at now, so it needs
6 | to be that because we're doing it now it's going to create some problem. Really, it has
7 | to be that it's going to scupper the trial date. Even that, I wouldn't accept, should be
8 | decisive if it were true. But he does need to show that.

9 | On that, the really critical point is the one that we established through my rude
10 | interruption earlier, which is that there is no need and the funder has no right to insist
11 | on any pens down in the opt-out proceedings. The funder is on the hook, and so this
12 | team will continue working, and the CMC in October can continue. It can go ahead.
13 | All of that can press on in the same way that it would if you decided this application
14 | the other way.

15 | And because all of the issues in trial 1 are in that litigation already, that means all of
16 | the preparation that needs to happen for trial 1 is going to happen anyway. The only
17 | disruption is that we find a group of people who, if we just had a single opt-out class,
18 | would have been potential targets for disclosure. And of course, now--well, there
19 | would be a relevant factor, you would want to know about just those people, which is
20 | whether they're opting-in or not. But obviously the fact that they opt-in doesn't mean
21 | that disclosure will be ordered against them, but it --

22 | THE CHAIR: Which you might want to know?

23 | MR PICCININ: Exactly. You would want to know whether they're opting-in, wouldn't
24 | you?

25 | So realistically, the disclosure for those people will need to happen after the opt-in
26 | process has closed. But there's no reason why that shouldn't be able to happen, and

1 everything else in the case can carry on as usual.

2 Our position is that it should be possible to sort out the application and certification this
3 year. I've already said that. This is the case --

4 THE CHAIR: If it does take a year or 18 months, that's the period that was given,
5 would you -- Amazon's undertaking on limitation?

6 MR PICCININ: My instructions are that 12 months there would be no issue, but
7 18 months, on my feet, is too much for me to give away without thinking about it.

8 THE CHAIR: Yes.

9 MR PICCININ: To put a further gloss on that, actually, which might make my
10 submission entirely irrelevant, we're trying to be reasonable here. This is not an
11 application that is being made to obtain a limitation advantage. That's not what we're
12 doing. We don't think 18 months is reasonable. Frankly, we don't think 12 months is
13 reasonable. If the Tribunal thought that 18 months was reasonable, then we still
14 wouldn't take a limitation point. That's how excessively reasonable those sitting
15 behind me are.

16 But, frankly, 12 to 18 months is ridiculous and unsupportable. It's important that we
17 take a step back and look at what's happening here. What's happening here is that
18 you have a claim that has already been pleaded -- the defence has been pleaded, the
19 reply has been pleaded -- and that claim is going ahead and it's fully funded. The only
20 additional work that needs to be done up to trial 1 for the opt-in claimants is work that
21 is associated with the opt-in process itself, as in persuading these undertakings that
22 they ought to opt-in. That's it. There's no additional work of any other kind, because
23 disclosure is going to need to be dealt with anyway, factual evidence and expert
24 evidence, all of that that anyone wants to adduce in relation to trial 1 they want to do
25 anyway. So the only increment we're talking about is the complexity of persuading
26 people to opt-in and working out precisely what the terms are.

1 | There will be incremental costs associated with doing that. There will also be some
2 | incremental costs associated with the running of the litigation if these people start
3 | asking questions, but it's not material in the overall scheme of running a piece of
4 | litigation like this. So the real issue in these negotiations that are going to happen
5 | coming forward is entirely different from what you have when you do a book-building
6 | exercise, when you're trying to get a claim off from scratch, because the only real
7 | question is how the funders' spoils get split between any damages that are awarded
8 | for the opt-out class on the one hand, and any damages that are awarded for the opt-in
9 | class on the other.

10 | That's the only thing there is to work out because --

11 | THE CHAIR: And the costs.

12 | MR PICCININ: The costs of the opt-out proceedings are going to be the same as what
13 | they always were.

14 | THE CHAIR: Well, how much of that will be borne by the opt-in (overspeaking)?

15 | MR PICCININ: But they don't bear the costs. All they bear -- because the claimants
16 | don't, because it will be presented to them on a no win, no fee basis. That's why it's
17 | the same point as I was saying before. It's just how much of the payment to the funder
18 | at the end of it comes out of which damages pot. That's all.

19 | I'm not saying that's easy. I accept that there's a lot more involved here than just
20 | contacting people. That's why it's six months, not six minutes. But the idea that that
21 | process should take 12 to 18 months, that is a cynical submission that has been made
22 | in circumstances where they're trying to resist this application.

23 | The one thing you can be very sure of is that five minutes after the judgment is handed
24 | down, when this becomes a matter of trying to keep the April 2028 trial date and the
25 | funder wants his money, if he still thinks he's going to get any, and the team, everyone
26 | wants to keep the trial date, the idea that they're going to sit around for

1 | 12 to 18 months mulling over the sharing of the spoils is just not realistic. All of their
2 | incentives will shift from resisting this application to keeping the trial date.

3 | If it takes that kind of time -- so if we're talking about, you know, the middle of next
4 | year for it all to be resolved -- then that still leaves almost a year to trial, which leaves
5 | enough time for us to get supplementary disclosure from the opt-in claimants, if any.

6 | (Pause)

7 | That just takes you back to the question I started this little topic on, which is the
8 | question of whether this is all worthwhile. Here we say there is a lot at stake. The
9 | thing that is at stake is the principle identified by the Supreme Court, which in this case
10 | has, according to Professor Stephan, more than a £1 billion tag attaching to it.

11 | So the question we're trying to answer is whether the claim should be inflated to the
12 | tune of two thirds, 67 per cent. My submission is that the non-trivial, the modest
13 | amount of work that is going to be required in the next few months, can certainly be
14 | done in parallel with the preparation of the trial, and that work is definitely outweighed
15 | by the benefit of working out whether this very large lump of commerce should be in
16 | the claim or not.

17 | Unless I can help you further, those are my submissions.

18 | THE CHAIR: Thank you very much.

19 | We will rise for about ten minutes.

20 | (12.26 pm)

21 | (A short break)

22 | (12.40 pm)

23 | THE CHAIR: For reasons that we shall set out in a written judgment to be issued in
24 | due course this application is dismissed.

25 | I don't think there's anything else, is there, for us to do today?

26 | MR BEAL: No, Sir.

1 | Might we make submissions on costs in due course, in the usual way?

2 | THE CHAIR: I think it's probably after proceeding --

3 | MR BEAL: After we've seen the reasons.

4 | THE CHAIR: -- it can be dealt with in writing.

5 | MR PICCININ: Then in relation to permission to appeal, Sir, if we could have an

6 | extension of time for that until --

7 | THE CHAIR: Until you receive the judgment, yes.

8 | MR PICCININ: Exactly. Very grateful.

9 | (12.41 pm)

10 | (The hearing concluded)

11 |

12 |

13 |

14 |

15 |

16 |

17 |

18 |

19 |

20 |

21 |

22 |

23 |

24 |

25 |

26 |

1	
2	
3	
4	
5	
6	
7	
8	
9	
10	

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?