

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

**IN THE COMPETITION  
APPEAL TRIBUNAL**

Case No:1329/7/7/19

Victoria House  
Bloomsbury Place  
London WC1A 2EB

6 November 2019

Before:

**THE HON MR JUSTICE MARCUS SMITH**  
(Chairman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

**MICHAEL O'HIGGINS FX CLASS REPRESENTATIVE LIMITED**

Proposed Class Representative

v

- (1) BARCLAYS BANK PLC
- (2) BARCLAYS CAPITAL INC.
- (3) BARCLAYS EXECUTION SERVICES LIMITED
- (4) BARCLAYS PLC
- (5) CITIBANK N.A.
- (6) CITIGROUP INC.
- (7) JPMORGAN CHASE & CO.
- (8) JPMORGAN CHASE BANK, NATIONAL ASSOCIATION
- (9) J.P. MORGAN EUROPE LIMITED
- (10) J.P. MORGAN LIMITED
- (11) NATWEST MARKETS PLC
- (12) THE ROYAL BANK OF SCOTLAND GROUP PLC
- (13) UBS AG

Proposed Defendants

Digital Transcription by Epiq Europe Ltd  
Lower Ground 20 Furnival Street London EC4A 1JS  
Tel No: 020 7404 1400 Fax No: 020 7404 1424  
Email: ukclient@epiqglobal.co.uk.

**CASE MANAGEMENT CONFERENCE**

## A P P E A R A N C E S

Mr Daniel Jowell QC and Mr Gerard Rothschild (instructed by Scott+Scott UK LLP) appeared on behalf of the Proposed Class Representative.

Mr David Heaton (instructed by Baker & McKenzie LLP) appeared on behalf of the First to Fourth Proposed Defendants.

Mr Arnondo Chakrabarti of Allen & Overy LLP appeared on behalf of the Fifth and Sixth Proposed Defendants.

Ms Sarah Ford QC and Mr Stefan Kuppen (instructed by Slaughter and May) appeared on behalf of the Seventh to Tenth Proposed Defendants.

Mr Josh Holmes QC and Mr Tom Pascoe (instructed by Macfarlanes LLP) appeared on behalf of the Eleventh to Twelfth Proposed Defendants.

Mr Brian Kennelly QC and Mr Paul Luckhurst (instructed by Gibson, Dunn & Crutcher UK LLP) appeared on behalf of the Thirteenth Proposed Defendant.

1 **Wednesday, 6 November 2019**

2 **(10.00 am)**

3 **THE CHAIRMAN:** Good morning, everyone.

4 A few housekeeping matters, and other things, before we begin.

5  
6 **HOUSEKEEPING**

7 **THE CHAIRMAN:** First of all, I am grateful to all the parties for their written  
8 submissions, which I have read with great care.

9 I have mapped out a running order of the points that I think are before the  
10 tribunal today.

11 Before I list them out, we are being transcribed today; and in the usual  
12 practice, I propose to rise at about 11.30 for five minutes to give the transcribers  
13 a break.

14 To assist the transcribers, given the range of representatives, it would be  
15 helpful, I think, if you could announce yourself the first time you speak, so that we  
16 get the right names on the transcript of counsel.

17 We have a number of points. Some are longer than others. The way  
18 I propose to deal with it is to go through these points one-by-one and, as it were,  
19 gauge the temperature, in terms of agreement or disagreement, as we go; on  
20 a number of points, we are quite -- I think there is common ground, and what I will  
21 do on those is identify what I think is common ground and then someone can leap  
22 up and correct me if I am wrong.

23 So to go through the items:

24 Item 1, not on the agenda because it is so recent, is the letter we received

1 from Hausfeld which I hope all the parties have seen.

2 **MR JOWELL:** Yes, sir.

3 **THE CHAIRMAN:** Regarding Mr Evans's putative CPO application. I will want to  
4 hear what the parties say on that.

5 Point 2, very quickly, forum.

6 Point 3, establishment of confidentiality ring. Again, another short point.

7 Point 4, the disclosure of materials into that ring, what those materials should  
8 be.

9 Fifthly, the third Commission decision and the applicant's request that the  
10 tribunal write to the Commission, regarding that letter.

11 Sixthly, the amendment of the CPO application, which has been mooted by  
12 the parties.

13 Seventhly, the procedural arrangements for the hearing of the substantive  
14 CPO application in early 2021, and the timing of CMCs, or one CMC, before that;  
15 in late 2020.

16 Eighthly, the question of whether -- and if so what they are, what matters are  
17 capable of being determined prior to the CPO application; and as I see it, there are  
18 only two potential points being mooted between the parties. One is the question of  
19 funding, on which there seems to be broad agreement; the other is the question of  
20 jurisdiction on which there seems to be broad disagreement. But it seems to me  
21 this is one of the knottiest points. I think we will need to articulate exactly what we  
22 mean by jurisdictional points.

23 But anyway, that is the other point that is up for grabs, in terms of anterior to  
24 the CPO application being heard.



1

2

**Submissions by MR HOLMES**

3

**MR HOLMES:** Sir, I appear with Mr Tom Pascoe for the RBS respondents, who are the eleventh and twelfth proposed claimants. We take a somewhat different view of the implications of the Hausfeld letter for the management of these proceedings.

6

Having seen that letter, since we filed our skeleton argument, it has led us to revisit our position on several of the matters that are dealt with in the skeleton.

8

As we see it, the letter indicates that the certification process will be a rather different beast from the one that we were all anticipating. It is likely to be a comparative process of assessment, rather than an individual process of assessment, which is novel terrain for this tribunal.

12

If I could first take a moment to draw your attention, sir, to a few points which emerge from the Hausfeld letter.

13

14 **THE CHAIRMAN:** Yes.

15

**MR HOLMES:** And which we say show that it cannot simply be dismissed, on the basis that it is a putative application which has yet to be made and may never be made.

16

That, in our submission, has an air of unreality about it.

17

18

In my bundle, sir, it has been inserted at the back, at page 2 --

19

**THE CHAIRMAN:** I have it in loose form.

20

**MR HOLMES:** In loose form?

21

**THE CHAIRMAN:** I have it before me.

22

**MR HOLMES:** Very good, sir. For the benefit of those working from the bundle,

23

I think it is at page 205.

24

So the first point, at paragraph 2; one sees that the intended application is to

1           be based on the same two decisions --

2   **THE CHAIRMAN:** Yes.

3   **MR HOLMES:** -- as Mr O'Higgins's application.

4           The second point, at paragraph 3, is the important indication, in the final two  
5           lines, that the matters raised in the O'Higgins application will be very similar to  
6           those to be raised in Mr Evans's application. That is the Hausfeld application.

7   **THE CHAIRMAN:** Yes.

8   **MR HOLMES:** And will likely contain a number of the same, or overlapping, claims.

9           So, we know that these proceedings will be closely interrelated.

10           Turning over a page, there is more detail given of Mr Evans's application.

11   **THE CHAIRMAN:** Yes.

12   **MR HOLMES:** Beginning at paragraph 6, where Hausfeld describes the application that  
13           Mr Evans will be bringing. He will be seeking to commence collective  
14           proceedings on a follow-on basis and, in the final two lines:

15           " ... will seek to commence opt-out collective proceedings, with the option for  
16           non-UK domiciled entities to opt in."

17           So, exactly as with Mr O'Higgins's application, this will be an opt-out claim.

18   **THE CHAIRMAN:** Yes.

19   **MR HOLMES:** With some opt-in bolt-ons.

20   **THE CHAIRMAN:** Mr Holmes, if it assists, I am very prepared, and I think it is  
21           prudent for us to proceed on the basis that there is, waiting in the wings,  
22           an additional CPO application that is -- or that gives rise to what an American  
23           lawyer would call a carriage dispute, regarding who acts as the representative for  
24           the class. It is quite clear that if you have two opt-out CPO applications, in relation

1 to the same subject matter, only one can prevail.

2 **MR HOLMES:** Yes.

3 **THE CHAIRMAN:** That has to be the case.

4 So I am very happy to proceed on that basis, because I think we do need to  
5 take account of reality.

6 **MR HOLMES:** Yes.

7 **THE CHAIRMAN:** On the other hand, I do not propose to hear, even if there were  
8 representatives present, from Mr Evans, unless and until a CPO application is  
9 issued.

10 **MR HOLMES:** That is fully understood, sir.

11 **THE CHAIRMAN:** Until then, there can be no standing.

12 So the question is: what do we do in this penumbral period, when we know  
13 something is likely to happen which is of significance, but it hasn't happened yet?

14 **MR HOLMES:** Yes.

15 **THE CHAIRMAN:** And if I may, sort of, flag one point that struck me -- and no doubt  
16 you will be touching upon it, in terms of your thinking about the implications of the  
17 putative Evans CPO application.

18 For instance, take the issue of funding.

19 **MR HOLMES:** Yes.

20 **THE CHAIRMAN:** It seems to me that if one is looking at funding, as between two  
21 rival applications, there's no point in having that sort of application heard in  
22 advance of the CPO application itself, because differences in funding will be  
23 a factor to go into the meting pot as to who is to be preferred as the representative.

24 On the other hand, if the defendants have a knockout blow, as regards one or



1 other funding regime, they can say: look, it's so inadequate or so wrong that the  
2 application has to fail, even if it were the only application; then that is something  
3 which ought to be dealt with earlier, because it's not weighing the rival merits of  
4 the two applications. What it is doing is it's an applicant versus defendant's battle,  
5 where it is being suggested that the applicant simply should be knocked out early.

6 Now, we don't know what the issues on funding may be, because there is yet  
7 to be proper and full disclosure of the materials.

8 So my thinking, but I will want to hear from you on this, was that we proceed  
9 on the basis that there is only one application before the court, as indeed there is,  
10 and deal with matters accordingly. But we have all in mind that, if and when  
11 Mr Evans issues his application, there may need to be a revisiting of some of the  
12 points that we fix today; otherwise, we just have to wrap up the show now and have  
13 a further CMC later on, when the Hausfeld application/the Evans application is  
14 issued and that doesn't strike me as particularly attractive. I think there is merit, but  
15 obviously I will want to hear from you on this, in thrashing out these issues, even  
16 though there is only Mr O'Higgins before the court at the moment.

17 So that was my thinking, Mr Holmes, but --

18 **MR HOLMES:** That is extremely helpful, sir, and indeed it anticipates submissions that  
19 I was intending to make. I am grateful for your indication that you apprehend the  
20 need to consider, in the round, issues such as funding and suitability, as part of the  
21 comparative process that will be necessary, given that one of the necessary limbs of  
22 the certification process, besides deciding whether either application -- working on  
23 the basis that the other application will be brought -- should proceed at all or in the  
24 proposed form; also, which of those two should proceed or, as you put it, which of

1 the proposed class representatives should have carriage of it.

2 **THE CHAIRMAN:** Yes.

3 **MR HOLMES:** And that, in our submission, has two applications for the business of  
4 today.

5 The first implication is that any matters that are decided today will need to be  
6 provisional and subject to liberty to apply, in the light of the application of  
7 Mr Evans, as and when it lands.

8 The second point is that if some funding issues are to proceed at some date  
9 ahead of the main hearing, it's not the case that all of the funding issues, in relation  
10 to this application, can be put to bed at that stage. In my submission, we need to  
11 keep in mind the prospect of revisiting funding, in the light of that comparative  
12 assessment exercise. Provided that is understood and accepted on all sides, then,  
13 sir, I think we have no issue with the way in which you have described the exercise.  
14 There may be knockout points relating to the funding, which the proposed  
15 defendants will wish to advance.

16 **THE CHAIRMAN:** Yes.

17 **MR HOLMES:** It is not, I think, altogether clear whether that is the case yet. But if it  
18 is, I think there is no objection to reserving time in the diary now for those to be  
19 dealt with sooner rather than later; and that helps to progress the claim. But that  
20 should not be understood as the last word in relation to funding.

21 The other point to raise at this stage is that it will, in my submission, be  
22 necessary, in short order, following the Evans application -- and in parenthesis,  
23 another point we get from the letter is that that application is imminent and will, in  
24 any event, proceed by the end of November.

1 **THE CHAIRMAN:** Yes, I thought there was an inconsistency between imminent and  
2 the end of November. But nevertheless --

3 **MR HOLMES:** Yes. They are keeping their options open, sir. But we know it is  
4 coming very soon, in a matter of weeks.

5 **THE CHAIRMAN:** Yes.

6 **MR HOLMES:** With that in mind, one use for which the February window might  
7 usefully be put, if it please the tribunal, would be to have a further case  
8 management conference. Now, of course, the tribunal will be anxious to avoid too  
9 many preparatory hearings. But it is very difficult to see how a course can be set in  
10 this novel situation, at least before this tribunal, without getting everyone in a room  
11 and hearing what they have to say.

12 **THE CHAIRMAN:** Well, if I may say so, that last point is one which I have well in  
13 mind. It seems to me that one key function of today is to put into the diary, over  
14 the next 14 months, a number of hearings. The parties will know better than I the  
15 difficulties that my unilaterally imposing a date has caused and I was very  
16 conscious that that was an undesirable course, but the least worst course in order to  
17 get matters rolling.

18 But, if it is at all possible, I want to avoid that in the future. I want everyone  
19 to have their representative available.

20 So the point you make about having something in the diary, even though it  
21 may not be clear what it is going to be used for, is, I think, entirely well made and  
22 I would treat 13 and 14 February 2020 in exactly that light. At the moment, it is  
23 penciled in for a knockout blow on funding; and I stress the knockout blow point  
24 does seem to me that, if one is simply talking about a comparative exercise of two

1 proposals, that both past muster but one is better than the other, that is and can only  
2 be a matter for the substantive application.

3 Equally, I think it is appropriate to put it on the record that when one has  
4 a carriage dispute, clearly one factor may be the level of preparation or one as  
5 against the other. But here, given that the O'Higgins application will need to be  
6 repleaded, as is accepted, in light of the Commission's decision, and given, I think,  
7 the indication in the Hausfeld letter that their application will be based on the  
8 non-confidential versions of the decision, it may be that there isn't actually that  
9 much difference in terms of where the two applications stand.

10 The only point I want to make is that the approach I will take, as and when  
11 a rival application is issued, is to case manage fairly, so that both have an equal  
12 shot at the carriage of this matter. And that, as it seems to me, is basically  
13 a question of fairness. Mr Jowell has an advantage, in that he's put his first through  
14 the door. We will see how much of an advantage that is as and when Mr Evans  
15 issues his application.

16 **MR HOLMES:** I have only two short additional points, if I may.

17 **THE CHAIRMAN:** Yes.

18 **MR HOLMES:** The first is to note that one of the matters that it may be helpful to  
19 canvas, when we come to a first joint CMC, will be to draw on the experience in  
20 other jurisdictions, for which, as you already averted to, sir, there is experience;  
21 while this is a novel matter in this tribunal, carriage disputes are a familiar feature  
22 of proceedings in the United States, and I believe in Canada, and there may be  
23 comparative jurisprudence which it may be helpful to see in charting its course.  
24 That is the first point.



1 **MR JOWELL:** -- notified; nor was the tribunal.

2           They have had the non-confidential version of the decision for over a month  
3 now, and they still haven't filed.

4           If one reads their letter carefully, they say that the main reason for their  
5 delay, they say, is that they were waiting for a full version of the decision. But by  
6 implication, that means that there were other reasons for that delay and, of course,  
7 one can speculate what those might be.

8           But for example, one would anticipate that for funders it would not be  
9 particularly attractive to propose to fund what would appear to be simply a copycat  
10 action of our application.

11 **THE CHAIRMAN:** Yes.

12 **MR JOWELL:** So that is what we have in mind.

13           We accept that where there is an opt-out claim like this, and there are two  
14 proposed representatives, proposing to represent what apparently will be the same  
15 class, or very much the same class, it will be necessary for the tribunal to decide  
16 which one should take the matter forward.

17           We say that one important factor in that will be who was first and also, no  
18 doubt, the funding will be an important factor; and we accept that.

19           But we would caution in muddling up what are really two separate exercises.

20           The one is assessing whether there is any objection to our client as a class  
21 representative, on the basis of either his funding or his identity.

22           Then there is a quite separate exercise, which is a comparative exercise, of  
23 comparing the two sets of funding and the identities of the two representatives to  
24 see which is more suitable.

1                   And those are very different exercises, as can be seen from the Trucks  
2                   litigation where one has already had a ruling on the two proposed representatives  
3                   there, as to the adequacy of their funding arrangements, and the tribunal concluded  
4                   that both were adequate, but has not yet ruled on their comparative status.

5   **THE CHAIRMAN:** Yes.

6   **MR JOWELL:** And so -- and the same. So they are really quite two separate exercises.

7                   So when Mr Holmes says, well, one effectively can stand out certain funding  
8                   exercises, yes, they can stand out the comparative funding exercises; but there's  
9                   absolutely no reason why we can't get on and hear in February all of the issues that  
10                  they might have in relation to our client's funding.

11   **THE CHAIRMAN:** Yes. I think Mr Holmes and you are **ad idem** on that.

12   **MR JOWELL:** Yes, I hope so.

13   **THE CHAIRMAN:** And to be clear, so am I.

14                  Very well. So to be clear: the order that will result out of this hearing will  
15                  contain a liberty to apply.

16   **MR JOWELL:** Yes.

17   **THE CHAIRMAN:** I am going to proceed on the basis that we are case managing only  
18                  one application, which is the O'Higgins application, and we will seek to make  
19                  rulings on that basis; but that is subject to the very important rider that we know  
20                  there is another application in the wings and that may require later readjustment  
21                  and everything that is said today is, to a certain extent, subject to that. I don't think  
22                  one can say more than that, because it all depends on when the Evans application is  
23                  issued and what it contains, and there are all sorts of imponderables, but one does  
24                  need to have that reservation noted.

1           Finally, just to be clear, but I think there is no dispute about this, I do see the  
2 anterior issues, like funding, like the identity of the applicant, as having two  
3 aspects.

4           There's, as you say, the comparative aspect; that it has two applications,  
5 which has to be considered in the round at the end of the day.

6           And there is the unilateral point, if one can call it that, where one or more of  
7 the defendants take the point that, irrespective of which scheme is better, one  
8 scheme is so bad, for whatever reason, that it needs to be put out of its misery early  
9 rather than later. To put it crudely, that, I think, is what one will deal with in  
10 advance of the substantive application.

11 **MR JOWELL:** Yes, indeed.

12 **THE CHAIRMAN:** Good. Well, thank you very much.

13           Next, then, was forum and it was common ground that the forum should be  
14 England and Wales. I don't think there was any disagreement there. So that order  
15 is one I am prepared to make.

16           Thirdly, the establishment: not what goes into it, but the establishment of  
17 a confidentiality ring. Is that agreed?

18 **MR JOWELL:** Well, let me tell you, sir, where we are with that.

19           We have sent across a proposed confidentiality ring. We received yesterday,  
20 at I think around 2 o'clock, an alternative proposed confidentiality ring, much more  
21 elaborate in its formulation. That is no criticism, but there it is. And we have also  
22 then received a letter from one of the proposed defendants, Barclays, saying that  
23 they disagreed with one aspect of that proposed confidentiality ring; and proposing  
24 that, instead, we should have undertakings **pro tem**, as it were.



1           So what I would propose, and I have proposed this also to my learned friends  
2           in advance, is that when we break, whether that's this morning or at lunchtime, and  
3           hopefully this morning, we should get together and see if we can hammer out  
4           a proposal, either a fully agreed confidentiality ring or something that can hold **pro**  
5           **tem**; and then come back to you, sir, on the point.

6   **THE CHAIRMAN:** Yes, that's fine. Let me make two points.

7           First of all, I think we need to either have it agreed or ordered today.

8   **MR JOWELL:** Yes.

9   **THE CHAIRMAN:** I don't think we are, on something as relatively straightforward as  
10          a confidentiality ring, served by having it undetermined.

11          But secondly, it is a timing issue. Chancery listing were unaware of this  
12          hearing this morning and gave me a patents disclosure application which I have  
13          listed for not before 2 o'clock. If we can be finished by 1 pm, that will be fantastic  
14          but I am not going to curtail anyone. I'm afraid, if we go on, then the patent  
15          application will have to wait.

16   **MR JOWELL:** Well, I very much hope we can.

17   **THE CHAIRMAN:** Indeed. But your suggestion is a good one, so we will park the  
18          confidentiality ring for the moment but come back to it.

19          Fourthly, then, there was what goes into the ring; and as I understand it, there  
20          are three candidates for what goes in.

21          First, the confidential but still in part redacted Commission decisions.

22          Secondly, the funding documents of the applicant.

23          And thirdly, subject to instructions, the ATE insurance documents.

24          Those, I think, were the three candidates for the insertion.

1 **MR JOWELL:** Yes, yes, indeed.

2 **THE CHAIRMAN:** First of all, are you happy for both funding and ATE insurance  
3 documents to go in --

4 **MR JOWELL:** Absolutely. We would like them to go in. There is an issue, in that  
5 although we sent the funding document marked "Confidential", it's understandably  
6 nevertheless been shared with certain of the lay clients by some of the defendants.  
7 We, of course, make no objection to that, as long as, of course, they abide by the  
8 restriction to use it purely for the purposes of these proceedings.

9 But we would like it prospectively to go into the confidentiality ring and  
10 I think that there's no objection to that, provided we can find suitable wording to  
11 ensure that nobody is in breach of that by virtue of what they have done  
12 historically.

13 **THE CHAIRMAN:** I see.

14 **MR JOWELL:** At least I hope that's acceptable.

15 **THE CHAIRMAN:** I have one point to make on funding and ATE, but perhaps I will  
16 wait to hear from anyone on the defendants' side. Ms Ford?

17 **MS FORD:** Sarah Ford QC for JPM.

18 For our part, we would be very happy with the proposal that insofar as the  
19 funding agreements have been provided to, for example, clients and advisers, they  
20 essentially undertake to keep them confidential and, going forward, the matter then  
21 goes into a ring. That is a very sensible proposal and we have no objections to  
22 either the Commission's decisions going into the ring, that is consistent with what  
23 we have been saying, and the ATE documents.

24 **THE CHAIRMAN:** Yes. And there is nothing else that you feel ought to go into the

1 ring that we haven't discussed, among the --

2 **MS FORD:** Those are the three categories for present purposes.

3 **THE CHAIRMAN:** Well, so ordered, then; subject to this point that I think  
4 Mr Justice Roth, the President, has made in the context of the Trucks litigation,  
5 which is that the funding arrangements have, as it were, a wider interest to  
6 members of the putative class, going forward. If one is considering whether to opt  
7 in or out of a given scheme, one wants to know how it's being funded. AI am  
8 entirely happy to put into the ring, at the moment, both funding documents and the  
9 ATE insurance documents.

10 But I want to put down my own marker: that I do not consider that to be  
11 a permanent regime and at some point, I am going to be quite keen -- and will raise  
12 of my own motion, the movement of these materials out of the ring and into the  
13 public domain. Now, that may be subject to more specific redactions. For  
14 instance, one might say that in the ATE insurance documents, the premiums ought,  
15 whatever the status of the other party document, be kept confidential because that  
16 shows a certain insight into the risk that is being attributed to the success or failure  
17 of the litigation; and I can see good reason for keeping that under wraps.

18 But generally speaking, I would want to see these documents migrate into the  
19 public domain and the reason I am not debating that today is it seems to me  
20 important that we enable the defendants to examine the documents, to see if they  
21 have got a point that they wish to deploy in relation to funding. They may not  
22 have, when they see the materials; on the other hand, they may have.

23 So subject to that marker, I am very happy with what the parties have agreed.

24 **MR JOWELL:** The tribunal's marker is noted and we will, of course, take it as a new

1 consideration.

2 One point I would mention is that it may be at least a less pressing  
3 consideration in this case where one has purely a proposed opt-out representative  
4 class and therefore any opt-ins will not -- would not eventuate until after  
5 certification, when such a person who is domiciled the UK would have to make  
6 an active decision whether to opt in. So it may be less pressing, but I think that is  
7 a debate for another day.

8 **THE CHAIRMAN:** Indeed, no. You may well want to articulate further the basis on  
9 which confidentiality matters and, to be clear, I am not closing that out.

10 **MR JOWELL:** I am grateful.

11 **THE CHAIRMAN:** I am simply wanting to have a debate, just not today.

12 **MR JOWELL:** I am very grateful.

13 **THE CHAIRMAN:** I am very grateful.

14 The fifth point was the third Commission decision.

15 **MR JOWELL:** Yes.

16 **THE CHAIRMAN:** And Mr Jowell, you want the tribunal to write a letter?

17 **MR JOWELL:** We would be very grateful and we understand that the proposed  
18 defendants make no objection to that.

19 **THE CHAIRMAN:** Indeed.

20 **MR JOWELL:** It's obviously irrelevant if the Commission decision is imminent or in  
21 the next few months, that is one thing. If it is not going to become, equally, for  
22 years, that is another. So it would be extremely helpful to know where the  
23 Commission are; if they are prepared to let us all know.

24 **THE CHAIRMAN:** Yes. I appreciate that the defendants aren't taking the stance, either

1 neutral or perhaps lukewarmly positive.

2 My concern is that this is -- well, I am not sure it is a pointful exercise. The  
3 reason I say that is that were we to get, no doubt, a non-binding indication from the  
4 Commission as to the timing of the third decision, I ask myself rhetorically: what  
5 difference would it make to the management of this case? It seems to me that, just  
6 as with the rival CPO application of Mr Evans, one should proceed to make  
7 decisions in regard to this case on the material that is before the court; and that the  
8 decision will come when it will come.

9 If it comes in the short term, I can see that you will have some rather difficult  
10 questions to debate.

11 **MR JOWELL:** Well --

12 **THE CHAIRMAN:** And that will be for you, in terms of how you frame, if anything,  
13 amendments to your present application.

14 **MR JOWELL:** Yes.

15 **THE CHAIRMAN:** You may think, depending on when the decision comes, that you  
16 don't want to delay this application, but rather have a separate CPO order in relation  
17 to the third decision. You may choose something else.

18 **MR JOWELL:** Yes.

19 **THE CHAIRMAN:** But I can't see how the Commission indication would really assist  
20 and --

21 **MR JOWELL:** I see the force in what you say. On the other hand, suppose the position  
22 is this: that you write to them and they say: well, actually, the decision is imminent  
23 and it should be with you by Christmas. Now, that is clearly quite important to  
24 know, in terms of our re-pleadings, and so on, because at the moment we are

1           proposing to re-plead within six weeks of receiving the confidential version of the  
2           decision. Of course, if in the middle of that or shortly before the end of that six  
3           weeks suddenly the third decision lands on our desk, that is likely to impact that.

4                        So it would be quite helpful a thing to know. Although we accept that, of  
5           course, it is not a decisive criteria. It is not necessarily going to be helpful, but we  
6           think it might be helpful. Just on a precautionary basis, our preference would be  
7           for the tribunal to write.

8   **THE CHAIRMAN:** Yes.

9   **MR JOWELL:** But of course, we are very much in your hands and we are content to be  
10          guided by your preferences.

11   **THE CHAIRMAN:** I am grateful. What I am going to do is I am going to not write  
12          a letter, but I am going to make the same indication that I made in relation to  
13          Mr Evans's application, which is that there is -- we have already discussed -- the  
14          general liberty to apply and it is primarily a matter for you, or your clients, if the  
15          third decision has an impact. All I would say is that I would be prepared to move  
16          very quickly to adjust things.

17   **MR JOWELL:** I am grateful.

18   **THE CHAIRMAN:** If you wanted them adjusted, and obviously one would have to  
19          thrash it out with the parties. But that would be an example where I would be  
20          either inclined to deal with the matter on the papers and adjust the orders very  
21          quickly or have what would inevitably be a hearing at the inconvenience of counsel  
22          to adjust the timetable.

23   **MR JOWELL:** Yes.

24   **THE CHAIRMAN:** But that, I think, is the best way to deal with this contingency.

1 **MR JOWELL:** I am grateful for that indication.

2 **THE CHAIRMAN:** So sixthly, and again I think this is substantially agreed, we have  
3 the question of the amendment of the CPO application. My understanding is that  
4 the parties are agreed that the amendment should take place within six weeks of the  
5 disclosure of the Commission decisions we do have.

6 **MR JOWELL:** Yes.

7 **THE CHAIRMAN:** That is the sort of amendment that is anticipated, and that's agreed.  
8 I make clear, and Mr Holmes made the point in his written submissions, that you  
9 might well want to amend in light of the third decision, and well you might. But  
10 that, I can I think, is precisely the sort of question that is pointless to address now,  
11 and it is a matter that you will raise if you consider appropriate. So if, you know,  
12 the day after you get the Commission decisions, out pops the decision, you may  
13 well want to say: we will do our amendments generally, but we would like eight  
14 weeks rather than six to do so.

15 **MR JOWELL:** Yes.

16 **THE CHAIRMAN:** So we will proceed that the amendment has a limited purpose of  
17 adjusting for the published decisions, and we will see what happens.

18 **MR JOWELL:** I am grateful.

19 **THE CHAIRMAN:** Thank you.

20 Seventhly, then, is the -- I am so sorry.

21 **MR JOWELL:** I should just mention one thing. What is agreed is that there are also, in  
22 relation to the disclosure of the Commission decision, like you just mentioned,  
23 a couple of things for the record. One is we understand that the proposed  
24 defendants are going to notify the Commission that they intend to disclose the

1 confidential version of the decision, subject to their various redactions, and that  
2 they will do that really as soon as possible after this hearing.

3 **THE CHAIRMAN:** Yes.

4 **MR JOWELL:** And that then they will request the Commission to come back to them  
5 by the 18th, in the event that it has any objections.

6 **MS FORD:** Sir, I am told that that has been done by e-mail.

7 **MR JOWELL:** Oh well; very well.

8 **THE CHAIRMAN:** I am very grateful, Ms Ford. That is extremely helpful.

9 My understanding is that the Commission is normally happy for this to occur,  
10 provided, as the parties are doing, appropriate confidentiality arrangements are  
11 made.

12 **MR JOWELL:** Yes.

13 **THE CHAIRMAN:** And no doubt they have been told that that is the case.

14 **MS FORD:** Certainly that is my understanding.

15 **THE CHAIRMAN:** Well, in that case, the order can reflect that position regarding  
16 amendment.

17 So the seventh point is the arrangements for the hearing of the substantive  
18 CPO application in early 2021; and here, I think there is a broad agreement that it  
19 should take place, for the convenience of counsel, in early 2021, with a CMC some  
20 time in October 2020.

21 **MR JOWELL:** Yes. The only, I think, perhaps gloss on that is that when we say the  
22 convenience of counsel, one means: provided that it can be indeed be  
23 accommodated within that.

24 **THE CHAIRMAN:** Yes.



1 **MR JOWELL:** Genuinely in early 2021. If somebody, for example, has a four-month  
2 trial starting in January 2021, I don't think -- it is not reasonable to wait for that.

3 **THE CHAIRMAN:** No. Well, what I am going to propose -- I don't think it is sensible  
4 for everyone to get their diaries out now, but it seems to me that what we need is  
5 a ten-day hearing provision, so two weeks, with the hope that one can carve that  
6 down.

7 **MR JOWELL:** Yes.

8 **THE CHAIRMAN:** But I say two weeks because it feels like a slightly excessive  
9 estimate, which I think is the comfortable position we want to be in, given that  
10 there may be two applications rather than just the one.

11 So if the parties could identify a two-week period in January, February and,  
12 at a push, March 2021, I will look and see whether those dates can be fit with my  
13 diary. I think they can, certainly so far in advance. If one can find a two-week  
14 period that everyone can make in January and February, then great.

15 Your point is well taken, that if there is one or more party that cannot  
16 accommodate a two-week period in that timeframe, then really, I'm afraid, it will be  
17 necessary to adjust teams. Let's cross that bridge when we come to it, but I think  
18 we are sufficiently far in advance of that substantive hearing to make it no hardship  
19 to adjust teams so far in advance. So if there is, you know, the four or five-month  
20 trial that puts someone out, then I fear I would be minded to order the hearing  
21 regardless. But I hope that that isn't the case; we will see.

22 I think a two-month window, possibly a three-month window -- I will hold  
23 March open but I really don't want to do March -- ought to be enough to enable the  
24 parties to find a ten-day period.

1 Do any of the defendants have anything that they want to add to that  
2 exchange? No. Good.

3 So the October CMC, again, same process? Shall we try and find a day that  
4 everyone, or most people, can manage; and I will mesh the dates that you come up  
5 with, with my diary. Again, I think I am fairly free at the moment in the October.

6 Could we have dates back to me within a week, so by, let us say, midday next  
7 Wednesday? I think just one communication. Maybe, Mr Jowell, you would be  
8 kind enough to take conduct of that. You can coordinate everyone's availability.

9 **MR JOWELL:** Indeed.

10 **THE CHAIRMAN:** And hopefully we can get those fixed.

11 So point 8 is matters capable of being determined prior to the CPO  
12 application.

13 Now, first of all, am I correct that there are actually only two potential points,  
14 jurisdiction and funding, or is there --

15 **MR JOWELL:** One is funding and identity.

16 **THE CHAIRMAN:** Funding and identity.

17 **MR JOWELL:** Yes. And I think that's right.

18 **THE CHAIRMAN:** Right, funding and identity. The two are joined, you would say, at  
19 the hip?

20 **MR JOWELL:** Yes. To some degree, yes. It is possible that there could be objection  
21 taken to the identity of the proposed representative, but it would be surprising, but  
22 it's important to -- in isolation of the funding arrangements.

23 **THE CHAIRMAN:** Yes. Well, to be clear, and I will hear from the defendants in  
24 a moment, I don't think it is pointful to have a very long discussion about funding

1 and identity. It seems to me that the defendants are entitled to see the materials that  
2 are going into the confidentiality ring.

3 **MR JOWELL:** Yes.

4 **THE CHAIRMAN:** And will want to take time to take a view as to what they want to  
5 do.

6 **MR JOWELL:** Yes.

7 **THE CHAIRMAN:** And they have every right to do that.

8 **MR JOWELL:** Yes.

9 **THE CHAIRMAN:** So we will allocate 13 and 14 February 2020, provisionally, to the  
10 determination of that sort of issue. But to be clear, though we have discussed it  
11 already, the application would be a knockout blow application --

12 **MR JOWELL:** Yes.

13 **THE CHAIRMAN:** -- rather than a comparative exercise. So there's no need to  
14 consider the Evans position. It is purely and simply a defendant versus O'Higgins  
15 matter.

16 **MR JOWELL:** Perhaps we could put it this way: whether there is anything in relation  
17 to the identity or funding of the proposed representative that would preclude it from  
18 acting as a proposed representative of the proposed class.

19 **THE CHAIRMAN:** Yes. Yes, that captures it very nicely. Again, do any of the  
20 defendants have anything to add to, or object on that course? Ms Ford?

21 **MS FORD:** We have indicated that content for a hearing to go ahead on 13 and  
22 14 February to deal with those sorts of issues. That is subject to the possibility that  
23 there might be an application for permission to appeal in the tribunal's Trucks CPO  
24 judgment.

1 **THE CHAIRMAN:** Yes.

2 **MS FORD:** This is perhaps another element to be added under the tribunal's category of  
3 things to be kept under review; but given that that sets out the appropriate  
4 principles which might be applied, it is something which could affect the timing.

5 It is also subject to the request for disclosure that we have made in relation to  
6 the schedules and the annexes to the litigation funding agreements and the  
7 after-the-event insurance.

8 Subject to that, the parties have indicated provisional timings. There is  
9 a slight dispute between us as to whether it should be 29 November or  
10 18 December for the defendants' response.

11 **THE CHAIRMAN:** Yes.

12 **MS FORD:** Sir, you indicated that we should have a good opportunity to consider these  
13 documents. We respectfully endorse that. That would tend to suggest that  
14 18 December would be preferable. It does seem to us that 29 November is really  
15 not enough time. These are potentially complex matters. The claimants have had  
16 the opportunity to prepare their claim and their documents at their leisure and we  
17 have, of course, only just received the tribunal's judgment in Trucks which does  
18 inform the analysis. So we would respectfully say that the 18 December date is the  
19 one to be preferred.

20 It is also subject to the points the tribunal has already canvassed about the  
21 potential impact of the Hausfeld claim; in two respects, in my submission.

22 The first is timing. If the tribunal were to consider that those claims ought to  
23 be managed together, then the timing for this sort of funding hearing is going to  
24 prove to be very tight, because the Hausfeld claim indication is that it might come

1 at the end of November and so then to get on any sort of hearing which would be  
2 considering the funding of both claims might be potentially be extremely  
3 challenging.

4 **THE CHAIRMAN:** Yes.

5 **MS FORD:** And then in the way that the tribunal has already identified, it might well  
6 inform the substance of what properly can be debated at that hearing as well.

7 **THE CHAIRMAN:** Yes, thank you.

8 Mr Jowell, do you have any push back on 18 December?

9 **MR JOWELL:** Well, we do for this reason; that we need an opportunity also to see  
10 what they say in reply and respond to it.

11 **THE CHAIRMAN:** Yes.

12 **MR JOWELL:** And we were proposing to do that, on the basis of 29 November, by --  
13 I think we said 23 January. Now, the difficulty with receiving something on  
14 18 December and responding on 23 January is obvious, the Christmas period, and  
15 particularly because it may well be that they will be taking specific points on the  
16 terms of the funding or the terms of the insurance, and that we will need to be able  
17 to discuss that with our insurers or funders in order to make suitable adjustments to  
18 accommodate their objections.

19 **THE CHAIRMAN:** Yes, I understand.

20 **MR JOWELL:** So we would say that an earlier date for their responses is suitable --  
21 and perhaps also than the 18 December, and also that a slightly longer period for us  
22 to reply, so perhaps until at least 30 January, which would still give us -- there  
23 would still be a good two weeks, or two weeks before the hearing. We are, of  
24 course, in your hands, but we do think we are being a bit too squeezed by the 18th.

1           Of course they have had the main funding agreement for many months now and  
2           they will still have about a month to consider all of this.

3   **MS FORD:** Sir, the alternative might be to nudge the date for the proposed  
4           representative response forward by a week, so put it to 30 January, for example,  
5           and there would still then be time.

6   **THE CHAIRMAN:** What I was thinking was to move your date a little bit forward to,  
7           say, 13 December, and that gives a couple of weeks this year for the applicant to  
8           respond; and then to order -- yes -- 31 January as the time for the applicant's  
9           response. It is slightly less than what you want, Ms Ford, but only slightly. It is,  
10          I think, sufficient for the applicant to adjust, if so advised, the funding scheme and  
11          one still has two weeks before the hearing to take on board what the applicant says.

12                 So if you are happy with that --

13   **MS FORD:** We would be content with that, yes.

14   **THE CHAIRMAN:** I am grateful. Then we will order the dates as such.

15                 Your point about Trucks, Ms Ford, is well made; and that, I think, is the third  
16          contingency that is covered by the general liberty to apply. There may be more, but  
17          that's the third one.

18                 To be clear: I appreciate that the Evans application may have an effect on the  
19          funding matter and I am certainly not going to say anything about that, save this.  
20          My present thinking is that the battle on funding and applicant identity is not  
21          a comparative battle; it is, as it were, a knockout blow battle. So as presently  
22          advised -- in ignorance of what the Evans application will say, but as presently  
23          advised, even if the Evans application were issued, I would not be minded to allow  
24          the Evans applicant to participate in this particular hearing, because I see it as

1 a bilateral question. One might very well need to have a separate Evans funding  
2 debate, at which you or your clients would not be present, operating in the same  
3 way, and one would have to make provision for that. But that is something which  
4 we will see what happens. I don't think, but I am not closing out the possibility,  
5 that the Evans application will derail this particular matter.

6 **MR JOWELL:** I am grateful for that indication.

7 **THE CHAIRMAN:** But I am always happy to be proved wrong. We will see.

8 So that's funding --

9 **MR JOWELL:** Yes.

10 **THE CHAIRMAN:** -- and applicant identity.

11 The last question of the matters capable of being determined prior to the CPO  
12 application, is what we have called the question of jurisdiction.

13 **MR JOWELL:** Yes.

14 **THE CHAIRMAN:** I was very keen to obtain an understanding of exactly what was  
15 meant by that, which is why it was put on the agenda for discussion, because it's  
16 very clear, from the very helpful responses of the defendants, that it's certainly not  
17 a jurisdictional point that is taken in relation to the application. No-one is saying  
18 that this tribunal doesn't have jurisdiction --

19 **MR JOWELL:** No.

20 **THE CHAIRMAN:** -- to hear and to determine your application.

21 **MR JOWELL:** No.

22 **THE CHAIRMAN:** What is being said, and what has been marked down very clearly  
23 by all of the parties, albeit in slightly different ways, is that, depending on what  
24 class, if any, is certified, there may be questions of jurisdiction that arise, which

1 would preclude certain class members either from being a member of the class or,  
2 if they were a member of the class, from receiving a payment at the end of the day  
3 if the claim was successful.

4 Now, first of all, is that understanding correct, in terms of the points that the  
5 defendants are taking?

6 **MR KENNELLY:** Yes, sir. That is exactly our understanding. That is how we  
7 clarified it.

8 **THE CHAIRMAN:** It was clearest -- Barclays made the point very clearly, but  
9 everyone said it is a contingent jurisdiction question.

10 So I think the next question, Mr Jowell, is, that being the case: what would  
11 you want the court to do, in terms of grappling with this contingent jurisdictional  
12 question, before the CPO application, if anything?

13 **MR JOWELL:** Well, we say that the natural timing for the resolution of the question of  
14 whether there are jurisdiction clauses that cover some of the claims that are within  
15 the proposed class, is to determine that either before the CPO or at least at the same  
16 time as the CPO; whereas the proposed defendants -- or at least some of them --  
17 suggest that it should be determined after the CPO.

18 **THE CHAIRMAN:** Yes.

19 **MR JOWELL:** Now, if it is the case that it should be determined before or at the same  
20 time as the CPO, then it seems to us that it's not an issue that is affected by merit;  
21 and therefore it's something that can be dealt with on a preliminary basis, now, and  
22 there is no reason not to get on with it.

23 We say that there are a number of very good reasons why the tribunal should  
24 get on with it.



1           The defendants have raised these points because they no doubt see  
2           an advantage to themselves in seeking to fragment the class claims, to push off  
3           certain of these -- of the members of the class to other jurisdictions, where perhaps  
4           there is not the advantage of our collective action regime; and no doubt they also do  
5           so in order to delay matters and create uncertainty.

6           Now, none of that is very attractive, but of course they are entitled to do so.

7           But what they are not entitled to do, in our submission, is to threaten to make  
8           these applications, but then not to be willing to carry through with the threat and  
9           have them resolved at the earliest reasonable opportunity.

10          Although these are not jurisdictional questions in relation to the application  
11          itself, as you have correctly identified, they do nevertheless potentially affect class  
12          members; and the starting point is that the House of Lords and the Supreme Court  
13          have constantly reminded us that jurisdictional questions should be determined  
14          swiftly and should be determined in a proportionate manner.

15          And that's particularly so here, because really if one were to have a CPO and  
16          it were to be certified at the main hearing, then at that point, there is then going to  
17          be a necessity for class members to decide soon after either to opt in or to opt out.

18          You will note that it is Rule 80(1)(h) of the CAP Rules that states that when  
19          a CPO is made, it will specify the time and the manner by which, in the case of  
20          opt-out collective proceedings, a class member who is domiciled in the UK can opt  
21          out; and where a class member who is not domiciled may opt in.

22          Now, if one certifies a class, which I think is what they are proposing, but  
23          one doesn't decide on at least jurisdictional issues for some of the class, then  
24          effectively you have a certified class with a hole in it of an uncertain size; and that

1 is extremely unsatisfactory for persons who then have to decide: well, am I actually  
2 within this class or outside it? Do I opt in or opt out? And of course they have to  
3 decide, also, should they be bringing proceedings elsewhere because, although I am  
4 ostensibly within the class, in fact my jurisdiction is going to be challenged  
5 subsequently.

6 So we say there's every reason to resolve these, at least as part of the CPO  
7 determination, and, since Merricks is not engaged, it means naturally doing it at  
8 this stage, at a preliminary stage.

9 The only point that is really made against us, that has any substance, in my  
10 respectful submission, is they say: well, there are an awful lot of these clauses  
11 because there are an awful lot of potential class members.

12 **THE CHAIRMAN:** Yes.

13 **MR JOWELL:** And it would be very burdensome for us to go through all of our  
14 contracts.

15 But the answer to that is actually a very simple one, which is that these are all  
16 going to be based, or almost all going to be based, on standard form ISDA master  
17 agreements. Although, of course, there are going to be specific annexes to those  
18 agreements on a customer by customer basis, it would be very unusual indeed for  
19 those ISDA master agreements to be varied in relation to their specific  
20 jurisdictional clauses. Those jurisdictional clauses will typically, almost always,  
21 with respect, be in a very standard form.

22 **THE CHAIRMAN:** But on the basis that when you get to that part of the agreement,  
23 people lose the will to live and don't vary --

24 **MR JOWELL:** Precisely.

1 **THE CHAIRMAN:** -- the document.

2 **MR JOWELL:** It would be amazing to think that people doing FX transactions, the last  
3 thing they are going to look at is the precise wording of the jurisdictional clause in  
4 order to amend it. Certainly one can assume that is going to be a very, very  
5 unusual position.

6 So what we say, there is no reason why the tribunal shouldn't grapple, and  
7 every reason why it should, are the standard form ISDA agreement clauses, if there  
8 are any which the claimants say they wish to rely on and that they say are wide  
9 enough to encompass the types of claims brought in these proceedings; and  
10 additionally any bespoke clauses they may have already identified in relation to  
11 particular claimants, if they have identified any of them.

12 If those matters are resolved, it will provide much greater clarity to the true  
13 scope of the class and it will remove the uncertainty.

14 For those reasons, we say that that's the natural stance that the tribunal should  
15 take.

16 **THE CHAIRMAN:** Well, I think, Mr Jowell, is the substance of what you are saying  
17 that, actually, this question, although it has a jurisdictional aspect, it's perhaps  
18 misleading to use that as a label for the points that you are articulating? I think  
19 what you are saying is that there are issues which relate to jurisdiction, which are  
20 equally relevant to the framing of the class of claimant for whom the representative  
21 will be acting; in that there may be a single category or there may be subcategories.

22 Let me give you an example. Let's suppose one has a variety, but a limited  
23 variety, of exclusive jurisdictional clauses; and let us say we have four different  
24 examples. One is an exclusive jurisdiction clause in favour of New York. One is

1 an exclusive jurisdiction clause in favour of the European Union, somewhere in the  
2 European Union. The extent to which that is a jurisdictional bar in those two  
3 examples depends because you have got different jurisdictional rules that apply in  
4 those two contexts; in that in one case, you have an automatic stay of the claim; in  
5 the other, you have a more nuanced question where exclusivity has a great deal of  
6 weight, but isn't conclusive.

7 **MR JOWELL:** Yes.

8 **THE CHAIRMAN:** So you might want to differentiate between persons falling within  
9 a contract which has one type of jurisdictional clause and another; but you would  
10 want to see the jurisdiction clauses in order to define your subcategories more  
11 clearly.

12 Equally, as I have postulated four different jurisdiction clauses, you might  
13 have one that was so widely drawn that it unequivocally embraced this claim, and  
14 you might have another which was more narrowly drawn, so as to only include, let  
15 us say, contractual claims. And there, you might want to have a ruling in advance  
16 of the application which will enable you to say: look, if you have a clause that is of  
17 this sort, don't worry, you can still be a member of this particular class. On the  
18 other hand, if you have the bad luck to be subject to this clause, then I'm afraid you  
19 are an excluded member because the jurisdictional clause bites and we can see no  
20 answer to it.

21 Now, that's, in a sense, of course, a jurisdictional question; but it is much  
22 more a question of how a contingent jurisdictional question affects the earlier work  
23 you have to do, in terms of defining your class of claimant.

24 **MR JOWELL:** I respectfully agree, in the sense that these are both jurisdictional issues

1 and they are issues that go to the proper definition of the class; because if there is  
2 a jurisdictional clause on which the proposed defendants are entitled to rely and do  
3 rely, and it captures the claims within the class, then clearly those claims cannot  
4 fall within the class. So it goes to both jurisdiction and to the proper definition of  
5 the class, and I entirely agree.

6 I would slightly caution against saying that they are not jurisdictional issues,  
7 because they are -- I mean, as well as being class definition issues, they are also  
8 jurisdictional issues and that is important in this respect, in that Barclays have  
9 said -- they have a particular position, because they have not applied to challenge  
10 jurisdiction. They say: we acknowledge that we have submit to jurisdiction. But  
11 then they say: we still want to submit that the claimant class should, as they put it,  
12 exclude persons whose FX contract contains a promise that the parties will litigate  
13 any dispute in another jurisdiction. That is what they say.

14 Now, we say, actually, they are not entitled to do that; because the effect of  
15 their submitting to jurisdiction is that they have entered an appearance in relation to  
16 this claim; and by entering an appearance, they cannot then take the point by the  
17 backdoor, as it were, to say: well, these promises are enforceable. In effect what  
18 they have done by submitting that is saying: we are waiving our right to rely on  
19 these clauses. So that's another issue.

20 **THE CHAIRMAN:** That's another issue. I --

21 **MR JOWELL:** That's another issue. But all of these issues, we say, can and should be  
22 resolved in advance of the claim.

23 The extraordinary, extraordinary situation is this: that we have an application  
24 to contest jurisdiction, where not a single clause, actual jurisdictional clause, is

1           prayed in aid or has been revealed to us. I can't think of another case in any context  
2           where somebody says: well, I want to resist jurisdiction on the basis of exclusive  
3           jurisdictional clauses but I am not going to tell you what are the content of the  
4           clauses I am relying on.

5                     And we have to know, really, so that the class can know, what are the types  
6           of clauses that are going to be subject to this allegation.

7   **THE CHAIRMAN:** Yes. Three points, if I may.

8   **MR JOWELL:** Yes.

9   **THE CHAIRMAN:** First of all, I certainly don't want to be viewed as even giving a hint  
10          of how I will decide this matter, but I would find it quite strange if, by not raising  
11          a contingent jurisdictional question now, a defendant could be said to have waived  
12          reliance on an exclusive jurisdictional clause in relation to a class of claimant that  
13          is yet to be determined. That does seem to me to be a rather far-reaching question.

14   **MR JOWELL:** Well, the -- yes.

15   **THE CHAIRMAN:** But I hear what you say. I am not sure that that point, good, bad or  
16          indifferent, makes much difference to the flip-side of the jurisdictional question,  
17          because it seems to me that, yes, of course these are questions of jurisdiction, but  
18          what we are talking about is not whether there is or is not a jurisdictional bar; what  
19          we are actually talking about, I think, is how one can, assuming certification, deal  
20          with these putative jurisdictional questions.

21                     What one wouldn't want to do, for instance, is expose a claimant to  
22          an argument that, by failing to opt out of a class, they were exposing themselves to  
23          a claim for damages for bringing a claim in breach of an exclusive jurisdiction  
24          clause.

1           It sounds a little bit far-fetched, but I am not sure that it is that far-fetched. If  
2           you had an absolutely cast iron jurisdictional clause that, were it an individual  
3           claim, would result in a damages claim or breach of the jurisdictional clause, then  
4           to put a member of the class in that position would be rather --

5   **MR JOWELL:** No, I quite see that.

6   **THE CHAIRMAN:** Well --

7   **MR JOWELL:** Certainly it wouldn't seem to arise unless they actually sought any  
8           distribution, but that's --

9   **THE CHAIRMAN:** I don't know. One could say of course damages would be nil  
10           because there were other members that were not subject to this bar. But this is --  
11           because then one would say: ought the applicant to be providing an indemnity, or  
12           offering an indemnity, to those persons who don't opt out but who are ...?

13           So these questions are --

14   **MR JOWELL:** Well, they are important.

15   **THE CHAIRMAN:** -- very difficult.

16   **MR JOWELL:** Yes, but they need -- I think in relation to your prior point, I should just  
17           point out that when you say that the class has not been defined, and therefore there  
18           can be no submission to jurisdiction, it's not quite right, in this sense: that we have  
19           sought to define the class.

20   **THE CHAIRMAN:** Yes.

21   **MR JOWELL:** They know our proposed classes and they chose not to -- in relation to  
22           that proposed class, they chose not to challenge jurisdiction. Others have. So we  
23           say, having taken that course, they are then accepting jurisdiction in respect of their  
24           attendance(?) in the class.

1 **THE CHAIRMAN:** No, I do see it. But the fact is without certification you don't have  
2 anything. So you have defined the class that you hope to represent, but you  
3 certainly can't, without more, actually represent them. Equally, you are certainly  
4 not precluded -- and indeed the whole premise of this discussion is that you can,  
5 adjust the class, in light of the thinking that goes on in the future.

6 **MR JOWELL:** Yes, yes. The fundamental point is that I think we are all agreed that it  
7 goes to the composition, the true composition, of the class. Therefore it must be  
8 desirable to try and resolve that, rather than to leave an uncertainty in the true -- in  
9 the scope of the class. And why not resolve that now, rather than later on?  
10 Because Merricks is not going to tell us anything further and if you leave it until  
11 after certification, then you certify what is a class of an uncertain ambit and you  
12 leave people in great difficulties when they are opting in or opting out. That is our  
13 essential submission.

14 **THE CHAIRMAN:** Yes. No, thank you, that has been very helpful at least in clarifying  
15 my thinking.

16 Two further points.

17 (1) It may be that there is learning in other jurisdictions as to how jurisdiction  
18 affects class composition.

19 **MR JOWELL:** Yes.

20 **THE CHAIRMAN:** A question which occurred to me, which I have no idea what  
21 the answer is, is: were it to be the case that a representative like Mr O'Higgins  
22 were certified in relation to a class of person, including persons subject to  
23 an exclusive jurisdictional clause that would otherwise bite, if it was  
24 an individual claim, is the fact that there is not an individual claim, but a class



1           **action, a mechanism of side-stepping an exclusive jurisdictional clause**  
2           **altogether?**

3   **MR JOWELL:** Indeed, there is that.

4   **THE CHAIRMAN:** It did occur to me that there might be an anterior question.

5   **MR JOWELL:** Yes.

6   **THE CHAIRMAN:** Which sounds slightly counterintuitive, but I don't know the  
7           answer to that.

8   **MR JOWELL:** No, indeed.

9   **THE CHAIRMAN:** Okay. So that I just wanted to put on the record as a thought.

10           Practically speaking, before I hear from the defendants, would what you  
11           would want be, in the first instance, a form of description of the types of  
12           jurisdictional clause that we are talking about?

13   **MR JOWELL:** Yes.

14   **THE CHAIRMAN:** So that you actually can be informed, in the same way as the  
15           defendants are being informed about your funding arrangements, as to the shape of  
16           the problem you face?

17   **MR JOWELL:** Indeed. Well, essentially what we want is a disclosure of any standard  
18           form ISDA agreements, or any bespoke contracts, containing jurisdictional clauses  
19           in favour of foreign jurisdiction that they allege would cover these present claims.  
20           That's important, because as you will know, sir, it's important not just to look at the  
21           clause in isolation, but also at the entire contract.

22           So really what we say if you have any ISDA clauses out there, from the  
23           claimants that are likely to fall within this class and that you say are in favour of  
24           Switzerland or New York or whatever it may be and are wide enough to cover this

1 claim, please provide us. But if of course, if there aren't any, well then, that's very  
2 comforting and we'll know that there is a remote possibility of some outliers that  
3 might affect a tiny, tiny, tiny minority of the class. But at least we will know that  
4 there is not any significant issue there; on the vast part, it's a majority.

5 At the moment they are being very coy about any contracts on which they  
6 purport to rely, which makes us think that perhaps this is all a bit of a phantom; but  
7 it would be good to know that.

8 **THE CHAIRMAN:** Yes, I see. Assuming you were to get some form of description of  
9 the clauses in question, it seems to me that what you would then have to do would  
10 be to frame some fairly abstract points for decision. In other words, in framing  
11 your classes, if you manage to identify -- take my four hypothetical exclusive  
12 jurisdictional clauses. You might want to have determined whether one or the  
13 other bit on this or on the proposed claim you wanted to bring, and equally, if there  
14 was a forum conveniens question, rather than a Brussels regulation question point,  
15 whether you were contending that, notwithstanding the existence of an exclusion  
16 clause that bit, other factors would nevertheless point to an England and Wales  
17 jurisdiction. That sort of question would be, you say, taken to being framed  
18 anterior to the CPO application.

19 **MR JOWELL:** I am not sure whether forum non conveniens is going to come into it,  
20 because of course we have a number of defendants who are domiciled in the UK.

21 **THE CHAIRMAN:** Yes.

22 **MR JOWELL:** And they are entitled to join on the basis of -- I think it is Article 8 of  
23 the Brussels regulation or --

24 **THE CHAIRMAN:** Yes. I see. No, you may be right about that.

1 **MR JOWELL:** But I think what we really simply want are, as I say, not descriptions.

2 We just want the contracts. We say if you have got a contract which you say has  
3 got a --

4 **THE CHAIRMAN:** No, no, no. To be clear, the descriptions would come from you.

5 **MR JOWELL:** Oh I see.

6 **THE CHAIRMAN:** The contracts would come from the defendants. You would look at  
7 them and you would then frame questions for determination.

8 **MR JOWELL:** Yes, well, we --

9 **THE CHAIRMAN:** -- which would be determined, if they were useful to be  
10 determined, in advance of the CPO application.

11 **MR JOWELL:** Yes, yes, indeed. And I think it would be quite a straightforward one.

12 We would simply say: does the class claim, as formulated, based upon the cause of  
13 action identified, and the facts identified, fall within the terms of any exclusive  
14 jurisdiction clause on which they wish to rely?

15 **THE CHAIRMAN:** Yes.

16 **MR JOWELL:** Of course, these are all tortious claims and so they will face the burden  
17 of showing that a contractual exclusive jurisdictional clause would cover these  
18 tortious claims, many of which for joint and several liability.

19 **THE CHAIRMAN:** Yes.

20 **MR JOWELL:** And which are not made under the contract, but in respect of which they  
21 say cover the claim.

22 **THE CHAIRMAN:** Yes.

23 **MR JOWELL:** So that would be the issue.

24 **THE CHAIRMAN:** Yes.

1 **MR JOWELL:** Or the issues.

2 **THE CHAIRMAN:** Thank you, Mr Jowell.

3 Who is -- Mr Kennelly?

4 **MR KENNELLY:** Sir, I am dealing with this. I see the time. It may be a good  
5 moment.

6 **THE CHAIRMAN:** Yes, thank you. Can I just give you two indications on how I see  
7 this.

8 First of all, Mr Jowell made the point that you might, in some way, be  
9 gaming the points that you are allowed to take. I am not really very interested in  
10 hearing on that. It seems to me that we have a very difficult question about when  
11 these issues are determined, whether it is before, during or after the application.  
12 Frankly, it seems to me that the jurisdictional claim -- which I consider to be  
13 inapposite, but if it were apposite would rather incline me to say: you determine it  
14 after the application. But my concern is very much more that this is not purely  
15 a jurisdictional question, but is really potentially enormously relevant to the  
16 framing of the class or classes that Mr O'Higgins wants to represent.

17 **MR KENNELLY:** Yes.

18 **THE CHAIRMAN:** That is one point you don't need to address me on.

19 The other is whether this is a non-issue and whether your coyness suggests  
20 that it is a non-issue. I am going to proceed on the basis that you have taken the  
21 view, the defendants have taken the view, that they are not going to disclose that  
22 which they don't have to and this is a real issue that needs grappling with.

23 **MR KENNELLY:** Yes.

24 **THE CHAIRMAN:** Because I am quite sure that these ISDA contracts contain

1 jurisdictional clauses, and I think you can proceed on the basis that there is  
2 a potential problem here which we need to grapple with. So those two points you  
3 don't need to trouble with, but --

4 **MR KENNELLY:** I am grateful.

5 **THE CHAIRMAN:** We will rise. Shall we rise for longer than usual, to enable you to  
6 address the question of the confidentiality ring?

7 **MR KENNELLY:** Yes, that would be useful, sir, yes.

8 **THE CHAIRMAN:** In that case, we will resume at midday, which I think gives enough  
9 time to knock, I hope, this point on the head and for us to be finished by 1 pm.

10 **MR KENNELLY:** I am grateful. Thank you.

11 **THE CHAIRMAN:** Thank you. I am grateful to you all.

12 **(11.28 am)**

13 **(A short break)**

14 **(12.00 pm)**

15 **MR JOWELL:** Shall we deal with the confidentiality first or continue with the ...?

16 **THE CHAIRMAN:** Let's continue the debate, definitely, and then we will revert back  
17 to the confidentiality ring.

18 **MR JOWELL:** Certainly.

19

20 **Submissions by MR KENNELLY**

21 **MR KENNELLY:** Sir, so first of all for the transcribers, I am Brian Kennelly,  
22 appearing with Paul Luckhurst for the thirteenth defendant, UBS AG.

23 Sir, as you have seen already from the discussion with Mr Jowell, the claims  
24 of certain members of the proposed class are likely to be caught by exclusive

1 jurisdiction or arbitration clauses in their agreements with the respondents; and  
2 UBS has found such clauses in an initial search.

3 We accept, as Mr Jowell said, the mere existence of such clauses isn't enough  
4 to exclude the tribunal's jurisdiction in respect of these members of the proposed  
5 class. They need to be construed according to their applicable law, to see if they  
6 extend far enough to catch these tortious claims.

7 All the banks have said the easiest way to resolve this is to exclude such  
8 persons from the class. But that has been refused by the applicant, which is why  
9 we are in this position.

10 **THE CHAIRMAN:** Mm-hm.

11 **MR KENNELLY:** There are three basic reasons why this issue should not be resolved  
12 before the CPO decision.

13 But before I get into those, just to note in relation to the Hausfeld letter.

14 **THE CHAIRMAN:** Yes.

15 **MR KENNELLY:** Of course, we don't know how Hausfeld propose, or how the  
16 applicant in this case proposes, to define their class; but it is possible, of course,  
17 that they will exclude, from the proposed class definition, persons covered by  
18 sufficiently broad exclusive jurisdiction clauses.

19 **THE CHAIRMAN:** Yes.

20 **MR KENNELLY:** In which case, if they get the carriage of the overlapping claim, the  
21 problem doesn't arise. That is another reason why that Hausfeld letter is relevant to  
22 this issue also.

23 **THE CHAIRMAN:** Yes, I see.

24 **MR KENNELLY:** But on the basis of the case before you, sir, three basic points that

1 have been raised in the counter submissions.

2 The first is a point of principle; that in principle the scheme indicates that  
3 jurisdiction has to be addressed after the CPO decision. It is not a pre-condition of  
4 the CPO. And in fact, even the applicant in the claim form noted that jurisdiction  
5 was a common issue to be determined in the main proceedings. That is at  
6 paragraph 44.1. I am not going to take you to the claim form in the time available;  
7 it's not worth it.

8 **THE CHAIRMAN:** No.

9 **MR KENNELLY:** But the second reason is the main reason and it is one of  
10 proportionality, because we say it would be completely disproportionate to require  
11 the respondents to do the work necessary for these applications now, when all that  
12 work and cost would be wasted if the CPO was not granted. And that the task  
13 would be enormous is beyond doubt.

14 In terms of how wide the search needs to be, you see from the claim form,  
15 CPO claim form, paragraph 37, that the number of class members is possibly in the  
16 tens of thousands. That is not surprising, in view of the claim covering a five-year  
17 period, in a situation where the defendants, the respondents, are alleged to have had  
18 up to 47 per cent of a market worth, they say, trillions of dollars.

19 **THE CHAIRMAN:** Yes.

20 **MR KENNELLY:** And taking the points raised by you, sir. In terms of the nature of  
21 the search, contrary, with respect, to the suggestion made by the tribunal, it isn't  
22 unfortunately the case that we have a limited category of typical clauses that can be  
23 produced as representative of the whole.

24 **THE CHAIRMAN:** Right.

1 **MR KENNELLY:** What we have seen, in our initial search, is that, although there are  
2 standard form agreements, they are often subject to party-specific annexes which  
3 are insisted upon by the counterparty. It's the counterparty that brings and insists  
4 upon the bespoke party-specific jurisdiction clause.

5 **THE CHAIRMAN:** Yes, I see.

6 **MR KENNELLY:** And so they vary, there is an enormous range there. So it is  
7 unfortunate that we can't simply pull out four typical examples. It is only an initial  
8 search so far, but what we are seeing is the counterparties insisted.

9 **THE CHAIRMAN:** No, I understand. I am tolerably familiar with the ISDA standard  
10 form and some of the quite detailed variations that are made. You may not know  
11 the answer to this, because in a sense, it predicates a sort of search that you don't  
12 want to undertake. But can you say anything about how far these party-specific  
13 annexes take questions like jurisdiction? I mean, if you say it is an impossible  
14 question, I quite understand.

15 **MR KENNELLY:** No, it is not impossible but my answer is necessarily limited. From  
16 the clauses we have seen, they vary. So that is why I can't submit to you properly  
17 that -- what we have seen so far is not simply typical standard variations on the  
18 ISDA agreement.

19 **THE CHAIRMAN:** Right.

20 **MR KENNELLY:** And they are party-specific, insisted upon by the individual parties.

21 **THE CHAIRMAN:** Yes, I see.

22 **MR KENNELLY:** Of course, even if we produced a sample, we don't know if it's  
23 representative without doing the full search.

24 **THE CHAIRMAN:** No.



1 **MR KENNELLY:** The full search is not just about examining tens of thousands of --  
2 potentially tens of thousands of contracts, covering a five-year period; it's necessary  
3 to undertake the task of construction urged upon us by Mr Jowell, which is that one  
4 must examine the language and see if it is broad enough to catch the tortious claims  
5 and by reference to the applicable law of that clause.

6 **THE CHAIRMAN:** Mm-hm.

7 **MR KENNELLY:** And which will again vary and has, in the sample we have seen -- in  
8 the ones we've seen, it varies. And that requires taking foreign law advice in  
9 relation to the clauses in question.

10 **THE CHAIRMAN:** Yes.

11 **MR KENNELLY:** So it is a truly enormous task in relation to a class not yet defined.

12 **THE CHAIRMAN:** Yes.

13 I mean, that's a circular issue, isn't it, because this material may assist in  
14 defining the class? But I think what you are saying is, whilst theoretically that  
15 might be right, in practical terms, because one doesn't have my four hypothetical  
16 examples as variants, one has something much more unpredictable, that a limited  
17 exercise, you say, is not going to help.

18 **MR KENNELLY:** Unfortunately, sir, yes. That is the position. And of course, the  
19 tribunal knows, on the basis of longstanding authority, it is normally not worth  
20 listing a preliminary issue for determination unless it can really resolve the point  
21 entirely.

22 **THE CHAIRMAN:** No, I understand.

23 **MR KENNELLY:** And without the search, without a proper search, one can't be sure  
24 that one is resolving a point entirely.

1 **THE CHAIRMAN:** Yes.

2 **MR KENNELLY:** The third reason is, of course, we need -- this exercise, if it is to be  
3 useful, has to cover all of the respondents to the CPO and it's likely that new  
4 respondents will be added by the applicant.

5 **THE CHAIRMAN:** Well, because of the third decision?

6 **MR KENNELLY:** Indeed.

7 **THE CHAIRMAN:** Yes.

8 **MR KENNELLY:** Now, in response, the applicant says in his skeleton that there's  
9 unacceptable uncertainty, because once the CPO is granted, people need shortly, he  
10 says, to opt in or opt out of the class. And it is unacceptable if they don't know if  
11 a jurisdictional clause applies to them or not.

12 I will deal with the first point about whether it has to be done shortly. Of  
13 course, the rule to which Mr Jowell referred, Rule 80(1)(h), which does specify that  
14 a time must be set for opting in or opting out -- that doesn't necessarily have to be  
15 short. It is within the gift of the tribunal.

16 **THE CHAIRMAN:** Yes.

17 **MR KENNELLY:** The question then is of proportionality, because although there will  
18 be, I accept, some uncertainty for those in the class, who may be covered by such  
19 a clause -- and they will have to do their own work to assess their position. That is  
20 a far smaller task for them, that small number, likely small number, than it would  
21 be for the banks to undertake this enormous task of examining the tens of  
22 thousands of potential contracts to ascertain if these clauses are there and what they  
23 cover.

24 **THE CHAIRMAN:** Yes.

1 **MR KENNELLY:** So it is more proportionate to have that uncertainty in relation to the  
2 smaller number that Mr Jowell raises than to require the banks to do this task now.

3 Of course, once -- if the CPO is granted, the tribunal can make directions  
4 right away for a determination of the jurisdiction point. They will get certainty, we  
5 hope, relatively swiftly if a CPO is made.

6 **THE CHAIRMAN:** Yes.

7 **MR KENNELLY:** And that takes me really to my final point, sir, which is -- it is  
8 an important point, because we accept that not all the claimants will be affected.

9 **THE CHAIRMAN:** Mm-hm.

10 **MR KENNELLY:** It is likely that non-UK domiciled claimants, in particular, will be  
11 the ones affected. So a CPO, if it is going to be granted at all, it will be granted,  
12 notwithstanding this jurisdiction application and can be resolved in parallel. And  
13 plainly our primary position is that there should be no certification. But if the party  
14 certifies, the jurisdiction point can be addressed in parallel.

15 **THE CHAIRMAN:** Yes.

16 **MR KENNELLY:** So it is not an attempt to delay or thwart the CPO application or its  
17 progress, if certification is ordered.

18 **THE CHAIRMAN:** No.

19 **MR KENNELLY:** Now, sir, you, in your exchange with Mr Jowell, raised the concern  
20 that: what about the claimants who, by failing to opt out -- that is the claimants  
21 caught by the class, who may have such a cause. By failing to opt out, would they  
22 be exposed to a damages action by the defendant banks? Of course that has never  
23 been raised but I am sure --

24 **THE CHAIRMAN:** No, no, it struck me as an interesting and rather difficult question,

1           that we might want to have to grapple with.

2   **MR KENNELLY:** Indeed.

3   **THE CHAIRMAN:** But it depends on how the class is framed at the end of the day.

4   **MR KENNELLY:** Indeed.

5   **THE CHAIRMAN:** Yes.

6   **MR KENNELLY:** The problem probably wouldn't arise, for the reason that you give.

7           But if it did, I am sure that a way in which the defendants could provide  
8           undertakings not to sue in that period between certification and the resolution of the  
9           jurisdiction applications --

10   **THE CHAIRMAN:** Yes, I see.

11   **MR KENNELLY:** -- would not be impossible to imagine.

12           You also raised, sir, the question of whether there was learning in other  
13           jurisdictions about how this question of exclusive jurisdiction clauses affects class  
14           composition and whether there was some way in which the class element provided  
15           a basis for sidestepping exclusive jurisdictional clauses entirely.

16   **THE CHAIRMAN:** Yes.

17   **MR KENNELLY:** That is just the kind of complex issue that would take time and cost  
18           which ought to be resolved only necessary, which we say we will not know until  
19           after certification is ordered.

20   **THE CHAIRMAN:** Yes.

21   **MR KENNELLY:** So for those reasons, sir, we say that it is not suitable for preliminary  
22           issues in advance of the CPO hearing.

23   **THE CHAIRMAN:** I am very grateful. Thank you very much, Mr Kennelly.

24           Ms Ford?

1

2

### **Submissions by MS FORD**

3

**MS FORD:** Sir, I would like to gratefully adopt Mr Kennelly's submissions and take the opportunity to emphasise specifically proportionality concerns that he has laid down, they apply equally to JPM. We have made the point in paragraph 13 of our application that we are presently unable to identify, first of all, the persons who will be within the proposed class, and that is not least because if proposed to permit non-UK domiciled persons to opt in to the class means there is inherently an element of uncertainty as to which persons are covered. We are also unable to presently identify which transactions would form the basis of the claim on behalf of the members of the proposed class. At that point, we then have to enquire: well, are those transactions governed by relevant clauses and what is the construction of those clauses and what is the governing law of those clauses?

14

15

16

17

18

19

20

21

22

So, at present, there is a large degree of uncertainty and that means that the exercise that needs to be undertaken is going to be extensive and it is going to be disproportionate in advance of the tribunal determining the actual main CPO application. It covers a period of some five years or so, in the period of the class. As Mr Kennelly has emphasised, it covers on estimate something like possible tens of thousands of people. It is unclear how many UK domiciled persons will then opt in. There is additional uncertainty arising from the applicant's intention to amend, to incorporate a further decision. That introduces not only further defendants, but further transactions that then need to be contemplated.

23

**THE CHAIRMAN:** Yes.

24

**MS FORD:** And Hausfeld's indication that they may bring their competing collective

1 action adds a yet further layer of uncertainty, because that means the scope of the  
2 class which may eventually be certified may change. The relevant transactions  
3 may be different. The clauses may be different. The defendants may be different.  
4 So in our submission, it clearly makes sense to determine which application is  
5 going to be permitted to go ahead before requiring this extensive contractual search  
6 process to be engaged in.

7 **THE CHAIRMAN:** Now, just so I understand the amount of work that you say is being  
8 asked of you. I take it, it's not, in terms of identifying the contracts themselves; it is  
9 the cost of going through them to work out what lies beneath, in order to identify  
10 the clauses that are in play. In other words, you have got many, many contracts.  
11 You are not sure which ones are engaged or not, because the class is a little bit  
12 unclear. So the selection exercise is difficult and then the review exercise is  
13 difficult. But just as --

14 **MS FORD:** Yes, there are stages.

15 **THE CHAIRMAN:** Just laying your hands on the contracts is not itself a problem.

16 **MS FORD:** Well, I understand there are logistical issues as well in the sense that these  
17 are long-term relationships, in some cases long-term trading relationships, so we  
18 are talking about contractual relationships that have come into being some time  
19 ago. So there are practical considerations as well.

20 **THE CHAIRMAN:** Okay. Right.

21 **MS FORD:** So it is identifying the individuals concerned, identifying the actual  
22 transactions concerned, identifying the contracts concerned. It really does pose  
23 an enormous amount of work which we say is simply disproportionate to engage in,  
24 in advance of knowing exactly the form of the class that has been certified.

1     **THE CHAIRMAN:** Yes. I mean, what I am wondering is whether it is possible, but  
2           I entirely take the point that Mr Kennelly and you are making about  
3           proportionality, to transfer the cost to Mr Jowell's clients, in that -- you see, what  
4           troubles me is not so much the obtaining of an answer to a question, but the  
5           framing of the questions itself. I feel that I certainly have no grip, and I think the  
6           applicants have no grip, on just the nature of this difficulty.

7           Suppose I were to say that each defendant should produce 100 randomly  
8           selected contracts within this class, irrespective of whether they are actually  
9           engaged or not, because I don't want you to do the transaction analysis, but I just  
10          want 100 each, which you pass to Mr Jowell, as simply a random selection; so that  
11          if he or his clients wish, they can examine it, just to get a sense of whether there  
12          is -- or what is the problem in regards to jurisdictional questions.

13          It may be that one sees a whole series of individually negotiated bespoke  
14          jurisdiction questions, which mean that one has, frankly, a problem in dealing with  
15          matters in advance.

16          On the other hand, because we would be talking about close to 1,000  
17          contracts being passed over on that basis, one may find instead that, although there  
18          are bespoke variations, it is a fact that jurisdiction clauses are not varied.

19          Now, who knows? None of us in this room does know. But that addresses at  
20          least, to an extent, the issues of cost and time that you have very properly raised. It  
21          gives the applicant the option to dig deep and to address the sort of questions that  
22          Mr Jowell and I have been discussing.

23          Would that be a middle course?

24     **MS FORD:** Sir, could I offer two responses to that?

1     **THE CHAIRMAN:** Yes, of course.

2     **MS FORD:** The first is, I think there would be a very real concern as to whether that  
3           exercise is going to be either representative or useful, in the sense that you would  
4           produce contracts and clauses which may or may not pertain to actual members of  
5           the class or actual transactions that are in issue in this claim. So I think it raises  
6           a very genuine risk of expenditure of costs on things that may turn out to be not  
7           pertinent; and so it raises costs rather than reduces them.

8           The second more fundamental point is: in my submission, it is really not  
9           necessary to go through that exercise in advance. I apprehend that the tribunal  
10          considers that this question goes to the definition of the class which is to be  
11          certified.

12    **THE CHAIRMAN:** Yes.

13    **MS FORD:** In my submission, the tribunal has the flexibility to certify a global class  
14          and then to identify potential subclasses within that class. That exercise can be  
15          dealt with after the global certification and the subclasses themselves would then be  
16          capable of being determined as common issues. So if, for example, once we know  
17          the scope of the class and we can identify the contracts which are in issue, it  
18          transpires that there are particular common groups or types of clauses, then those  
19          can be dealt with as subissues within the class; and that would tend to be consistent  
20          with what the claimant itself has put in its claim form, that jurisdiction is a common  
21          issue which can be dealt with in these proceedings.

22          That, in my submission, would be a much more proportionate way of dealing  
23          with this.

24    **THE CHAIRMAN:** Yes.



1 **MR KENNELLY:** Well, we echo Ms Ford's procedural suggestion and solution. But  
2 on the proportionality issues raised by you, sir, unfortunately our answer is the  
3 same as my learned friend's. We appreciate why the tribunal is anxious to find  
4 such a solution, but unfortunately it wouldn't be representative. And a random  
5 selection won't answer the question that the tribunal has to answer, which is: are  
6 there clauses there which exclude its jurisdiction because it's sufficiently broad for  
7 tortious claims. It simply doesn't do the job.

8 We have grappled with this problem ourselves and we come back to the same  
9 problem again and again, which is that, until we do the full search, we can't be sure  
10 if even a sample is representative. And there is no way of avoiding a full search, in  
11 order definitively to resolve the issue; which is why it is going to be resolved, as  
12 you have just heard, by having it as a subcategory, following the certification that  
13 takes place.

14 **THE CHAIRMAN:** Just to test one other point and, Ms Ford, do feel free to interject as  
15 well.

16 If I were to require each defendant to describe its practice, in terms of  
17 negotiating ISDA contracts, with specific reference to jurisdictional clauses, would  
18 I simply get a statement saying: each defendant has a very strong preference for its  
19 standard form jurisdiction clause, but depending on how the negotiations go, the  
20 bank is at times no doubt reluctantly forced to accede to a variant?

21 **MR KENNELLY:** Sir, I am taking instructions. But without instructions, and I will be  
22 corrected if I am wrong, I strongly suspect that that will exactly be the response;  
23 which is why I say that we expect that when we search the tens of thousands of  
24 contracts, we won't find many with clauses broad enough to cover tortious claims,

1 because the tribunal is quite right: the bank fails its own standard form. The  
2 clients, especially certain clients, insist and they insist on language they have  
3 chosen, which is why we have this variety. I will be corrected if I am wrong, but  
4 I suspect that would be the answer, if you did ask us to produce that --

5 **THE CHAIRMAN:** I understand. And Ms Ford, I take it, that would be true of all the  
6 defendants?

7 **MS FORD:** My Lord, certainly our impression is that it is difficult to know whether that  
8 exercise would actually yield anything of any use; both because of the nature of the  
9 individual process, the fact that these are individually negotiated amendments to  
10 a standard form agreement; and also because of the historical nature of the  
11 relationships. Because they go back a number of years, any statement about the  
12 general practice needs to cover a large period of time and may vary.

13 **THE CHAIRMAN:** Yes, thank you.

14 Anything else from the defendants, before Mr Jowell responds?

15

16 **Submissions by MR HEATON**

17 **MR HEATON:** Sir, may I? David Heaton for Barclays.

18 Sir, I don't want to cover ground that you have already dealt with in  
19 exchanges with Mr Jowell, but I would just wish to respond on one point, lest it be  
20 thought that, because I didn't respond, that was accepted. And that is: I think you  
21 have the points that we don't challenge jurisdiction to make the CPO order, but we  
22 do wholeheartedly endorse the comments you made this morning: that the existence  
23 of a contractual promise, as it were, not to litigate in this forum is something that  
24 may be very material to the class and should be considered, as you have heard,

1 from Mr Kennelly and Ms Ford.

2 **THE CHAIRMAN:** Yes.

3 **MR HEATON:** Could I respond just to the submission made for the first time by

4 Mr Jowell this morning on his feet: that Barclays can't take this point, because by

5 not challenging jurisdiction, it has waived the right to rely on those clauses? I am

6 not sure that you need to determine that, in order to --

7 **THE CHAIRMAN:** I am certainly not going to determine it, and I am very prepared to

8 accept that the fact that you have risen to your feet indicates that it is contentious.

9 **MR HEATON:** Yes.

10 **THE CHAIRMAN:** Whether we need to go further than that, I am in your hands. But

11 I am certainly not taking, from the fact that you aren't addressing me on the point or

12 haven't yet addressed me on the point, that it is common ground. I know it's not.

13 **MR HEATON:** Well, that's very helpful. I am not sure we do need to go further. And

14 I would simply say: you have, under section 47(b) and under the rules, a very broad

15 discretion as to class. There is nothing we can see that provides any basis at all for

16 an argument that we are somehow precluded from making an argument that goes to

17 class definition.

18 And unless I can assist you further, those are my submissions.

19 **THE CHAIRMAN:** Yes. Thank you very much, Mr Heaton. I am much obliged.

20 Mr Jowell?

21

22 **Submissions by MR JOWELL**

23 **MR JOWELL:** Yes. Mr Kennelly started by mentioning that original proposal, which

24 was to simply exclude from the class definition those claimants who have, as he put

1           it, exclusive jurisdiction clauses that are sufficiently broad to cover these claims.

2   **THE CHAIRMAN:** Yes.

3   **MR JOWELL:** And the problem with that is that it renders the class rather uncertain in  
4           its scope, because one then has a class member who comes forward and says: well,  
5           I have an exclusive jurisdiction clause in my standard form ISDA contract, which is  
6           in favour of Switzerland. Is it or isn't it broad enough to cover these claims?

7   **THE CHAIRMAN:** Mm-hm.

8   **MR JOWELL:** And we can then give them assistance on that, by giving them legal  
9           advice, but we can't say that there's any determination of that. And obviously it's  
10          fundamental to -- the definition of the class should be sufficiently clear that people  
11          are easily able to know whether they fall within or without it.

12   **THE CHAIRMAN:** Yes.

13   **MR JOWELL:** So that is a fundamental problem.

14           Now, I will come in a moment to the alternative suggestion that Mr Ford  
15          raised of having a subclass which is a rather more promising approach; but  
16          nevertheless, in our respectful submission, does not quite go far enough.

17           Because the burden of their song(?) was really, they said: well, these  
18          contracts can sometimes vary. I don't think it was put higher than that, really, on  
19          analysis. And we also said: we need to go through all of the original individual  
20          transactions and identify who all of these claimants are.

21           That's not necessary. All we are saying is that we want clarity, sooner rather  
22          than later, on their standard form ISDA contracts; because we, for our part, are not  
23          persuaded that there will be a substantial number of persons who have varied their  
24          jurisdiction clauses in the standard ISDA contracts.

1           And what we wish, on behalf of the members of the class, is clarity as to  
2           whether it is said by the defendants that any of the jurisdiction clauses in favour of  
3           foreign jurisdictions, for members of the proposed class, under those standard  
4           ISDA agreements, or possibly any bespoke agreements that they have already  
5           identified, whether it's said that those agreements are wide enough to cover the  
6           claims that are made in these proceedings; the tortious claims based on joint and  
7           several liability.

8   **THE CHAIRMAN:** Yes.

9   **MR JOWELL:** And then at least, if a member of the class comes to us and says: well,  
10          I have got a standard ISDA contract in favour of the Swiss courts, does this cover  
11          the claim? We can say either: no, the proposed defendants have acknowledged that  
12          those standard form agreements don't cover, aren't broad enough to cover those  
13          claims, or we can say: yes, the proposed defendants did say that, but now the  
14          tribunal has resolved that they do not; or indeed that they do, but at least then, we  
15          will have clarity on those contracts.

16                 And we say, really, there is no reason why the proposed defendants should  
17                 not be expected to come out and say whether their standard form ISDA  
18                 jurisdictional clauses are or are not wide enough and, if they say they are wide  
19                 enough, then we should have a debate about that in front of the tribunal as early as  
20                 possible.

21                 And as regards the stragglers, the outliers, the people who amend their  
22                 jurisdiction clauses in the ISDA agreements, well, one can see that there is some  
23                 sense potentially in having a subclass for persons who have got, unusually,  
24                 contracts that vary their jurisdictional clauses in their standard form ISDA

1           agreements; and that can then be dealt with subsequently, if indeed there are any  
2           such persons in respect of whom the proposed defendants take any point.

3   **THE CHAIRMAN:** Mm-hm.

4   **MR JOWELL:** As long, of course, as the proposed defendants accept -- and I think this  
5           is accepted -- that that solution wouldn't in any way affect the certification of the  
6           class as a whole; and we have had some comments that are comforting in that  
7           regard, both in the skeletons and orally today, in which it's been said that it's not  
8           anticipated that these potential jurisdictional challenges will affect certification of  
9           the class.

10                 So for those bespoke agreements, we can see the sense of potentially having  
11           a subclass. But as regards the ISDA agreements, the standard form, we simply  
12           don't understand why that can't and shouldn't be resolved sooner than this.

13   **THE CHAIRMAN:** Yes, thank you. **(Pause)**.

14

15

#### **RULING**

16   **THE CHAIRMAN:** I do not necessarily share the confidence that it is possible, or  
17           perhaps desirable, to certify a single class and leave, as it were, after certification,  
18           the identification of subclasses. That may be the appropriate course to go down,  
19           but it may not be. It seems to me equally likely, possibly the more likely, that one  
20           wants to debate, at the application itself latest, these issues of different persons or  
21           claimants being differentiated by reference to the jurisdiction clauses that they have  
22           signed up to.

23                 The problem that I have is that I simply don't know the scale and nature of  
24           the problem, but I am very clearly of the view that certain steps need to be taken, in

1 order to at least enable the point to be considered; fully recognising that  
2 an exhaustive and conclusive answer can only be obtained by a review of all of the  
3 implicated contracts, which I am not going to order.

4 It seems to me that we are just to probe the nature of the problem and learn  
5 more about it, going to take a randomised approach in terms of the production of  
6 example ISDA contracts, derived randomly from the period under examination.  
7 I appreciate that there will be certain contracts that predate that period, which will  
8 govern transactions in that period, but I think the selection should, in the first  
9 instance, be from contracts in the period under, or subject to, the proposed  
10 collective proceedings.

11 So what I am going to order is that each defendant provide a random sample,  
12 but distributed across the period, of up to 100 executed contracts, which will be  
13 disclosed into the confidentiality ring.

14 In addition, each defendant is to provide a short statement, identifying the  
15 standard form contracts that they wanted their counterparties to sign up to, over the  
16 same period. Again, I recognise that there may be standard forms predating this;  
17 and I am, as part of what is really an initial scoping exercise, simply going to order  
18 those standard forms to be identified and produced.

19 That is going to result in a significant amount of documentation passing from  
20 the defendants, or proposed defendants, to the applicant. I am satisfied that  
21 although that process is going to involve the defendants in a certain amount of  
22 expense, the expense is as minimal as is appropriate, given the stage of the  
23 proceedings we are at. It will be for Mr Jowell's clients to conduct a review of this  
24 material.

1           And what I am inviting, but not ordering, the applicants to undertake is  
2 a consideration of whether, in light of this material, it is appropriate to define and  
3 have adjudicated, earlier than January or February 2021, certain preliminary issues  
4 going to the question of class definition; because that, to my mind, is the issue that  
5 has troubled me most this morning.

6           I cannot say whether the questions can be framed in a manner suitable for  
7 preliminary issues and I want to be clear: I am making no order that preliminary  
8 issues will exist. But what I would like is a date in the diary by which the applicant  
9 will either have framed these questions or will say that there is no point in framing  
10 them, because it is too difficult. It seems to me that that date would appropriately  
11 be some time before the end of February or perhaps March next year, which gives  
12 ample time to the applicant, if so advised, to look at the documentation, think about  
13 these very difficult questions and frame the questions, if any, which it would invite  
14 the court to consider earlier than that.

15           Thereafter, there may or may not be a hearing to deal with the framing of  
16 questions which may narrow or help articulate the classes or subclasses of claimant  
17 that will arise. I do not want to, in any way, anticipate whether the exercise that  
18 I am proposing will lead to a useful outcome or not. I am agnostic about it.  
19 I simply think we need to give it a go, because if there is a way of clarifying  
20 subcategories of claimant before 2021, we should at least examine that.

21           But I do think it would be appropriate for the parties to identify a further  
22 window in their diaries in June or July of next year at which this sort of question  
23 can potentially be adjudicated upon.

24           Again, I am erring on the side of excess, rather than too little, but I think



1 a period of five days should be identified and earmarked for the potential of dealing  
2 with these issues and, in making an order for such a hearing, I want to be  
3 clear: I am in no way deciding that such a hearing should inevitably take place.  
4 I am simply seeking to ensure that all parties have the opportunity to be properly  
5 represented, should such a hearing take place.

6 So that, I think, puts the cost and hard work, at least initially, in Mr Jowell's  
7 camp and is, to my mind, a proportionate order for the defendants, given the  
8 questions that arise at the stage of the proceedings that we are at. So that is what  
9 we are going to do.

10  
11 **Submissions by MR JOWELL**

12 **MR JOWELL:** Sir, we are very grateful for that. There is one important point of  
13 clarification.

14 **THE CHAIRMAN:** Yes, of course.

15 **MR JOWELL:** The 100 contracts, it is not going to avail us as much if we get  
16 100 contracts that all have English exclusive jurisdictional clauses.

17 **THE CHAIRMAN:** No.

18 **MR JOWELL:** So I think it seems to us that those 100 contracts -- although randomly  
19 selected, they have to, it seems to us, satisfy probably certainly one or maybe two  
20 criteria. One is that they should be in favour of jurisdictions other than the UK,  
21 I think, otherwise it's not going to assist us, or at least a significant portion of them  
22 have to be. And secondly, that ideally they should be chosen in relation to parties  
23 who at least might be members of the proposed class. So in other words --

24 **THE CHAIRMAN:** How are they to tell that?

1 **MR JOWELL:** Well, at least they might have transacted in the UK. So if, for example,  
2 they are known to be with a client who transacted exclusively in the United States,  
3 for example, then we know they are outside the class. I just say "might" because if  
4 they are known not to be, then they should be excluded. They should be at least  
5 ideally entirely, or if not predominantly, with non-UK jurisdiction clauses.

6 **THE CHAIRMAN:** But that, I'm afraid, implies precisely the sort of under the bonnet  
7 scrutiny that I am keen to avoid.

8 **MR JOWELL:** Well, the second part may be. I think the existence of a -- does it have  
9 a non-UK jurisdictional clause. But I think some degree -- all I am saying is that if  
10 they know -- it would be disingenuous if they provide us with 100 clauses that are  
11 all in favour of the US courts; and they know that they were all in relation to clients  
12 that were transacting in the US, because that is just irrelevant for our purposes.

13 **THE CHAIRMAN:** Well, how --

14 **MR JOWELL:** It has to have some --

15 **THE CHAIRMAN:** What is a quick and dirty way of telling whether the transactions  
16 were transacted in the UK or in the US?

17 **MR JOWELL:** Well, I think they will have -- you know, these are enormously well  
18 resourced banks and they should be able to tell who these contracts are with. It  
19 shouldn't be too difficult.

20 **THE CHAIRMAN:** Well, I think --

21 **MR JOWELL:** These are contracts relating to clients who transacted with the London  
22 desk, or a European desk of the bank, but who have --

23 **THE CHAIRMAN:** I will see what the defendants say. I don't see an issue with  
24 an order that the random selection be contracts that were concluded through the

1 London offices --

2 **MR JOWELL:** The London offices.

3 **THE CHAIRMAN:** -- of the --

4 **MR JOWELL:** Or the European offices, we could say, to make it broader.

5 **THE CHAIRMAN:** If you are happy with that restriction, we can say European offices.

6 I will hear what the defendants say about that very broadbrush classification. But

7 within that, I think it is going to be a purely random selection and if you get

8 100 jurisdictional clauses which all say "England and Wales".

9 **MR JOWELL:** Oh, I see.

10 **THE CHAIRMAN:** Then so be it.

11 **MR JOWELL:** I see. I mean, that is not going to be relevant to the issue, though. It is

12 not going to be of assistance to --

13 **THE CHAIRMAN:** Well, isn't it though, because the point is: if you have a random

14 selection -- I appreciate there are many more contracts. But if one has a random

15 selection and they all come up with England and Wales, then one thing one gets out

16 of it is that what appears to be a big problem may not be.

17 **MR JOWELL:** I see that, I see that.

18 **THE CHAIRMAN:** So what you would be contending is actually: we thought

19 jurisdiction was a problem, but happily we have looked at the standard form, which

20 says X, we have looked at a number of additional contracts which are properly

21 agreed and what we see is no-one tampers with the jurisdictional clause.

22 **MR JOWELL:** Yes.

23 **THE CHAIRMAN:** It seems to me to go further. I am not saying at some point we will

24 not go further. This is, as it were, the first flight where I am seeking to minimise

1 the costs on the respondents.

2 **MR JOWELL:** Yes. I see that. So through the European offices?

3 **THE CHAIRMAN:** So through the European offices and let's see what we get.

4 **MR JOWELL:** Very well.

5 **THE CHAIRMAN:** It may be that you can't or don't feel able to frame the examination  
6 questions, in light of that material.

7 **MR JOWELL:** Well, if we don't get any exclusive jurisdiction clauses other than in  
8 favour of the UK courts, then clearly we won't, because we won't have anything to  
9 bite on, I'm afraid.

10 **THE CHAIRMAN:** Yes. But I think it would be wrong, at least at this stage, to require  
11 the respondents to do a contract by contract search --

12 **MR JOWELL:** No, no.

13 **THE CHAIRMAN:** -- questing for what you would like to see, in order to help you  
14 frame that, because that is shifting the burden back on to them.

15 **MR JOWELL:** Very well.

16 **THE CHAIRMAN:** It may be that such a course recommends itself in the future, but at  
17 the moment I am anxious to respect the pretty powerful point made by Mr Kennelly  
18 and Ms Ford about the cost of the exercise.

19 **MR JOWELL:** Very well. Very well.

20 **THE CHAIRMAN:** But I am not saying no to a future --

21 **MR JOWELL:** This is the initial stage.

22 **THE CHAIRMAN:** This is the initial -- what I want to do is just to get a feel for how  
23 much of a problem this is.

24 **MR JOWELL:** On another matter, could I suggest that we have two months to review

1           these contracts, because they will be quite numerous.

2   **THE CHAIRMAN:** So that takes us to when?

3   **MR JOWELL:** Well, it depends when we receive them.

4   **THE CHAIRMAN:** A very good point. Any offers on when they can be produced,  
5           **Mr Kennelly?**

6   **MR KENNELLY:** If I may, I will wait for -- I will take instructions on how long we  
7           need to produce them.

8   **THE CHAIRMAN:** Yes.

9   **MR KENNELLY:** Just to indicate that we are content with the tribunal's -- obviously,  
10           since it seems to be the decision taken, we are content with that; for the purposes  
11           for which the tribunal described of course.

12   **THE CHAIRMAN:** Yes. It is no more than this. It is an attempt to actually assist me  
13           to understand whether we have as big a problem as I think we may have. To be  
14           absolutely clear, the only decision I am making is the production of this material  
15           and an imposition on Mr Jowell to either say: here is my proposal for early issues;  
16           or: the defendants were right all along, let's do it either in 2021 or later.

17           The only reason I am putting a hearing in the diary is because I don't want the  
18           parties to be deprived of their chosen representatives.

19   **MR KENNELLY:** I am grateful.

20   **THE CHAIRMAN:** Nothing more than that should be read into it.

21   **MR KENNELLY:** Thank you. I am told we need four weeks.

22   **THE CHAIRMAN:** Four weeks?

23   **MR KENNELLY:** Four weeks, one month to produce the 100 random contracts issued  
24           from a European office, which would be Switzerland in my client's case, but I think

1           it covers the point.

2   **THE CHAIRMAN:** That is very helpful. That is very helpful. And four weeks also for  
3           the proforma statement as to standard form contracts.

4   **MR KENNELLY:** Indeed. I was speaking about simply for UBS. My learned friends  
5           may have different views.

6   **THE CHAIRMAN:** I want everyone to rise to inform me as to the issues.

7   **MR HOLMES:** Sir, we are also content with your proposal. We will do our best to do  
8           what's needed within four weeks. We obviously cannot give an absolute and  
9           definitive guarantee today, because it will require an enquiry.

10   **THE CHAIRMAN:** This has been pulled rather like a rabbit from the magician's hat, so  
11           I quite understand.

12   **MR HOLMES:** Our first reaction is that that should be doable.

13   **THE CHAIRMAN:** I am grateful. Does anyone have a serious problem with  
14           four weeks? I will intend to build in an ability to vary this timeframe, should it be  
15           necessary. But Ms Ford?

16   **MS FORD:** Sir, I'm afraid that is exactly why I am rising. We do have a genuine  
17           concern about whether we can do this within four weeks. We need to do initial  
18           reviews to find out whether the contracts in question are held in a centralised way  
19           or not. We don't know the position. Our concern is that if there is a drive to do  
20           these things quickly it is not really a random sample because we will simply access  
21           those which are the most easily accessed. You also easily need to factor in the need  
22           to upload the contracts and to review them.

23   **THE CHAIRMAN:** Yes.

24   **MS FORD:** So those behind me do have a concern that four weeks is not going to be

1 doable. We are going to ask for the end of January.

2 **THE CHAIRMAN:** Right. Anyone else who has points about timing?

3 **MR HEATON:** Sir, yes. May I address you briefly on that?

4 **THE CHAIRMAN:** Of course.

5 **MR HEATON:** We are also content with the proposal, but I am told that those here  
6 today are not certain that it will be possible easily, technically speaking -- we  
7 suspect it is probable but we are not sure -- to identify contracts from the European  
8 offices. So if that turns out to be a much more burdensome task than you  
9 anticipated, we may well take up the liberty to apply in the order. I simply lay that  
10 down.

11 As to the timing, I am told that the contracts are stored in a client-by-client  
12 manner and so not in a centralised manner; and so for that reason, we would  
13 anticipate that time may be required more along the lines of what Ms Ford has  
14 suggested than the four weeks that you had initially mooted.

15 **THE CHAIRMAN:** Thank you. Right.

16 Two points arising out of that. First of all, I do not want a quest for what is  
17 genuinely random to obscure what is clearly something of a hit and miss exercise.  
18 What I am looking for is the production of contracts from the relevant period,  
19 through the European branch, that is not selected according to any kind of design,  
20 regarding the points at issue here. That is what I mean by "random".

21 So what I am going to order is a four-week period, but the defendants have  
22 liberty to apply to vary that by letter to the tribunal, explaining the circumstances.  
23 But I would hope that 100 contracts which are selected, perhaps not randomly but  
24 haphazardly according to what is available, can be done.

1 I would only add that a brief description of how these 100 contracts have  
2 been obtained should accompany the process; so that you say: well, the contracts  
3 most readily available were stored here, and we took, across the period, a random  
4 selection based on the letters of the alphabet.

5 I am really, at this stage, entirely indifferent as to how the sample is  
6 produced. And indeed, I think there is a positive virtue in that, in that what we get  
7 is, as I say, something that gives us an idea of the issues that we may face.

8 So that is what I am going to order. We will see whether that can be  
9 achieved and, if necessary, I will extend the time. But I would hope that Mr Jowell  
10 will, within four weeks, get a reasonable number of contracts to get his feelings.

11 If we say four weeks from today, that brings us to 4 December. So that is the  
12 indicative date I will make. And if we say two months from that. Well, can you do  
13 it, then, by 4 February, Mr Jowell?

14 **MR JOWELL:** We will certainly endeavour to do so and of course --

15 **THE CHAIRMAN:** I have the same liberty applies to you. So we will say, subject to  
16 that, 4 February. That actually is a rather happy date, given the date that we have  
17 for the 13th and 14th hearing.

18 **MR JOWELL:** Indeed. So potentially some further directions can be given.

19 **THE CHAIRMAN:** Indeed, if appropriate. Thank you. You will identify a five-day  
20 slot in June or July to be provisionally marked out?

21 **MR JOWELL:** Yes, we will do so.

22 **THE CHAIRMAN:** Thank you.

23 **MR JOWELL:** Thank you.

24 I think that only leaves the confidentiality issue.



1 **THE CHAIRMAN:** Unless anyone else has further points to raise? I am seeing silence  
2 or shaking of heads. It is just that, really.

3 **MR JOWELL:** I am happy to say that agreement has been reached, at least to this  
4 extent -- really, this was a matter of dispute met largely between the defendants.  
5 But a form of confidentiality ring has been agreed that includes both an inner and  
6 an outer ring. It is agreed that the confidential documents identified thus far, the  
7 funding agreements, and so on, and the decision itself, will go into the outer ring.  
8 There is an extant dispute over who should be in the inner ring.

9 **THE CHAIRMAN:** I see.

10 **MR JOWELL:** It is really a dispute between the defendants themselves. But since no  
11 documents, at the present time, need to go into the inner ring, we think we can  
12 leave that up in the air for now.

13 **THE CHAIRMAN:** I see.

14 **MR JOWELL:** And it can be resolved as and when.

15 **THE CHAIRMAN:** May I suggest, then, that we make an order that simply defines  
16 a single ring, which we will all understand to be the outer ring.

17 **MR JOWELL:** Ah.

18 **THE CHAIRMAN:** And then we can supplement it, as and when necessary, by  
19 creating, as it were, a carve-out from that ring when the need arises?

20 **MR JOWELL:** Well, I will leave one of my learned friends to deal with that, because  
21 clearly they are --

22 **THE CHAIRMAN:** Right, Mr Holmes?

23 **MR HOLMES:** Sir, others will correct me if I am wrong but I think where matters stand  
24 is that the parties have collaborated over the short break.

1 **THE CHAIRMAN:** Yes.

2 **MR HOLMES:** And have agreed some modest amendments to the Allen & Overy  
3 proposed form of order.

4 **THE CHAIRMAN:** Right.

5 **MR HOLMES:** Now, that contains provision already for an inner and outer ring. The  
6 parties are all agreed on that text. So if the tribunal is content, we will use that text.  
7 Whether the inner ring will need to be triggered through material being placed  
8 within it and the list of people within the inner ring populated can be left for  
9 another day.

10 Just to correct a minor point, the dispute isn't really among the defendants. It  
11 is simply that one of the defendants has a concern that it may be necessary for the  
12 inner ring to contain an in-house individual, in order for them to be able to take  
13 instructions.

14 **THE CHAIRMAN:** Yes.

15 **MR HOLMES:** I think a position has been arrived at that that point has been parked,  
16 which may or may not be a dispute between the PCR and the defendant in question  
17 and it will be argued about as necessary.

18 **THE CHAIRMAN:** Yes I see.

19 **MR HOLMES:** But we do have an agreed form of order which we can present to you;  
20 and if the tribunal is content, it can then be enshrined in an order.

21 **THE CHAIRMAN:** Well, yes. I am happy for that to occur. I have no problem in  
22 leaving matters which don't slow down the production of documents into the ring  
23 for another day. If the parties are content that there is no hold-up of that sort, then  
24 I, too, am content.

