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IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1771/7/7/26

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 2nd November 2026

Before:

Mr Ben Tidswell
Mr John Davies
Ms Rosalind Kellaway

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Mr Jeremy Newman

Proposed Class Representative

v

Rightmove PLC & Others

Proposed Defendants

APPEARANCES

Kieron Beal KC, Robert Marven KC, Oscar Schonfeld & Greg Adey (Instructed by Scott & Scott UK LLP) on behalf of Mr Jeremy Newman

Tim Ward KC, Rob Williams KC & Ciar McAndrew (Instructed by Herbert Smith Freehills Kramer LLP and Linklaters LLP) on behalf of Rightmove PLC & Anor

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Monday, 2 November 2026

(10.30 am)

(Proceedings delayed)

(10.34 am)

Housekeeping

THE CHAIR: Good morning, everybody. Some of you are joining us on our live stream on our website, so I should start with the customary warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of court.

Morning, Mr Beal.

MR BEAL: Good morning. May it please the Tribunal; I appear with my learned friends: Mr Marven KC on my far left, Mr Oscar Schonfeld to my immediate left, and Mr Greg Adey sandwiched between them.

THE CHAIR: Yes.

MR BEAL: To my right we have Mr Tim Ward KC, Mr Rob Williams KC, and Ms Ciar McAndrew for Rightmove.

THE CHAIR: Yes. Thank you.

MR BEAL: In terms of housekeeping, I hope the Tribunal has a core bundle, a supplemental bundle, and a second supplemental bundle, which was updated on Friday to include updated references to the rather voluminous authorities bundle. There's a correspondence bundle which I'm not proposing to go to at all, and then there are four separate bundles of authorities. On Friday we received a letter -- (interrupted)

MR DAVIES: I don't have access.

Mr BEAL: This doesn't involve any technology, sir, so I'm hoping that I can deal with this. There was a letter that was sent on Friday afternoon from Herbert Smith Freehills Kramer. It updates some of the data that you will have seen in Annex 1 to Mr Anderson's statement. Could I ask that be handed up? It didn't make it into the electronic bundle, but I'm sure we can provide copies electronically if that assists. (Handed up)

THE CHAIR: Okay. This annex is familiar. Is it --

MR BEAL: The headline figures are -- what was previously 13,000 members is now 13,400 members, and the composition and absolute number of entities identified from page 4 onwards has changed. Because the information is confidential, I don't think I can tell you what the final figure is, save that it's a bit more than it was previously.

THE CHAIR: Yes.

MR BEAL: Until confidentiality is waived on a range, which I'm sure Mr Ward may be able to help you with --

THE CHAIR: Well, I would like to just have a brief discussion of that. I mean, I appreciate why things have been marked confidential. It does make it quite difficult, though, in this case, because we're obviously going to go on and talk about the distribution of the potential class members, and that is all about the numbers that are confidential. That's not only going to make it a little difficult today, it's going to make the judgment somewhat problematic as well.

I don't know whether there's any thought being given to how we manage that. I mean, obviously we can do things like have ranges and so on. What I have noticed, having done the preparation for this hearing, is that quite a few of the judgments do have excisions and no information at all about the distribution, and that does seem to me to be somewhat unhelpful if we're trying to give people some indications of how these decisions are to be made. But I say that appreciating that it's very late to be raising

the point, and also that on the face of it, it's obvious that the material does have some degree of confidentiality.

MR WARD: But also we will provide some range figures for the key metrics, and then of course if there are others that you'd like a range on, we can do this as well.

THE CHAIR: Yes. I think maybe this is not where you've been looking at, Mr Ward, but I've been looking at Ms Deakin's second report -- I think paragraph 21 has got quite a useful table -- which seems to me to be -- maybe this changes it, but it's more or less the last word on distribution. I mean distribution in the -- not sure what sort of sense that is, but you know what I mean. If you were able to do it more or less by reference to that, or something like that, that would be helpful.

MR WARD: Can I just, sir, be clear which table you are looking at?

THE CHAIR: Yes, of course.

MR WARD: Yes. Table 5 at paragraph 21.

THE CHAIR: I think it's page 419 of the core bundle, and that's tab 10. What I think is helpful about this is that it gives you, the breakdown, doesn't it, on the left-hand side of the sort of damages range, and so that distribution is very -- I think it's probably easier to look at the post interest figures, because it gives you possibly a more useful figure, but it gives you that distribution on the right-hand side. That's the sort of thing I think we're going to have to talk about both in the hearing and also in the judgment, as to how that impacts this sort of point about practicability, isn't it?

MR WARD: We'll come back with some proposed ranges as soon as we're able to.

THE CHAIR: Yes. Thank you. That's very helpful.

Submissions by MR BEAL

MR BEAL: In this case, as the Tribunal will well appreciate, there's been no application by Rightmove to strike out the proceedings or to ask for reverse summary judgment.

Certification is not as such opposed; it's only opposed on an opt-out basis.

As my learned friends' skeleton at paragraph 74 makes clear, Rightmove does not oppose certification as such for any of what I'm going to term authorisation condition pieces, and therefore those are points of detail to be addressed, rather than a barrier to certification as such.

What that means is there are, in my respectful submission, four core issues for this hearing to adjudicate upon. Firstly, whether the collective proceedings should be certified on an opt-out basis, as we contend, or on an opt-in basis, as Rightmove contends. That's the first issue.

There is then a fallback position, so issue number 2 is the hybrid proposal, and whether or not there should be opt-in only for potential class members -- PCMs -- who have an expenditure with Rightmove exceeding £1 million over a six-year period. That represents, as at the date of the Claim Form, annual expenditure on Rightmove of rounding up £167,000 per annum. Obviously, with each passing period, the average represented by that figure diminishes. So as at today's date, my numerically astute junior tells me that the per annum figure is £154,000 per annum, once one has factored in the period since the Claim Form was issued.

The third issue is whether the exclusionary conduct has a sufficient methodology for trial, applying the *Pro-Sys* or *Microsoft* test; and the fourth issue is whether the compound interest claim has a sufficient methodology as a blueprint to trial.

After giving some introductory observations and a quick overview of the claim, what I'm proposing to do is simply address each of those four key issues in turn, and I'll then let my learned friend Mr Marven KC address the issues that have been raised under the rubric of the authorisation condition.

Could I just deal with timing? I think given the amount of material that we have to get through, we will unfortunately need tomorrow, having discussed it with Mr Ward, and

I'm proposing to try and sit down collectively -- Mr Marven and I are proposing to sit down, if we can, by 3.45 today to enable my learned friends to have ample time and perhaps hopefully not to need all of tomorrow.

THE CHAIR: Yes. I think we'd reached the same conclusion that it was going to run into tomorrow. I think it would be helpful if it didn't take all of the day, but on the other hand, obviously Rightmove will need time and should have the time it needs.

MR BEAL: I'll be going at a canter anyway, but what I don't want to have to do is gallop and try and sit down by 1.00 pm if that's unrealistic.

THE CHAIR: No. No, that's absolutely fine.

Opt-in/opt-out submissions

MR BEAL: Turning, if I may, to some short introductory observations on the key issue of opt-out versus opt-in, we have a number of points worth noting right at the outset. Firstly, this isn't the first time that this Tribunal has had to grapple with this issue, including post the *Evans* Supreme Court decision, and both decisions before and after that Supreme Court judgment of Lord Sales have recognised that it would not be fair or just for collective proceedings to be brought on an opt-in basis or using a hybrid approach. I think there's five or six authorities I'll need to track through, albeit briefly, to show you the before and after approach.

Secondly, my learned friends' skeleton at paragraph 7 does not assert that the claims are weak. They say it falls somewhere in the middle of a spectrum between strong and weak. They therefore suggest that the strength of the claims is a neutral factor. With respect, we disagree. We say -- and I'll take you to some evidence to support this -- that the claims are in fact strong, particularly in the light of the Tribunal's decision in *Kent*.

Thirdly, my learned friends' skeleton at paragraph 22 accepts that if our evidence is

accepted from Mr Hain-Cole, among others, then opt-in is indeed impractical. They then go on to say in their submission -- which amounts to, we respectfully suggest, no more than a bare assertion -- that that evidence shouldn't be accepted. But that is the evidence that is before the Tribunal from a very experienced solicitor in this area.

Fourthly and relatedly, it's telling that Rightmove has adduced no evidence itself to gainsay the very detailed evidence that we have adduced on practicability issues. It's true that Mr Anderson has given evidence about certain matters, but save insofar as he's dealing with matters of fact that are within his gift, such as the help that Rightmove has said it would give to enable us to contact potential class members, his witness evidence to a large extent turns on simply doubting whether or not our witness evidence is correct. With respect, that isn't the function of a witness statement of fact.

If I can adopt the approach that the 1970s TV detective Columbo would adopt in this situation: *cui bono*, from the opt-in approach? Who benefits? The answer, we say, to that is only Rightmove. The opt-in approach would see the class representative incurring greater costs with additional complexity, while achieving a substantially reduced recovery of the loss that the class members have sustained, and it would lead to a natural attritional effect on the number of members actually opting in.

So reduced exposure for Rightmove -- that's what they're after -- reduced number of class members having their claim for remedial loss satisfied, but at the same time, the cost for the class representative inevitably will go up, and the complexity of managing the litigation will go up. What that means in the cost per pound of recovery is that the cost per pound of recovery increases substantially. Of course, the level of recovery for the injured class as a whole would substantially fall.

We make the evidenced submission on the back of that, that that is not consistent with the aims of the CPO regime which Parliament introduced in 2015, in order to deal with precisely this sort of case: namely, a claim for a large sum of money brought by a small

number of small and medium-sized businesses, for sums which on an individual basis would not justify the cost of litigation.

So, true it is, this is a claim that is brought principally on behalf of SMEs rather than consumers. Is that a material difference? We say no, because SMEs in the competition sphere are the equivalent of equity's darling.

Could I please invite you to look in the core bundle, tab 3, page 139. It's part of our Reply, and it sets out succinctly -- at the top of the page there. It's core bundle, tab 3, page 139. As it happens, it's the rump end of paragraph 4.1.2. But there's a reference there to the figures adduced by Mr Anderson's witness statement confirming that the estimates from Ms Deakin were reassuringly accurate, based on the second expert report of Ms Deakin, which you referred to, sir, at tables 2 and 4:

"... small and medium-sized businesses with fewer than 250 employees ... are likely to represent [a confidential figure that is very high] *and* [represent a confidential figure that is also substantially high] *of the aggregate claim value."*

So we are in the territory of having a claim that is brought substantially by small and medium-sized businesses with fewer than 250 employees, and they account for the lion's share of the claim value in this case. That's actually, as it turns out, is in contradistinction to some of the cases, such as *Rodger* and *Ennis*, where there were a handful of PCMs who had much higher levels of claim value, albeit in the context of -- in *Rodger's* case, I think there were 2,200 class members, so less than here, and in *Ennis* it was around the 13,000 mark, so similar to here.

Now, a further point to note is, as well as being aimed at the sweet spot of SMEs, as I've indicated, this would also be a case where if the claim was certified on an opt-in basis, and if, as one would envisage, there will be a natural attritional effect, and indeed, if there weren't, what is Rightmove's point? Because their point is, "Well, this is undue leveraging. This is the way you should test the appetite of the claimants and

so on".

If the consequence of the opt-in proceedings in a counterfactual would be that you had 13,000 people signing up, then there's no difference in practical terms between allowing this to run as an opt-out proceeding and allowing it to run as an opt-in proceeding. So it must therefore be that Rightmove is tilting at the counterfactual in which a substantial volume of the class members would not bother to opt in, if it were certified on an opt-in basis.

The question, and the key question, is whether that reflects what is perceived to be a weak claim, and they're voting with their feet, or whether or not it reflects natural inertia and so on, a lack of willingness to be involved proactively in litigation for well-known reasons. That is one of the core considerations in this case.

Could I then please move on to the second part of my submissions, which is a brief overview of the claim.

Firstly, in core bundle tab 5, page 249, we have a passage from Mr Newman's first witness statement, paragraphs 36 to 38. I don't know whether the Tribunal has had a chance to read this statement, but if you would be kind enough to cast an eye over paragraphs 36 to 38, you will see Mr Newman's evident experience not just as a former member of the CMA panel, but also as former managing partner of BDO and a variety of different roles involving a great deal of expertise.

THE CHAIR: Yes, I think I can indicate we have -- I think I can speak for us all, we have read the witness statements and the expert reports.

MR BEAL: Thank you very much. That enables me to go much quicker.

His CV, for your note, is in supplemental bundle 1, tab 7, page 72. If you've read the witness statement of Mr Budden, who is the former CEO of Foxtons, you will have seen his description of the marketplace -- perhaps it's worth briefly turning to. It's at supplemental bundle 1, please, tab 5, page 44.

THE CHAIR: Yes.

MR BEAL: What one sees at page 47 is a summary of Rightmove's pricing:

"*Rightmove has been able to increase* [its] *prices consistently,* [one sees at paragraph 18]*, at rates materially above inflation (often many times RPI), and at a much higher pace that* [estate agents'] *revenues have grown over the same period.* [That has led] *to margin pressure* [he says]."

There's a comparison of the three main portals, that is in the table at page 51. At page 53, paragraph 27, we see a breakdown of the size and composition of various estate agencies according to some ONS 2025 business data. You'll see that a large proportion, 77-odd per cent of estate agencies in the UK have as few as between zero and four employees. I imagine zero would encompass a director, who is a director rather than an employee, so a one-man band.

Then we see figures for what I'm going to call the NHD market at paragraph 32; that's page 55. A new home development, we see some figures indicated there as to the average number of developments, for example, that are typically developed by an average housebuilder.

That's some just helpful industry background.

Has the Tribunal had an opportunity to read the collective proceedings Claim Form?

THE CHAIR: Yes.

MR BEAL: In that case, I can take that exceptionally quickly as well. Perhaps if I can drill straight down into the class definition. There was a potential issue here which has been ameliorated by the agreement of Rightmove, in the event of certification, to accept that a particular amendment to the class definition is appropriate.

THE CHAIR: That is the direct/indirect point.

MR BEAL: It's the direct/indirect point. Yes. I think we hadn't necessarily appreciated that there was a category of marketing agency with whom Rightmove dealt who paid

invoices. But actually, Rightmove's evidence of Mr Anderson was Rightmove negotiates actually with the NHD or the estate -- I think it's called NHDs, actually -- negotiates with the NHD the actual price, but the formal invoice is submitted by one of these marketing agencies. So the class definition was intended -- paragraph 17 -- to cover, we hope, people who were estate agents or NHDs who were directly contracting with Rightmove for the supply of services. This agency issue threw a bit of a wrinkle. So we were proposing, in the terms outlined in our skeleton argument, to amend.

Of course --

MR WARD: As you would have seen, we have no objection in principle to the amendment. We do actually have some points to make on the wording. It's probably best if the solicitors try and sort that out rather than troubling you with it. It's nothing to do with the high-level points at all. It's just precisely how it's framed.

THE CHAIR: Yes. Well, I mean, I think experience tells us that it's important to get these things right. So I don't think we want to hurry you on that. But if you need us to resolve it, then obviously we can do that.

MR WARD: I'm wholly welcome to that.

THE CHAIR: Yes. Thank you. (Pause)

MR BEAL: Moving on in the Claim Form to the key parts that deal with the issues before this Tribunal at page 20, paragraph 45. We have recognised the impact of the *Evans* case. This is tab 1 of the core bundle.

THE CHAIR: Yes.

MR BEAL: At page 20, there's a citation of the *Evans* case. We try and set out the reasons why we are not within the scope of the observations of the Supreme Court in that case. Then at 46, we make the point that:

"*This is not a case where weak claims are brought* [by] … *well-resourced businesses*

seeking to leverage nuisance settlements ..."

At page 27, paragraph 57, we submit that the claims are strong for the purposes of the Tribunal's assessment. We indicate why we have good evidence to support the proposition that Rightmove is dominant in the relevant property portal services market. Then, at page 28, we set out why it would not be practicable for the proceedings to be brought on an opt-in basis, referring back to paragraphs 45 to 47 that we just had a quick look at and then making the further points there set out.

At page 41, paragraph 86, we have pleaded out some core information about the membership fees and the requirements for subscription. We've indicated how those prices have increased significantly year on year through the relevant claim period, I think, with the exception of arguably the COVID year, financial year 2020.

Page 45, we then indicate at paragraph 89 that the comparable pricing for Rightmove's key competitors, namely Zoopla and OnTheMarket or OTM, has been much lower.

Page 46, paragraph 90 deals with the relevant market analysis. Paragraph 93 then moves on to dominance. At page 49, at paragraph 95.4, we observe that:

"*A number of rival property portals* [do exist and] *have been established for a number of years ... but have not been able to dent Rightmove's dominance* ..."

So notwithstanding two established rivals, market shares, we say, have remained the same. We've seen that Rightmove has been able to increase its prices year on year, but it hasn't faced any countervailing competitive threat from Zoopla and OTM which would have suggested that raising your prices is a bad idea.

Tellingly, at paragraph 95.6, we set out in detail the very high profit margin figures that are deployed and shown from Rightmove's own financial statements. Its operating profit has typically been around the --i.e. their operating margin has been around 70 per cent throughout the period. I will come on to show you what the equivalent

figures were in *Kent*.

In terms of abuse, as the Tribunal well knows, there's both the exploitative abuse of excessive and unfair pricing, and then that's dealt with both on a limb 1 and limb 2 basis under the *United Brands* test. We rely on -- page 56, paragraph 106 -- the preliminary findings in Ms Deakin's first report, which the Tribunal has read. At page 58, we then plead out the limb 2 abuse, relying on both the prices being unfair in themselves, but also unfair by reference to comparators' pricing. We make the point that Rightmove is not subject to any significant competitive pressures and that their customers are essentially "*captive customers*" in the sense that this is a must-have service for estate agents, precisely because the estate agents' clients say, "What are you doing? You need to list my property on Rightmove when I'm coming to you. If you don't list it on Rightmove, I'm going to go to the rival down the high street".

Page 61 pleads out the exclusionary abuse. You will have seen that there was initially an objection taken in Rightmove's Response that somehow this was inconsistent with what was said earlier; we've addressed that in our Reply. The key point, as I now apprehend it from my learned friends' skeleton, is that Ms Deakin doesn't cover a methodology for identifying a theory of harm for the exclusionary abuse. As such, she deals with it as a counterfactual issue when looking at what the effect on the counterfactual price is likely to have been.

THE CHAIR: That's your issue 3, I think, is it?

MR BEAL: That's my issue 3.

THE CHAIR: So we're going to come back to that. I think we'll --

MR BEAL: I'm going to deal with that in detail.

THE CHAIR: You won't be surprised to find me quite interested in that. So I'm sure we'll have some questions for you on it.

MR BEAL: Yes. I mean, just so you know where I'm going with it, the methodology of

establishing the abuse requires us to rely on facts and documentary evidence and witness evidence to establish the fact of abuse. We then rely on legal submissions to say why that abuse has caused -- actually or potentially - harm to the market. Ms Deakin is then proposing that she analyses the impact of the exclusionary abuses when looking at what the counterfactual price would be.

But at the moment, based on where we are, her position is she doesn't think that the exclusionary abuses would have led to a separate counterfactual price -- different from the counterfactual price that would be developed by the exploitative abuse.

In that, she is, with respect, following the same approach that you adopted, sir, in the Tribunal in the *Kent* case of saying we're not going to do a separate finding of specific loss attributable to exclusionary abuses, because when looking at the counterfactual, you strip out the exclusionary abuses because they are part of the abuse and therefore can't be included in the counterfactual world. That enables you to determine what the normal workable conditions of competition would be, and that gives you a counterfactual price predominantly based on the exploitative case, but having stripped out consideration of the exclusionary effects in the counterfactual of those abuses, because you assume that they don't exist.

THE CHAIR: It's tempting to go down the rabbit hole now, but we'll leave it until you get to it, I think. I think we'll have some things to ask you about when we get to that.

MR BEAL: Of course.

THE CHAIR: Yes.

MR BEAL: Of course, and I hope I'll be able to answer them. So that is the pleaded case on exclusionary abuse.

117 then deals with the counterfactual; page 63. (Pause)

117 through to 120 deals with counterfactual. Then specifically at 121 to 123, we make the point I've just tried to make, probably in as many sentences as it is pleaded,

where we, Ms Deakin, paragraph 162 of her first report, will look at the effect of Rightmove's exclusionary conduct on the prices charged to PCMs. But it's likely that her estimates of that will be captured by her analysis of the excessive and unfair pricing.

It's right, paragraph 123 says:

"*Ms Deakin also does not quantify the value to the Proposed Class of the other benefits it would have received absent Rightmove's exclusionary conduct, i.e. the greater quality, differentiation and innovation associated with a more vibrant online property portal market* ..."

So page 65 then contains the pleading for compound interest, which is the subject matter of issue 4, and we see at paragraphs 127 to 129 how the assessment of compound interest is intended to be addressed. That concludes my brief overview of how the claim is pleaded out.

Moving on to issue 1, which is opt-out versus opt-in, for your note, this is dealt with in our Claim Form that I've just looked at, at paragraphs 45 to 47; and in our Response at paragraphs 10 to 63. That's core bundle 2, page 80, tab 2, page 80. Sorry, I said in our Response -- in Rightmove's Response. I beg your pardon.

In our Reply to Rightmove's Response at paragraphs 6 to 80, it's core bundle 3, page 141; finally, in our skeleton paragraphs 18 to 47.

THE CHAIR: So just give me the paragraph reference for the Reply again, would you, please?

MR BEAL: The Reply was 6 to 80, and our skeleton is 18 to 47.

THE CHAIR: Yes, thank you.

MR BEAL: What I'm proposing to do on this first issue is look at the relevant precedents from the Tribunal that deal with opt-in versus opt-out, and then to focus on what becomes the twin factors that need to be looked at, namely the strength of the

claims and the practicability of bringing the claims on either basis.

Turning then to legal precedent, could we start, please, with the *Stephan v Amazon* case, which is in the bundle of authorities 2, tab 43, page 1339, picking it up really at paragraph 152. Would the Tribunal be kind enough to read paragraph 152 through to 154. I should say this is a pre-*Evans* case.

THE CHAIR: This is pre-*Evans*, yes. (Pause)

MR BEAL: So a number of points. Firstly, whilst it's true that there were more PCMs in that case than there are here, nonetheless there was no trade association or representative body which eased the process of contacting them and maintaining contact with them, unlike in the RHA case in *Trucks*. Secondly, most of the PCMs were small businesses, and that applies equally here. Thirdly, the relatively small claims made up the bulk of the claim; that also applies here. Finally, there was a concern about PCMs jeopardising their relationship with their key contractual counterparty. We say that applies equally here.

Now, I'm not proposing to take that submission further and rely on allegations of intimidation or retaliation. In my submission, it's sufficient that in this case, there is a reasonable perception by members of the class that if they stick their head above the parapet, they may get some adverse consequences from dealing with their key trading partner. They depend on Rightmove as the window to the world for the sale of their properties, and they're trying to sell properties. If they engage in what will no doubt be keenly contested litigation with Rightmove, then they reasonably can perceive that they could jeopardise that relationship.

THE CHAIR: If Mr Anderson has put in a witness statement saying that won't happen, how does that affect the inference?

MR BEAL: He has indicated that he will, in due course -- I don't think he said he has at this stage done so -- send out a memo to members of staff saying, "Please don't

take retaliatory measures". That ensures, one hopes, that there will be a management diktat that retaliatory measures will not be adopted. Subject to enforcement, that takes one so far.

That doesn't, however, deal with the perception from somebody who is dealing with their account manager from Rightmove that if they are singled out as trouble, they will somehow get a worse deal. That doesn't depend on anything that Rightmove does or doesn't do. That depends solely on: does somebody who is critically engaged with Rightmove, and he is trying to negotiate a better deal, fear that if they are part of a class that is physically identified by reference to a class register list, they will be at risk of getting a worse deal. I think that's the common-sense proposition that was accepted in the *Google* case by Mr Justice Meade as being a common-sense proposition.

THE CHAIR: It's an objective test, isn't it?

MR BEAL: Yes. It's an objective test, as in: is it objectively likely that people would have a perception of concern about their commercial relationship with a must-have partner being jeopardised?

I mean, obviously if it was simply irrational to think that, to have that fear, then it wouldn't be something that this Tribunal took into account. But because Mr Justice Meade in *Google* described it as a common-sense proposition, I don't need to go so far as to say it can be anything other than an objective analysis of the circumstances of the case.

Could I then please move on to another pre-*Evans* decision, this time of the now President of the Tribunal, Mrs Justice Bacon. That's the *Spottiswoode* case. It's bundle of authorities 2, tab 46, page 1420. I'm sorry, she was President at the time. Time flies. Page 1420, paragraph 2, please, which is at page 1423. One sees that:

"*The CPO Application seeks to combine 'standalone' claims ... alleging that Motorola*

has abused its dominant position ... through the charging of excessive and unfair prices for the use of Land Mobile Radio (LMR) network services [so-called Airwave Services]."

If we flip forward to page 1428, paragraph 21 gives the class size. The class definition was intended to cover all those who had paid for Airwave Services, and the class size was estimated to be between 400 and 2,000 PCMs.

Paragraph 33, page 1431, identifies that the Tribunal would take an active role in looking at both the authorisation and eligibility conditions. So the Tribunal was proactive in dealing with the process. In terms of opt-in, opt-out, which it then considers, the Tribunal set out the various competing submissions.

But at page 1442, paragraph 67, there's some evidence given by Mr Gale at Ashurst LLP. Please can I invite you to read the evidence he gave?

THE CHAIR: Yes.

MR BEAL: Paragraph 67. (Pause)

There's then quite a long section, please, beginning at page 1444, from paragraph 74 through to paragraph 83. There are some paragraphs in between that don't really take matters substantially further forward, but rather than trying to get you to read two paragraphs and ignore two paragraphs and then two paragraphs, it's probably easier just to invite you to read 74 to 83.

THE CHAIR: 74 to 83.

MR BEAL: 74 to 83. (Pause)

At paragraph 80, the learned President makes the point I've already made, which is if opting in were as easy as in that case Motorola was suggesting, then there wouldn't be any practical difference between that and opt-out. So what they are really -- I think it's fair to say that one derives a sense that the learned President thought that Motorola's objective was to, one, to knock out some of the larger claims, and indeed

some of the smaller claims as well, to reduce their exposure, and secondly, to make the process of seeking disclosure and witness evidence more stringent and more resource-heavy with the same aim, namely, to encourage people not to opt in, or, having opted in, to then give up the claim.

THE CHAIR: These pre-*Evans* -- this is pre-*Evans* as well, isn't it?

MR BEAL: Yes.

THE CHAIR: So these pre-*Evans* decisions, I mean how much weight should we put on them, given that *Evans* -- they are referring to the Court of Appeal decision in *Evans* and *Le Patourel*, aren't they?

MR BEAL: Yes.

THE CHAIR: And obviously we now know that *Evans* said the Court of Appeal had been approaching it the wrong way, how reliable are these decisions now?

MR BEAL: So the key two takeaways, we suggest, from the *Evans* Supreme Court case are, firstly, that the strength of the claims is a more significant factor than the Court of Appeal judgment in *Evans* had suggested.

THE CHAIR: Yes.

MR BEAL: The first point. The second point is that the risk of the opt-out procedure being used to leverage weak claims, in particular for nuisance value settlements, needs to be firmly borne in mind. We don't suggest that that's anything other than the correct approach. The interesting thing, in our submission, is to look at what the Tribunal has done post-*Evans* to see, assuming that you have at the forefront of one's judicial mind the strength of the claim and the risk of leveraging, is the actual test any different? This Tribunal has consistently said: actually on analysis, we still have to reach a fair and just result that produces the best outcome for the interests of the class as a whole. That's the first point.

Secondly, you take into account all of the factors. It's simply that the merits of the

claim is a more direct factor and a more significant factor than had previously been thought. In a sense, the Pro-Sys test is not the answer. You can't simply say: well, the Pro-Sys test is met therefore I don't need to worry about the strength of the claims. Measuring the perceived strength of the claim becomes more important for working out what is the just and fair way of dealing with the class' claims.

THE CHAIR: Yes. I mean, I think if we end up - in the question of, the leveraging question, there are some other more complicated issues, aren't there, like how one looks at the class as a whole and in parts, on which we have some guidance. I'm sure we're coming to *Evans*, but --

MR BEAL: Yes.

THE CHAIR: And also the question of where one starts and whether, actually, I think the statement is relied on by the Defendant, by the Proposed Defendant, is you start, you should have opt-in if it's practicable. In other words, it's effectively making the point you start there. Whereas the Court of Appeal is saying you didn't do that. There are some things that flow, aren't there, from the sort of the broad statement about leveraging, once you get into the weeds.

MR BEAL: *Evans* says there's no statutory preference in favour of opt-out or opt-in. I think that the effect of *Evans* in the Supreme Court, which is summarised -- I'm going to take you, if I may, to the Tribunal decisions that summarise it.

THE CHAIR: Yes.

MR BEAL: Because that shows you how they've worked out what difference it makes.

THE CHAIR: Yes.

MR BEAL: And how the response from this Tribunal should change. When you have three or four decisions all in a row, analysing evidence the same way -- I'm not actually proposing to take you to *Evans* because the hard work has already been done by your colleagues. So what one sees is there's no statutory preference either way. True it is

that if a claim can practically be brought on an opt-in basis, then that's a strong factor in suggesting it should be. But of course you could have a strong claim where there are concerns about the practicability of bringing it on an opt-in basis, and that would then favour opt-out. That's the conclusion, as it happens, that's been reached in the various cases that have looked at this.

Turning, if I may, to the *Rodger v Google* case.

THE CHAIR: Yes.

MR BEAL: This had been certified with a class size of 2,200 PCMs. For your note -- I'm not proposing to go there -- that's the original CPO decision in *Rodger*, bundle of authorities 2, tab 44, page 1375, at paragraph 91. There the Tribunal recognised that the PCMs were likely to be small businesses who were, and I quote, "*unlikely to have the resources to take the positive steps required to participate in the opt-in* [procedure]".

There was then an application to have the proceedings recertified as opt-in proceedings, and that's the judgment I'm proposing to take you to. It's bundle of authorities 3, please, tab 53, page 564.

THE CHAIR: Yes.

MR BEAL: If we could pick it up at 567, paragraph 1, we see that this was an application to have the proceedings recertified on an opt-in basis. At page 572, there's a reference to Google's application. Please could I invite the Tribunal to read paragraphs 20 through to 27. (Pause)

THE CHAIR: Yes.

MR BEAL: This is Mrs Justice Bacon again, sir. We've just seen her decision in *Spottiswoode*, and, sir, you made the perfectly valid point that, well, that's pre-*Evans*; does *Evans* change anything? The learned judge, at paragraph 24, recognises that there is a somewhat different approach to the assessment of practicability by the

Supreme Court, but the overall test remains the same. It was noted that the overall assessment had to be of what was in the interests of the balance of justice for the class as a whole.

Here, the class was on a sliding scale of size and value of claim. No doubt the top 25 developers were all large and sophisticated entities, but at least seven of those appeared to be SMEs, in fact, when on further analysis; and of course the vast majority of the class numerically had small claims. The point is, you have got this distribution of claim size by reference to the claim value of the individual developers, but there are no objective breaks in that distribution curve justified on anything other than the size of the claim. So there aren't any qualitative differences between the class members such as would make, for example, the practicability issue different; and where even within the top 25 there are some of them that appear to be either small or medium-sized companies, and you couldn't, unlike *Evans*, simply assume that they were large and sophisticated financial service operators. I don't know why the figures for the class size there are redacted, because they were unredacted in the CPO judgment, but there we are.

Could I then move on to *Ennis*? *Ennis* was a claim that was certified with approximately 13,000 class members. If I could simply give you the reference to this in a couple of paragraphs, that's bundle of authorities 2, tab 38, page 787, and the paragraph in question is paragraph 53.

The CAT rejected opt-in for the reasons given at paragraph 56. The reason for not turning that up is that it was based on the approach of the Court of Appeal in *Evans*, and so things moved on. We know things moved on because Apple then attempted to have the original certification overturned in their decertification application. That's, please, in this bundle, bundle of authorities 3, tab 56, page 713, where it starts. Within that judgment, if you would be kind enough to turn to page 716, paragraph 3, to see

how the case is put.

It's noted that the application for certification had been granted in the judgment I've just referred you to. In the light of the *Evans* decision, Apple contends that the Tribunal "... *should now hold that the conditions for certification on an opt-out basis are not met ...*", and therefore the CPO should be revoked for the class as a whole.

What we see then, please, at page 736 is paragraphs 64 to 68, a detailed summary of the need to weigh the various different interests, and there are references to the *Evans* decision test that now should be followed post-*Evans*. Please would the Tribunal read paragraphs 64 to 68. (Pause)

The Tribunal then broke out, as I'm proposing to do, an analysis of the strength of the proceedings and then the practicability. The conclusion on strength is at paragraph 75, page 739, and that was: the claims in the present case were markedly different from the claims in *Evans; "This is not a case like Evans where the weakness of the claims is a reason against certifying on an opt-out basis*".

The Tribunal then at 76 through to 78 looked at the key tests from *Evans* for practicability. Please would you read 76 to 78. (Pause)

THE CHAIR: Yes.

MR BEAL: Would you then, please, be kind enough to read the application of those principles to the facts of this case, starting at 79 and going all the way through to 87. Paragraphs 79 to 87. (Pause)

THE CHAIR: Yes.

MR BEAL: Our submission is that the five factors that were relied upon in paragraph 84 also apply equally to our case. For example, number 1, the claims are strong; number 2, the class is homogeneous; number 3, opt-in for the entire class would risk valid claims not being brought by small businesses; 4, there is a real concern that the opt-in claim would fizzle out; and number 5, there's no unfairness to

Apple. On the contrary, access to justice for a numerically large cohort of claimants would be secured. We say we can plug that analysis into our case equally.

The next decision is that of the Tribunal chaired by Mr Justice Meade in the *Brook* case. That's in this bundle at tab 59, page 801. Please would you turn to page 805, where at paragraphs 6 to 7 we see that this was an application for a CPO; and in paragraph 6 at subparagraph 4, on page 805, one sees that counsel for Google was not proposing certification on an opt-out basis, but rather suggesting, if certification was to be granted at all, it should be opt-in only; and does not oppose opt-in certification, but it opposed opt-out certification in any scenario, so there was a note as to how the case was being put.

Page 812, one sees the Tribunal citing extensively from what are described by Mr Justice Meade as setting out in full the relevant paragraphs of *Evans*, which is why I'm not proposing to run you through quite a detailed judgment separately, because this is, in a Blue Peter way, somebody's "Here's one we made earlier". Paragraph 30; if you'd be kind enough, please, to read 30 through to 31, that summarises the key guidance from the Supreme Court in *Evans*. (Pause)

THE CHAIR: Yes.

MR BEAL: The core test remains, as set out in paragraph 31, to stand back and make an overall assessment of the balance of justice on the basis of all the factors before you. It's a multifactorial assessment of where the balance of justice lies. There's a reference there to the *Stasi* case, which I haven't taken you to deliberately, because it's specifically on the hybrid proposal. I'll come back and deal with that as part of issue 2.

But otherwise, one sees that guidance has been given in *Evans*. It's being taken into account by the Tribunal, but the core test remains the same as it was pre-*Evans* and post-*Evans*. The two key things that have changed, in my respectful submission, are

strength of the claims matters -- and it's not simply, you can look at Pro-Sys and say, "That's satisfied; therefore, we don't need to consider strength more generally" -- and secondly, the leveraging point. Those are the two key changes.

If we can see how that is then considered on the facts of this case -- firstly, please, page 818, paragraph 40 -- the Tribunal had the benefit of evidence from Mr Teague, a partner in Geradin Partners who had significant experience in this area, whose evidence was found to be cogent and reliable, coming from a solicitor at a firm with a lot of experience in collective proceedings and the challenges involved in putting together opt-in claims.

Paragraph 44 and 45, the Tribunal makes the point that being able to contact the PCMs is one thing, but getting them to engage is another; and the submission I'd made to Mr Justice Meade on behalf of the PCR in that case was: it's one thing writing to somebody saying, "Here's a pot of money. If you engage with us, you can have it", and another saying, "Here's a prospective action where we may require you to give disclosure and witness evidence, and you'll need to sign up for the litigation as part of the procedure". That may well produce a different, almost visceral response from the email respondent, in particular from small businesses. Please could you read paragraphs 44 and 45 to see how the Tribunal dealt with that. (Pause)

THE CHAIR: Yes.

MR BEAL: At page 823, then, paragraph 60, there's then an analysis of the class profile and practical issues. There's quite a lengthy section there through to paragraph 69 that essentially seeks to give effect to the *Evans* guidance on the facts of that particular case. Please would you read paragraphs 60 through to 69. (Pause)

I then have two short points to make on *Evans* itself, and then I'll propose that if the Tribunal is minded to do so, we take the transcriber break. But these can conveniently be dealt with before I move on to the next stage of my submissions, which is the

strength of the claims.

The submission that is advanced by Rightmove in this case is that all of the cases we've just looked at, and indeed *Stasi* that we'll come on to, are very different from Rightmove's case. But with respect to, aside from *Evans*, there is no example of this Tribunal directing collective proceedings on an opt-in basis in the face of opposition from the PCR to that course of action. So if a PCR says, "We think we can do this; this is our proposal" -- there have been examples of that being endorsed by the Tribunal -- *Evans* is the only case where the PCR says it has to be opt-out, that's rejected, and the Tribunal instead says, "We are prepared to certify on an opt-in basis only".

As I've indicated, the new point from *Evans* was to be alive to the risk of weak claims, precisely because in *Evans*, the Tribunal had found that the claims were strikable but had declined, in fact, to strike them out, which is obviously a very different situation from having a strong claim. The reason why that matters is that a defendant facing a justifiable strong claim is not being leveraged in any way at all. It's simply facing a completely proper claim for a remedy that seeks to unburden the defendant of profits it has obtained only through an infringement of competition law. That's what this regime was intended to produce.

However, there's another important point, which is the context for *Evans*. Firstly, if you'd be kind enough to look in bundle of authorities 1, tab 23, page 1337.

THE CHAIR: Yes.

MR BEAL: This is taken from the Tribunal's decision at first instance in the *Evans/O'Higgins* case. At paragraph 179 through to 181, there's quite a detailed section dealing with -- the previous litigation had been started in a case called *Allianz*; and essentially in *Allianz*, a series of highly sophisticated investors in the financial services market and the FX market in particular, had clubbed together to bring

a unified claim against Barclays Bank and others, in litigation that was being fought in the Commercial Court. I think some of that litigation was subsequently transferred to the Tribunal. But where we end up is at paragraph 181, quite a detailed description of how it was pleaded out, and by reference to the bid/ask manipulation processes and so on.

But this then factored into the CAT's assessment of what was practicable. So against a background of other people having already started their own litigation in the Commercial Court, the CAT noted that at paragraph 381, which is at page 1412. (Pause)

If you would be kind enough to read all of 381, it gives you the details of the class composition, which lies behind the finding that these were -- even the 18,000 that were identified in subparagraph 2 as a result of Mr Ramirez's expert evidence for the proposed class, there were 18,154 financial institutions and 23,861 non-financial customers. It didn't include high net worth individuals, and we see that in fact he had stripped out smaller claims as well. But rather than trying to race through it, would you please just cast an eye over 381, all the way down to the end of the paragraph, which is a series of subparagraphs, because you can get a sense of exactly whose claims were in issue in this case.

THE CHAIR: Yes.

MR BEAL: That's the description of the class, as a matter of fact, that then feeds into the Supreme Court's judgment, which is bundle of authorities 3, tab 48, page 431, in particular, at paragraph 117. That's bundle of authorities 3, tab 48, page 431. Where at 116, their Lordships describe the regime as being designed to accommodate "*a wide spectrum of cases*" ranging from, at one end:

"... a *large class of ordinary consumers affected by a competition law breach resulting in their having to pay more for goods or services, but involving small sums for each*

individual which would make each individual case economically unviable ..."

That's one paradigm. We would say that the same could be said of a large volume of claims by small and medium-sized businesses that equally would not be viable on their own.

Then:

"*At the other end of the spectrum* [paragraph 117], *the claimants who allegedly suffered losses as a result of breaches of competition law may be large commercial organisations, well capable of looking after their own interests, and the sums involved may be large enough to make it financially viable to contemplate bringing proceedings to seek recovery* ..."

This is against the background of the *Allianz* cohort having done precisely that.

"*That may be done by clubbing together with other similar organisations with similar claims to bring a single set of proceedings with multiple claimants, or a number of separate proceedings that are case managed together, rather than trying to bring* a *collective action* [at all]."

So that's in the light of the factual findings that were made by the Competition Appeal Tribunal at first instance, where there are large and sophisticated financial institutions; (inaudible) 18,000. The comment about the tail wagging the dog was for the much smaller claims that had been excluded from the *Evans* case, but were being proposed for the *O'Higgins* case.

It was there that the Tribunal said, "Well, we're not going to take those into account at all". It was making its finding about the suitability of opt in precisely because the 18,000, even though it's a large number, were all large and sophisticated commercial organisations capable of defending their own interests.

THE CHAIR: Please could you give me the page reference for 381 in the CAT judgment for O'Higgins, there was a table there.

MR BEAL: Yes. That was bundle of authorities 1, page 1412.

THE CHAIR: Yes. Just that, there's a table, isn't there, where's that table gone?

MR BEAL: That's at page 1414.

THE CHAIR: Yes, at the top of the page, yes. I couldn't quite understand the average across the class. In the paragraph before they talk about the average of £2.76 billion per class member, that's ...

MR BEAL: That's the volume of commerce.

THE CHAIR: It's the volume of commerce, I see. It stems from the volume of commerce (overspeaking).

MR BEAL: Yes. So the overcharge is going to be lower.

THE CHAIR: Yes, I see, yes.

MR BEAL: But the quantum of claims is ranging. The average across the class gets diluted, because there are the additional 22,000-odd who are not said to be sophisticated parties.

THE CHAIR: So this average is not just the 18,000?

MR BEAL: That's my understanding. I may have --

THE CHAIR: No, no. Well, maybe it doesn't really matter. It's just I find it all quite hard to understand what's going on, but ...

MR BEAL: Mr Schonfeld, who's good at maths, tells me that the figures necessarily imply that it's the larger group, not just the 18,000.

Yes. Mr Williams points out, it says, "*Across both classes*" at the bottom of --

THE CHAIR: "*Across both classes*", yes.

MR BEAL: -- page 1413. So I didn't misstate the position.

That brings me to the end of my submissions on the legal precedent. I'm then proposing to, I hope, be slightly quicker on dealing with strength of the claims and the practicability issues for this case. I would hope to deal with both that and hybrid with

a fair wind before the short adjournment.

THE CHAIR: Yes. Good. Okay. We'll take a ten-minute break. Thank you.

(11.49 am)

(A short break)

(12.03 pm)

THE CHAIR: Yes, Mr Beal.

MR BEAL: I turn now to the strength of the claim. Would you please turn to -- in the supplemental bundle, the first supplemental bundle, tab 62, page 1277. I think if you have separate electronic files, this is the second of the supplemental bundle files as part of bundle 1. This is page 1277.

THE CHAIR: In the middle of something called a strategic report; is that right? Oh, hang on, sorry, I've got the wrong page.

MR BEAL: Tab 62 is the half-year results.

THE CHAIR: Yes. I'm sorry. No, 1270 -- I'm not sure it's letting me do this.

MR BEAL: 1277?

THE CHAIR: Supplemental 2, did you say?

MR BEAL: Supplemental bundle 1, but I think it's broken down into three separate PDF files.

THE CHAIR: Yes, sorry, give me the tab again.

MR BEAL: Tab 62.

THE CHAIR: I think it must be in a different bundle. I think supplemental bundle 1 only goes as far as 277. Volume 2, I think we should be in volume 2.

MR BEAL: What I have down from my downloaded bundles was that tabs 1 to 35 were bundle 1. Tabs 36 to 87 were bundle 2.

THE CHAIR: Yes. We're in bundle 2. (Pause)

I don't know whether I got that wrong or you got that wrong. We were in the wrong

bundle.

MR BEAL: 1277, your Honour. It's supplemental bundle 2. The mistake I made was thinking that this was all part of supplemental bundle 1.

THE CHAIR: Oh, I see, I see. Yes, okay.

MR BEAL: It's the second supplemental bundle.

THE CHAIR: This is the danger with trial bundles.

MR BEAL: I'm going to find a way of referring to the second supplemental bundle using an entirely different nomenclature to avoid this confusion.

THE CHAIR: We're there now.

MR BEAL: This is supplemental bundle 2 (overspeaking).

THE CHAIR: Supplemental bundle 2.

MR BEAL: Page 1277.

THE CHAIR: It should be the Rightmove's -- yes, that's it.

MR BEAL: It's the half-yearly results --

THE CHAIR: Yes.

MR BEAL: -- in July 2025.

THE CHAIR: Right. We're there. Sorry about that.

MR BEAL: Five bullets up from the bottom of the page, there's a reference to the: "*Underlying operating profit* [being] *up 9% with the underlying operating profit margin of 71% reflecting planned growth-focused investment and consistent with full-year guidance of 70%*"

At page 1286, there's a consideration of the principal risks and uncertainties. Under the box headed "*Competitive environment*" -- this is the financial publication from Rightmove -- that says: "*The Group operates in a competitive marketplace, where there are attractive margins and low barriers to entry, which has been changing through the activities of our*

property portal competitors in recent years. Whilst increased competition may impact Rightmove, through a potential loss of consumer audience or reduced demand for advertising by customers, the impact has been insignificant to date with all KPIs continuing to grow in the first half of 2025."

Now, there's an assertion there that there are low barriers to entry in this particular market. We respectfully suggest that that's hard to understand, given the continued dominance of Rightmove over a sustained period. But on any view, they are recognising that the impact of competitive pressure has been insignificant to date.

In terms of our case, our case is that this is a classic example of a tipped market where the ubiquity of the dominant undertaking means it's produced a must-have service for estate agents and NHDs.

We invite you to consider again, in due course, the witness evidence from Mr Whittaker, which the Tribunal has read -- so just for your note, supplemental bundle 1, tab 4, page 37. That's Whittaker paragraphs 13 to 15, where he talks about the must-have nature of the product. This conduct has squeezed out rivals; that can be seen in Daniel Oxford's witness statement at paragraph 13 -- that's supplemental bundle 1, tab 3, page 26 -- where he describes how when he was starting as an estate agent, the high prices set by Rightmove meant that he couldn't afford to take out a supplementary subscription with either Zoopla or OTM.

The witnesses have complained about the opacity of Rightmove's pricing. Duncan Ley's witness statement at paragraph 14 -- for your note, that's supplemental bundle 1, tab 6, page 63 explains how it's been variable for the various entities with which he's involved for reasons that he finds hard to explain.

The strength of the claim, however, is vouchsafed, we say, by the preliminary findings of Ms Deakin, which I understand the Tribunal has read.

THE CHAIR: Yes.

MR BEAL: So if I may skim over her conclusions about market shares, dominance, online time spent on property portals, the claim to Sky News that Rightmove has an 80 per cent market share and above -- that's, of course, sufficient to establish super dominance, let alone dominance. I'm going to cut to the chase, if I may, and look at ROCE figures and EBIT figures, because obviously, that's what we're all fascinated by. That's at page 380, please, of the core bundle, tab 9.

THE CHAIR: Yes.

MR BEAL: I'm only being slightly facetious. It is jolly interesting to look at the ROCE figures and EBIT figures and then compare and contrast them with the figures that were found to establish excessive and unfair pricing in *Kent*. So page 380, we have table 2. This is an estimate of -- at this stage, Ms Deakin does not have the raw data from Rightmove itself. She's basing these figures on publicly available data, and therefore they're not confidential. But one sees an average EBIT margin in -- row E, I suppose it is -- or subparagraph D of that table averaging out at 70 per cent over the five, six-year period. ROCE, return on capital employed, is coming out at an average of 375 per cent.

We then see at page 382, the comparable analysis for EBIT margins for OTM and Zoopla. OTM is at page 381. Zoopla is at page 382. OTM is not posting positive results. So it's perhaps easier to look at Zoopla's at page 382; the EBIT margin is on average 8 per cent over roughly the same period. So Zoopla has a significantly lower EBIT margin than Rightmove.

We then see page 386. There's a scatter graph showing the comparable EBIT margin considered against capital employed intensity from the FTSE All Share index, where Rightmove is the green dot in the top left-hand corner, putting it substantially above EBIT margins for other entities on that index and at the left-hand side of the capital employed intensity.

Page 387, the same plot is then achieved with figure 7 for EBIT margin versus capital employed for FTSE 100. The previous one was the FTSE All Share.

So that shows that Rightmove is an exceptionally profitable business, given its capital intensity, in comparison with all the other entities listed on the two separate indices.

Page 387. Then at paragraph 127 it says:

"*RM's EBIT margin of c.70% exceeds all other listed companies on the FTSE All Share, regardless of their reported capital intensity*."

Turning, please, to page 389, table 8 shows that apart from the COVID year, Rightmove's ARPA has increased in each year of the relevant period, including by substantial amounts of 36 per cent and 21 per cent in certain periods. So the average revenue it is receiving has increased by those sums. That's reflective essentially of the underlying price increases, as one sees at paragraphs 136 and 138, despite paragraph 138 says:

"*Despite RM's price increases, total subscriber numbers have remained broadly consistent across the Relevant Period of between 18,785 and 19,272* [subscribers]".

So high market share, consistently high profits, ability to charge increasing prices year on year, and no impact on subscriber numbers. Plus also ROCE and EBIT profit margin figures that are comparable to the figures that were given in *Kent*. I can make good that point in a moment.

If we could then please look at page 392, table 9, it deals with the comparator position for OTM and Zoopla. In terms of ARPA, paragraph 153 states:

"*Based on reported and estimated ARPAs across FY20 to FY24, RM is on average 3.4x that of Zoopla and 7.2x that of OTM*."

So that's the comparator pricing analysis. Page 393 then sets out the provisional findings in relation to the limb 1 and limb 2 analysis.

I said I'd make good the comparison with *Kent*. That's in bundle of authorities, please,

bundle 3, tab 47, page 222. If you'd look, please, at paragraph 610. We see that the Tribunal in this case had looked at figures for return on revenue, return on assets, and ROCE. They were:

"... *reasonably reliable estimates for determining whether there was a significant and persistent difference between the price of services in the App Store and the cost of those services. We find that there was a significant and persistent difference over the Claim Period ...* [and the] *ROCE* [figure is] *351%* [to a figure that is excised for confidentiality reasons]"

So the figure that we had was 371, I think it was, and this is 351.

The conclusion that the Tribunal reached at page 247, paragraph 674, was on the basis of the evidence before the Tribunal, the Commission rate set by Apple in the App Store was unfair in and of itself, which is a sufficient finding for a limb 2 analysis to be engaged, and therefore for the price as a whole to be excessive and unfair under the *United Brands* test.

Of course, that excessive and unfair pricing produces a deadweight welfare loss as a result of the anti-competitive conduct which if, and to the extent that class members have a claim for that excessive and unfair pricing, if and to the extent that it's not remedied because they don't take part in these proceedings, that would lead to the deadweight loss not being reflected for the economy as a whole. Of course, we also have the impact on deterrence as a policy consideration.

So we do submit that these claims are strong. It's telling that Rightmove has not chosen to cast doubt on these preliminary findings with a countervailing expert's report of its own.

Unless I can help any further on the strength of the claims, I propose to move on to practicability.

Practicability submissions

THE CHAIR: Yes.

MR BEAL: As you know, Ms Deakin had initially suggested there may be somewhere around 7,000 class members. In fact, we now know from Mr Anderson's evidence, at paragraph 13, that there are at least 13,000 members of the class. From the letter that I handed up, the estimate now is 13,400.

Now in *CICC*, as the Tribunal knows, a great deal of work has been undertaken in order to opt in a cohort of what is now, I think, around 75 or so legal entities. But even putting that to one side, if one assumes a dedicated team within my instructing solicitors signing up, say, 20 claimants a day to this process -- which is frankly going at some rate. Giving the necessary advice, signature of DBA arrangements, insurance cover, details of the claim, proposed adjustments for arrangements for distribution, and so on, if you assume you can do all of that for 20 potential class members in the course of one day, which would require something of a team effort, to put it mildly, then signing up 13,400 claimants would take a little under two years. By my calculations, somewhere around 670/672 days, something like that; an extraordinary length of time. And that's on the very, very charitable assumption that you could get through 20 PCMs a day when one knows that a cohort of what was initially, I think, 210 or so claimants in the *CICC* proceedings have caused, it's fair to say, more than four days' work.

Now, in reality, as you've said -- and I'm not proposing to turn the light on and off in the jury box every time I make this point -- but the only reason for the opt-in application is because Rightmove knows there will be a much lower level of participation, and it's seeking to reduce the size of the claim against it, or except if it really thinks we could have 13,500-odd class members on a list managed by this Tribunal, then essentially that's going to require so much effort and maintenance that the budget will be

exhausted very quickly and the litigation will run into the sand.

Those are, practically speaking, I think the only two outcomes that are realistic.

What is apparent is that Rightmove's suggestion is not motivated by the interests of those class members who have strong but unsatisfied claims against it. Many of them have relatively small claims for damages, and there are a very large number of them. You've seen table 5 in Ms Deakin's second report, where she breaks down the average claim value per cumulative number of class members, and the statistics speak for themselves.

Add to that, of course, the risk of jeopardising their commercial relationship with Rightmove, well-recognised inertia, one's looking at a high drop-out rate that is exactly what the Tribunal has repeatedly recognised in the five or six cases I took you to before the transcriber break.

Now that is simply signing people up to the basics. But, of course, it's very different, we say, dealing with PCMs on an opt-out basis than dealing with them on an opt-in basis. We are not suggesting here that the PCMs are in a position where they can analyse and recognise a weak claim and then vote with their feet. That isn't the concern that we say is operative here, precisely because I've just shown you that the strength of the claim is such that comparison with *Evans* is ill-judged. Therefore, to the extent that there is drop-out with people voting with their feet, that must necessarily reflect not a realistic appraisal of the value of the claim, but the factors of inertia, concern about detriment to the commercial relationship, and so on.

More importantly, just as there has been in, for example, the *Rodger* and the *Ennis* and then the *Brook* case, there's been substantial evidence from the PCR on the practicability issues. Now, you've seen Mr Hain-Cole's witness statement, his second one. It's in core bundle tab 7, starting page 295.

But I would just like to pick out some highlights of that evidence, if I may. Firstly,

there's a bit of a dig about Mr Hain-Cole's evidence and his experience in my learned friend's skeleton. But his extensive experience is set out at page 296. I don't think he has mentioned that he used to work for defendants' firms as well, back in the day, as many people did. But one sees at paragraphs 2 and 3, the extensive experience of both him and the firm, Scott+Scott.

THE CHAIR: I think the point that was made was: did he have any experience of a bookbuild? I don't know whether he does or not.

MR BEAL: He has had experience of building a book in the *Interchange* litigation, and he deals with that at some point in his statement. I'll find the specific paragraph. But he then, at page 298, goes on to deal with not only his experience of bookbuilding, but the firm's, more generally.

If you could look, please, at page 298, paragraphs 11 through to 14, we see that -- I'm reminded *Interchange* is dealt with at paragraph 18, which I haven't got to yet. He explains essentially, at 11 to 14 why the assertion that building a book -- and bearing in mind it's very important to realise how this works in practice -- a funder is not going to sign off on an opt-in claim without knowing what the anticipated volume of commerce is, and therefore what the overcharge will be, because the funder is going to want to know what is the bottom line likely recovery for the class.

Where, as here, we're looking at the opt-in proceedings for the class as a whole, there's necessarily going to have to be a good estimate of (a) how many people are likely to opt in, and (b) what their recovery is going to be. Because the funder is looking at what return it can get from funding this litigation. And that's the core point. You don't get a funder engaged unless you've already done a substantial bookbuilding-light exercise. This isn't bookbuilding in the sense of getting them physically to sign in to an opt-in register, as we know from *CICC*. This is engaging with them in the first place, as Harcus Parker did in *CICC*, going through the list of contacts that are

interested in the claim, gauging the extent of their interest, and necessarily engaging with them on the parameters of the documents they will need to sign in due course when they formally sign into the opt-in proceedings.

All of that needs to take place before the funder will consider the proposal. In the *RHA* case that I'll come on to in a moment, that process took place over, I think, four years. We've seen the reference in *Evans* to the attempts that were made by Mr Maton of Hausfeld to build a book over several years in *FX* before he realised he could only drum up support from 321 people and therefore applied for an opt-out claim instead.

We know from *CICC* that there was a register of interested persons who were regularly contacted even before the CPO certification hearings were held. Then obviously it was to that cohort that the solicitors then turned when inviting them formally to then opt into the process. So you have a very detailed process before the funding gets off the ground. That's essentially the point that Mr Hain-Cole is making at paragraphs 11 through to 14.

Now, it's true that at 14, he says: "[this] *firm has never been involved in building a book of claims specifically for the purpose of bringing opt-in collective proceedings*". Pause there. That's simply because they are very difficult to get off the ground, for the reasons I've just given. But, however, Scott+Scott does have extensive experience in approaching and engaging with and signing up clients for a bookbuild in litigation before the English courts. Based on that experience, it's not a matter of one or two phone calls or emails but rather a time-consuming, highly iterative, extensive and expensive process.

At 300, one sees paragraph 16, Scott+Scott spent a number of years trying to build a book of individual claimants in the *FX* case, and they were behind the *O'Higgins* element of that. Paragraph 17, he refers to Mr Maton's evidence and the efforts he had made, which I've just summarised. Then at 18 he explains how the firm has been

actively involved in bookbuilding claims against Visa and Mastercard in relation to multilateral interchange fees.

He says halfway down that paragraph:

"*Typically, there will be a preliminary outreach, followed by a first in-person meeting or call on which the potential claim is discussed at a relatively high level. Should a potential claimant be interested based on this initial contact, the firm generally provides additional materials in relation to the claim and also sends the potential client requests for data relevant to their estimate of their loss. Once received, any such data needs to be analysed to produce preliminary loss estimates ... followed by multiple rounds of due diligence ... before a decision is reached as to whether there is even an interest in proceeding with a claim. This interest will be based, in large part, on whether the estimated quantum is sufficiently high for their involvement to be worthwhile*."

That process then has to be reiterated across the cohort of interested persons in order to derive a realistic estimate of the proposed value of the claim, which is something you can go to the funder with.

THE CHAIR: Just reading on; so when he says in 14, "... *the firm has never been involved in building a book of clients specifically for the purpose of bringing opt-in collective proceedings* ...", and then he does seem to go on and say that, as you say, they were acting for O'Higgins and they did start that process at least. Is that what he's saying?

MR BEAL: *O'Higgins* was an opt-out application.

THE CHAIR: Well, because they decided to change.

MR BEAL: Yes.

THE CHAIR: But the beginning of 17 suggests that -- he says that they've started the exercise as an opt-in. I don't know. Maybe they just wanted to know who was

interested. I'm just struggling a little bit to reconcile the beginning of 17 with the beginning of 14. I'm not inviting you to supplement it with your own evidence, Mr Beal, which is going to --

MR BEAL: Our instructions -- implicitly second-hand, rather than directly talking to Mr Hain-Cole -- are that they were trying to essentially build together a book of individual standalone claimants, much like the *Allianz* proceedings --

THE CHAIR: Right. Rather than collective proceedings.

MR BEAL: -- rather than specifically choosing to go down the opt-in route.

THE CHAIR: Yes. That's helpful.

MR BEAL: The advantage of the build-up of old-style GLOs, or GLO-light approach, is you've got direct contact with the client and you can enter into arrangements with them. The funding will be dealt with differently. Involving a funder for an opt-in, you need to tell the funder what the return is likely to be. That's the problem. So you don't get to give those figures to the funder unless you've done this preliminary analysis, this due diligence, however you like to characterise it, where you need to work out: who's going to be interested? What's the uptake going to be? What's the quantum likely to be; and then you can make an educated estimate as to the likely levels of return from the opt-in claim. Whereas, of course, the advantage of an opt-out claim from the funder's perspective is you assume that all of the class will be in subject to anyone telling you they want to opt out such as Connells, who were the founders of the Rightmove platform. Subject to that, you are able to gain an idea using estimates and aggregate figures of the overall likely quantum of the class, as we've seen from Deakin 1. But without knowing who is likely to actively sign up, you don't get that bottom line figure.

Then at paragraph 19, due diligence is then needed, and negotiation of the terms. You need to negotiate DBAs -- damages-based agreements -- because the funder will be

funding elements of the claim, but the individual claimants are likely to have to enter into DBAs with the solicitor for the solicitors' fees, because the funder ordinarily wouldn't want to fund those if a DBA option is available.

Paragraph 20, then, fairly recognises that even if opt-in proceedings may allow for a degree of standardisation in that process, a detailed level of engagement is still required. The client still needs to understand the overall terms. It has to read the DBA. It has to, if it wishes to do so, be dealt with if it seeks to negotiate a bespoke arrangement. You simply can't say, "Well, here's a one size fits all; take it or leave it". You have to engage with that individual ethically as much as anything else, because you need to get that person on board so that they've understood what they're in for.

Paragraph 22 then looks at the experience of opt-in claims in other CPO cases. It looks at *Trucks*, *Ad Tech*, and so on. The point about *Trucks* was that the RHA already had a large number of these members, and I'll come on to show you the figures. At the time, I think, of the application for certification there were about 3,500 who had signed up, and then that application was stayed behind *Merricks*, and so that allowed a further period of time to evolve; and the take-up numbers were then much improved, because the RHA was able to carry on with its book-building activities.

Ad Tech; the bottom line point on *Ad Tech* is there were two distinct cohorts. You had the publishers, and then you had the other group who were -- it will come back to me in a moment what the other group were called. (Pause)

Publisher partners. Thank you. Only one of those signed up, and they then withdrew their claim. I'll make that good in a moment.

What we then see at paragraph 23; 23(a) looks at *CICC*, which I don't need to dwell on. This Tribunal is very familiar with that. 23(b) looks at *Trucks*. 23(c) looks at *Ad Tech*. There -- indeed, I was coming to it -- there's a reference to: based on public information, only one publisher partner opted in, but they subsequently withdrew as

cited in the *Rodger* case by Mrs Justice Bacon.

24, then, explores the forms of documents that have been seemingly required in other opt-in cases, and those are all documents that you need to walk through with the different opt-in claimants.

Paragraph 25 sets out the steps that are needed, and what Mr Hain-Cole says is: looking at the way that these particular steps have played out, then that reflects his concerns about the level of involvement that is needed, and he says that -- the fifth line up from the bottom of 25:

"... *there are genuine commercial considerations that must be worked through and potentially novel (for class members) contractual documents to be reviewed and understood before an opt-in class member can reasonably be in a position to sign up to a claim. Again, no such considerations or arrangements would be necessary for* [an opt-out]".

Just pausing there: there seems to be a sort of general sense from the Rightmove skeleton that all we need to do is send out 13,500 emails on a Friday afternoon, and within a matter of weeks, we will be able to compile a list of the opt-in claimants. If that is what they are suggesting, then I'm afraid that's wholly unrealistic and not borne out of any of the practical experience, either before this Tribunal or, as my instructing solicitors have seen it, nor indeed is it consistent with the evidence given in those other cases from the other solicitors, which was always accepted to be cogent and reliable about the very significant practical steps that need to be taken to opt in a claimant class, and which reflect a need to have proper engagement with them.

Paragraph 33(a) deals with Connells Group and their desire to opt out, and it's pointed out that they were a founding member of the Rightmove platform, and therefore not necessarily indicative of an absence of appetite from the class as a whole. Then paragraph 35 and onwards looks at the likelihood of the claim proceeding if it were to

be certified only on an opt-in basis.

We recognise, candidly, that it's not good enough for a funder to simply say, "Well, I won't fund it if it's certified on an opt-in basis", and for that to be determinative, because of course that would be highly self-serving. However, what we do have here is a very experienced funder in the form of Mr Garrard, who has committed to writing what I would respectfully suggest is a very considered piece of evidence. He doesn't simply do a knee-jerk reaction and say, if you certify on an opt-in basis only, that's it. I'm refusing to fund under any circumstances. What he's saying is, "I would need to understand the parameters and have a much better suite of information and data before me before I could take a decision". In relation to the hybrid proposal, I think it's fair to say he is more concrete in saying it's improbable that funding would be given for the hybrid portion.

Turning back to the analysis at page 308 and onwards, Mr Hain-Cole makes a series of points from paragraphs 35 through to 40. I'm conscious that you have read these, so perhaps I can just give you the edited highlights.

Firstly, 35 notes that the funding to date has been provided only on an opt-out basis, which is true. Paragraph 36 then confirms that the funding and adverse costs package would therefore need to be revisited. Paragraph 37 states that the funder would require an analysis of the likely uptake before it would consider a funding proposal, and that solicitors and/or some form of agent, such as Epiq, would have to bear the costs of that, and they would then need new funding terms between the funder and the PCR.

Paragraph 39, page 310 makes the point I've just made, which is that it's not simply a question of having a contact list. What you need to do is work out what is the likely response to that, and how meaningful is that response going to be. Paragraph 40 notes that we're dealing with 13,000 PCMs -- that's now 13,400 -- of whom we've seen

that the lion's share, if not almost all of them, are SMEs. It's likely that those SMEs have little or no experience of litigation.

Paragraph 41 deals with a reticence to stick one's head above the parapet in an action against an important commercial counterparty. You've got my submission on that already. That's his evidence. Then 42 gives a figure and suggests that an attempted bookbuild, so as to justify a decision on funding, would probably require at least 12 months. Of course, there's no guarantee of that producing a sufficient volume of estimated take-up for there to be a viable commercial claim. So that 12-month initial analysis period is necessarily at risk from both the solicitors' perspective and anyone who was assisting the solicitors with that exercise, because the funder isn't necessarily committed to it until the funder sees the likely claim value.

Paragraph 45 deals with a risk; assuming you get through to secure funding, there's then a risk of a divide and rule strategy from the Defendants whereby, for example, they settle out the most valuable claims and thereby immediately reduce the value of the claim to the funder, which may well impact on its viability. Paragraph 46 refers to the requirement to refile an opt-in claim, which obviously produces an impact on limitation. So Rightmove -- if, for example, we had to refile this application on a purely opt-in basis, then there would have been a two-year period or so -- a two-and-a-half-year period -- whereby the claim value over that time has been eroded through the impact of limitation on a rolling basis. 47 then makes the point that obviously the costs incurred to date will have been lost.

Next, in Mr Garrard's witness statement -- that's behind tab 8 -- can we start, please, at page 340. I assume again that the Tribunal has read this, so I will simply give you the headline points. Paragraph 37 at page 340 notes that a significant number of variables need to be considered before reaching a view on whether an opt-in claim or hybrid claim would be viable. As it happens, paragraph 38 says Innsworth has never

funded an opt-in claim, and at paragraph 39, he confirms that if certification were to proceed on an opt-in basis only, Innsworth would need to consider whether to continue to fund this litigation.

At 41, we don't see the knee-jerk, self-serving, "Well, I won't fund this at all". What he says is: "*It's likely to be very challenging to convince me and Innsworth that a wholly opt-in version of the claims would be commercially viable*. But at this stage, I'm simply not in a position to determine whether this is the case." He notes at paragraph 42 what he describes as a quite obvious point -- and it being obvious, I've already made it -- that the impact of switching to an opt-in is that you substantially decrease the claim quantum but increase the claim budget. That's the cost per pound of recovery point that I made right at the start.

Then, at paragraph 44, the firms might be at risk that whilst the funder is requiring solicitors and/or those who help them to establish a sufficient interest, that would have to be at the lawyers' and/or the book-builder's cost. Paragraph 45 states that there would be the risk of Rightmove seeking to settle early with the most valuable players, which would likely change the viability of any claim, and paragraph 46 confirms that he would require a minimum level of commitment before agreeing to fund. 47 notes that if it was a requirement for each opt-in claimant to prove their own individual loss -- bearing in mind for the compound interest claim that's exactly what the Defendants are saying would have to be done -- then that would make it even more expensive. As we know from recent *Interchange* CMCs, opt-in claimants in that case are being required to provide their own schedule of loss on an individualised basis.

Paragraph 48 to 49 then says that even once you've got through this very complicated process of working out, does this claim still have legs, there's then all of the other bits you have to do once the funding proposal has been approved, such as sorting out the relevant documentation, terms for funding, ATE cover and so on, all of which has to

be renegotiated because it's being dealt with on an opt-in rather than an opt-out basis. That's the evidence. I would note, just on that issue of each individual opt-in claimant needing to produce their own individualised assessment of loss, there's something of a tension in my learned friends' skeleton. At paragraph 23 of their skeleton, when dealing with practicability, they suggest that there's no need to have the individualised approach, if I can put it that way. Then at paragraph 68, they make it very clear that Rightmove is likely to try and argue that individualised approach is necessary for the determination of loss, because you need to show compound interest. You don't get an individualised figure for compound interest without breaking down the individual claim for the individual claimant.

Against this evidence, there has been nothing filed from Rightmove at all. They could have, but have chosen not to adduce countervailing evidence from a solicitor -- one of the solicitors in the two City firms that they've instructed -- but none has been produced at all. Rightmove also forgets that the entire statutory regime came into existence because of a concern of a lack of effective enforcement in competition claims that was typified, as I know only too well and to my detriment, by the unsuccessful "claim" brought by Which? in the Football Shirts case, where we tried very hard to build a book of people who had bought a Manchester United shirt between certain years, tried all sorts of extraordinary ways of getting people to sign up, including attending football grounds and publications in football magazines and so on, and did very badly at it. That was one of the reasons why there was then a groundswell of support for regime change in 2015.

The case law, as I've said, has indicated on several occasions that there's a common sense proposition that if somebody is in a must-have supplier relationship, and that supplier's ongoing services is critical to their needs, there may be a reluctance to get involved, and that reluctance becomes stronger, the lower the value of the claim. So

when one's looking at the overwhelming majority of SMEs who have claims of below, say, £50,000, one sees, just numerically, that they are going to require a great deal of encouragement to join and potentially sign up for something that may require detailed resource disclosure, witness evidence if need be, and so on. As I've made the submission to Mr Justice Meade, I make it to you: it's very different writing to somebody saying, "Here's a pot of money if you want to sign up", from saying, "Here's some litigation, can we have you come in? This is what you'll need to do. Here's some complex documentation you now need to sign. By the way, we may have to ask you for six years' worth of data and various other commercial documents. And yes, it is against your key supplier without whom you could not conduct your business".

So we say it's inevitable that there will be some large claimants within our class. What's, with respect, surprising is that actually looking at some of the figures in Mr Anderson's witness statement, there aren't many that he identifies that would meet the *CICC* threshold of having more than £100 million worth of revenue per annum to join that particular opt-in class. But nonetheless, there are clearly large claimants who, in principle, could no doubt bring proceedings off their own bat, if they wish to do so, albeit that their claim values are not so high that even that would be terribly easy.

But that's been the case for each of the five or six different cases that I took you through, and it's to be expected. That does not imply that large claimants are the nucleus of this claim; they clearly aren't.

It's also worth noting, of course, that if large claimants really do take against the merits of the claim, as Rightmove seeks to imply they might wish to do so, they can, of course, opt out. I mean, we know that Connells has done so, albeit for the reasons that we say are different from that which would apply to a generic large claimant entity within the opt-out group.

Now, the fallacy, with respect, is to treat here a claim value as somehow determinative

of the practicability, as opposed to the very large number of claimants. It's no good saying that a very small number of claimants have a very large size of the pot in due course on an individual basis. What one has to look at is the class as a whole, because the focus of both the statutory test and even the post-*Evans* analysis is always about what is best for the class as a whole, and here, the nucleus of the class. Indeed, the overwhelming majority of the class is SMEs. That is, therefore, not an *Evans* case.

I said that I would take you to the evidence in relation to *RHA*. That can be seen in the *RHA/Trucks* CAT decision. That's bundle of authorities, please, bundle 2, tab 26, page 139. (Pause)

Bundle of authorities 2, tab 26, page 139.

THE CHAIR: Yes.

MR BEAL: We see there at paragraph 161:

"... *it is relevant to consider the number and value of the individual claims. Mr Burnett states as of 29 March 2021, over 17,500 PCMs had signed up or registered an interest in the RHA's proposed collective proceedings. He confidently expects that* [number] *to increase if a CPO is granted* ..."

So, as I said, there had been the stay of the application pending the *Merricks* decision. One then sees, please, at page 160, at paragraphs 218 to 220, some observations about the essential reasons why opt-in proceedings were found to be practicable. Could you please read paragraphs 218 to 220. (Pause)

These are very different facts, we say, from the facts here. That was the equivalent conclusion reached by Mr Justice Roth in the *Stephan* case on certification; for your note, that's bundle of authorities 2 at tab 43. I think it's probably page 1134. I've got a stray zero in my reference, but I'm hoping that's the right one. If I'm wrong, I'll correct it in a moment.

Can I deal responsively with 12 key themes that emerged from my learned friends' skeleton? Then probably, I won't have time to move directly on to hybrid, but my hybrid submissions largely mirror this, but say: that's even worse.

THE CHAIR: Yes. Just at the risk of messing up your time even more, is it right that we should be -- I mean, I know this is the way the Proposed Defendant puts it, but is it right that we should be starting by thinking: is this an opt-in or opt-out case? Then, if we reach a conclusion on that, then think about hybrid. It's actually one composite review, isn't it? Doesn't one start by looking at this, and following the instructions in *Evans* and elsewhere, and looking at the merits, looking at the practicability and then thinking about the interests of the class and different bits of the class that one can identify -- doesn't one have to do that right at the start and think about the whole thing and then think about what the implications are for any variant of opt-in or opt-out, rather than structuring it as a sort of a sequential decision?

MR BEAL: I think if there were an identifiable subclass or cohort of claimants that are clearly objectively separate from another cohort on what I would describe as qualitative grounds, the analysis might be different. I think you're absolutely right, sir, for this reason; as the distribution curve has shown in Deakin 2, there isn't a bright-line distinction between those paying £167,000 a year and those paying £166,000 a year in terms of their Rightmove fees. There's no way of drawing a distinction between them. One may have 16 branches up north of the line, that cut-off. One may have 22 branches south of the line. But the reality is that there's no way, ex ante, of determining who is going to be in a particular group. There's nothing to choose between them. It's just that one of them spent more on Rightmove than the other. That's what it boils down to.

Because that distinction is essentially arbitrary, in our respectful submission, one needs to consider the position for the class as a whole. The class as a whole analysis

goes along very much the lines I've been taking the Tribunal to with my submissions this morning.

I think where that leads to is a conclusion that if you don't win on the opt-in class as a whole proposition, then splitting off the top 20 or the top 50 or however many it may be -- I think in *Rodger*, it was the top 25 -- doesn't serve much of a useful purpose, because all you're doing is diminishing the claim value, which may impact on the commerciality of the funding, and increasing costs. Given that it's inherent in any distribution which involves a mixture of predominantly -- indeed, almost exclusively small-sized businesses with relatively small-value claims but then with a number of high-value businesses with high-value claims -- given that that's going to be the profile of pretty much any sector of the economy, doing what is suggested in the alternative case by Rightmove is simply a recipe for extra costs for no additional benefit. Therefore, we say that the proper approach is to look at it from an opt-in/opt-out perspective to begin with. Then that conclusion is likely to drive the rejection of the hybrid proposal for the reasons I've just outlined.

THE CHAIR: Yes, I suppose, I mean, certainly, just to be clear, I wasn't making any observations about the strength or otherwise of the point you're making. I understand that's your case. But I suppose the other way of doing it is to say, "This is the situation we've got. This is the distribution. This is the way one can look at or not look at different claimant groups". Then to say, "Well, faced with that, we have a number of options, three options". Obviously, one is opt-out, one is entirely opt-in, and one is some form of hybrid, and what is the best solution for the balancing exercise required by *Evans*, looking at that, rather than asking the questions in a series and saying: should it be opt-out? Then if it is opt-out, should we then try and slice a bit off?

I mean, it feels a bit clumsy and a bit uncomfortable to be approaching it in two steps; that's the point I'm making.

MR BEAL: Well --

THE CHAIR: I mean, I appreciate that's not the way you've put it, because obviously, that's not your case.

MR BEAL: The case law -- I mean, Rightmove, I think, is possibly -- I can't remember whether in *Brook*, there was an alternative fallback position that was then ditched at the hearing – somebody would have to correct me --

THE CHAIR: I think *Ennis* was possibly --

MR BEAL: *Ennis* --

THE CHAIR: *Ennis* was -- I think there was a fallback in *Ennis*, but I think that Apple declined to put forward a break point.

MR BEAL: That's right. Ms Demetriou wouldn't come up with a number, so --

THE CHAIR: Yes.

MR BEAL: -- that sort of rather knocked that on the head.

Rightmove has gone down that route. Pretty much everyone else has chosen one or the other.

THE CHAIR: Yes. So let's see what they have to say about that when we get to that. Thank you.

MR BEAL: I've given you the wrong reference for *Stephan*. It was page 1340, not whatever I said.

THE CHAIR: 1340. 1-3-4-0.

MR BEAL: "0" was in there; correct.

THE CHAIR: Yes.

MR BEAL: 1340.

THE CHAIR: Thank you.

MR BEAL: So 12 points, if I may, responsively, I'm not going to necessarily point out the specific paragraphs. These are just general points in terms of the skeleton.

They're all made at some point at paragraphs 10 to 41 of my learned friends' skeleton. So one of the repeated refrains is that if we're right in what we say, no case could ever be certified on an opt-in basis. That isn't, I'm afraid, either what we say or what we say is the import of us saying that the multifactorial evaluation required in this case leads to a conclusion, we say, that opt-out is the right and just outcome for the class as a whole. That sort of *in terrorem* argument clearly didn't win the day in the other six cases where opt-in certification has been sought. It, with respect, would simply lead to a presumption in favour of opt-in proceedings, which the statutory regime avowedly does not endorse. True it is, if it's practicable for claims to be brought on an opt-in basis, there is a presumption that that will therefore be followed. But you can't assume that which needs to be proved, which is that opt-in is indeed the practicable way forward.

So, unsurprisingly, there is every chance that a PCR does not elect, for example, for opt-in proceedings, if there's no practical way of assisting a large class of SMEs with relatively low value claims that could not be brought by themselves. So the fact that PCRs and funders are not bringing opt-in proceedings, in a sense, is reflective of the fact that there are very severe difficulties in practice in bringing such claims where there's a large class of SMEs with relatively low value claims.

Now, the second criticism we voice of Rightmove's approach is that they've tried various tactics to improve the average value of the claim. But we say that table 5 in Ms Deakin's second report speaks for itself. It's worth having a quick look at that. I can't mention any of the figures. Core bundle 10, page 419. Interestingly, my learned friend's skeleton, at paragraph 12, they have in fact given a percentage of 77 per cent for something. That something is the second row down, fourth column in table 5. The difference between the figure that is given there and 77 per cent is the figure that is given in the first row, fourth column for the earlier banding. So when referring to the

lower figure, what Rightmove has essentially done is pulled a statistical stunt of cutting out the earlier bandwidth of 0 to x, and the correlative percentage for that in order to try and reduce the figure to the one that is openly mentioned in their skeleton as being 77 per cent.

THE CHAIR: Which paragraph of the skeleton is it? Paragraph 12.

MR BEAL: They do say in paragraph 12 that they're covering that band. But of course, it gives a misleading impression of the size of the figure -- I mean it's just knocked the other figure off the overall cumulative assessment.

THE CHAIR: So you're saying Ms Deakin's done it cumulatively.

MR BEAL: Yes.

THE CHAIR: And they're making a selection which is not cumulative?

MR BEAL: Exactly.

THE CHAIR: Yes.

MR BEAL: Yes, not comparing apples with apples. The class size is not small. You have evidence, as opposed to an assertion, that it's going to be very difficult, time-consuming and costly to conduct a bookbuilding exercise. There is no counter-evidence to that. There is simply bare assertion in the form of submission from Rightmove, who don't demonstrably have any experience of building a book in collective proceedings.

The next point is that it's true that the "Say No To Rightmove campaign" -- for your note, this is supplemental bundle 2, tab 59, page 1217 -- identified 1,850 agents who had signed up to that campaign. But, of course, that's 13.8% of the class. That level of engagement was, in fact, dated, as you'll see from the document, they've gone back on the Wayback Machine to produce a website extract that's historically been cached. The date is April 2020, just at the start of lockdown, when the outcry was that Rightmove were continuing to charge fees at high levels when estate agents were in

lockdown and couldn't transact any business. So that was arguably driving the particular interest. But it's still only 13.8% of the class. At various stages -- this is my fourth point -- Rightmove seeks to suggest that somehow we should have engaged in a build-the-book exercise before deciding whether to go for opt-in or opt-out. That ignores the obvious point we make that when you've identified that the class is many thousands strong and doesn't involve sophisticated entities, and involves small and medium sized entities that predominantly have few employees, that you are realising that's going to be a very difficult process. Of course, all the meantime, the limitation clock is ticking. So it's different if, for example, the *Allianz* proceedings, if you've got a series of hedge funds who you know you can get in touch with and say, "There's an FX claim here, what do you think?" There's an imperative for those companies. I mean, *FX* was also bedevilled by the fact that there were various regulatory decisions that were outstanding. But obviously that's a very different circumstance from the one we're looking at here.

My fifth point is that Rightmove clearly has no practical experience of building a book, because otherwise they simply wouldn't have been able to suggest in terms -- see paragraphs 12 and 15 of their skeleton -- that building a book will not present any practical or logistical issues and need not be complex, costly or time consuming.

The sixth point is they suggested a top-down approach to managing the opt-in claims. I'm afraid we just don't understand how that could work. We need to have a bottom-up approach for DBAs explaining the arrangements, explaining the funding, explaining the claim. You can't simply send an email out and say, "Right, that's it; job's done".

The seventh point is that Mr Hain-Cole and his firm have been criticised as not having any experience of opt-in proceedings themselves. But that, in a sense, makes the point for us. These are individuals from a firm that have very extensive experience in the group litigation and collective proceedings field, and yet they haven't successfully

brought opt-in proceedings.

The evidence from Mr Mansfield from the same firm was considered reliable in the *Ennis* certification case.

The remaining points from Rightmove are on funding. All involve putting the funding cart before the horse. There's an assumption by Rightmove that we will get funding because it's a certifiable case. I'm afraid that wholly ignores the fact that we can't apply for opt-in certification without doing all of the steps in order to secure a proposal for funding from a funder. We don't get there without the very detailed build-the-book process.

Next, Rightmove suggests at paragraph 24(c) that the funder will not require a well-founded and reliable estimate of the value of the claim. That simply, I'm afraid, betrays their ignorance of the funding market and how it works. Mr Garrard's evidence is measured and cautiously expressed, and it leaves no doubt that funding of any opt-in claim is going to be subject to very real difficulties.

There's a threat of leveraging against the most profitable company on the FTSE All Share index, extracting certain banks and financial institutions, and Rightmove is capable of instructing two expensive City law firms to defend it, with costs to date which we understand are approaching many millions of pounds, and that's before the claim has even been certified. This isn't a defendant that is going to be cowed by the opposition.

On leveraging. The next point is: leveraging is a bad thing if it's a weak claim. Where you have strong claims, it's not leveraging; it's simply holding a defendant to account for an anti-trust infringement. That's the whole purpose of effective competition law enforcement, and it's the reason why Parliament changed the regime in 2015.

Finally, Rightmove tries to shoot down concerns that we have about inertia from class members and fear of jeopardising their relationship. But those are factors which have

been taken into account by successive Tribunals. So Rightmove must necessarily have been suggesting that each of the learned Tribunal chairs that dealt with those applications was wrong. And there's simply been no actual basis articulated for distinguishing those claims and their precedential value.

I'm sorry, I've slightly overshot my time, but I have brought us to issue 2.

THE CHAIR: That's fine. Yes. Good. Okay. Well, we'll resume again at 2.00 pm. Thank you.

(1.05 pm)

(The short adjournment)

(1.59 pm)

The hybrid proposal

MR BEAL: May I please turn to the hybrid suggestion. So this is issue 2. I'm going to deal firstly, if I may, with two legal precedents which touch specifically on the hybrid issue. The first is the *McLaren* decision of this Tribunal. It's at bundle of authorities 1, tab 22. Could we look please at page 1266, paragraph 156. The Tribunal looks at the question of bifurcating opt-in, and whether or not it was possible. Essentially, Mr Ford, for the PCR in that case, was expressing doubt as to whether or not a hybrid solution was even possible. But the Tribunal nonetheless found that any potential for abuse, for example, by manipulation of a class whose claims are otherwise suitable to be certified on an opt-in basis could readily be addressed through the Tribunal's more general powers. So that was dealing with the sort of threshold approach of whether a hybrid approach was permissible, but it proceeded on the basis it was.

Then at paragraph 158, over the page, one sees that the number of large business purchasers was estimated to be 45 at the aggregated -- at the suggested threshold of the purchase of 20,000 vehicles, in that case. Page 1268, there's then a discussion

as to whether or not the hybrid approach should be followed.

Please would the Tribunal read paragraph 161 through to 165. (Pause)

We say all of those factors apply with equal force in the present case then.

Then the second precedent, please, is the *Stasi* case, which Mr Davies will fondly recall, Microsoft cloud computing, et cetera. Allegation of abuse of dominance. It's bundle of authorities 3, tab 52, and it starts at page 512. But if we could turn initially, please, to page 520.

THE CHAIR: Yes.

MR BEAL: We see -- I'm making this point in passing instead of having to go back to it when I come on to deal with the exclusionary abuse issue. In *Stasi*, the class representative's claim form had pleaded what were referred to as certain "*Quality Abuses*" -- this is paragraph 20 -- which the PCR relied on as evidence of Microsoft's anticompetitive intent:

" ... *but as to which she will not seek to 'quantify the impact' or bring any claim. The Quality Abuses are said to involve Microsoft* ..."

It then gives three examples of the quality abuses that were pleaded in that case.

So in that case it was certified, even though quality abuses were part and parcel of the pleaded case against the defendant.

Turning to the hybrid proposal issue, page 548, has a discussion of whether or not proceedings should be certified as either opt-out or opt-in. One sees at 113 to 114 the recital of the Supreme Court *Evans* decision and the need to have a reiteration of the overall test, which is that you need to find an outcome that's fair and proportionate as between the parties which deals with the proceedings justly and at proportionate cost.

We then see at 115 a series of balancing features. Please would the Tribunal read 115 through to 117. (Pause)

THE CHAIR: Yes.

MR BEAL: On the facts of this case, one sees at page 551, paragraph 125, the Tribunal considered that it wasn't appropriate to call it weak. It had surpassed comfortably the threshold of having a real prospect of success, but it couldn't be characterised as being obviously strong, either. It was appropriate to describe it as a viable claim with a good prospect of success.

At 127, Microsoft did not argue that it was practicable for the claim, comprising all members of the proposed class, to proceed on an opt-in basis, but nonetheless it should be broken into a subgroup of the proposed class that could be hived off, and the remaining claims would then be certified on an opt-out basis. So it's describing essentially a hybrid proposal.

But the implication was that it would be impracticable for those claims to be brought on an opt-in basis. So, for anyone who was south of the threshold, it was identified, it was accepted, necessarily, that they couldn't practically bring these proceedings on an opt-in basis.

Paragraph 129, at page 552, applies the guidance that's been given from *Evans* and says:

"... *we would start by agreeing with the PCR's submission that the limited data available in this case makes it difficult to have confidence that a reliable distinction can be drawn between claimant sub-groups having different profiles*."

But putting that to one side, at 131, the Tribunal then said it wasn't comfortable necessarily drawing distinctions between different cohorts based on the data that was available, because of the lack of class data. But then at 133, on the next page, there's essentially a reiteration of the argument, or rather an advanced iteration of the argument, that is essentially landed upon by Rightmove in this case, which is then dealt with by the Tribunal. Please could you read paragraph 133 through to 139.

THE CHAIR: You want us to read 139 as well?

MR BEAL: Yes, please. (Pause)

At 140, then, the Tribunal noted that the issue of leveraging was a two-sided equation, because whilst there was a risk on the defendants' side, nonetheless also the advantage of collective proceedings being funded was that access to funding was thereby made available for the opt-out aspect of the hybrid solution or hybrid proposal. Of course, the Tribunal then went on to look at 141 as to the risk that might arise if a hybrid proposal were adopted with the funding for the opt-out portion of the claim also going by the by, which would then mean that the funding would have to be renegotiated and the entire case might collapse, and that would produce its own risk of injustice. That's what's being dealt with at 1.

The only other point to note is that in *Stephan v Amazon*, this Tribunal recently heard an application for a recertification on a hybrid basis. It was rejected by Mr Justice Roth, for reasons to be delivered in due course.

Turning then to practicability issues. I'm not going to repeat the submissions about the strength of the claim, because they apply *mutatis mutandis* to this hybrid proposal. The practicability issue is somewhat different, but we start with the obvious proposition that here what is being proposed is effectively an annual split of £167,000 per annum of spend with Rightmove, which is said to connote a sufficient degree of sophistication and overall awareness of how to bring a claim, that it can be brought on an opt-in basis, whereas an entity with a Rightmove spend of £166,000 per year is not and cannot practically bring proceedings.

We respectfully suggest that that split is arbitrary. It's based solely on the spend with Rightmove, as a proxy for claim value, and we've seen from the *Stasi* case and from *McLaren* that that's a poor proxy for working out any practicability issues that will land on a given claimant as a litigant.

The *Ad Tech* split, as I've indicated, was in fact based on qualitative criteria, and it was the qualitative difference that was alighted upon in that case, but we've seen that that didn't work. In the most recent *Rodger v Google* decertification case, Mrs Justice Bacon at paragraph 41 made clear that hybrid proceedings raised complex questions which required careful management. For your note, that's bundle of authorities 3, tab 53, page 578. Mrs Justice Bacon noted the *CICC* issues and the *Ad Tech* issue, and said, essentially, this shows that care has to be exercised when adopting this sort of approach.

Here, Rightmove hasn't proposed any division between claimants based on objectively verifiable qualitative criteria. They're not suggesting corporate estate agents are different from other estate agents, because the other estate agents might have a spend that was north of their threshold, and a corporate estate agent might have an average spend that was below it. Nor have they suggested any distinction between NHDs and rental operators, which isn't a term that we understand to be widely used in the industry, but it is an internal term that is used within Rightmove to identify a particular type of housing development accommodation supply, namely in the rental sector rather than as a new house developer. Again, those sorts of qualitative differences between cohorts in the class are not the ones that are alighted upon by Rightmove in this case.

Could I then please invite you to have a quick look back at Ms Deakin's second report. There is a newsflash on this, which is that table 5 apparently can be referred to in its entirety; page 419 of the core bundle. I'm also informed by Mr Ward that he's content for me to record that the number of claimants in this hybrid cohort would be in a range in and around 200, and that the claim value attributed to that cohort on the basis of the up-to-date figures, rather than the figures that are cited in Deakin 2, is in a range that is in and around one-third of the claim value. Ms Deakin gives precise figures that

are different from that, but I don't think anything is going to turn on a very small amount of difference in the underlying percentage, even though it's in Rightmove's favour.

Turning then to Deakin 2, at paragraph 9. Ms Deakin there identifies that various customers have been treated in various different ways. She identifies that two particular large franchises have either been treated as a single customer, or have had the separate franchisees recorded. So what this goes to is eligibility issues for being in the class and working out who is on the right side of the line for a volume threshold, which is obviously an issue that has bedevilled the *CICC* proceedings, as the Tribunal well knows.

We see at paragraph 10, there's a reference to customer data being adjusted and a certain group being replaced, and that led to a change in the proposed class. We have seen from the letter on Friday afternoon that further analysis of Rightmove's own data, which of course the class won't have, has led to reallocation of various class members in a way which would make a difference. So if you had a cut-off of Rightmove spend, there would be a risk, for example, of Rightmove's own data being different from the claimant's data; and even on Rightmove's data, we can see that data analysis over time has shown a shifting cohort, both in terms of composition and in terms of numbers. So the number that -- in and around 200 -- I think it's fair to say I'm not going to breach any confidentiality if I say that that's higher with the Friday evening letter than it was previously. I don't think that gives anything away.

We then see in Deakin 2 at paragraph 14 that we have in table 1 a useful analysis of mean and median spend, those inside and outside the cohort. But of course that simply reflects the fact that some of them are bigger than others, and therefore the bigger ones are likely to spend more. It doesn't tell you anything meaningful. When one looks at the cumulative distribution chart at page 416, which is more meaningful, there is no evident break in that distribution curve. It tells you nothing more than -- and

again, I don't think this is controversial -- a small number of claimants with large volumes of commerce with Rightmove are likely to have higher value claims. But that's exactly what the Tribunal has recognised is likely to be the case in every case.

We see in contrast at paragraph 16, top of page 417, a very high percentage/number of PCMs are likely to have less than 50 employees and total spend with Rightmove of less than £1 million. Companies with less than 50 employees meet one of the thresholds to be considered a small company. This is a case where the bulk of the claim sits with not a tail, but the dog itself, and the dog is a dog that is an SME dog, if I can put it that way.

There is then an issue about the inclusion within Rightmove's analysis of the estimate of damages attributable to the Connells group, which of course has indicated that it's going to opt out; but Ms Deakin, I think, had included the figures from that in her estimate.

Finally, we have paragraph 21 at page 419, and table 5, which I can now refer to, which shows that 82 per cent, cumulatively, of PCMs will have claims, allocated damages, on an estimated basis that are less than £50,000.

I don't think I need to go specifically to the *CICC* experience in the eligibility opt-in judgment, because it's very familiar to this Tribunal. Suffice to say that in that case, there had been a concerted attempt to build a book. That then led to an approach which was predicated on a cut-off threshold of more than 100 million pounds in revenue per year, and the threshold criterion has caused satellite litigation in the form of a challenge to eligibility and then a challenge to how one defines being on the right side of that line. So it's perhaps not a happy example of this being done successfully before, but that's ongoing litigation.

THE CHAIR: Just looking at table 5 for a minute. I mean, it would be a difficult exercise, I expect, but one that perhaps someone might care to embark on at least in

a general sense, to try and work out at what stage on the left-hand side those bands of damages, one might think that an ordinary SME might be interested in becoming an opt-in member, if you see what I mean. In other words, there is presumably a number at which inertia is overcome, and it may not be actually necessarily listed on the left-hand side.

But I think you're saying that's not the question we're engaged with here. That's your point about: that's going to be the case in any damages claim where the distribution goes above that sort of number, and if you did that, then these would all be hybrid claims, because at some stage you'd have to split the class once you got to what somebody worked out was a notionally practicable number to overcome inertia or another, which might be different in every case. But broadly speaking, it's not going to be £25,000, is it? And at some stage, it presumably is going to be fairly more obvious that that might overcome that.

But, I mean, I think you're saying that that's not really the point, because you need to be looking for some reason why you would split the class at a particular point. Is that the submission?

MR BEAL: It has to be based on an objective, non-discriminatory, non-arbitrary distinction between the cohorts.

THE CHAIR: On a qualitative basis.

MR BEAL: Well, primarily of a qualitative basis, because otherwise you're simply saying, well, some people have got big claims and some people have got small claims, and that's true for everyone. It was true in *Ennis*. It was true in *Rodger*. It's true in *Stasi*. That isn't tangibly a way of sorting the wheat from the chaff.

My second point is that these spends, the witness evidence is that a very high proportion of an estate agent's business costs is attributable to Rightmove. I think it's the second biggest cost after labour, so it's a chunky cost. It's not to say that they're

not aware that it's a big cost. The problem is that because it's a big cost, these figures don't show what the revenue is. What's striking, if you look at Mr Anderson's evidence, is that in a sense, you know, without singling out any names, some pretty household estate agents' names have annual revenues of £11 million, or £147 million for a very well-known one. I think it's only Savills that are up in the £2 billion-plus annual revenue territory.

When you look at Mr Anderson's evidence, and he goes through -- I'm assuming that those figures are all available from financial information that's in the public domain. I hope so. But when you look at the figures that he's providing, one's in a position whereby only a handful would actually meet the *CICC* threshold based on revenue.

So using Rightmove's spend, my point is: Rightmove's spend will be a high business cost. Therefore it's likely to be a high proportion of the revenue that is attributable to the estate agency, and therefore the actual underlying revenue that a particular business may have may be actually surprisingly low. Of course, if they've got relatively little headroom for additional expenses, that is likely to dissuade them from becoming engaged in time, and if necessary for cost purposes, engaging with litigation on an opt-in basis.

So it's always a question of time and money for small businesses. If these are small businesses, they don't have the time or the money; and even if one gets up to somebody with a spend of £150,000 a year on table 5 basis, if it's a very high cost of business, that still doesn't necessarily bespeak a multi-million-pound business. (Pause)

Sorry, it's the damages. Yes. The damages sums are, being a proxy, based on a percentage of overcharge, and the percentage of overcharge is quite high, because it's an unfair and excessive pricing case, and so therefore the claim for damages is likely to be a relatively high proportion of the overall spend on the business. It's a point

Rightmove makes against us, actually. They say, "Well, you're wiping out our profit". Well, in circumstances where the profit has been obtained from unfair and excessive pricing, that's unsurprising.

That's my immediate response to that. In terms of the evidence that you have read in Mr Hain-Cole's second statement and Mr Garrard's statement -- I think I can take that at a slightly quicker pace. Mr Hain-Cole has made it clear that he's not aware of any hybrid solution being imposed as opposed to chosen. He suggests he might need a different class representative and different funding; different funding arrangements certainly would be necessary. It's not clear why the arbitrary line is drawn at £167,000 per year. He makes the point that the likelihood of some PCMs not opting in for reasons unrelated to the merits of the claim mean that there would then be both a delay in proceeding with the opt-out proceedings, but also the need to refile would give rise to a limitation windfall. So the viability of the opt-out claim would also have to be reviewed.

Mr Garrard, at paragraph 51, is doubtful whether ICL, Innsworth, would get to a position where it was sufficiently comfortable to move to a bookbuild, but if they did, it would be obvious that additional expense and time would have to be factored into the costs of funding. As matters stood, such funding was improbable, was the conclusion he reached.

So we end up with a position where, on our case, you are increasing the costs of the claim at the very real risk of two things: Well, the racing certainty that people will drop out and then the very real risk that the opt-out claim itself would then fail. That's notwithstanding my submission that the claims are strong, whether viewed for the hybrid proposal or the entire opt-out proposal.

It's suggested by my learned friends that all of the proposed cohort would be substantial businesses operating at scale who would, and I quote, be "*large and*

sophisticated"; see paragraph 47 of their skeleton. That simply goes against the evidence that is given in Mr Hain-Cole's second statement, paragraph 56, where he said that at least 30 per cent of the claim cohort would be small companies for accounting purposes or micro-businesses for accounting purposes.

But in any event, you've got my point that a business with a claim of £160,000 per annum is likely not to have a substantial annual spend with Rightmove. It can't be inferred from that that the annual spend that lies behind that claim -- sorry, it is a spend of £160,000 per annum. It can't be inferred that that expenditure is a meaningful proxy for the level of sophistication of the entity. That is all I wish to say on hybrid, unless you have any questions for me.

Exclusionary conduct submissions

That brings me on to exclusionary conduct. Again, just giving you the references, this is in the Claim Form, paragraphs 109 to 114. In the Response, it is at 64 to 97. In the Reply, it's 81 to 101. In our skeleton, it is 59 to 64.

Now, you've seen our pleading. There was a pleading point that was taken against us. That's no longer, as I understand it, pursued. We had cited extensively from Court of Justice case law in support of our approach, which means that it's sufficient to show that certain conduct is capable of restricting competition, which means you don't have to show an actual effect on competition in every case. There's been no application to strike out our pleading.

We intend to prove our pleaded case through reliance on documentary and witness evidence and on the basis of legal submissions. That establishes a methodology for showing the abusive conduct.

Now, of course, it would be open to any expert to say, "I can give an expert opinion view that mirrors or tracks the legal submission that is made on the basis of the

documents and the facts", but there isn't much point in an expert doing that. That doesn't really show a meaningful methodology, if that's all the expert is saying. We do have examples of supporting material in the documentary bundle -- I'm not proposing to go through them -- where we have shown *prima facie* evidence of businesses being told that if they leave Rightmove and then come back, they would have to pay more than they are paying at the moment.

I'll give you a handful of examples, they're in supplemental bundle 2. The first one is at tab 66, page 1417. Second is at tab 69, page 1402. The third is at tab 75, page 1430. They're all either blogs or comments on a web page or an article from Mal McCallion -- he's relatively well-known in the industry -- explaining various points that chime with our exclusionary case. But as I said, this isn't the subject of a strike-out, and obviously, a much fuller picture will be available once disclosure has been given.

THE CHAIR: So just so we understand that, is it, from the way you've described it in your skeleton, you are intending to advance it as a naked abuse? So I mean, the whole point of the way you've done it is that you're saying this is a systematic approach that is effectively imposing a penalty. You're not saying it's just -- it goes beyond a loyalty rebate that's been taken away or something like that.

MR BEAL: No. It's ...

THE CHAIR: You're putting it right at the far end of --

MR BEAL: Disciplinary conduct.

THE CHAIR: Yes.

MR BEAL: And it's designed to deter departure, and therefore, it's departure from the Rightmove platform and then churn. You have a lower customer churn, because you're putting people off the act of moving in the first place. Yes, we don't shy away from the fact that that is the sort of conduct which is capable of restricting competition

on the facts. If the evidence demonstrates that it's happening, there's no *de minimis* threshold for Article 102 -- we've set out the case law on that in our Reply. In those circumstances, these instances of disciplinary behaviour are sufficient to establish the tort of abuse of a dominant position.

Back in the good old days, I used to deal with vehicle distribution agreements or something like that. The analysis would always be: what's the contractual term? Does it fall within the scope of the block exemption? Is there a reason why -- if it falls outside the scope of the block exemption, is it for some reason not harmful to competition?

The economist came in with a sort of overview of, "Does it fall within the scope of the block exemption?", but actually, the economic evidence was secondary, very much secondary to anything that I was making a submission. In a case called (inaudible), for example, that argument was raised.

Here, given that whether one calls it a naked abuse or simply an abuse that gives rise to conduct that's inherently capable of restricting competition is a terminology issue. But the point is, if I'm stopping, effectively, my subscribers from leaving for a rival platform on pain of paying a higher price if they come back, then that is operating a bit like, I suppose, a reverse boycott, which would be an abusive conduct.

THE CHAIR: Yes. I mean, I think that -- you go.

MR DAVIES: Maybe it's just chiming in with what the Chair said, but isn't there a difference between conduct which is nakedly anti-competitive, which, for example, references a competitor and says, "If you go and put your business with them, then you get hit with a penalty fee", from, for example, some sort of discount for loyalty, which has the effect, as you say, of reducing churn? But that might require effects-based analysis, not just to look for actual effects -- agreed you don't have to show actual effects, *Intel* and all that. But there is a difference between conduct which could have a perfectly normal business justification, but when carried out by

a dominant firm, happens to have an anti-competitive effect, which could be an abuse of dominance, and conduct which could only be an abuse of dominance, because it is nakedly anti-competitive.

Is that a fair distinction? You are therefore going to demonstrate that this conduct is more like the second?

MR BEAL: Yes. We would say it's not a form of rebate for the simple reason that one can understand that if a dominant firm offers a lower price the longer you're with them, that will necessarily have a foreclosing effect on rivals, and you, therefore, need to analyse the foreclosure effect on the market of that conduct, which requires, arguably, a much more effects-based analysis.

These are examples where an estate agent has gone to Rightmove and says, "I'm not happy paying that price increase". Rightmove says, "Well, you have to pay it". When the estate agent says, "Well, I will leave", Rightmove says, "Well, if you leave, when you come back, we're going to charge you even more". So we say that is not a rebate. It wouldn't be viewed as a rebate, either in economic literature or, indeed, in common parlance. It's a blatant threat -- to put it, you know, in its clear, unvarnished terms -- to a subscriber that is designed to secure continued services or continued subscription to the Rightmove platform and is intended to deter that person from actually then going and using the services of the rival. So when I described it as a "reverse boycott", it sort of is, because it's saying, "You have to stay with me. If you go, there will be consequences".

THE CHAIR: So we'll be interested to see more detail on this, but wouldn't you get the same effect if you had a loyalty discount that increased over time? So your price was perhaps not going down, but not going up as much as everybody else's, because you were being loyal. If then you left and you came back, and the normal application of Rightmove's pricing rules meant that you restarted the clock on your loyalty rebate,

you'd get the same effect. But that might not be quite the same as being a penalty for going to a competitor. Or would you say the two are the same?

MR BEAL: The context in which this is taking place is evidence of anti-competitive intent to forestall subscription to the rival services, which means it's apart from what might be perceived to be a pro-competitive justification for a loyalty rebate scheme if it's open, non-discriminatory and all the other requirements that it must be, which is designed to reward a customer for ongoing commitment to a company, in a way that, if it causes foreclosure, it's problematic but otherwise wouldn't be.

So we would say that the context and framework in which the conduct is taking place, given that the categories of abuse aren't closed, marks it out for separate treatment from a loyalty rebate scheme. It's not a loyalty rebate scheme by effect, simply because if somebody does, in fact, ignore the threat and leaves, they then come back and get a higher price, therefore that's a reverse loyalty discount; precisely because the intention behind it is to stop you leaving in the first place, so it's to lock you in. It's a form of lock-in.

THE CHAIR: That's clear. Thank you. You'd be trying to get documentary evidence through disclosure.

MR BEAL: We've got some evidence of it already, but I'll be candid, what we don't have is an understanding of the prevalence of this practice. That's why Ms Deakin hasn't felt able to opine on whether or not it causes an effect as such, because an effects-based analysis is going to require one to have an understanding of how prevalent the practice is, so that she can, as an independent expert, take a sensible approach to looking at the potential foreclosing effects and everything else.

THE CHAIR: Now, I'm getting a bit lost here. Because presumably, if it is very prevalent, you're going to be arguing it's a systematic disciplining, and puts you in the per se category that you don't need to show effects. I mean, I suppose one of the

concerns I think is being advanced is that you're going to morph this into an effects case later, when we haven't had any discussion about what your approach to that was going to be. I understand why, if that is the path you're going down, it may be that that's sort of fine, because that's where we are. But I'm a little bit confused, I have to confess, by I think you seem to be suggesting that if it was more prevalent, then you might be more inclined to go down the effects route.

MR BEAL: With respect, the point I'm getting to is it's always going to be our case that there's no *de minimis* threshold. This is abusive conduct in and of itself. Whether one calls it a naked abuse or anything else, it's an abuse for which you do not need to have a full effects analysis, because it's inherently capable of deterring somebody from moving to a rival. Without a *de minimis* threshold, it doesn't matter how many go. So, where this comes in is whether or not we plead a separate claim for loss on the back of it.

So we're not at the position at the moment where we're claiming a separate itemised claim for specific damages, separate from the overall claim for loss that will be established on the basis of a counterfactual between the price that Rightmove charges and the price that is available under normal conditions of workable competition. That parameter, that counterfactual parameter of normal workable conditions of competition, requires this abuse to be stripped out, because one needs to say: well, in the hypothetical counterfactual where Rightmove is charging a price, it's also not engaged in this disciplinary behaviour against its subscribers.

THE CHAIR: It doesn't follow, does it, that if you stripped out what you say is the exclusionary abuse, it doesn't follow that that is going to be the same as the damages for the workable competition, does it? I mean, it doesn't work the other way around. Because you're not -- and this is where it's different from *Kent*. Because in *Kent*, the exclusionary conduct was, or the removal of exclusionary conduct would have opened

up the entire platform, which this doesn't necessarily do, does it? I mean, this is a restriction which, well, we don't really know anything about the effect it might have on the overall competitiveness of the market. It might be a significant part of it; it might be a small part of it. Is it likely to be so significant that it's going to lead you to the same place as conditions of workable competition? I wouldn't have thought so, but maybe it will.

MR BEAL: I think the way we put the case is, the exploitative abuse establishes a head of loss, a quantum of loss.

THE CHAIR: Yes.

MR BEAL: Either we make out our case in full, at which point our counterfactual price is the one that's accepted by the Tribunal, and the difference between that and the Rightmove price is the measure of loss *prima facie*, or Rightmove, through its evidence, persuades you that if it's right on its case, namely that it's always charged a price that equates with the price that would prevail in working competition, then we lose, because our claim is then zero.

In between those two examples, it means that we haven't proved our counterfactual price to the full extent, but at the same time Rightmove has lost on its suggestion that its price was a workable competition price. So between those two, you end up with an analysis of what the price would have been in the counterfactual.

What Ms Deakin is currently saying is, on the basis of everything that is before me, I don't think that there would be anything other than a counterfactual price which reflected workable conditions of competition that would therefore also necessarily encompass any impact of the exclusionary abuse.

THE CHAIR: I can see why she might say, "I don't think it would be more", but it might be less, mightn't it? It might be substantially less, potentially, depending on ...

MR BEAL: But if our case is always whatever we show is the exploitative level of

pricing is our claim.

THE CHAIR: Yes.

MR BEAL: And an aspect of that claim is necessarily reinforced by whatever impact the exclusionary abuse has, then we're no different from *Stasi*. In *Stasi*, you had the quality abuses. They were pleaded; they were part of the framework. They didn't try and plead a separate itemised claim for damages in respect of the quality abuses. But they said it went into the overall mix of what (overspeaking).

THE CHAIR: I can see that, and in a sense, I'm not suggesting to you that you can't or shouldn't be doing what you're doing. Obviously, we will hear what the Proposed Defendants have to say about that. I think just conceptually, though, it seems to me that your damages -- I mean, I think I can understand the reasoning that goes: there's not much point looking at the potential damages for the exclusionary conduct, because the exploitative conduct is going to determine really what the damages are in this case. I can see that. I suppose it does beg the question of: what are we getting by way of benefit from including even the, you say, relatively marginal evidence, but whatever it is, for the exclusionary conduct, I can see why, for example, you might want to put that in the mix for your market definition and dominance analysis. Because it may have some relevance to all of that and constraints and so on.

MR BEAL: Yes.

THE CHAIR: So I'm not saying it's not something that can be explored. I suppose it's just a bit odd to have this abuse that's sitting there by itself, which is not actually fully explained. I think certainly you've given us some help with that, but I don't think it's completely and fully set out in the pleading. And it doesn't really seem to go anywhere financially.

I guess the question is, well, you know: why have you put it like that, as opposed to just put it in the mix, and maybe add another question to that.

MR DAVIES: Well, related to that, I think you earlier described this as a classic market-tipping case, and markets can tip without necessarily any exclusionary conduct. This market would seem to have obvious very strong network effects. Customers want to go to where all the estate agents are advertising, and the estate agents want to advertise where all the customers are going. It may be that the exclusionary abuse sort of, as it were, adds something to that. But you may well not need to rely upon it. We're just wondering how you see it fitting in.

MR BEAL: How I see it fitting in is, as matters stand, it's relevant for the overall assessment of harm. It would be necessary to strip out consideration of this exclusionary conduct when looking at workable conditions of competition. It reinforces Rightmove's dominant position and acts as a barrier to entry, which is Mr Tidswell's point about: it comes in at the dominance and market definition stage.

But also, of course, it contributes, we say, to the competitive harm in the market. Therefore, even if we can't put a final pounds, shillings and pence figure on the damages that would be associated with it, it is relevant to consider the nature and extent of the loss and the harm that my client class have suffered.

Of course, it also goes to the deterrence rationale because it calls out improper, abusive behaviour from a dominant undertaking, which is having a dramatic, chilling effect on those people who suffer from that conduct. Where I accept I can't pin the tail on the donkey at the moment is how prevalent this behaviour was.

If I had 5,000 examples of this being used over the course of six years, I don't think you'd be asking me, well: what's the impact of this? Because the effect would be much easier to prove. It's because I'm having to rely on a handful of examples that we found in the public domain as being evidence of a wider problem, without being able to show you categorically, at this stage, because of the information asymmetry between the claimants and the defendants. I'm having to rely on this as evidence of a wider problem

you won't get to the bottom of until disclosure. If, on disclosure, Rightmove is right that this is a handful of awkward customers who were simply dealt with in a particularly inappropriate way, and it's not evidence of a wider problem, then I suspect the whole issue will go away.

As matters stand, we have pleaded a sustainable case, based on the evidence available to us. We've refrained from claiming on an exaggerated basis that there is a specific item of loss attributable to this. We've shown a methodology for dealing with it in the counterfactual that enables a loss figure to be arrived at for the claim as a whole on an aggregate damages basis.

As I say, in *Stasi*, the expert again declined to split loss depending on whether it was quality abuses or the other licensing abuses, and that claim was certified.

THE CHAIR: Was it a separate head? Was there a separate exclusionary abuse in *Stasi*?

MR BEAL: The quality abuses were pleaded as separate abuses.

THE CHAIR: Yes.

MR DAVIES: I don't want to re-argue it, but I don't think there may be quite such a difference in kind as the difference between an exploitative and an exclusionary abuse.

MR BEAL: I'm sure that's true, but ...

MR DAVIES: You can have a pricing element of an abuse, and then you can also have, as it were, lower quality associated with that, which has similar effects, but without ...

MR BEAL: So I'm not sure I can --

THE CHAIR: No, no that's fine. We'll see what the Proposed Defendants have to say about that.

Compound interest submissions

MR BEAL: That leaves me only with compound interest. This is dealt with in our Claim Form at paragraphs 126 to 129. It's dealt with in the Response at paragraphs 88 to 93. It's dealt with in the Reply at 102 to 117, and it's dealt with in our skeleton at paragraphs 65 to 68.

As you know, Ms Deakin, in her first report, paragraphs 168 to 169 explained what she meant to do. It was suggested she didn't have a sufficiently clear methodology, so she came back with Deakin 2 with a fleshed-out version of that methodology. You will have seen that it involves stratification. So she's proposing to use a survey sample of claimants to work out what they would have done with excess funds. Would they have paid down an overdraft? Would they have reinvested in the business? Would they have put the money into the money market and obtained a specific rate of interest on it? So the standard three things you can do with surplus cash as a business. In reality, my best guess is that most of these small businesses would have had some level of borrowing, and it's likely to be a borrowing claim, but it's not for me to say -- that's speculating based on VAT practice rather than competition practice.

But the point is, Ms Deakin has set out a stratification process where she will look at, based on the survey evidence she obtains, and then the individual data for each of the PCMs and their data, she will then combine the two and use weighted averages to come up with a stratified approach to the different types of return that would have been obtained with excess cash. She then blends that into an aggregate sum, which is then suitable for a broad axe determination for aggregate damages.

We say that's appropriate. But she also, at paragraph 39 of her second statement, page 426 of the core bundle, proposes to look at historic ROCE rates from financial data, which are then used for a cross-check for the WACC. The WACC is used simply to come up with an aggregate figure for the return on investment for the cohort which would have invested their funds. Because it's WACC, yes, it will either

undercompensate or overcompensate a given individual. But the point is it's being dealt with on an aggregate basis. It's a benchmark for the return on investment for that particular stratum. So in *McLaren* what one sees -- this is bundle of authorities 1, tab 22, page 1276.

THE CHAIR: Sorry. Can you give that again?

MR BEAL: Bundle of authorities 1, tab 22, page 1276.

THE CHAIR: Thank you.

MR BEAL: There's a section beginning "*COMPOUND INTEREST*". Please could I invite you to read 185 to 187. (Pause)

The compound interest claim in *Rodger* was certified. For your note, that's paragraph 88, subparagraph (2), bundle of authorities 2, tab 44, page 1373. And also see paragraph 93. There's a reference to the pleaded claim having a claim for compound interest and paragraph 93. The Tribunal certifies the *Rodger* claim. So it can be done. It's permissible to do it.

As for, "Should it be done here", the response from Rightmove is, well, you're never going to be able to show the individual head of loss on a pleaded and proven basis for compound interest for a given PCM. That's essentially one of their points. To which our answer is: well, that isn't what aggregate damages are intended to achieve. One sees in *Merricks* -- this is well known, so I'll just give you the reference, if I may; paragraph 58 of the Supreme Court in *Merricks*, bundle of authorities 1, tab 17, page 1023 -- there's that famous paragraph where Lord Briggs says: this is an extraordinary parliamentary intervention in the standard way of doing things. This isn't about compensatory loss anymore. It's specifically about aggregate damages being awarded on a just basis, rather than on a purely compensatory one. That's part and parcel of the trade-off that he recognises Parliament has come up with when giving redress to a large cohort of people, precisely because the individual determination of

compensation for each individual claimant would render it disproportionately expensive, and therefore unattainable, and back into the enforcement problem which started off the regime in the first place.

Rightmove, also at paragraph 71, criticises our methodology for relying on a sampling exercise. But that's the only way, proportionately, of dealing with a class that's 13,400 people strong. The sampling process is being used in trial 3 in *Interchange*. It's been used in litigation elsewhere. It's not that it produces a strictly accurate compensatory figure; of course it doesn't. What it produces is a figure on a broad axe basis which is capable of giving rise to a just assessment of loss. True, there will be some winners, there will be some losers; but you cannot in advance, ex ante, say that the survey which hasn't been conducted yet is skewed towards a particular outcome. So when Rightmove says, "Oh, well, this means that we're going to end up paying too much", we can't know that yet, because if, for example, there are a large number of small businesses who were paying, say, a commercial rate of between 8 and 10 per cent to their bank over the last six years -- not unrealistic, LIBOR plus two on a compound basis; if for some reason the end result is anything less than that, that entire suite of claimants is under-compensated for compound interest. But that's just the way that the cookie will crumble, if the different elements of the stratum approach produce an outcome that says that. But there is a methodology in place. It will be tweaked. It's a blueprint to trial of this particular issue.

We also know, since it's a point I've already made, that this rejection of the aggregate damages approach stands in stark contrast to the approach they invite you to take hypothetically, at this stage, in relation to the assessment of individual loss when looking at the practicability of opt-in, full stop.

Finally, they've taken an objection to WACC on the basis of some observations in the *Royal Mail* case. WACC -- obviously *Royal Mail* involved, I think, Royal Mail and BT.

Mr Ward will correct me if I'm wrong. Each of those businesses were able to identify their return on investment, because they had the data. The reliance on WACC didn't make much sense. When you're looking for an aggregate return on investment, then the efficient rate of capital investment and returns on capital based on a WACC measure is a perfectly reasonable proxy. It's not being used directly as a proxy for the rate of interest as such. Ms Deakin has confirmed that she'll use financial data to cross-check the use of WACC, based on a survey of individual sampled claimants. Unless you have any questions for me on compound interest, those are my submissions on it. If I may add one point on exclusionary, I'm reminded by Ms Deakin that, of course, her approach to assessing loss will necessarily have bound up within it -- that portion of the loss that is, in fact, attributable to the exclusionary conduct, because that's the way she's planning on approaching that particular issue. But (overspeaking).

THE CHAIR: I think that was the point I was trying to make, which is that if you have got a workable competition, it's probably in there somewhere.

MR BEAL: Yes.

THE CHAIR: Yes. That's that point, yes. (Pause)

MS DEAKIN: (Inaudible)

MR BEAL: I hope that's on the transcript.

THE CHAIR: I'm not sure --

MR BEAL: Otherwise, I will feel like a puppet.

THE CHAIR: Good. Okay. Thank you.

MR BEAL: May I please hand over to Mr Marven for the cost wizardry.

THE CHAIR: Yes, of course. Thank you.

Yes, Mr Marven.

Submissions by MR MARVEN

Authorisation conditions

MR MARVEN: Yes. I'm going to deal, I hope, relatively economically with the authorisation conditions; what are called the concerns that Rightmove has expressed. As I'm sure the Tribunal appreciates, it's not said, if it ever was, that this is an impediment to certification. There are two issues on which Rightmove asked the Tribunal to do something: the class representative's remuneration, and the provision for adverse costs, and I'll come to those specifically having set the scene.

But as I understand it, if not explicitly, then implicitly at least, that something of the broadside against Mr Newman, that the various circumstances meant that he hadn't demonstrated sufficient independence from the funder for the authorisation condition to be met is not being pursued. So I'm going to set the scene, and then I'm going to deal with the two specific issues where the Tribunal has effectively been asked by Rightmove to do something.

THE CHAIR: Yes. Just before you do, can I add one to your list --

MR MARVEN: Of course.

THE CHAIR: -- which I think is a point which the First Defendant has raised, and this is a question about clause 8.3, the obligation to pay under the waterfall, and whether that should more expressly refer to the Tribunal's oversight.

Just to give you advance warning of the point, the reason why -- I'm aware of the point in the recitals and the reference to it, but it does give me some concern that you have the assignment of proceeds in clause 10.1. I suppose I'm just a bit unsure about what's going to happen. Let's say we've got a pot of money to distribute and it comes back here, let's say, on a settlement, and we say, "Well, actually, we don't think that the payments under the waterfall are satisfactory", and someone says to us, "Well, that's all very interesting, but not only have we got a contractual entitlement to it, we've

also got an equitable interest in the proceeds, which means you can't interfere with it". Maybe nobody has thought about that, and there's no -- I'm certainly not suggesting there's any intention on anybody's part to do that.

MR MARVEN: Actually, we'll deal with that. It seemed to me that point is not in the Rightmove skeleton. It seems to me that they dropped that point (overspeaking).

THE CHAIR: No, I think you're right, but it hadn't dropped away from me yet.

MR MARVEN: But I will come to clause 8.3 in due course, and I'm sure the Tribunal won't let me forget that.

Just to set the scene; I mean, leaving aside that point, if I may, just for a moment.

THE CHAIR: Yes, of course.

MR MARVEN: I start with the class representative, because it's the context in which all the concerns ought to be seen. You've already seen his statement, in particular his first statement, paragraphs 31 to 39, that set out his experience, and I think you've been directed to his CV. Unless you want me to, in the interests of efficiency, I won't dig those out now, but I hope it goes without me needing to belabour it that he has an outstanding CV with a lot of highly relevant experience that makes him well qualified. I do say that's directly relevant to any concern that he might be unduly beholden to the funder, or because of the level of his remuneration, he might unduly align himself with the funder. That last point in particular I will come to address specifically; but I do say that those concerns set in the context of the CV, and experience and motivation of the class representative, have an air of unreality about them.

Let me go straight, then, to the funding terms. There is a complaint that the remuneration is too high, but it's not on the class representatives' list of things that the Tribunal is asked to do something about. Can I -- just because it's important, I set the scene and deal with the --

THE CHAIR: I think you can take it we're very familiar with the case law on it.

MR MARVEN: Indeed. That's extremely helpful. We've picked some examples where the multiple was higher, and in fact, in two cases it was the multiple of the total commitment, and there's obviously case law on (inaudible) that, generally --

THE CHAIR: You're talking about the funders' return. I was talking about the PCR's remuneration.

MR MARVEN: The funders' return. I'm so sorry. I was just going to deal with that first.

THE CHAIR: Of course. No, please do.

MR MARVEN: I'm sure you're familiar with the case law on that as well.

THE CHAIR: I hope so, but yes.

MR MARVEN: Just to go to clause 8.2 in the funding agreement, which is in the core bundle at tab 11, page 455.

THE CHAIR: Yes.

MR MARVEN: I'm just going to go to clause 8.2. I don't think I need to go to the definitions here, but the headline points to understand from clause 8.2: it's not, as the defendant would have it, a question of this waterfall being some kind of bolt-on to the multiple. It's that the multiple is part of the waterfall, and is within the waterfall. So you have, at the first stage, 8.2(a), what you might call make-whole amounts, and then you have a distribution as you go through it; and the constant theme of this is that the funder gets back one times the project cost -- and to be clear, that's what's actually invested -- and two times the project cost goes to the class, and that's how it works throughout the waterfall. So on lower returns, if you simply apply the multiple, that gives you a false calculation of what the funder will actually get back.

The important point to take away from that is -- insofar as one can do it with multiples rather than percentages -- there is an alignment between the interests of the funder and the interests of the class which is to be welcomed. So in my submission, the way

it is done in this waterfall is, firstly, it's absolutely integral to the structure of the remuneration; and simply looking at schedule 3, which of course I dare say you've seen is on page 474, on its own that gives the multiples, gives an entirely incorrect impression of how the funders' remuneration works. The waterfall at clause 8.2 is not some fiddle factor that's applied later. It is the structure of the remuneration, and it does mean that on many lower recovery scenarios, the headline, if I can call them that, multiples, do not give a correct impression of what the class will receive.

Sir, I think you asked me about clause 8.

THE CHAIR: Just before you do, are you going to take us to Mr Newman's examples?

MR MARVEN: Oh, I am, yes.

THE CHAIR: Oh, good.

MR MARVEN: Let me --

THE CHAIR: I thought it might be quite useful to do that just there, I think, because it does rather --

MR MARVEN: There are two aspects of the examples I wanted to -- I'll do that straight away -- that I wanted to take you to.

Can I, before I go to Mr Newman, go to Mr Garrard's statement, and you have that at tab 8 of the core bundle. In particular, I'm going to look at paragraphs 9 to 14, which begin on page 326.

Mr Garrard, as the Tribunal will have seen, is the managing director of Innsworth Advisors, who are the managers of the funder Innsworth Capital Limited. He sets out how the return is calculated. I know the Tribunal has read the statement, so I won't go through that in detail, but he explains that returns are calculated objectively to give an overall reasonable rate of return commensurate with risk. He lists various factors: likelihood of success, track record of opt-out claims, proposed degree of take-up, size and duration of investment; and those last two factors are important, not least because

often both the size and the duration of the investment can turn out to be greater than is predicted at this stage. He makes the point that Innsworth is well known and is often approached to fund proceedings. He also makes the points that I've endeavoured to make about the waterfall, and how that is an integral part of calculating what the funder gets.

The first example I wanted to show you -- and it's not actually Mr Newman's statement; it's in this statement -- is at paragraph 18. That gives an example of how on a £60 million recovery, the funders' ostensible multiple of three would actually be reduced to a multiple of one. I don't think I need to go through all the arithmetic, but the Tribunal has that. That's the first example of how it all works in practice.

THE CHAIR: Actually, in a way, this will come out when we get to Mr Newman's illustrations. One of the things that is interesting is that the lower levels of recovery -- because of the 2-1 ratio, you do end up with a funder getting close to 50 per cent, I think, of the outcome; is that right?

MR MARVEN: Well --

THE CHAIR: I'd say one-third.

MR MARVEN: -- a-third. A third rather than 50 per cent, yes.

THE CHAIR: Yes. Well, maybe we should look at Mr Newman's examples.

MR MARVEN: Well, if we -- yes, Mr Newman's -- well, I wanted to take you to that first, because the thing about Mr Newman's examples -- and the Defendant is right about this up to a point, some of Mr Newman's examples do show the funder getting the full headline multiple back on what I would characterise as higher recovery. What the Defendant says to this is, "Well, if you actually look at it against the pleaded claim size, in fact, it is only a qualified success".

I say that that's not the right way to look at it. I will take you directly -- and I think you want to go to Mr Newman's statement. Before I do that, can I just take the Tribunal to

the Reply, which is in tab 3 of the core bundle. That's page 215 at paragraphs 132 to 133. (Pause)

So did I say -- I'm so sorry? I think I gave you the right page number. It's 215.

THE CHAIR: It's 215, yes.

MR MARVEN: It's only me who hasn't got the right page open. I just wanted to go to this, because before we go to the examples themselves, it's what we say at paragraphs 132 and 133 of the Reply that the complaint that is made is that Innsworth might get back the full entitlement in circumstances which would not constitute overwhelming success.

Now, the way they calculate whether success is overwhelming is to say, "Well, it might only be half of the pleaded value". I say that's a flawed approach. If you're looking at whether the success is overwhelming from the perspective of whether the funder has earned the entitlement, what you look at, really, is the level of investment. You don't compare the maximum pleaded claim with the actual outcome. You compare the level of investment with the actual outcome. In fact -- and this is why I wanted to go to paragraph 133 -- in the examples of what the Defendant would describe as "less than overwhelming success", the recovery can be a multiple of 29 or 21 or eight or six times what the funder has invested, and I would say that constitutes overwhelming success. That's the first thing to bear in mind about the critique that's made of Mr Newman's examples.

The second thing is when the Defendant says, "Well, in certain circumstances, the funder will get back the ostensible multiple", the ostensible multiple in these examples isn't invariably ten. Some of these examples, because they are speculating about claims that have resolved earlier that the multiple is actually significantly less than ten.

So I'm sorry, you did want me to go just --

THE CHAIR: Yes. Just before you do -- and I keep asking you to, and then I interrupt

you. But just on your points you've just made, I mean, I take the point that the relationship between what's been invested and the return is an important factor, and obviously, it is, I think I might push back a bit on the suggestion that you don't look at what the original claim size was, though. I think that's not entirely consistent with the way that the Tribunal approached things, for example, in *Merricks*, where I think there is quite a lot to be said about what the claim size was originally and where it ended up.

MR MARVEN: Oh, yes. But I'm not talking about -- I mean, if we were looking at hypothetical returns of 1 per cent or 2 per cent of the -- but here, where the return is about £600 million --

THE CHAIR: Yes, I understand.

MR MARVEN: -- (overspeaking) I'm saying that doesn't constitute overwhelming success. I'm not pushing my submission to that extreme because --

THE CHAIR: That's fine.

MR MARVEN: -- by reference to the examples that I really am just this minute going to show --

THE CHAIR: Well, just before you do, I suppose just to make this point, and I think in a way this sits really on top of all the discussion we're having, it comes back to really the point about 8.3. The exercise you're undertaking, I think, is, at least I hope, to establish -- you're seeking to establish -- no doubt that both Defendants will have something to say about this -- that there's nothing so concerning on the face of the funding documents that we should interfere with it at this stage.

MR MARVEN: Well, (overspeaking) that's all I need to show.

THE CHAIR: (Overspeaking) Yes. That's all you need to show.

MR MARVEN: I'd like to go further than that if I can, in terms of reassurance, but that's ultimately all I need to show.

THE CHAIR: Yes. In that context, of course, the Tribunal has made it very plain -- notwithstanding some complaints about this, but it has made it very plain that it thinks the right time to deal with the answer is when we know what the answer is, if I can put it that way.

MR MARVEN: Well, indeed.

THE CHAIR: Really to your point about, "What does success look like?" only really makes sense when you know how much you spent, how quickly you got to a result, what the result is and a myriad of other things as well, how difficult was it on the way, for example?

MR MARVEN: Well, quite, yes.

THE CHAIR: So I suppose I'm just concerned just that you're -- not really you, Mr Marven, because I'm sure you are clear. But certainly those sitting behind you, and perhaps those watching on screen, are clear, which is that, I'm happy to take the submissions; I understand where you're coming from, but I do think it's very important that we all understand that the real answer to this is going to depend on how it all turns out later. I completely understand from the point of view of the funder that that's, in some respects, unsatisfactory. But it is, I'm afraid, the way the system works.

MR MARVEN: Well, and I can assure you, sir, that everyone is fully aware that that is how the system works.

THE CHAIR: Yes.

MR MARVEN: I say this with some humility, because I've advised him -- but a well-advised class representative is advised not only by me; very experienced solicitors, very experienced funders.

THE CHAIR: Exactly.

MR MARVEN: Everyone on this side of the Tribunal room understands that the final decision about who gets what is made when you know what there is to distribute and

not before, that is fully understood.

THE CHAIR: And the reason for making the point -- I'm sure everybody does fully understand, but the reason for making the point now is that the arithmetic outcomes are interesting. I'm not saying we shouldn't be looking at them, because obviously, they go to the first point we talked about. But I do think that if we had a recovery of -- I think the example given in Mr Garrard's is 60 or I think the lowest number in Mr Newman's is 50 -- I think the Tribunal would be looking at it more than just on an arithmetic basis, if I can put it that way, and it would -- I don't know what the answer would be, because it would depend on the circumstances, but I'm just making it very clear that I don't think we are now viewing, and we certainly won't later be viewing, the question, as just an arithmetic one.

MR MARVEN: No, that's fully understood. But, sir ...

THE CHAIR: So we can look at what happens when. I mean, I think one can say, with some confidence, that if the claim is not very successful, then everybody's struggling a little bit. It may well be that everybody has to take more pain than they would like. What that means for each of the participants, I don't know, because it depends on what's happened. But on the other hand, if you're at the other end of the scale where there's a lot of money to distribute, and even with the best will in the world, one knows that distribution is unlikely to be anywhere near complete, even with a very clear set of relationships and so on, it is a different game. Of course, that is, I think, and hope the way that everybody views, the point about aligned incentives that you were making.

MR MARVEN: Yes. I mean, two aspects to that. One is it is entirely understood that in lower recovery scenarios, everyone will get less than they want. The second is -- and I'm speaking now, although from the funder's perspective, because I think that's what you're pressing me on -- the funder understands that. Of course, they do.

They're very experienced funders. But the corollary of that, if I may just put in one word, is that on a higher recovery, you know, they will point to the risk that they are taking, amongst other things, on lower recovery, to justify unapologetically a very significant reward. The merit of the waterfall in the funding agreement that doesn't just have the class at the end of it is that, at least to an extent -- obviously, subject to the Tribunal's jurisdiction to supervise and intervene -- that already reflects that and reflects that everyone will have to share, if there's not as much as -- at least on this side of the courtroom, one would like there to be at the end of the day.

THE CHAIR: Yes, absolutely. That's very helpful. I suppose the only other thing to say is just simply to repeat the point that the arithmetic way it has been set up may not reflect the circumstances at the time. That could operate both ways.

Just to be absolutely clear, I fully accept the point you're making about the need for the funders to be properly compensated, because otherwise, these proceedings won't get off the ground. I understand that.

I'm not suggesting for a moment that's not an important factor, but I think that's at the other end and maybe in the middle as well. I mean, there are lots of different ways this might turn out that don't match up with the arithmetic for all sorts of different reasons (overspeaking).

MR MARVEN: There are, I mean --

THE CHAIR: That's really the only point I make.

MR MARVEN: I mean, I've given one example from Mr Garrard's evidence. I am now at tab 5 of the core bundle, page 260.

THE CHAIR: Yes, thank you.

MR MARVEN: Going to go to the examples exhibited to Mr Newman's statement. But of course, you're absolutely right. There are all kinds of scenarios one can imagine that are not -- and indeed, it would be an impossible exercise at this stage to do worked

examples for every possible scenario.

But Mr Garrard's statement is, if you like, a realistic -- on what might be called a lower recovery scenario that demonstrates -- and the importance of it is it demonstrates that you can't just look at the multiple in isolation.

Can I just make just, while it's in my mind, one final point about the waterfall? Some of the cases you will have seen, the waterfall operates on fixed periods of time.

THE CHAIR: Yes.

MR MARVEN: Under this waterfall in schedule 3, as you will have seen, it's stages in the litigation. Even if it ends up taking, as it sometimes does in the Tribunal, longer than one envisages. So that the multiple of ten that's attracted particular attention only cuts in if we get to the stage where there is a trial and one essentially gets to the conclusion of proceedings. So even if things take a year longer than everyone expects, if we don't get to a trial, we don't get to the top multiple.

So the examples, starting on page 260, this is on the assumption that there is full deployment of the approved budget. Just a word on the figure of £21.7 million. I'm sure the Tribunal has this. That's the full budget that the funder would be spending. It's not the same as the budget figure because it includes things like the insurance premium. It's not part of the inter partes costs. But by the same token, it also only has discounted levels of fees for the lawyers, as you see set out in the table. So here the maximum multiple is ten. If you, because it's gone to trial, it assumes all the project costs are fully spent. If you go to page 261 -- I don't know how convenient it is for you to do this in landscape. I'm sorry.

THE CHAIR: Yes, we have it.

MR MARVEN: The key figures are, firstly, you look at the damages from starting at £50 million going up to over the page £1,560 million. It's only towards the bottom of the first page, if you get to a figure of £700 million, which I appreciate, that isn't the full

pleaded claim. But I will suggest that against an investment of £21.7 million, that would represent, looking at it economically, objectively, something that can fairly be described as, I would say, overwhelming, but at least substantial success.

It's only when you get down to that point that the funders' multiple, just looking at the one that's column six from the left, the one that says "Funder multiple (ROIC)", you see the funder actually gets their multiple of ten.

THE CHAIR: Yes, I see that. We have the point.

Can I just ask you, just if we work across? Let's just take the second, maybe the third, line 150. Maybe it is easier if we take the second line; the number is a bit easier. So if we take 100 million of damages, take out the project costs, and then the funder gets just under £25 million.

MR MARVEN: Yes.

THE CHAIR: And that's 32% of the net damages.

MR MARVEN: That's right. Yes.

THE CHAIR: Net of the project costs, I should say. The next one, and it's 25 per cent of the full amount, more or less. So that's really, I think the point I'm just intrigued about. So some of these lower levels, even though the multiple doesn't deliver a very high return, you actually end up with the class representative getting, in this case, £50 million, and so the funder is getting about 50 per cent of what the class representative is getting.

MR MARVEN: Well, at that lower level of recovery, yes. That is correct.

THE CHAIR: I mean, you know, I'm not sure. It's an interesting question, isn't it, as to whether, with not very much success, that sort of -- because obviously later on, the proportions are completely different because the class starts to do better and better as the number goes up. There you obviously have your point about the ability to pay handsomely to the funder and recover. I ask rhetorically: is it right that the class is

getting 50 per cent of recoverable damages in circumstances where, or, sorry, the funder is getting 50 per cent of what the class is getting in circumstances where there hasn't been great success, I suppose is the rhetorical question. Which I think only underlines the point I was trying to make to you before, which is that might be a perfectly reasonable outcome, or it might not, depending on where we are with £100 million and why we got the win, and so on.

MR MARVEN: In my submission, there is always, and I'm not going to hide behind this, there is the fallback answer that the Tribunal has a jurisdiction which it's fair to say it exercises actively --

THE CHAIR: Yes.

MR MARVEN: -- at the end of proceedings.

THE CHAIR: I suppose what it does do, and I think this is perhaps really the point you're trying to make, is the waterfall does have a significant effect on what happens, which the outcome is not driven primarily by the multiple, and actually, in some circumstances, it's not driven by the multiple at all really; it's driven by the way the waterfall works.

MR MARVEN: Yes, indeed.

THE CHAIR: Yes.

MR MARVEN: So in my submission, yes. But if yes is the wrong answer, then it's not something that's an impediment to certification at that stage.

THE CHAIR: The question wasn't assuming that. So thank you.

MR MARVEN: Is it helpful to just go to the other two more examples, unless you want to ask me anything about that one.

THE CHAIR: I think we probably -- it's just a different premise, isn't it?

MR MARVEN: Well, it's a different premise.

THE CHAIR: And the timing and costs and so on. So I think as long as we understand

the mechanics of it, which I think we do, I think we're fine. Thank you.

MR MARVEN: So I think you were asking me, can I just deal with this because you asked me about it, clause 8.3.

THE CHAIR: Yes, please. Yes.

MR MARVEN: I think.

THE CHAIR: We are back on page. Where are we -- 455, was it?

MR MARVEN: Sorry, was it 8.3, the ...

THE CHAIR: Yes it is. It's a combination of 8.3 and 10.1. So the concern is, I think you -- actually it even starts in 8.2 because 8.2 starts by saying that the --

MR MARVEN: Can I just have one moment to take instruction?

THE CHAIR: Yes, of course.

MR MARVEN: Sorry, sir.

THE CHAIR: That's fine; take your time.

Mr Marven, we probably need to take a break. So would you like us to do that? Why don't we do that? We'll take ten minutes and let you do that. Thank you.

(3.22 pm)

(A short break)

(3.32 pm)

THE CHAIR: Yes, Mr Marven.

MR MARVEN: Can I deal straight away with clause 8.3 and clause 10.1?

THE CHAIR: Yes.

MR MARVEN: 8.3, page 456 is simply providing that the funds, anything that's recovered -- and I paraphrase -- will be put into an account called the trust account, or the administrator's account, and then is distributed in accordance with the waterfall. In isolation, I would submit that that's entirely unproblematic. I think the point, as I understand it, the Tribunal is pressing me on, is how that interacts with clause 10.1

that provides for a charge?

THE CHAIR: Yes. Well, exactly. I just don't know quite -- I actually am not sure what the answer to that is. If we're all here in two years' time and your client has fortuitously won, and we've got some money to give away, I don't know to what extent the charge has any implication for the discretion of the Tribunal. That's the point I'm making.

MR MARVEN: Yes. I hope I can sidestep that. I mean, my submission would be, on behalf of the class representative: well, of course, the Tribunal can act in the best interests of the class. But I hope I can reassure the Tribunal that you don't need to grapple with that, because if we go to page 459.

THE CHAIR: Yes.

MR MARVEN: It isn't apparent, on the face of the agreement, that there has been -- and I'll give you the references to this in just a moment -- that the funder has agreed that in clause 10, the reference to "Resolution Sums" is to be deleted, and so the only charge will be over, essentially, costs.

THE CHAIR: Yes.

MR MARVEN: Which were never to end up, obviously costs are not recovered other than notionally for the benefit of the class representative. They are the one aspect of recovery that belongs, if I can put it like that, to the stakeholders. So the answer is that the reference to resolution sums in clause 10.1 is to be deleted. So the assignment is only in respect of costs.

THE CHAIR: Yes.

MR MARVEN: Just to reassure you that I haven't produced this as a rabbit from a hat, although it hasn't been executed yet, this is recorded in the Reply at paragraph 142. If I can just show you this. It's the core bundle tab 3, page 218.

THE CHAIR: Yes. I missed that. So that's helpful. Thank you.

MR MARVEN: Of course, I appreciate that the Tribunal is, of course, entitled to raise

points of its own motion, but that was a sufficient reassurance for Rightmove.

THE CHAIR: Yes. Well, I think it is for us, as well. So that's very helpful. Thank you.

MR MARVEN: I'm grateful.

Sir, I'm sorry I didn't have the references at my fingertips a moment ago.

Unless there's anything else the Tribunal wants to raise with me at this stage, I'm going to go straight to the points where the proposed Defendant is actually asking the Tribunal to take some step.

THE CHAIR: Yes.

MR MARVEN: Firstly, I'll deal with the provision for adverse costs, and then I'll deal with the class representative's remuneration. So the first thing to say on adverse costs is that clause 3.1(c) of the litigation funding agreement, which you have at core bundle, tab 11, page 447. The funder, that's Innsworth -- I use the word Innsworth -- has agreed to indemnify the class representative for any adverse costs up to £15 million. I don't think we need to turn that up unless you want me to, because I think this --

THE CHAIR: No. Yes, this is all just about the direct enforcement, isn't it?

MR MARVEN: This is all about the direct enforcement. So the second point to make is that Elliott, the Elliott entities, as I will call them for shorthand, have provided a guarantee. Again, I don't think we need to look at this because the terms of the guarantee, I understand, are not being impugned. But that's in I think we're calling it supplementary volume bundle 3. In fact, you might also be calling it supplementary bundle 1, volume three. But at any event it's at tab 95.

THE CHAIR: I think we had it in the core bundle. Is that a different document? The one I looked at was in section E of the core bundle, tab 12, but maybe it's not the same document.

MR MARVEN: No. That's not the guarantee.

THE CHAIR: I'm sorry, I see, I see. There are three things, of course.

MR MARVEN: There's the indemnity in the funding agreement.

THE CHAIR: Forgive me; I'm jumping ahead. Yes.

MR MARVEN: Elliott is guaranteeing that. So if there's any concern about Innsworth's ability to pay, or willingness to pay, which, in my submission, would be unreal, as Elliott guarantees it.

THE CHAIR: Yes.

MR MARVEN: The third thing, the document you took me to, is the undertaking that both Innsworth and Elliott offer to give to this Tribunal. That is the document at tab 12.

THE CHAIR: Yes. That's me getting confused.

MR MARVEN: Not at all. But this is perhaps the document we need to look at, although I'm not sure we need to look at it because it's not really the terms of the document.

THE CHAIR: No.

MR MARVEN: There were one or two, if I can call it this, quibbles about notification arrangements, but they don't appear in the skeleton, so I won't say anything more about those.

The complaint is that this is an undertaking to the Tribunal, and the challenge is put down, that that is not sufficient comfort. I start firstly by saying you will have heard of both Innsworth and Elliott. Innsworth, based in Jersey -- and I mentioned that because this is part of the Defendant's concern -- is a well-known international provider of funding for litigation. It's a member of the Association of Litigation Funders. Elliott is a well-known entity. Assets -- and this is in the bundle -- of over £100 billion. We've confirmed that in evidence, but I don't think that's in dispute.

It's just unreal that these two entities, having given the indemnity, the guarantee and offered undertaking, either won't pay or can't pay. It's a fanciful concern. Elliott and Innsworth in proposing an undertaking to the Tribunal, are clearly stating that they're

not going to contest any demand made on them to pay the sums up to the £15 million limit in circumstances where there is some difficulty in simply getting payment of an obligation ordered against the funder.

It is just worth saying that it seemed at one point that Rightmove were actually asking for this form of undertaking. Can I just, for the first time today, just go to the correspondence bundle? I think it's the first time today and it's tab 47.

THE CHAIR: Yes.

MR MARVEN: Subject to what my learned friends from Rightmove want to say, it may even be the last time today. It's tab 47, page 141.

THE CHAIR: Yes.

MR MARVEN: It's paragraph 3.3, if you have that.

THE CHAIR: Yes.

MR MARVEN: This is the LFA. I haven't even mentioned the ATE policy yet; I'll come back to that: the LFA, the ATE and the guarantee don't, "... afford our clients direct rights of enforcement".

Then I don't need to read the rest of that out, but can I just show to you that it footnotes *Merricks v Mastercard*; that's footnote 26, paragraphs 29 to 32.

THE CHAIR: Yes.

MR MARVEN: *Merricks v Mastercard*, you have in the authorities -- can I take you straight to this -- volume 1, tab 19, page 1065.

THE CHAIR: Yes.

MR MARVEN: This is a decision that's familiar to this Tribunal. And the way it was dealt with there, at paragraph 29, beginning on page 1065:

"*Mastercard has no right to enforce the ... LFA* [third-party rights excluded]. *It could apply for a third-party costs order* [and I'll come back to that] *but Innsworth Capital is a Jersey company and therefore outside the jurisdiction. In those circumstances,*

Mastercard sought an undertaking by Innsworth Capital to the Tribunal that it would discharge a liability for costs ordered against Mr Merricks.

"30. *We consider that Mastercard's position is understandable*."

It then goes on to say, and I'll paraphrase paragraph 30, that without the undertaking, then effectively Mastercard would be an unsecured creditor if something went awry with Mr Merricks.

Then I won't read out paragraph 31, but 32 says:

"*In light of the Tribunal's indication during the hearing, Ms Demetriou informed the Tribunal that Innsworth Capital had no objection to giving a suitable undertaking along the lines sought by Mastercard. It is not appropriate for the Tribunal to draft the terms of the undertaking. If the parties are unable to agree on suitable terms, we will resolve the issue on the basis of written submissions following this judgment*."

In other words, the Tribunal was satisfied that an undertaking by Innsworth in principle met the concern that was being raised, that the defendant didn't have a direct right of enforcement under the litigation funding agreement. So it seemed, until we got their deed, that this is -- what we have now done was precisely what Rightmove were asking for. They footnoted those four paragraphs, as I've just shown you, in their letter, and so they've got the undertaking. There's no complaint about the small print, but the complaint is now one about the principle. But *Merricks* contradicts rather than supports Rightmove's position, that an undertaking from a funder outside the jurisdiction doesn't suffice, because in *Merricks* the Tribunal was plainly satisfied that it did.

THE CHAIR: The undertaking was given to whom, do you know, in *Merricks*?

MR MARVEN: Well, I understand it was given to the Tribunal.

THE CHAIR: Yes.

MR MARVEN: To be clear, I mean, it's said, well, they're not officers, that they're not

solicitors. But we're not talking about an undertaking in correspondence. We're talking about an undertaking given to the court.

THE CHAIR: So the answer to that would be, if it wasn't complied with, then it would be a contempt of court.

MR MARVEN: Yes.

THE CHAIR: Then one would have to enforce the contempt of court order in Jersey or the US. So, are you saying that that's not materially different than -- if it was a contractual obligation, it would have to be --

MR MARVEN: No. It would be exactly the same.

THE CHAIR: (Overspeaking) It would be a court order.

MR MARVEN: I mean, I haven't trawled every single anti-avoidance endorsement that's been through this Tribunal, but I imagine most of them are justiciable in England and Wales rather than anywhere else. Indeed, one imagines in a lot of cases, if they were justiciable elsewhere, that would be the complaint.

This is an Aunt Sally of a point. There's no difficulty with the Tribunal enforcing an undertaking given to it. And another Occam's razor answer is: it's well established that this Tribunal has jurisdiction to make non-party costs orders. So you could just make a non-party cost order against the funder or the guarantor, if needs be.

We end up with a situation where the defendant is completely protected, because this Tribunal can enforce an undertaking, make an order. So the final fallback position seems to be: ah, but these entities are abroad. Well, that would be true of any anti-avoidance mechanism. Indeed, the final reason why I say, "Oh, these entities are all abroad, and some kind of enforcement by this Tribunal would not suffice", is that in Rightmove's own deed -- we say there's just no need for this deed, but in the deed that they propose, and I do just want to show you this: it's tab 13 of the core bundle --

THE CHAIR: Yes.

MR MARVEN: Page 503, clause 9.1. Sir, if you have tab 12, it's just over the tab, so to speak.

THE CHAIR: Yes.

MR MARVEN: They don't like our undertaking, but their own proposed deed, clause 9.1, provides for the exclusive jurisdiction of the courts of England and Wales.

THE CHAIR: Yes.

MR MARVEN: The other point, sir -- we deal with this in the skeleton argument. They don't engage with Mr Garrard's evidence that equivalent undertakings have been given in both the *Gormsen* and the *Stephan* litigation. In the first one, there is some difference in wording to do with the notification provisions, but nothing that's material. Again, because it's not the small print that's being challenged, I don't think in the interest of time I need to take you to those, but you do have those undertakings, and we have Mr Garrard's evidence that those are the undertakings given to the Tribunal in those two proceedings, in supplementary volume 2, tabs 82 and 83. So there is really no concern, and there is no need for the Rightmove deed, as it has been called. The other thing I ought to just deal with, that is in the Rightmove deed, is that the figure isn't 15 million. It's 21 million. Now, 15 million is a figure that often at this stage of the proceedings passes muster as appropriate adverse cost cover. But my short answer to that -- and we've obviously had an indication that the Tribunal won't be dealing with budgeting today, but I do just put it in the picture -- if the Defendants, who are not stinting on what they're spending on this litigation, want to say that £15 million is insufficient adverse cover, that should be done in the context of cost management after a CPO, if it is made, is made. But there's certainly no basis at this stage for increasing the adverse cost cover above 15 million.

THE CHAIR: Yes. Just to be clear on that, I don't want anyone to take our letter on this to indicate less than enthusiasm for cost management, because we do intend to

have cost scrutiny here, and I think it is becoming a matter of general practice in the Tribunal now for defendants in class and collective proceedings to be asked to produce some form of budgeting. It's just a question of what that is and how we do it.

MR MARVEN: Just a few sentences on that. The real questions are what and when, and our answer to when is as soon as possible after any CPO is made. As to what, we say cost budgeting under part 3, section 2 of the CPR, which essentially -- and the importance of that is it binds the parties on a detailed assessment on the standard basis, unless there's good reason to depart, so it gives a degree of certainty.

Our concern with the Defendants' approach is that 1) they want to postpone the cost budgeting, and 2) they don't want what I would call CPR cost budgeting. They want indicative estimates that ultimately don't bind anyone, and don't therefore give the rigour of certainty that cost budgeting in accordance with the CPR does. The issues, as I see them, between the parties are "what", and we say budgeting with teeth and consequences, not just indicative estimates that really carry little if any weight by the time one gets to a cost judge, because everyone will say, oh well, the proceedings changed. The second point is "when", and we say as soon as possible, respectfully, after a CPO is made, because as this court will appreciate, cost budgeting under the CPR only applies prospectively, so the later one leaves it the more money that has been burnt through, before the discipline is imposed.

THE CHAIR: Yes. Thank you.

MR MARVEN: That's all I have to say on the adverse costs undertaking.

On the class representative's remuneration, the Tribunal has Mr Newman's second statement, I hope. That's in the supplementary bundle. It's in the supplementary bundle, volume two -- it's a slim bundle -- at tab 3.

THE CHAIR: Yes.

MR MARVEN: I appreciate this will have landed -- well, it was in the main bundle. It's

later than some of the other documents, but I hope the Tribunal has had an opportunity to have a look at it.

THE CHAIR: We have read it.

I'm just conscious of the time too, Mr Marven. Just to slightly short-cut this; first of all, I think (inaudible) it was helpful to see the suggestions that Mr Newman has put forward, and we understand the basis on which that's been done.

I think all of those three carry some disadvantages. The first carries the disadvantage that it decreases transparency, and it creates at least the potential for a concern that there's another economic factor that might impinge on the relationship between the class representative and the funder. I put it no higher than that, but it seems to be opening the door to something which, if it became more prevalent, might be really quite unsatisfactory.

The second, I'm afraid, runs up hard against the decision of the President and the Tribunal in *JLP*, and that is, I think, a fair statement of the Tribunal's working practice in relation to this at the moment. So it's difficult, frankly, to get away from £170 and £250.

MR MARVEN: You mean £750.

THE CHAIR: £750. Forgive me. £170 and £750.

Then the third, I think, is interesting, but I think a little bit unsatisfactory, because we all know that these proceedings will have periods in which the class representative won't be doing as much, and periods when they're doing an awful lot, and that will be over quite an extended -- those periods will last quite a long time, and so there will be an unevenness, if you like, in the work done and the profile of the payments.

I'm certainly not saying that in any way we're not grateful for the thought process. I think it was very interesting, and we've given it considerable thought, but I think it is difficult to get away from the position the Tribunal stated in *JLP*. Now, I'm not saying

you shouldn't have a try if you want to have a try, but I'm really putting down a marker that --

MR MARVEN: (Overspeaking)

THE CHAIR: -- given a Tribunal with the President on has given that pretty firm indication of what the current thinking is, I think you're going to have to try quite hard to get us to depart from that.

MR MARVEN: I mean, there are at least three points of distinction with *JLP*. The first one is that in *JLP*, the PCR is an SPV rather than an individual. So --

THE CHAIR: The trouble with this is that you quite quickly get into the thing that I think *JLP* discouraged, which is negotiating the rate. And you're right, Mr Marven, and I'm not going to stop you from doing it, because it's entirely fair for you to make that point; but the trouble with it is that in *JLP*, actually, I think the Tribunal left completely to its own devices would have picked £150, and they only really felt that in fairness to Mr Le Patourel, it had to be slightly higher. So, you know, there's quite a lot of nuance in this, and I --

MR MARVEN: There is, yes. I'm not sure -- but well, in fact, I'm sure the Tribunal was endeavouring to be fair to everyone. But as I understood it, the particular reason they gave for taking the slightly higher figure within the range was that -- I mean, it was partly because there had been problems. This was *Riefa* mark 2, and they didn't want there to be a third round of applications for a collective proceedings order. But the other reason was -- and that is a point of nondifference here -- that the class representative's rate was agreed before the *Waterside* decision came out. So in that respect, we are the same as *JLP*. But the fact that Mr Newman is doing it as an individual, (a), increases the personal risk and the reputational risk he is taking.

The second point is that he is not someone who could be described as a professional class representative. These are the only collective proceedings for which he is the

class representative.

The third point is you do have evidence as to negotiation and reassurance that that money is not being excessively spent, that wasn't there, in my submission, in *JLP*. Of course, in *JLP*, although they made the point that there was a £750 cap, they recorded without disapproving. I do say this suggests that the President was not setting a tariff that everyone had to follow mechanistically. They recorded without disapproval that, in *Brook*, the rate had been £250 an hour --

THE CHAIR: Yes. Although I think, well --

MR MARVEN: -- subject to a £750 cap.

THE CHAIR: Yes. Although I think -- I mean, *Brook* itself makes it plain that it was operating in something of a knowledge vacuum, and in a sense, there's not much really that the Tribunal could have done about it afterwards. I think the thing about *Brook* is that -- well there are a number of things about *Brook*, weren't there, about the identity of the class representative and what she could contribute to the litigation, but also the observation that she wasn't necessarily recording all her time, now, even having filled in timesheets, still filling them in for 30-something years, getting on for 40 years. My advice would be to fill them in. Actually, I think it would be a better outcome, frankly, if we had the class representative writing down properly, recording it and charging it at the rate which we agreed.

I do take your points about points of differentiation, but the trouble is that actually, if you read *JLP*, it's essentially saying £150 is the sort of starting number, and you can build a bit on that, if you like, but don't build very much. The question really comes down to -- I mean, you know, are we really going to be -- whatever that number is, is it going to be materially different from £170? I wouldn't have thought so the way things sit at the moment, subject to (overspeaking) --

MR MARVEN: Well, I mean, the reason I mentioned that -- that's why I meant -- you

are right that *Brook* says we're not setting a tariff, and they acknowledge *JLP* is to come. But in *JLP*, the President doesn't say, she simply records the £250 rate and says, "But in practice, it will often be a lot lower than this because of the £750 cap". But the Tribunal didn't say, as it could have done, with the benefit of more research, we think that the decision in *Brook* was flawed. I mean, they could have said that and they didn't.

THE CHAIR: Well, I think, firstly, I'm not sure that that would be right or appropriate, but I just don't think you can read *JLP* as saying anything other than what I've just said, which is that a number really should start at £150, but £170 -- I mean, everybody, I think everybody will appreciate that having put £170 in that judgment, it becomes a bit of a sort of point of reference, doesn't it? But I'm afraid I don't think that you can point to many other things at the moment which are valid points of reference.

I think just to make the point slightly more broadly, Mr Marven -- and this is not without sympathy to the class representative's position, because obviously he started on one basis, and this is a bit of a moving feast, and I know that's very unsatisfactory, and I'm sorry it's doing that, but that's not obviously the circumstances within my control. But the thing that really matters here, it seems to me, at least in economic terms, is the £750, and that is not something which is the subject of any discussion. As for that, he's committed to that. Actually, that's entirely acceptable to us. So ...

MR MARVEN: We're committed to that in both options 1 and 2.

THE CHAIR: Yes. Yes. You know, in a world in which the class representative is spending a lot of time on this, then that will be the daily rate. If it's not that much, then, actually, you know, it's a reflection, I suppose, of the view the Tribunal takes as the appropriate rate for the work that's less than that, if I can put it that way.

MR MARVEN: So may I take a step back. I mean, it's very helpful to have that indication, but I do, if I may, just want to press the case for the options that we have

put in. I mean, the starting point -- and I say this with the greatest respect to the Tribunal and the President -- is that the decision in *JLP* is not legislation. It's not a statutory instrument setting a rate that binds subsequent Tribunals. The starting point is the question: why, when the Tribunal doesn't regulate -- no one is suggesting you look at the lawyers' hourly rates, et cetera, et cetera. They're all there in the various appendices. No one is suggesting that you look at that at this stage. But ultimately, if at the end of all this, you decide that the lawyer shouldn't be paid as much as they have billed, it's going to be between them and the funder, but principally the funder who suffers.

So the class representative's rate has been put in a special category where it's scrutinised in advance. Now, I'm not saying I'm not pushing against that, but I'm saying one has to identify what is the principled reason for doing that. The only principled reason -- and it's the one that's given; I'm not just making this up -- is a concern that the class representative's interests will be "misaligned". That's the word that's used in both *Waterside* and in *JLP*, that the class representative becomes too closely aligned with the stakeholders and too distant from the interests of the class.

So I do start by making a point. You will have seen how this happened. Mr Newman negotiated -- and it was a negotiation -- a higher rate, but in the light of *Waterside*, an alternative, or three alternative proposals, have been put in.

Just to be clear, contrary to what's being said, I'm not committing the offence of trying to negotiate with you. I'm not just saying, "Here are three. You tell me what's best". The way we put it -- and the response will no doubt find itself in the Tribunal's judgment -- is we seek option 1. If you're not happy with that, our alternative is option 2. If you're not happy with that, our alternative is option 3. So we're not just saying, "Here are three possibilities. You tell me what the right one is". We're not saying that. So I'm not seeking to negotiate with you. I'm seeking to put alternative

proposals before you.

But I do pray in aid, firstly, everything I've already said about Mr Newman's CV, but secondly, the evidence in paragraphs 10 and 11 of his second statement and also confirmed in Mr Hain-Cole's statement. Firstly, that he takes a reasonable approach to time spent. Secondly, that the rates that are now being proposed, any of them, were negotiated downwards -- in fact, this was true even of the higher rate that is no longer being pursued -- from his normal rates. And he is an individual rather than an SPV. And they were SPVs in both *Brook*, as it happens, and in *JLP*. And he is taking on very significant obligations.

I do say against that background, there is no concern with any of the three options he puts forward. On the first option, just to deal with the point you put to me -- there might be some concern if this caught on -- it's right to say that a side agreement, if you like, has not yet been executed between the class representative and the funder, but it will and would be very simple. It's simply that the £170 a day will go through the waterfall, and the balance up to £275, so £105 day will be paid by the funder without the funder being able to put that through the waterfall. That answers a specific point about the PCR's return, making inroads into the damages available to the class. It wouldn't above the £170 rate. That £170 would be capped at £750 a day. So by my maths, the bit that wouldn't be put in the waterfall would mean that the class representative's daily remuneration would be capped at £1,213 a day. That's just uprating it from £170 to £275. So that means that the class is protected from anything above £170.

I mean, I don't know if this was the Tribunal's concern, but there'll be nothing untoward going on. It's not going to be that the funder is going to be paying more than that.

THE CHAIR: I think that's not really quite the point, actually. It's a lack of transparency, and it's creating a financial relationship between the funder and the class representative, which is not subject to the Tribunal's supervision.

Now, I don't see how you get around those two points, and they just seem to me to be not how we want to be running these cases. Because it opens the door to any number of different permutations of that. I'm not suggesting for a moment that Mr Newman is somebody who would be influenced by that.

MR MARVEN: No, I'm sure --

THE CHAIR: But the moment we do this, we're going to have the next and the next and the next turning up and doing this. The numbers could be very different. We've lost control of the process at that stage.

MR MARVEN: Well, you haven't lost control, because you can say, ultimately, that you're not going to certify on that basis. One would expect -- and most class representatives are supported by reputable funders and represented by reputable solicitors -- you would be told the whole picture. What would be unacceptable is if I said option 1 was £170 an hour, and I didn't tell you that the funder would be paying another £105, but that wouldn't go in the waterfall -- obviously, if we didn't tell you that, that would be completely unacceptable. But we are telling you. So that's the transparency.

THE CHAIR: And then the class representative is beholden to the funder and an instrument which is outside the funding arrangements, over which we have no visibility at the moment. Even if we did, you know, on what terms could it be changed, varied, terminated? All of this is just unsatisfactory. I think it's --

MR MARVEN: Well --

THE CHAIR: -- not the way I think we want to do it, Mr Marven.

MR MARVEN: Well, I'm making my submissions. I mean --

THE CHAIR: You are.

MR MARVEN: If we changed it, having told you what it was, if -- I mean, can I say there's no intention to change it? I mean, there have been discussions. This is for the

proceedings as a whole. But if in this or another case, someone came before you and said, "This is the basis on which the PCR is being paid" and that then changed, of course, I would suggest you would expect them to come back and tell you. But that's not specific, if I may say, to this arrangement, that the concerns which one hopes would not arise if people were conducting themselves properly in any proceedings could arise under any form of arrangement for the -- I mean, you could have a vanilla situation where the PCR says the funder will pay me £X an hour.

Now, if that later changed, the Tribunal would only know, because someone would tell it. But the Tribunal no doubt trusts the lawyers who act for the class representative and trust the class representatives, having approved them, that they wouldn't make a backdoor arrangement like that, which meant that what they had told the Tribunal needed to be corrected. Without correcting it.

But that's not -- I suppose my overall answer to the concerns is it's not a concern that's specific to the detail of option 1. If people change things without telling the Tribunal, that, of course, is a concern, but it's not a concern that's specific to my option 1.

THE CHAIR: Mr Marven, I'm just conscious of time.

MR MARVEN: Yes. I'm sorry.

THE CHAIR: I appreciate this is very important to your client, but you are going to need to finish.

MR MARVEN: Well, that's all I've got to say on option 1.

Option 2, I've kind of said it already. It's precisely the arrangement that was blessed in *Brook*. It was not challenged as being incorrect in *JLP*.

Just one other point on *Brook* -- and I don't think we need to turn it up -- in paragraph 75 of the judgment, can I just leave this with the Tribunal, given the pressure of time. There was discussion about the personal effectiveness of the PCR, and particularly that she, although it was an SPV in that case, is not making

a profession out of being a proposed class representative. Both the personal effectiveness of the PCR and the fact that she's not making a profession out of being a class representative are also features here.

On option 3, I just want to say one word on this. That, in a sense, makes the structure closer to the salaried analogies that were being looked at in *JLP*. Although it's still not a perfect analogy, because the class representative doesn't get pension benefit, holiday benefit, sickness benefit, in the way that someone on an actual salary would.

So, in my submission, any of those alternatives would be appropriate. You've got the evidence, I know. I've mentioned Mr Newman's statement, Mr Hain-Cole at paragraph 61 to 63 of his second statement -- tab 7, page 318 -- makes the point that each of the options are a significant discount, and that the PCR has only -- the charges operates effectively and efficiently; has only charged more than two hours a day on two occasions. Mr Garrard's evidence, tab 8, page 339, paragraph 33 to 34.

The point was that he confirms that as a commercial funder, they wouldn't endorse higher rates than they needed to get a class representative of the quality that they would want to entrust their money in proceedings to.

Sir, I'm conscious I've over -- may I just turn my back on the Tribunal for a moment before I sit down?

THE CHAIR: Yes.

MR MARVEN: Sir, unless there's anything I can assist with at this stage, those are my submissions. I'm sorry to have overrun.

THE CHAIR: No, no, I'm sure that's mostly my fault. Thank you, Mr Marven.

Mr Ward.

Submissions by MR WARD

MR WARD: I'm going to address you on three topics.

Firstly, opt-in/opt-out. It is our submission, as you're aware, that the proceedings should only be certified on an opt-in basis. All of the class members are businesses. They're well able to understand and engage with this particular claim.

On the PCR's own case, they are highly motivated to do so. On the facts of this particular case, it is entirely practicable for them to do so. The PCR has raised a series of objections which are almost entirely generic. They don't reflect the facts of this case or indeed their own evidence. Most importantly, the PCR has failed to advance any evidence about this particular claim capable of substantiating its concerns.

We also have a hybrid option, and so we'll talk later about your observations about that, but broadly, we are entirely ad idem with you, that our primary case is the entire class should be certified for opt-in. But the hybrid option is merely an *a fortiori* part of that case. The same reasons apply but *a fortiori*. We don't actually say there is a cliff edge of the kind Mr Beal suggested we did, between £166,000 and £167,000.

We say, all of the claim should be certified as opt-in, but if you have doubt about that, at least these large and sophisticated claimants should be included.

The second point is exclusionary abuse. The short point is simple. If the PCR intends to allege exclusionary abuse caused loss and damage, he needs a *Pro-Sys*-compliant methodology. If he does not make that allegation, he does not. Listening to Mr Beal and his discussions with you this afternoon, we think he probably does intend to make that allegation. In that case, if we're right, he does indeed need a methodology.

THE CHAIR: When you say methodology, do you mean --

MR WARD: A *Pro-Sys* methodology for calculating aggregate damages.

THE CHAIR: Yes.

MR WARD: Then once I've had my say, Mr Williams is going to pick up the various authorisation issues, and you've seen that we do ask for limited directions. One of those issues is indeed PCR remuneration, where evidently there are live issues,

listening to what has just transpired.

So with that, if I may -- are you content to sit until 4.30?

THE CHAIR: Yes, of course. Yes.

Opt-in/opt-out submissions

MR WARD: Then what I'm going to do is open my case on opt-in/opt-out, and hopefully we can have a look at *Evans*. But before we do that, I thought it'd be useful just to remind ourselves of what the rules say. They are in the authorities bundle under tab 5 on page 34. It's just a point about the structure of the requirements, which is banal, but we hope informative, even so.

If we go to page 34, tab 5, page 34 of the authorities bundle. It's all very familiar material, I'm conscious of that. We start with Rule 78, which is the authorisation condition, which, happily for me, I'm not concerned with that; Mr Williams is.

Then 79, where I am concerned. We start off with the eligibility requirement.

"*The Tribunal may certify claims as eligible ... where, having regard to all the circumstances, it is satisfied by ...* [three things]."

That they're brought by an identifiable class, raise common issues and are suitable.

Then the requirements of suitability are all itemised in 79(2).

Then we get to 79(3):

"*In determining whether collective proceedings should be opt-in or opt-out proceedings; the Tribunal may take into account all matters it thinks fit* ..."

So obviously multifactorial assessment, as they say, including, though, the following specified matters: the strength of the claims; and whether it is practicable for them to be brought as opt-in collective proceedings. I just draw attention to the structure to draw out a point which I hope is not controversial, that we only get to opt-in/opt-out if the claims are suitable; suitable for collective action rather than being brought

independently.

If it would be helpful to have an example of higher authority for that proposition, it's in *Le Patourel* in the Court of Appeal. I can just give you the reference, but if you'd like to see it, you can go there. Authorities bundle 2, tab 24, page 33, paragraph 101, where the Court of Appeal talks about the subsequent and consequential decision on opt-out or opt-in.

THE CHAIR: Just to make sure I understand where you're coming from, I understand the structural point, but you're not taking -- unless I've missed something -- you're not taking -- apart from the methodology points -- you're not taking an issue in relation to the suitability in (2)?

MR WARD: Perhaps it was too long-winded a way of doing it. To make a short point, we're only talking here about claims that are suitable.

THE CHAIR: Yes.

MR WARD: It's from that perspective we look at whether they should be opt-in or opt-out.

THE CHAIR: Yes, I see.

MR WARD: Not whether in fact they should be brought independently.

THE CHAIR: No, I see.

MR WARD: We've crossed that hurdle to even be having this conversation.

THE CHAIR: Yes, I understand.

MR WARD: Now, there are times when I felt from Mr Beal's submissions as though he was sort of suggesting it was somehow unduly tactical, or maybe slightly disreputable for Rightmove to be raising this question. But of course it is hardwired into the statute. We now have, of course, leading authority on what the test is, in *Evans*. But, having said we're going to get to it, I want to go first actually to *Merricks*, which also provides very important context. There we are, in the authorities bundle 1,

under tab 17. I'd like to show you some very familiar paragraphs. The first paragraph is at page 1016, paragraph 37.

THE CHAIR: This is *Merricks* in the CAT?

MR WARD: *Merricks* in the Supreme Court. I'm so sorry, I should have made that clear. Tab 17, 1016. This is from Lord Briggs, the majority judgment. The first part looks a bit unpromising because it's talking about Canadian jurisprudence. But if we pick it up at "f", and the important bit begins.

THE CHAIR: Yes.

MR WARD: He talks about how they both operate within the civil framework. And then at "g". It's really what he says about the policy that is interesting.

"*Both* [i.e. English and Canadian] *may be said to serve broadly the same statutory purpose of providing effective access to justice for claimants for whom the pursuit of individual claims would be impracticable or disproportionate*."

Then his Lordship quotes with approval, *Hollick*. And it talks there in the quoted passage:

"*The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool ...* [et cetera]."

Familiar stuff. I simply say that because this identifies what the policy consideration is behind the Act as a whole, and the idea of a collective mechanism.

But now, with much fanfare, we are going to turn to *Evans*, because that tells us what the right approach is to the consequential decision, whether the proceedings should be on an opt-in or opt-out basis.

In broad terms, it tells us two things about opt-in and opt-out. Firstly, it addresses the underlying questions of policy, and they are additional policy questions. It makes clear that the choice between opt-in and opt-out raises actually competing policy considerations.

Now, in this case, Mr Beal, the proposed class representative, says they've put forward the policy interests of the class in access to justice, the kind of interests identified in that passage of *Merricks*. But *Evans* identifies countervailing policy considerations in respect to the interests of defendants and, of course, the particular burden that an opt-out kind of claim can bring. So these competing policy considerations require a balance to be struck. In our respectful submission, Mr Beal really just ignores that need. His case is essentially that he should be allowed an opt-in claim because it would create burdens if there were an opt-out claim. But that is not the other.

THE CHAIR: The other way round, I think.

MR WARD: I'm sorry. The other way round. Thank you.

Secondly, *Evans*, of course, provides guidance on the application of these policy considerations through the lens of the Act. It makes clear that the key criterion in many cases will in fact be practicability. It also makes clear the need to focus on the particular facts of the case. So we need to be very careful in trying to, if you like, algorithmically apply earlier cases, particularly cases that predate *Evans*. What's needed is a fact-specific assessment.

Now, 4.15. Let's look at *Evans* itself, if I may. This is in authorities bundle 3 under tab 48, and I'd like to go to page 425. (Pause)

I'm going to start by just making good some of the observations I've already made about policy, before we look at what it says about detailed criteria. But on page 425, we see that the judgment in *Evans* starts by quoting from the minority in *Merricks*. We see:

"*89. In Merricks, two of us (Lord Sales and Lord Leggatt)* [who notably agree with themselves, of course, say] *by reference to the legislative history and experience in other jurisdictions, that collective proceedings -- particularly if they are opt-out -- confer substantial legal and commercial advantages on claimants and burdens on defendants*

which are capable of being exploited opportunistically."

Then they quote from themselves:

"'*A class action procedure which has these features ... provides a potent means of achieving access to justice for consumers. But it is also capable of being misused. The ability to bring proceedings on behalf of what may be a very large class ... without obtaining their active consent and to recover damages without the need to show individual loss presents risks of the kind already mentioned, as well as giving rise to substantial administrative burdens and litigation costs. The risk that the enormous leveraging effect which such a class action device creates may be used oppressively or unfairly is exacerbated by the opportunities that it provides for profit.*'"

Then if we could just turn on now to page 436 of the bundle, paragraph 137. Picking up really the same policy consideration again, but perhaps on a broader basis:

"*The defendants have argued as a separate ground of appeal that the Court of Appeal erred in holding ... that the principles of 'facilitating the vindication of rights' and 'deterring future wrongdoers' are factors relevant in this case which point* [to] *opt-out proceedings*. [The defendants say they're not relevant to opt-out]. *However, there is no doubt that, as Lord Briggs* [said], *these are indeed policy goals which the availability of the statutory scheme for collective proceedings is designed to further. Lord Briggs also considered that these factors fortify the approach which courts apply even in ordinary civil proceedings that, when claimants are shown to have suffered loss* [because of] *wrongdoing*." That is really talking about the broad axe. Five lines from the bottom: "*these factors do not assist the Tribunal in making important decisions when operating the statutory scheme, such as a decision whether to certify collective proceedings as opt-in or opt-out. That is because, as discussed earlier, there are competing policy aims, which also underpin the regime, of protecting businesses from the burden of defending unmeritorious or inflated claims. The Tribunal is required to*

strike a balance in the way that we have described between these interests."

THE CHAIR: It's slightly curious, isn't it, where it says these factors don't assist the Tribunal, because presumably the balancing process does require taking into account the policy of vindication of rights. I mean, I don't quite understand how you -- you're not excluding that from the balancing process, are you? It's just a slightly odd way of putting it, isn't it? I think I understand what the judge is saying, but I … how are you excluding (overspeaking) --

MR WARD: It's not -- yes. I entirely see your point. I'm not saying these things just vanish into (overspeaking).

THE CHAIR: Yes. Just it ceases to be an overriding consideration, perhaps, is a better way of putting it.

MR WARD: The mere appeal to this isn't going to answer the question of opt in or opt out.

THE CHAIR: Yes.

MR WARD: We'll see in a moment, that is in fact the case that you're faced with.

If we just could read on a little bit more, I'd like to just highlight some more points in the next three paragraphs. "*We agree with the defendants' submission: the Court of Appeal was wrong to suggest that 'facilitating the vindication of rights' and 'deterring future wrongdoers' are factors which point in favour of opt-out proceedings, at any rate* – [and this may be where we square the circle, sir] -- *… without mentioning that those factors are counterbalanced by the need to safeguard the rights of defendants and that the approach of the Tribunal should be even-handed, without any bias in favour of opt-out (or opt-in) proceedings*."

THE CHAIR: Yes.

MR WARD: So under the statutory scheme, the starting point is one of neutrality. Mr Beal mentioned that. There is no presumption or predisposition in favour of either

opt-in or opt-out. The mere fact that class actions help with the vindication of rights doesn't answer that question. It says the Court of Appeal appears to have lost sight of this.

Then at 139:

"*A similar perspective appears to have influenced the court's approach to access to justice. At para 123 of the judgment, Green LJ said:*

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

That was the Court of Appeal, and my friend Mr Beal didn't quite go that far. Mr Garrard is more cagey than that, but he certainly wants to telegraph he thinks this is all difficult:

"*This suggests that the Tribunal failed to take account of this factor, when in fact the Tribunal specifically treated it as 'a factor that points strongly in favour of* [certification on an opt-out]. *The real complaint would ... seem to be* that *the Tribunal did not regard it as conclusive. But there is no warrant for that approach. Rule 79(3) does not direct the Tribunal to consider whether there would be no proceedings* [other than] *on opt-out terms; it directs the Tribunal to consider whether it would be practicable for the proceedings to be brought as opt-in* ..."

"*140. Reliance on 'access to justice' as requiring certification on an opt-out basis does not recognise sufficiently that access to justice is something to which both claimants and defendants are entitled*."

Then, just skimming down:

"*We endorse* [the following observation of the Tribunal]:

'"*Access to justice does not, in our judgment, mean that every case that can only be brought on an opt-out basis must be permitted to proceed on that basis. Opt-out*

certification is not a certification basis of last resort, in the sense that if opt-in proceedings do not work, there is effectively an entitlement to certification on an opt-out basis. Rather, 'access to justice' means ... taking all the material into account -- whether certifying on an opt-out basis is appropriate.'"

We respectfully seek to apply that approach in our analysis. But this matters, because the proposed class representative repeatedly relies on access to justice for class members as a reason for opt-out certification, but without acknowledging these countervailing considerations. May I just give you some examples from his skeleton argument?

THE CHAIR: Just before we do that, I think that that paragraph must be a reference to the strength of the claims, mustn't it? Because if it's talking about opt-in certification not working, the only reason on which you -- well, not the only reason, but the reason, in fact, the Tribunal didn't certify was that the claims were weak. So I don't think that undermines the point you're making. I'm just trying to understand the context of that quote.

MR WARD: We'll double-check, sir. I confess I took it to be about overall sort of viability, whether it is if a case is being presented on the basis that if only opt-out would work, it must be opt-out.

THE CHAIR: Well, no, I think it is -- I think you're right. I think I'm just making the point that in the context that's being discussed there, there must have been a failure of practicability for the opt-in proceedings in order to get to the point that you're then considering whether opt-out is the necessary default, whereas, in fact, the Tribunal reached the conclusion -- or the majority reached the conclusion -- that wasn't the right answer because of the strength of the claims.

MR WARD: As it's 4.27, we'll have a look at this overnight and provide an answer tomorrow morning, rather than me winging it.

THE CHAIR: Yes.

MR WARD: If I may just sort of conclude this --

THE CHAIR: Yes, of course. Please do.

MR WARD: -- just by showing you the proposed class representative's skeleton argument, which is in -- what I'm trying to remember, it's called the second supplementary bundle, as opposed to the supplementary bundle volume 2. I do love this job sometimes. It's under tab 1 at page 4, and we can see paragraph 1.4.

THE CHAIR: Sorry. What are we supposed to be finding here? These are the skeletons?

MR WARD: It says "*Fourthly*".

THE CHAIR: I'm struggling with this, I'm afraid. Maybe it's the timing as well. The second supplemental bundle --

MR WARD: Under supplementary bundle 2, tab 1 at page 4, para 1.4 of my learned friends' skeleton, sir.

THE CHAIR: Yes. I don't know where I put those. Carry on. It's fine. Why don't you give us the references? I will go back and look at them.

MR WARD: It's page 4, paragraph 1.4 of my learned friends' skeleton.

THE CHAIR: Yes.

MR WARD: Do you have that?

THE CHAIR: Just carry on. That's fine. I can go back and look at it.

MR WARD: What it says is:

"*Fourthly, opt-out certification would further the underlying legislative purposes of the CPO regime, namely facilitating access to justice, promoting procedural and judicial economy, deterring anti-competitive behaviour which would otherwise go unrectified.*" [as read]

Then a similar point is made at paragraph 7.

In our respectful submission, what is missing from this is the acknowledgment of the countervailing policy considerations identified in *Merricks*. Where I propose to go with that now tomorrow is to then look -- sorry, I said *Merricks*; I meant *Evans* -- is to go to *Evans* tomorrow and see what it says about actually applying the statutory criteria.

THE CHAIR: Yes. Just in terms of timing --

MR WARD: Yes.

THE CHAIR: -- obviously you started a bit later than you expected. I don't know whether you have a sense of that at the moment.

MR WARD: I think we're well placed. I'm going to stick my neck out and say I can't imagine us going all day, even allowing Mr Beal some time to reply.

THE CHAIR: Yes. I think it would be convenient for the Tribunal if we could finish by 4.00, but if at any stage you think that's at risk -- and indeed Mr Beal may have a view on this as well -- we could have a short, short adjournment. We're willing to cut the short adjournment.

MR WARD: Let's see where we get to by lunch.

THE CHAIR: Yes.

MR WARD: I actually think, having heard Mr Beal, I'm able to cut down quite a bit of what I was going to say. But at the moment -- I mean, it's famous last words from any advocate, but I feel really quite relaxed about the time tomorrow.

THE CHAIR: We should be worried, I expect.

MR WARD: I think probably that's right. Yes.

THE CHAIR: That's helpful. Why don't you keep us posted on how you see it going, and we can pick that up.

Good. Thank you. 10.30 tomorrow morning.

(4.30 pm)

(The Tribunal adjourned until 10.30 am on Tuesday, 3 November 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?