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**IN THE COMPETITION APPEAL TRIBUNAL**

Case No: 1771/7/7/26

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 3rd 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**

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# 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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Tuesday, 3 November 2026

(10.30 am)

(Proceedings delayed)

(10.36 am)

Submissions by MR WARD (continued)

Opt-in/opt-out submissions (continued)

THE CHAIR: Yes, Mr Ward. Good morning.

MR WARD: The start of my submissions are continuing with opt-in and opt-out.

THE CHAIR: Yes.

MR WARD: Just by way of route map through those submissions, I'm going to start with your question of yesterday afternoon about *Evans* and what was really being discussed about the first instance judgment.

THE CHAIR: Yes.

MR WARD: Then I'm going to make five points by way of our positive case on opt-in. Then I'll deal with the PCR's objections, then the hybrid option, and then the authorities, because actually they speak to both options, and I thought that I will have picked some up on the way through, but just to sweep up the ones Mr Beal talked about yesterday, insofar as necessary.

I would like to start with your question yesterday, which was about a passage in *Evans* at authorities bundle 3, tab 48, page 436. (Pause)

You'll see there, there is a quotation from the first instance judgment. I'll just remind you. It's paragraph 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."*

THE CHAIR: I'm sorry. Could you give me the page reference again?

MR WARD: I'm so sorry. I thought I did. 437.

THE CHAIR: Thank you. Yes, I have it.

MR WARD: I was reading from 140, and this is just by way of recap: Reliance on access to justice applies to both claimants and defendants. Then towards the bottom, before the quotation, it says:

*"The Tribunal was right to make these points at para 372(2)(ii) of its judgment. We endorse ... this observation:*

*"'Access to justice does not, in our judgment, mean that in 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 ... an entitlement to opt-out ... 'access to justice' means ... taking all material into account -- whether certifying on an opt-out basis is appropriate."*

Your question, sir, if I understood it correctly: was this really talking about the merits or something else? The answer is -- I'll show you -- that the Tribunal was actually thinking about costs and benefits, but in the context of opt-in and opt-out. We can see that if we go to the authorities bundle, tab 23 at page 1409 of bundle 1. (Pause)

You'll see at the top of the page, at 372, the Tribunal says it is considering the various factors in Rule 79(2) as a framework for assessing eligibility in the context of opt-in/opt-out.

THE CHAIR: Yes.

MR WARD: Then at (2)(i) it talks about the cost being borne by the funders, and then the passage the Supreme Court endorsed is from (2)(ii), where it's talking about the benefits in terms of access to justice.

That's the answer, sir, if that's helpful.

THE CHAIR: Yes, that is. Thank you.

MR WARD: Against that background, I'm now going to go back to *Evans*, and as I foreshadowed yesterday, go through the passages of *Evans* which provide guidance on how the statutory criteria should be applied. If we therefore go back to authorities bundle 3 at tab 48 -- I should have asked you to keep it open -- at page 426. Mr Beal showed you this passage yesterday, I think.

THE CHAIR: Yes.

MR WARD: This is a passage about the relevance of the merits. At 94, the Supreme Court says:

*" ...if the claim is very weak it is likely to be more difficult to justify resort to the opt-out procedure* [as a fair balance]*. It is also likely to be difficult to justify resort to ... opt-out ... as a proportionate way of providing access ...*

*"*[But] *The assessment involved is not all or nothing. The detriments and potential unfairness to a defendant of an opt-out procedure are real, and do not drop out of the picture just because the claimants have claims that might have some merit. The less the Tribunal has confidence about that, the harder it is ..."*

Then they say, at the bottom of that paragraph: it is a sliding scale.

THE CHAIR: Yes.

MR WARD: Then over the page there is more on this topic, starting at paragraph 100, at the bottom of page 427:

*"The Court of Appeal in Le Patourel further observed ...*

*'"in many cases the* [Tribunal] *might be hard pressed at the certification stage to form a sufficiently clear view of the merits to enable it, with confidence, then to take merits any further in the overall balancing exercise. This might be because of the complexity of the legal and economic issues arising and the absence at the certification stage of expert evidence and disclosure.'*

*"It is certainly true that in cases where the Tribunal concludes it cannot form a view of*

*the merits at the certification stage, it may be unable to place any weight on this factor ...*

*"Equally, however, there will be cases* [where] *the Tribunal does feel able to form a view, albeit necessarily provisional, of the strength or weakness of the claim to which it considers that weight can properly be attached in deciding between opt-in and opt-out proceedings. If the Tribunal is able to form the view not only that the claim has a realistic prospect of success but ... appears to be a strong case that will provide support for a decision to make the proceedings opt-out. The same point arises in reverse."*

The point I make simply is it is a sliding scale. It becomes a matter of weight. But what the Supreme Court is saying is: even if the Tribunal is able to form a view of the merits one way or the other, that won't be decisive. And it's not decisive, because what the Court also makes clear is that the question of practicability is of utmost importance. We see that if we move on to page 430, paragraph 112. This is a sentence we have placed weight on:

*"The implication of rule 79(3)(b) is that, if it is practicable for the proceedings to be brought as opt-in proceedings, then generally speaking they should be. The principle is clear: if it is practicable for claimants to bring opt-in proceedings, it is unlikely to be proportionate to confer on them the ... advantages* [of opt-out]*."*

But it makes clear, and I don't want to overstate this point, about seven lines down, near G, *"As with the strength of the claim, this is only one factor ... (clearly, since it is singled out ... potentially an important one) which feeds into the overall evaluation ... weight may vary from case to case ..."*

I don't say it's just that necessary and sufficient condition, but the language of the Supreme Court there is strikingly strong.

I'm asked to read 113, which I'm very happy to do:

*"The legal significance of rule 79(3)(b) is similar to 79(3)(a). Both have to be read and applied in the context of the overriding objective ... There are risks of unjust outcomes on both sides.* [That's very much our submission.] *If refusing to allow opt-out proceedings means rights are not duly enforced, that is unjust to prospective claimants. On the other hand, if allowing opt-out proceedings results in defendants paying off claims which in reality are not valid, that is unjust too. In deciding between opt-in and opt-out proceedings, the Tribunal has to seek to advance the interests of justice overall in circumstances of uncertainty."*

That's actually a useful reminder just to draw attention to something I read yesterday but wanted to put a little more emphasis on. If we could just turn on to page 436, where it talks about the policy aims. I'm only going to reread one sentence.

You'll see at the bottom of the page, at 137, the last two lines:

*"... as discussed earlier, there are competing policy aims, which also underpin the regime, of protecting businesses from the burden of defending unmeritorious* [then this is where I want to add additional emphasis] *or inflated claims."*

The policy consideration is not just, is the claim plainly bad; but might it be put excessively high and might that itself apply the kind of leveraging pressure that is articulated by the Supreme Court?

THE CHAIR: Can I ask you, just if you take the two specific identified limbs, strength of claim and practicability; are you suggesting that practicability is more significant than the strength of claim? Are you saying that paragraph 112 is providing a sort of weighting towards practicability?

MR WARD: It's very dangerous, isn't it, for me to presumptuously interpret what's being said here. But I'm going to say that the language here at the beginning of 112 is strikingly strong. If it is practicable, then generally -- *"generally"* is of course a vital caveat there -- they should be brought on an opt-in basis. Whereas the language that

we've looked at about strength of claims, it is very much a sliding scale, it's in the balance. It's not decisive either way. If you get a strong claim, it's only a relevant factor.

THE CHAIR: Well, couldn't practicability be a bit of a sliding scale as well --

MR WARD: It could be.

THE CHAIR: -- in the sense that you might have; and indeed, you know, I think this is your case here. You might have some really quite small claimants, and you might have some large ones, and the sort of profile in between is what you're really interested in. So in a way, you're trying to make an assessment across that sort of plane, and also thinking about the strength of the claim plane, and putting those together, all in the exercise of providing that balance of interests. I mean, is that a fair way of looking at it?

MR WARD: I think it is a fair way of looking at it, yes. I can't really improve on the language of the Court, but just to say how important the practicability requirement is. I don't shy away from saying, as indeed I did yesterday, it is a multifactorial assessment that's required here.

THE CHAIR: Yes.

MR WARD: You're right, of course -- of course, sir -- that the level of practicability will be variable across a class. But here, the submissions I'm going to develop are: given the nature of this claim, given the evidence of the proposed class representative, it is clear one can be robust, that it is practicable for the entire class. If it is practicable, then it really does raise the question of why the merits would somehow swing this away all towards an opt-out only claim.

THE CHAIR: Well, I suppose it comes back to this point, doesn't it, if you look at 112 --

MR WARD: Yes.

THE CHAIR: -- which says, *"If it's practicable for claimants"*. It doesn't say, *"for all*

*claimants"*. But --

MR WARD: It says, *"the proceedings"*.

THE CHAIR: Well, I think it probably does. I think one is inferring, from what they say, they do mean all claimants. So it seems to me that if you've got a class in which you reach the conclusion that it is practicable for all of them to bring opt-in proceedings, I can see that that's a pretty powerful reason, isn't it?

Obviously we're going to come on to what *"practicable"* means in practice, but if you were to form the conclusion that there was a mixed picture, which is certainly what I read the post-*Evans* decertification cases as talking about, then you are back into my sort of two planes, aren't you?

MR WARD: Perhaps. I mean, I wouldn't accept that if there are a small cohort for whom it would be, if you like, practicably challenging, that that would itself be a reason to conclude that the whole claim had to be on an opt-out basis. But of course, one has to read 112 against what we're going to turn to in a moment, which is the Supreme Court's articulation of the scope for a hybrid approach. So obviously, that's in play here today.

But of course, if the Tribunal concludes there are a cohort for whom it's obviously practicable, there's another cohort where it's at least more doubtful, maybe we're not convinced -- maybe it's not even practicable. That is exactly the kind of logic that pushes you towards a hybrid solution.

I don't shy away from saying our primary case is absolutely that this claim, this cohort, can all opt-in.

THE CHAIR: Well, obviously, you'll develop that. But yes, I think, I mean, that's helpful, I think. Certainly, in some ways -- because if you go back, there is, you know, the earlier statement that there's neutrality in the Act.

MR WARD: Yes.

THE CHAIR: So the logic of 112, I think, has to be, doesn't it, that if there's no obvious reason why people shouldn't be bringing it as an opt-in, then why would you make it an opt-out? The obvious reason and the test for that is practicability; I can see that. But you are then -- I suppose the question is: does that apply to individual claimants? So I'm jumping onto the hybrid point now. Once you jump onto the hybrid point, how useful is that observation? Because clearly, you've got some other factors that come into play, haven't you? One of which is the Tribunal's resources and the ability of the Tribunal to manage cases which are configured in particular ways.

So, at that stage, it seems to me you do necessarily depart a little bit from the simplicity of the two planes. Because you're not just talking about strength of claim, and you're very much back into 79(1) and all the factors listed out -- or subparagraph (2). Subparagraph (2), isn't it?

MR WARD: Perhaps, yes. In a sense, I'm going to be making two, I think, really quite simple submissions on this. It is practicable for the whole class. But if you're against me on that, there is a cohort within the class where it's so obviously practicable that this requirement must be found to be satisfied.

I accept, sir, as you say, that's not entirely the end of the story, but I do rely on the robust language of the Supreme Court.

THE CHAIR: Yes, I see where you're going. I suppose I'm just trying to get the architecture right. Because it seems to me if you're dealing with it in the simplest terms -- without wanting to suggest anything about the merits or otherwise of your case, but if you dealt with it in the situation where you had ten very large potential class members, and regardless of the merits, you'd have to be asking yourself the question why the expectation in 112 wasn't met. Yes, it's a very simple question at that point. You're actually only engaging more or less one plane.

The moment it becomes more complicated than that, where you've got a mixture of

people who are much smaller claimants, and there's a question about whether, for whatever reason, inertia or whatever, they're not going to bring their own claims. You're then into the two planes: the strength and practicability. I mean, it seems to me you have to bring strength in at that stage.

Then you've got the third situation, which is that once you start thinking about splitting up the class, you really have to start thinking about some other things apart from those two things. That's the architecture I have in mind.

MR WARD: As always with the judgment in *Evans*, it leaves a few questions unanswered.

THE CHAIR: Yes, that is helpful. Thank you.

MR WARD: I was going to just go on and just quite quickly deal with some other paragraphs here, which we think are helpful, just to understand the way to approach this.

At paragraph 114, really, this is part of the discussion we've just been having, sir:

*"The nature of the Tribunal's assessment ..."*

It is an *"open-textured"* question:

*"... the* [difficulty] *of assessment and the* [wide] *range of cases ...* [means] *the Tribunal* [does have] *a wide case-management power of evaluation and discretion ..."*

It talks about the Tribunal's expertise.

Then picking up at (b):

*"The choice between opt-in and opt-out collective proceedings involves an element of trade-off between different aims* [perhaps that's partly what you were just saying, sir] [and] *in particular the need to ensure people with valid claims should have a reasonable opportunity to vindicate them and the need to ensure that defendants are treated fairly and are not subjected to tactical and commercial pressure beyond what is reasonable ... as a proportionate* [way] *of securing that opportunity."*

So these words, *"reasonable opportunity"*, are important. This is now explained in the passages below:

*"The* [collective proceedings] *regime provides additional opportunities for claims to be brought and vindicated, but it does not guarantee this will be possible in every situation where there has been a breach of competition law. The regime still operates on the basis of commercial factors* [which] *affect whether individual claimants or third party funders are prepared to provide the funding necessary ... What the regime seeks to provide is a reasonable opportunity, not available previously for a group of claimants to club together (or, in the case of opt-out ... to be grouped by a claims entrepreneur) to vindicate their rights in a way that would not be practical or cost-effective if they had to proceed individually."*

That's a useful reminder about the eligibility criteria. That is, in fact, what the regime is all about. But the regime is not intended to immunise them completely from the usual background commercial considerations, which have a role in determining whether proceedings are thought to be sufficiently viable.

We pray that in aid, really, when one is considering the objections that I'm going to come to, that this would all cost more money and require more work for the lawyers and the funders.

Then it talks about a spectrum of cases at 116 and 117:

*"The regime is designed to accommodate a wide spectrum of cases ... At one end ... there may be a large class of ordinary consumers affected by a breach of competition law resulting in their having to pay more for goods or services, but involving small sums for each individual which would make individual cases economically unviable* [see *Merricks*].

*"At the other end of the spectrum, the claimants who allegedly suffered loss 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. That may be done by clubbing together with other similar organisations with similar claims to bring a single set of proceedings ... In such circumstances, it may not be appropriate for collective proceedings to be brought at all; and if collective proceedings are considered appropriate, it is likely to be on an opt-in basis."*

Then, their Lordships say:

*"The present case falls between those two poles."*

We would accept that this case falls between the two poles, though there are some very large claims. You've seen that there are class members with hundreds of branches, and the proposed class representative's claim that the average per-branch amount for estate agencies is £10,249 plus compound interest. That's the Claim Form at paragraph 46. We'll see later that the compound interest claim allegedly adds about half as much again. So, in extremely rough numbers, that turns into £15,000 per branch. So we are going to say that, as well as there being very large claims, even the smallest claims are well capable of opting in.

Then moving on -- I've almost finished with this now.

THE CHAIR: Yes.

MR WARD: 119 over the page. You alluded to this yesterday sir, but it is important, given the case that's being made:

*"In assessing the practicability of bringing opt-in proceedings, we agree with the Tribunal ... an objective assessment is called for, in the sense that it should not depend on evidence about the subjective state of mind, and legal advice received by individual potential claimants."*

This is relevant to retaliation, which we were surprised to hear more about yesterday.

Then finally, just for completeness, before we finally leave *Evans*. 120 -- you're well

aware of this already -- this is contemplating the possibility of a hybrid class:

*"This does not require the Tribunal to assume that the position of all potential claimants is the same. It is relevant to consider the composition of the proposed class and whether it is relatively homogeneous or comprises potential claimants of different types and with different sizes of* [a] *claim. The identification of distinct groups is a matter for evaluative assessment by the Tribunal depending on the particular facts, and is one in relation to which it has a wide discretion."*

I thought Mr Beal's submissions yesterday came close to saying, "Well, if you haven't got something qualitatively different, like apples and oranges, this just can't apply". I don't know if he made that submission. It was just the flavour.

But certainly, in our submission, that is not what the Supreme Court is saying. It's an evaluative judgment.

MR BEAL: If you read on.

MR WARD: Yes.

*"In our view, where the Tribunal identifies groups of claimants with distinct profiles relevant to the assessment ... it should consider the practicability of bringing an opt-in claim for each group separately; and if this yields a different conclusion for each group, it should stand back and make an overall assessment of the balance ..."*

We entirely embrace all of that.

THE CHAIR: Just this point about qualitative. When you go back to the fourth line, it talks about *"claimants of different types and with different sizes of potential claim"*. So it's not just about the size of the claim, is it?

MR WARD: No, no, it isn't. We don't base our assessment purely on the size of claims. That is not our case. I will come to it, because I'm going to try and persuade you it's a bit more nuanced than that.

THE CHAIR: Yes. That's fine. But I mean, just on the question of -- I mean, without

wanting to get into precisely where Mr Beal got to -- well, I mean, it seems to me we are faced with a qualitative and quantitative evaluation --

MR WARD: Yes.

THE CHAIR: Obviously, the weighting of each of those will depend a bit on the -- as it says, we'll need to think about that and the circumstances of the case.

MR WARD: Absolutely. It's very clear that it's an area in which the Tribunal has a wide discretion.

Of course, even though you may say there are, in fact, all sorts of different categories within the class, which I am going to come to, you may say, "Well, estate agents. They vary within the claim from estate agents with one branch to very large national chains that are well-known household names", but that doesn't mean they're just the same thing, and the only difference between them is just how much money they turn over. Obviously, there is something qualitatively different between Foxtons, say, and a small, rural estate agent.

But all of that is for later. I think, now, finally, I can put *Evans* away.

In light of that, I'm going to --

THE CHAIR: Sorry, before you do, though --

MR WARD: Yes.

THE CHAIR: But I mean, I'm so sorry -- but just if one is undergoing this exercise in 120, you're still back to the sliding scales, aren't you, bearing in mind what you think about the strength of the claim? Yes. So practicability is the tool by which you would undertake the assessment of the smaller group.

MR WARD: I would. I would.

THE CHAIR: Yes, yes.

MR WARD: So unless you have any more questions for me, I was going to put *Evans* away.

THE CHAIR: No, thank you. No, that's helpful. Thank you.

MR WARD: Thank you.

I'm now going to move on to our submissions. As I've already said, we rely on five factors that cumulatively make this claim particularly suitable for opt-in proceedings.

We do submit that the proposed class representative's objections are strikingly generic, and they would apply to almost any claim, at least, perhaps, except the very extreme polar end identified by the Supreme Court.

Mr Beal said yesterday that we were guilty of the fallacy of treating claim value as determinative. That's not right. It is one of our factors, undoubtedly. But I'm going to go through all five.

In the course, I will also deal with some of the 12 points of objections from Mr Beal; in fact, I hope I'm going to deal with all of his 12 points, but just not in an enumerated way. I will have addressed them.

The first point is in a sense rather basic. This is a class made up of businesses. They vary in size, from single-branch estate agents to large corporates. But we do say that on the facts of this particular claim, it is practicable for all of them. In the language of *Evans*, they're well capable of looking after their interests, and none lack the awareness, capability or resolve.

Now, yesterday, Mr Beal said there was no material difference between an SME and a consumer. But, well, with respect, that isn't right, and it's worth bearing in mind that an SME may have up to 50 employees and still qualify as an SME. If you want the reference for that, we've set it out in our skeleton second supplementary bundle tab 2, page 54, paragraph 52.

To be clear, we do not say any business-to-business claim is of necessity practicable for an opt-in. We don't go that far. It's the particular features of this claim that make it an obvious candidate. Indeed, they're so obvious that I'm also going to be submitting

that this ought to have been considered properly by the proposed class representative at the outset. That is going to be a theme of my submissions that I'm going to develop in stages.

The second point is about the nature of the claim. Good or bad, the claim is easy to understand. There is nothing esoteric about it. It doesn't depend on an obscure or confusing theory of harm, unlike, notoriously, *Evans* did. I want to show you how the class representative describes it in their skeleton, which is in the second supplementary bundle tab 1 at page 12.

THE CHAIR: Paragraph 21, are we?

MR WARD: Paragraph 21, page 12.

THE CHAIR: Yes.

MR WARD: This is under the heading *"Strength of the claims"*.

*"The PCR's case theory is straightforward and orthodox. The claim is that Rightmove abused its dominant position by charging excessive and unfair prices in restricting competition. The PCR seeks damages equal to the difference between the fees actually paid and the lower fees they would have paid in the counterfactual." [as read]*

That is indeed strikingly orthodox. At its heart is a simple proposition that Rightmove's fees are too high because of its alleged market power. That is not hard to explain, and it is not hard to understand.

Thirdly, on the proposed class representative's own case, the amount of money involved is large. This is not a claim for a few pounds on a train ticket, or even the football shirt that we were all fondly remembering yesterday when Mr Beal referred to it. We summarised the data in our skeleton. But I believe we have declassified now a little bit more, and we're going to talk about what has been marked as confidential.

But the average claim value on the class representative's claim is £86,000 pre-interest. Interest adds about a half. But then of course, there is a breakdown in Ms Deakin's

table 5, which we're now allowed to read out, which adds a bit more colour to that. I want to go to that.

THE CHAIR: Yes.

MR WARD: That's in the core bundle under tab 10 at page 419. Do you have that?

THE CHAIR: Yes. Thank you.

MR WARD: We were accused yesterday of a tactical stunt around this table. We certainly didn't mean to pull one. I'm not sure that we even did. What we see here -- I'll be corrected if I misinterpret this. We have the first column, allocated damages in pounds. Then we have pre-interest allocated damages. Then we have post-interest allocated damages.

THE CHAIR: Yes.

MR WARD: There's two points to make. I think the bit where we were accused of, again, a stunt was by focusing on the second row, which is £25,000 to £49,000, because you can see in the pre-interest category, that is actually a large number of claims. But when we look at the post-interest category, we can see something quite important: that the first row has become a row of zeros. In other words, by the time you add interest, there's nobody left in the category of £0 to £24,999. Indeed, most of the people who were populating the next category have been bumped into the one above.

So the point that we made about where the sort of bulk of the value of the claim lies, even at the bottom end of the claim is, I hope, not a stunt, but was a fair one. What this really tells us then is that even at the bottom of the claim, there are really substantial sums and they're substantial, not just in absolute terms, but in relative terms. This again is the proposed class representative's own case. If we could now please --

THE CHAIR: Just before you do, because I just – isn't the point about this, then. Let's

take the pre-interest damage, and I appreciate your point that you tip a lot of people over into the next band once you add the interest. But, just for argument's sake, let's just take the pre-interest.

MR WARD: Yes.

THE CHAIR: Then we'll go on and look at the post-interest, but basically the pre-interest. If you've got 82 per cent of the PCMs have a claim which is less than £50,000. That's what it's telling us, isn't it? Is that a reasonable benchmark to take for the bulk of the claim, for practicability? So once one's done doing this exercise, and standing back and having a look at the whole thing as we've been told to do, we're now being told that 82 per cent of the claim's face value is below £50,000, and when we think about practicability, that's the number we should have in mind.

MR WARD: Well, firstly, if I may, sir, I'm going to resist the word *"benchmark"* because I think -- obviously I know you don't intend this in this sense -- but it isn't a bright-line figure based on claim valuation. That's exactly the sin that Mr Beal accused me of, that we were very determined not to commit. So --

THE CHAIR: Well, hang on, but sorry, but surely when you talk about practicability, and you've made the point yourself, I think, about the claims being significant, surely the size of the claim is a big factor in practicability.

MR WARD: It is a relevant factor, for sure. I'm going to show you why we think there are some other very strong factors that go with it.

THE CHAIR: Yes, yes.

MR WARD: But I do say, what this shows this claim is not about, is the very small-sum types of claims that we've seen in some of the tech cases --

THE CHAIR: I understand that submission. Yes.

MR WARD: -- where it might be £10 or a few hundred pounds, where it becomes much more like train tickets or these other sorts of claims.

THE CHAIR: Yes. And no one's going to issue proceedings for those. And --

MR WARD: And you can see why the incentives to actually opt in are a lot less --

THE CHAIR: Yes.

MR WARD: -- if you're being offered £100. You've got to understand even some relatively simple paperwork rather than, as Mr Beal fairly says, getting an email saying, "Good news. All you need to do is send me your bank details, and I'm going to send you some money".

THE CHAIR: And even then, people don't do it. So ...

MR WARD: But obviously there is -- I'm not going to say there is no burden on a class member who chooses to opt in. I'm going --

THE CHAIR: No, no, no, but you're going to deal with that. But I suppose I'm just trying to pin you down on whether you accept that the reference point, a reference point for that is that, is that in the context of someone seeking to get £50,000 back and possibly some interest. So it may be that, you know, you can take the same view. You can say, well, actually, you might say the number we should be looking at is £75,000, because that's where, once the interest is concerned, that's where that bulk now shifts to. Of course, what we don't know is, I mean it's interesting, isn't it, because one rather suspects that a claim of £50,000 isn't going to have £25,000 of interest on it.

MR WARD: It is according to Ms Deakin.

THE CHAIR: Is it?

MR WARD: Yes. I'll show you that in a moment. It's in the same report. In fact, just look at it now. It's page 426.

THE CHAIR: Yes.

MR WARD: Where she summarises her quantum work.

THE CHAIR: Yes.

MR WARD: She says, at paragraph 40(a), (b) and (c):

*"[a.] Losses incurred during the Relevant Period, which comprises RM's Financial Years FY20-FY25, of £699mn";*

*"[b.] Ongoing losses incurred in future periods from 1 April 2026 to an estimated trial date of 2028 of £415mn;*

*"[c.] Compound interest at 8 per cent of £446mn."*

THE CHAIR: So a bit below 50 per cent.

MR WARD: That's why I said earlier it's about 50 per cent.

THE CHAIR: Yes.

MR WARD: Obviously, we're going to have an argument later about whether that claim should be certified.

THE CHAIR: No, no, of course. Exactly. No, but I understand that's helpful. So can we go back to --

MR WARD: May I take one other point here on the table.

THE CHAIR: Yes, of course, but I want to go back to that. Yes.

MR WARD: Yes, unless you had another question.

THE CHAIR: No, no, I want to go back to the table. That's good. Yes.

MR WARD: So back to the table, which is on page 419. The real significance of this row of zeros in the top right-hand corner is it shows that even in the pre-interest class, in the smallest category, there's no one's claim that is so small that it wouldn't be bumped into the second category by compound interest.

THE CHAIR: Yes.

MR WARD: So there's nobody there without a -- even these 612 people who were in that category, their claims are still quite substantial.

THE CHAIR: Well, on a rough rule of thumb, tell me if I'm getting this wrong, but –

MR DAVIES: £16,000.

THE CHAIR: Yes, exactly.

MR WARD: £16,000. Yes, £16,000 or above. Somewhere between £16,000 and £24,999.

THE CHAIR: Yes. So exactly. But in a way, I mean obviously I understand the reason you're making that point, and it's a point of distinction from the £10 claim and indeed actually the £1,000 claim. But isn't the really sharp point of this -- I'm going to come to this, you're going to say there are lots and lots of reasons -- but one of the things we are going to have to think about is whether a claim of £50,000 or alternatively £75,000, if you're looking at it with interest in it, is practicable, in the sense that you would be likely to encourage people to come and sign up for an opt-in claim. I mean, that is a key question, isn't it? I'm not saying it's the only question, but ...

MR WARD: It is a key question, and I think one of the differences between our case and my learned friend's case is that it really characterises the opt-in regime.

THE CHAIR: Yes.

MR WARD: It really only applies to the very big commercial entities.

THE CHAIR: Yes, and you are going to come on and do that. But what I want to be clear about is that when we do that, when we're thinking about that issue, the relevant numbers are either £50,000 or £75,000, depending on how one puts it.

MR WARD: Yes, and --

THE CHAIR: For the simple reason that once you're into the low 80s, that's really where the bulk of the claim is. Obviously, you're going to come to the hybrid point. I understand that you then say, okay, well, you can look at bits of it separately. But if you've got 80 per cent below £75,000, then £75,000 becomes a pretty important number for the purpose of practicability.

MR WARD: -- We just say without hesitation that for this claim, that is an ample amount to motivate --

THE CHAIR: Yes. Well, you're going to come on and --

MR WARD: -- Are people going to be motivated enough to claim this money, or are they going to leave it on the table? And when we're talking about train tickets, it's not terribly surprising that the take-up was very, very low. But I'm --

THE CHAIR: Well, now you're talking about distribution, though, aren't you? That's a bit different from opting in, isn't it? I mean, aren't you doing the very thing that Mr Beal is complaining about?

MR WARD: I thought I was making a concession, but it doesn't matter. I'm simply saying that this is enough money to be motivating. I'm going to show you now the PCR's own evidence -- own evidence -- that makes that good.

THE CHAIR: Yes. Thank you.

MR WARD: For that, we're going to go now to -- if I can put that away -- the supplementary bundle 1, tab 4, where I hope you're going to find Mr Whittaker's witness statement.

THE CHAIR: Yes, we are.

MR WARD: He is one of the proposed class members.

THE CHAIR: Yes.

MR WARD: Witness evidence was obtained, and we can see he operates an estate agent's -- if you look at paragraph 5 -- with one branch, and he is the market leader in Harpenden.

What he says, though, that is important here -- it's at paragraph 10, page 36, *"Rightmove is currently Whittaker & Co's second largest expense per annum, second only to staff costs"*.

This isn't some kind of obscure technical banking charge, or deep in the terms and conditions of some tech company. It is, on the class representative's own case, a very, very important charge. Of course, Mr Whittaker, with respect, sounds like he is at the

lower end of the scale of these claims. But this is, of course, an overcharge articulated as a percentage.

So ultimately, what is very important for Mr Whittaker seems, plausibly enough, would be very important for others. The scale goes up; the numbers go up; the relative importance is likely to remain.

THE CHAIR: Yes. Okay. I understand the point you are making.

I think the battleground is not so much the importance. It's actually the consequences of the importance, if one can put it that way. It's the inertia point, isn't it? It's about whether the effort -- whether one can form a view on the motivation of a proposed class member to undertake the steps necessary and distract themselves from their business in order to participate in the opt-in. Isn't that really the key question here? That's going to be the thing that tells us the most about whether, for that 82 per cent, it's practicable.

MR WARD: And actually, where you are (inaudible) to form an inferential case, because of the big gap in the class rep's evidence that I'm going to come to a little bit later, the question is: what can you reasonably infer?

THE CHAIR: Yes.

MR WARD: What have we learned? We have learned that even for the smallest class members, these are substantial sums, and that the charge is something of real importance. For Mr Whittaker, it's his second largest expense, second only to staff costs. Why? Why would he not want to recoup what is said to be a very sizable share of those charges, given the choice? Of course, the answer is it's all too difficult, but I'm going to try and persuade you it's not too difficult.

We come to my fourth point now, which is that according to the PCR, there is already a groundswell of concern in the class about the charges. So this might not be like, perhaps, say, *Interchange*, where it might be that by the time someone contacts you

about *Interchange*, it might be the first time you've even heard of *Interchange*. At least, I suspect I wasn't alone in that being the case when I started looking at it. This is something very much in the face of the proposed class, and we are told they are very concerned about it.

THE CHAIR: This is your fourth point, isn't it?

MR WARD: It is my fourth point.

THE CHAIR: Yes.

MR WARD: I'd like to show you again, the class representative's own evidence and submissions about this. I'm going to start, please, with the Claim Form. This is of course in the core bundle under tab 1. I'd like to go to page 21.

THE CHAIR: Yes.

MR WARD: You'll see at 45.6, it talks about very high levels of public dissatisfaction among the PCMs with the pricing and services set, including calls for regulatory intervention.

Then over the page, at the bottom of paragraph 46, this has now become a public outcry from PCMs and notable press, particularly industry press coverage, in relation to their treatment by Rightmove. So we have a public outcry about this; again, according to the PCR.

While we're in the pleadings, I'll show you where it's put in the Reply, before going to the underlying evidence. The Reply is under tab 3 of the same bundle, and it's at page 174. Some of this is just repetition, but there is an additional angle I want to emphasise. Paragraph 50:

*"... there is evidence of a very high level of* [very high, it is now] *public dissatisfaction among PCMs with Rightmove's pricing and service, including calls for regulatory intervention. In those circumstances, and given the prospect of receiving a damages award, there is every reason to expect that most PCMs would wish to be included in*

*the Proposed Collective Proceedings if they are certified on an opt-out basis ..."*

I'm not quite sure why that qualification comes, because the logic of this case is that people are really concerned about these charges. High levels of charge, relatively important charge in the business, highly visible and apparently high levels of concern.

I now want to show you what's actually said about this in the witness evidence. For this, we're going to go to the two witness statements of Mr Newman, and the first one is in the same bundle under tab 5.

THE CHAIR: Yes.

MR WARD: He says something quite similar at paragraph 11. But again, there's more.

If we go to page 238, please:

*"It is important to note, however, that the Claim relates to conduct and allegations that are supported by a number of complaints from market participants and a groundswell of negative feeling towards Rightmove from its customers ... calls for a probe by the ... 'CMA'."*

And then this bit is very interesting:

*"Indeed since announcing the launch ... there has been significant interest from the Proposed Class including sign-ups to the claim website and expressions of interest made by the email address provided thereon."*

Then we get into some knotty things about waiver of privilege, which I am actually going to come back to later.

Then carrying on at page 245, again, there's some repetition here, so I don't need to read out everything that's just a repeat of the same evidence. But towards the bottom of the page, again in the third line, he says:

*"It is ... telling ... that despite the strength and depth of feeling in the industry, no claims have ... been brought."*

If we put that away and go to the second supplemental bundle and have a look at Mr Newman's witness statement from last week, where he was really dealing with his own remuneration, a topic Mr Williams is going to have something to say about -- I suspect it will be this afternoon. If we go to that, please, second supplementary bundle under tab 3 at page 71.

This is the sort of hot off the press version, and he says something quite similar. He's justifying his own fees, at 71, 11(c), *"Because of the high-profile nature of this matter, a very interested and engaged proposed class and industry, including press"*.

All of that is the class representative's own case and you'll have seen reference to a "Say No to Rightmove" campaign, with 1,850 signatures. Obviously, my clients don't want anyone to say no to Rightmove, and they're sorry to hear that anyone wants to. But I'm simply presenting the PCR's own material here.

So of course, I touched a moment ago on the question of the privilege application, which I've no intention of reheating. But of course, you'll recall that one of the factors there was that you ordered that they would need to come forward with information, including about how many estate agents they had approached, and they decided not to do that and to withdraw their evidence, which was absolutely in accordance with the options given by your order. Just for your note, it's in the supplementary bundle 3, tab 92, page 46.

But really I'm making, I hope, a very simple point here that on the PCR's own case, there should be no lack of motivation here. It's the very opposite of *Interchange* or *Boundary Fares.* But it's really striking that the PCR tries to face in two directions at once in this issue; and when the discussion turns to opt-in, the tone is all doom and gloom. Mr Beal talked yesterday about how difficult it was to write to class members, how they might face a -- I think he said -- visceral response on receipt of a letter saying, "Would you like to join a claim where you might get lots of your Rightmove

fees back?"

But of course, in any opt-in claim, undeniably, the class representative is going to have to contact class members. I mean, there's no getting away from that. That's baked into the statutory regime. So it is really, we would submit, a purely generic objection, and the question --

THE CHAIR: Isn't part of the point there the number of them? I mean, if you've got 13,400, the idea of converting that into an opt-in claim is quite different from, say, converting ten financial institutions into it.

MR WARD: Of course.

THE CHAIR: I think that's the point that's being made about -- at sort of this stage of the sausage machine, where we're talking about, well, how do you start engaging, even; and obviously your point about awareness. I understand what you're saying about all that; but really, I mean, it would be a very significant class size to engage with, wouldn't it, just --

MR WARD: I'm going to come on and say why we think that's much, much easier. We're much less pessimistic than the class representative about how that can be done.

THE CHAIR: Yes.

MR WARD: Of course, I acknowledge your point, absolutely, in the abstract, sir. Of course that's right. 13,500 is an awful lot smaller than some classes, but bigger than others.

THE CHAIR: Well, when you say *"some classes"*, is that opt-in classes? I mean --

MR WARD: I mean, of course --

THE CHAIR: Yes.

MR WARD: -- I just mean cases where this issue has been considered.

THE CHAIR: No, but really, if we're interested in practicability, the question is: what are the chances of converting 13,500 of these sort of businesses, bearing in mind the

range, to opt in? That's the question, isn't it?

MR WARD: Of course, one would have to do it through a mixture of electronic communication and legal resource, without doubt. But these are entrepreneurial claims. This is a classic example of an entrepreneurial claim devised by a funder, worked out with a firm of lawyers, and now promulgated on behalf of a class. But that's a question of whether or not this is worth the investment to them, and of course, the class we're talking about is smaller than the one in *Evans*.

THE CHAIR: Yes. I'm not sure I'm that fond of the expression *"entrepreneurial claims"*. I know it comes from *Evans*, but it does seem to me to be --

MR WARD: It's the Supreme Court's.

THE CHAIR: Well, quite, but it does seem to me to be a slightly odd way to put it.

MR WARD: I mean, ultimately this claim is backed by Elliott.

THE CHAIR: No, it doesn't mean it hasn't got an economic consequence, but all commercial litigation has an economic consequence, doesn't it? I suppose it's sort of the speculative nature that comes with being entrepreneurial, and we know that entrepreneurialism is a very highly risky business, and I'm not sure that -- well, litigation is a risky business as well, perhaps.

MR WARD: These claims have proven quite risky too, haven't they?

THE CHAIR: Yes.

MR WARD: But I'm not wedded to the word.

THE CHAIR: No, I'm not criticising you. I'm just probably uselessly making the observation about that.

MR WARD: You know, one could use a -- if we're trying to avoid any negative connotation that might involve, there is an investment in the hope of achieving a return. The investment requires the funder to commit financial resources. But of course, one of the topics for discussion, it will be this afternoon, is about the multiples of gain that

they're seeking to obtain.

So one of the themes that was really in the Supreme Court's observations that I read earlier is: it's not really an answer to say this creates more work for lawyers, or it's not the optimal way for lawyers to do it, or that on its own, this would be hard. I'm not saying it's a completely irrelevant factor. So I'm not ...

THE CHAIR: Well, it sort of has to be reasonable and realistic, doesn't it? Because at that point, you know, putting aside the point about the trump card point. I mean, at a point, it's not going to be investable, is it? Because someone's going to say, "Well, I'm not interested in investing in that".

I'm not saying that's the position in this case.

MR WARD: (Overspeaking).

THE CHAIR: Well, you'll come to that, I'm sure, in here.

MR WARD: We're going to come to that.

THE CHAIR: But just as a matter, just conceptually, there has to be a reasonableness associated with it, doesn't there?

MR WARD: It's multifactorial.

THE CHAIR: Yes.

MR WARD: Okay. I was going to just move on a little bit further --

THE CHAIR: Yes.

MR WARD: -- and say I was going to have a look at Mr Hain-Cole's evidence, which is in the core bundle under tab 7, where he also is very doomy and gloomy about this. That is at tab 7, page 310.

THE CHAIR: Are you still on your point 4? Just so I'm aware of this.

MR WARD: I'm still on point 4, yes. This is a little preview of Mr Hain-Cole. Then I'm going to look at it in more detail in a moment.

THE CHAIR: Yes.

MR WARD: If we look, please, at page 310, paragraph 39.

THE CHAIR: Yes.

MR WARD: He says:

*"... I consider a class with the characteristics of the Proposed Class would be very difficult to engage with efficiently and quickly* [even though we've seen they've already had some kind of engagement]*."*

Then at paragraph 50, he says:

*"I believe ... that* [a bookbuild] *there is a real risk* [it] *would yield a low return."*

Then he refers to the "Say no to Rightmove" campaign.

Then he says at 51 -- and this, I confess, we find confusing. But line 4, he tries to square the circle:

*"This would not be reflective of any alleged 'lack of appetite' ..."*

Why? This is where we begin to struggle, because we're being told about this groundswell, this campaign, how important these charges are, how substantial they are, how we heard earlier that people would be keen to be part of an opt-out action, but not keen to do what is required to opt in.

THE CHAIR: I don't think that's what he's saying there, actually, to be fair, Mr Ward. I think he's saying that's why no one's brought individual claims, which I --

MR WARD: I'm sorry. If I've done him a disservice, I --

THE CHAIR: I think you might have.

MR WARD: I can --

THE CHAIR: I think you might have, where it says --

MR WARD: If we look back at paragraph 51, without going back on my point --

THE CHAIR: No, no -- well, but it's an interesting point isn't it? I mean, in a way, I thought it was the point you might make, which is that there is a difference, isn't there, between, if you like, the general difficulties associated with issuing an individual claim

are different from the general difficulties of issuing or participating in an opt-out claim, which are different from opt-in claims.

MR WARD: Yes, yes.

THE CHAIR: Sorry, it should be the other order. It should be --

MR WARD: In a way, well, I might say, reading this more carefully as you have, sir, is he then elides the problem into the question of what is the policy interest in group redress as a whole?

THE CHAIR: Yes.

MR WARD: Which is, of course, to allow collective claims for even very small sums of money, potentially larger ones. Of course, that is the policy interest behind collective proceedings. But the only issue we're dealing with today is not whether the claims are suitable, but whether they should be on an opt-in basis.

THE CHAIR: Well, I mean, I'm not going to make a business of defending Mr Hain-Cole, because he can look after himself. But I mean I think he is not distinguishing between the two, is he? I mean, I think it's perfectly fair for him to say what he says in the last paragraph, as long as he does mean opt-in and opt-out.

MR WARD: Well, sir, I think I'm quite content to leave it there. My broad submission, I think, is unimpeded by whatever Mr Hain-Cole did or didn't say, and I don't want to do him a disservice.

What I do want to do, though, is look at what happened in *Trucks*.

THE CHAIR: Yes.

MR WARD: Because, of course, *Trucks*, I think is the only currently pending opt-in claim, unless someone's going to pop up and correct me. We can see this in the authorities bundle 2 at tab 26.

I think while we're here, I'm going to deal with a few points on it, just so we don't have to go back to it, even though some of this is very peripheral to the point I'm making

now.

Do you have it?

THE CHAIR: I have it, yes.

MR WARD: Thank you. If we turn it up, we can go to page 80, which is internal page 10. It just reminds us of the procedural history, which is quite important.

Paragraph 10:

*"The substantive hearing of the applications was adjourned following the judgment of the Court of Appeal ... Pending the further appeal to the Supreme Court ..."*

Then 11:

*Following the judgment of the Supreme Court ... UKTC and the RHA amended their claims ...*

*"The hearing of the applications was* [remote] *because of the ... pandemic."*

Then eventually, we are here looking at a certification decision, in 2022. So there was quite a protracted period of gestation for this claim before certification because of just entirely external factors. This is relevant because one of my friend's points is how long it took them to build the book.

We can go to that at page 160. But what they were attempting to do was build a book against the background of noncertification, delayed certification, and of course, legal uncertainty.

If we remember what the *Merricks* first instance judgment of this Tribunal looked like, it was a very, very different world to where we ended up in the Supreme Court.

So you'll see, at 220, they started in 2017. Then eventually -- this is all pre-certification. Even by the period before certification, they'd signed up 15,761. Now, that's really dealing with a different point that's going to come up later.

The bit I really wanted to show you for current purposes is actually in 219, where the solicitor, Mr Burnett, explained why they thought opt-in was suitable. It's really quite

simple:

*"Mr Burnett states in his first witness statement:*

*"'Trucks constitute a material capital outlay* [because, of course, these are haulage firms]*. In addition, the haulage industry operates on tight margins, which means any damage and loss by the Infringement will have a material impact on road haulage operators. The RHA therefore took the view it was unlikely there would be inertia on the part of potential class members to opt in ...'"*

That was quite simple, according to Mr Burnett.

Here, I can't say this is all absolutely true seriatim, but we know that these are substantial fees. We know that we've heard from Mr Whittaker that this is a very important fee for estate agents. We know, as we are going to see shortly, that the actual quantum estimate was £5,500 per truck; we'll come to that in a minute.

Of course, hauliers -- I confess I've had no personal involvement with this action -- will vary in size; from large national chains down to small operations with maybe only one or two trucks.

Yes, Mr Williams nods. Good.

So, yes, apparently it's all too difficult for estate agents, even though it's comprehensible for hauliers. The problem is that it's not only that there's no evidence for this, but for reasons I've already shown you, it's really not consistent with the evidence the PCR has actually advanced.

Our submission is that if they wanted to persuade you that it was all too difficult, they would need actual evidence that they had tested, as has happened in other cases, whether or not there was any realistic appetite for it. I'm going to come to that in a minute on what the evidence is.

Before I do, I just want to make a fifth point, which I think is quite simple, which is that the class is straightforward to contact and, indeed, relatively small. We say it's

relatively small because it's smaller than the *Trucks* opt-in, which stands at 15,700-ish. It's much smaller than *Evans*, which was 42,000. It's a whole different order of magnitude to *Brook*, which is 880,000. I'm going to come to that in detail later, so I'm not going to turn it up now.

But it's very, very important when we think about this class that they're all current or past Rightmove customers. So Rightmove actually has the contact details for most of them. This is explained by Mr Anderson, and it's in core bundle 6, page 286, paragraph 35 and onwards. Providing that the Tribunal orders them to hand over those contact details, they're happy to. I say order just because that solves a lot of legal problems with handing over confidential information.

So they're not like train tickets, where there was no database of customers within the class. Or even *Ennis* -- and I'm just going to show you *Ennis*. I'm afraid, we probably will have to come to it twice.

But if we turn up authorities bundle 2, tab 38, please.

This is important, because a lot of weight was put on this yesterday. Tab 38.

THE CHAIR: Yes.

MR WARD: Of course, as you all know, this is the developer claim against Apple's commission. There's lots of features of this that are interesting, but for present purposes, just to make this point, I want to go to page 787. You'll see at paragraph 53, it said:

*"Whilst it* [may] *be possible to contact a sufficient number of PCMs with large claims and persuade them to opt-in and ... attract ... funding ... this would not resolve the practical difficulties of identifying, contacting and persuading the large tail of claimants with modest claims ... The evidence of the PCR was that he would face significant informational challenges in identifying and contacting PCMs. He would have to rely on incomplete publicly available data, and there was almost no immediate resource ...*

*where he could readily obtain all (or* [even] *a significant portion) of the PCMs' contact information."*

Then at the bottom of the page, paragraph 56, this was accepted. The last three lines there say:

*"The process of identifying and contacting many thousands of App Developers would be costly and time-consuming. Even if they could be contacted and identified, the opt-in rate would be ... low because of the small sums ..."*

And the sums indeed were small in that case.

I'm going to come to that later, but we are just in a different world here, a different world, where Rightmove has the details.

You will have seen on there -- I'm sorry, that was a separate point. But Mr Anderson makes absolutely clear that we've got the information. There may be some small gaps in it, but they can be dealt with, whether through trade bodies, Companies House, or even using the kind of publicity and notification ideas they have for the distribution phase, notice and administration plans.

So let me sum up before I go to what the class representative says about this. We have a claim brought on behalf of businesses. The PCR's case is simple to explain. It would yield large sums of damages for class members in relative terms and even in absolute terms for some. It relates to a very important cost element. There is a groundswell of concern, and the class members would be easy to identify and contact.

When we consider the interests of the Defendant here, as the Supreme Court mandates us to do, we do rely on the sheer scale of the claim and its nature. Again, the current pleaded value is about £1.5 billion. Of course, it's an attack on Rightmove's revenues for its core business. You will have seen that the pleaded claim is more than Rightmove's total profits for the claim period. So this has an obvious leveraging effect

of the kind the Supreme Court talked about, whether because of its merit or just its scale.

But that's why we say, in the round, the claim on a multifactorial assessment satisfies the requirements of opt-in.

And I'm going to turn to the PCR's objections. Would that be a suitable moment?

THE CHAIR: Yes. Just one question before we do, are you going to say anything else about the merits?

MR WARD: About merits? Oh yes, I am, absolutely.

THE CHAIR: Fine.

MR WARD: But because this argument is more complicated, I'm having it now.

THE CHAIR: No, that's fine. I just wanted to check that that was still on the agenda.

MR WARD: No, of course.

THE CHAIR: Yes.

MR WARD: That I am definitely going to come to.

In terms of time, I'm guessing I will go past lunch, but not much. But obviously we can see where we are at 12.55.

THE CHAIR: Yes.

MR WARD: I've made some good progress.

THE CHAIR: And so, when you say that, that's you, rather than you and Mr Williams?

MR WARD: Yes. Mr Williams tells me he needs about 45 minutes.

THE CHAIR: Yes.

MR WARD: We are well on time to finish comfortably, at the moment.

MR BEAL: (Inaudible) reply in more than 45 minutes if I can possibly avoid it.

THE CHAIR: Yes.

MR WARD: Yes, I've written that down.

THE CHAIR: I've written it down as well, actually.

MR WARD: We're in good shape. But if I start to drag, I'll try and speed up and also just (inaudible) because you kindly raised the possibility of a short short adjournment. At the moment, I feel comfortable we won't need it, but ...

THE CHAIR: We'll see how we go. Just let us know. That offer is open, and it can be 15 minutes or 30 minutes or something in between. So let us know as you go. That's helpful. Thank you. We'll take a ten-minute break now.

(11.40 am)

(A short break)

(11.54 am)

MR WARD: All of those factors cumulatively are as to why, on the facts of this case, opt-in is appropriate.

Submissions on t the PCR's objections

The objections of the PCR are, in our submission, strikingly generic, and don't really engage with those facts. Indeed, if they're really right in the things they say, it's going to be hard to imagine any case where opting-in is really practicable. But the evidence to back up these extreme submissions is simply not there.

Can I ask you to turn now to Mr Hain-Cole's second witness statement. Core bundle 7, page 317.

THE CHAIR: Yes.

MR WARD: He's talking about the money that this will all cost. Sort of in the middle of the page, you've got electronic non hole-punched. He says about ten lines down. *"Unlike in CICC I, neither the PCR nor anyone else (including this firm) has yet engaged with the Proposed Class in relation to their opting in to the action. The reason for this is obvious -- the Claim is brought on an opt-out basis. ..."*

Now this, in our submission, is really striking evidence because, of course, even before *Evans*, opt-in/opt-out was an issue. *Evans* came out last December. I think it's fair to

say it caused a lively debate in the profession. The change in the wind was obvious. We are not saying a full bookbuild was needed before the claim could be brought. That was a windmill that Mr Beal tilted at yesterday. But we are going to see Mr Garrard's evidence that he needed some help in this area, but the PCR chose to do nothing.

And when you think about the features that I've identified this morning, and the fact that the PCR was even in contact with class members, though we don't know how many, it is truly remarkable that no concrete steps were taken at all, even though it seems highly unintuitive, to test this proposition that is now being advanced.

I want to actually show you *Spottiswoode* now, where really the opposite approach was taken. This is in authorities bundle 2 at tab 46. Of course, as you know, this is the case about the airwave emergency radio system. I can deal with this case now and therefore not later. If we turn, please, to page 1441, at 66:

*"The PCR relied on evidence [evidence] that the PCMs would face practical problems opting-in due to budgetary constraints, a lack of qualified legal personnel to advise on and oversee active participation, and a general lack of resources to make decisions on complex litigation ... where ... the PCMs are otherwise engaged in fulfilling their public sector or charitable duties. ... this would be particularly true for smaller PCMs. As an example of potential lack of engagement by the PCMs, the PCR noted that a user survey ...* [with low response rate] *..."*

Then at 67:

*"... The evidence of Mr Gale, a partner at Ashurst LLP, the PCR's solicitors, was his team had already spent over 300 hours attempting to contact a sample ...* [We don't have that problem here, obviously, but this contacting them] *would be very time-consuming,* [and] *expensive ..."*

Then if we go then to 1444, paragraph 76:

*"In the present case, there was evidence before us (in particular from Mr Gale who had contacted numerous PCMs) indicating that while purchasers such as individual police forces would welcome any damages award, the time and resources required to make active decisions on opting in to the proceedings and continuing to participate on an opt-in basis would mean that at least some forces would not ultimately do so, given the other significant demands on their time and resources.*

*In the present case, there was evidence before us indicating* that *while purchasers such as individual police forces would welcome a damages award, time and resources to make active decisions on opting in and continuing to participate* in opt-in *would mean at least some forces would not ultimately do so, given other significant demands on their time and resources, such as preventing crime*."

Then over the page at 77:

*"Similar problems would likely arise for organisations such as fire and rescue services, particularly the smaller services, local authorities, and charitable organisations such as the Loch Lomond Rescue Boat Service, whose annual charges for Airwave Services were in the range of £1,500-£2,000. It is easy to see why for this user and similar small users the amount recovered would potentially be outweighed ..."*

So that was evidence. Instead, what we have is Mr Hain-Cole explaining they have just chosen not to ask the question. Instead, what we have is the claim presented as a fait accompli, that it would now be all too difficult to convert -- *"convert"* is the word used -- into an opt-in claim. Mr Hain-Cole -- I'll just give you the reference for time. He says converting the claim would cost millions of pounds. That's in his witness statement, core bundle 7, page 314, paragraph 49.

But of course, this is exactly the approach that the Tribunal deprecated in *Brook*. May we turn to that now, please? That's in authorities bundle 3, tab 59. This is a discussion of bookbuilding. Actually, it's relied on by the class representative. We

can see, if we turn to page 823, paragraph 60:

*"... the great majority of the claim value is accounted for by a small percentage of PCMs (a tiny percentage have claims in the millions of pounds), and conversely, many PCMs have very small claims. ..."*

Then, at 62, the solicitor for the proposed class representative said:

*"... it would be a long and difficult process to carry out an opt-in "bookbuilding" exercise. We accept his evidence about the practical difficulties of engaging with a class of the sort of size involved here (about 880,000). It is not just a question of making contact ...*[et cetera]*."*

Then at 64, tellingly, a bit more optimistically than Mr Beal:

*"Second, the overall length of the bookbuilding exercise would be significant. We do not have the materials to put a specific time on it*, *but we think* it *could be well over a year, perhaps two. ..."*

That's for 880,000 for a firm applying suitable resources. But the most important point now is at 65:

*"The PCR also said through Mr Teague's evidence that rearranging funding and insurance to be on an opt-in basis rather than the current opt-out setup that is in place would take a lot of time and be uncertain.* [We have got a similar point here.] *We can see that this would be a practical issue but find it somewhat presumptuous for the PCR unilaterally to arrange the whole proceedings on an opt-out basis and then to say that changing to opt-in would be hard. ..."*

Our facts are very different from that case, but we do say that that dicta very much applies here because it's just obvious that there's a real issue here. It was obvious before *Evans*. Once *Evans* came out, it was glaringly obvious. In our respectful submission, it is just apparent that serious steps should have been taken. We'll see shortly, that's what Mr Garrard wanted, as well.

Now, in light of that, in terms of bookbuilding, again, we're just not as pessimistic. It's not just the small class that we're talking about, but we're talking about bookbuilding itself, once there has been certification. So you can go to the class members and say, "A class representative has been authorised; the funding arrangements have been scrutinised by the Tribunal; the methodology has been held to pass the Pro-Sys test; the claims are strong enough to proceed". We can see that this can be readily explained in adequate detail for an opt-in case by the *Road Haulage Association* case.

THE CHAIR: Just before you go there, what about the point that you can't get the funding until you know how many opt-in you've got?

MR WARD: I'm going to come exactly to that.

THE CHAIR: Yes.

MR WARD: You need to know something about this. That's what Mr Garrard says. Of course, if you say you can never get the funding until the claim has been constituted as opt-in, that is definitely going to create a chicken and egg situation.

THE CHAIR: Yes.

MR WARD: That is not what Mr Garrard says. May I take that in turn?

THE CHAIR: Yes, of course. Please do.

MR WARD: I'm going to come to it.

THE CHAIR: Yes.

MR WARD: All I was going to do is turn up briefly the supplementary bundle, volume two, tab 81. There we find the Road Haulage Association brochure. Sounds exciting put like that, doesn't it? But it is going to be useful. (Pause)

What you'll see -- and I invite you to read this at your leisure, if you're so inclined -- is the brochure is at page 1465, and it's inviting opt-in. It just explains what the claim is about, in perfectly clear and comprehensible terms, aimed at road hauliers. You'll see

if you just turn up pages -- because of time, I really just want to direct your attention to --

THE CHAIR: Yeah. That's fine. We can look it up later.

MR WARD: 1473, you will see they deal with a complicated wrinkle to do with the subclass, you'll be familiar with the problem.

Then at 1477, they explain what they think an estimate of quantum is. It says, *"After costs, your compensation per truck is £5,503"*.

So this is a perfectly sensible approach, and it is entirely viable. What we have here is a point run which is eerily similar to the one that was run in *Spottiswoode* about public sector organisations. But the difference is, we don't have any sensible reason for this to be considered to be as difficult as they say. It's just not remotely comparable, and there's an evidential vacuum dealing with this very important point.

Then very quickly, I just want to pick up a few more points that were made by Mr Hain-Cole. One is that he talks about other bookbuilding exercises, but he's talking about bookbuilding mostly for group litigation. Mr Hain-Cole and Mr Garrard are explicit: their experience is in group litigation, and obviously, it's much harder. You don't have a certification decision. You have to go cold. You have to knock on doors cold: explain, sell a claim. Explain the arrangements; justify your view of the merits; explain the funding. All of these things have to happen without the benefit of the Tribunal's imprimatur. All of that is greatly exaggerated. We keep in mind the fact that the Supreme Court evidently thought opt-in was perfectly viable even for a class of 44,000.

So we are looking here at a threshold question where, in our respectful submission, this claim is miles over the threshold. The difficulties are badly exaggerated.

I just want to very quickly deal with some cases that Mr Hain-Cole cites as examples of where it can go wrong. One is, of course, *Evans* and *O'Higgins*, as in *FX*, where he

said they had difficulty. But of course, one of the problems there was the theory of harm. The theory of harm was held to be so lacking in cogency it was liable to be struck out, and that's discussed by the Supreme Court in *Evans*, paragraphs 80 to 83. If you felt at all tempted to look at the original, the Tribunal's ruling on that is in the authorities bundle, tab 23, page 1377, paragraph 240.

Then Mr Hain-Cole talks about *CICC*. I hesitate to venture into such a difficult terrain in front of you, and with Mr Beal there, who can absolutely keep me honest on this one. But what we have seen is that case had all sorts of difficulties which are not remotely applicable to this one. We actually brought to hand up, if we may, the first certification ruling that you gave in that case. I will risk my arm making some limited observations on this.

THE CHAIR: Mr Beal has referred to a number of cases. You've referred to a number of cases. You are making a point about an absence of evidence. I mean, to what extent are these legitimate places for us to look for things like how often it works in practice? I mean, do you have any difficulty with us doing that? Is that a proper thing to do?

MR WARD: I don't think many of them are very informative.

THE CHAIR: No.

MR WARD: I think none of them have the fact pattern of this case, but Mr Beal deployed them at quite some length. I'm going to have something to say about it.

THE CHAIR: Yes.

MR WARD: That's all. I think I'm largely, but not entirely, reactive on this topic.

THE CHAIR: Yes, fine. Thank you.

MR WARD: I'm going to dare to just highlight a few paragraphs of your judgment here, fully and frankly admitting that I'm not exactly across the detail.

But like *Evans*, this claim was very problematic. But also the objective was to sign up

a very low number of people. If we could turn to, in the report, page 1251, paragraph 156.

Counsel for the class representative confirmed: the methodology for infringement was not addressed anywhere in the collective proceedings, but was going to be addressed in the umbrella proceedings. Of course, the existence of the umbrella proceedings may well be one reason why this action wasn't terribly attractive to people.

Then if we move on to page 1264, you say at 246 that you agree with the submission of Ms Tolaney KC that there was a long list of defects in the CPO application that suggested it was not being directed as well as it could be.

Then before we put this away, just another point. Mr Hain-Cole talks about how the sign-up rate was low in this case; and in fact, the legal representatives made a further mistake about undertakings, you will recall. They thought they could sign up an undertaking, rather than a legal person.

But could we just look at page 1260, paragraph 219.

THE CHAIR: Yes.

MR WARD: It talks about how the expected number of class members would be in the low hundreds. In the end, I think they signed up 208, albeit some of them were undertakings.

That was another claim, or still is, that appears -- I say tentatively -- to be bedevilled with difficulty. So all of these examples that are relied on are not reasons for pessimism in this case. *Ad Tech* is mentioned, but frankly, we have no information about *Ad Tech* in the public domain.

Then just quickly, a couple more factors Mr Hain-Cole mentioned. One is the burden of providing disclosure or witness evidence. Mr Beal made the point yesterday. But of course, the case law shows the same burden can arise in opt-in or opt-out cases. There's plenty of Tribunal case law on that. If you want a reference for it, a perfectly

good one is *Rodger*, authorities bundle 3, tab 53, page 577, paragraphs 37 and 38. Importantly, the PCR's own litigation plan is to obtain evidence and disclosure from members of the class. We can see that in his Reply in tab 3 of the core bundle, at page 206.

This actually relates to the compound interest, and we can see at the top of the page he's summarising here Ms Deakin's second report:

*"*[The survey will ask the class members] *what they would have spent the additional funds on ... provide any* [additional] *documentation they* [may] *have to support it, such as board minutes on investment decisions, loan documents and bank statements ..."*

THE CHAIR: It probably is a difference, isn't it? I mean, I think if one is objectively assessing what a proposed class member might think about this, I think it would be right to think you were more likely to have to participate in opt-in than opt-out, just as a general proposition. I mean, I'm not saying -- your point is that there are obligations in both. I accept that, yes.

MR WARD: I'm not making an absolutely bright-line point.

THE CHAIR: Yes.

MR WARD: I'm probably trying to defeat the bright-line point.

Let's go on to funding now, which I've sort of previewed without developing. Can we go back to what Mr Hain-Cole says about this? This is core bundle 7, page 312. He says:

*"Given the matters addressed above* [which, with respect, we say are overstated] *I estimate that an attempted bookbuild of the Proposed Class could take at least 12 months to achieve a sufficient level of expressions of interest to justify opening discussions on funding."*

The clear implication is that there have been no discussions about funding on an opt-in basis, either when the funder came to Scott+Scott with the claim, or following *Evans*.

There has just been no attempt to consider this.

What we have is a witness statement from Mr Garrard, who explains all the sorts of things that would concern him about this. If we turn to page 341, tab 8 of the same bundle. At paragraph 41, he's pretty non-committal, but he makes clear he just doesn't have the information he needs. Paragraph 41:

*"It is likely to be very challenging to convince me and Innsworth that a wholly opt-in version would be commercially viable. But at this stage I am simply not in a position* [to say]*."*

He goes on to explain that lots of work would need to be done. At 44, he talks about the time-consuming nature of doing this in a securities group claim. But then really it's 46 that's very important. This is the point you previewed a moment ago, sir. He says in the middle of the paragraph:

*"I would require concrete evidence that a large proportion of the potential class members would opt in in the form of a bookbuild ..."*

But the problem is that Mr Hain-Cole's evidence is that they've done nothing at all to progress that question. Nothing. So no evidence has been obtained at all of anyone's appetite.

My submission, that you already have, is it's just glaringly obvious that people ought to have a high appetite for this claim, given what the PCR himself says about it.

THE CHAIR: Well, I don't know what Mr Garrard would expect or want. But it's interesting, isn't it, to see in *Spottiswoode* what the dialogue was between the solicitors and the -- so it might be that Mr Garrard would say, "Well, that's all very interesting what you say, Mr Ward, about motivation, but let's see what their inclination is, and let's ask them."

MR WARD: But then the decision was taken not to test that inclination, and in the words of Mr Hain-Cole, the reason for this is obvious. The claim is brought on an

opt-out basis.

THE CHAIR: Yes.

MR WARD: That's what he says.

THE CHAIR: Are you saying that because they've put themselves in that position, that's essentially their problem, and it's not for --

MR WARD: They've done exactly what was deprecated in *Brook*, which is they've just come to you with a fait accompli. This is opt-out. It would be very hard to unravel. It would be really expensive. You would have to do loads of work, and we haven't done any of it. Therefore, we get an opt-out.

THE CHAIR: So there's no question, is there -- I mean, that theme, I can't remember where the trump card comes from. It comes from *Evans*, doesn't it, the reference to the trump card? I can't remember whether it was the CAT or the Supreme Court, but there's no question that the Tribunal has consistently said that's an unhappy circumstance, and as a result, there's a discount on the weight that's applied to that. But it hasn't ignored the point altogether, though, has it?

MR WARD: I don't go that far. I don't know, sir. All I'm saying, sir, is that you have been presented with insufficient evidence to justify the concerns that are being expressed in a way that we say are overstated and don't reflect the realities of this particular claim. My submissions were based on those realities, as articulated in the class rep's own evidence.

Instead, you're faced with this evidential vacuum, which is just -- what you have instead are all sorts of expressions of pessimism, but no one has tested the water, and it's a decision not to, and instead to present this as a fait accompli and then say that unwinding it all would be too difficult. (Pause)

Of course, this isn't a case, though, where -- again, the very carefully drafted evidence does not say it would collapse there could be no claim. I mean, that's not a trump

card, as you say, anyway. But they don't say that. They just say, "It's all very difficult, but we don't really know – “

THE CHAIR: Yes. I mean, you made an observation a bit earlier about *Evans*; the Supreme Court thinking that opt-in was practicable for 44,000 class members. In a way, as I understand it, what they're doing is saying, "We accept there might be some fallout", but actually a lot of those small claims are not going to opt in, and --

MR WARD: But that is part of the assessment.

THE CHAIR: Well, it's actually not so much a decision about practicability. That's the balancing exercise, which I think is what you're about to say. That's the outcome of the balancing exercise, which is, "Oh, well, in order to be fair to everybody, the consequences are that some people are going to drop out, and anyone who wants to opt in is going to prove their intention by opting in".

MR WARD: Sir, yes. That is what I was trying to say.

THE CHAIR: Yes.

MR WARD: That, of course, is in the context of what was in fact an unsuccessful bookbuild in *Evans*. But that's part of a murky background.

THE CHAIR: I suppose the point is that your -- the natural consequence of your submission is that in the balancing exercise, it is quite possible that there are some people here who won't opt in, and claims will be unsatisfied.

MR WARD: The Supreme Court is very, very clear about that. There is no guarantee that you can bring a claim in the way you want. There's no guarantee you'll be able to get funding; no guarantee that everybody will get a claim. What the law provides is a reasonable opportunity. That was in the passage we looked at first thing.

If I may move on, I was just going to say just a little bit about retaliation, but not very much. We were surprised that this came up repeatedly yesterday. We reminded you already, sir, that your order was that they actually agreed to provide the number of

proposed class members who had expressed concerns about retaliation, but had the option of withdrawing their evidence instead of doing that. They took that option, and where we are, then, is we have evidence from Mr Anderson, who says that his -- I'll just summarise it back to you, but of course, I invite you warmly to read it. It's core bundle 6, page 288, paragraph 42 and following.

He explains, in his experience, that Rightmove does not retaliate. He gives evidence that Rightmove will not engage in retaliation. He makes clear that his position has the support of senior executives and will be disseminated through the business. Of course, if the PCR is genuinely concerned about this, he too can disseminate these reassurances through the class, as part of his bookbuild.

So there is no objective basis to be concerned about retaliation at all; and as you yourself observed yesterday, sir, *Evans* tells us the test is objective; paragraph 119.

Looked at objectively, even the proposed class representative has accepted that there would be no retaliation. Can I ask you to turn to the authorities bundle 4, tab 83.

This is a short extract from the transcript from the privilege hearing. I'm probably going to provoke Mr Schonfeld to follow on Mr Beal's reply with this, but this is tab 83, page 1148, page 72 of that transcript.

Mr Schonfeld says, right at the bottom of the page, line 25:

*" ...the point I was just going to pick up en passant is my learned friend opened his submissions with the statement that the PCR has made a suggestion that Rightmove would retaliate, and that Rightmove vehemently rejects that suggestion. To be absolutely clear, that Rightmove would in fact retaliate against PCMs is no part of the pleaded case or the evidence or our submissions. The question is whether the PCMs have a concern about that which would affect their behaviour were the claim to be an opt-in. So it's no part of our case that Rightmove would ... retaliate."*

Then the question is: is there any actual evidence that they do have these concerns?

THE CHAIR: Sorry, just perhaps to save Mr Schonfeld from getting up, I mean, I think all he's saying is that's not a positive case that's being advanced.

MR WARD: Yes. I do. I appreciate that he's not --

THE CHAIR: He's not excluding the possibility. I mean, I think, you know, there remains, doesn't there, the possibility that --

MR WARD: Of course, it does.

THE CHAIR: -- anybody might think well they would say that, won't they, and therefore I should be bothered about it? I'm not saying they should. But we're trying to make an assessment about what somebody sitting in an agency in Harpenden or something might think.

MR WARD: I appreciate that. Of course. That's why I'm coming on to now --

THE CHAIR: Yes.

MR WARD: -- which is: is there any actual evidence to give an objective basis to think there even is such a concern, the PCR, having chosen to withdraw his evidence, rather than waive privilege in a way that would have allowed us to test it. The answer is no. Again, we can draw a contrast here to *Ennis*.

If we go, please, to authorities bundle 3, tab 56, we find *Ennis*.

THE CHAIR: Yes.

MR WARD: You'll see here that this is the *Ennis* attempted decertification.

THE CHAIR: Yes.

MR WARD: One of the ways we distinguish this case is, of course, this was at the 11th hour just before the *Coll* trial started -- no wonder that the application failed. But here, the retaliation is mentioned at paragraph 83.

THE CHAIR: The page number?

MR WARD: So sorry, it's 741.

As long as the Tribunal is weighing various factors. It says at D:

*"There is before the Tribunal substantial evidence of concerns being expressed in the public domain about retaliation, or the risk of retaliation, by the Defendants against developers who challenge them."*

What is that evidence? Let's go to page 728. Firstly, at (vii), there is a reference to the fact that, if you look at F:

*"... when Epic* [a very big and powerful games developer] *introduced an alternative in-app payment option, Apple removed Epic Games ... from the App Store. He explains why Epic Games,* which *was one of the largest developers globally, was not typical ...* [but it] *reveals the leverage ... Apple has ..."*

Then, at (5):

*"Mr Newman ... the Chief Executive Officer of the Online Dating and Discovery Association* [a large membership]*."*

He says, at the bottom of the page:

*"Members, he says, feel they have no realistic option but to accept Apple's commission, although they consider it to be disproportionately high. He is confident his members would be aware of the* [Epic Games litigation] *and Epic's exclusion ... He states that, from discussion with his membership, there is a 'deep-seated fear of retaliation' from Apple if members raise concerns, challenge ... policies or speak publicly ... As a result ... 'members generally avoid voicing concerns directly to Apple ...'."*

That is what is meant by substantial evidence of concerns. Here, there is nothing remotely comparable.

THE CHAIR: I thought by the time, I think, he had worked through it -- I thought Mr Beal's submission was as much as anything an inference that there might be sensitivity to commercial counterparty relationships and which I think is he's asking us to draw in this --

MR WARD: Then that becomes entirely generic, doesn't it?

THE CHAIR: Yes.

MR WARD: If you're saying you never really want to fall out with a contractor any more than you want to fall out with your plumber, that becomes entirely generic.

THE CHAIR: Yes, it might depend a bit on the relationship, but certainly within the class, yes.

The hybrid approach

MR WARD: So in the interest of time, I'm going to try and move on. I must admit I'm slightly behind where I wanted to be, which is down to me, of course, not you. But I want to deal now with a hybrid solution, which I can deal with very briefly, given the amount of ground I've already covered.

It's summarised in the Rightmove Response at paragraphs 49 and 50. This is, just for your note, core bundle 2, page 96, and in our skeleton in the second supplementary bundle, page 52, paragraphs 4, 5, and 6.

The point is quite a simple one, good or bad: it's a small cohort of very large entities. Non-confidential facts are that it's around a third of the claim value and has around 200 class members in it out of 13,400. It uses Rightmove's internal classification as a starting point but absolutely is not identical to it. So it includes "corporates" and "majors", as they're known, all of which are in the category, apart from one that's a franchisor. It includes estate agents that typically have more than 40 branches. It includes household names. It includes new house developers who are household names, and rental operators with large portfolios of properties. The criterion is intended to be both qualitative and quantitative, a metric of sophistication as much as anything. The way the metric works is by capturing entities who have a minimum spend of £1 million, but also a minimum number of branches.

But of course, my case is that the whole class is inherently able to cope with the

demands of this litigation as an opt-in. If you are concerned about this, this is a class about which we respectfully submit there cannot be any doubt.

If I can just deal quickly with the objections to this, one is it's said to be arbitrary. But as I explained yesterday, it's not our case that claims of £167,000 are suitable for opt-in and claims of £166,000 are not. It's a case they all are. But it's just an *a fortiori* case for this class of larger and more sophisticated entities.

THE CHAIR: I'm sorry, I don't quite understand that. Because once we're into this discussion, it is arbitrary isn't it? I mean, if you're going to segregate the class, you're going to need to look at the specific characteristics that justify that. At the moment, it is done, as you say, on claim value or turnover, in fact, isn't it? It's done on turnover with Rightmove.

MR WARD: (Overspeaking) And branch numbers.

THE CHAIR: Yes, exactly. So that's the question, isn't it? Are you sufficiently differentiating something from one side of the group to the other side of the group? That's the criticism, I think, that's been made.

MR WARD: That's the criticism. The best answer we can give is it's conservative. It's just a very conservative view. It says, on any view, these people above this line, you can be confident are able to opt in.

THE CHAIR: But that doesn't just answer the question, does it? I mean, it's because we're back into the balancing exercise again. Isn't the test not -- it's not just a question of practicability. I don't think you can say, in this scenario we're talking about, "Oh, we've lost, because we couldn't persuade the Tribunal to say that £25,000 claims should opt in, so therefore, we're just going to move down that scale", because you're ignoring that scale, plus all the other things that now have to sit on the table, like how do we manage two claims at once and how people can know which claim they're in and all that sort of stuff. I mean, it becomes much more complicated than just putting

another marker in the continuum of claim value, doesn't it?

MR WARD: It does. We do say that this -- look, I can't get away from it. It's a sliding scale --

THE CHAIR: Yes.

MR WARD: -- of course it is -- the smallest to the biggest. Of course it is.

THE CHAIR: Yes.

MR WARD: The best way I can put the point, whether or not it attracts you, is to say: if you are doubtful about the people at the lower end of the scale in this claim, you can be confident about people above this threshold. Therefore, the policy that is articulated in *Evans* ought to be applied so as to test their appetite for the claim.

THE CHAIR: Yes, I think the point I'm putting to you is that that it does seem a very narrow way of looking at that test at that stage. It seems to be excluding an awful lot of things that need to come into the consideration, the balancing exercise. Actually, it's no longer just a question of strength of the claim or practicability, because we are absolutely into cost benefit, which is why I think you see in *Evans* and the CAT, you know, so much focus is put on those sorts of issues. You're right back into 79(2).

MR WARD: But that is our concern as well. That is, of course, if Mr Beal is right, one can never apply this test to anything that has the quality of a sliding scale. And it's going to be rare, indeed, that this option could ever be said to apply. You know, the Supreme Court has articulated it as a valid way of dealing with this issue.

THE CHAIR: Well, isn't the answer to that that the strength of the claim is pretty important there, isn't it? If you have got a claim where practicability is challenging, *Evans* showed us that with a weak claim, you can still come to the conclusion that it should be -- that the balancing puts you into opt-in?

So I'm not sure I buy that. It seems to me, if the point you're making is -- the trouble with that submission is that it puts practicability as the paramount indication of

outcome, and I don't think that's right.

MR WARD: Well, sir, you have the submission.

THE CHAIR: Yes.

MR WARD: I mean, of course, I accept that it's a multifactorial assessment. Of course, I accept the practicability. It's extremely important, but it's not the only consideration.

THE CHAIR: Yes.

MR WARD: I'll move on, if I may.

THE CHAIR: Yes.

MR WARD: I've dealt with quite a lot of Mr Beal's cases, but I'll just say a little bit more about some of them. Because of time, I'm going to try and do this quickly.

The first one is *Stephan*, which is in authorities bundle 2, tab 43. This is a pre-*Evans* case, so caution is needed. You'll see at page 1340, there are four factors identified in favour of opt-out. Mr Beal said they all applied. We don't agree. The first one is class size, 211 --

THE CHAIR: Sorry, would you give me the page number again?

MR WARD: 1340.

THE CHAIR: 1340, yes.

MR WARD: 1340. Item one, class size: 211,000. So that's 15 times our case. Secondly is a point about scale, which is not the same. Thirdly, this is not a case where individual claims are for loss from the sale or purchase of a few items involving a large capital outlay. Well, it's not a large capital outlay, but it's a very big item, according to the PCR. Then 4, there is a concern about intimidation. You have my submissions on that.

Then he relied on two cases which were decertification, attempted decertification. *Rodger*, which came very late in the day before trial. If we can turn up, please,

authorities bundle 2, tab 44. This is the first *Rodger* certification judgment. You'll see at page 1346. This is *Rodger*, the first *Rodger*.

THE CHAIR: Yes.

MR WARD: Paragraph 11.

The solicitors for Google notified the Tribunal that they did not oppose the CPO and would not file a response. And then, it said they raised a number of issues to do with funding and so forth:

*"... the solicitors for Google ('RPC') notified the Tribunal that Google did not intend to oppose the CPO Application and would not be filing a response. However, certain matters were identified by Google that it considered should be brought to the Tribunal's attention when considering whether a CPO should be granted in these proceedings. In particular, Google identified a number of issues concerning the PCR's litigation funding arrangements that it considered unsatisfactory and not adequately addressed by the PCR."*

There was no opt-in/opt-out issue at all at that stage. Then opportunistically, very shortly before trial, they had another crack. This is authorities bundle 3 at tab 53.

THE CHAIR: Yes.

MR WARD: If we just turn to the second page, you see this was heard on 4 June 2026. Then at page 567, you can see the procedural history. Then at 568 at paragraph 6, the trial was due to commence in September.

THE CHAIR: Yes.

MR WARD: So it really was the eve of battle. The Tribunal essentially said: "We don't know why you're making these points now that could have been perfectly well made at the certification stage". That's paragraph 22, if you'd like to look at it.

It's also worth observing in *Rodger*, if we go to page 573, that it said, paragraph 27.

*"... the vast majority of the class members have claims worth no more than a few*

*hundred pounds ..."*

So very, very different from this case.

Then *Ennis*, which of course was the App Store decertification attempt. Mr Beal said this was a case that could be plugged into our case equally, but we definitely don't agree with that, not just because of the decertification point. But again, it's notable that if we go to paragraph 82 on page 741.

THE CHAIR: Yes.

MR WARD: It was a, *"very significant group of ... developers with claims worth between £10 to £10,000* ..." So again, very different from our case.

*Brook*, I've already dealt with. *Stasi*, which is at tab 52. I'm sorry, I'm taking this at speed; it just is --

THE CHAIR: It's fine, yes.

MR WARD: This was again a case where Microsoft had argued for a hybrid opt-in/opt-out based solely on spend. But there's an important distinction to our case at page 551. It says at paragraph 127 that Microsoft didn't even argue that the rest of the class it was -- sorry, let me avoid putting in my own negatives.

*"In this case, not even Microsoft argues it is practicable for the Claim as constituted, comprising all members ... to proceed on an opt-in basis. ..."*

Again, there was some small spending in there. One of the problems was data limitations about identifying the opt-in class which, again, we don't have here. Then at paragraph 136, there's a reference to a very low spend value of £29,000.

Then finally, in this rapid tour, *McLaren,* which is another pre-*Evans* case, authorities bundle 1, an average of £29,000. *McLaren*, authorities bundle 1 tab 22, it's a pre-*Evans* case. Again, a hybrid claim was advanced, a hybrid certification argument, I'm sorry. And we can see at page 52 it was large business purchasers. There are a number of objections to this. At 165 on page 1269, one is the point about

whether it's arbitrary, which we've discussed. You have my submissions on that. Then two points that simply don't apply here:

*"It will not necessarily be apparent to class members which category they are in."*

We can solve that. We've got what we've already written with our list. But, thirdly:

*"There is no assurance that ... members of the opt-in class would have actually suffered larger losses ...* [because of the complexities of that claim] *..."*

So that's not relevant either.

THE CHAIR: Yes.

MR WARD: Thank you, sir.

I was going to turn to the merits. I'm slightly up against it now on time, having been so confident earlier in the morning. I'm sure that's familiar to you, as well.

THE CHAIR: That's fine; we can find you a bit of extra time.

Submissions on the merits

MR WARD: Let's keep going anyway.

We fully accept that the merits are relevant to the question of whether to order opt-out or opt-in proceedings. But at this stage we do submit that they are neutral. The short reason is that this kind of abuse, the alleged abuse, is dependent on disclosure and detailed economic evidence. That makes it a type of allegation that Rightmove can't realistically tackle at the certification stage. There's no doubt that they've correctly applied the rubric of unfair pricing.

But the claim itself is highly fact-sensitive. It will depend, at the end of the day, on your evaluative judgment on the basis of the evidence. I do want to make some limited points here, based on *Kent* and the points that Mr Beal made about *Kent*. That's in authorities bundle 3 at tab 47.

Firstly, just to remind you of the extremely well-known core proposition of law when we talk about whether prices are unfair, which is at page 185.

THE CHAIR: 185.

MR WARD: Yes. 185 is the judgment; 187 of the bundle. This is Lord Justice Green's famous summary from *Flynn Pharma*. At paragraph 1, the test for abuse is whether the price is unfair. In broad terms, it will be unfair where a dominant undertaking has reaped trading benefits which it could not have obtained in conditions of normal and sufficiently effective competition i.e. workable competition, not perfect competition.

That is a very complicated question. If we proceed, please, to page 247, Mr Beal took you to paragraph 674, where you say:

*"We therefore conclude on the basis of the evidence before us that the Commission is unfair in itself."*

He read that paragraph to you. But the *"therefore"* in that is quite important. The previous paragraph sets out a 13-bullet point multifactorial assessment based on the very large volume of reasoning that precedes it. So, and that's all, of course, a matter for later.

I'm going to just risk my arm with some extremely high-level points about this now. The first is that Ms Deakin herself describes OnTheMarket and Zoopla as being Rightmove's closest competitors among other property portals. That's at core bundle 9, page 366, paragraph 61.

It is simply stating the obvious that the Tribunal is going to have to look at the economic value of the service Rightmove provides, given what it offers on both sides of the platform, the network effects that Mr Davies referred to yesterday, and compare it to the position of the competition. But again, we do just want to show you a bit more of the class representative's own evidence from the PCMs about what they say about Rightmove.

For that, can we go to the supplementary bundle, please, volume 1, tab 2, which is the evidence of Mr Lee of Dreamview Estates. If we turn, please, to bundle page 13. He

says, at the bottom of paragraph 19, he talks about his lettings business here:

*"... Rightmove does provide a notable number of enquiries, to the point that when I temporarily left Rightmove, my lettings team received a significant shortfall of enquiries."*

Then at paragraph 34, which is on page 18 of the bundle, he says:

*"I am on all three major platforms to increase exposure and ensure I do not miss anything ... I estimate, through my CRM system, that around 60% to 70% of my buyer/tenant leads come from property portals, 90% of which come from Rightmove. The remaining 30% to 40% ... come from local recommendations."*

Then there's more evidence of this, with this flavour. I'll just show you a little bit more. If we go to Mr Whittaker again, who we heard from earlier, this time he's under tab 4, bundle page 39, paragraph 19:

*"I regularly use Rightmove's Best Price Guide which allows me to see previous transactions on a property."*

Then he says at the end of that paragraph:

*"Both Zoopla and OnTheMarket have similar valuation tools, but neither are as user-friendly as the Rightmove Best Price Guide."*

Then, under the heading of *"comparative value"*, paragraph 25 at the bottom of the page:

*"Rightmove generates the highest volume of leads."*

Then, finally, Mr Ley, whose witness statement is under tab 6. He's another of the smaller estate agents. He says, if we can please go to bundle page 67, paragraph 29.

*"I view the role of an estate agent as advertising a client's property in the best way possible. In order to do this, you must be listing the client's property on the medium with the largest audience, which is Rightmove. ... If I did not list my clients' properties on Rightmove, I would be acting against the best interests of my clients. I would*

*compare not listing a client's property on Rightmove to trying to sell a client's house without taking photographs."*

Over the page at 68, paragraph 34:

*"In terms of leads, Rightmove sends me the most by far. I estimate that Rightmove makes up between 60-70% of all leads ... in terms of volume. The remainder is split equally between Zoopla and OnTheMarket."*

Of course, these witness statements are also showing multihoming by these particular witnesses.

I am not trying to make an argument here and now about whether or not any of this evidence justifies Rightmove's fees. That is going to be for trial, if this case proceeds to trial. But the point is just really that all of that will require detailed factual and economic evidence and careful appraisal by the Tribunal of the kind that we saw at *Kent*.

Ms Deakin has obviously had very, very limited information, for which she cannot possibly be criticised, of course. But her starting point is something a little bit different to that. If we look at her report in the core bundle, tab 9, at page 390, you will see at the bottom of the page, paragraph 145, she says:

*"Under conditions of workable competition, I would not expect Rightmove to be able to earn a return significantly and persistently above costs, plus a reasonable rate of return without attracting entry ..."*

Which I understand to mean WACC. Of course, this is a preliminary report, and of course that reasoning is developed and there are lots more things she says; and we don't criticise her for not being able to realistically assess this situation fully at this stage. Of course not. All of this will require disclosure data, factual evidence and analysis; all in due course. But what we do say, with respect, is that the Tribunal cannot form a view about this question now.

THE CHAIR: Cannot form a view at all, you say?

MR WARD: Sorry. Let me back up for a moment.

Cannot form the view that Mr Beal is arguing for, that the claim is strong at this stage. That is why we say it is neutral.

THE CHAIR: Yes. Well, there is the danger of semantics here, isn't there, as to what any of that means. Neutral is pretty obvious, but, I mean -- there's a problem here, isn't there, which is that neutrality rather suggests that we can't form any view, as I think you were almost suggesting to us. I think we can form a view, can't we? Ms Deakin tells us about market definition, and there's some case law which seems to support the way she's approaching it, and you've not put anything in to contradict that.

I'm not in any way seeking to hold you down, tie you down as to what you will do when you put your defence in; but, I mean, just when we are looking at it now. You very fairly say, when you get to the question of abuse, it all rather depends on the numbers, doesn't it? But she has put in some indicators of the numbers that come from your client's own accounts, and you're not suggesting there's anything wrong with her mathematics, as I understand it.

MR WARD: We don't attack the arithmetic. We don't attack the overall methodology. We don't say she has misunderstood *Flynn Pharma*, nothing like that.

THE CHAIR: You say there's a lot more below the surface that needs to be looked at, and it could come out in different ways.

But it is different, isn't it, and it's substantially different from, say, *Evans*, where there isn't a clear line of sight from the beginning to the end. You don't need me to tell you that all cases depend on how the evidence comes out. But what we do have here is a fairly clear line of sight, with orthodoxy in the approach, and subject to your point -- I know you've got some points about compound interest and WACC and so

on.

I find neutrality a difficult position to accept. It doesn't seem to me it is neutral. I think it seems to us -- at least it seems to me -- to be at least coherent. But of course, it depends on how the evidence comes out, and I'm not sure that is that neutral.

MR WARD: Sir, I would go a little bit further than that, though, if I may.

THE CHAIR: Yes.

MR WARD: Obviously, as we said, we start from this kind of costs plus WACC proposition, which -- I fully appreciate that's not the be-all and end-all in this (overspeaking).

THE CHAIR: Well, I think to be absolutely clear, and to be fair to Ms Deakin, she has made it very plain she understands the point about distinctive value, doesn't she? I mean, there's no question that she said that.

MR WARD: I'm not suggesting she's made a methodological mistake. I'm not.

THE CHAIR: No.

MR WARD: I'm saying, though, that where we are -- the really important question here about fairness is one that you just do not have information to form a view on. That's the point.

THE CHAIR: But I don't think that's what the Supreme Court has told us to do, though. This is the problem I think I have with the way you're approaching this, because on the one hand, it seems to me you're very keen on pushing the Supreme Court guidance on us, which is quite right, of course. But at this point, you step back a bit and say, "Oh, they don't do that". Whereas, in fact, my reading of the Supreme Court is they say, "Do do that".

MR WARD: I'm sorry. I don't mean to be heard to do that at all. I'm just talking about the particular nature of this kind of claim.

THE CHAIR: Yes.

MR WARD: We are talking about an unfair pricing claim, which is exceptionally fact-sensitive and previously was thought very, very difficult, until it's become quite a popular form of claim in recent years. But of course it's highly evaluative. You only have to state the tests to see how evaluative it is. It's very different from, say, at the other end of the spectrum: suppose this was a collusion case, where my friend had come along with a whole bunch of emails that showed there was collusion between Rightmove consumers, say. You'd be able to say, "Well, look, that looks a lot like an infringement". But here, when you talk about this clear path, there's just a big foggy patch right at the critical part of the path.

THE CHAIR: Well, it's not highly foggy, is it, because we've got the benefit of Ms Deakin's desktop analysis of the accounts that gives us a number of, what is it, 350 per cent?

MR WARD: That's just excessive (inaudible) excessive.

THE CHAIR: Well, but it's a big number, isn't it, and it does beg the question of -- in a way, almost begs the question of, "Well, what is, what is going to contextualise that to make sure that it's not unfair?" Obviously, that's all to play out.

Just to be clear, I'm not putting that in any sense of changing the burden of proof, or anything like that, just in case anybody misunderstands what I'm saying. But I mean, in terms of our line of sight, the one little hill poking out of the fog is that we've got a reference point for that, which is a relevant reference point, but by no means the end of the story.

So I think it's just a little bit more than you're putting it, perhaps.

MR WARD: If it is, it's -- if I may respectfully suggest -- a matter of degree.

THE CHAIR: You're saying, be careful, because it's all very uncertain. I understand that submission.

MR WARD: Yes. As I'm saying, it's not just, well, something may turn up. This isn't

just, "Oh, well, you never know". I mean, goodness knows what Rightmove's evidence might say at the end of the day.

I've shown you some of the PCR's own evidence about what is obviously a market with multiple players in it. Obviously, Ms Deakin's market evidence is that Rightmove is far more successful than these others. But that doesn't actually demonstrate that its prices are unfair, or that it's successful because of an unlawful exercise of market power. We've seen this snapshot of evidence that the PCR has chosen to put forward that shows, on that evidence, Rightmove is just a fantastic product.

That's why we invite you just to row back from any kind of conclusion that Mr Beal was inviting you to make, that this is actually a strong claim. It's particularly invidious where it's just not obvious what Rightmove could do at this stage to, if you like, knock this claim out, or counterbalance it with some factual matter, that if I try to do that, Mr Beal would obviously say, "Well, that's all a matter for trial".

THE CHAIR: I think that's probably not the test, though, is it? In a sense, if there were obvious flaws, you'd be pointing them out to me, is the point, isn't it? As you say, you accept there's a coherent theory of harm, coherent methodology. That in itself gets you past neutral, I think is the point I'm making to you.

Then after that, the question of how -- you know, you make very fair points about the difficulty of trying these cases and getting to the answer if you're the class representative, you want. So I understand that submission. I think that's the difference between us, really.

MR WARD: Perhaps. But maybe I can encapsulate the difference this way, sir.

We wouldn’t accept that "coherent" means the same thing as "strong". "Coherent" means, well, there is a methodology that gets you to a result. The question of whether it's strong really will depend on a proper market evaluation.

THE CHAIR: That's fair. But as I say, there is some evidence beyond the coherence

as well, isn't there?

MR WARD: But there's also countervailing evidence, we submit.

THE CHAIR: No, that's helpful. Thank you. That's a helpful discussion.

Exclusionary abuse submissions

MR WARD: I will move on, if I may, to exclusionary abuse.

THE CHAIR: Yes.

MR WARD: I've recovered some lost time through a bit of compression. I've still got to do exclusionary abuse and compound interest. It's 12.53. Let me have a go at exclusionary abuse, because it really is a short point.

As you appreciate, the simple point is this: if the PCR wants to allege that this alleged abuse caused damage, then he needs a methodology for establishing aggregate damages that complies with the *Pro-Sys* test. That methodology is needed at certification, so that the parties have a blueprint to trial, so the Tribunal can be confident this matter can be sensibly progressed. Those authorities are all set out in our Response. They're very well known, but if you would like them, they are at core bundle tab 2, page 108, paragraph 71 and following.

That's what he needs to do if he says this causes damage. If he does not wish to allege the exclusionary abuse caused damage, he doesn't need those things. I am not sure why we would be having the argument and whether it would justify the money, but that is undoubtedly true, that he would not need a *Pro-Sys*-compliant methodology.

But when we listened to yesterday's discussion, we think we came down at understanding him to say that he at least wants to keep the option open of arguing that the exclusionary abuse could have caused damage, at least in circumstances where the excessive pricing case doesn't succeed, or doesn't succeed in its entirety. That means the claim cannot be certified until he has a *Pro-Sys*-compliant methodology.

I want to show you at least a little bit of his pleadings. Given the discussion yesterday, I'm going to be much quicker with this than I might otherwise have been justified. You'll see why the issue arises. If we go to the Claim Form, in the core bundle at page 61, I hope you'll understand why we were a bit confused.

Page 61, paragraph 112, Rightmove has adopted exclusionary practices; 113, imposing or threatening higher charges is a discriminatory practice; 114, the above practice does not reflect competition on the merits.

That necessarily harms competition -- the online property market; okay, so far we're on, "Is there an infringement?" which, as Mr Beal rightly says, you can argue for a naked infringement of Article 102.

Then we get to effects. That's sounding more like damage, and there are two different things alleged. It says, *"Rightmove's exclusionary conduct confers an unfair advantage"*.

Then this is the important part, at the bottom of this paragraph, *"Because of the thus diminished competition ... Rightmove has been able to charge higher prices ..."* That's why we said, "Hello, this is a claim for damages".

Then on the next page, there is more. At 119, *"That conduct is aimed at the objective of and had the anti-competitive effect of foreclosing competition"*.

So we're back into effect. Of course, not all effects are damage. I have to accept that: *"Absent the abuse, there would have been a more competitive ... market. This would have led to lower prices ..."*

That is again a damages claim.

Then this plot thickens a bit, because at 122, it accurately summarises what Ms Deakin said. She said:

*"...the effect ... is likely to be captured by her estimation of the damages* [for excessive pricing]*. Accordingly, it would make no difference to her quantification method if* [the

conduct did not occur or was not abusive]."

Okay. But this raises a lot of questions, because what happens if the excessive pricing claim is not made out in whole or in part, or if this exclusionary abuse is said to increase the level of damage?

I'm going to try and summarise back what we understood from Mr Beal yesterday. I know he'll correct me if we get this wrong, at least in his reply.

We think what he said yesterday was what he intends to do is prove a naked infringement from facts and law and submission. So there would be no expert evidence to establish that infringement, and we note that as the basis on which certification is being sought. But of course, if he did want to prove the infringement using expert evidence, you'd have to bring that forward now as part of the blueprint to trial.

We'll take that as understood. But that still leaves open the question of whether there is somehow a claim for damages arising from that naked infringement, where there would need to be an aggregate damages methodology.

The phrase he used yesterday, or at least that my learned friend Ms McAndrew wrote down, was that there was no separate itemised damages claim. That was the phrase. I think he might have used it more than once. But, he maintained, it was still relevant to the counterfactual, and that struck a chord, because that is also what they say in their Reply. Can I turn that up, please, which is in core bundle 3, page 189.

THE CHAIR: Yes.

MR WARD: You see towards the end of paragraph 82, the last five lines:

*"Although no claim is advanced for additional ... loss ... these allegations remain relevant to understanding the full extent of Rightmove's abuse of dominance and assessing the appropriate counterfactual ..."*

The same point is made later -- I'll just give you the references. In fact, this is actually

quite important, at 195, paragraph 88. Again, it says, in respect of this claim -- in fact, we need to go from line 3:

*"Establishing ... all the conditions necessary to found liability for the exclusionary conduct ... will turn on: (i) the economic analysis ... of the market; (ii) ...* [facts]*, in the light of disclosure ... and* [then] *(iii) expert evidence in relation to the counterfactual scenario where the alleged exclusionary conduct does not take place, including an analysis of whether or not the exclusionary conduct gave rise to any greater loss than is already established ..."*

That sounds like damages, again, because, of course, the word counterfactual is, in fact, slightly ambiguous. But there's a counterfactual that is purely factual: what would people have done? Then there's an economic counterfactual: what would a price have been? That, of course, is a question of damages. That is where one needs a methodology.

Doing our best to understand the position -- again, Mr Beal will tell us if we have this right -- is that we understand the argument is that the exclusionary abuse might add nothing if the excessive pricing claim succeeds in full. What if it fails, at least in part? Is he going to say the exclusionary claim increases the damages? If he wants to keep that door open, he needs a methodology. So we're doing our best with his explanations yesterday.

It's 1.01 pm.

THE CHAIR: Just before you -- just one question. One of the things that Mr Beal did say, which I think seemed significant to this, was that he didn't really know about the prevalence of this. If it turned out that it was a handful of incidents, that would obviously go -- well, I say "obviously". One might think it would go both to the appetite to pursue it, but also to the significance of it for damages purposes. Of course, if it turned out that it was a practice that was adopted widely, then he might take a different

approach to it. So there was a little bit of a plea to give me some time. I don't know whether you have a response to that.

MR WARD: My response to that is certification always takes place in circumstances that proposed class representatives always call an "information asymmetry".

THE CHAIR: Yes.

MR WARD: That is a road to plead in these cases. So one has to approach it on the basis that the evidence will develop, the case will unfold, choices may prove to be wrong, amendments may need to be made.

But the question for today is: are you going to certify this claim? Where I do think, if we may respectfully say so, he wants to keep the door ajar for a damages claim for which he has no methodology.

I wanted to just go back to *Kent* briefly.

Just by way of time, it's 1.02 pm. I can finish this point in between five and ten minutes, and that would just leave me with compound interest to deal with quite briefly.

THE CHAIR: No, I think what we might do is I think we might take the break, mainly to give the shorthand writer just an opportunity -- the transcriber an opportunity just to have a break.

So how much time do you need before ...?

So can we do this calculation? Mr Williams is going to need how long do we think? About 45 minutes?

Mr Beal says he needs 45 minutes.

MR WARD: When will the Tribunal be able to sit till today, sir?

THE CHAIR: 4.00 pm.

MR WARD: 4.00 pm. I hope that starts taking us to 2.30 pm.

THE CHAIR: Yes. So we've got a bit of time in hand.

If we rise now and start it again at 1.45 pm, does that feel like a safe place to be?

MR WARD: We'll move on to (inaudible).

THE CHAIR: Good. Good. Okay. Well, let's do that. Thank you.

(1.04 pm)

(The short adjournment)

(1.46 pm)

THE CHAIR: Yes, Mr Ward.

MR WARD: Thank you, sir.

Just to remind you where we were, we were in the PCR's Reply, core bundle at page 195.

THE CHAIR: Yes.

MR WARD: Which, I think, still expresses Mr Beal's case, paragraph 88(iii), which is that:

*"... expert evidence in relation to the counterfactual scenario where the alleged exclusionary conduct does not take place, including an analysis of whether or not the exclusionary conduct gave rise to any greater loss ..."*

We call that a "damages claim". It requires a methodology.

Mr Beal made a submission about *Kent* where he said, *"Well, there was a single counterfactual in Kent. There are two abuses"*. Of course -- sir you need no reminding of this. But for the benefit of everyone, I wanted to just turn up *Kent* briefly and look at what actually happened. That's in authorities bundle 3 under tab 47.

The short point I'm going to demonstrate is that in *Kent*, there were two methodologies for the two separate abuses which generated two counterfactuals. Then the Tribunal, evaluating all of the evidence, decided that a single counterfactual was appropriate for both, not least because one way it modelled the unfair claims was by looking at a world without the exclusionary conduct.

I'm just going to show you that with just a very small number of references. So this is

page 307 of the bundle. You'll see that, at 842 -- this is the class representative's case:

*"The Class Representative submitted that market entry by"* --

Sorry, this is in exclusionary abuse.

*"... market entry ... would have led to Apple charging a lower rate of Commission in the counterfactual. She said ... that once there was market entry Apple would set a competitive rate ..."*

Then at 843:

*"As for the likely level of Commission, the Class Representative relied on Dr Singer's assessment ...* [of 12 per cent leading to 15.1 per cent] *commission rate."*

So that was the *Pro-Sys*-compliant case that led to a commission rate for exclusionary abuse.

Then, for excessive pricing, move on to page 315, 866. You'll recall, sir, there was a separate expert with a separate methodology -- I think Dr Singer might be giving evidence down the hall today.

*"The Class Representative noted ... in considering the excessive and unfair pricing abuse allegations, Mr Holt found an effective average ... commission rate between 10 and 20% ...* [He took] *the ... effective average rate* [to be] *15%."*

Then the Tribunal considered all of this evidence in the round.

If we go to page 345, they're quantifying overcharge.

Yes, paragraph 961:

*"For the purposes of quantifying the overcharge (for both the exclusionary abuses and the excessive and unfair pricing abuse) we ... find that the counterfactual price for ... in-app payment services is 10%."*

So on the evidence for complex reasons, which are in the judgment, they ended up with a single counterfactual. That was after consideration of the fruits of two *Pro-*

*Sys*-compliant methodologies.

So I raised that because Mr Beal went to it. But it does illustrate my point, which is if it is being said that the exclusionary abuse has an impact on the competitive counterfactual that sounds in damages, then a methodology is needed.

If it is merely, in some abstract sense, a naked restriction, it is, if you like, object without specific effects relied on, not needed, albeit it's hard to know what the point would be. If those effects are not said to be a pecuniary effect, then, again, it may not sound in damages.

But it does sound to us as though Mr Beal is saying it sounds in damages, therefore he needs a methodology. Therefore, that claim cannot be certified as it stands. Those are our submissions.

THE CHAIR: Yes. Thank you.

Compound interest submissions

MR WARD: My final topic is compound interest.

I probably did gallop a little bit before lunch; covered a lot of ground.

I hope the references were at least helpful on the transcript where I didn't go to material.

Now, back on track.

THE CHAIR: Yes. No. That's fine. I think we got all that. I think it's very helpful. Thank you.

MR WARD: My final topic is compound interest. Then Mr Williams is going to talk to you about funding.

THE CHAIR: Yes.

MR WARD: Now, firstly, I want to sweep aside a misunderstanding of our case. Mr Beal said yesterday that -- he suggested, at least, that our case on compound interest was that losses have to be claimed individually. That's not our case.

He said, that's contrary to *Merricks*, which, of course, has held that the award of aggregate damages removes the need to prove loss on an individual basis.

Of course, we're not here arguing that *Merricks* is wrong. So we accept that compound interest can be proved on a top-down basis, but it must be done with a methodology that meets the particular requirements for proof of compound interest. We're not concerned with questions of distribution here, which, again, might have been a feature of Mr Beal's observations. But what is needed is a methodology which is plausibly capable of generating an accurate assessment of the aggregate amount. We'll see, in a moment, in one of the many *Merricks* judgments, the Tribunal has made exactly this point.

Can we turn first to the Claim Form and see what's said about compound interest? It's in the core bundle, tab 1 at page 65.

THE CHAIR: Yes.

MR WARD: At paragraph 126:

*"The PCR claims compound interest on the losses ... The effect of the overcharge ... was ... an increased demand for borrowing, a reduced level of interest* [on] *cash balances and/or a reduction in the sums available for reinvestment to generate further profit."*

That's a fairly conventional formula for compound interest.

Then at 128, it explains -- really probably puts the same points in slightly different language. Through looking at the bullets:

*"Through being deprived of money to which they were entitled, the PCMs:*

*"lost the returns they would have otherwise made ...* [or]

*"incurred costs of funding ...*

*"*[or] *have suffered a loss of return on investment* [or] *additional financing ..."*

So those are the alternatives. Of course, where we are today is that the PCR, of

course, has no idea, as far as we know, of which of those was actually incurred by any class member. None of the witness statements he's provided from PCMs addressed this.

I want to reiterate a point I made earlier about just how important this claim is. You saw earlier, sir, it's about 50 per cent uplift to the existing claim. Again, just for the transcript, we looked at it earlier. It's Ms Deakin's second report, core bundle 10, page 426, paragraph 40, where she sets out her quantum. If it's helpful to see it again, I'll just turn it up.

Yes, page 426, you'll see again. You can see the compound interest at (c), paragraph 40, is £446 million of the £1.56 billion claim. It's not a small add-on. It's a really important part of the claim.

What we say is that it needs to be proved to the standard required by *Sempra Metals*, which is, of course, the leading judgment in this area. It's in the authorities bundle at 1, under tab 8, but I think we can save time because it's quoted in the *Merricks* ruling, which I want to go to, which is authorities bundle 1, tab 19. Where does this come in the long saga of *Merricks*? This is one of the rulings following remittal from the Supreme Court, but it is in light of the Supreme Court's judgment.

What's being considered is, here in the passage we're interested in: whether to certify a claim for compound interest. We can see that if you pick it up at 1075, paragraph 74.

THE CHAIR: Yes.

MR WARD: You'll see the quote from the pleading is something quite similar:

*"Compound interest ... The members of the proposed class ... who effectively borrowed money and/or increased their borrowings ... and/or as a result of paying, the Overcharge ... (... using credit ...)* [suffered charges on compound interest basis] ... [et cetera]*"*

There's more detail we're not really concerned with exactly.

Then Mr Justice Roth, and it's not just him, it's a panel, considered *Sempra Metals* and then the Tribunal summarises *Sempra Metals* at paragraph 80 on page 1077.

If I can pick that up:

*"... building on some previous judgments, the landmark decision of the House of Lords in Sempra Metals established the basis on which compound interest may now be awarded, not on damages but as part of the damages. But, interest on that basis must be specifically claimed and justified as part of the claimant's loss for breach of* [contract or] *tort. ..."*

Then there is a quotation from well-known passages from the House of Lords, Lord Nicholls.

*'" ... the House should now hold that, in principle, it is always open to a claimant to plead and prove his actual interest losses ...*

*95: "In the nature of things the proof required will ... depend upon the nature of the loss. ... The loss may be the cost of borrowing money. The cost may include an element of compound interest ...*[or opportunity to invest]*..."'*

But 96:

*'"But an unparticularised and unproved claim for "damages" will not suffice. General damages are not recoverable. The common law does not assume that delay in payment of a debt will ... cause damage. Loss must be proved. ..."'*

Over the page, at 81, the concurring judgment of Lord Scott is quoted, where we can see in the third line down.

*'"... held in principle to be recoverable, but subject to proof of loss, remoteness ... obligations to mitigate ...* [et cetera]*'"*

Here the claim is obviously for MIF, our good friend MIF, and at 83 Ms Demetriou, who on this occasion was for the class representative, says *"it is difficult to imagine ... that there will be any member of the class who did not, at least at some point ... either*

*borrow money or have savings. ..."*

At 84, Ms Demetriou accepted this is not sufficient:

*"It is necessary to show, on the balance of probabilities, how they funded the additional expense."*

Then, at 85, pointed out this is really on average £10 a year. Then at paragraph 86, the Tribunal says:

*"It is important for present purposes to recognise the development of the law by the House of Lords in Sempra Metals still leaves compound interest available on a restrictive basis, as Lord Nicholls pointed out. ..."*

More quotation, and then the bottom of 87:

*" ... compound interest constitutes a distinct head of loss, which must be separately established and cannot be presumed. ... it is fundamentally different from ... simple interest ..."*

Then the point is made that one needs a *Pro-Sys* methodology at 88, that's shorthand. Then at 91, there is a discussion of what the approach was proposed in *Merricks*. You'll see quoting from 44:

*"'The first approach would seek to calculate a blended rate which reflects saving and borrowing rates* [across the period] *... proportionate to the members of the class who saved and/or borrowed money. ..."*

Then it says there are data problems with this. Then at 47, on the next page:

*" ...the second approach would limit compound interest only to the sub-class of borrowers, ..."*

Then at 92, now we're getting to the meat after all that preamble:

*"The problem with both approaches is not any limitation on the data that might be available. As the SC Judgment made clear, that is not a basis for denying certification* [and that's the Supreme Court in *Merricks*, obviously.] *But the first*

*approach is based on the assumption that anyone who was a saver or borrower would have used the small amount by which each of their purchases would have been cheaper ...* [to reduce their borrowings and add to their savings.] *The second approach rests on the same assumption limited only to borrowers. However, ... the relevant question is: 'if class* [the class members] *hadn't suffered the overcharge, what would they have done with the additional money that they would have received?' Both the above approaches assume the answer to this question ..."*

Then at 94:

*"In the course of argument, Professor Waterson suggested that a method might be to conduct a controlled experiment by giving a sample cross-section of individuals £10 and observing what proportion used the money to reduce debt or increase savings ..."*

That £10 is not just a completely random number, as you've seen. It actually reflects the annual level of the overcharge.

So this is a sampling exercise, which is what we have here, albeit our sample exercise is very different. It would be a real-world kind of actual experiment rather than just a kind of back cast.

Counsel for Mr Merricks was quick to adopt it:

*"... on reflection, we do not think that this could be an appropriate method. In the first place, as noted above*, *the alleged Overcharge was not incurred as a lump sum, even on an annualised basis, but incrementally in small amounts on the price of virtually every single purchase of goods and services. Secondly, while the method of distribution of damages on a per capita basis may provide a fair and practical way forward after aggregate damages have been recovered ... by definition it represents an average. In reality, there will be a wide divergence of the expenditure of individuals, with a minority spending much more than the average and the majority spending less. The controlled experiment on use of money therefore will not provide a guide to the*

*proportion of class members who actually suffered a loss ... or ... to the proportion of the aggregate Overcharge which would have resulted in the loss of compound interest."*

*"We should emphasise that the issue addressed here is quite different from that regarding the Overcharge itself. The Overcharge represents the aggregate of the MIFs that were passed through to the class members (in effect, the general population over the age of 16) by retailers and suppliers. Mr Merricks, by expert evidence, has put forward a plausible and credible method for estimating that loss on an aggregate basis, and that estimation can be approached using a 'broad axe'. This serves to quantify the loss which the class as a whole actually suffered (and it has been held by the appellate courts that it does not matter that the distribution of that loss as between class members cannot be determined). By contrast, no credible or plausible method has been put forward to arrive at any estimate, even by 'informed guesswork' (per Lord Briggs, SC Judgment at [48]), of the extent of the Overcharge that would have been saved or used to reduce borrowings rather than spent, which is the essential basis for the claim to compound interest as a distinct head of loss."*

Then at 96, I foreshadowed this. Again, the Tribunal here is not making the error that Mr Beal accused me of. It says:

*"In this regard, s.47C(2), which enables the Tribunal to award damages on an aggregate basis, and on which Ms Demetriou placed great emphasis, does not assist. If there was a credible or plausible means of estimating the aggregate Overcharge paid each year ... that is likely to be entitled to compound interest ... we do not suggest that each relevant class member would have to establish his or her claim ..."*

And we, of course, accept that. But our objection is really the same as that which attracted the Tribunal in that case, which is to say what is proposed is a form of survey, a survey of class members in strata, which will then produce blended numbers for use

of funds, a proportion of investment or saving and so forth. That is the method that is proposed.

But the problem is, we submit, that taking a fraction of the class and then asking them now, after the event, to essentially estimate how they might have used the money in the past, is just simply not sufficient to prove a loss of this scale. Of course this will be with the benefit of hindsight. There isn't going to be, of course, in a class claim, the opportunity to test individually. We fully accept that. But Ms Deakin is going to do some kind of exercise of asking some questions of some sample.

But ultimately there's going to be an enormous degree of extrapolation here, which creates a margin of error. Again, I come back to the fact that this is a claim for £446 million, and this can give no confidence that the method is capable of operating reliably. It doesn't provide a reliable estimate of which of these choices the different class members would have made.

THE CHAIR: So it is different from *Merricks*, isn't it? Because Ms Deakin is saying, she's actually asking them the question that the Tribunal in *Merricks* identifies as the question. So, as I understand it, you're saying you've got two objections. One seems to be that's not very good evidence because you're asking them to answer the question which they obviously have an incentive to answer in a particular way. The second is the extrapolation from the way in which -- I think the expression Ms Deakin uses is stratify. She stratified the --

But aren't those, those are about criticisms of -- it's definitely a methodology, isn't it? You may have some criticisms about it, but it's a matter for trial, isn't it, as to whether that works or not? I mean, the weighting that we attach to that as a matter of evidence is surely a matter for trial rather than certification, isn't it?

MR WARD: Well, the certification issue is: is this sufficiently reliable as a way of estimating a claim for nearly £500 million, which is what this is. Given the very specific

requirements for proof of interest, our respectful submission is that it just doesn't answer the question.

THE CHAIR: Because of the extrapolation?

MR WARD: Extrapolation, and what you might loosely call backcasting.

THE CHAIR: Backcasting --

MR WARD: Well, I mean, in other words, asking people now what they would have done with money in 2020.

THE CHAIR: I mean, I think Ms Deakin says she's going to test that with some documents, doesn't she?

MR WARD: That's of course a great unknown. We recognise, of course, that in a class claim we do not have the opportunity. We can't conceivably embark on an exercise of asking 13,400 people, and testing what they would have actually done.

THE CHAIR: Well, no, but you can participate in the sampling, can't you? Because one assumes that at some stage fairly early on in this process, putting out a marker now, assuming that this case moves forward in any form -- let me put it that way, entirely without prejudice to what happens with opt-in or opt-out or whatever -- but if this case goes anywhere, then we're going to expect some expert engagement on some of these things fairly early on. Isn't it precisely the sort of thing where we would say, well, the experts need to discuss how they're going to approach this, and if your expert says that it's important to include in the sample particular cohorts or to get documents from them, that's the sort of thing we would expect to be aired with us, and if Ms Deakin didn't agree with that, then obviously we'd have to resolve it. But that's all just about working out how it works, isn't it?

MR WARD: Of course, the question for today is whether this very, very high-level description is adequate to get over the Pro-Sys test, so that we then trigger these obligations. Our submission is this is just too imprecise and too underspecified for

such an enormous claim. Is it a credible methodology proving aggregate damages? For the reasons I've explained, we submit that it isn't.

THE CHAIR: Yes.

MR WARD: And there is a second -- so sorry, Mr Davies. Sorry. I thought you were going to speak.

I'm going to move on to a separate flaw.

MR DAVIES: Part of the problem is that it's a survey, and I guess that's your backcasting point, that the answers might not represent reality. But I mean, surveys get used in competition economics a lot --

MR WARD: They do.

MR DAVIES: -- to prove the boundaries of a market, or something like that, and enormous claims could depend upon them.

MR WARD: Yes, and I'm not making the submission that they cannot be part of a methodology. I'm not making that point. The court has already rejected those submissions on other occasions.

So it's just a question of whether overall this methodology is sufficient to pass the certification standard. That's the issue. But there is a free-standing flaw with it that I want to come on to as well.

THE CHAIR: Is it the WACC point?

MR WARD: About WACC, yes, and obviously, sir, you're already there. But let me just show you the points in the core bundle under tab 9, at page 396, paragraph 169.

(Pause)

Ms Deakin's first report.

THE CHAIR: Yes.

MR WARD: She says:

*"For preliminary purposes, I assume that the funds would have been reinvested in the*

*PCM's business and in turn would have assumed an interest rate in line with the WACC ..."*

Then she derives two separate WACCs, one for EAs and one for NHDs. I don't know whether she's forgotten about ROs, but in any event, there are those as well.

THE CHAIR: Isn't that because she's segregating her sample by reference to them? I think that's the reason for that.

MR WARD: Well, that's not my point at all, as you know, in any event. The point is really a short one, that the Tribunal has made clear that WACC is not a measure of loss. It's a measure of expected investment returns. The authority for that is the *Royal Mail v DAF* case. Is it helpful to go to it?

THE CHAIR: I think we've got the point.

MR WARD: I'll just draw your attention to the conclusion of 796, *"Actual losses must be based on actual costs"*.

THE CHAIR: Yes. How do you, in the context of collective proceedings and opt-out proceedings -- so where does that leave us? Let's just say for argument's sake you're right, and -- well, I suppose the question is, is there an alternative methodology which can satisfy things, and I suspect that's quite a difficult question to answer. If we end up in a circumstance where it's actually quite difficult to find any methodology to test the return on investment, then obviously there are other bases on which one can award compound interest. But clearly then you've got an issue about which class members relate to which.

MR WARD: I'm going to give a slightly unhelpful advocate's answer in adversarial litigation, which is: you have a method in front of you that has been proposed by the class representative. We've raised this objection. They've come back without answering it, and without suggesting an alternative. In our submission, then, it can't be certified on that basis. That's the methodology you've been asked to consider. We

say that on WACC, it just contains a basic flaw. Whether there are other things that Ms Deakin and her team could have come up with, I don't know. But don't forget, we made this point in our Response. They filed their Reply with a second statement from Ms Deakin. Instead of that, she just doubled down on it. That's our submission.

MR DAVIES: We're familiar with, for example, the discussion in *Trucks*. When WACC has been rejected by this Tribunal, I think what has then tended to happen is that the Tribunal has gone to a cost of debt, because it's the cost of equity part of the WACC that they're rejecting. But if Ms Deakin is going to estimate WACC, then she has to estimate a cost of debt as part of that. If you're right, she might have ended up doing some unnecessary work, but she will on the way have got to the right answer. Right?

MR WARD: Well, again, if the question is, what is the cost of debt incurred on this loss -- somebody would have borrowed; what's their cost of debt -- then of course, WACC becomes an unnecessary element. But what's being advanced here is a case that there will be a claim for investment returns, which is obviously something above and beyond the cost of debt.

If the claim is confined to the cost of debt, of course, the difficulty with WACC disappears. The claim that's advanced is not put in that way at all.

THE CHAIR: Thank you, yes.

MR WARD: Those are all my submissions before handing over to Mr Williams, unless I can assist further.

THE CHAIR: Thank you very much.

Submissions by MR WILLIAMS

MR WILLIAMS: Sirs and madam of the Tribunal, the issues that we have raised in relation to the authorisation condition fall into two categories.

First, there are issues relating to Mr Newman's funding arrangements, which we say

merit scrutiny as part of the Tribunal's consideration of the authorisation condition. The points are concerned with the impact of the funding arrangements on the class, as opposed to being matters which directly affect Rightmove. So, we haven't opposed certification on the basis of this first category of points. But you'll be aware, sir, I think, that there's authority, for example, in *Gormsen* that it's appropriate for us to highlight matters of this nature for the Tribunal's attention without positively opposing certification on this basis, so that the Tribunal has visibility of the issues and can consider them, and that's what we've done in relation to the first set of issues.

The second category concerns two issues, where we do object to the arrangements that Mr Newman has made and in relation to which we've sought directions. The first is Mr Newman's remuneration, where the position as it's developed is more problematic than we'd anticipated, and I'll come back to that later on.

The second is that the arrangements that are in place to create protection for Rightmove's costs, those aren't adequate, and that is a point which does directly affect Rightmove.

What I'm going to do is deal with the first category of issues, then deal with cost protection, and then come back to remuneration, so that I follow the order of Mr Marven's submissions.

THE CHAIR: Yes.

MR WILLIAMS: Dealing, then, with the first category: I mean, obviously we heard your exchanges with Mr Marven yesterday. In my submission, Mr Marven didn't really meet the way that we put the points, and some of the points we make haven't been considered in previous cases. So, if I may, I'd like to spend perhaps 20 minutes developing those first points, just to make sure that the issues have been fully ventilated.

The first set of issues arise because of the combination of two features of the case.

First, the proceedings were originally proposed and are driven by the funder Innsworth. The consequence of that, we say, is that as far as we can see, there's been an absence of any market testing of Innsworth's terms.

Secondly, we observe in the funding package a number of terms which we say appear to be excessively favourable to Innsworth, and for which no justification has been given, and the most notable of these is the funder's return, but there are other examples.

In his submissions yesterday, Mr Marven jumped straight to the second of those points. But it is the combination of the two points that's caused us to raise the issue as to whether the funding package that's proposed is in the best interest of the class.

I'm just going to spend a few minutes on the first point, if I may.

Can I start with what Mr Hain-Cole says about this in his second statement? This is core 7, page 319. (Pause)

At the bottom of the page, paragraph 67, he says:

*"Rightmove places particular emphasis on the negotiation of the LFA and, in particular, the level of commission/funder return".*

He accuses Rightmove of a fundamental misunderstanding of the funding market, and what's involved in getting collective actions funded.

Then he makes three points, and I'm going to deal with (a) and (b), and then (c) separately, if I may.

(a) is:

*" ...Innsworth had committed pre-funding to the development of the* [claim and that] *Rightmove's proposal assumes that the PCR should be able to approach other funders with a proposed claim that had been developed, in part, with Innsworth's financial support."*

Secondly, it says, *"To take this step would introduce material delay into the process"*,

and they basically explain the time that is taken engaging with the funder to get an action going. You've no doubt seen the evidence, but that's the point.

Then the third point in (c), which I'll come back to, is he says:

*"Although I cannot speak for the wider market experience, in both my personal experience ... and that of my firm ... we have never been involved in a scenario where there have been 'competing bids' ... from funders ..."*

Dealing with (a) and (b) first, in my submission, the evidence in (a) and (b) doesn't answer the concern. It actually just illustrates why this is a concern, because if the perception of the PCR or his legal team is that Innsworth can't be or shouldn't be displaced because it's offered some initial funding to the action, or because it would slow things down to consider alternatives, then that is in itself a problem. It illustrates our point that if a funder is in place from the get-go, that that can lead to a lack of pressure on the terms that it's prepared to offer, and why it is that the funder may have leverage to return better terms than he might obtain in a situation of competitive tension.

That's (a) and (b). In terms of (c), the point is made that Scott+Scott don't usually use a bidding process to get the best tender terms, and Mr Hain-Cole fairly says that he can't speak for the market as a whole. In fact, there is evidence that this isn't in line with market practice. I don't know if you want to go there. In our skeleton, we've given an example in the recent *JLP* case which, as you know, followed the unsuccessful *Riefa* application.

Perhaps it is just helpful for you to see this because I don't think you've seen it. It's authorities 3, tab 61, page 951, paragraph 186. You can see here, it says:

*"The decision to agree to the amended LFA in those terms followed a market tendering process described in* [the evidence]*. Mr Le Patourel devoted considerable time to the funding negotiations and received input from Exton, Hausfeld* [so on and so forth].

*Nine potential funders were approached in addition to the existing funder. Only one provided indicative competing terms. Mr Le Patourel explained that those terms were materially more expensive than those offered by Asertis ..."*

So, there was a tender process. There was competition as a result of that tender process, and as a result, Mr Le Patourel was able to satisfy the Tribunal -- well, he was able to demonstrate that the terms he'd obtained were the best available. The Tribunal actually went on to consider whether that was good enough in that case, and they went on to conclude that it wasn't actually good enough for Mr Le Patourel to demonstrate that the terms were the best available. But what one can clearly see from that is that other legal teams active on the claimant side of the market do use and are able to engage in a competitive process as part of obtaining funding terms.

Of course, the context for this, as the Tribunal will appreciate, is that this followed on from the *Riefa* application, which went all the way to a certification hearing. So, if one's thinking about sunk costs, investment costs here, there was an awful lot more water under the bridge in the *Riefa* action. A lot more money had been invested in getting to that point, and yet it was still considered appropriate to go back to the market and to see whether Asertis' terms could be improved upon.

THE CHAIR: Well, I suppose the outcome from the first hearing may well be the reason why it was thought necessary to go and do that, because of the criticism of the PCR in *Riefa*.

MR WILLIAMS: Yes.

THE CHAIR: I suppose the question really is -- I mean, it's absolutely fair for you to point to it -- is that market -- I don't think you can just say on the basis of that it is just market; are there other cases -- I don't know whether you've got others, or whether --

MR WILLIAMS: Well, one doesn't usually have visibility of this sort of thing.

THE CHAIR: No. Well, Mr Hain-Cole has listed quite a few of them, which he says it

hasn't happened. I suppose I'm just curious as to whether you know of any others where it has. That's the question.

MR WILLIAMS: I don't think there's evidence of others, no.

THE CHAIR: Thank you.

MR WILLIAMS: But in any event, we don't accept that competition wasn't an option, and we don't accept that it's not reasonably to be expected because a funder has committed some initial funding to move a case forward. But absent market testing -- and I do have to reiterate the point -- the unusual feature of this case, to our knowledge anyway, is that this is funder-initiated. So, there's a particular reason to scrutinise the terms that the funder has put forward, because of course, one's in a situation where they are automatically in pole position. So, there's a particular reason to see that that then doesn't gain momentum and lead to the funder gaining an undue advantage.

If we then ask ourselves what was done in that context to ensure that the case offered value, and if we look at what we've been told about that, it's extremely opaque. It's summarised in the Reply, which is core 3, page 216, and paragraph 135.

THE CHAIR: Yes.

MR WILLIAMS: If you just read the first half of paragraph 135, it says Newman 1 confirms that:

*"... the PCR understood the issues, he was actively involved in negotiating terms, and he received advice (over which privilege is not waived).* [He] *has now confirmed ... that the advice ... included specific advice on the funder commission/return ..."*

So, there was a process, but, in my submission, that is opaque. It doesn't give you comfort that the terms are, in fact, value for money. All we know is that those steps were taken.

THE CHAIR: Yes. So I think he tells us a bit more about it in his witness statement,

doesn't he? Doesn't he say -- he obviously spoke to Mr Marven, I understand, and obviously --

MR WILLIAMS: Yes, you're right. I'm sorry. It does say here that he took advice from costs counsel.

THE CHAIR: Yes. Yes. Exactly. But also, I think did he talk to Mr Perrin about it; is that right? I think on his advisory panel -- I think he said something about that in his witness statement somewhere.

MR WILLIAMS: Yes. So just to be clear, we know what steps were taken. We know that (overspeaking) --

THE CHAIR: You don't know what the advice was.

MR WILLIAMS: Yes. But in terms of having comfort that this actually provides assurance that these terms are valid, we know he spoke to certain people, and that's as much as we have.

THE CHAIR: Yes. I suppose it's an interesting question, isn't it? I mean, as you say, we don't know what they told him, but he's gone to people who -- I mean, would you accept that Mr Perrin and Mr Marven, on the face of things, ought to have some idea of what the market was?

MR WILLIAMS: Yes. Yes. Yes. I mean, he's spoken to people with relevant -- who were able to give him advice about it. Of course, we accept that.

THE CHAIR: Yes. I suppose the question is: is it possible for him to reasonably get comfortable without running a tender process? I think you're accepting that he could do, but we don't know whether he has or not because he hasn't told us what he was -- not unsurprisingly, he hasn't told us what the outcome of that process was.

MR WILLIAMS: No, no. I mean, one can't sort of slice up the points; I'm making a series of them.

THE CHAIR: Yes.

MR WILLIAMS: But one is that there was no competitive process.

THE CHAIR: Yes.

MR WILLIAMS: One that's as much as we know, broadly speaking, about what Mr Newman was advised or the process by which he was advised.

Thirdly, I'm going to come on to the actual terms themselves.

THE CHAIR: Yes.

MR WILLIAMS: And the Tribunal is then going to have to draw its own conclusions from everything taken together. But the submission I'm making is that when you take it all together, and when once I've shown you the level of the return, we'll say: well, none of this really gives you comfort that the level of the return that's been agreed to is at an appropriate level; I'll come to that. But I mean, one's got to look at it in the round.

THE CHAIR: Yes.

MR WILLIAMS: Yes. So that's that. So then moving on to that further piece of the jigsaw. As I said earlier on, we also see in the funding package a number of terms that are, in our submission, on the face of it, excessively favourable for the funder. We focused on two issues. The first is the return, and the second is other terms that give the funder excessive control over the action.

Taking the return first, if I can be completely clear about this, we obviously recognise what is said in the case law and, indeed, what the Tribunal observed yesterday, that the level of the return is a matter which can be addressed at the conclusion of the proceedings. There are reasons why it is appropriate in many cases to do that at the end of the proceedings. As a result, it isn't usually in focus at the certification stage. But the Tribunal is aware, I think, that there are limits to that point.

Do you want me to go to *Gormsen* on this issue or ...?

THE CHAIR: No, I think we're all on the same page on this. I think if we thought it

was a problem on the face of it, then we would say so.

MR WILLIAMS: Right.

THE CHAIR: In a way, I mean, maybe I wasn't putting as high as that, but I'm certainly putting a marker down as with Mr Marven yesterday that there are some outcomes and illustrations which I don't think can be taken for granted that -- if one can put it that way, because I think rather depending on the circumstances at the time, that might not be an appropriate outcome. So I ...

MR WILLIAMS: Sir, beyond that question, is there enough of a concern at this stage for you to, as Mr Justice Marcus Smith put it in *Gormsen*, call the terms out now?

THE CHAIR: Yes, that's the question.

MR WILLIAMS: Yes, exactly. So, I'll just develop that. The two points we take from *Gormsen* are, first of all, that it's appropriate for us to approach this in this way, which is to raise these issues -- you get that from paragraphs 35, 36 of *Gormsen*. This is paragraphs 35 and 40 of *Gormsen*, which is authorities 2/34. So that's the first point.

The second point is that the Tribunal will be prepared to intervene or may be prepared to intervene in relation to funding terms at certification, including the level of the return, if the term is considered extreme. That's paragraph 36.

This is important, for reasons I'll come on to, because the multiplier in *Gormsen* has been relied on by the PCR as a benchmark. But if one looks at *Gormsen* -- I wasn't going to go there, but I think the Tribunal has seen it -- *Gormsen* was a case where there was a ratcheted multiple, but the Tribunal's focus was on the top end, which was a 14-times multiple of those costs.

THE CHAIR: Yes.

MR WILLIAMS: And they expressed it in a different way, which was that it was 8.3 per cent of the overall exposure. But the multiple was 14 per cent of the total commitment, which the Tribunal said was equivalent to project costs in that case. And

the Tribunal said it was too high. They said it's not justifiable. Then the Tribunal, having expressed that concern, it was retracted and replaced by something else, and we can't see from the judgment --

THE CHAIR: Yes, we don't know what the answer to that was, yes.

MR WILLIAMS: -- what that is. So that's the sort of template, really, for the point we're making.

Now, in the present case, the commission is set out in schedule 3 to the LFA, and it ratchets from 3 per cent to 10 per cent. As I've said in *Gormsen*, there was also a ratchet, but the Tribunal expressed its concerns with reference to the top end of the ratchet.

Now, we have looked at the return in this case relative to the return seen in other cases -- I don't know if you've seen this at the back of our Response, it's core 3, 133. I do want to show you this.

THE CHAIR: Yes.

MR WILLIAMS: So, this was the annex to Linklaters' letter of 13 July 2026. It was included in the Response. You can see there's a table which runs over three pages. If I've counted correctly, there were 19 examples. In the first 16 examples, there is no multiple above 8x.

THE CHAIR: Yes.

MR WILLIAMS: Then if you move on to the last page, you see three more examples: *Stephan*, *Gormsen* and *Merricks*. These are the multiples that the PCR points to.

Now, notably the three on the last page are all cases where Innsworth was the funder. So, to the extent that these cases are said to provide comfort, it is Innsworth benchmarking itself against itself. That's, in part, why we say that the way that the PCR has sought to deal with this issue isn't satisfactory. I mean, there is a pattern here, which is that Innsworth is above the rest of the market. So that's the first point

we make.

Now, of course, the point that's made on the other side is -- well, I'm sure they don't accept that, but they say, "Well, in any event, these were all certified". But the picture is actually more complicated than that.

Now, we can discount *Gormsen*, for the reasons I gave a few minutes ago. Thinking, then, about *Merricks*, and *Merricks* was 6 to 15 times, but the context of *Merricks* is that this was an agreement -- you see, *Merricks* was a pre-*PACCAR* case, and it was certified at an earlier point.

Then my understanding of the position is that that multiple was then agreed later in the middle of the action, rather than as part of the initial process of certification. So, one doesn't have, as far as we're aware anyway, the sort of judgment one sees in these cases, scrutinising that multiple at certification.

We know from other cases that the Tribunal has been troubled by multiples of 14. I'm not saying this went completely under the radar, but it's been subject to a different process than for most of these cases. So, in my submission, that doesn't give any comfort either. Of course, we know that ultimately, it was sliced right down to a fraction of that in the context of the award after the settlement.

So that leaves *Stephan* -- I think it is worth turning this one up. This is authorities 4 at 86 at 1321. What we see from *Stephan* is -- this is a carriage judgment.

THE CHAIR: Yes.

MR WILLIAMS: We've got rival applications by Mr Stephan and BIRA. BIRA's LFA provided for a multiple between 4 and 6.5, and Professor Stephan's LFA, funded by Innsworth, provides for a multiple rising from 4 up to 10. It says the funder's return is substantially higher, if the proceedings are brought by Professor Stephan than if they're brought by BIRA.

The Tribunal says in 55:

*"Although we* [consider this] *remarkably high, we note that under the amendment to the LFA...* [they] *expressly agreed that* [it would be paid] *out of undistributed damages* [and so on]*."*

If you then read underneath the quote, it says:

*"The higher return agreed* [for Professor Stephan's funder] *may well reflect different assessments of the litigation risk, given the wider claims made* [that is made by Professor Stephan as opposed to by BIRA]*, and the higher amounts ... committed to by Professor Stephan's costs and adverse costs cover."*

So, they basically identify facts and circumstances which are said to justify the fact that the return is higher in Professor Stephan's case than in the BIRA case.

So, we've accepted in our written case that higher returns may be considered potentially justifiable for specific reasons. But in this case, we don't have any such specific reasons.

We have a witness statement from Mr Garrard of Innsworth. I wasn't going to go back to it. You've seen it already. Core 8 at 326, paragraphs 9 to 14. The points he makes are all essentially generic points about opt-out claims. He doesn't say anything to explain why the return in this case should be above that in almost every other case in the market. He expresses reservations as to whether his competitors' returns are sustainable. But the fact is, as we've already seen, Innsworth is consistently the most expensive. He offers nothing to explain the multiple in this case.

In my submission, conspicuously, there's one highly material point that he doesn't address, which is how risky a claim this is perceived to be, relative to others. As Mr Ward already addressed you on today, the PCR's position is that these claims are strong, straightforward, and orthodox. Now, obviously we don't agree with that, but that is their view, and if that is their view, then the multiple that applies to this case ought to be lower than cases which are less straightforward, but it is actually at the top

of the range, as you've already seen.

So, we do say that, putting all that together, the absence of a competitive process, the lack of transparency as to the assurance that the PCR has been given, and the sheer level of the return relative to the history of the cases that have come before the Tribunal, we do say that this is an extreme return which hasn't been justified.

Now, the further point I need to deal with is the effect of the waterfall, because the way this is presented by Mr Garrard, and I think this is really the way Mr Marven put his case yesterday, is to say, "Well, don't worry too much about the return because the waterfall makes sure that the interests of the class are aligned with those of the funder".

Now, I think the Tribunal has already seen some of this material. I'll just explain how we put this point. I think you are going to need to take the examples out because there's a bit of arithmetic.

THE CHAIR: That's part of Mr Newman's statement, isn't it?

MR WILLIAMS: So, it's core, tab 5, page 260.

THE CHAIR: Yes.

MR WILLIAMS: So this is the first example. The project costs are £21.7 million, and so we know that the maximum return -- and actually this is a point I'm going to be relying on. The maximum return Innsworth can make from the action as a whole is £217 million which is ten times the project costs -- that's the maximum commission, I should say. They get the project costs. That's the commission.

THE CHAIR: Yes.

MR WILLIAMS: If one then looks at 261, one can see that Innsworth obtains that return, £217 million at £700 million, recovery of £700 million, and we've already made this point in writing. It's less than half the value of the claim. So Innsworth gets its full return at half the value of the claim.

THE CHAIR: Yes.

MR WILLIAMS: So, we say that isn't alignment. But the point carries through into the other examples. The points made against us will say, "Well, Innsworth doesn't get the 10 per cent return in every case -- sorry, the ten times more in every case". But that doesn't affect the point we make.

If you then look at example 2 on page 263. Now here the project costs are £19.5 million and Innsworth gets an eight times multiple in this example, which if you turn on to 264, you can see the eight times return, that caps out at £156 million against £550 million award. You see that on the left-hand side.

THE CHAIR: Yes.

MR WILLIAMS: So, having done the arithmetic, 156 million is 72 per cent of 217 million, which is the maximum Innsworth can get if it gets the best return it can get from the action as a whole. So here we see that Innsworth gets about 72 per cent of its maximum return, when the class recovers about a third of the maximum damages they can recover. So notwithstanding that they don't get the ten times multiple, there is still no alignment between Innsworth and the class in this example.

If you then move on to the example 3, which is, I think, a six times multiple, you've got the same point again, arguably even more extreme, on page 267, where here the maximum return you see is achieved at 300 million recovery. So, that's 20 per cent, and at a 20 per cent recovery of the overall claim, Innsworth recovers 37 per cent of its maximum return from the action.

So, you can see it's a systematic point in terms of the way this works all the way through. Innsworth is consistently doing better than the class. That's the way it works. That's over and above the points that you made yesterday, sir, about the fact that this is disproportionately weighted in favour of Innsworth at low levels of recovery. I don't need to make that point. You have that.

THE CHAIR: Well, I think I was making a general point, which is that where the returns do look disproportionate, the Tribunal is unlikely to accept them. So, in a way, you know, Mr Beal and Mr Marven may not agree with your analysis of that, but if you were right about it, then that would fall into the same category.

MR WILLIAMS: Yes, I understand.

THE CHAIR: Yes.

MR WILLIAMS: The point I'm making is that I've made my submission about the level of the return in absolute terms.

THE CHAIR: Yes.

MR WILLIAMS: The way that, in my submission, that is answered is to say, "Well, don't worry about the -- you shouldn't focus just on the multiple because actually the waterfall ensures alignment". The point I'm making is that actually the PCR can't take the edge off the point in that way, because, in fact, the waterfall doesn't actually achieve alignment, in that sense.

THE CHAIR: I think it probably achieves more alignment, doesn't it? I mean, I suppose we haven't got a counterfactual average, but I mean, I think perhaps would it be more accurate to say it achieves a degree of alignment but not full alignment?

MR WILLIAMS: Well --

THE CHAIR: Because it does soften the point.

MR WILLIAMS: It is more alignment than simply taking the top slice.

THE CHAIR: Exactly, yes.

MR WILLIAMS: I understand that, but the way the point is put by Mr Garrard, is to say, "Well, this structure ensures alignment."

THE CHAIR: Yes.

MR WILLIAMS: I think I'm just saying that really isn't right, when one actually looks at the way that it works.

THE CHAIR: Yes.

MR WILLIAMS: Really, I mean, the way Mr Marven responded to this point yesterday was, in my submission, revealing because he took you to paragraph 132 of the Reply. He said, *"But look how successful this is on a cost-benefit ground"*. Because for an investment of 20 million, you're recovering £700 million worth of damages. But, in my submission, that's a deflection. We're not making a point about cost-benefit. We're making a point about alignment, and about whether the concerns about the level of the multiple are allayed because the waterfall ensures alignment. For the reasons I've given, it doesn't ensure alignment.

So, pulling those submissions together, we say the return is above a market level. No justification for that above market level rate has been given. Most of the comfort that the Tribunal is supposed to take is Innsworth benchmarking itself against itself. And two of the three examples, in my submission, are not reliable comparators at all. And the points that are made about alignment also break down on analysis.

So that's why we say that the return appears extreme and merits serious scrutiny at this stage. So those are the points about the return.

If I can just very briefly deal with a couple of other examples of terms which we say appear to be excessively weighted in favour of the funder. I think the convenient way to do this is to look at the Reply, which is core 3, 217. I'm going to do it here because I can avoid jumping around between documents. You can see the issue. So, 139 deals with clause 4.2(e) of the LFA, which requires the PCR, as it says here:

*"*[to]*... seek the prior written agreement of the Funder before asserting any new claim ... adding any new defendants or otherwise making any material amendment to the claims/causes of actions made in the Proceedings."*

Sir, it is a right in the funder to control changes to the case. Now, if one looks at the explanation that's provided in 139, it is said to be reasonable for Innsworth's consent

to be required before new claims or defendants are added, because this ensures that the claim being pursued is the action which Innsworth agreed to fund. One understands that point. But that wasn't our main point. Our point is that it allows Innsworth, for example, to prevent aspects of the claim from being withdrawn, even on advice. And there's no safety valve in this provision. There's nothing which says such consent not to be unreasonably withheld or that it needs to take into account legal advice. It is simply an absolute right in the funder to prevent the PCR from withdrawing parts of the case, whatever advice he might be receiving. We cannot see how a clause like that can be justified. So that's one example.

THE CHAIR: What's the evil there: the expectation that what, the funder will not agree to taking away part of the claim that's no good anymore? Why would it do that? I suppose I'm just trying to work out, trying to think of a scenario where this would be a problem.

MR WILLIAMS: Well, the funder obviously has an interest in the level of recovery.

THE CHAIR: Yes.

MR WILLIAMS: I'm speaking hypothetically, if there's an element of the claim that appears on analysis not to be in the view of the legal team, it's not justified taking that aspect of the claim to trial, and the funder says, "Well, frankly, I'd rather you kept it in on the off-chance that we might recover something at trial and that that would then inure to the funder's benefit", it gives it the opportunity to refuse to agree to the withdrawal of that element from the claim.

THE CHAIR: It just seems like a slightly odd thing for the funder to be doing, and therefore to be worrying about. I mean, I can see there is a scenario like that, but it doesn't seem to me to be terribly likely one. Is it something we should be very worried about, do you think?

MR WILLIAMS: Well, I mean, I think if the clause had included safety valves in the

manner of other provisions, then we might not have taken exception to it, but it doesn't contain a safety valve. And the answer that's been given, in my submission, doesn't really respond to the point we're making. Obviously, we understand that the funder isn't going to agree to the addition of claims which it hasn't agreed to fund. There's an obvious relationship between the extent of the available funding, the funder's position, and the claims that move forward on that basis. But not in the example I've given. Yet, they've only really been able to give an explanation for half of the provision. So that's one point.

THE CHAIR: Yes.

MR WILLIAMS: The second point is more extreme, which you see in 140, which is essentially a right on the part of the funders to have Scott+Scott removed from their role, albeit this is subject to such agreement not to be -- it says, *"... provided the Claimant agrees to such a course, such agreement not to be unreasonably withheld or delayed"*.

So that's a safety valve there. I think our position in relation to this is: what is the basis for this provision at all? It's said against us that there are safety valves, and so this is unlikely to give rise to any mischief. But our point is, well, what's the legitimate basis for a clause of this nature at all? The concern is not so much whether this scenario is going to come to pass in exactly this form. It's whether it creates a sort of cloud over the legal team, knowing that they are subject to these draconian rights on the part of the funder.

In relation to these terms, one wouldn't have thought that a compromise solution was beyond the class representative and Innsworth, but the points we've made about them have been resisted tooth and nail, and that has tended to reinforce our concern that we have a situation where this is done on Innsworth's terms or not at all, which just really goes back to the beginning of the point.

THE CHAIR: What's the compromise solution here? I mean, I can see it obviously in relation to the previous one, but what would you do here?

MR WILLIAMS: We just don't really understand why it's for the funder to tell the PCR to dismiss Scott+Scott at all. It just doesn't seem to be the sort of provision that has a proper place in this.

THE CHAIR: No, I understand your submission. I think that's just -- there isn't a compromise solution, is that it?

MR WILLIAMS: Well, sort of.

THE CHAIR: Yes.

MR WILLIAMS: What I mean is: on reflection, is this provision really needed? No. But, no, that's not the response to it.

So there has been a degree of digging in. You know, you might not expect the Tribunal to be faced with these slightly satellite points, but we raised the points and we're faced with intransigence about them, so that's why we're still here.

THE CHAIR: Yes, I see.

MR WILLIAMS: So obviously, the point I was just making is that, well, it's the fact that there is intransigence about points which you might have thought would fall away. That is a point which suggests that this is a situation where the funder has sort of had its own way on the terms, and that's where we're stuck.

That's everything I wanted to say about --

THE CHAIR: Just conscious of the time. We need to keep moving, don't we? Is there anything else on these points?

MR WILLIAMS: No, that issue is finished now. We're now down to the two specifics, neither of which will take terribly long. Did you want to --

THE CHAIR: No, we're fine. I'm just conscious of the time. I suspect that one of the consequences of some of the things you said is Mr Marven might want to say a few

things, but I think we've got time to do that, as long as you can finish up the next 10 or 15.

MR WILLIAMS: I think I'll be done in the next 15.

THE CHAIR: Yes. Good. Thank you.

MR WILLIAMS: Sorry, am I overrunning? I'm sorry if I am.

THE CHAIR: No, I'm just moving along. That's all right.

Costs protection submissions

MR WILLIAMS: Okay. Costs protection.

There's a fairly short point of principle, and then a couple of points of detail. I mean, just to put this issue in its practical context, the party against whom Rightmove can seek a costs order is Mr Newman. But obviously, there's no expectation that Mr Newman personally is ever going to be able to meet an adverse costs order for proceedings on this scale.

The structure of the arrangements, as Mr Marven explained yesterday, is that Innsworth indemnifies the PCR against any order for adverse costs. It then takes out an ATE policy to cover those costs, and then Innsworth's parent, Elliott, guarantees Innsworth's liability. But all those arrangements are between Innsworth and its parent, and the PCR and the ATE insurer. They don't provide any mechanism on which Rightmove can rely to ensure that it has recourse against the entity that can meet its costs liability. So it's common ground that something needs to be put in place to plug the gap. The question is what?

Innsworth and Elliott have offered an undertaking to the Tribunal. Our simple point is that this isn't a mechanism that is enforceable by Rightmove, as a direct right would be. It is obviously better than nothing. But given that the problem is the absence of direct protection for Rightmove, we say it's not satisfactory, and frankly, it's not especially coherent to take the trouble to create a mechanism, but to put in place one

that has got obvious limitations. So, if we're going to address this, we might as well address it properly, rather than partially. If I can just address you on those limitations.

THE CHAIR: Yes.

MR WILLIAMS: How would the undertaking work? Well, if Innsworth doesn't meet a costs liability, Rightmove would need to seek some form of relief against them, as against the background of the undertaking. So presumably, we need to seek an order of some sort against the background of that.

The undertaking is not really an enforcement mechanism. It is a means to another enforcement mechanism, and if we think about how this would work, Rightmove would need to join Innsworth and Elliott into the proceedings in some way or other. They are all outside the jurisdiction, as you've heard, so Rightmove would need to serve them out of the jurisdiction.

Mr Marven says, *"Well, Rightmove can seek a cost order against the non-party under the Tribunal's powers"* but any such application would need to be served on them. So, there's the substantive problem that it's not a direct mechanism. It's a means to an end, not an end; and secondly, there are obstacles in process terms.

I think what this comes to is Mr Marven's submission that the undertaking tells the Tribunal that Innsworth and Elliott are not going to resist a costs order. But we're not asking Innsworth and Elliott to tell us that they won't resist the costs order. We're trying to put in place a mechanism.

THE CHAIR: If one compares it with the undertaking your solicitors have suggested, the point that was being made, I think by Mr Marven, was: you've still got to go to court. In relation to the PCR's undertaking, I have to -- because I'm not sure what the procedural mechanism would be, but it would be a contempt of court application, wouldn't it, in the first instance? I mean, the third party cost order is an alternative. This would be an undertaking which has been breached -- undertaking as (inaudible)

has been breached -- contempt of court application --

MR WILLIAMS: But it's an application -- I mean, that's my point.

THE CHAIR: Well, no, I understand that. But actually, if you wanted to pursue Innsworth under the indemnity you've got -- the indemnity you've suggested -- you would need to pursue them on that anyway, wouldn't you? You would have to go and get an order from a court somewhere anyway, wouldn't you?

MR WILLIAMS: It's never going to be self-executing.

THE CHAIR: No.

MR WILLIAMS: I mean, I could obviously --

THE CHAIR: Well, that's the question, isn't it? Is it materially worse just because -- if you've got to come to the Tribunal or a court somewhere, in the UK, in England and Wales, then it doesn't make any difference which of those mechanisms it is. That's the point that's been put against you.

MR WILLIAMS: I'm making a very simple submission, which is: there is a gap. We're trying to plug the gap. Shall we half-plug it, or shall we plug it, I think, is the submission I'm making. In my submission, the PCR's proposal is at best half a plug, and the advantages of our solution are, first of all: it is a direct right. It's not a right to seek an order. It's a right which we're able to enforce, rather than coming to court and saying, "There's an undertaking and now we'd like something consequential on the undertaking"; and secondly, we deal with the service problem, but through provisions -- because there's a provision which irrevocably appoints Scott+Scott as agents for service. So it is a much more streamlined and smoother path to enforcement.

I don't think, really, there's any answer to those points, because they're just obviously right. So, what's being said is: what's been offered is good enough. We're saying, "Well, it's something, but it's deficient".

THE CHAIR: Would your second point be assisted by an express submission to jurisdiction in the PCR's undertaking?

MR WILLIAMS: Well, it's not so much about submission to the jurisdiction. It's actually just about effecting service of process, because you have still got to serve them.

THE CHAIR: Yes.

MR WILLIAMS: So we've got a means of serving them, and either we serve them out of the jurisdiction, or we serve them in the jurisdiction. What our deed does is it makes provision for service in the jurisdiction.

THE CHAIR: Yes.

MR WILLIAMS: So --

THE CHAIR: That's sort of the point I'm making. This could as well, couldn't it?

MR WILLIAMS: I mean, it could. It could.

THE CHAIR: I absolutely understand the point you're making, but your point about the half-plugged and the plugged -- I mean, what you're doing is inviting us to say to the PCR, "This isn't good enough. Go away and get another one", in circumstances where he says -- well, acknowledging that may be different from what you've suggested, but he says it does the job.

Now, if you're saying it doesn't do the job and we can fix it, that's an awful lot easier than saying you've got to go away and do something completely different.

MR WILLIAMS: It's deficient for the reasons I've given, sir. It's a strange situation, because Innsworth is professing a willingness to fix the problem, and to address the concern, but they're only willing to go so far. The point they make is, *"Well, we did this before in Merricks and it was fine, so what's the problem?"* We said, well, this is the problem, and we don't know why Mastercard were satisfied with this. I mean, it's not unusual in the context of legal problems for there to be further progress made in clarity of thinking when you come back to an issue, and that's what's happened here. We

can see now that the mechanism that was put in place in *Merricks* has weaknesses. So if Innsworth and Elliott are prepared to address the problem, why not address it in a way that avoids the difficulties that we're suggesting, rather than retains them? It's a sort of slight process --

THE CHAIR: We've got the submission. Yes. Thank you.

MR WILLIAMS: There are two other issues in relation to this. I think we just need to look at the language for the first one.

THE CHAIR: Yes.

MR WILLIAMS: The first issue is about the effect when the undertaking is withdrawn, and how it deals with liabilities already incurred by the PCR.

THE CHAIR: Yes.

MR WILLIAMS: I think ultimately this is a drafting issue rather than a -- because we're told this is intended to meet our concern.

If you could just turn to page 501 of the core. It's clause 5.

THE CHAIR: Yes.

MR WILLIAMS: It's the words, *"...but the withdrawal of this undertaking shall not affect..."* If you just sort of read those words. (Pause)

THE CHAIR: Yes.

MR WILLIAMS: If we understand the points that are made on the other side correctly, there's nothing between us on the principle. But we just don't think that that drafting says as clearly as it ought to say that if the undertaking is withdrawn, Innsworth and Elliott will remain liable to pay Rightmove any sum for which the PCR was held liable prior to the undertaking being withdrawn. It's extremely wordy, and it's just a complicated form of words which doesn't directly say what we think it should say. I think that's a drafting point, but it's not very satisfactory drafting, in our submission.

THE CHAIR: Your second point?

MR WILLIAMS: The second point is the extent of the cover.

THE CHAIR: Yes.

MR WILLIAMS: We've taken a realistic position about this. We haven't come to the Tribunal and said that the degree of cover should be based on what we expect the cost of the action to be, and we haven't suggested that the PCR needs to go away and get further insurance. All we've said is that, to the extent that indemnity has been put in place, it should provide parity in the sense that Rightmove is likely to spend at least as much as the PCR. You've seen their budget, which is around £21/22 million, and yet the extent of the protection under the insurance and under this provision, by extension, is £15 million. We say it isn't reasonable for the PCR to expect to spend £21 million or £22 million, but only to offer protection for our costs to the tune of £15 million.

We're not making the more dramatic point that they need to go and get additional ATE at the moment. We're not making that point now. There may come a point -- we're not making that point now -- but if we're going to get some form of an undertaking or deed from Innsworth and Elliott, then it should provide us with protection to the same extent as our own costs.

THE CHAIR: The £21.7 million isn't the legal costs, though, is it? It's got all the other stuff in it. The project costs include other things like the premium (overspeaking).

MR WILLIAMS: That's true.

THE CHAIR: I had understood the 15 -- whatever it is -- £15 million to be something like 70 per cent of the estimate of the PCR's cost to reflect reduction on assessment. I mean, if that was the position, would you be objecting to it at this stage? I appreciate you obviously leaving it open as to what happens in the future. But is that an unreasonable position for them to be taking, if that's what it is?

MR WILLIAMS: I'll just turn my back, if that's all right.

THE CHAIR: Thank you. (Pause)

MR WILLIAMS: Yes. So the position is that the £21/22 million is the full extent of the legal costs. It doesn't include other elements, like ATE. So obviously, the £15 million is -- there's a component which is the costs incurred in any event. But our figure is based on the full extent of the legal costs.

THE CHAIR: That's right. Okay. We'll see what Mr Marven has said there. That wasn't my understanding. But he'll have something to say about it, I'm sure. Yes. Okay. Thank you. Well, anyway, we understand the point you're making.

MR WILLIAMS: Okay. So that's everything on costs protection.

THE CHAIR: Yes, yes. Thank you.

Remuneration submissions

MR WILLIAMS: So, remuneration -- and I'll take this as quickly as I can.

THE CHAIR: Yes.

MR WILLIAMS: So, Mr Newman's latest position on this came in, once our skeleton had been finalised. So we didn't address it in our skeleton. We wrote last week.

THE CHAIR: We've seen the letter. Thank you. Yes.

MR WILLIAMS: I'm grateful. So this is where we are. It's right to say that when we raised this issue at first and, indeed, until about two weeks ago, we hadn't seen this as an issue going to whether Mr Newman should be authorised. We'd seen it as an issue that would likely be resolved as part of this process. But I say that because we hadn't anticipated such resistance on Mr Newman's side of the Court to bringing the terms of his remuneration into line with the recent authorities.

I mean, of course, *JLP* is the recent authority, but it reflected the trajectory of the case law, which we cited in our Response. In *Waterside*, the Tribunal had disapproved of a rate that was lower than Mr Newman's original rate. So, in our submission, your observations yesterday, sir, about how *JLP* now sets the standard, those observations

are clearly correct. *JLP* sets out a set of general principles, and, indeed, it was clearly intended to do so by the President and to supersede what had come before. So that's really the only way to read the judgment.

But we nevertheless heard Mr Marven press Mr Newman's position, and he continued to press the menu of options in Mr Newman's second statement, leaving aside the point that the Tribunal has disapproved that sort of haggling with the Tribunal in the *JLP* judgment.

So it is striking, in our submission, that even when faced with *JLP*, Mr Newman has taken a considered position that he's not prepared to act on the basis of the rates that have been set out in *JLP*. All of his options are out of line with *JLP*. So this does, frankly, appear to be more of a barrier to certification than we had anticipated.

If Mr Newman is ultimately not prepared to act on the basis of *JLP*-compliant terms, then it's a question for the Tribunal. But it does seem to us that there is an issue on the critical path to certification. But that's obviously a question for the Tribunal, rather than us.

Just to make a few brief observations on the specifics. Obviously, you observed yesterday that the guideline rate in *JLP* is actually £150, not £170. So, to the extent that Mr Newman had been undertaking work on the case in the expectation of a higher rate, he's in the same position as Mr Le Patourel was in that case.

The Tribunal, obviously, has the point that both *JLP* and *Waterside* say that the CR is not a commercial stakeholder and shouldn't be entitled to be paid a commercial rate. We say that that objection is really a complete and sufficient objection to options 1 and 2.

In relation to option 1, I would just like to add another point for the Tribunal's consideration, if I may, which is this: Mr Newman says that in this case, the funder is prepared to absorb the top-up amount in his option 1. So that won't form the basis of

Innsworth's commission. It won't come out of any damages is the point that's made. The point we make is that if this sort of arrangement is acceptable, then this practice is just going to lead to class representatives seeking to negotiate an off-book uplift in lots of cases, and it will become a cost of the regime. It's not going to come out of thin air. It's going to be a cost to the funder. It's realistic to think that it's going to have some impact in the background on the levels of returns that funders expect from their investment. So there's a real risk, in my submission, of setting a precedent, which would have adverse consequences for the regime in addition to the points you made yesterday, sir.

I don't have anything else to say about option 2, which is the *Brook* cut and paste option. In my submission, the Tribunal has the points about that.

Then finally, as far as the retainer is concerned -- I mean, this is based on analogies with other sorts of appointments, some of which are the appointments that the Tribunal considered in *JLP*, some of which, according to Mr Newman's second statement, are his other roles. We say that, really, this is all about what is an appropriate level of remuneration for this role in this case. The fact that, a pension trustee is paid a salary for a different role involving a different amount of work, or Mr Newman is paid a salary for a different role in different work, doesn't really tell you anything. The way that those analogies were used in *JLP* was to derive a rough equivalent hourly rate and to get to an hourly rate that way. But the arithmetic doesn't work the other way around, sir. And certainly, no material has been put before the Tribunal to suggest to you that the arithmetic does work the other way around. Otherwise, we agree with the observations that you made.

So in short, Mr Marven didn't give any valid reason why an exception should be made for Mr Newman. We'll have to see whether that's a barrier to certification.

So unless the Tribunal has any questions, those are my submissions, sir.

THE CHAIR: Thank you very much.

Mr Beal.

MR BEAL: I don't know if we need a transcriber break, or whether that squeezes my margin further.

THE CHAIR: Well, I think we might be better just to run through, if we can realistically get it done before --

MR BEAL: 4.00 pm.

THE CHAIR: -- 4.00 pm. So that gives you and Mr Marven together 50 minutes. If the transcriber will forgive us for taking away the break to give 30 minutes back at the end.

MR BEAL: I'm going to offer my apologies to the transcribers that I've done so.

Reply submissions by MR BEAL

Opt-in/opt-out submissions

MR BEAL: My first point is to do with *Evans*, which is that, in our submission, one sees running through that judgment, almost like words in a stick of rock, the obvious taking into consideration of the fact that the merits were very weak.

If one looks at paragraph 91 at page 425, bundle of authorities 3. *"If the merits ... are very weak"* is the preface to that particular paragraph of the judgment.

At paragraph 92, again, I think at 425 (sic), one sees that the procedural advantage that is being conferred is specifically tied in to the concern that it's extracting value from *"unmeritorious claims"*; that's the expression that's used.

Turning to 94 and 95 at page 426, which I think my learned friend took you to this morning, it's clear that they're all couched in terms of *"if the claim is very weak"*, and then a recognition that even if you move on -- and the watershed is in paragraph 95. Even if you move on to considering that the claims might have some merit, it's then

couched in terms of: does the Tribunal have confidence about that? Or is there a concern that even if it has some merit, there's still a lack of confidence in the strength of the claim?

One of the key paragraphs in this judgment, which in a sense sums it up, is at paragraph 99, which I think you weren't taken to. I think it was cited in Mr Justice Meade's judgment in *Brook*, which is where I tried to take a shortcut of showing you all the key paragraphs.

If you wouldn't mind just casting an eye over that paragraph, because one sees the tension between the two sides being played out. (Pause)

THE CHAIR: Yes.

MR BEAL: So the greater the strength of the claim, the greater the confidence this Tribunal may have that opt-out is a fair and just outcome.

Similarly, at paragraph 101 on page 428, if the Tribunal can form a view at this stage on the merits of the claim and that they are strong, that will support opt-out as a solution. So this is a judgment which, as I indicated, was concerned to recorrect two aspects of the Court of Appeal's approach:

One, merits really matter, and they don't just matter once -- you don't just tick the Pro-Sys box and then don't worry about merits. Insofar as you're able to do so, you can consider the strength of the claims. That feeds into the policy considerations. If it's a weak claim, the concern about leveraging is increased. If it's a strong claim, you don't need to worry about that, because all you're doing is providing a facility for unrecompensed individuals that have suffered loss as a result of the competition infringement to get money for that infringement, which was the gap in the enforcement regime that this was designed to protect what was referred to as the *"mystery of the reluctant plaintiff"* as long ago as 1982, which was characterised by systematic underenforcement of competition infringements against defendants.

So the policy considerations behind *Evans* were, obviously, the desire to ensure effective competition enforcement, but that didn't give rise to an undue entitlement to bring clearly unmeritorious claims; see, for your note, paragraph 141.

Now, the Tribunal was taken to paragraph 140 in this judgment, which cross refers back to paragraph 372(2)(ii) of the Tribunal's decision. You were taken to it, but there was one particular point that you weren't taken to. So I'm afraid I do need to go back to it. It's bundle of authorities 1, tab 23, page 1409. So bundle of authorities 1, tab 23, page 1409. The paragraph is in the middle of the page there, if you have it. I think you were taken to the top half.

Then, you were not taken to:

*"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 considering -- taking all of the material into account -- whether certifying on an opt-out basis is appropriate. To an extent, that involves considerations which fall squarely within the additional factors of 'strength' and 'practicability' that we consider below. We do consider that the fact that a case can only be brought as an 'opt-out' collective action has significant weight. However, it cannot be in and of itself a sufficient reason for resolving the Opt-in v Opt-out Issue ..."*

If in practice, the only way you're going to get collective enforcement of these meritorious claims is through an opt-out proceeding, that is a significant factor. We have never suggested it's a fait accompli, or that once you reach that conclusion, that's the end of the consideration. The Tribunal will take into account all of the circumstances of this case and weigh up the strength of the claims and the practicability of bringing proceedings either on an opt-out or on an opt-in basis, and it will reach a just and fair result that balances the competing policy interests that lie

behind the *Evans* recalibration of the test.

So everything that we are advancing in this case is consistent with *Evans*. Everything that we see in the post-*Evans* decertification cases or collective proceeding application decisions, is also consistent with *Evans* because the focus has been: what is the just and fair outcome on the facts of that case? It so happens we haven't yet seen any examples ever of opt-in proceedings where the opt-in aspect hasn't been sought by the class representative in the first place. That tells you something, because it means that class representatives are weighing up, in advance of making the applications, whether or not it's a realistic form of proceeding for the class that they are seeking to represent. And for those cases like *RHA*, there's a very tight-knit community of road hauliers who band together under the close association with the RHA, who were able to get 3500 signed up even before they issued the application, committed to the litigation. That's a very different scenario from where we are here.

By reference to the five factors that my learned friend Mr Ward identified, first off, we are, as you've seen, 82 per cent, sorry, a far greater number -- I think it is still confidential. The overwhelming majority of class members are SMEs. There's no indication from Rightmove in any form of evidence of what level of resource will be available to a typical SME. What we do know, from other cases that have both looked at the issue by reference to any evidence that was before them, but also by reference just to common accepted recognition of how businesses work, is that if, for example, you are a small estate agent on a high street with no more than five employees, having to suddenly deal with complex litigation is likely to be extremely burdensome, and you're not likely to have the resources to understand the technicality of the claim to necessarily willingly engage meaningfully with the requirement to enter into a DBA, deal with funding, deal with insurance, consider what your position is going to be if there is a disclosure request, consider what your position will be if there's

a requirement for you to file witness evidence.

All of these things, there is no evidence from Rightmove whatsoever, but there is evidence from Mr Hain-Cole and, to a lesser extent, from Mr Garrard, dealing with how this has impacted in other cases and what has been taken into account, and therefore what the concern is and the impact on this particular class will be. The next issue was --

THE CHAIR: Just before you move on, just on the evidence point, it is unhelpful that there's no evidence from the PCR about any of this. The point is made that *Evans* has been around for a while now. You know, it would have been possible to ask some of the people who've given witness statements as to how they would perceive opt-in proceedings. Because we really don't have any direct evidence, do we? And the only way we would have got that, it would be through your instructing solicitors having ...

MR BEAL: Mr Ward repeatedly said, and it is a dictum in *Evans*, that you can't rely on subjective evidence from the class members of what they would have done, what they're likely to do. So we're damned if we do and damned if we don't, in Mr Ward's submission. He says, "Well, you haven't produced any evidence from an estate agent saying, 'Oh, well, I wouldn't really want to opt in because it would put an undue burden on me'". But if we had produced that evidence, he'd say, "Well, that's simply the subjective view of one estate agent; you can't read anything into that".

Whether there's a dicta in the judgment in *Evans* saying, you shouldn't be looking at this from a subjective viewpoint, we would have been told off for not meeting the legal test.

THE CHAIR: Well, I suppose -- I'm not sure that's quite an answer, is it? Because you're never going to be able to form an objective view without some information about the subjective views of the population. I take your point about going to see one of them, but if you went and asked them about what considerations, the things we've

been talking about. If you said to them, "These are things which need to be done, how does that impact your business?" That is potentially taking it beyond subjective, isn't it?

MR BEAL: Well, in my respectful submission, if we're saying, "Well, you've managed to procure witness evidence from four estate agents and three of them are small, and therefore you can infer that there's no problem with getting them engaged", that suffers from the classic problem of selection bias. We've managed to find four individuals who are sufficiently outraged by what's happened, that they are prepared to put their heads above the parapet and become engaged.

That doesn't mean that that's going to hold true for 13,400 estate agents, who are not of a --

THE CHAIR: So you're effectively saying it's a biased sample, by definition, but you've managed to get them to put in a witness statement in the first place.

MR BEAL: They've approached us. We've said, *"Are you willing to give witness statements?"* I'm not going to try and talk about what was done, as that is subject to litigation privilege.

THE CHAIR: No, no. Of course I'm not asking you to do that, no.

MR BEAL: (Overspeaking) for trouble. But one can infer that, from the people we've approached, four have said, *"Yes, we're prepared to give witness evidence"*, because they have done so. You can't infer from that, that that's indicative of a level of engagement that one can expect from everyone else. Indeed, the classic evidence of that is the "Say No to Rightmove" document, which I took you to in opening, if you recall. That was the petition. All they had to do was sign a petition and there, I think 1,850 did sign a petition, in the heat of the COVID lockdown, when they're still being charged full whack by Rightmove for the services that are being provided in circumstances where the estate agents can't earn any money because nobody can

view any houses, nobody's buying any houses.

So, it was that, in a sense, deeply unpopular action which triggered as many as 1,850 to simply sign a petition. But that's 13 per cent of a class of 13,400 agents. So, again, the evidence we have is in fact backing the proposition that this isn't a class that is going to overcome inertia easily, notwithstanding my learned friend's assertion to the contrary.

In terms of claim size, my learned friend added in the compound interest. In fact, if we do the maths the way it works out with £446 million being taken away from £1.56 billion, you end up with a figure of £1.14 billion. If you take 446 over 1.14, effectively as a shorthand, stripping out the zeroes, you end up with a 40 per cent figure, not a 50 per cent figure. Mathematically, the additional element provided by compound interest is 40 per cent.

But if we were approaching it on a simple interest basis, I recognise that we would also have an increase on the net of interest calculation somewhere in the range of 25 to 30 per cent. So even a simple interest calculation is going to increase the value of the claim. But the reality is, that claim size is still, for most people, no higher than £50,000.

THE CHAIR: Yes. It looks like quite a concentrated amount of proposed class members between £25,000 and, well, depending on where the interest line cuts in, somewhere between £50,000 and £75,000.

MR BEAL: The bulk of the claim does look as though that would be what would be called the sweet spot on the cricket bat, of where the Court claims --

THE CHAIR: And not much below, I think Mr Davies did a quick back of the envelope, which is round about £17,000. It didn't look like -- this is not a claim where there are lots of tens or hundreds or even small thousands. It starts around about £16,000 or £17,000.

MR DAVIES: (Overspeaking) none of those.

THE CHAIR: (Overspeaking) none of those.

MR BEAL: Yes. Okay. So we're talking about a number of claims that exceed the threshold for the Small Claims Court in the County Court, but we're still talking about several County Court claims.

THE CHAIR: No, we're just trying to get a fix on that we're all on the same page as to -- Yes.

MR BEAL: Mr Ward's quite right. The Rightmove fees are so large that they do represent a significant proportion of the costs of a business, and therefore, because the business is in the business of selling properties using Rightmove, inevitably they do have a number of reasonably-sized claims. They're not large claims, and nor are they small. They are modest claims which couldn't be justified as standalone claims. The question then is well are they big enough to overcome the problems of class inertia so that they can sensibly be brought on an opt-in basis? To which the answer, we say, is clearly not.

Because my learned friend simply didn't address all of the steps that are required to be taken in an opt-in claim to get people on-boarded for the claim; signing the DBA, getting the advice, understanding the legal advice, dealing with insurance, being warned of the risk of class disclosure.

We all know that once there's an opt-in claim, and we've seen it in other litigation I don't need to refer to, because it's transparently obvious that this happens. The application that's made by a defendant is for extensive disclosure requests from those class members for data going over the claim period. If nothing else, coupled with internal management accounts, internal documents that deal with who is the particular claimant using for their services, and how would they view rival services. So that the standard disclosure request is then very fulsome, and that imposes a burden on all of

the class members, and the class members have to be warned of that.

So this is more than simply putting your name on a list and that does mean, we say, that potential class members are likely to be deterred from putting their name on a list once they are told exactly what will be required of them. It doesn't mean that if they're sufficiently outraged, they won't overcome that, but what it does mean is that a very large number can be expected to drop out, and that is the aim -- that is Rightmove's aim -- with this suggestion of an opt-in only claim.

Now, of course, what that doesn't mean is that that is somehow reflective of their appetite for the claim or the level of understanding that they have suffered loss. It simply means that they are having to face up to the practical realities of dealing with a relatively low value claim in circumstances when they're busy trying to run their businesses, that they may well take the view that the claim is meritorious, but they have to balance it against other demands on their time and resources, and that's been recognised in a number of cases, to be a highly relevant consideration when determining whether or not opt-out or opt-in should be the way that is sanctioned.

There was a reference to funders being entrepreneurial; I'm afraid that's unhelpful. The whole structure of the scheme is that civil legal aid is not available and it's obviously pretty low down the Lord Chancellor's list of priorities. This regime was developed as a funded regime by external funders in the private sector and to suggest that they're somehow entrepreneurially seizing on the claims to have a sort of quasi claims factory just fails to reflect what Parliament's intention was, to get this regime going in the first place.

On *RHA*, one additional point just to note is that there wasn't any limitation pressure in that case; because of the individual circumstances of the case, there was an EU settlement decision, and then one of the companies had chosen to appeal through the Court process. But in any event, the limitation pressure was not on, and so the

bookbuild was able to proceed, regardless of limitation issues. For your note, that's bundle of authorities 2, tab 26, page 77.

Practicability submissions

Moving on to practicability issues: what -- with respect -- was telling, was Mr Ward's submission that Rightmove will not disclose contact details without an order of the Tribunal.

Throughout my learned friend's submission --

MR WARD: That's just GDPR.

MR BEAL: (Inaudible) a rejoinder. But anyway. A Tribunal order is required. Now, given that one of the features of Mr Ward's submissions was to say, *"You can assume that there's been certification"*, but then wanting to go back to the ex ante position of not being in this hearing and looking at what we do when we're trying to put together a claim on a collective proceedings basis, and we're looking at is it opt-in or is it opt-out.

Somebody in that ex ante position is not going to be able to say, "We have ready access to the contact details for 13,400 estate agents", because they're not going to be available, and what you're not going to be able to do on any sensible basis is make an application to the Tribunal for those contact details and have them disclosed to us without doing a number of things.

Firstly: notifying Rightmove that we're in the process of trying to put a claim together.

Secondly: notifying the market that we're in the process of trying to put a claim together and therefore risking a carriage dispute.

And thirdly: having to incur costs of going for an interlocutory order ahead of a claim being filed for disclosure of sensitive, confidential information held by Rightmove.

Now, the prospects of that happening, I would say, are vanishingly small. When we notified Rightmove in our letter before action of the intended claim, they did not write

back, saying, "Here you go, here are the contact details of 13,400 estate agents, you're welcome to write to them and try to get them to opt-in".

If one then looks at the *Ennis* case, which was relied upon, dealing with contact, this is bundle of authorities 2, tab 38, page 788. (Pause)

One sees at top of the page at paragraph 53 that, in fact, in the *FX* case, there had been an extensive attempt to bookbuild in *O'Higgins*, and they'd managed to contact 321 PCMs in relation to losses. That required investing:

*"... more than 6,000 hours over 4 years. The present collective proceedings appear to involve over 13,000 PCMs ... even if the PCR could make contact with a PCM,* [see my point about, well, they're not willing to give us contact details] *there would be no guarantee that the PCM would be proactive and respond."*

Now, this is *Ennis*, where the developer is in a must-take relationship with the services being provided by Apple and where, necessarily, Apple will have contact details for the people that are buying Apple's services.

So it's very difficult to understand how what holds true in *Ennis* can't equally be plugged in -- and I think that's the expression I used -- to our case. It's a very similar class size, very similar considerations apply, and where we have evidence of the difficulties and all that is put against that evidence is assertion, it's simply right that we can point to other evidence that was given in *Ennis* by another solicitor, other facts in *Ennis* which are remarkably similar to ours, and say, well, therefore a similar process of reasoning should apply.

It was also suggested that somehow we hadn't started a bookbuild process, tested the appetite of the class, written to people, tried to work out whether or not a bookbuild would be operative. I'm not going to go into the details that went into the formulation of the claim or the considerations that took place, because they're protected by litigation privilege, but what I will do, if I may, is show you in *Stasi* where that very point

was rejected by this Tribunal. That's bundle of authorities 3, please, tab 52, page 556.

(Pause)

And at paragraph 144, there's a response to the:

*"... criticism that the PCR* [should or] *could have helped herself by conducting a more aggressive 'book building' exercise – i.e., she should have sought to engage in direct contact with potential claimants, which would have provided more reliable data about the make-up of the Proposed Class, which in turn would have enabled the Tribunal to make a more informed assessment as to whether or not an opt-in structure was viable for some discernible sub-group or groups. Again, we see little in this criticism. The PCR's response was again to point to the diversity of the Proposed Class, which comprises entities across a large number of industries and sectors, linked only by the fact that they have incurred incidental IT costs ... The PCR submitted that in those circumstances, it would be highly impracticable and disproportionately costly at this stage to identify and approach potential class members in order to 'book build'. Given the range of entities involved across the different areas of business, there's no trade association or other body to act as an obvious point of contact. We agree, and indeed would say that the obvious diversity of the class underscores the point made above ..."*

Now here it's true there's a greater homogeneity to the class, but there's still estate agents and NHDs and something called "rental operators", which you asked about earlier. That is an internal term to Rightmove; it's not an industry known term. We have therefore treated it as estate agents and NHDs. They are different types of class members, but we don't have contact details for them. We are in a position whereby our class is 13,000-odd, 13,400, and we don't have contact details for those people. Given that it's very difficult to understand how it can sensibly be suggested, it would have been the easiest thing in the world, apparently, to reach out to this class and test the water and see their appetite for bringing a claim. Bearing in mind, of course, that,

on an opt-out basis, we are looking at strong claims. We're looking at strong claims, not weak claims, so the leveraging concern is abated, in my respectful submission. But we're also facing opt-out claims, where if the PCM is asked hypothetically, "Do you think this claim is worth anything?" And the answer must be that they would sensibly take legal advice from the legal team that they're going to have to be engaging with substantially, in signing DBAs and receiving advice on the merits of the claim, and one can infer -- given that I'm submitting that the claims are strong ones -- that they will be told that the claims are strong ones.

Not to say it's without complexity, and clearly many a slip twixt cup and lip, but they will be advised, hypothetically, that these claims are strong ones.

The appetite will be tested as to whether or not, in the circumstances of an opt-out proceeding, they then choose, notwithstanding that, to opt-out, and of course, that brings to bear fiduciary obligations on behalf of people who are running businesses to promote the business in the best way possible and their statutory duties to do that as well.

What I'm afraid we cannot simply assume is that if it flips into an opt-in proceeding, that same view will prevail over the natural inertia and in the face of concerns about pulling the tiger's tail, when that tiger has your throat in its mouth, when they are the must-have supplier of an essential service for your small business.

There was no evidential vacuum; I'm afraid that was hyperbole. We have clear evidence from Mr Hain-Cole, who's an experienced solicitor, supported by evidence from an experienced funder that all chimes with the evidence that has been given in the other cases that I took you through with some care. My learned friend didn't, I'm afraid, manage to do more than say, there are different cases with different class sizes with different permutations.

But the core theme: looking at *Rodger*, the class size was 2,400; looking at *Ennis*, it

was 13,000. Admittedly, *Brook* was a much higher figure. But these are claims that have all been certified on an opt-out basis, notwithstanding substantially the same submission being made by different counsel for the defendants in those cases.

What we cannot do at this stage is assume that we are now back at square one, trying to work out what type of claim to bring, and that therefore certification is not an issue. My learned friend sought to suggest we're back at square one; we need to put you in the position that you would have been when you were working out how to bring this claim, but you can assume that it's a certifiable claim, and that simply is marrying up two ends of the process.

It's right that what we're not doing is saying that because we're here, because we're opt-out, and that's how we're proceeding, that forces your hand, and you have no other alternative. But it's not fair, with respect, to say: well, you've done all this work on a certain basis, and you can now assume that that work is done and that you are where you are now, and feed that back into the position back in 2024/2025 when we were looking at this claim, to say, "Well, you have the benefit of everything you know now, but back then, and you can work out on what basis you are bringing that".

That's simply not a fair proposition. We have to either look at it from the perspective of being back at square one, with no data and no visibility, or we take it as the position is now, but with the recognition that we have already made the shot selection of going for this on an opt-out basis.

We're not saying it's a fait accompli. What we are saying is: if this now proceeds on an opt-in basis, we are going to have to do a great many things. Funding cannot be assured -- at its lowest, funding cannot be assured -- and we then are therefore in a position where there is a real risk of no claim being brought on behalf of this class at all; or if it does go ahead on a funded opt-in basis, of the number of class members being caught by the proceedings being substantially lower. Therefore that feeds into

my point that the cost recovery ratio is substantially impaired on my learned friend's case.

Submissions on the hybrid approach

Turning then to hybrid, the hybrid class did not have as its expressed definition the number of branches. The number of branches -- and this is in Rightmove's Response, paragraph 53(d), which is core bundle 2 -- the definition is at 99, and the cross-check is at page 101. The cross-check involved seeing how many of the sampled 200-odd cohort were going to have branches; more than five branches. That was simply used as a cross-check. In fact, one cohort member was identified as only having four branches, so it wasn't a cross-check. It wasn't a test that was built into it.

But in any event, the hybrid proposal relies on an entirely arbitrary distinction -- and I don't shy away from repeating it -- of somebody who spends on Rightmove £167,000 per year. As matters stand, it's going to decrease over time. The longer the claim period goes on, the more people fall into the cohort on their construction of the class definition.

£167,000, as it stands at the start of the end of the claim -- at the issue of the Claim Form, that's the 167 guillotine coming down. Somebody on that level of expenditure is assessed by Rightmove to be sufficiently sophisticated, a large organisation that is perfectly capable of looking after its own affairs. Somebody on £166,000 spend per year isn't, and cannot therefore be assumed to be sufficiently sophisticated to be able to bring proceedings on an opt-in basis, and do what is required to opt in to the collective proceedings.

That distinction, I'm afraid, simply is arbitrary. It's been recognised as arbitrary in *Stasi*. It was recognised as arbitrary in *Brook*, and it's no less arbitrary here.

On merits, I've got nothing further to add.

Exclusionary abuse submissions

On exclusionary abuse, our case -- I've said it now several times -- we've pleaded a perfectly satisfactory explanation of exclusionary abuse. It's not being doubted that it constitutes a tort. We have said it's given rise to loss. We say that loss is subsumed for calculation purposes within the larger loss that will be revealed by the counterfactual of the price that is the sustainable price in conditions of normal workable competition. We are relying on that calculation to build in the loss that is recoverable for both the exploitative abuse and the exclusionary abuse. I'm not seeking to identify a separate element of that loss that is attributable specifically to damages separately for the exclusionary abuse alone.

THE CHAIR: The pleading was somewhat inconsistent with that. I mean, if that is the position, then ...

MR BEAL: The inconsistent bit was in the Reply --

THE CHAIR: Yes.

MR BEAL: -- when it says there may be additional loss over and above the exploitative. That is a position that we may reach on disclosure, but it's not the position we're at now for the reason I gave you, which is ...

THE CHAIR: Well, it's quite difficult, then, isn't it? Because if you're advancing a case which is leaving it open as to whether that's going to happen, how do we deal with the methodology point?

MR BEAL: Well, the methodology point is that we don't need to plead it at the moment, because there's no separately identifiable loss. It would only be, if in due course, disclosure shows that there is, in fact, separately identifiable loss, that we would need to amend our pleading to make that abundantly clear, and (b), we would need expert evidence to support the proposition that additional loss was attributable to that exclusionary abuse.

THE CHAIR: So you would accept that if you're going to advance a case which does

involve a separately identifiable loss, you would have to amend.

MR BEAL: Yes. Because we've said so in terms of paragraphs 119 to 121. Mr Davies.

MR DAVIES: What about in the circumstances in which you get to trial and you lose on exploitative, but you win on exclusionary?

MR BEAL: We lose on everything.

THE CHAIR: Right. Of course, you won't know you've lost on exploitative at all --

MR BEAL: No, but if you --

THE CHAIR: -- until you find out (overspeaking).

MR BEAL: If we haven't amended, and there's no evidence to support the proposition that there's a separately identifiable pot of loss that is specifically attributed to exclusionary abuse and not exploitative abuse, and we lose on exploitative abuse, then we've lost. That's clear.

In the halfway house, if we don't win to the full extent that we've claimed, but we win, say, the overcharges are found to be, you know, effectively, 30 per cent rather than 60 per cent, then, again, we haven't proved loss for the additional 30 per cent. We fully accept that.

But it's not a methodology issue. It's simply that we have not pleaded a specific claim for the identifiable loss that is subsumed within the greater figure. We don't need to do so until we actually say, "Yes, there's a specific pot of damages that we are specifically claiming for the exclusionary abuse". It doesn't mean we're not claiming for loss. We're claiming for loss but then not seeking to do something that, frankly, even on a broad axe, can't be attempted at this stage, which is to identify with specificity the portion of the loss that is separately attributable to exclusionary abuse. Because at the moment, both of -- the exploitative abuse is telling you what the counterfactual price would be, and the exclusionary abuse -- because it causes harm

and loss -- is contributing to the overall assessment of where that is.

And you would strip the exclusionary abuse out of any counterfactual anyway, which is why this is essentially an arid debate, because the Tribunal is going to have to look at this question, because it will need to strip out the exclusionary conduct that we prove, in order to work out what the appropriate counterfactual basis is, because you can't allow abusive conduct to exist in conditions of normal workable competition.

THE CHAIR: So I mean, it's only an arid debate if you're not bringing a claim for loss. Now, obviously, you have to establish loss, if you're going to plead it as a tort, you've got to establish loss.

MR BEAL: Absolutely.

THE CHAIR: But at the moment that is, I think what you've told us is much clearer than what your pleadings are, if I may put it that way. But I think we're taking it from you that that is the position you're --

MR BEAL: We're claiming loss, but the specific identification or the separate loss is not being claimed for (overspeaking).

THE CHAIR: Yes. You're not pursuing a claim for loss, if I could put it that way.

MR BEAL: We need to constitute a tort, otherwise it's strikeable.

THE CHAIR: Yes.

MR BEAL: So it must have caused loss and harm. We say it has, but it's subsumed within the claim that for specific damages is identified at the moment by the exploitative abuse analysis and methodology.

THE CHAIR: Yes. I mean, the only reason it's not arid -- if you're being given a licence to go and do something which is not constrained to require you to provide a methodology, if you pursue a claim for loss, that's the reason why it's a problem. If we're clear you're not doing that, you have to amend to do it, then it seems to be a different position, I think.

MR BEAL: Well, if we were pursuing a claim for a specific element of loss specifically attributable to the exclusionary abuse, then I accept we would need the methodology that separated out how one did that, if that helped.

THE CHAIR: That's right. Thank you.

Compound interest submissions

MR BEAL: Compound interest. Ms Deakin is proposing to use a methodology which uses strata to allocate losses. That will depend upon a sampling exercise. But crucially, that sampling exercise is then applied to the relevant figures and data for all of the 13,400 claimants for whom the aggregate loss calculation is being done. So the sampling methodology tells you what the aggregate compound interest claim is by working out, for example, what proportion of that cohort reinvested the overcharge or would have reinvested the overcharge, what proportion had borrowing costs, at what level and so on. You then plug those figures, that analysis, into the actual data from the 13,400 claimants, because we will know their Rightmove expenditure, because that would be data that Rightmove holds. So we will be able to work out the overcharge on an individualised basis. Then the sampling methodology is used to apply a rate to it. That is done in order to come up with an aggregate damages figure for compound interest.

It's not right to say that somehow, that is inappropriate, because, of course, we use sampling, as Mr Davies said, in wider competition issues. But we've used sampling much more recently for trial 3 in *Interchange* and for trial 2 in *Interchange* to a lesser extent. So sampling as a means of finding a way on a broad axe basis of assessing loss and damage is perfectly standard. It's been used in pass-on and in exemption previously.

The key difference here is we're assessing aggregate damages. That's aggregate damages which are awarded not on a compensatory basis, as Mr Ward accepted, but

on a just basis. That does mean you don't have to descend, as he accepted, into an individualised assessment of what the compound interest is per claimant, in the same way you don't need to do that for the underlying damages themselves.

Where the aim is just an award of damages, the methodology is there. It shows you what you can do. Unless this Tribunal is going to say that sampling is a problem in a collective proceeding, there can sensibly be no objection to the methodology that's being proposed.

On WACC, it was a proxy that was being used to establish the return on investment on an average basis. It wasn't being used for the purposes in *BT* of trying to determine the financing interest rate and costs of finance. We weren't getting into equities and betas, because it was simply being used as a proxy for equity, betas and debt financing. It was simply being used as a proxy for the return on investment. It's going to be cross-checked -- see Deakin 2 at 39 -- against the sampled evidence of return on capital employed from a portion of the cohort.

So this methodology stands. It doesn't rely unduly on WACC. It doesn't suffer from the *BT* problems with WACC. It has much to commend it. Unless a view is taken, as a matter of policy, that compound interest simply can't be claimed in a collective proceeding, which the authorities at the moment don't say; they say the opposite.

That leaves Mr Marven ... (Pause)

MR WILLIAMS: Sir, I've got a better answer to the £21 million. I thought it might be better if I gave it to you now --

THE CHAIR: Yes.

MR WILLIAMS: -- before Mr Marven replies, so that he's heard the submission, rather than me giving you the reference.

Could you look at correspondence page 140, please?

THE CHAIR: Yes.

MR WILLIAMS: I thought this was fairer than popping up after Mr Marven.

THE CHAIR: Yes. Of course. Yes.

MR WILLIAMS: Can you see there's a heading, *"Adverse costs protection"*.

THE CHAIR: Yes.

MR WILLIAMS: This is a letter from Linklaters to the PCR. Paragraph 3.1(i) deals with the issues. I think I confused the issue by referring to £21 to £22 million, which should, in fact, be £20 to £21 million.

If you then look at the footnote, that gives a breakdown. But the basic point is this includes solicitors, counsel, expert and e-discovery fees, including an element of deferred fees, but not success fees. So the important point is it's a like-for-like costs figure, in the sense that it doesn't include costs that are particular to the PCR, so for example, ATE, which is a cost the PCR has to incur that we don't. It only includes costs that will be incurred on our side.

THE CHAIR: Yes.

MR WILLIAMS: That's how we got to the figure. That's why we say --

THE CHAIR: Yes, I see (inaudible). Well, let's see what Mr Marven has to say about it. Yes.

MR WILLIAMS: I thought --

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

Reply submissions by MR MARVEN

Inter partes costs submissions

MR MARVEN: Just for that last point straight away, that isn't the right figure. It's not terribly helpful to look at the correspondence, the underlying documents that give our budget, which is the inter partes comparison. It's supplementary volume 1, tab 10, page 123. If you like, that gives inter partes costs of £15.9 million.

THE CHAIR: Yes, so we can go and look at that. I think that's helpful. I think I understand the point. We'll look at it.

MR MARVEN: That's different from what the funder's funding, because the funder's funding things like premia that are not -- and, indeed, PCR costs -- which I might have to say a little bit about -- and one or two other things and the advisory board that are not part of inter partes costs.

THE CHAIR: Yes.

MR MARVEN: And that's where the --

THE CHAIR: We'll see that in the budget, right? Yes.

MR MARVEN: It's core 11, page 476, but that's not the right comparison. So having just dealt with that --

THE CHAIR: Sorry, so the reference you gave us was a supplemental bundle reference.

MR MARVEN: Supplemental 1, volume 1, tab 10, page 123.

THE CHAIR: But you just gave us a core bundle reference there as well.

MR MARVEN: Yes, the core bundle reference is tab 11, page 476.

THE CHAIR: Which of those is which? What are those for?

MR MARVEN: So first of those is the inter partes budget, if you like.

THE CHAIR: Yes.

MR MARVEN: (Overspeaking) the inter partes costs, inter partes rate.

Core bundle 11, 476, is the funder's budget, if I can use that, which is how much the funder's going to spend. That, as you will see, includes various contingencies, various things, and in particular, the ATE premium which are not recoverable as costs.

THE CHAIR: But we'll see the inter partes budget coming into that.

MR MARVEN: Yes, you will.

THE CHAIR: Yes, that's good. Thank you.

MR MARVEN: But to be clear, there's another complication, not at quite the same rate --

THE CHAIR: Because of the success fees.

MR MARVEN: -- because the funder's budget has discounted rates, because the funder is funding the lawyers at discounted rates.

THE CHAIR: Yes. Exactly. Yes. I understand that.

MR MARVEN: But yes, you will see it there, but it won't be the same figures.

THE CHAIR: Yes. Thank you.

MR MARVEN: So just going back to, quick as I can, the first complaint that we hadn't gone to the market. Well, that's true, but there's no basis for saying and no authority was shown to you that we needed to. Something of an attempt was made to rely on *JLP*. I actually also rely on *JLP*, and I don't need to -- it's paragraph 209, and you were taken to it. It was said that the test is not whether it's competitive, but whether it's reasonable. On the facts, the Tribunal found that it wasn't reasonable. The particular reason for that -- I know you will appreciate -- is because it tried to sweep up all the costs for the first failed set of proceedings. But what the Tribunal didn't say, on a fair reading of that paragraph, was that it was a necessary antecedent step to go to the market.

There's no basis for the complaint that our evidence on the process is opaque. All that really means is Mr Newman hasn’t waived privilege. I'm not going to turn it up. But if you look at his statement, as I'm sure you have in the core bundle tab 5, in particular, pages 255 and 258, paragraphs 53, 54, 58, 59, he explains that he was involved in the process; he explains from whom he took advice, et cetera. It has now been confirmed, because we were told this wouldn't be taken as a waiver of privilege that the advice included advice as to the level of the funder's return.

I'm not going to go back to the tables. Just to say I don't entirely understand the

submission that the funders are doing better than the class, because once you get past the make-whole -- as I showed you yesterday, that the funder's multiple in the waterfall is one times project costs and the class's is two times, and that's reflected in the figures in Mr Newman's statement.

Just a word on the authorities, *Gormsen* -- I mean, incidentally, in *Gormsen*, despite the fact that the multiple was 14, it was still certified. I don't read the reference to the ratcheting effect being softened, and I don't have any inside knowledge on this as meaning that the multiples were reduced. It would be very odd for the Tribunal to set out what it knew were the wrong multiples. I assume that means the staging was stretched.

But in our case, the staging is different, because in *Gormsen*, the multiple of 14 came in at a particular date, whereas here, whatever the date is, and even if it's later, it's trial.

Also, in *Gormsen*, it was a multiple of the total commitment. So the funder would have done very well on an early settlement, because of that multiple rather than multiplicand.

The other terms that are swiped at -- if that's not unfair -- were taken out in the Reply. In the interest of time, I say these are non-points. It's in the skeleton.

THE CHAIR: Yes.

Costs protection submissions

MR MARVEN: On the adverse costs protection, the points that were made today were that actually, the difficulty is service out of the jurisdiction.

Now, I've checked on this -- the Defendants' skeleton argument at 86 to 89 and also the Response -- core, tab 2, page 130 at 119 to 123 -- that complaint is entirely absent. That's a new point that arises this afternoon. The gravamen of the complaint was an undertaking to the Tribunal's questionable legal status.

This is an unreal world. It's not fair, in my submission, that a point that the funder needs UK agents for service baked in should be taken at this late stage. But in any event, I don't really understand how it would benefit the Defendant much when in their unreal world these costs aren't paid. They're going to have to enforce wherever, once they get the order from the English, whether it's this Tribunal or a different English court.

Also, it's obvious that the undertaking doesn't allow. Again, so far as I can see, this is a new point. The people giving the undertaking, Elliott and Innsworth, to retrospectively withdraw cover. That's just a strange reading. Obviously, as I'm sure the Defendant really knows, that is not what it means.

Remuneration submissions

That, I think, just takes me finally -- I do, I'm sorry, need to revisit the class representative's remuneration point. I express no surprise that the Defendant puts it this way. They say there's a tariff, and we haven't made out a case for an exception.

I say that's the wrong way to look at it. What, with respect, was a little theatrical was suggesting they were surprised that I made a submission in accordance with the witness statement we'd just put in. Of course, that's our position, and they responded to that in correspondence. So, this suggestion that it's surprising that we've continued to support that.

Can I just emphasise a couple of things on this. I've made my submission yesterday that, really, a Tribunal to intervene at this stage needs a principled basis for doing so. That has to be a concern about misalignment. What I say is that this is a fact-sensitive test, and there is no tariff. It's a fact-sensitive test. On the facts here, there's no need for this Tribunal to be concerned about the class representative not acting in the class's best interest.

I do refer to *Brook*, the £250 rate. That was a decision -- it wasn't the President's -- the

President wasn't on the Tribunal, but it was Mr Justice Meade, as he then was. That's a strong Tribunal. They had no difficulty with £250 capped at £750, although I do accept they said *JLP* is on the way.

*JLP* didn't even say *Brook* is a bit on the high side. *JLP* didn't actually -- I mean, although of course a decision from the President is accorded the greatest respect, it's not in the President's gift to set a tariff. The President, like every other Tribunal, was making a decision in the case before, I should say, the Tribunal: the President and her colleagues. But the Tribunal didn't purport to set a tariff.

Can I just -- and I can do this -- it's probably just worth looking at authorities bundle 3, in my last minute or so, tab 61, page 969. I will do this at pace, if you will forgive me.

THE CHAIR: Yes.

MR MARVEN: You probably won't forgive me if I don't.

First at paragraph 250, you do see -- and this is entirely absent here -- concerns expressed as to the excessive amount of time being spent.

254, you do actually see the point being made that an SPV is at less personal risk.

They make the point -- and I don't need to mention this again -- 259, misaligned incentives.

261, a point about depletion of damages -- well, I'm not going to go into all our options again, but option 1 would answer that.

Then at 263 onwards, there's a discussion of salaried posts. Although this wasn't the only factor that weighed with the Tribunal, it was a significant factor that they calculated that for pension funds of the value of £100 million to £1 billion, the hourly rate worked out at about £170.

Although the figure isn't there, that paragraph of the judgment does say in terms that for above £1 billion, the rate was higher in the table that they saw. This claim, of course, is above £1 billion, whereas after the limited certification, the *JLP* claim was

worth -- and you have this at paragraph 9 -- somewhere between £289 and £306 million.

So I do say that this is a fact-sensitive test, that there isn't a tariff to which I need to prove an exception. It's a question of: is it appropriate to intervene in this case, and to what extent?

The final fallback point I make -- and to be clear, I'm not changing my options; my three options do not include an inflationary ramp. But if what's being said against me is, "You've got to go with *JLP*", then I do just make the point -- and you can see this at 276 that in *JLP* there was an inflationary ramp.

Unless there's anything else I can assist with, those are my submissions.

THE CHAIR: That was extremely impressive, Mr Marven. Well done.

But actually, just before you do sit down, Mr Marven, I suppose just on the last point, I mean, in a sense, I'm not sure that if we were to reach the conclusion that the right answer was £170, it's not really for us to dictate -- we can't force Mr Newman to turn up and work for £170, if he doesn't want to. So, there's a bit of a process point here.

MR MARVEN: Yes.

THE CHAIR: You've obviously not come back with -- not having had the discussion yesterday, you're maintaining your position, which is absolutely fine. I understand you're doing that. So this is not a situation where we've said, "Well, we're not sure we like this", and you've come back and said, "All right, we can do that instead". I suppose it just gives a real uncertainty, doesn't it, to how this is going to play out?

MR MARVEN: Yes, I mean, the way it was dealt with in *JLP* was there was a condition.

THE CHAIR: Yes.

MR MARVEN: That's one option. I mean, I would certainly say -- I mean, this is when I refer to ramping up a minute ago. I mean, what was asked for in Rightmove's

skeleton was directions. What I said was a slightly theatrical suggestion that they were surprised that we'd stuck to the position that we put in a few days earlier. They did just try and ramp that up a bit.

I mean, certainly, and I -- 4.00 pm, I'm not going to get into, I hope, a procedural wrangle with the Tribunal. But I would say if that is the Tribunal's conclusion, we should be given the opportunity to consider our response to that --

THE CHAIR: Well, in the sense of what? In the sense ...?

MR MARVEN: -- and that's (inaudible) generally.

THE CHAIR: In the sense of Mr Newman's options, or ...?

I mean, you've had your argument about it. If we reach the conclusion that £170 is the right number, then and I suppose, then, we deliver a conditional judgment. I mean, you will have the opportunity -- Mr Newman will have the opportunity to consider his response, because he can always say "no".

MR MARVEN: Yes.

THE CHAIR: Or indeed, if you thought it was something you could take somewhere else, then, of course, you could think about that.

MR MARVEN: Well, that's another option. That's getting ahead. Well, I mean, that's a hypothetical at this stage. But yes, those are possibilities.

THE CHAIR: That is very helpful. Thank you very much, indeed. Good. Thank you. Well, thank you.

Mr Williams.

MR WILLIAMS: I was accused of making two new points. I'm just going to give you two references to the points made.

THE CHAIR: Yes, of course.

MR WILLIAMS: Clause 5, the lack of clarity in clause 5 is addressed at 123(c) of our Response.

The suggestion that the service-out is a new point. It's not right either. 87 of our skeleton argument refers specifically to the difficulties in bringing proceedings out of the jurisdiction --

THE CHAIR: What paragraph was it?

MR WILLIAMS: It's the end of paragraph 87 of our skeleton argument.

THE CHAIR: 87.

MR WILLIAMS: It refers to the difficulty of having to initiate proceedings against entities outside the jurisdiction.

THE CHAIR: Yes.

MR WILLIAMS: So they aren't new points.

THE CHAIR: I'm grateful.

Good. Okay. Well, thank you, everybody. Very much appreciate all your efforts to present this to us in such a helpful way. We'll obviously reserve our judgment, and we'll be in touch as soon as we can. Thank you very much.

(4.03 pm)

(The hearing concluded)

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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? |