IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1329/7/7/19
1336/7/7/19

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

13 February 2020

Before:
The Honourable Mr Justice Marcus Smith
Paul Lomas
Professor Anthony Neuberger
(Sitting as a Tribunal in England and Wales)

BETWEEN:

MICHAEL O'HIGGINS FX CLASS REPRESENTATIVE LIMITED

Applicant/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) JP MORGAN 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

Respondent/Proposed Defendants

AND

BETWEEN:

PHILLIP EVANS

Applicant/Proposed Class Representative

- v -

(1) BARCLAYS BANK PLC
(2) BARCLAYS CAPITAL INC.
(3) BARCLAYS PLC
(4) BARCLAYS EXECUTION SERVICES LIMITED
(5) CITIBANK, N.A.
(6) CITIGROUP INC.

(7) MUFG BANK, LTD
(8) MITSUBISHI UFJ FINANCIAL GROUP, INC.
(9) J.P. MORGAN EUROPE LIMITED
(10) J.P. MORGAN LIMITED
(11) JPMORGAN CHASE BANK, N.A.
(12) JPMORGAN CHASE & CO
(13) NATWEST MARKETS PLC
(14) THE ROYAL BANK OF SCOTLAND GROUP PLC
(15) UBS AG

Respondents/
Proposed Defendants

A P P E A R AN C E S

Michael O'Higgins FX Class Representative Limited	Scott+Scott UK LLP	Daniel Jowell QC (Brick Court) Gerard Rothschild (Brick Court) Nicholas Bacon QC (4 New Square - Costs Counsel)
Barclays	Baker McKenzie LLP	Daniel Piccinin (Brick Court) David Heaton (Brick Court)
Citibank	Allen & Overy	Richard Handyside QC (Fountain Court) Tony Singla (Brick Court)
JPMorgan	Slaughter and May	Sarah Ford QC (Brick Court) Stefan Kuppen (Monckton)
NatWest / RBS	Macfarlanes LLP	Josh Holmes QC (Monckton) Tom Pascoe (Brick Court)
UBS AG	Gibson, Dunn & Crutcher UK LLP	Brian Kennelly QC (Blackstone) Paul Luckhurst (Blackstone)
All Respondents (O'Higgins)		*Costs Counsel for all Respondents* Roger Mallalieu (4 New Square)
Phillip Evans	Hausfeld	Aidan Robertson QC (Brick Court Chambers) Victoria Wakefield QC (Brick Court Chambers) Joanne Box (Brick Court Chambers) Aaron Khan (Brick Court Chambers)
MUFG	Herbert Smith Freehills LLP	Ronit Kreisberger QC (Monckton Chambers)

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

Thursday, 13 February 2020

(10.00 am)

Housekeeping

THE CHAIRMAN: Good morning. A couple of housekeeping matters. We propose that because we have got shorthand writers, that there should be a mid-morning break which I will leave to counsel's discretion as to when it is, but 11.30, quarter to 12 would be the sort of time. For the transcript, I would be grateful if you could identify yourselves first time you speak, so that we can attach names to voices and then more substantively, before we get to the agenda, all three of us have certain matters of disclosure to raise with the parties. We do so out of an abundance of caution. We don't consider but we would want to hear the parties on this if they did, these amounts to questions of recusal, but I, for example, know Lord Carlile and Sir Christopher Clarke extremely well and I see that they are participating, each of them, for one of the applicants and the other. Mr Lomas has, entirely unsurprising, given his career, acted for many banks over many years, including parties here. More specifically though, he had as a second partner involvement, an involvement in a currency price fixing question, where he was asked to take a very theoretical second view. It did not involve these chat rooms and Mr Lomas cannot actually remember very much more about it beyond that but he felt he ought to mention it. He has, to be clear, not gone back to check and refresh his memory because he thought that might make matters worse rather than better and I entirely agree with him. Thirdly, Mr Neuberger has known Mr Jowell since childhood. That is probably Mr Jowell's problem more than his. He also knows Lord Carlile and as a colleague, Professor Breedon. He has also done prior work, consulting on market returns with UBS in 2013. I suspect if we'd arranged further, we

could find other links between ourselves and the case but those seem to us to be the high points and we felt it was appropriate to get those on the record early, in case there were any objections. And to be clear, if there are, we will entertain them later on today and determine them but that is the material, for better or worse.

The main item on the agenda is what we call the carriage dispute and that is what I am going to invite the parties to make their submissions on, but before we do that, I had one further point that struck me last night when I was considering the carriage dispute, which was the proper approach for the applicants' representatives, when making submissions in relation to matters that related or concerned the persons in the class that they hope to represent. Because the elephant not in the room is very much the persons who are to be represented but who are not yet represented and it seemed to me that that configuration which will pertain until the applications are resolved, or the indicators of a form of application or form of submission, that ought to be made on the basis of full and frank disclosure as if it were ex parte. Now, I quite appreciate that the written submissions will not have been prepared on that basis and that you will not have been ready to make submissions orally on that basis. But I wanted to float whether, going forward, that was the appropriate way of framing submissions. It is obviously not a point for the defendants, the respondents. It is equally not a point when there is a battle, simply between the applicants and the respondents, but it seemed to me that when the applicants were making a point, such as whether it is appropriate to have a preliminary issue on carriage return, that is something where I feel the Tribunal will be assisted if submissions were made on that basis. So I raise that and I appreciate it has come out of the blue but I would be grateful for the response, Mr Jowell, of you and Mr Robertson, on behalf of the Evans applicant.

MR JOWELL: Well for our part, I'm Mr Jowell for the O'Higgins applicant, we don't consider that this does give rise to an obligation of full and frank disclosure because it

is not a hearing without notice. However, we are of course, entirely content to address a counter argument, as it were, because as between ourselves and the Evans claimants, there is now full agreement that this should be taken as a preliminary issue and indeed the defendants, some with varying degrees of enthusiasm, certainly don't oppose the preliminary issue on the point. So we are conscious, of course, that our duty, we do have a duty to the Tribunal to ensure that it is fully and fairly informed of any counter arguments that might be made. Certainly in the course of my submissions, I would plan to address you on those -- to raise those and to seek to address them.

THE CHAIRMAN: All right, thank you very much, Mr Jowell. Mr Robertson?

MR ROBERTSON: Sir, members of the Tribunal, I will echo those submissions of Mr Jowell. I wonder whether it would be sensible if I just deal with other matters that are on the agenda for our CMC, so we get them out of the way before then concentrating on the carriage -- and I will try to avoid saying carriage return -- with the carriage issue or the carriage dispute.

THE CHAIRMAN: Yes.

MR ROBERTSON: If you are content for me to take the agenda for the hearing that the Tribunal gave us and then just deal with the matters in turn and that will then enable us to focus on the carriage issue.

THE CHAIRMAN: I am more than happy for you to do that. Frankly, they seemed either to fall into the uncontentious category or to fall into the category which would require the carriage dispute to be resolved first, in terms of what one does with July, for instance. That is hugely dependent on the outcome of that dispute. So my inclination, but I am in your hands, would be to take those minor points, really, towards the end. In other words, resolve the carriage dispute first and then trip through the, as it were, consequential directions in light of that determination which I anticipate we will be able to do fairly quickly because it seemed to me that most of what was being said, if not all

of it, was very sensibly, common ground. Things like the joint confidentiality ring and the England & Wales jurisdiction, these are matters that will be a matter of seconds. Shall we deal with them at the end?

MR ROBERTSON: Yes, that is fine.

SUBMISSIONS by MR JOWELL

MR JOWELL: May I? If I may, simply since I think it is formally our application, at least in the first instance. I think I should open it, if I may. It arises, of course, from the fact that the O'Higgins application having been made in July, an application, at least as far as the definition of the class is concerned in almost identical terms, was subsequently filed by the Evans applicant in December and since this is the first time that the Tribunal has been invited to list the carriage dispute for separate resolution, I should just remind you of the precise jurisdiction under the rules, albeit that I am very confident that the Tribunal will already be very familiar with it.

THE CHAIRMAN: Speaking entirely for myself, I am very keen to invite fairly full submissions on this, particularly given the outbreak of harmony that has occurred with all the parties on this issue.

MR JOWELL: I am grateful for that indication. Could I ask you to take up the first file of the authorities bundle, file 1 and to go to tab 1 at page 45. These are the CAT Rules.

THE CHAIRMAN: Yes.

MR JOWELL: They are statutory instruments. They also, in this respect, reflect the terms of primary legislation which is s47B(5) of the Competition Act, but the first provision is Rule 77. That, as you will see, that stipulates that there are two conditions for the Tribunal making a collective proceedings order. The first is (a), it must consider that the Proposed Class Representative is a person who the Tribunal could authorise to act as the Class Representative in those proceedings, in accordance with Rule 78. The

second is it must be in respect of claims or parts of claims which are eligible for inclusion in collective proceedings, in accordance with Rule 79. So those are the two sets of conditions. Seventy-eight, you will see below, which relates to the Class Representative, contains a number of conditions in subsection two, including that they would fairly and adequately act in the interests of the class, does not have a conflict with the interests of the class. And then (c), if there is more than one applicant seeking approval in respect of the same claims, which would be the most suitable. Then the other conditions are will they be able to pay the defendants' recoverable costs, if ordered to do so, and then the last one relates to an interim injunction.

THE CHAIRMAN: Yes.

MR JOWELL: Then 79, which I don't think we need to be concerned with, was the principal focus of the Court of Appeal in Merricks. The only focus of the Court of Appeal in Merricks relates to the class.

THE CHAIRMAN: Yes.

MR JOWELL: So those are the two conditions. So I think it is common ground and indeed clear from (d), that at least where you have two opt-out claims, as you do in this case, which are covering essentially the same class, the Tribunal must choose between one of the two representatives. The question for the Tribunal is when is that issue best resolved.

THE CHAIRMAN: Yes.

MR JOWELL: Now, if we go back in the same rules to Rule 53, which you will see on page 31, we see here there is jurisdiction to give directions:

"The Tribunal may at any time, on the request of a party or on its own initiative, at the case management conference ... give such directions as are provided for in paragraph 2 or such other directions as it thinks fit, to secure that the proceedings are dealt with justly

and at proportionate cost."

THE CHAIRMAN: Yes.

MR JOWELL: Then in 2, we see subsection (o), it includes the power to hear issues as preliminary issues prior to the main substantive hearing.

The Tribunal has used this power in the past in the context of collective actions in both the Trucks proceedings and indeed in the O'Higgins application, where it has listed certain of the Rule 78 issues relating to the identity of the representative and funding as preliminary issues.

THE CHAIRMAN: Yes. That is absolutely right, Mr Jowell.

MR JOWELL: Yes.

THE CHAIRMAN: I find myself in a slightly odd position, in that the only person in this room to have indicated a view contrary to a preliminary hearing is me. Obviously, it is a preliminary view and I am open to persuasion, but it does seem to me that contrary to my usual practice of sitting back and just listening, I ought to, at the appropriate point, articulate why I --

MR JOWELL: That would be very helpful.

THE CHAIRMAN: -- have that preliminary view because I am encouraging push back on those thoughts. So what I will do is I will raise them when they seem to fit in with the point you are making. I obviously accept that we have, in these proceedings, ordered preliminary issues. It happens -- it seems to be largely academic, but I was perfectly prepared to entertain a funding preliminary issue but on quite a narrow basis and I articulated that in the first CMC which I have loose, I am afraid, but I will just read out what I said. It is unpaginated, unfortunately, but it is the sixth page of the transcript and Mr Holmes was addressing me and I said that:

"It seems to me that if one is looking at funding as between two rival applications, there is no point in having that sort of application heard in advance of the CPR application itself

because differences in funding would be a factor to go into the melting pot as to who is to be preferred as a representative. On the other hand, if the defendants have a knockout blow as regards one or other funding regime, they can say: look, it is so inadequate or so wrong that the application has to fail, even if it were the only application, then that is something which ought to be dealt with earlier because it is not weighing the rival merits of the two applications. What it is doing is it is an applicant versus defendants' battle, where it is being suggested that the applicant simply should be knocked out early."

That, I confess, is how I saw both the representative and the preliminary issues and the funding issues. It was a question of, is this application so pathetically inadequate that it ought to be put out of its misery early, rather than an argument about the relative merits. And it seemed to me that the preliminary issue is not actually a distinct issue from the final matter that we will be determining in March. In a sense, if you ask yourself: how am I choosing between the two applications, the test that I will be applying, I think, is precisely the test that you have articulated in Rule 78, suitability, and whether it is, under 77, just and reasonable to make an order. But 78(2)(c) which you took me to, rather suggests that the rival merits of the two applications are part of the entire authorisation process that one has in Rule 78. So if, for instance, one had a different test for who should be the applicant in a carriage dispute hearing, if, for instance, it was a first past the post test and there was a dispute as to whose nose was in front, then absolutely, I get the idea, the preliminary issue resolves that. But here it seems to me you are asking to do a Rule 78 process light in June or July and a Rule 78 process heavy in March.

MR JOWELL: Well, I can understand entirely how, Mr Chairman, you've got to where you've got and I can fully understand why on first blush, that that might well seem to be what is envisaged by the rules. But as I will come to in a moment, that is not how it is

done in other jurisdictions and in our submission, there are very strong reasons why it should not wait for the final CPO hearing and I think if I may, and I am very grateful for that indication to that argument, what I would like to do if I may, is just take it step by step because I think that is the best way, really, to see how this all fits together, rather than just seek to sort of address those points just immediately, I think.

THE CHAIRMAN: No.

MR JOWELL: I will bear them in mind as I am going through. I entirely understand where you are coming from on that.

THE CHAIRMAN: We will proceed on that basis and what I will do is I will check that all of the points that occurred to me which informed my preliminary view, are put to you, so that you have an opportunity to deal with them.

MR JOWELL: That is absolutely ideal and I think though, if I may, if we take the first step, the first step is, is there jurisdiction to order a preliminary issue on this matter.

THE CHAIRMAN: Yes.

MR JOWELL: I think the answer to that must be the CAT does have jurisdiction to do so. There is nothing, notwithstanding the fact that the terms talk about which is most suitable. I think the first question is, is there jurisdiction to make a preliminary issue in relation to who should have carriage? Clearly, I think there is that jurisdiction, on the basis of the powers that I have shown you. Then the next question is, well what factors should the Tribunal take into account in the exercise of its discretion, whether to exercise that jurisdiction? Now, you will have seen that the exercise of discretion is governed by the test of dealing with a case justly and at proportionate cost. We saw that in 53. That is defined again in the -- for that, we need to go back to Rule 4 at page 7. We see that it enjoins the Tribunal to ensure that each case is dealt with justly and at proportionate cost. And among the factors that it instructs the Tribunal to take into account, include at (b), saving expense, dealing with the case in ways which are

proportionate. In (d), ensuring that it is dealt with expeditiously and fairly and at (e), allotting to it an appropriate share of the Tribunal's resources, while also taking into account the need to allot resources to other cases. You will also see that in paragraph 4, it enjoins the Tribunal to actively manage cases which includes encouraging the parties to cooperate with each other in the conduct of the proceedings. And in 5(b), identification of and concentration on the main issues as early as possible.

THE CHAIRMAN: Yes.

MR JOWELL: We say that the best fulfilment of those principles is to order an early determination of the carriage dispute under 78(2)(c). The reason for that is essentially this: if the Tribunal does not determine the carriage dispute early, then what is going to happen? Well, the two applications will both run up alongside each other in parallel, up to the certification hearing in March. One of them will then fail, one of them may or may not succeed. But what will occur is that both sets of claimants will have to expend considerable further resources in preparing for the certification hearing. There is a lot of work still to do. They are both going to have to take into account the Merricks judgment, when it comes to considering whether to amend their applications. They are both going to have to appear at the next CMC, or PTR. I think it may be in October. Both will potentially wish to make or have to resist any further interlocutory applications before the main hearing in March. Both will have to consider the responses of these numerous defendants and their armies of lawyers, who will have made very clear that they are going to oppose any CPO. They will then both have to put in reply evidence and they will both then have to prepare for and attend the ten day hearing. That sort of duplication is not efficient for anyone. It is going to take up the claimant's resources but, importantly, it is also going to take up the Tribunal's resources, hearing two sets of submissions from myself and Mr Robertson and it's going to take up the defendants' resources as well because they will have two targets

they will have to fire at.

THE CHAIRMAN: Yes. It is important to be clear though, the reason we have got the hearing in March next year is because of Merricks. Otherwise, I reckon we would be having the substantive application determined in July, if not sooner.

MR JOWELL: Yes.

THE CHAIRMAN: So are you completely satisfied that we can properly determine the carriage dispute whilst Merricks is up in the air?

MR JOWELL: That is a very good point. I am going to come to that. I am grateful for that indication. It is a very good point but the second -- if I may, the second point, the second consideration one has to take into account -- perhaps in fact, it is not the second, really it is the first. The interests of the class. Because at the moment, the existence of two alternative representatives is a real negative for the claimants. It leads to real confusion and we know that already among members of the class, not surprisingly, as to who is representing us, they are asking the class and on what basis. Now it is fair to say that so far, the Evans website has largely echoed that of the O'Higgins website. There is a real possibility that that will not persist. There is bound to be a split between those members of the class who are registered with O'Higgins and those who are registered with Evans and the class is liable, in the future at least, to receive mixed messages and potentially inconsistent messaging. For example, about what is the scale and likely recovery. The two teams may have radically different views about that. Or indeed, what is the proper theory on which the recovery can be made. Of course, having two class representatives makes it much more difficult to liaise with members of the class because you don't know -- some may not want to register or be informed with, by two potential representatives. And importantly, until there is a single authorised, potential class representative, there is no realistic ability to explore any possibility of settlement with the defendants. So we say that from the point of view of the class, this

position should not persist any longer than it has to. Very importantly, the Canadian regime, which is the closest to ours and has been recognised by both the CAT and the Court of Appeal in the Merricks case as a model for our own regime, does typically resolve carriage issues at an early stage. If I can show you one just -- there are many Canadian authorities that both ourselves and Evans have referred to but I will just show you one. It is at tab 19 which is in volume 2 of the authorities bundle. This is the Strohmaier case, the Supreme Court of British Columbia.

THE CHAIRMAN: Yes.

MR JOWELL: You will see paragraph 27 which is on page 7. As they say:

"As noted above, there is a wealth of authority holding that carriage disputes, the carriage, should be determined in advance of a certification application."

Then the counsel refers to certain authorities. Then perhaps if I could just invite you to read 28 and 29.

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

MR JOWELL: And so you will see that in our skeleton argument we gave a list of the ten most recent Canadian cases, all of which were, I think, almost without exception, were resolved -- the carriage was resolved in advance of certain --

THE CHAIRMAN: Can you help me as to by which criteria the carriage dispute was resolved in Canada?

MR JOWELL: I will indeed. Would you like me to do that now?

THE CHAIRMAN: Whenever is convenient.

MR JOWELL: Let me go to that now. Before I do, may I just mention one further point or I'll forget it, which is that we've also mentioned in our skeleton argument that the Law Commission of Ontario, which is a very distinguished body, in its very recent 2019 report, has said that if anything, the Canadian courts don't resolve these carriage disputes soon enough. It thinks that they should be heard and resolved as soon

as possible after a relevant carriage motion is filed. So even earlier. So if anything in Canada, things are going to move into an even more expeditious direction, so far as carriage disputes are concerned. Let me take you then to the position in Canada. Perhaps the easiest way to look at this -- let us look first, if I may, at how it is supposed to be resolved here, according to the CAT guide because I think that is relevant, which is -- that is in tab 2 of the authorities bundle, the first bundle. If we go to page 74, you will see 6.32 and they are discussing here Rule 78(2)(c) which is where more than one applicant is seeking approval to act as a Class Representative. They say:

"In such a scenario, the Tribunal will consider who would be the most suitable representative. The Tribunal will seek to arrive at a decision which is in the best interests of all class members and is fair to the defendants."

They note that:

"The factors that are likely to be relevant include the proposed class definition and scope of the claims, the quality of the litigation plan referred to above and the experience of the lawyers of the competing class representatives."

That is a non-exclusive list. The key important point to take from this is the quite definitive statement that "the Tribunal will seek to arrive at a decision which is in the best interests of all class members and is fair to the defendants."

THE CHAIRMAN: That is entirely fair and right but this discussion is, of course, part of the broader discussion as to how one resolves the certification of collective proceedings.

MR JOWELL: True that is, although of course, all those other factors also have been listed, such as funding and so on, have also been listed as preliminary issues.

THE CHAIRMAN: No indeed.

MR JOWELL: It's not precluding that.

THE CHAIRMAN: It is not precluding it, no, I think you can take it, Mr Jowell, you are

not going to get any push back from the Tribunal on the question of jurisdiction. It is the question of discretion that is troubling us.

MR JOWELL: Discretion, I see that. But with that in mind, could I then take you to a very recent Canadian case which sets out very comprehensively what the test is in Canada you are asking me about. That is in the second authorities bundle at tab 22. It is the case of Kenneth Wong v Marriott International in the Supreme Court of British Columbia. If you go to page 8, please, and you will see paragraph 23:

"The question before me is which action is most likely to advance the interests of the class members, provide fairness to the defendants and promote access to justice, behaviour modification and judicial economy."

Other than that bit tacked on to the end, it is the identical test of the CAT guide that I have just shown you. I think you will find, certainly, access to justice and judicial economy are, of course, also matters that the CAT must take into account. So it is essentially the identical test. Now, in Canada, they have developed a number of factors. You will see those, if one starts in paragraph 24 and you will see they set out no fewer than 17 factors. I will not read out to you.

THE CHAIRMAN: Let us read them to ourselves.

MR JOWELL: Yes. (Pause).

THE CHAIRMAN: Yes.

MR JOWELL: Then in 25, they explain how those can be grouped into three categories. One to three which concern the qualifications of the proposed representative plaintiffs. Factors four to eight concern the qualifications of the class counsel and factors nine to 17 concern the quality of the litigation plan for the proposed class action. So those are the three main areas. They are not dissimilar to those that have already been identified in the CAT guide but more comprehensive. Now, if you go through, you will see that some of these factors are effectively threshold factors. So you have to get over,

normally, a fairly low threshold but providing you get over that low threshold, then no more consideration is given to it and others are really more important comparative factors. Of course, which factors are actually important in any one case will depend on the circumstances of the case. But if I can go through this at a bit of a trot. If we go forward to page 12, for example, we see paragraph 36:

"The quality of representative plaintiffs is a minor factor in the carriage context."

They say. Then they say:

"Whilst all the representative plaintiffs appear to be suitable in this proceedings, one of them has extensive experience." The judge says "I find this to be a minor factor." Then 37, on the other hand, funding:

"External funding to provide indemnity against adverse costs awards is considered on a carriage motion. In Ontario, funding is an important factor."

That is because Ontario has the English rule, where the costs followed the event. Then if you go forward, say to paragraph 57, which you will see on page 16, we see "The quality of proposed counsel is a threshold question. I am not determining which lawyers are best."

THE CHAIRMAN: Yes, that would be very invidious, I think.

MR JOWELL: Yes, indeed. And then if we go forward to page 22, I think this is important and in a sense, this is what I think meets, Mr Chairman, your potential objection or your concern which is where we come on to case theory. Because what they say is this:

"Krygier counsel argues the lack of understanding of the factual basis of the proposed class proceedings will ultimately make certification more difficult in the other actions. This is not a certification hearing. At this stage, it is neither possible nor appropriate for the court to embark on a detailed analysis of the merits of this class proceeding. The court should only consider whether there are conspicuous or egregious problems or readily apparent advantages and disadvantages in the competing theories."

And if I could just show you, that is then the approach that is taken on pretty much, really, all of these, if you like, merits issues. If you go forward to --

THE CHAIRMAN: Just pause there, Mr Jowell. I find this paragraph extraordinary. Because what you've got articulated there is exactly the sort of strike-out formulation that I put to Mr Holmes on funding and I quite see that if one of the rival applicants was waltzing along with a case theory that was just barmy, you know, which had conspicuous or egregious problems, I really would not have a problem in knocking that on the head. The problem I think we have got is that it may be that what appear to be in this case, very similar claims, are actually very different. It may be that one of your economists is so much better than the other that the framing of the case theory, as to how damages are recoverable, makes an extraordinarily big difference but you cannot tell at the stage of the carriage dispute. Now, it seems to me that to say that I am going to determine the carriage dispute based upon an assumption that unless one case theory is conspicuously, egregiously bad and otherwise, I'll treat it as a neutral factor, is to potentially do the most enormous disservice to the class that is supposed to be represented.

MR JOWELL: Well I think there are two answers to that. One is that one has to look at the system as a whole. If it turns out that -- I mean one has to imagine -- suppose there were not two applicants, the class representative, but there were five and that could well happen in future cases, one is then going to have a situation where it just becomes intolerable in these kind of claims because they are going to have to expend enormous resources and, I mean, the kind of amounts that you have to -- the kind of investment that people need to make to get these claims off the ground, is already very considerable. To then take them all the way through, where you only have statistically, I say, in that instance, a one in five chance, it is going to potentially, in our submission, it is going to undermine the whole regime. So one has to look at the class's interests

also from that wider perspective. You have to make this a workable regime in our submission. That is, I think --

THE CHAIRMAN: Very, very good point.

MR JOWELL: Yes.

THE CHAIRMAN: Is not the answer though, that as the regime for collective proceedings developed -- and of course, we are here, hearing the first carriage dispute in this jurisdiction, we're feeling our way a little bit.

MR JOWELL: No, indeed.

THE CHAIRMAN: In the future, these things will go much more quickly and will have the answer in Merricks or the answer in all kinds of other funding questions. The case law will evolve and what one will get is an ability to bring on the substantive resolution of the application at about the same time as the very fast preliminary hearing. Now, yes, you are now saying: oh no, the preliminary hearing is going to be much shorter but that, I think, is something you are going to have to help me on also, because if you were to say: oh yes, the criteria for a carriage dispute are such that we can do it, actually, a week after the application has been issued and do it within an hour, then I can see the point. But one of the points where there is not quite so much harmony as in other areas, is the question for instance, of the participation of the respondents in the carriage dispute. And the applicants say it is not a matter for the respondents at all and if they participate, it should be on a very straight jacketed basis, whereas the respondents are going to be telling me that they quite appreciate that it is a carriage dispute, but that they should not be inhibited as a matter of justice, from taking what course they consider appropriate without the straight jacket. So depending on how these issues are resolved, the preliminary issue can either be very slim and short, or it can balloon into something which then looks remarkably like the final application itself.

MR JOWELL: I think there were a number of points bundled in there, if I may. On the first

point, that in the future, these applications for collective proceedings will all become more streamlined and swifter and less expensive, I think that is rather optimistic because as all of these defendants will tell you, they are not just going to roll over and allow certification of classes, they are going to fight them, typically, tooth and nail. All I can say is the experience in Canada and in other jurisdictions, in the United States as well and Australia as well, very similar, but particularly in Canada, is that these are not easy and quick applications, even applying the Canadian test. And it's the Ontario Law Commission's considered view, having had lots of experience of this, is that it is essential that these carriage disputes for the efficiency of the proceedings as a whole and the class action regime as a whole, it is essential these things come on and are resolved quickly. I think that one can see in that context, it is sensible to have at least a very light touch approach to the question of the merits, the comparative merits of the two applications. Because if you are going to have a preliminary issue on carriage, it is reasonable to say: well we cannot make this, we cannot turn this into a fight to the death between them over the merits of the dispute because otherwise, A, you are effectively doing the defendants' work for them, but B, more importantly, it then does become impossible to distinguish it from the ultimate CPO application, the CPO hearing. If one goes back to Wong v Marriott, we see that this approach of, effectively, as you say, almost a strike-out approach to the respective merits, it may be slightly more -- it is slightly more nuanced than that because it is also if there are readily apparent advantages and disadvantages in the competing theories. That is also something that can be taken into account. But if one goes through, this is how all of these merits factors really are approached. If you go forward from 82 to paragraph 92, you see again, where they are now considering the scope of the causes of action. You see:

"At this stage, it is inappropriate for this court to determine whether each and every cause of

action will ultimately succeed."

Again, they quote Justice Skolrood in Strohmaier that I have just shown you. And again, if you go forward to page 26 at paragraph 103, again, "On a carriage motion, the court should not delve too far into the merits". And then 107, the prospects of success: "As previously stated, the three actions present no conspicuous or egregious problems or errors."

Leaving that aside, there are plenty of other factors that the courts in Canada have found which enable you to choose between the two claimants. Such as funding, as I have shown you, such as the priority in which the claims were brought and other factors. And the Canadian courts do manage to make choices at this stage and to do so efficiently.

THE CHAIRMAN: This is going to be extraordinarily irritating for you, Mr Jowell, but I wonder if we could go through the 17 factors listed in paragraph 24 and see exactly what the judge found weighed in this case. I just want to get a feel for -- because looking at the number of neutrals one has, the concern I have got is deciding this, where there is a substantive difference on a matter that may be altogether minor, which would be not a good idea.

MR JOWELL: It may seem like a good idea, but also, decisions have to be made and I think in the interests of an efficient process sometimes, even if it may, on occasion, turn on factors that --

THE CHAIRMAN: What swung it in this case?

MR JOWELL: If we go to 26, we note he discourages a tick box, tick the boxes approach to carriage motions and he says:

"The focus should be on the broader goal of promoting the best interests of the class and when factors are very similar or have only minor differences, a court may assess them as neutral or not refer to them at all."

And the circumstances of each case will determine how much weight should be given to each factor. So I think that is an important caveat. So if one then goes to carriage considerations which starts on page 11, paragraph 34. He says that:

"I am going to address each factor. Many are neutral. I will focus on those factors which I attribute weight to in my decision."

I have already shown you 36, the quality of the proposed representatives. He says that is a minor factor, the experience of one of them. Funding, he says is an important factor, but in the end, he says he places little weight on the factor. You will see that in paragraph 42. Then he goes to the fee and consortium agreement, where everybody agrees that the fee agreement is an important factor. Then paragraph 56, you see he places little weight on it.

THE CHAIRMAN: Right.

MR JOWELL: He then says the quality -- I have shown you already, the quality of counsel is a threshold point and you will see 68, he finds that to be a neutral factor. Disqualifying conflicts of interest, 72, he places no weight on those issues. Relative priority of commencement of the action. Since they were brought within a very close period of time, he gives no weight to that. Preparation and readiness of the action. And he says at 78, he places little weight on that. Preparation and performance on the carriage motion, he says at 81, while not determinative, he places some weight on that factor. Case theory, neutral. You see that at 83. Then scope of the causes of action. Again, he places some, but little weight, on that factor. Ninety-three. Selection of defendants. He finds that to be neutral. Correlation of plaintiffs and defendants. Again, neutral, 95. Proposed class definition, he finds neutral, 103. Class period, he places some but not undue weight on this factor. Prospect of success, neutral. Paragraph 109. Interrelationship of the class actions in more than one jurisdiction, he finds that to be the most important factor in this case which is one that does not really

arise in English proceedings.

So this is perhaps not -- you know, on this particular case, it is perhaps not particularly informative, other than as I have shown you on the approach he takes to what the factors are and how he does not take into account, save that on quite a light touch basis, the merits.

THE CHAIRMAN: No, indeed. I mean looking at this list, if one excludes the neutral, no weight, little weight and minor factors, the judge has decided this on factors 8, 14 and 17.

MR JOWELL: Yes.

THE CHAIRMAN: And some have been labelled neutral, on the explicit basis that one cannot poke too deeply into them.

MR JOWELL: Yes.

THE CHAIRMAN: Okay. So --

MR JOWELL: That is on that case. Let me show you another case which I think again illustrates the same point about the light touch that they approach to the merits. That is tab 16. It is the Mancinelli v Barrick Gold case of the Court of Appeal of Ontario. If you turn to page 14, we see a little more explanation of why they take this approach. So perhaps if I could read you, or perhaps if you can read to yourself, paragraphs 42 to 45.

THE CHAIRMAN: Yes, of course. (Pause). Yes, thank you.

MR JOWELL: So I think it is clear that if one is to go to a carriage dispute resolution early, as we propose and invite the Tribunal to do so, that is, in our submission, a broadly sensible approach, for the reasons given by the Canadian courts because otherwise, it does become duplicative of the final hearing. So that brings me to this question about the impact of Merricks which you asked me about, Mr Chairman.

THE CHAIRMAN: Yes, indeed.

MR JOWELL: Merricks was concerned, of course in the Court of Appeal, is concerned with section 79 factors, not 78. Because the CAT below had accepted that the requirements under 78 were met. It is fair to say, I think, that the Court of Appeal within Merricks also takes, to put it neutrally, a fairly light touch approach to the assessment of the merits of the claim in the CPO hearing and, indeed, to the potential methods for distribution. And it is possible, of course, that the Supreme Court could change that approach, either entirely or partly, back to the somewhat more rigorous scrutiny that was given in the CAT to the merits. There are, nevertheless -- I have two answers, really, to the question of why Merricks should not impede an early resolution of the carriage dispute. The first is principle and the other is pragmatic. The principle one is what I have just shown you which is that on a carriage dispute motion, regardless of the position, the ultimate position of the CPO, the Tribunal should take a light touch approach to the merits. So it does not actually matter, even if the Supreme Court turns the dial back up for the final hearing, that should not matter as regards the carriage dispute. The pragmatic answer is that if the Tribunal is still concerned about Merricks and wants to -- really would like to see how Merricks turns out before it makes any resolution on any carriage motion, then the solution is, in our submission, very simple. The Supreme Court is hearing Merricks in May. We are proposing that a carriage disputes hearing would be in July.

THE CHAIRMAN: Yes.

MR JOWELL: It is relatively unlikely, I accept, that the Supreme Court will have given judgment by July but I think we are all expecting that it should come in October or soon after that time.

THE CHAIRMAN: I think the working assumption behind the timing of the 2021 hearing was that by October at the latest, we would have an outcome from the Supreme Court.

MR JOWELL: Indeed. So the pragmatic answer is simply to have the carriage dispute

in July. Not deliver judgment until after the Supreme Court has handed down judgment in Merricks. If Merricks in the Court of Appeal is upheld by the Supreme Court, then the Tribunal clearly can just continue to give judgment. If Merricks is overturned or the test is changed by the Supreme Court, then the parties can make further submissions, probably I would expect, in writing, or if the Tribunal can invite further submissions from the parties on anything that it is concerned with, in writing, in light of the Merricks and the Supreme Court and then proceed to give judgment. So we say Merricks is not an impediment. In the interests of full and frank disclosure, as it were, there is one other factor that I should draw to your attention --

THE CHAIRMAN: Thank you.

MR JOWELL: -- that, in our submission, is said to tell about the carriage dispute. That is the point that is made by -- I think it is the RBS defendants in their skeleton argument. They mention the possibility there could be an appeal from this. I think there are a number of answers to that. The first is we don't think that, strictly, it would be an appeal, it would have to be a judicial review.

THE CHAIRMAN: Review.

MR JOWELL: Secondly, it is highly speculative whether that is going to hold things up, because first of all, there may be no such application for judicial review of the decision. If there is an application, permission may not be granted. It is, after all, the discretionary matter, ultimately, and even if there is, even if permission is granted, it is possible that the applicant for judicial review could seek expedition, so the matter is resolved by the end of the year, potentially. So it is highly speculative, whether it is going to interfere. The third point in answer to that is that, of course, there is also a possibility of a similar judicial review at the end of the process, even if the carriage dispute is melded into the final hearing in March. So ultimately, we don't think that that does tell in favour of melding the two hearings.

THE CHAIRMAN: Yes, I must say, somewhat pessimistically, I am confidently anticipating that whatever the outcome of the March 2021 hearing, there will be an appeal, so I am quite conscious of that. The fact is, it will not be disruptive of anything other than the main claim.

MR JOWELL: Yes.

THE CHAIRMAN: But here, unless one takes the sort of speed that you would like to see in the judicial review, or the Court of Appeal, we are going to lose the March 2021 hearing, are we not? I take on board everything you say about it may not happen. We are talking about probabilities --

MR JOWELL: It may not.

THE CHAIRMAN: -- or possibilities but if those probabilities, possibilities emerge, it will be adjourned.

MR JOWELL: It is a contingency. It may not be appropriate. It may be one will just say: we'll plough on regardless. Because I mean, if one considers the position suppose that -- even if there was an appeal of the carriage dispute issue, suppose the Tribunal decide, hears everything together in March, makes a collective proceedings order or chooses one over the other, and then there was a judicial review of the carriage decision, at that point there still might have to be -- in those circumstances, might have to be a remittal back to the CAT to say: well are you prepared to certify? We think you are wrong. So it could still lead to the same kind of delay, whenever the application for judicial review is made, in my submission. So we respectfully say that the Tribunal should accede to the request of both of the prospective applicants and list the carriage dispute in July.

In relation to the point about knockout blows, we, for our part, have of course, or are about to have determined the question of whether there's a knockout blow in relation to the identity of the funder -- the identity of the representative or the funding arrangements.

We concede that there is some sense in that being determined early. The Evans applicant apparently eschews a similar application. We have floated the possibility that they might wish to have that -- that could be heard, potentially, also in July, perhaps before the carriage motion. It is not really for us to say how the Evans applicants wish to -- what they wish to do about that, but there is that possibility. It is really a matter for the Tribunal. But in our submission, it is not necessarily an either or, it can perfectly well be both and we can see some sense in that.

THE CHAIRMAN: Yes.

MR JOWELL: So those are our submissions. I am not sure -- I hope I have dealt with your issues, Mr Chairman, as best I can.

THE CHAIRMAN: No, I am very grateful.

MR JOWELL: If I can summarise. I think our essential point is this: that one does need to bear in mind not just, if you like, the ideal position that where the Tribunal might wish to consider any number of applicants and their different claims and then certify the very best, it also needs to consider the workability of the system as a whole and the practicability of having a number of applicants bearing these enormous financial burdens, all the way right through to a CPO application and hearing, which in our submission, is not practical and could undermine, really, the workability of the whole system. And that is why the experience of, really, all of the other jurisdictions that have experience with very similar systems, have chosen to resolve carriage disputes early and consider it vital that they should do so. So those are my submissions. I think Mr Robertson may have --

THE CHAIRMAN: I'll hear from Mr Robertson, obviously, in a moment. The only point that it would assist me just to have a short articulation of is -- because I want to hear from the respondents as to how they see their role in the carriage dispute and you are obviously envisaging something which is as short as possible. What is the O'Higgins

line on respondent participation?

MR JOWELL: Thank you. The fairness to the defendants is a factor in the test that is mentioned both in the CAT guide and also by the Canadian authorities. For our part, we see that, really, the only element that, really, that we can see that that gives rise to is the question of ATE insurance. We cannot really see how in other respects there is room for any submissions on the question of fairness to the defendants. The defendants are, of course, conflicted as well because the one point of view they want, the weaker claimant to go forward, but I think one can fairly assume that even that would be overridden by their desire to ensure that their costs are potentially covered by ATE insurance. And that is a reasonable consideration. So in relation to that, we see no problem with the defendants making short and non-duplicative submissions on that point but otherwise, we don't see a role for them at the hearing.

THE CHAIRMAN: Thank you. Mr Robertson.

SUBMISSIONS by MR ROBERTSON

MR ROBERTSON: Sir, members of the Tribunal, I gratefully adopt, with one exception, Mr Jowell's submissions. The exception is in relation to the Tribunal raising the same motion, a challenge to Mr Evans' funding arrangements or identity of funders and so on. It just simply has not been raised by the Proposed Defendants at this stage and as we have set out in paragraph 9 of our skeleton, were any objection to be raised, how to deal with it should be addressed after the resolution of the carriage issue and I want --

THE CHAIRMAN: Mr Robertson, can I interrupt you there because my view about funding questions done in isolation, is exactly as I put it to Mr Holmes in the first CMC. It seems to me that, first of all, it is not for the Tribunal to raise it, it is for the parties, but secondly, I don't consider that it should be raised unless it is the kind of knockout blow that I envisaged. So it seems to me, actually, that it is more for the

respondents to raise than for the applicant. In other words, if the respondents think that they can with one leap divest themselves of you, then good luck to them, they can have a go. But if the argument boils down to: we have this quibble about the funding arrangement, it could be better, but it is not a reason for permitting the application to be made, then I, for the life of me, cannot see the benefit of it. So I hope that is an indication at least, of how I see this sort of preliminary issue operating.

MR ROBERTSON: I am grateful, sir. So with that clarification, I otherwise adopt what Mr Jowell has submitted this morning and his explanation of the UK legislation, guidance, the Canadian case law to which he has taken you.

The additional points I want to make are quite limited but they are these:

THE CHAIRMAN: Thank you.

MR ROBERTSON: Firstly, if you don't hear -- standing back, every jurisdiction in Canada, with the exception of Quebec which has got a different system, every common law jurisdiction in Canada sees the good sense in dealing with carriage right at the outset. That is something which has developed over many years, it is not a recent development. The case law that you have been looking at, some of these are major cases. The Strohmaier case arises out of the same facts as the Thompson case in Manitoba and you have seen the quote from Mr Justice Edmond in the Thompson case. It was endorsed in the Court of Appeal in Manitoba, you have got the authority in the authorities bundle. The underlying facts of that case are interesting to look at, just to give you a sense of the scale of the litigation. It arose out of something called the "60s Scoop" in Canada. This was a process that took place between the late 1950s and in fact, the early 1980s, when Canadian authorities took children from aboriginal or indigenous families and put them up for forced adoption or foster care, usually at the age of six months or so. Essentially, it was a process of attempting to impose so-called western values and culture on them.

Some 20,000 children were involved. So the case was litigated in class actions over a number of provinces. It eventually settled about a couple of years ago, with a settlement reported at 800 million Canadian dollars. I just mention this. These are major cases of real significance but they deal with carriage right at the outset.

So the second point I wish to make is that Canada is not isolated in doing this. As we have explained in our skeleton and in some detail in the annex to the skeleton, Australia has come to look at an issue of effectively de facto certification. They don't have a certification in Australia, but when they are dealing with funding that requires a common fund order, then they are going to have to decide which of the class actions goes forward against the common fund order. So effectively, it becomes a form of de facto certification. And the Australian courts have seen the good sense of dealing with that at an early stage and they refer to the Canadian case law and adopt it. We, in this jurisdiction, have referred in the Merricks case to the Canadian experience, it is highly instructive. In this Tribunal and it has been endorsed by the Court of Appeal. The United States gives us less direct guidance because the legislation is different under the federal rules of civil procedure but in the United States, they have also seen the importance of dealing with carriage right at the outset. For this Tribunal to ignore that, effectively disagree with that jurisprudence, is in our submission, a pretty steep leap for this Tribunal to take. We say it is not warranted. It is particularly not warranted where both rival sets of Class Representatives invite the Tribunal to deal with this at an early stage. Of course, we know there are risks. If we lose, it is a knockout blow to us, subject to any right of review.

THE CHAIRMAN: Yes.

MR ROBERTSON: But it is a knockout blow to the unsuccessful application. So why are we doing that? Well, the prospect of fighting the case all the way through to certification and then only to lose the carriage dispute would be a major disincentive to

Class Representatives. Now it is a risk, of course, we have to accept because this is the first case in which this has arisen. I think the Tribunal needs to look at the wider policy. If you adopt an approach in this case which then is seen as being the model the Tribunal is going to adopt in other cases, then that is going to be a strong disincentive to subsequent Proposed Class Representatives, after the first Class Representative has filed its application. Because you are going to run the risk of having to fight the case all the way up to certification, in order to find out whether you've got carriage or not.

THE CHAIRMAN: Mr Robertson, I think I should make one thing clear in terms of -- not the outcome, we'll obviously retire to consider that, but in terms of how we are going to decide this. We see this, I think, essentially as one of discretion and there are a number of factors in this case that make it unique, in the sense that I would be -- were we to ignore -- well not ignore but were we not to follow the Canadian jurisprudence, then it would be in significant part because of the peculiarities of this case and the fact that, for instance, there are only two; the fact that we have the uncertainties of Merricks; the fact that we are at the beginning of a learning process. These are all matters which are very specific to this case. I would not want it to be thought -- and will make it, if necessary, clear in any ruling -- that we see ourselves at the beginning of a fairly steep learning curve. I can obviously see the force of Mr Jowell's hypothesis of five or more applicants rivalling for certification and the idea that costs are multiplied five times obviously has rather more weight than two times multiplication.

MR ROBERTSON: Sir, dressing this up as -- well stating that this is due to an exercise of discretion on the facts of this case, in my submission is not an answer. It is not an answer because any litigation funder looking at a second Proposed Class Representative will have one precedent, and it will be seen as precedent, and it is this case and the message will be, if you are going to fund the second Class Representative, you are going to have to fund that all the way up to a certification

hearing, unlike the position in Canada and now Australia and indeed in the United States, where you get a quick resolution and you determine whether your initial investment has been successful or not. In my submission, you absolutely have to acknowledge the realities of third party litigation funding. It is going to be the bedrock to this regime, that is plain from the guidance and what has already been said.

THE CHAIRMAN: Yes.

MR ROBERTSON: If you just look at what happened in this case. My learned friend, Mr Jowell, somewhat mischievously has been describing us in the previous CMC, and his clients repeated this in press releases, as if we are a copycat claim, coming along copying his homework. As if somehow, Mr Evans, who is sitting at the back there, was a naughty schoolboy looking over Mr O'Higgins' shoulder to copy out the answer and then bring his claim. Nothing could be further from the truth. We did not copy the O'Higgins application. Their application was made on 29 July, following the publication of the European Commission press release on 16 May. So when they made their application, they did not have the decisions upon which they brought their application. We have taken a different approach which is to do detailed homework, making a request on 5 July for a non-confidential version of the decisions under the EU access to documents regulation. It has got to be said we were met with some initial reluctance from the European Commission to comply with that request but eventually, under the pressure from those instructing me, they did on 1 October. So we were able to take full instructions on the basis of the non-confidential decisions which we have been provided with, instruct our experts and draft our claim. We filed the application on 11 December, so it is as fully informed an application as it is possible to make. At that point, Mr O'Higgins -- I don't think they had either decision. We know from correspondence they did not have the Three Way Banana Split decision, they did not get that until 17 December. They may or may not have got to the Essex Express

decision by that point. But just standing back, firstly to make the point we are not a copycat claim but secondly, we have taken a different approach to make sure that our application is as full and as complete and informed as it is possible to be. If the precedent were that: well, actually, you have got to fight it all the way through to ultimate certification, you cannot get an early carriage motion on, then that is going to dissuade a Class Representative from doing that. In reality, what you are going to find is Class Representatives going as quickly as possible, to be first in the queue after the publication of a press release. Or even before the publication of a press release. Now, does the Tribunal really want to encourage that sort of pre-emptive collective proceedings application? Because in my submission, that is what you would be doing if you were to exercise your discretion in this case, to say carriage has to go off to the full certification hearing. So I am asking the Tribunal to stand back and look at the policy consequences. What would be an exceptional exercise of discretion, viewed in the common law world, not to have an early carriage motion. I should also just make the point -- I think Mr Jowell has made the point -- but it is clear from the Ontario Law Commission report that nobody in the common law world is advocating abandoning early carriage motions. Yes, they are not without their problems. Yes, you have to make judgments at an early stage, but that is a trade-off. And the trade-off, in my submission, is dealing with a case justly and proportionately, at the outset, in a way that avoids leading to a system where the risk of running up the full expense of going through to certification puts off subsequent Class Representative applications and instead, encourages a regime which effectively becomes a first to file regime, encouraging the first application to be made, even on the most scanty information, not necessarily even a European Commission press release, it might just be made on press reports. Unless I can assist you further, those are my submissions on the carriage issue.

THE CHAIRMAN: Yes, thank you, thank you very much, Mr Robertson. Whichever

defendant wishes to rise first. Mr Holmes.

SUBMISSIONS by MR HOLMES

MR HOLMES: Sir, we have heard a lot of food for thought both from the PCRs representatives and as a result of your observations from the bench. We wondered, given the time, whether now might be a convenient moment to take a break for the shorthand writers, so we can just take instructions and respond on that basis.

THE CHAIRMAN: Of course, if you want to take instructions that is understood. We will rise for ten minutes; would that assist?

(11.23 am)

(A break)

(11.45 am)

THE CHAIRMAN: Mr Holmes?

MR HOLMES: Sir, we are grateful for the opportunity to discuss with our respective teams. I should say at the outset, sir, we agree there is no issue as to jurisdiction and that this is therefore a question of discretion. We see it as a difficult question of case management for the Tribunal at this early stage, in the development of the new regime. As you will have seen from our skeleton argument with which two of the other banks agree, we see pros and cons in each approach. Having heard what the Class Representatives have to say today, we remain of that view and we continue to take a neutral stance, but we do have some brief observations that we would like to make, in case they are of assistance to the Tribunal in addressing this issue.

On the one hand, we do see that an early resolution of the question of the selection of Class Representative would focus the proceedings, reduce the number of parties and streamline the certification hearing. Those are all powerful considerations of case management. We do see, however, that it would result in at least some element of

overlap between the two, or possibly three separate hearings that would be involved. I say three separate hearings because, as Mr Jowell observed, there might be the need on the timetables that are currently being presented to the Tribunal, for the parties to come back and discuss the Merricks ruling.

THE CHAIRMAN: Yes.

MR HOLMES: The overlap arises because the comparative suitability of the PCRs is not, in our submission, just an exercise in considering their personal attributes and funding arrangements. It extends to a substantive consideration of the respective applications. In my submission, one sees that in the Canadian authorities. Mr Jowell fairly observed that it is not as simple as suggesting that the assessment of the merits at the selection stage can be confined to a strike-out. Just to make that point good, sir, may I take you to one other Canadian authority which can be found in bundle 5B.

THE CHAIRMAN: Bundle 5.

MR HOLMES: The second authorities bundle.

THE CHAIRMAN: Yes.

MR HOLMES: At tab 21.

THE CHAIRMAN: Tab 21, thank you.

MR HOLMES: This is the case of Winder in the Ontario Superior Court of Justice which was heard and decided by Justice Perell. The hearing on 19 September 2019. The judgment is 7 October 2019. The nature of this class action was a data breach by the Marriott Hotel Group which was the subject of various sets of class proceedings within different states in Canada.

THE CHAIRMAN: Yes.

MR HOLMES: The relevant passage begins at paragraph 48. You see the heading "See discussion and analysis", and at (1), the test for carriage. If I could pick it up at paragraph 50. You see the formulation which is already familiar to the Tribunal from

the passages that Mr Jowell took you to. Not in this judgment but in another:

"The court will grant carriage to the putative class counsel whose proposed action is better for the interests of the putative class members, while being fair to the defendants and promoting the prime objectives of class proceedings which are access to justice for plaintiffs, class members and defendants, behaviour modification and judicial economy."

Then this:

"Although the determination of a carriage motion will decide which counsel will represent the plaintiff, the task of the court is not to choose between different counsel according to their relative resources and expertise. Rather, it is to determine which of the competing actions is more or most likely to advance the interests of the class."

That in my submission, sir, suggests as one would expect, that one looks beyond merely questions of identity and funding and one considers what is being proposed by way of an action, the substance. Then one has the list of overlapping and non-exhaustive factors at 51 which the Tribunal has considered. I emphasise in particular, (9), case theory, (10), scope of causes of action. (13), class definition. (14), class period, and (15) and (16), prospects of success. Then at paragraph 52 --

THE CHAIRMAN: Yes, you are emphasising those but these are precisely the ones that are hardest to evaluate early.

MR HOLMES: They are, sir, exactly so. The point I am making is that it is not possible to make a clean split between substantive considerations that will arise at the second stage. So if these are to be heard at two separate hearings, the Tribunal will need to engage, at least to some extent, with the underlying substance and in my submission, that is what this case supports. You see at paragraph 52 -- you were taken to the first part of this quotation, which is set out in the Wong ruling, noting that:

"Factors 9 to 17 concern the quality of the litigation plan, thus nine of the factors are about or

are connected to case theory ..."

Then this:

"... which is understandable because at the very heart of the test for determining carriage is a qualitative and comparative analysis of the case theories of the rival class counsel."

So that is why we say there is an inevitable overlap between the issues that will need to be canvassed at the selection and the certification stages and some efficiencies could therefore be heard by hearing them together. This is why we say it is a difficult question of case management, with factors pointing in both directions.

THE CHAIRMAN: So what am I going to be -- let us suppose you go down the preliminary issue route. I think it will probably be appropriate for the Tribunal to give some fairly clear indications as to what material it would find helpful to decide that matter.

MR HOLMES: Yes.

THE CHAIRMAN: And you will therefore, I suspect, be much assisted by material going to precisely the ones in that list that you have been --

MR HOLMES: I think --

THE CHAIRMAN: -- pointing out.

MR HOLMES: Yes, we endorse that.

THE CHAIRMAN: So we would be wanting both applicants to take -- or one case, by way of example, to articulate exactly what their case theory was. Now, that gives rise to all sorts of difficult questions. Is it fair to oblige the applicants at an early stage, when they might have further work to do, to articulate the case theory in that way, when, if they don't do it right, they are going to be exiting the process?

MR HOLMES: So that may be more a matter on which to hear the applicants.

THE CHAIRMAN: Yes.

MR HOLMES: But my immediate reaction, sir, would be that the case theory already

emerges, at least to an extent, from the expert reports and from the applications which have been submitted which shed some light on the approaches that each of the Proposed Class Representatives intends to take, if certified.

THE CHAIRMAN: Yes.

MR HOLMES: The risk of not considering the substantive factors in the list in at least some detail, is that the Tribunal will be left with a very slender basis on which to make a selection in a case such as the present. You apprehended, sir, that if one works through the factors that were considered in the Wong case, one sees just how difficult it becomes if one does not consider, at least to some extent -- if one does not, at least to some extent, try to get under the skin of the respective parties' case theories, the approach that they intend to take. So it does strike us that in the competition context, this consideration may weigh particularly heavily and this is one difference between the Canadian regime and that with which this Tribunal is concerned. In Canada we have seen that class proceedings of this nature can cover a broad range of different subject matters. They can often raise big questions of principle about recovery for tortious loss, forced adoption, data breaches, product liability claims and the way in which those cases are articulated will turn, very often, on a presentation of case law and that is why causes of action come to the fore in a number of these cases, how you frame your case, whether as a conspiracy or in some other way.

In the competition context, we know our cause of action, that is defined and a particular focus of importance will be the theory of harm and the theory of damage, of economic damage which is enshrined in the respective expert reports. That is likely to be something that the Tribunal may wish to consider when deciding and selecting between the rival applications. Conversely, the other factors may be unlikely in this context, to weigh because we have quite a developed competition -- specialist set of competition solicitors, firms, within the UK. It is unlikely that a claim will be brought within this

regime by people who cannot make a claim to some experience and a sound basis in terms of their representation for proceeding. So to make an informed choice, in my submission, the Tribunal may well be pulled into something of a consideration of the merits. Now we don't say that this is a decisive consideration because we see the arguments which weigh in both directions but we do say that the Tribunal should be alive to the substantive analysis that may be required. That has implications, we say, for the role of the Proposed Defendants because we have an obvious interest, sir, in ensuring that a proportionate and well formulated claim goes forward. We should be heard on that by the Tribunal when it is making its selection. So in my submission, there should not be artificial constraints placed on the scope of the role that the potential defendants might play. You have seen today that the defendants have behaved and are behaving responsibly in this litigation. They are making efforts to avoid duplication and to ensure that the Tribunal receives focussed and coordinated submissions, where there is an overlap. But in my submission, it will be premature at this stage, before we have even seen submissions from the respective Proposed Class Representatives, to circumscribe what the Proposed Defendants can say, going to the factors that have been identified and have been considered and equally, it would be wrong to confine the Proposed Defendants to a single set of submissions, when they may have differing perspectives to bring to bear. Sir, unless the Tribunal has any questions, those are my submissions.

THE CHAIRMAN: Thank you very much, Mr Holmes. Yes Mr Kennelly.

SUBMISSIONS by MR KENNELLY

MR KENNELLY: Brian Kennelly and Paul Luckhurst for UBS.

You have seen that Slaughter and May, on behalf of our solicitors, wrote to the Tribunal, saying that we endorse the skeleton argument lodged by RBS. Our position is also

neutral. From what we have heard today and from the submissions received by the Tribunal, it is plain that neither approach is without difficulty. There are problems with both. And what Mr Holmes has shown you by reference to the Winder authority is that the concerns that the Tribunal has raised are the very same problems facing the Canadian courts, the need, to a certain extent, to engage with the merits of the underlying cases. We note simply, that with the very similar legal test and faced with the very same difficulties that concern this Tribunal, the Canadian courts have consistently opted for what they regard as their pragmatic solution which is how the carriage dispute is determined at a preliminary stage.

THE CHAIRMAN: Yes.

MR KENNELLY: But having said all that, our position remains one of neutrality and we are in the Tribunal's hands. I will make one short point about the role of the defendants at a preliminary issue carriage hearing, if that is what the Tribunal orders. As you have seen, both JP Morgan and UBS asked a single firm of solicitors to write to the Tribunal, endorsing the skeleton argument of RBS. We have approached this in a proportionate and efficient way, in order to save costs, which is precisely the approach that we would adopt in any hearing the Tribunal orders. There is no need to impose any formal restrictions on us now, not least because it may well be the case that some engagement with the merits will be necessary and it will be important that we're there, in order to deal with that if it arises.

THE CHAIRMAN: I am very grateful. Yes, Ms Ford.

SUBMISSIONS by MS FORD

MS FORD: Sarah Ford for JPM. We have also indicated that we adopt a neutral position in relation to the timing of the carriage dispute but I do rise to echo the points that have already been made about the role of the defendants in any such dispute. I make three

short points. The first is in what we are all aware is a new jurisdiction, with emerging and developing law, in our submission, there would be a real danger if the Tribunal were minded from the outset and in the abstract to purport to set constraints on what the defendants could contribute to that process. Secondly, in our submission, the banks have relevant market experience to offer and to contribute to the debate. That may well be of assistance to the Tribunal in determining the matters it has to get to grips with. And thirdly, to echo both Mr Holmes and Mr Kennelly, the parties and counsel are well familiar with the need to take a proportionate and non-duplicative approach and we have illustrated that in the course of these proceedings.

Sir, I make those points in any event. I would say they apply with even more force the more the Tribunal is minded to apply a test in relation to a carriage dispute which does get into the substance of the claims, into the merits of the claims, the greater the necessary role the defendants will play in that debate and they must be fairly heard.

THE CHAIRMAN: Yes.

MS FORD: Those are my submissions.

SUBMISSIONS by MR PICCININ

MR PICCININ: Sir, for the transcript, I am Daniel Piccinin and I appear for Barclays, together with Mr Heaton. As you will have seen from our skeleton argument, Barclays' position is that it agrees with the PCRs on this issue. Those are not words I anticipate I will say very often in these proceedings. I just want to make some very short submissions that don't duplicate what the PCRs have said, to explain why we take the position. In particular, why we say that an early, quick look approach to the carriage factors and issues supports the objectives that are identified in paragraph 6.32 of the Tribunal guide, that Mr Jowell showed you before. Those are the objectives and what is in the best interests of the class members and what's fair to the defendants. And we

say that it would be unfortunate if, in seeking to arrive at an outcome that served those interests, we adopted a procedure that operated against those interests. So that is really the focus of my submissions.

I would like to start by making some remarks of general application and then talk about the particular features of this case. Starting with the general application and the question that Mr Holmes has raised about the extent to which the Canadian courts actually do take a quick look approach. Mr Jowell showed you earlier, the decision of the Ontario Court of Appeal in Mancinelli and Mr Holmes responded by reference to the Winder case. I just want to show you what the court actually did in Winder, when it came to look at these merits type points, if I can put it that way. So I think it is in your second authorities bundle which is tab 21.

THE CHAIRMAN: Yes.

MR PICCININ: And the whole section starts at paragraph 117 and there are lots of interesting points made in there. Just in the interests of time, I just wanted to focus on paragraph 131 which gives you the key part of the answer. Page 20 of the judgment. The court said:

"In my opinion, in the context of the carriage factors [which you have already seen], the extolled strengths and the dissed weakness of the case theories of either the Consortium or Siskinds balance each other out [and the key point is the reasons for that]. Since both theories are built on the same factual foundation and since the workhorse for both case theories is the tort of intrusion on seclusion on the macroscopic level of grand strategy, the case theory carriage factor approaches neutral."

In case after case after case, we could go through all of the ones in the authorities bundles if we had time, but in case after case after case, what you have seen is the analysis of the merits of the competing claims takes place at that level of generality. Most of the points are about which causes of action are actually being deployed, or which particular

defendants are being sued in one claim or the other and the question is, are any of these case theories or courses of action completely hopeless, or to the extent that they are not, will they add undue complexity to the proceedings? It makes them costly and inefficient to litigate. That is the kind of consideration that we are looking for at that level of detail.

THE CHAIRMAN: Okay. Let me ask you this, it is a question I asked Mr Jowell: the preliminary issue would, I think, have to be where there is more than one applicant, as there is here, which is the most suitable.

MR PICCININ: Yes.

THE CHAIRMAN: Now, how can the Tribunal properly determine that by leaving certain factors which go to suitability, out of account?

MR PICCININ: Yes. So it is not that you leave them out of account, it is that bearing in mind that the reason why we are looking at the question of suitability, or to put it another way, what we mean by the most suitable Class Representative is the one, the selection of which is in the best interests of all class members and is fair to the defendants. We need to take into account the possibility that if you do a more deep dive and you look very carefully at the competing merits of the claims, you are actually going to be doing damage to and undermining those very objectives. And so the answer to the question how you do it, sir, is essentially as the Canadians have done it here, which is you look to see if there are any high level points at the merits and if there aren't then that is the selection of the cause of action of the defendants and so on, then you treat that as neutral and you look to the other things which are different.

THE CHAIRMAN: No, I entirely understand that but the point is whether they are left out of account or given a different account, I think what you are telling me is that the meaning of suitable, how one decides it, is different at the carriage stage, compared to the application for representation order stage.

MR PICCININ: Yes, I don't think I am saying the meaning of suitable is different, I am just saying that the level of detail in which we look at these factors and the same factors are likely to come up --

THE CHAIRMAN: Let me put it again differently. What we are doing is we are -- you see, preliminary issues, when you have a preliminary issue, you don't determine them according to different criteria as at the final stage. What you are doing is you are fast tracking something which you decide in precisely the same way as it would be at the final stage, it just happens to be better to do it earlier. So you might have a point of law which resolves certain factual issues, so you plot that right at the beginning and you decide it, but there is no question that you will decide that point of law differently at trial, as at the preliminary issue. And it seems to me that that would be a rather strange proposition. Here, what you are saying, I accept it is not a point of law, it's a point of fact, but here you are saying that the outcome on the question of suitability could be different, depending on when you decide it.

MR PICCININ: No, I understand the point you are putting to me. Sir. No, that is not what I am saying. What I am saying is irrespective of whether the question of carriage -- so the selection of which of the two PCRs was most suitable -- irrespective of whether you were deciding that early or at the CPO hearing, you would be applying the same approach to that question which would be a quick look approach.

THE CHAIRMAN: I see. So you are saying that the approach in terms of light touch on, as it were, the theory of risk, is the same at both stages?

MR PICCININ: For the comparative exercise, that is right and there are really --

THE CHAIRMAN: Okay. For the comparative exercise, it is the same test but when you are working out whether there should be certification, it is different?

MR PICCININ: Yes. This goes to the question of the extent of the overlap, sir. The issue, the factors that are likely to be important in differentiating between two applications for

certification are likely to, or at least may well be, very different from the factors that are important to the question of whether either one of them meets the standard for certification. So just to give you an example. It may well be that there is not much to pick between the two case theories, or between the two causes of action and that from a comparative perspective, the thing that is most different is the ATE insurance or the funding or some aspect of preparation. But when it comes to the CPO hearing, you may conclude that looking at the merits, neither of them, if they had both been there, neither of them would have met the standard for certification.

THE CHAIRMAN: Looking at it from the interests of the putatively represented class of persons, don't they want as their representative, the people who are framing the action in the best and most, to put it crudely, remunerative way?

MR PICCININ: I think there are two answers to that. One point is, if in fact, there is not a lot of difference between the quality of the case theories and the causes of action and all of that, then it is not in anybody's interest to spend a lot of time and money trying to figure out which one is very slightly better, that is not a useful exercise. That is true at whichever stage of the proceeding you are doing it.

The second point is that in any event, it is not good for the claimants, it is not good for the represented persons to have the two PCRs fight against each other and pick holes in each other's case theories and if you still have open the Winder decision and just turn back over the page.

THE CHAIRMAN: Yes.

MR PICCININ: Paragraph 118, you can see the court there deprecating exactly that sort of activity and explaining why that sort of argumentation -- this is the lauding and the extolling and the dissing -- is not regarded as being in the interests of the representative classes.

But the third point is that, in any event, each of the PCRs is going to see the material that is

being advanced by the other PCR and so the risk to which you averted earlier, sir, of there being some good point that one of them has that the other one has not taken, the risk of that being missed and not being picked up and pursued in the litigation is one that we would say is low. So sir, for those reasons, we say that although, of course, as Mr Holmes rightly says, we don't disagree with this, that this is a difficult question with pros and cons. The balance of interests, bearing in mind the interests of the class and also fairness to the defendants, does lie in favour, generally speaking, of having that quick look and then because it's a quick look, it makes sense to do it early.

THE CHAIRMAN: Yes.

MR PICCININ: So that is the general position. Of course you don't need to make a decision today as to what should be done in every single case. The question is what should be done in this case. There are particular factors in this case that militate in favour of early determination. The first one is the position that the parties before you have adopted and it is a simple point. Both PCRs are in favour. At least two of the respondents, I think it may be slightly more than that, are also in favour and none of the respondents are against. So although that is of course not decisive, it is indicative of what the interests of the class and the interests of the defendants may be. The second point is that this is a case where the cost savings of deciding carriage earlier are actually likely to be quite high.

Now, Mr Jowell referred earlier to the possibility of a case where you might have five PCRs. Sir, you pointed out that in this case we only have two and that is true, but there are two points that go the other way. One is that this is a case where there are six, I think, respondent banks, not a case where we have one or two.

THE CHAIRMAN: No.

MR PICCININ: The second point is that this is the case where each of the two PCRs applications are quite chunky and complex and responding to them in full is not going

to be a trivial exercise. So if we run this all the way to the CPO, you are going to have 12 sets of full responses to these highly complex and detailed applications. Six of those could have been probably avoided if we had the early determination.

Finally, sir, you raised the prospect that the defendants might essentially blow open a carriage hearing and turn it into a mini CPO and on that I just want to echo what Mr Kennelly said that you can see the way we have conducted ourselves today and it is likely to be very much the same at the carriage hearing. So unless I can help you further, sir.

THE CHAIRMAN: No, thank you very much, I am grateful. Mr Handyside.

SUBMISSIONS by MR HANDYSIDE

MR HANDYSIDE: We endorse Barclays' position which is the submissions that carriage should be determined as a preliminary issue. I have no additional points to make. We recognise there is no perfect solution, but it does seem to us that the pros of a preliminary issue outweigh the cons.

So far as the scope of the respondents' involvement in any preliminary issue is involved, I would echo what has already been said that the tribunal should not be prescriptive, at this stage, in terms of the nature or degree of the respondents' involvement in that hearing. We can be relied upon to be efficient in terms of the points that we each make.

THE CHAIRMAN: Yes. As the Tribunal well knows from interveners in other actions, people know how to limit their submissions, yes. Have I heard from all the...? No.

SUBMISSIONS by MS KREISBERGER

MS KREISBERGER: No, I am grateful, sir. Ronit Kreisberger for MUFG. Sir, we are the 7th and 8th defendants in the Evans application.

THE CHAIRMAN: Yes, and you have an application to --

MS KREISBERGER: To object in the other.

THE CHAIRMAN: Indeed.

MS KREISBERGER: We are not a Proposed Defendant in O'Higgins. Sir, I don't want to repeat points that have been made. I would endorse the submissions of Mr Handyside, Mr Piccinin and both PCRs. We do support a preliminary issue on carriage. I would like to add two further points to those which have already been made.

THE CHAIRMAN: Yes.

MS KREISBERGER: The first point goes to the conduct of the litigation and the second point is of fairness to the defendants, particularly the defendants that I appear for.

On the general point on conduct of the litigation, sir, Mr Jowell referred to the possibility of remittal back in the event of a judicial review on carriage. That is a point which we think does go into the mix and tilts the balance in favour of carriage as a preliminary issue. The reason for that is obviously we cannot at this stage rule out the possibility of a judicial review.

THE CHAIRMAN: No.

MS KREISBERGER: If that judicial review on carriage were to be successful, the determination on the certification would need to be revisited. Now, that would involve possibly a rehearing or at the very least a re-determination, or there is another approach and we say that approach highlights quite clearly the difficulties rolled up here in dealing with carriage and certification and that is that the Tribunal may be urged to address certification for both applicants to avoid any need for a rehearing of the issue of certification should the initially preferred CPO not be the one ultimately preferred. We say that would be potentially wasteful of the Tribunal's resources as well as the parties'.

Sir, you were taken to governing principle 4.2(e) which requires that an appropriate share of the Tribunal's resources are attributed, allocated to the case. So we say the Tribunal finding itself in a position of having to make a hypothetical determination on

certification is a factor which weighs against a rolled up hearing on both elements. Whereas a phased approach would avoid the risk of a judicial review unwinding the ruling on certification. So that seems to us a potentially important point for conduct of the litigation.

I then have a further point which is a point specific to MUFG, to my clients, so it falls on me to make. If O'Higgins is ultimately preferred in the carriage dispute, then my client will not have to incur the cost of opposing certification as a Proposed Defendant in a phased approach. That has a very material bearing for my clients, as you will appreciate. So we say that is a further relevant consideration which tips the balance in favour of carriage as a preliminary issue.

Sir, I then just wanted to say a brief word on the question of participation in the event that carriage is heard as a preliminary issue. There has been discussion of a joint submission, but the points I have just made about MUFG's particular position in this really show that that would not be achievable. Because MUFG is not a proposed defendant in O'Higgins, we may well have a different perspective from the other defendants. You may have seen, I don't think we need to go to it, but joinder of proposed defendants is treated as a relevant factor for determining carriage disputes in the Canadian authorities.

Sir, I am in your hands, I am happy to take you to it.

THE CHAIRMAN: No, I think I am happy that that must be right.

MS KREISBERGER: I am grateful, I will just give you the reference. It is Mancinelli at paragraph 16, that is the 2016 judgment and that is at tab 16, page 6 of the hearing bundle. So, really, the point is that MUFG must be entitled to make submissions on fairness from its own perspective. So a joint submission will simply not be feasible, not achievable and that is added to the more general point that a joint submission invariably leads to inflated costs when one's attempting to agree a precise

formulation of drafting. So we would be opposed to that.

Then finally, simply to echo the submissions that have already been made on any formal constraint as to the scope of the defendants' participation in carriage, given the novelty of the dispute and the difficulty of predicting the precise nature of the issues that are going to arise. So we would vigorously oppose any laying down of parameters as regards the defendants' contribution, given that we may usefully contribute on areas that are wider. We would also caution against creating the scope for a preliminary skirmish on the question of: well does the defendants' submission properly fall within the category which has been directed? We think that would be a wasteful distraction in the circumstances. So sir, those are our submissions.

THE CHAIRMAN: Thank you very much.

MS KREISBERGER: Unless I can assist.

THE CHAIRMAN: I think Mr Robertson first and then you, Mr Jowell, last, is that -- if you have anything by way of reply, Mr Robertson.

REPLY SUBMISSIONS by MR ROBERTSON

MR ROBERTSON: Four points. The first is to pick up on the extent to which you do a comparative analysis of the case theories.

THE CHAIRMAN: Yes.

MR ROBERTSON: There is one additional authority to draw your attention to, so you are aware of it.

THE CHAIRMAN: No. Thank you.

MR ROBERTSON: It is in the second authorities bundle, tab 14. It is a case called Locking. It is an appeal by Locking against denial of certification and it is heard by the Divisional Court of the Superior Court of Justice in Ontario. The relevant passage is at paragraphs 22 to 25 which is on pages 7 to 9 of the transcript of the judgment but the

key passage is at paragraph 25:

"It is always preferable on a carriage motion to avoid any analysis of the merits of including or excluding a particular claim or defence and the strategy of counsel in doing so. However, it is apparent from reviewing the authorities that some carriage motions are incapable of being resolved by merely considering whether claims have glaring deficiencies or can be said to be frivolous. Sometimes it is necessary for the motion judge [that is the carriage motion judge] to conduct a more detailed and nuanced analysis because there is no other way to properly distinguish between the actions and choose the proceedings that is in the best interests of the class."

Then they say that the judge in this case, he did that, he did not depart from the established principles, referring there to the case of Setterington. So you've got to do the best you can on the material in front of you. That is essentially what the message is. That might involve a more detailed and nuanced analysis. So that is Locking in the Ontario Divisional Court.

The second point I wish to make is about procedure for a carriage motion -- this is just to draw your attention to where we have set out the Canadian procedure and how it differs from the procedure that would be followed in this Tribunal. That is in the annex to our skeleton, paragraphs 17 to 30. That is just to put that on the record. That is where we have set that out. The essential difference is that here in the UK, we front load by putting evidence in with the claim. In Canada, the claim form goes in, the statement of claim goes in but then the evidence is only subsequently served in advance of the carriage motion being heard and it is done by way of affidavit and then they put in their written submissions which they call -- a written submission in Ontario is called a factum. So that is the procedure, it is a bit different.

The third point I wish to make is in response to the defendants' submissions on their involvement in a carriage motion, if one is ordered. They say that they will be targeted

and precise in their submissions but their submissions need to be targeted on the precise issue that falls for them in the carriage motion which is comparative fairness of the two applications as concerns the defence. It is not fairness at large. It is, which is the fairer? Or which is the less fair? So that is why we say their submission should be narrowly focussed and if the Tribunal does not order a single submission, with supplemental submissions, then at the very least, the Tribunal should indicate page lengths, as is the practice in other cases before this Tribunal.

The fourth point and on this one, I think I might just hand over to my learned friend, Ms Victoria Wakefield QC, who is my co-leading counsel in this case and she will just explain why I was wrong to refer to review of a decision in this case.

THE CHAIRMAN: Yes, Ms Wakefield.

SUBMISSIONS by MS WAKEFIELD

MS WAKEFIELD: Sir, this relates to what happens after a carriage motion hearing and whether it would be challenged by way of judicial review or on appeal. I appear for Walter Merricks, so I am familiar with this vexed area. As I understand it now, the question is whether the decision of the Tribunal puts an end, a final end, to one of the proposed proceedings. So I would suggest that because following the carriage motion, the unsuccessful applicant, obviously, would have had their day, their claim would be over, that that would be subject to the appellate jurisdiction rather than challengeable by way of judicial review.

THE CHAIRMAN: Thank you. I notice though, in the Canadian cases, what they seem to have done is stayed the unsuccessful applicant and allow one to proceed. Does that make a difference to your answer?

MS WAKEFIELD: I don't think it does, sir, in this jurisdiction because in this jurisdiction, there would only be one set of proceedings which have been certified which would go

forward to a certification and so the carriage motion, were it to be brought on early and where one of us would lose it, that would be the end of the proposed proceedings, as I read the rules.

THE CHAIRMAN: Yes, thank you.

MS WAKEFIELD: It's interesting, of course, sir, you would have seen in the statute that the language on certification refers to continuing the proceedings. So as I understand it, it is yet to be determined that the present status of proceedings both exist and don't exist in a curious fashion.

THE CHAIRMAN: Schrödinger's proceedings.

MS WAKEFIELD: Exactly, Schrödinger's proceedings, exactly.

THE CHAIRMAN: In terms of the significance of that point in this matter, I mean all we are talking about, really, is the disruption to a timetable which will be broadly similar, whether it is an appeal or a judicial review, so in a sense, obviously, that is a question which is going to matter greatly in other contexts but is it something that we need to grapple with --

MS WAKEFIELD: One might think that an appeal could go quicker, perhaps, because obviously, a judicial review will go to a court, although it is a court of inherent jurisdiction, at coordinate level and then it may itself go up on appeal to the Court of Appeal. So I would suggest that the fact that it is an appellate jurisdiction means it will go faster.

THE CHAIRMAN: Thank you. I am very grateful. Mr Jowell.

REPLY SUBMISSIONS by MR JOWELL

MR JOWELL: Just one short point. It is difficult to reply in circumstances where everyone is in violent agreement, almost everyone, but nonetheless, Mr Holmes made the point that I have accepted that there can be some further consideration at the carriage dispute

stage, of questions going to the merits of the claim and that depends, of course, what one means by the merits. I mean the starting point is that, under the law as it currently stands in Merricks in the Court of Appeal, and I quote from paragraph 54, the Court of Appeal has said that:

"At the certification stage, the proposed representative should not, in our view, be required to demonstrate more than that he has a real prospect of success."

THE CHAIRMAN: Yes.

MR JOWELL: If that is the correct test at the certification stage, clearly in relation to carriage disputes, in our submission, it cannot be right to impose any higher level of scrutiny.

THE CHAIRMAN: I think that must be right, Mr Jowell. I think the problem we have got is we have got the appeal ongoing, so one cannot bank what the Court of Appeal has said.

MR JOWELL: Indeed, and I proposed a pragmatic solution to that.

THE CHAIRMAN: Yes. No, indeed you did.

MR JOWELL: Under the Canadian authorities, again it is in line with this, it is tolerably clear, in our submission, that when it comes to -- when they consider the merits, at least as regards the prospect of success, one is not going beyond -- in the comparative exercise of the carriage disputes stage, one is not going beyond what we would consider a real prospect of success. However, there are wider considerations when it comes to factors which -- I suppose one can consider the merits in the wider sense, when it comes to things like the scope of the class, or perhaps the scope of the causes of action. So just to make that point good, if one goes back to the Mancinelli case which is in tab 16 of the second bundle and if you go to paragraph 46 which is on page 50 --

THE CHAIRMAN: Yes.

MR JOWELL: -- they say:

"It is also my view, consistent with the jurisprudence, that there may be cases in which the actions are sufficiently indistinguishable, that to use the language of Locking, a more detailed analysis may be necessary. This analysis will not consider the merits but will consider, as the court said in Locking, the nature and scope of the causes of action advanced and the theories advanced by counsel for their approach to the case. This may include an assessment of the efficiency and costs of the competing strategies. I regard this factor as important, but not necessarily of greater importance than every other factor."

That is what I accept that one can look at the merits from that perspective but not, in my submission, the prospect of success. I have no further points to add.

THE CHAIRMAN: Thank you very much, Mr Jowell. If you just give us one moment (Pause).

Yes, thank you all very much for your helpful submissions. My firm inclination was to give you at least a decision, even if the reasons followed but it's a tribute to the agreement that I find in front of me that I feel that we need to take time to consider our decision for longer than simply the luncheon adjournment. What I am going to propose is that we reserve our judgment. That is to say we don't hand down reasons or give an outcome but we will get it out as quickly as possible but that we proceed for the purpose of directions as if a preliminary issue were to be ordered, get the timetable fixed on that basis and then if we decide the other way, we can remove matters on the basis it is easier to delete things from the diary than insert them. So that is the course we are minded to take, if the parties feel that that is practically possible.

MR JOWELL: Absolutely, Mr Chairman. I think the directions are broadly agreed.

Discussion re Issues

THE CHAIRMAN: That also struck me. I think one indication that I ought to give is in

relation to the respondents' role in any preliminary issue and it does seem to me that this Tribunal expects and almost always gets the sort of cooperation that it requires from the parties, whether it be extensive or minimal submissions and I think we are well able to look after the process if things go wrong. So with that indication, I endorse everything that Mr Jowell said about the need for efficiency in the process and, indeed, Mr Robertson, but I am not going to be directing, if we go down the preliminary issue route, any kind of page limits or structure for the respondents' participation because we are moving to unchartered waters and it would be, in my judgement, unwise to do so. That said, we have taken entirely on board what the applicants have said and if, as I am sure we will not, we end up with duplicative 500-page submissions, then someone is going to be very cross, so I am sure that will not happen but that is the marker I am putting down. In terms of the other directions, they are, as you say, substantially agreed. Is it worth going through those now?

MR JOWELL: It may be most helpful to do it -- we annex to our skeleton argument, a draft case management order.

THE CHAIRMAN: Yes, let me find that.

MR JOWELL: The first is a confidentiality ring.

THE CHAIRMAN: Sorry, just one moment, Mr Jowell, I need to find it (Pause). Yes, thank you very much.

MR JOWELL: The first is that confidentiality be established.

THE CHAIRMAN: Just one moment. (Pause). Yes, thank you Mr Jowell.

MR JOWELL: I believe that has now been agreed, miraculously.

MR HOLMES: Yes, my solicitor has had carriage of the draft and I think it is now agreed. We are very grateful to all of those who managed to --

THE CHAIRMAN: I echo that.

MR JOWELL: We will provide a copy to the Tribunal in due course.

THE CHAIRMAN: And that includes, does it not, Ms Kreisberger's clients there? It was agreed that they be --

MS KREISBERGER: Sir, I am grateful. I hesitate to interrupt but there is the outstanding matter of our proposed objector application, which has not been objected to by anybody.

THE CHAIRMAN: I saw that and speaking for my part, I see not only the sense but the need for there to be, as it were, an identity of parties, if not the defendants, in the two applications, because to be clear, so far as is practically possible, it makes sense, obviously, to run things in parallel and it would not be efficient case management for your clients to be left out in the cold when they are defendants in Evans.

MS KREISBERGER: I am very grateful for that indication, sir.

THE CHAIRMAN: Can that be included in this order?

MR JOWELL: It certainly can. We will liaise with regard to suitable wording. We have no objection to that. And I think we're the only ones who would have standing to object.

THE CHAIRMAN: No, very grateful.

MR JOWELL: The second matter on the order is the exchange of application documents as between the two CPOs. Our understanding is that will include all of the funding, relevant funding documents which I am not sure whether the Evans' defendants have provided all of those to the defendants or not but they certainly should be provided to us, so that will be an important aspect of --

THE CHAIRMAN: It seems to me, unless there is a good reason, one should have a common confidentiality ring to which all of the parties, embracing non-parties, should have access.

MR JOWELL: Yes.

THE CHAIRMAN: Does that include also the contractual disclosure that I ordered at the

last CMC, the sample contracts?

MR JOWELL: It certainly can do.

THE CHAIRMAN: It seems to me that it should, even if Mr Robertson thinks it is -- Ms Wakefield?

MS WAKEFIELD: Yes, the agreed position, as I understood yesterday, is that all documents filed and served, past and in the future, will now be shared amongst everyone.

THE CHAIRMAN: That was my understanding.

MR JOWELL: Yes, indeed, we have no objection to that. The only people who could object again would be the defendants as it is their own contracts.

THE CHAIRMAN: Very sensibly, they're not.

MR JOWELL: Yes, the next matter I think has been resolved is whether there will be a hearing prior to a carriage dispute hearing relating to the funding or suitability issue. It is my understanding that neither the Evans applicant nor the defendants have an appetite for that, therefore that will not occur.

THE CHAIRMAN: Yes, though to be clear -- obviously, July is a degree away -- were the defendants to have a rethink and they saw a fatal flaw in Mr Robertson's client's application, then as long as it was made in a timely way, I don't think we would be inclined not to hear it but the Tribunal is in the parties' hands for that.

MR JOWELL: That's a helpful indication. On that basis, the hearing would commence, at least provisionally, on the 13th. It might be sensible to retain, at least for the Tribunal to retain the whole of that week, in case there is a funding application to be made by the defendants.

THE CHAIRMAN: Yes.

MR JOWELL: There is a difference in terms of the provisional time estimates. We have suggested two days. However, given the open-ended nature of the defendants'

participation, it probably would be more sensible for the court, as a matter of precaution, to make it three days.

THE CHAIRMAN: Again, on the basis it is easier to cut down than expand, on that basis, three days.

MR JOWELL: Then we have the directions to the carriage dispute. We have got a direction that by 4 pm on 20 March, either applicant may notify whether they seek to rely on expert evidence in relation to the carriage dispute hearing and then by 7 May, they will file and serve any written submissions. By 29 May, the Proposed Defendants will file and serve any written submissions. That will no longer be confined to one joint submission on behalf of all of the Proposed Defendants and I suppose -- that of course, includes Mitsubishi, Ms Kreisberger's client. Then by 4 pm on 22 June, the O'Higgins and Evans applicants file any written submissions and evidence in reply and then on 6 July, there is a filing and exchange of skeleton arguments.

THE CHAIRMAN: That is very helpful. What I suggest, given that the carriage dispute hearing is, as it were, hanging fire, is that you file with the Tribunal, an order containing paragraphs 1 and 2 and that we then, when we have reached a decision on the carriage dispute hearing, make an order, if appropriate, which concludes 3 to 9. I want to be clear I don't have any issues with the order, but it would be slightly odd, I think, to make provision for a carriage dispute hearing that in the end, we don't order.

MR JOWELL: No, that makes perfect sense. So we have provisionally agreed we'll be all ready with the remaining order, in the event that the Tribunal is with us.

THE CHAIRMAN: Thank you very much. Well, I'm extraordinarily grateful to you. Now, does that leave the Evans action directions?

MS WAKEFIELD: Sir, could I just add one point on the joint directions, which canvasses the protection given to and the use that may be made of the exchange documents and, again, this is just setting out an agreed position, as I understand it. If you look at the

top of the O'Higgins draft order, you will see there are two undertakings which are given, "and upon and upon" and that relates to Rule 102. That imposes the well familiar prohibition on collateral use --

THE CHAIRMAN: Yes.

MS WAKEFIELD: -- on both non-party PCRs. A consequence of that is that there needs to be a provision in the order clarifying the use which can be made of documents disclosed in one set of proceedings in the other. We have agreed a position on that and you will see it in due course in the draft order but so that you know the order you are being asked to make is that the documents can be used in either proceedings, but that following determination of the carriage dispute, whenever that may be, any party, including the unsuccessful applicant, can apply to the Tribunal for a different order. Now, it may well be that no such application is ever made but that just draws a line between sharing now, this carriage dispute, only one party goes forward and liberty to apply, essentially, thereafter.

THE CHAIRMAN: That seems very sensible. Again, I see nodding heads. I am very grateful.

MR JOWELL: We have agreed that.

THE CHAIRMAN: Thank you very much. So that is everything on the O'Higgins order, I think, is it?

MR JOWELL: It is, Mr Chairman.

THE CHAIRMAN: So Mr Robertson, you have the sorting out or Ms Wakefield has the sorting out of the matters?

MS WAKEFIELD: I am sorting them out. So the two issues on my list are the funding documents and we seek permission that they be disclosed into the joint confidentiality ring, adopting the same approach as is standard. In our case, those are the two documents that are presently in tab 15 and 16, as filed at the Tribunal and then

confidential versions of the decisions. Again, the Proposed Defendants, save MUFG, who don't have a copy, have agreed to provide us with the confidential version of the decisions which were produced following the last order. And, again, if you are content with that, we would ask that that disclosure order be made and of course, that would go in the joint confidentiality ring as well. That's all that I had on my list. I think the outstanding matter is forum, perhaps. England and Wales please, sir.

THE CHAIRMAN: Yes. So ordered.

MS WAKEFIELD: I am grateful. I think that is everything --

THE CHAIRMAN: Thank you all very much. We're extraordinarily grateful for the quality of the submissions today. Mr Jowell?

MR JOWELL: Just to remind the Tribunal, there is of course, the question of the application which Mr Bacon will be --

THE CHAIRMAN: Oh, the funding question. Yes, indeed.

MR JOWELL: The intention is to come back after lunch.

THE CHAIRMAN: I suppose the question is, how long will you be?

MR BACON: Nicholas Bacon. I hesitate to begin by saying we are agreed but we are agreed and it is really a matter for the Tribunal. Unless the Tribunal wishes me to take you through the funding documents to amplify anything or in respect of them, as I say, there is little between myself and Mr Mallalieu. I think he is at the back of the court and so I would anticipate that we wouldn't need to come back this afternoon unless it was --

THE CHAIRMAN: Well no, I mean the view we have taken is that it is at this stage, for the parties to get into the detail of the funding --

MR BACON: Yes.

THE CHAIRMAN: -- and to raise such points as they consider appropriate and we are content, if the parties don't have anything for our attention, to proceed on that basis.

MR BACON: That is the position, as you know from the skeletons. Matters have been

whittled down gradually, in the course of submissions, as one would expect. In fairness to my learned friend, various positions have been adopted in terms of reserving their right to say more in due course but for the time being, in accordance with your order which raised the question about whether there was anything about the identity or funding of the Proposed Class Representative that precluded them being authorised pursuant to a section 8, there are no such objections.

THE CHAIRMAN: Well perhaps the O'Higgins order could formally record that, just so that --

MR BACON: That would be sensible.

THE CHAIRMAN: -- we've tied off that loose end, but obviously, the purpose of that hearing was, as I explained in the first CMC, a strike-out attack and, obviously, nothing that is said today is precluding anyone from taking such points as to the nuanced funding questions, whether they be fundamental or not, at a later stage. So that is our position. I don't want anyone to think that by abandoning this preliminary issue, there has been a closing out of points.

I think that is -- yes?

MR MALLALIEU: Sir, thank you, Mr Mallalieu for the respondents in the O'Higgins application. Sir, subject to that qualification, I have little to say, other than what Mr Bacon has said. You will have seen from our skeleton argument that there are a number of reservations that we have about various matters and in particular, we have reserved our right to make an application for security for costs but that is not something we seek to advance today and to go back to the description, sir, that the Tribunal gave matters at the directions hearing, we don't seek to advance any argument at this stage, that there is a knockout blow. On that basis, we have nothing further to add.

THE CHAIRMAN: Thank you both very much. So if, subject to finding a form of words that records that, perhaps in the recital rather than in the order, I don't think I'm making

an order, that would be everything.

MR JOWELL: I am grateful.

THE CHAIRMAN: Thank you all very much. I am very grateful to all of you.

(12.55 pm)

(The case adjourned)