IN THE COMPETITION APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Wednesday 14 July 2021

Before:
THE HONOURABLE MR JUSTICE MARCUS SMITH
(Chairman)
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
Respondents/Proposed Defendants

AND

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 A N C E S

Michael O'Higgins FX Class Representative Limited	Scott+Scott UK LLP	Daniel Jowell QC Gerard Rothschild Charlotte Thomas
Barclays	Baker & McKenzie LLP	Mark Hoskins QC
Citibank	Allen & Overy LLP	Max Evans
JPMorgan	Slaughter and May	Sarah Ford QC Daisy Mackersie
NatWest / RBS	Macfarlanes LLP	Tom Pascoe
UBS AG	Gibson, Dunn & Crutcher UK LLP	Brian Kennelly QC Paul Luckhurst Hollie Higgins
Phillip Evans	Hausfeld & Co. LLP	Aidan Robertson QC Victoria Wakefield QC David Baily Aaron Khan
MUFG	Herbert Smith Freehills LLP	Ronit Kreisberger QC Thomas Sebastian

Wednesday, 14 July 2021

(10.32 am)

THE CHAIRMAN: Good morning, everyone. If we could just hold our fire whilst the live stream comes online. I will tell you when we are ready to go.

(Pause)

THE ASSOCIATE: We are live.

THE CHAIRMAN: Well, thank you very much.

Before we start, I will give my usual warning. These proceedings are being live streamed but they should not be recorded in any way, shape or form, broadcast or photographed. That will be punishable as a contempt.

Subject to that, Mr Hoskins, I will hand over to you.

MR HOSKINS: I think you will be delighted to hear that I am not taking the lead today, so I will pass the buck to Mr Kennelly. Thank you.

THE CHAIRMAN: Mr Kennelly. Thank you very much.

MR KENNELLY: So, as Mr Hoskins indicated, the respondents have divided tasks in the time between them. We were given seven hours in total. I will deal first with the law on opt-in versus opt-out and practicability. That will take about three hours, so to the break of the afternoon today, and then, Ms Ford will deal with

the disjunction between the claims and the Commission decisions. That will take about one and a half hours, and then we will hand over to Ms Kreisberger who will deal with causation, another one and a half hours, and then finally, Mr Hoskins will take about one hour on methodologies.

Submissions by MR KENNELLY

So, turning then to our submissions on opt-in and opt-out. Just contrary to the suggestion in the PCRs' skeletons by way of an overall background point, the respondents are not trying to stifle or delay these claims. As the Tribunal has seen, we are not arguing every point, we have not challenged funding or the appropriateness of class representatives, we have not adduced evidence, we have not sought to turn this into a mini trial. We are trying to be focused and constructive, but we do say that if these proceedings are certified, it should be on opt-in basis.

I will deal first, if I may, with the law, and in that regard there were two broad questions raised on the submissions. The first is whether the Tribunal has the power to consider if opt-in is practicable at all, if that has not been raised by the PCRs.

Secondly, the question is, is there a general preference for opt-in if that is practicable?

So turning then to the first question of jurisdiction, there is no need to go to the act, Mr Jowell showed you the relevant provisions, but I would like to take you to the rules and that is in the authorities bundle, tab 82 {AUTH/82/1}. If you are using a hard copy, it is in the fifth volume of the authorities bundle. To make the first and obvious point, the rules are themselves legislation, they are an SI made under powers granted by the Enterprise Act, and if you could then -- you can obviously see that on the first page of the rules.

If you go then, please, to the key provisions here, Rule 79 behind page 46, so that is {AUTH/82/46}.

If I can take you first to 79(2), that deals obviously with the first threshold question:

"In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters that it thinks fits, including."

Then a range of considerations set out for your discretion.

Then 79(3), again you see the same language:

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

including ..."

The two matters that are listed below that.

You have seen in both provisions these words "in determining whether", and that is a formulation that we see also in rule 78 and in rules 94 and 96 dealing with collective settlement and approval of settlement representatives. There is no need to turn those up. My point is that each of these instances where you see that formulation relates to important matters in the context of collective proceedings on which the Tribunal is required to make a determination. So here, in rules 79(2) and 79(3), the rules indicate that -- or the words indicate that in each instance the Tribunal is required to make a determination and is empowered to have regard to a wide range of factors in doing so, including all the matters that it thinks fit. It cannot realistically be suggested that the Tribunal will be constrained in its discretion under Rule 79(2) by the menu of options presented to it by a PCR. It could not be said, because the claimant firms only applied for a CPO and is not contemplating an individual action, the Tribunal cannot determine for itself whether a CPO is appropriate at all.

Then you turn to 79(3) and we look at how that is split up. So first, the two considerations below (3),

(a):

"The strength of the claims."

The reference to strength. So why is that there? How is the strength of the underlying claim relevant to whether the collective proceedings should be opt-in or opt-out? So we say the purpose is plain, the weaker the claims or the more complex or difficult the claims, the more appropriate it is to try them in an opt-in proceeding, because opt-out has a greater potential for waste and oppression if it runs into the sand because of legal or the mentioned legal or evidential problems, so we say opt-out is therefore suitable for stronger cases, and that is reflected in the first part of the Tribunal's guide at paragraph 6.39 {AUTH/83/86} that I will come to. That part, as Mr Jowell said in his submissions, was cited by the Supreme Court in Merricks without any hint of disapproval, to use Mr Jowell's language. That has to be right when you test the opposite proposition. It cannot be said that the legislature intended that the more speculative a claim the better to try it in an opt-out proceeding.

So then we come to the next part of 79(3), the next consideration:

"Whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard

to all the circumstances, including the estimated amount of damages that individual class members may recover."

Again we ask, why does the legislature draw that to your attention?

Now, Mr Evans' team says that is one factor among many and should be given no particular prominence. You have seen that in their pleadings. But the legislature saw fit to give it prominence from the language used in the rule. You are asked to consider, first, whether opt-in is practicable and not to proceed to opt-out until you have addressed that question. The legislature has not asked you to consider before ordering opt-in to consider if opt-out is practicable. The inference, we say is that the rules thereby express a general preference for opt-in, but only where it is practicable, and we put it no higher than that. There is no point, we say, in engaging in an arid discussion about whether that amounts to a rebuttable presumption.

So, these words in rule 79(3) are relevant to our case on general preference, but also to whether you have the power to consider whether the collective proceedings should be opt-in, even if that is not the PCRs' preference, and there is nothing in the legislation or the rules to suggest that your hands are tied by the manner in which the PCRs express their preference.

On the contrary -- sorry.

THE CHAIRMAN: What about a more nuanced approach? Presumably you are not going so far as to say that the manner in which the applicants have approached the framing of their application is irrelevant, it is a highly relevant matter to practicality, it is just not -- practicability, it is just not determinative. Is that the essence of the battleground that we are talking about here?

MR KENNELLY: Sir, yes, that is correct. It is a factor, and that is why we say the burden of proof on practicability, including the impracticability of opt-in, rests on them, they are best placed to speak to what is practicable or not. That is why it is a factor for your consideration.

THE CHAIRMAN: But just to look at it. If we have a situation where -- well, let us make it a hypothetical -- one has two applicants who are saying, opt-out, not opt-in, and they are strongly hinting that if it is opt-in, they are not going to touch it with a bargepole, and the Tribunal is faced with a view that, actually, opt-in is perfectly feasible, it is just that the two applicants, hypothetically speaking, are forcing the Tribunal's hand to go for opt-out by taking opt-in off the table, then that in itself is a factor that goes

into the weighing process, it is just that in that -- I stress hypothetical example -- the Tribunal's choice is effectively between certifying on a basis that it thinks is inappropriate and not certifying at all.

MR KENNELLY: Sir, yes. So, that is why I stressed that it is just a general preference.

THE CHAIRMAN: Yes.

MR KENNELLY: Even if opt-in is practicable, that means there is a general preference to opt-in in those circumstances, but then it falls to the PCR to say, notwithstanding the fact that opt-in is practicable, there are other factors which say that it should be opt-out. So, I think I am agreeing with you, sir, that it is a factor, but of course it cannot be determinative, PCRs' preference, their commercial preference, for example, from the funders' perspective, cannot be determinative of whether it is opt-out.

THE CHAIRMAN: Yes.

MR KENNELLY: So, here we are dealing with a -- if I may say so, a rather bold submission from the PCRs that you are barred from even considering whether opt-in is practicable because they have not put it before you, and we say, far from that being permitted by the legislation, the legislation specifically directs you to consider that issue. So it is not, we say,

a dereliction of duty, as O'Higgins says, for you to order opt-in, you are specifically directed to consider whether opt-in proceedings would work. So your legal duty, in fact, is to be open to that possibility, regardless of whether it is put before you expressly or not.

In the O'Higgins reply, in paragraph 50 -- there is no need to turn it up -- it was suggested that the retention of opt-in, the opt-in option is in large part a result of -- and I am quoting -- a "historical contingency and happenstance". We say that is clearly wrong in view of the base -- the very wording of it.

Then I go to the Guide, the Guide to proceedings and that is in the same bundle of authorities, the fifth volume, {AUTH/83/1}, tab 83, and this is a practice direction covering those made, made under the rules.

If you go, please, to page 86 {AUTH/83/86}, and paragraph 6.38, this is relevant because the PCRs do not challenge 6.38 of the Guide, but if you look at the last sentence of 6.38, again we say, we see the general preference expressed because, under the italicised heading, "Whether proceedings should be opt-in or opt-out", the last sentence of 6.38 says:

"Where the class representative seeks approval to bring opt-out proceedings, it will need to make

submissions as to why that form of proceedings is more appropriate than opt-in proceedings."

So they are directed to address the practicability of opt-in in 6.38.

Then we turn to 6.39, the key paragraph of the Guide for you. This, of course, is very important because it is suggested in the -- well, submitted in the skeleton for both PCRs that part of this paragraph is ultra vires of the rules under which it is made. That point was not stressed as much in oral submissions, but it remains part of their case, the reference to general preference. So you see, first, under "Strength of the claims ...":

"Given the greater complexity, cost and risks of opt-out proceedings, the Tribunal will usually expect the strength of the claims to be more immediately perceptible in an opt-out than an opt-in case, since in the latter case, the class members have chosen to be part of the proceedings and may be presumed to have conducted their own assessment of the strength of their claim."

But that does not mean you conduct a full merits assessment, it is not to be a mini trial, rather the Tribunal will form a high level view of the strength of the claims based on the collective proceedings claim form, and it is expected that if it is a follow-on

claim, that will generally be of sufficient strength.

But then, the next point:

"Whether it is practicable for the proceedings to be brought as an opt-in ...

"The Tribunal will consider all the circumstances, including the estimated amount of damages that individual class members may recover in determining whether it is practicable for the proceedings to be certified as opt-in. There is a general preference for proceedings to be opt-in where practicable. Indicators that an opt-in approach could be both workable and in the interests of justice might include the fact ..."

Include, so it is not exhaustive.

"... that the class is small but the loss suffered by each class member is high, or the fact that it is straightforward to identify and contact the class members."

So, if the point that is being made by my learned friends is that the words "general preference" are an impermissible gloss or ultra vires, we say that is wrong. The meaning of legislation or rules is clear on its face and that is simply reflected in the Guide. So, there is no need, we say, to go to the underlying materials to identify the mischief, but if there is any doubt in the mind of the Tribunal -- and you get that

also from the mischief that the legislation was intended to address and that is why opt-in -- opt-out was introduced, and the way in which the opt-out proceeding was intended to operate. So because it has been canvassed quite extensively in the written submissions, I will go briefly, if I may, to the background material.

I will begin with the Civil Justice Council proposals for collective actions in 2008.

THE CHAIRMAN: Yes, just one moment, Mr Kennelly. Just pause for one second.

(Pause)

Mr Kennelly, I hope it helps, but I do not think you need take us to the underlying materials. Our sense is that the real battleground here is not whether jurisdictionally we are able to choose not to certify or go for opt-in or opt-out, but that it is really a question of weighing the factors, and I anticipate you have a lot to say about weighing the factors in relation to opt-in and opt-out. If our provisional view that you are right on this changes, of course, we will indicate, and I suggest you have some time in reply just in case to deal with that. But I think you have got an awful lot to get through, as have your colleagues, and I would not want you to be pushing at the moment at what is an open door. It may subsequently become locked because

Mr Jowell and Mr Robertson and Ms Wakefield are very persuasive, but at the moment I think your time is probably better directed elsewhere.

MR KENNELLY: Sir, that is a very helpful indication. May I -- I will not take you to much of the background material, but there are a few --

THE CHAIRMAN: No, of course. I am not going to shut you up, but I want to give you an indication as to what is most efficient for your time.

MR KENNELLY: Very helpful, thank you.

So going to the Civil Justice Council document, which is in the B bundle, CPO B, and this was obviously relied on heavily by the PCRs, so it is important to turn it up, but just on the point of what the legislation was intended to do and how it was intended to do it, if you could go, please, to -- very briefly. So {B/8/2}. I will make a very short point about this. At the bottom of {B/8/2}, the PCRs' line is to say there is no presumption as to whether it should be claims brought on opt-in basis -- of course, it is opt-in or opt-out. All we say here is that the Tribunal can see that the proposal was that the Tribunal or court would decide:

"... according to new rules, practice directions and/or guidelines, which mechanism is the most

appropriate ..."

And that is precisely what you now have.

We can turn then -- so we can leave that document and go to tab 12 in the B bundle, {B/12/1}, the consultation document on reform of private competition law actions in April 2012, and to go to page 12 of this. Now, this is relevant because, among other things, it was cited by Lord Briggs in *Merricks* as relevant background, and the first question, page 10 {B/12/10}, "Why is reform needed". I am taking you to this to highlight the kinds of consumers and SMEs that were intended to be protected by the opt-out regime. So you see at 3.12:

"Currently it is rare for consumers and SMEs to obtain redress from those who have breached competition law, and it can be difficult and expensive for them to go to court to halt anti-competitive behaviour."

Then 3.13 {B/12/11}:

"A further difficulty is that competition cases may involve large sums but be divided across many businesses or consumers, each of whom has lost only a small amount. [And that can mean] ... a major case, with aggregate losses in the millions or tens of millions of pounds, can nevertheless lack any one individual for whom pursuing costs makes economic sense."

If you go please then to paragraph 5.6 in this document, that is on page {B/12/28}, this is where the consultation document is discussing collective proceedings in particular. 5.6, having referenced the Which? football shirts case, 5.6:

"Given the fact that there has been only one case in almost ten years, and that that case retrieved only a small fraction of the consumer losses involved due to the low level of participation ..."

Pausing there, that is a point the Tribunal has seen now consistently raised in the PCRs' documents that the regime was intended to ensure that the wrongdoers, the cartelists would not escape the amount of pay out, the proper amount of the damage they caused, because in cases like the Which? case only a small fraction of the overall losses were recovered, and that was quoted in the Merricks judgment also.

Then at 5.9, over the page {B/12/29} on page 29, with regards to the question of whether businesses should be allowed to bring collective actions:

"... the Government considers that businesses who have suffered loss due to infringements of competition law should not be denied the right to bring a collective action to recover their loss, provided that a collective action is the most appropriate means of bringing

the case. Box 3 gives an example of a situation in which to deny rights to businesses would make little sense."

This is the printer cartridges example in box 3:

"... a hypothetical case in which a company that makes printer cartridges has been found to have been involved in a price-fixing cartel, raising prices by £25 per cartridge. Over the period in which the cartel was operating, the company sold 1 million cartridges, of which 500,000 were sold to consumers and 500,000 sold to businesses, for use in office printers. None of the cartridges were resold.

"In such a case, the most natural approach would be to bring a collective action on behalf of those who had bought cartridges. To allow an action to be brought on behalf of the consumers only would simply deny redress to the business users and ..."

Importantly:

"... allow the cartelist to keep half of its ill-gotten gains - something that would be of no benefit to anyone other than the cartelist."

That is what the consultation contemplated as a reason for involving or allowing businesses to make these claims.

So then we go to the government's response to

the consultation, and that is tab 14 in the same bundle, bundle B, tab 14 {B/14/30}. So, the government's decision is to establish the opt-out regime and to allow businesses to make claims along with consumers. And 5.11 on page {B/14/30}:

"The Government recognises that there are strong and passionately held views on both sides of this debate. It recognises the concern of those respondents who worry about frivolous cases and has no wish to introduce a regime that would create a 'litigation culture."

We would paraphrase, a culture where large scale US-style class actions, on an opt-out basis, would be the norm.

That is why, at 5.13:

"The government does ... firmly agree that strong safeguards would be needed as parts of an opt-out regime. The design details will therefore be critical and a range of safeguards, including certification ..."

And so forth.

... will be introduced."

Then 5.15 -- this is against us {B/14/31} -- the government -- at 5.15:

"The government does recognise that there may be some collective actions which would be more appropriately brought on an opt-in basis such as a cases

brought by a small number of businesses all of whom are clearly identifiable."

And again, we say that is just an example, and we will show you the evidence why opt-in is appropriate in this case, even if a large number of businesses are involved.

Then 5.19, the same page:

"... there may be many occasions, such as the hypothetical 'printer cartridge' case highlighted in the consultation where it would be perverse to require multiple cases to be brought or for businesses and ... As was acknowledged by many respondents, it is also the case that small businesses may often have difficulty in bringing cases themselves, and would be likely to benefit from taking part in a collective action."

And then 5.20, this is important because it explains why the government allowed businesses to be included in that distinction, they:

"... considered whether or not different provision should be made for SMEs and larger businesses. However, it has listened to the points made by the majority of respondents ... that it is in practice difficult to distinguish between large and small businesses in terms of access to court procedures."

So similar principles will be applied in the case of

collective actions.

So that is why large businesses are not included, because of that difficulty in distinguishing them from the SMEs, but there is absolutely no suggestion in any of the material that the opt-out regime was intended to benefit large and very well resourced and sophisticated companies.

If I could go then -- if you put that background material to one side, sir, that is all I wanted to show you from that, and take you then briefly to *Merricks* in the authorities bundle, tab 34 {AUTH/34}. For the hard copy users, that is the second volume, and briefly to paragraph 92 to the dissenting judgment of Lord Sales and Lord Leggatt on page 32 {AUTH/34/32}. Now, we do not understand this passage to be in dispute between the Justices of the Supreme Court, it is taken as being common ground. It is a description of the nature of opt-out collective proceedings, and if I could ask you to turn just to the last sentence on paragraph 92 below the first hole punch. So he describes, Lord Sales, the basic way in which opt-out collective proceedings works and then he says:

"This arrangement (which applies only to class members domiciled in the UK) ..."

The relevance of that you will see later:

"... is designed to facilitate action to legal redress for those who lack the awareness, capability or resolve required to take the positive step of opting in to legal proceedings."

If you go to page 33 {AUTH/34/33} final point on *Merricks*, Lord Sales raises some of the risks that are involved in opt-out class actions. He says:

"A class action procedure which has those features provides a potent means of achieving access to justice for consumers. But it is also capable of being misused. The ability to bring proceedings on behalf of what may be a very large class of persons without obtaining their active consent and to recover damages with the need to show individual loss presents risks of the kind already mentioned, as well as giving rise to substantial and administrative burdens and litigation costs. The risk that the enormous leveraging effect which such a class action device creates may be used oppressively or unfairly is exacerbated by the opportunities that it provides for profit. As the Court of Appeal observed ... 'the power to bring collective proceedings ... was obviously intended to facilitate a means of redress which could attract at be facilitated by litigation funding'. Those who fund litigation are, for the most part, commercial investors whose dominant

interest is naturally to make money on their investment from the fruits of litigation."

So that is just a recognition of the risk involved in ordering opt-out proceedings. So that is where you put the authorities bundle away and I will make my brief submissions on the law having reviewed that material.

So on that first question: do you have the jurisdiction even to consider that collective proceedings should be opt-in if that option is not raised expressly by the PCRs. You have our submission about rule 79(3). It expressly invites you, in all cases where opt-out is sought, to consider first whether opt-in is practicable instead. It is a matter for you and it is completely contrary to the discretion that you are plainly given to say that the PCRs can take that option off your table simply by their own expressed preferences.

The -- for this purpose, and I appreciate that a view has been expressed by the Tribunal, but just to deal with it in -- from the skeleton, if I could take you to the PCRs' skeleton, first to the O'Higgins skeleton, and I shall not take you to the Evans skeleton because similar points are made there. Just using O'Higgins as the basis, that is paragraph 27, that is on page 8, on tab -- it is advocates bundle, tab 2, at

paragraph 20 -- sorry, page 9 {AB/2/10} paragraph 29, about four lines down, O'Higgins says:

"The Rule cannot realistically be interpreted as ordinarily requiring such a determination where no-one has seen fit to propose opt-in proceedings."

Well, we have submitted that opt-in proceedings could work. This is a point we are entitled to make because we are making submissions on the facts --

MR LOMAS: Can we go to the next page, please? Are you in paragraph 29?

MR KENNELLY: Yes, I am. Oh, forgive me.

MR LOMAS: Flip forward a page.

MR KENNELLY: So, the point there that is relevant to the Tribunal is four lines down, O'Higgins is saying you cannot interpret the rules as requiring you to consider opt-in when no one has seen fit to propose opt-in proceedings.

We, on the respondents' side, have made submissions as to how opt-in proceedings could work and we have made submissions as to the practicability of them.

Of course, the PCRs did engage with the possibility of opt-in and they rejected it, but in their own claim forms they engaged with the possibility of opt-in and made submissions as to why it would work. There is no need to turn it up, it is in the O'Higgins claim form,

paragraph 49.2 and in the Evans claim form, paragraph 170(c).

The next point at paragraph 30 on the same page is a suggestion that this submission I am making is an invitation to do a merits assessment by way -- by the back door, a kind of merits assessment that the *Merricks* judgment told you not to do. But you see, Mr Jowell took you to the rule at 79(3) which invites you expressly to consider the strength of the claims when deciding between opt-in and opt-out. There is no question of undermining what the Supreme Court says in *Merricks*.

On the strength of the case -- there are inherent weaknesses, we say, in the underlying claims, and Ms Ford and Ms Kreisberger will address you on those later.

Then we come to the key hole in the O'Higgins argument on this, paragraph 35, page 11, if we could have page 11, please {AB/2/11} -- it is page 12 of the {AB/2/12} -- that's it, thank you -- because here we see, at 35, their argument on jurisdiction fall apart because they say that it:

"... it might theoretically be possible, in rare cases, even where there is no opt-in application before [you] ... to ... [consider] whether the claim ought to

be brought on an opt-in... basis ..."

That would be either where it has been expressly acknowledged by the applicant. Or:

"There might be highly exceptional cases where it is manifestly clear… that the claim could be brought[on an opt-in basis]."

So either you have a power to consider opt-in if it is not raised by the PCRs or you do not, and here is a recognition that you do have the power. Really what this boils down to is an argument by the PCRs that you should exercise great caution or that the respondents have a high evidential burden in these circumstances, but again, there is nothing to support that, and in fact, as I said -- as I submitted earlier to you, the PCRs bear the burden here.

So, that is all I need to say on the first legal question.

The next one is whether the Guide is correct to state that there is a general preference for opt-in where it is practicable. You have our submission that this is clearly correct from the language of rule 79 and paragraph 6.38 of the Guide which is not challenged.

The background materials which you see show, as you saw from the CJC report, that you will ultimately be guided by the rules, practice directions and guidelines

in selecting between opt-in and opt-out, and you have seen that. You saw there was a concern about facilitating US-style class actions and having that -- having opt-out as the norm from the 2013 BIS consultation response, and that is why, as you have seen, the government instituted strong safeguards, that is intended to be strong safeguards, including, critically, the requirement to certify proceedings as either opt-in or opt-out.

Now, both skeletons make the point that practicability of opt-in is just one of several factors that the Tribunal could consider, deciding between opt-in and opt-out, and we agree that your discretion in this regard is broad, but as I said earlier, the legislature has seen fit to single out opt-in. You are asked to consider, first, whether opt-in is practicable and not to proceed to opt-out until you have addressed that question, and you were not asked to consider the opposite, that where opt-in is proposed whether opt-out is practicable.

But as I said in discussion with the chairman earlier it is no more than a general preference, and even if you are satisfied that opt-in is practicable, it is open to the PCRs to persuade you, notwithstanding that, that it still could proceed as opt-out.

But finally, the argument on the law here, the argument that both PCRs make that this part of paragraph 6.39 is ultra vires, the rule on which it is made is a hopeless argument and that explains why it was not pressed, of course, in the argument -- oral argument at the beginning of the hearing. The language of 6.39, in full, does no more than reflect the language of the rules and the underlying legislative purpose.

So those are my submissions on the law and, with that, I will turn, if I may, to the evidence and the factual question of the practicability of opt-in proceedings. As the Tribunal has seen, the question is not whether opt-in is comparatively less attractive for the PCRs and their funders; the question is, is it practicable, will it work? What I propose to do, subject to the Tribunal, is go through the issues which have been joined between the PCRs and the respondents on the various factors that go to the practicability of opt-in proceedings. The most important of those is the nature of the class and the value of potential recovery. You have our point, the vast majority of the potential class members are likely to be sophisticated.

By sophistication we do not mean expert in FX trading. What is relevant is whether these PCMs have

the capability and the resolve to be able to opt-in if that is in their economic interests, to paraphrase what Lord Sales said in *Merricks*. And this is a factor that the Tribunal is entitled to take into account, contrary to the suggestion in the PCRs' skeletons, it is obviously relevant as to whether an opt-in procedure is practicable. We say, the sophistication of the class, along with the comparatively high value of the claims show this is plainly a claim where it would be practicable as an opt-in proceeding.

Another important point is not to conflate practicability with 100% participation by the class, that is plainly not the objective of the legislation, because even in an opt-out procedure, 100% participation is not expected and you see that from -- even from the PCRs' own litigation plans for what they expect to happen at the distribution stage. That gives you insight into what is really happening when they talk about 100% participation and you get that from their own documents, and for this could I ask the Tribunal to take up the advocates' bundle, AB, {AB/15A}. This is Evans. So {AB/15A}, the Evans funding arrangements, pages 22 and 24. We will start at 22 {AB/15A/22}.

So, in these tables in the -- in appendix 4, you see the "analysis of potential scenarios for payment of

Mr Evans' costs out of undistributed damages" and in brackets there, at the top of page 22, "35% distribution". So Mr Evans here, is assuming 35% distribution, and if you look at footnote 3 -- I apologise for the very small font -- at footnote 3:

"It is assumed that 35% of the aggregate damages awarded will be paid to class members."

Which is equivalent to the estimated rate of distribution by the value of commerce in the US FX class action.

This does not reflect Mr Evans' expectation as to the rate of return, it is his intention to maximise the rate of participation by class members in the distribution process, and Mr Evans said that in terms when he spoke to you on Monday. But it is interesting that the Evans team themselves, when they are asked to set out the scenarios for payment of their own costs out of undistributed damages, they are assuming 35% distribution based on what happened in the US. Then they have the next scenario, more optimistic scenario for distribution on page {AB/15A/23}, and you see again in brackets, at the top of the page, "42.5% distribution". The same caveat that Mr Evans hopes for better is in footnote 3, but whilst the model is not more optimistic than 42.5% here.

Then you have the most optimistic expectation on the next page, 24 {AB/15A/24}, "50% distribution".

Again, Mr Evans hopes for more, but the Evans team do not try and model a higher percentage of distribution than 50%. That gives you a feeling for what they expect in their own expert view as to what is likely to happen at the distribution stage.

O'Higgins does exactly the same exercise on the same assumptions, I will give you the references, there is no need to turn it up, it is CPO {D/7.2/2-4}. In fairness to Ms Hollway, in her fifth statement, she says that is not an endorsement of those expectation figures, but it is telling that those are the percentages that they are using to model the expected distribution.

So, we say, if the -- so on this question of whether the scheme -- whether the purpose of it is to ensure 100% participation, apart from the fact that the PCRs themselves do not expect that even at the distribution stage, if a class member is informed -- or a potential class member is informed and sophisticated and is able to act effectively in his own self interest, and he decides on the basis of his own experience and judgment that he does not want to opt-in, that prospect is not of itself a reason to order an opt-out collective proceeding. Those companies in those situations are not

excluded or cut adrift, to use the language of the PCRs in their pleadings, or left out in the cold as Ms Wakefield has said on Monday. That is not an accurate description of that scenario. It is plain that that is genuinely the risk that the PCRs raise in the context of this particular class. You have the nature of the class as described in the claim forms themselves, I will not take you back to that. It is in the -- it is at paragraph 71 of the Evans claim form and paragraph 32 of the O'Higgins claim form, lifting the description from the Commission decision.

You will have seen from the claim forms -- again, I will not take you to the passages -- that there are retail FX customers, the micro businesses, are excluded. So genuinely small players are already excluded from the class description. That is in the Evans claim form, para 103, and the O'Higgins claim form at 33, sub 5.

But we see this even more clearly in Mr Knight's statement and I would like to take you to that, and that is in {EV/8/50}, "FX customers". So, I will begin at paragraph 146, if I may:

"The range of FX customers is ... very broad. A helpful way of identifying categories of customers is provided by [the Bank of International Settlements] ... in their reporting guidelines. BIS identifies three

categories of counterparties ... 'Reporting Dealers', 'Other financial institutions' and Non-financial customers'."

I will use those formulations in my submissions.

At 147 {EV/8/51}, Mr Knight explains that he is excluding reporting dealers, he is not discussing them any further, and we are focusing only on other financial institutions and non-financial customers.

In 148:

"The category of 'other financial institutions' encompasses financial institutions that are not classified as reporting dealers, and are defined as follows."

Now, the Tribunal will be bearing in mind the kinds of companies that the legislative regime is intended to protect in addition consumers, but here we are looking at:

"... smaller commercial banks, investment banks ... securities houses ... mutual funds, pension funds, hedge funds, currency funds, money market funds, building societies, leasing companies, insurance companies, other financial subsidiaries of corporate firms and central banks."

Then he breaks it down further, at 149:

"Non-reporting banks ... smaller or regional

commercial banks, publicly owned banks, securities firms or and investment banks."

Then:

"Institutional investors ... 'mutual funds, pension funds, insurance and reinsurance companies and endowments'."

Then c:

"Hedge funds and proprietary trading firms, which are [then] ... divided into two categories."

There is no need to read all of the italicised passage, I will only draw your attention to the four lines from the bottom:

"[These] hedge funds and proprietary trading firms ... typically cater ..."

They cater.

"... to sophisticated investors such as high net worth individuals or institutions ..."

And I think the short point here that these kinds of financial institutions, we say, will be necessarily sophisticated in the sense that I described at the beginning of my submissions. For a large part, these institutions will be heavily regulated, they will necessarily have the sophistication to act in their own commercial self-interest.

THE CHAIRMAN: How far is the uncertainty of the affected

class relevant? Let me unpack that a little bit. I mean, if one had, let us say, to go back to the printer cartridges example, a list of 1,000 purchasers of cartridges that one knew and one could say, "Look, you purchased a cartridge on such and such a date, we can tell you you have overpaid, do you want to come in or not"? That is something which even a relatively unsophisticated putative member of the class could understand. If they say, "Well, thanks very much, but although we appreciate there is no cost to us, we just do not want to opt-in because life is too short", then that would probably be a factor actually weighing against opt-out, because you would say, "Well, if these people do not want to come in ...", it having been served up to them on a plate, "well, why carry on with litigation that no one who has suffered harm particularly wants"?

Here, though, there is a -- I am sure we will be coming to this -- a real difficulty in understanding how the class have actually suffered harm in the sense that the linkage between the anti-competitive conduct, as found by the Commission decisions, and the effect on spreads is one which is extremely difficult, and really, what we are getting is a large number of extremely learned economists saying, "We consider that we can put

1 together such a claim, but we are going to have to do an
2 awful lot of data processing, which has never been done
3 before, before we can tell you whether there has been
4 such an effect or not".
5 Now, put that way, one can see that if one serves
6 this particular offering up on a plate to the relevant
7 sophisticated investors, they will say, "Well, if you
8 can make it walk, we might think about it, we might go
9 for it, but at this stage, when you are just serving up
10 a could have/might have line of analysis which is based
11 upon aspirational analysis of data to put together
12 the claim", does that not rather indicate that one ought
13 to allow something which is, if it is, arguable go
14 ahead, and when one has established the claim, in other
15 words when one has identified the difference between, as
16 it were, the dirty and the clean market operations, and
17 you can say, "Well, look, if you were in this market, we
18 can tell you now, you have suffered this loss and here
19 are the criteria for claiming it", does that not make
20 opt-out, on the facts of this particular case, rather
21 more indicated?
22 MR KENNELLY: Sir, respectfully we would say no, because we
23 have got to look at this from the perspective of
24 the potential class members -- and I will come back to
25 if it really has weaknesses and difficulties and it is

highly complex whether it should be opt-in -- opt-out at all, that is a different point -- but whether it is attractive to potential class members, notwithstanding the difficulties that you have described. From the potential class members' perspective, they have to do almost nothing at all.

The PCRs have very experienced legal teams and very experienced public relations individuals and a sophisticated operation of their own, and they are well capable to explain to the PCMs, even the large institutions, do not worry about the fact that this is novel or complex or large, once you sign up, you will have to do almost nothing between now and distribution, we will run the case for you, we are claiming aggregate damages, you do not need to prove individual loss, and in terms of the -- whatever disclosure you may want to provide, the Tribunal will take a very proportionate view, there is no suggestion where aggregate loss is sought that individual disclosure needs to be produced to demonstrate individual loss. It may be no more than a survey that they have to produce for the purposes of the trial or easily obtainable trading data, but ultimately, you will be in charge of what is ordered, but it will always be proportionate.

But subject to that, they will have to do nothing

before collecting their pot of cash at the end of the day, and the -- that is the PCRs' pitch to them and that will be well understood. That is the very nature of an opt-in collective proceeding.

So, even if the case has difficulties and it is novel, in view of the huge amounts of money that are there for the taking, according to the PCRs, it is still a very attractive prospect, particularly to the core members of the class, because, as I shall show you, there are 681 members of this class who will have claims worth £1 million on average. There are 1,414 members of the class who have claims worth more than £100,000 --

THE CHAIRMAN: Let me just intervene again there, Mr Kennelly. To be clear, what I am trying to frame is how I think the applicants might push back on this so that we get your response in advance. You said there, "there for the taking", and I think that is an area where the applicants would push back. Obviously, they do not need to establish anything that is there for the taking, the standard is, *post-Merricks*, significantly lower than that. Is that not the problem getting into the door of a potential class member? They will say, "Well, what is the bottom line, just, you know, tell me what there is" --

MR KENNELLY: Yes.

THE CHAIRMAN: And they will say, "Well, it could be this, but it does require Professor A and Professor B to be right in their assessment and to do a modelling the like of which has never been done before". Now, at which point, one can imagine a busy director, in even a sophisticated organisation, saying, "Well, thanks, you have taken up five minutes of my time, I am not going to give you another ten, and if you have got a low hanging fruit where you can say, if you can show A, B and C parameters which are easy to establish, you will get a cheque for £1 million, well, come back, but at the moment, even though I accept what you say, that it is not going to cost me very much by way of administrative time, I am not going to sign up to something which is going to cost me any time because it is so speculative".

Sorry, I have put it tendentiously but --

MR KENNELLY: I see the picture, but again, any sensible, rational business is going to work out the net benefit to it, and if a business is offered -- I mean, again, it is proportionate. A very, very large company may require a bigger return for it to make sense and I fully accept that, but even for a large company, if they say, you could get one or two or £10 million here and it is -- focusing on the core group is important, because

once they are in, he has momentum for the whole operation, it makes it much easier then to draw in the tail of smaller claims.

But the net benefit to the class member who is coming in with a claim worth 1 million or £2 million is enormous, because the effort required on their part is de minimis and the return is very substantial. So it is not a question of a lengthy amount of time or litigation in any traditional sense. This is a completely different type of case: they sign up, there may be some information required at a later stage, and for doing almost nothing at all, they stand to receive this cash windfall. It is even a point which, from a fiduciary duty perspective, a director would be fair to think, is it really sensible for me to turn this away when, even if the claim is speculative, the return for us could be very substantial, provided it is properly brought and it is brought by respectable lawyers and it is brought in a respectable way, which it would be. That is the whole presentation the PCRs make to you and why we do not contest that in terms of their appropriateness.

But --

MR LOMAS: Mr Kennelly --

MR KENNELLY: May I -- may I -- just to finish the point on

this because it is really important. If it is as speculative as you are making out, sir, if it is something which is speculative, never done before and requires very strong assumptions by the experts, it is not suitable for opt-out at all. That is why the Guide is very clear, speculative cases should be opt-in, they need the rigour of opt-in to prevent it becoming a car crash, to use the Tribunal's own expression, not in relation to the claims, more broadly.

Sorry, I interrupted one of the panel members.

MR LOMAS: No, I was interrupting you I think. I was just going to ask, are you going to go on at some stage to talk about whether that model would be fundable?

MR KENNELLY: Absolutely, sir, yes.

MR LOMAS: Okay.

MR KENNELLY: It is coming near the end, but I will be dealing with it at length, so if you are patient, Mr Lomas, I will be getting to it, and I am doing well on timing so I shall not be constrained in that respect.

So, we are looking here at the nature of the class and the value of their claims, and I am leaving Mr Knight now and going to Mr Ramirez, primarily in his first report, to look at the non-financial customers. He is in {EV/10}, same bundle, tab 10, same bundle. And page 26, please {EV/10/26}.

So I am going to go to the non-financial customers first, even though their share of the VoC is relatively small. So, 61, Mr Ramirez says:

"To ascertain the population of non-financial customers in the classes, I consider that the non-financial customers transacting with FX dealers are largely importers and/or exporters of goods in the UK that require FX in their regular course of business."

Which we say, again, suggests a certain level of sophistication.

Then at paragraph 66, we see his exclusion -- on page 28, please {EV/10/28}, the bottom of that page:

"The number of enterprises which import and/or export is further adjusted by excluding 'micro' and 'small' sized enterprises ... [he makes] this adjustment because it is less likely ..."

Over the page at {EV/10/29}:

"... because it is less likely that smaller enterprises participate in the FX market, or if they do, it is may be unlikely that they transact with FX dealers ... supported by survey evidence indicating that larger exporters are more likely to invoice in a currency other than the exporter's currency. This implies that larger companies are more likely to

participate in FX markets in order to exchange foreign currency."

So that is what we are looking at in NFCs.

Then we have the conclusions on class size, page {EV/10/30}, and you see the table for estimated class size. For financial institutions, it is about 18,000 for non-financial customers, 24,000, about, so the estimated class size in total is about 42,000.

Then, the share of VoC -- share of VoC, please go to {EV/10/75}, paragraph 163(a), at the bottom of the indented and italicised paragraph, 163(a):

"[The] financial [institutions] account for 90.4% of the VoC."

And then (b):

"Non-financial customers account for a small share of the classes' VoC, [only] 9.6%."

So, when we talk about the core group, we are talking about financial institutions, and I will come back to that, within the financial institutions.

Next, Ramirez 2, please. That is in the C bundle, tab 7 {C/7/1} -- the CPO C bundle, page 7 {C/7/7}. Here Mr Ramirez makes the point, at paragraph 15 -- paragraph 15, about just below the halfway point in paragraph 15, he applies -- he says:

"... an often-used definition of SMEs as firms with

less than 250 employees ..."

So he says:

"... 18,065 (or 99.5%) of the ... financial class ... members [will] be considered SMEs."

We say, first of all, that is rather counter-intuitive when you think about the kinds of undertakings that were listed in Mr Knight's evidence, but we say that is explained by the fact that Mr Ramirez is defining SMEs by employee headcount. You have our point in the rejoinder, at paragraph 52(a), that that approach, for example, the BT pension fund would be an SME because it had 173 employees, but it has -- or in 2019, had assets of £58 billion. Many very powerful hedge funds have similar numbers of employees.

Then he goes on to say at paragraph 19, {C/7/9}, he is dealing now with the non-financial business entities, the NFCs. He says that, if you look at the bottom of 19, about five lines from the bottom, he says about 76/77% of the NFCs are medium enterprises, with 23% being large enterprises.

For the claim values -- the claim values for those, if you go to page 14 in the same report {C/7/14}. Looking now at paragraph 28, last line, on the basis of his 42,000 class members, the average claim value per class member is 63 -- well, £64,000 approximately.

In the same document, page 17 {C/7/17} at his table 5, he breaks down the non-financial customers, because here, Mr Ramirez is trying to show just how small some of the claims can be. Page 17, paragraph 36, table 5, and his point here on non-financial customers is that, for the larger ones -- that is the last column on the right, the average claim is £35,000, but for the smaller NFCs, the ones he describes as "medium-sized NFCs", the average claim is only three and a half -- approximately £3,500.

This is a large minority of the whole class, but it is still a minority. I have three points to make on these NFCs. The first is that both -- for the companies in question, we say, both £35,000 or even £3,000 may well be worth opting in for, in view of the minimum effort required of an opt-in class member. Even a figure of £3,000 is much higher than the values canvassed in the consultation or in the *Gibson* case or the *Merricks* case, and you have that in our CPO response, where some £20 or £40 or even £300 were in issue. But we say also the size -- these smaller claims go to the question of retaliation, and it is a point I will come to later. It is hardly credible that medium size NFCs would be concerned about sticking their head above the parapet if they are claiming £3,000 or £4,000

in a class action where thousands of others are claiming for far greater sums, and I will come to those, the core group among the financial institutions.

Now, I accept, as I said to the chairman in our exchange, it is possible that some NFCs that may, of course, be very robust, large financial -- financially robust institutions, notwithstanding having only 200 employees, may not bother opting in for only £3,000, but the collective proceedings regime is not designed to ensure that every single class member recovers, and you have my point about what the PCRs themselves expect at the distribution stage.

The important point -- and this is to paraphrase what the chairman said to me a moment ago -- is that when an NFC chooses not to opt-in because the amount is too small, they will have taken that decision as a sophisticated and informed business fully capable of indicating its own economic self interest. But even if you treat non-medium NFCs as having a sufficient incentive to opt-in, more than 97% of the volume of commerce will be recovered by the other financial institutions and by the large sized NFCs, all of which do have compelling incentives to opt-in and, we say, would plainly do so in large numbers. That gives the lie to the notion that is suggested in the PCRs'

skeletons that an opt-in action would result in the respondents escaping their liability. The point that an award of damages would be insufficiently high to have a penal or a deterrent effect in -- the Evans reply said, it would be contrary to exacting appropriate payment by the defendants to reflect the wrong done.

Well, we say, first of all, that is nonsense in view of the massive penalties the banks have paid in billions of pounds, penalties paid by banks, including UBS. But in any event, once the core group of financial institutions opts in, that covers 90% of the VoC, about £2 billion, and this core group will definitely opt-in, they have no economic reason not to. It is slightly higher in this case, but even easier for them because of the ease of the opt-in route. We see that clearly in the appendix B to the second Ramirez report. That is on page -- still in tab 7, page 82 {C/7/82}. There is a series of columns in this table, and Mr Ramirez has characteristically given us a very informative selection of information.

So, a series of columns and, if you look at the last two on the right -- sorry, this is -- I am in the C bundle {C/7/82}. Thank you. So, just to clarify, before I went to this document when I said the core group constituted 90% of the VoC, I meant 90% of the VoC

for the financial institutions, the core group that I will take you to constitute approximately 79% of the VoC for the whole class, and you see that core group on the last two columns of the table. These are just the financial institutions covered by the class.

Mr Ramirez lists them by turnover and, if you go down the column, the first right, you see the non-reporting banks, there are 76 of them. Total claim value, just for those 76 non-reporting banks, of over £443 million, an average claim value of 5.8 million. Institutional investors, 165 of them, total claim value, 403 million, average claim per member, 2.4 million. Hedge funds and proprietary trading firms, only 66. Total claim value, 251 million, average 3.8 million. Then, others -- 36 others, 70 million claim value in total, average 1.9.

Then you have slightly smaller companies where the annual turnover is in the second last column on the right: 91 non-reporting banks, claim value £319 million, average 3.5 million; institutional investors 106, 155 million total, 1.4 for each of them; hedge funds, 97, total 224 million, average 2.3.

If one looks at just those two columns, that adds up to 681 class members. 681 class members with a total claim value just below £2 billion. So that inner core

have truly enormous claims and it is a relatively small number of class members who, we say, would obviously have a powerful incentive to opt-in given the minimum effort required for them.

Then, the further two columns -- or the three columns to the left of those two columns where the turnover is between £1 million per annum and £10 million per annum. Those are the claims which, on average, are over £100,000. If you add those class members with claims on average of over £100,000 plus the very large plus £1 million claims, you get 1,414 class members, so that is 1,500 class members with a claim value of £2.1 billion.

PROFESSOR NEUBERGER: Mr Kennelly, if I can just clarify a point I do not quite understand. Is it part of your argument that a potential claimant who would not bother to claim if it were opt-out would be prepared to be part of an opt-in action, or -- I mean, is there any reason why somebody who would not claim under an opt-out would feel strongly enough to opt-in to an opt-in claim?

MR KENNELLY: There is obviously some similarity between the considerations. The inertia arises in both scenarios. It will affect those who will choose to opt-in and, plainly, the PCRs expect a high level of inertia, which will stop people opting in, even after

they have succeeded and there is money on the table.

In my submission, from the class members' perspective, there is a degree of inertia, that has to be recognised on both sides, but it is relevant here to notice the role of the PCRs in engaging with class members in the two different stages, because recognising that inertia at the opt-in stage, the degree of inertia, the PCRs will have an incentive to book build, to go out to these -- especially to the core group, and demonstrate to them the huge amounts of money that are potentially available to them for minimal effort. They will have a very strong incentive to do that.

At the distribution stage, the PCRs obviously have an obligation to organise distribution, but the incentive is not as great, especially if, at the end of the trial, because of causation and other problems, the pot is not as huge as they currently project. So there may be less of an incentive, at the distribution stage, for them to encourage full take up of the pot. I am not suggesting any bad behaviour; it is a question of incentives. So that may well be a relevant factor and that is why we say that the incentive the PCRs face is relevant as well in deciding whether it should be opt-in or opt-out.

But the point -- sir, just to be clear about

the core group, these institutions are the ones best placed to act in their own self-interest. There is no question of these people having any retaliation concerns. True it is for them, 1, 2 or £5 million may not be a huge amount of money, but for the effort required, the option or opportunity to have that is obviously attractive, and once they are in, as I shall explain, that provides a huge amount both for the funders, to Mr Lomas' point, but for the tail of smaller claims, because -- and just in terms of whether they -- when these large companies would opt-in, it was accepted by Mr O'Higgins that the core was likely to opt-in. We have that in the surrejoinder at paragraph 6. There is no need to turn that up, because, in very interesting exchanges between Mr Evans and Mr O'Higgins with Mr Lomas, sir, it was clear that they both think that an opt-in could work, but for the core group, for the largest class members. You have that in the transcript -- it may be useful to -- I will give you the references. I know -- for the purposes of time, I will give you the transcript references, it was at Day 1, page 64, line 2, to page 65, line 5, and that is where Mr Lomas was asking whether the opt-in structures could work -- actually -- well, since it is in front of me, we will go to it. It is on {Day1/64:2}, please,

just above -- page 64, line 2, so it needs to go up. Thank you. Thank you, stop.

So, Mr Lomas says:

"Just picking up the chairman's question ... may be something we wish to pick up it the legal teams ... is ... the equivalent of an opt-in action going on before the High Court ... 100 parties split into 11 groups ... does that not show that opt-in structures can work?"

Mr O'Higgins says:

"I think it shows that opt-in structures can work for large organisations."

But he does not think it would cover the long tail of cases in this case, and he thinks, for capturing everyone, opt-out works better.

Then, Mr Evans is at line 17, he says -- he echoes Mr O'Higgins' points and he talks about the *Volvo* and the other case, but then at line 25, he says, he shares Mr O'Higgins', but:

"... the *Allianz* case actually shows that opt-in works very well -- potentially works very well for large companies that are well funded and exposed significantly ... doesn't work for those who are less engaged ..."

So both Mr Evans and Mr O'Higgins assume that in an opt-in action these larger institutions, as I say, they are the core of 681 or the larger core of 1,414, are

very likely to opt-in, and --

MR JOWELL: Forgive me for intervening, but I have to put down on record that that is not how we understood the true gist of these questions or answers. They are not addressed to an opt-in action of the type that my learned friend is advocating. He is talking about -- specifically, about the *Allianz* action and he is talking in general terms about large organisations.

THE CHAIRMAN: Well, we will obviously take these answers and take our own views in relation to them.

I did have one point, I think, regarding *Allianz*, which is this: as I understand the case -- and do please correct me if I am wrong, because I could well be -- the claimants there are people who can arguably say that they have been directly hit with a transaction which is not, as it were, at the market rate because of the infringements of the traders that we are looking at. In other words, they are differentiated from other market players in that they can say, "We entered into a specific set of trade or trades which have been, for us, loss-making in the sense that, had they been at the proper market rate, we would have got more".

In this case, there is a lack of specificity, because as I understand the applicants' position, they are, to slightly differing extents, but generally

speaking, focusing on an effect on the spread which is, as I say, to varying degrees, a market-wide matter, such that one cannot be differentiated out as being someone who has suffered a loss specific to them because everybody else has also suffered that particular loss.

Now, does that have an effect on one's willingness to come into an action such as this in that one might imagine that if you can see that you have been wronged in a particular specific way, you might be more inclined to opt-in, than where, actually, what you are saying is there has been an effect on spread which affects everyone who has been dealing in transactions with that spread?

MR KENNELLY: Sir, the *Allianz* case, as you saw from the pleading, which (inaudible), includes bid-ask spread claims --

THE CHAIRMAN: It does, but I would not say it was front and centre the main thrust of the claim. I mean, as I say, I am willing to be corrected. I accept it is there, but it is not the primary way of putting it, is it?

MR KENNELLY: It may well turn out to be, we do not know at this stage. But there is no doubt there is a significant bid-ask spread element to the *Allianz* claim and there is a substantial spillover claim where the claimants allege that they were prejudiced even when

they traded with non-defendant banks by virtue of a lingering effect which they say persists, what they call the ribbon of artificiality persists through the whole of the claim period. Notwithstanding the episodic nature of the infringement, there was this persistent effect which infected the prices they paid, the bid-ask spreads throughout the market, even when they traded with non-defendant banks, so there is actually a parallel with the claim before you --

THE CHAIRMAN: But there is an additional element in *Allianz* which I think is the "we in particular have been harmed" compared with others. That is the point that I am getting at, that there is a kind of, perhaps visceral might be the way to describe it, visceral response to, if you have been particularly affected by the actions of another, then that serves as a prompt to opt-in which perhaps is not present here. Again, I am trying to articulate points that may very well not be made by the applicants because they are so bad, but I put them to you so that we can at least get your response on the record.

MR KENNELLY: No, not at all. I mean, my Lord, so you are absolutely right, there are elements in *Allianz* which are not here, the ribbon of artificiality point that I made goes to the benchmark infringement that is

described, it is the umbrella effect which, in *Allianz*, is pleaded to include these bid-ask spread claims. So, they are not exactly the same I accept that. But if the concern, sir, is that in *Allianz* there may be businesses that feel that they have been directly harmed and have a visceral desire to sue the banks for what they have done, one must remember that both in *Allianz* and in (inaudible) action that precedes as opt-in, the class members are cold-eyed financial institutions and large corporates who are not going to be motivated by visceral emotion. They have duties to their shareholders and they will -- they will do their own cost-benefit analysis internally and if they are told that, for minimal effort, as part of this legitimate, respectable and court-endorsed opt-in proceeding, you, with thousands of others, can gain up to £1 million or £2 million for minimal effort, that is not only appropriate, but it may well be your duty to be involved. That is the judgment call that the core members will make, and they will be sophisticated enough to see how they could have been harmed and they will be sophisticated enough to see that there may be speculative elements. But -- and you will see this when I come to Mr Maton's evidence, all the things that deterred the core when Mr Maton was lobbying them have

largely disappeared; it is much easier for them now in an opt-in proceeding.

And this question of momentum is really important because once the core has opted in, the collective proceeding will be worth billions of pounds, even with only 700 class members, the claim is worth basically £2 billion. I will come back to the significance of that for the funders, but it obviously provides momentum for the smaller claims, momentum because it secures the funding and provides safety in numbers if retaliation is the concern. I say, "encouraging smaller claims", of course, these are not small in the sense of the legislation, the kind of size of claims that were canvassed in the consultation. As you saw in appendix B to Mr Ramirez's second statement, even the smallest claim on average for the smallest financial institution type is over £15,000, and overall, for the whole class, including the non-financial customers, on average over half will have claims worth more than £10,000.

Now, the PCRs say it is pure speculation that the core opting in will give momentum for the rest, but we say that -- we say that that is exactly what the PCRs say will happen for the non-UK class members.

So before I go on to that, I forgot to give you the transcript reference. Just on the point of what

Mr Evans and Mr O'Higgins said, in view of Mr Jowell's intervention, I will just give you the reference {Day1/59:18-22}. That is Mr Evans also talking about how the PCRs' teams have been engaging with what appear to us to be the core group.

But moving on to what the PCRs themselves say about momentum for non-UK class members. If you go to the O'Higgins reply -- and please do go to it, this is in the CPO A bundle, behind tab 2, page 24 {A/2/24}, and I am looking at paragraph 58 -- sorry, yes, 58(3). Here, O'Higgins says, about four lines down, they make the point:

"... the claim is viable, irrespective of whether those domiciled abroad... do... opt-in ..."

But this is important:

"But it is clear that once there exists a large opt-out collective action in which persons domiciled in the UK are already enrolled, the barrier to entry for opting in will be reduced."

And that is exactly my point. Once you certify an opt-in collective action and a large number of the core group opt-in to recover the £2 billion that they are told is on the table for them ultimately, the barrier to entry for the tail, for the smaller claims, is plainly reduced. We rely on that. You will also see on page --

same bundle {A/2/26}, page 26, same tab, paragraph 65:

"As to those domiciled outside the UK ..."

They are not the core of the claim. PCR, they say, PCR has proposed to:

"... publicise the opt-in claim element of the claim and it is hoped that a substantial number may be persuaded to opt-in, particularly with the 'momentum' of an opt-out claim in respect of those domiciled in the UK."

We say that very same momentum will arise once you order opt-in and the core opt-in following that.

The last point I want to make on Mr Ramirez's evidence is just to give you the evidence. You have seen in the pleadings references to high net worth individuals. Let us give you the reference. Paragraph 23 of Ramirez 3. That is {C/10/1}. It is not in dispute this is a very small proportion of the class and many of these will be very sophisticated and will have at least the benefit of very sophisticated advisers based on their wealth. That is {C/10/13} page 13 of Ramirez. We do not understand that to be in dispute and so I will move on to the factual --

PROFESSOR NEUBERGER: Can I just raise one point, which is this is putting a very heavyweight on the size of the claim. I mean, I think it ought to be clear from --

I think that is largely based on Mr Ramirez's evidence and Mr Ramirez's evidence on the size of the claim is very much a speculation in terms of this is the margin and this is the sort of per cent overcharge is in typical cartel claims, so it is not based in detail on the facts of the case, and as was established yesterday, the size of the claim nobody knows until the empirical analysis is done. So, although we have an indication which is really valuable for this discussion, I do think it is important not to put too much weight on the precise numbers.

MR KENNELLY: Sir, of course. Of course, we make the point ourselves that much of this is speculative. That is our own submission to you which you will hear in due course. But even if one heavily discounts these estimates to reflect their uncertain nature, they are still huge sums of money when one thinks about what the opt-out collective proceeding process was designed to do, and one could divide the whole thing by half and one would still have an extraordinarily large, powerful claim, both as the totality, but also by reference to the core group of financial institutions (inaudible).

THE CHAIRMAN: Well, Mr Kennelly, I think, if that is a convenient moment, we should take a five-minute break just to enable the transcriber to take a break, but

I will leave you with this thought: is there a -- what is informing this very interesting debate is that there is a mismatch between the criteria that you say that apply to the question of opt-in/opt-out versus the criteria which apply to certification in general terms, in the sense that what the Supreme Court has taught us is that, in terms of assessing the potentiality for success, that potentiality is really quite low, in that we do not have a significant role to play in rigorously assessing the merits. It does seem to me quite possible that a claim that we might think, come trial, might actually very clearly lose should nevertheless be certified.

Now, that being the case -- and I have expressed myself very generally in terms of what *Merricks* does teach us, but taking that as a very loose encapsulation of what it does teach us, one can see that members of the class capable of certification might very well say, "Well, if that is what you are selling me, I am just not interested, even if you have got the no cost minimal effort of opt-in, even so -- they might say -- well, we are just not interested". Now, I think that is the fault line, because you say that is a very clear indication that it should either be opt-in or nothing, because unless you have got the level of interest, it

just should not -- it should be put out of its misery early on.

I think the answer that the applicants would be putting is to say, "Well, if you take that approach, then you are actually diminishing the effect of *Merricks* and what you lose is the public policing of a claim which meets the very low hurdle and which can be brought on an opt-out basis, but where opt-in is not suitable for the very reason that you are saying it should not be certified at all, effectively, because of its speculative nature, it is just not attractive to persons concerned.

Sorry, I have put that very badly, but I leave that as one of the perhaps conflicting weights that we have to apply on certification when viewed in the round versus certification in terms of a particular basis, which I think have a certain pressure that certainly it would be helpful to have your assistance on how we incorporate the teaching of *Merricks* into the specific opt-in/opt-out discretion. I know you touched on it at the beginning and I am sure you will be coming back to it, but for my part, I certainly would welcome assistance on that.

What we will do is, I see it is 10 past, we will come back at quarter past for your submissions. Thank

you very much.

(12.10 pm)

(A short break)

(12.17 pm)

THE CHAIRMAN: Yes, Mr Kennelly.

MR KENNELLY: Thank you, sir.

The transcribers said that there might have been some problems with my microphone earlier on. I hope the Tribunal will indicate if you cannot hear me clearly, I will try and fix that over the short adjournment.

THE CHAIRMAN: Certainly we will do so. I have not discerned any problems and I see my colleagues shaking their heads, so -- but that goes for everyone. I am very keen for the record to be clear for all, so if there is a problem, perhaps do not raise it here, but email the Tribunal and we will rectify it, or raise it for someone else's rectification. So thank you for raising it.

MR KENNELLY: I am grateful sir.

So coming back to the question that you posed to me just before we broke. I think the first point you made was, what about class members who may be deterred, notwithstanding the lack of effort they have to make and the absence of costs risk, they may be deterred by

the complexity or the speculative nature of elements of the claim. In our submission, in our respectful submission, you are right to focus on that being a deterrent because, if the claim is strong, if it is not speculative, well then, there is no reason at all why certainly the core group would not opt-in. One cannot give any rational reason why they would not do so. That is my first point.

My second point is, if these claims are weak, if they are speculative -- and let us say "weak" is too strong a word, but just speculative, one does not know, and that tells against the fact that it is obviously strong, to use the language of the guidance, that is a factor militating against opt-out. The legislature has given you an indication in rule 79(3) that the strength of the claims is a factor which you take into account in deciding between opt-in and opt-out and it is a factor militating against opt-out if the strength is not clear. That is not to undermine *Merricks*. On the contrary, the Supreme Court in *Merricks* drew specific attention to the fact that, notwithstanding what they said about what one does with the merits at the threshold stage, whether one has (inaudible), when one makes that decision between opt-out and opt-in, you are specifically directed to

consider the strength, it is a different exercise, and there you are permitted to engage and to decide if the case is not obviously strong it is more appropriate for it to be opt-in.

THE CHAIRMAN: Yes, though, of course, there is a hidden point there. When you say making a choice between opt-in and opt-out, that implies that there is a choice to be made, and, of course, that brings us back to where we started, which is to what extent we apply weight to the fact that opt-in is not on the table. Of course, I have your submission that here, whatever might be the case elsewhere, here you are saying there is no good reason for there not to be an opt-in option and that is something which militates very much in favour of our saying, even though there is not an opt-in option on the table, we should say, we certify so far, but no further, and if that means the action does not go ahead, then so be it.

MR KENNELLY: Indeed. In considering -- but in considering that factor, in considering whether, realistically, the case will go away if it is not certified as opt-out, you do have to weigh the evidence which the PCRs have put before you, and it is primarily their evidence that needs to be tested. We are criticised for the lack of evidence we put before you, but this is not a mini

trial. You are testing the PCRs' evidence and you have to ask what are their reasons for saying that opt-in would not be practicable. They say, "Well, it is not true about the funding", and I will come to that, but I have already flagged my submission that if there is a claim worth £2 billion, that should be good enough for the funders. But I will come to the specific funding evidence in a moment, which was very carefully drafted; it does not say they will not be funding for opt-in. Then, one looks at the concern on the part of Mr Evans and Mr O'Higgins, it is that even if that they agree, it seemed to us, that the core will opt-in but the tail may not. But then, we say, your evidence itself explains how, if there is a core group on foot and the case is progressing with funding that gives momentum and provides a traction for the tail to opt-in.

I will come to the publicity question, how they can reach out to all class members, including the smaller ones -- the ones with smaller claims -- and they have a very effective mechanism in place already to ensure that the claim is publicised, which, when combined with momentum, means that that tail concern falls away. That is why, sir, when you ask -- when you asked what weight do you give to their submission that there will not be an opt-in case at all, we say you give very little

weight because their own evidence does not stack up on that question.

THE CHAIRMAN: Can I throw in another point which might weigh in the minds, particularly of the big institutions who you say would opt-in as a -- if I may be colloquial -- no-brainer, and it is this. We saw yesterday that all of the economists were stressing the importance of data, and one could see that if a very large FX participating bank opted in, the applicant, or applicants themselves, whether they were using the offices of Professor Bernheim or Professor Rime, would be saying, "Oh goody, you have got an awful lot of data here which we ourselves would like to want to have". In other words, there would be a positive advantage in going for the data that this particular class member opting in would have.

Of course, you are right, the Tribunal would exercise a very high degree of proportionality in terms of ensuring that disclosure does not operate as a disincentive for these matters, but one could see an argument for the very advantage of an opt-in that it accesses data acting as a disincentive in that, suddenly, the bank is going to have to envisage the probability of having to extract vast reams of data so as to sort out the sort of difficult matching

problems that we saw articulated yesterday when you have got trades at different times and you are trying to make sure that you have got a single consistent dataset on which you can apply your econometric analysis.

MR KENNELLY: Certainly. So, sir, the first point to make there, of course, is that in an opt-in proceeding, it will be the defendants' trading data. The defendants will be expected, in due course, to produce trading data and that will be of assistance to the Tribunal.

THE CHAIRMAN: Of course, I accept that as a given, but I am looking at the disclosure on the other side.

MR KENNELLY: Indeed, and, well, we accept that -- and of course, we make a virtue of it -- one of the virtues of opt-in is that at least you have the potential to get further material from individual class members and the PCRs' economists themselves may benefit from having that material. But because they will be told that the PCRs, and they will understand that the Tribunal exercises proportionality control, and because they will not need to show, not necessarily, individual loss, which is, again, the most onerous aspect of disclosure from a claims perspective in follow-on damages actions, pass-on disclosure, the detailed disclosure demonstrating one's own loss is the most onerous disclosure that the claimant has to produce, and that

does not arise where aggregate damages are being sought in the same way. So they can be reassured, that is, say compared to the *Allianz* case, their disclosure burden should be far less onerous.

Even if there is the potential of having to produce some document, some information, some data, knowing that they are subject to proportionality control and knowing that it is not the kind of burden that falls on a claimant in an individual action, that would be a price worth playing if the ultimate return is as great as the PCRs say it may well be, and in view of the other -- well, in view of the lack of effort that they have to make otherwise.

THE CHAIRMAN: Thank you.

MR KENNELLY: So, sir, just, if I may finish the point I was making before --

THE CHAIRMAN: Of course.

MR KENNELLY: -- about *Merricks* and the relevance of *Merricks*. You have my point that if it is weak, if it is not clearly strong, rule 97(3) tells you it should be opt-in. But -- and this is the point that I did not make -- the PCRs themselves say, of course, that their case is not speculative, it is very strong, and they say that by reference to the fact that it is a follow-on action and they stress, as you see in the papers,

the settlement, the settlement which Scott+Scott got in the US, the $2 billion-odd -- sorry, $1.3 billion that the defendants paid in the United States, and that also provides reassurance to class members as to the underlying strength of the case.

One can again refer to the *Allianz* case. In *Allianz*, that 100-odd group of claimants that have issued proceedings against the defendants, they are taking on adverse cost risk; they do not know what their ultimate recovery will be, but they plainly thought it was in their interests to do that, notwithstanding the risks that they take. They had exposure that the class members would face in the opt-in proceedings, far less serious and therefore the opt-in proceeding is far more attractive for that core group of financial institutions.

So, if I may move on then to the factual evidence and to the litigation plan for O'Higgins. That is in {MOH-C/4/1}. This is the litigation plan. You see it on -- sorry, {MOH-C/4/2}. It is a short point to make on this. If you go to page 10 {MOH-C/4/10}, page 10, I think as you were describing -- and when I refer to O'Higgins, I mean no disrespect, because O'Higgins is a company, for these purposes I am referring to O'Higgins. When I refer to Mr O'Higgins, I will

say "Mr" as opposed to just "O'Higgins". I mean no disrespect with that.

On page 10, it says:

"…the proposed class will include ... pension funds, asset managers, hedge funds, multinational corporations and mutual societies who engaged in FX transactions. They will generally be sophisticated investors and the proposed representative recognises that the procedure for governance and consultation will have to be tailored accordingly."

And then, he says that you cannot deal with them individually, but they have got a consultative group to:

"... allow it to obtain the views of others when considering the decisions it must [take] in the proceedings."

And I will come back to how they propose to engage with individual class members in a moment.

I will not take you to Mr Evans' second statement on this question. He makes a very -- at the core of his statement, a very basic point about the *football shirts* case which he outlined to you on Monday, and we have three points to make to what Mr Evans says about the difficulty with that, which football shirts action which disappointed him, and indeed the industry as a whole, because it demonstrated the inadequacy the what

was available at that stage.

First point to make is that they were ordinary consumers who had bought a replica football shirt; they were not as sophisticated as hedge funds or insurance companies would be in deciding whether to opt-in in these proceedings.

Second, all of the claim members in the *Which?* case were entitled to no more than £10 or £20. There was not a core group of very high value claims that could act so as to give momentum to the rest of the action. On this question and the points that you have raised with me, sir, the Evans evidence really is based on what Mr Maton says in his fourth statement and that is where, on the points that you have raised with me, Mr Maton gives evidence, and that is the D bundle, CPO D, tab 9 {D/9/1}. So this is Mr Maton's fourth statement and it deals with the difficulties that he experienced in getting clients to commence proceedings against the respondents. We need to look, in my submission, a bit more closely at this evidence.

If you look first, please, at paragraph 8 on page 3 {D/9/3} Mr Maton says:

"I first became aware of potential misconduct in the FX market in or around 2014. Due to the transitional provisions under the ... [2015 Act], it was

not possible to pursue the collective proceedings in the Tribunal ..."

That did not become possible:

"... until the ... Commission's two infringement decisions were made in.... 2019."

I stress that date, May 2019.

Paragraph 10 over the page {D/9/4}, you see the period during which Mr Maton sought to build his book of potential claimants and that was between -- paragraph 10, first line -- between 2014 and 2018. So at the time that Mr Maton was trying to encourage claims against the banks in England, there was no binding infringement decision against them. So any such claim would have had to have established liability from scratch, allege a cartel against these major banks and prove it.

Secondly, as Mr Maton acknowledged and acknowledges on the previous page, all they could offer those potential claimants at that stage were the traditional models of litigation: individual claims, GLOs and representative action. Of course, in those types of claims, the claimant must prove its own loss, and this is the point I made to you, sir, earlier, under the new regime, even for an opt-in, there is no need to prove individual loss, aggregate damages -- you have the power

to order aggregate damages even in opt-in proceedings.

So when Mr Maton reflects on why so few claimants were prepared to sue the banks in advance of the infringement decisions, it is surprising we say that he does not mention those reasons as possible deterrents. But we will look at the deterrents he does mention and they are in paragraph 19 which is on page 8. So, let us look at the deterrents that Mr Maton lists, "Unwillingness of potential claimants to commit to opt-in proceedings". The first (a), he says:

"A key concern expressed by many of the organisations we contacted was that they did not want to embark on a legal fight with major banks for what seemed to them to be modest to small level of potential damages (in most cases single digit millions or less)."

And I do draw attention to that figure because, as one saw from the materials underlying the legislation, the opt-out regime was not designed, not clearly designed, for class members who could not be bothered to pursue a claim for millions of pounds. But in any event, what we say deterred them was plainly the fact that they had to allege wrongdoing of the banks, prove it from scratch in the absence of an infringement decision, and then prove individual loss.

Then (b):

"Several organisations ... expressed a reluctance to invest time navigating their internal approval processes ..."

And they were concerned about reporting considerations. One can imagine, if one is asking a major financial institution or a large corporate to issue a standalone competition damages action against the bank, to allege a cartel against a number of banks and prove their own loss, that would involve detailed internal discussions and internal approval, and we say that would be a very different exercise where there is an infringement decision and aggregate damages may be awarded.

Then (c) {D/9/9}:

"Many potential claimants expressed concern that participating in litigation would require them to share confidential business information with the other claimants, the defendant banks and/or more widely."

Now, I stand to be corrected, but no one has suggested in this case that that would be a problem in an opt-out -- sorry, in an opt-in action. It would not be a problem in an opt-in action that could not be managed, and of course, there is the confidentiality ring already in place in these proceedings.

Then (d):

"The process of engaging a client itself often proved to be a practical deterrent for potential clients. Many of the 321 organisations and individuals we spoke to told us that gathering historic FX transaction records, along with any other relevant evidence ... would require a significant amount of internal resource."

And that goes to the point, sir, that we discussed -- the chairman and I discussed earlier on. It may well be that they have to produce data, it may be something as basic as the commission of a survey may require providing more information, but it will be managed by the Tribunal and the burden will be shared, potentially, among the core members of the class, and the larger the class the wider the sharing of the burden.

Then, at paragraph 20, Mr Maton then refers to the *Allianz* case, and he says, "there is only one claim ..." -- that:

"... there are only two claims against the banks involved in FX misconduct in this jurisdiction.

"The first is a claim pursued by some of the world's largest financial institutions ..."

He lists them:

"Their substantial size [he says] means that they are each individually, and particularly as a group,

likely to have very substantial claims which are worth the time and effort of pursuing."

And I rely on that. There are 681 class members according to Mr Ramirez who could have very substantial claims which are well worth the time and effort of pursuing.

But what we note here -- what Mr Maton shows in this witness statement is that Hausfeld have already identified hundreds of potential class members with viable claims. He refers to 321 organisations and individuals and you can see from his evidence that the organisations he is targeting are for the large part large financial institutions and corporates. That gives Mr Maton and Hausfeld a head start on book building for an opt-in action. Now with an infringement decision on which they will ground the action and, we say, if they had an opt-in collective proceeding, that is a much more attractive and straightforward way to proceed with these hundreds of institutions and corporates that Mr Maton has contacted (inaudible) than he was offering them in 2014 and 2015.

Coming then, in particular, to the burden of disclosure, Mr Maton deals with that at paragraph 23(a), and he said -- this is page 10, please {D/9/10}, Mr Maton says:

"The Proposed Defendants seem to contemplate time-consuming and laborious disclosure being given by class members ..."

And he describes that as a deterrent. I have attempted to answer that concern in answering the question put to me by the chairman, but this is not disclosure to show an individual loss, it is essentially trading data and it will be proportioned and supervised by you, and if it is particularly burdensome, as Mr Maton and Professor Bernheim are suggesting, you are unlikely to order it. But if it can be produced easily with little cost, if it is readily available, then you are more likely to order it, but in those circumstances, it would not be burdensome it would not be a deterrent.

Even in individual damages actions, the Tribunal is very careful to approach disclosure in a proportionate way and we have seen that even in individual damages actions in this jurisdiction.

But the basic point here though is the answer I gave to you, sir, which is that even if there is going to be some cost involved in producing information, producing in a proportionate way, information relating to trading data, that still leaves, on the PCRs' estimates, even if one discounts them on the basis that they may be ambitious, that leaves significant net benefits to

the PCRs and the class members in view of the minimum effort they have to make otherwise, and that is why we maintain the submission that, for the core members, it is a no-brainer, to use the chairman's expression, for them to opt-in and they provide the momentum for the rest of the class.

Just before I move on to default effect -- yes, and I will come back to Mr Mitchell, Mr Mitchell makes a point about disclosure, but I will come back to it when I describe retaliation themes.

Then the next point the PCRs make against us on this issue is what Professor Bernheim calls "the default effect", and we have that in his second report. Can we just go to that, please, it is in the CPO bundle, bundle C, page 6 {C/2/6}. And Professor Bernheim here is dealing -- sorry, it is page 7 {C/2/7}. Page 7. Please. He is dealing with the economic literature on default effects which imply that an opt-in proceeding would likely result in the exclusion of many class members. He says:

"In virtually all economic decisions, one alternative serves as a default option: when people fail to make an active choice, whether intentionally or by neglect, they end up with a default option. An important line of recent research establishes that many

people passively accept default populations. This passive acceptance may reflect the perceived costs of actively electing an alternative to the default, or it may result from psychological considerations such as inattention, inertia, or the tendency for people to gravitate toward the most salient alternative."

Then at (10): this arises in lots of contexts:

"... such as pension plans, organ donations, advance directives for end-of-life care, welfare programs, and tax withholding."

And then over the page, {C/2/8}, he gives bullets referencing the research upon which he relies for that point, and I am looking at the third bullet, where he says:

"Critically, according to this literature, default effects are so powerful that they can cause people to leave thousands of dollars of value on the table. In Bernheim, Franklin and Popov ... I estimate this the magnitudes of the stakes required for people to overcome the inertia implied by the default effect."

He says this, and he relies on this later, so I stress this:

"For a worker earning $40,000 annually, the median is $2,200 and the mean is $3,200."

That is to overcome the default effect.

Then at 11, he applies this to our case, four lines down, end of the line {C/2/9}:

"If a potential gain of a few thousand dollars is insufficient to overcome inertia on the part of the typical worker earning $40,000 a year ..."

Sorry, next page, please, page 9. So four lines down, end of the line:

"If a potential gain of a few thousand dollars is insufficient to overcome inertia on the part of the typical worker earning $40,000 per year, it is unlikely to induce those who engage in FX transactions, for whom such sums are much less significant, to prioritise the issue, reassure themselves that any risks are negligible, evaluate the compliance costs, and opt-in."

Just three short points about these. First of all, if his example of a worker is not comparable, then the inertia effect for them may reflect a lack of sophistication. There is no indication of what kind of worker he was studying. $40,000 is about £28,000, and he says, "such sum", so he is saying such sums there are £2,000 or £3,000 -- sorry, $2,000 or $3,000, but as you have seen, the majority of class members, taking the class as a whole, are entitled to receive more, and you know my point that a core group are entitled to

about $2 billion between them on the PCRs' case.

Critically, the class members will be sophisticated, and if, having taken informed, considered decisions, it is decided not worthwhile to opt-in in their own best economic interest, the purpose of the legislation is not undermined.

He makes a point, in passing there, about compliance costs, that they may be concerned about compliance costs, but there is no reason why there should be any compliance costs for any class member in opting in, and the PCRs make a virtue of their experience, their extensive and distinguished teams of advisers, not just lawyers, but industry experts and PR agencies, and they should be well able to explain to financial institutions and to non-financial customers why there is no need to incur any significant compliance costs in opting in and why, in fact, the costs involved should be minimal.

The next point I want to address, members of the Tribunal, is the question of retaliation, the potential of retaliation by the bank, because we get that from Mr O'Higgins' third witness statement and that is in the D bundle behind tab 1 {D/1/1}. It is {D/1/12}, paragraph 24. The concern here is that the respondent banks will somehow single out and punish class members who opt-in, and this is the evidence

O'Higgins puts forward to support that contention. Halfway down 24, Mr O'Higgins says -- he refers to a webinar that he held, and he says:

"Others made the point of asking, including in the recent webinar, whether if they registered on the Claim Website, this information would be kept confidential, particularly from the Proposed Defendants. This further confirms to me that many organisations and individuals are reluctant to take any positive step adverse to the banks, particularly by becoming involved in litigation which they see as speculative or uncertain."

You have my point that if it is speculative or uncertain, rule 79(3) tells you, you should not order -- you should be encouraged not to order opt-out.

But this evidence refers to questions, no more than questions at a webinar. It is hardly, we say, conclusive evidence of fear of retaliation enough to deter a claim to recover tens of thousands of pounds at minimal effort.

The next evidence you have on this retaliation point is Mr Mitchell for O'Higgins. Mr Mitchell's witness statement is at tab 5 of the D bundle, so it is {D/5/5}, and Mr Mitchell describes his involvement with the US settlement. So you see at paragraph 18, Mr Mitchell

says he became --:

"In November 2017, I became aware of the US claim when I received a claim form in the post ..."

Then, just below the halfway point in that paragraph 18, Mr Mitchell says:

"My immediate reaction upon reading the claim form was that there may be risks from participating in the US settlement. As well as potential costs of participating, I was conscious that RBS, one of the settling banks in the US claim, was DSquare's prime broker."

That is his company:

"I was concerned that participating in the collective settlement ..."

This is the settlement pay-out:

"... might in some way compromise DSquare's long-standing relationship with RBS, and if it did [those] ... settling banks might refuse to provide prime brokerage services to DSquare for the same reason, effectively shutting us out of the market."

Then at 19, he says:

"... speaking to an acquaintance in London ..."

He appreciated -- he realised a point he had not appreciated before, that there was no risk to DSquare. Similarly, we would say in these proceedings there is no

risk:

"On the basis that there was essentially money on the table as the settlement had already been negotiated, I calculated the numbers ..."

We thought we would expect the potential preference(?) to opt-in:

"... and DSquare's likely share of the settlement pot."

Again, something that another potential preference(?) for opt-in would do, not for settlement but for ultimate recovery:

"Based on that, the size of the class and therefore the relative anonymity even if the banks were able to obtain the identity of the claimants ..."

He says he understands that they were not, but even if they did find out that he was a participant and he was given comfort that there was no risk to their business, no adverse costs, for example:

"... I decided to participate in the settlement."

So, he said he was worried, but he went ahead anyway, because he was comforted by the size of the class and the relative anonymity that he would have in that class even if his identity was disclosed, and that is exactly the momentum effect. If there is a thousand commercial institutions in the class,

the smaller non-financial customers, for example, would have that safety in numbers, if they are genuinely concerned about this problem.

In paragraph 22, over the page {D/5/6}, page 6, he says he was -- at the top of 22, he was:

"... nervous about participating in the US claim, because of the ... possible implications for [the] ... relationship with RBS ..."

It was an ongoing relationship with RBS.

But not only that, at 23, he says he was also happy, three lines down:

"... to be involved in the UK claim as a member of the Advisory Committee ..."

Which he joined in September of 2019. He wanted to send a signal:

"... to stand up to the banks for the long term greater good ..."

But he says then he is now in the process of winding down his FX trading operations so he is less worried about DSquare's ongoing relationship with the banks. But in 2019, almost two years ago, he obviously was not very worried, because he joined the Advisory Committee to be involved in the UK claim.

So, there is a limit on how much weight you can put on this evidence. Even if he is planning on winding

down his relationship now, it is still a current relationship, and two years ago -- or just under two years ago, he joined the Advisory Committee, and of course is giving evidence in these proceedings.

Then we have Ms Hollway's evidence, Hollway's evidence which is in D3. So tab 3 in the same bundle, paragraph 20, on page 7 {D/3/7}. Page [sic] 20, he -- Ms Hollway refers to Mr O'Higgins' evidence about "commercial parties may be reluctant to commence proceedings against key suppliers, such as the banks".

Then over the page -- we are now on page 8 -- {D/2/8}, Ms Hollway says, in paragraph 22:

"The reluctance to sue the banks is one key element that goes to the practicability of bringing an opt-in action. Whether or not class members would, in fact, face retaliation or harm to their relationship with the banks by joining an opt-in action is irrelevant ..."

She does not express any view on if it is going to happen:

"... the mere concern about the possibility of such retaliation ... is sufficient to be a significant hurdle to any opt-in action."

Now, on that, members of the Tribunal, the banks deny the allegation in the strongest possible terms in their pleading that they will take any action against

any people who would opt-in. You have that in the rejoinder, paragraph 61(b).

But more importantly, why would the respondents take this kind of retaliatory action? These are customers that the respondents want. We compete with these customers. There is no suggestion of any retaliation against the claimants in the Allianz case. At most, the respondents to these applications constitute about 50% of the market. You have this from our skeleton at paragraph 47(f). There is no need to turn that up. If one of us treats a customer badly, that customer will switch. There are alternatives, no shortage of alternatives, in the market. The truth is that litigation arising out of the banks' past admitted misconduct is part of our normal existence. It is completely implausible that a bank would take retaliatory action against any class member who would opt-in in a case like this where it is based on a follow-on settlement decision.

Thirdly, the PCRs complain that the respondents have not adduced evidence that we would not retaliate. That is a point, I think, Mr Jowell made in his opening. But we have to ask, what would such evidence serve? We would be trying to prove a negative. In any event, if we did adduce that kind of evidence, we would have

Ms Hollway's answer, which is: whether you do it or not will be irrelevant, what matters is the perception of the class members. So, the point about a lack of evidence of the banks goes nowhere.

Those are my submissions on this issue of retaliation. I will move on now to publicity, and I see there is about five minutes left before we break, but if that is okay, I will carry on.

THE CHAIRMAN: No, of course.

MR KENNELLY: Thank you.

So, it is a question that the PCRs have raised that it would be very difficult to reach out and publicise an opt-in action to the potential class members. We say, of course, the nature of the class facilitates publicity. Even if the class manages to consist of 14,000 class members and a small proportion of high net worth individuals, the nature of this type of class means it is relatively straightforward to ensure that notice of the opt-in class action (inaudible) were actually proceedings made to them, but it is not necessary for the PCRs effectively to either contact each class member upfront through publicity and information. The idea on the part of the PCRs is to facilitate the class members' own decision to come forward, as they would for distribution -- as they would

for distribution in an opt-out action.

For that we see the -- firstly, the Evans Angeion publicity plan in the Evans bundle -- the second volume of the Evans bundle behind tab 14A, page 5 {EV/14A/5}, "Target audience characteristics", so:

"The Target Audience implies that the key stakeholders and decision-makers within the entities which comprise the Classes. The Target Audience can be split into two broad categories ... individuals within financial institutions, such as investment funds, including hedge funds and pension funds ... individuals within non-financial institutions, such as multinational corporations, government entities (as well as private investors and their advisors)."

Over the page, 3.7 {EV/14A/6}, they have:

"... analysed data from the City of London Corporation, GfK, MRI and ComScore relating to financial services professionals ... represent 3.4% of the domestic workforce."

He examined how those professionals consume their media.

And you see that in the table.

And then, 3.9:

"The number of individuals within (b) is ..."

That is individuals in non-financial institutions:

"... is large and the types of entities and private investors are varied ... no one dataset from which to draw conclusions in relation to [their] ... characteristics... [but they] are likely to be are likely to be the treasurers and directors of finance of domestic and multinational corporations and businesses ... The first five publications listed at paragraph 4.17 will already cater to the demographic profile of [them] ..."

So they were targeted by the media plan.

Then, in "Notice plan", 4.2 {EV/14A/7}:

"We will employ different media at each stage of the proposed proceedings in light of the communication objectives for that stage."

This plan, of course, was drawn up for opt-out proceedings -- sorry, could the producer show us page 7, please. Next page, please, page 7. Thank you. This is designed for opt-out proceedings, but one can see how the very same plan could be adjusted for opt-in proceedings.

So, 4.3:

"For each stage, we set out the ways which we intend to notify the Class ..."

So, they are going to provide:

"... formal notices ... an integrated media campaign

... a robust public relations campaign designed to generate substantial news coverage of the proposed proceedings at a local, regional, national and international level ... online and print advertisements in a combination of national and international publications ..."

With a sophisticated advertising campaign, we will come to that:

"... a dedicated claim website."

Then, 4.5:

"We will utilise 'search engine optimisation' throughout the proposed proceedings to ensure the claim website features prominently in search engine result listings ... increasing the likelihood that interested parties are directed to the claim website ..."

Page 9, please {EV/14A/9}, we have:

"[The] advertisements ... [the] publications ... which [have been] contextually and demographically appropriate ..."

This is 4.16:

"... for the target audience ..."

And the publications which are relevant are listed below that, and it gives you another indication of the nature of the class in the minds of the PCRs that those are the publications that have been selected for

an advertising campaign.

Over the page {EV/14A/10}, 4.19:

"In order to test this, we will conduct qualitative and quantitative research to gauge the effectiveness of the advertisements."

The level of sophistication here obviously is quite developed, not just to do the advertising, but then to test that it is landing through research.

Then 5.4, on the same page, how they will do "direct noticing". They are:

"... currently using, and will continue to use, various data sources to compile a mailing list of likely Class Members ..."

We say this is directly on point for how you would develop an opt-in action:

"We will use this information to identify likely Class Members within these databases with the aim of providing them with the CPO Application ..."

And so forth.

5.5 {EV/14A/11}:

"So far, we have identified the following public bodies and associations which hold publicly available databases which contain the following information at no cost:

"HMRC trade information database, which contains

the business names and addresses of operational importing and exporting companies in the United Kingdom."

This is the non-financial customers:

"Investing.com ... contains a database containing the business names and addresses of approximately 1,600 mutual funds across the European Union.

"The Investment Management Association (a trade body and ...(Reading to the words)... which contains the business names of approximately 280 investment funds ...

"The Association of Investment Companies (a national trade association for the closed-ended investment company industry) database, which contains the business names of approximately 260 investment companies in the United Kingdom and approximately 100 offshore investment companies; and

"Angeion's proprietary list (already compiled) containing approximately 4,300 contacts at financial institutions ..."

Pause there. You have the point from the PCRs at the beginning that, unlike other cases, there is no trade association that can be used as a hub for reaching out to class members. True it is, there is no single industry association covering the whole of the class,

but unsurprisingly, for large well-resourced and sophisticated institutions, there are a range of trade bodies and trade associations which can serve that purpose, for the purpose at least of obtaining the detail of class members.

5.6:

"We will consider contacting the following associations which we have identified hold the following databases for a fee."

And then we have:

"Pension Funds Online ... which contains the business names of approximately 7,000 pension funds [in] the EU ... 4,600... in the United Kingdom);

"Eureka Hedge ... [for] global hedge funds ... a database... of ... 5,800 hedge funds;

"The British Exporters Association ... 120 exporting companies;

"The Alternative Investment Management Association, [again] a database... of approximately 2,000 alternative investment funds;

"A database including the names and contact details for individuals at approximately 72,000 businesses in the sector; [and]

"A database including the names and email addresses of approximately 15,000 executive-level directors and

corporate chairpersons."

At 5.10 {EV/14A/12}, we have "Dedicated claim website", which will be used as the site.

Now, please go to page 12. We will go over the next sections quickly, I am going to show you some of the headings. Page 12, please. Thank you.

So the dedicated claim website is the sophisticated portal they use to provide information.

Then please go to {EV/14A/13}, "Public relations",10 5.17:

"Upon issue of the proposed proceedings, a concise and informative press release will be issued proactively by Byfield Consultancy."

I think Byfield was then replaced, but the point is that they are using professional PR consultancies in tandem with their own industry knowledge and legal teams.

Sir, I see the time. I have got one -- if I can just quickly -- I think I can finish on this document and I can do it very quickly. Yes, that is all I need to take from this and I see the time, that may be an appropriate moment.

THE CHAIRMAN: Well, thank you very much, Mr Kennelly. We will rise and resume at 2 o'clock. Thank you.

(1.04 pm)

(The short adjournment)

(1.59 pm)

THE CHAIRMAN: Mr Kennelly, if you just wait while live stream goes live.

(Pause)

THE ASSOCIATE: We are live.

THE CHAIRMAN: Mr Kennelly, over to you.

MR KENNELLY: Thank you, chairman.

I was dealing with the ease with which the PCRs could make potential class members aware of the opt-in proceedings and we had gone through the evidence of the publicity plan.

Now I turn to Mr O'Higgins' evidence and that is in his first witness statement {MOH-C/0/8}. "Identifiable class", said Mr O'Higgins. He sets out how the proposed class is defined and then, just below the second hole punch, halfway down the paragraph, he says:

"I believe that, generally, most entities which traded FX will have done so repeatedly, either as a fundamental part of their operations (eg investment funds) or as an ongoing ancillary risk to a businesses' main operations (eg multinational corporations repatriating money ..."

And so forth:

"... and will be well aware that they have done so.

Members of the proposed class are therefore [he says] clearly identifiable."

And in the same bundle, please go to page -- sorry, page {MOH-C/5}. This is the litigation plan annexed to Mr Evans' -- Mr O'Higgins' evidence -- {MOH-C/5/1}, the Epiq plan, and in that, if you go to page 10, please {MOH-C/5/10}. This is the "Notice and Administration Plan", which is similar to the one you saw from Angeion for Evans. I will move very quickly through this because it is very similar to the one that you have seen for Evans. At 6.1, at the bottom of page 10, "Second notice phase: notice of the CPO", and here Epiq, retained by O'Higgins, describes how the class members will be notified. At 6.3, over the page, page 11, {MOH-C/5/11}, there is a reference to updating the website.

Over the page, page 12, please {MOH-C/5/12}. Again, they plan to pay for UK newspaper adverts, international newspaper and magazine adverts, again, I think worked out based on which ones are best suited at targeting the class members.

At 6.12, there is a reference to, "Paid UK trade print" adverts. Then, over the page, page 13, {MOH-C/5/13}, you see the list of specialist publications in which advertisements will more directly

reach the decision-makers in potential class members.

6.13, at the bottom of that page, again, there is an online media campaign. They will use Google and the various websites, FT .com and so forth, and LinkedIn for the purposes of media advertising.

Over the page, page 14, {MOH-C/5/14}, paid adverts on LinkedIn are referred to at 6.14, and of course, that is very targeted because it is done by reference to the professionals themselves and their job titles and self-descriptions in order to have very targeted advertising.

You see that at 6.15:

"LinkedIn banners will be targeted to those individuals with job titles that suggest involvement in the relevant sectors."

At 6.17, there is a summary of the digital adverting that will be purchased.

At 6.18, it is said that:

"[The] combined banner impressions for all sites will exceed 40 million."

I will go on then, please, to Mr O'Higgins' third witness statement. That is in CPO bundle D, tab 1, {D/1/1}, page 5 {D/1/5}, and at the bottom of the page 5 you see Mr O'Higgins discussing, "Communication with the proposed class", and if you go over the page to

paragraph 12 {D/1/6}, he says, at paragraph 12, that he visited Dublin with a member of the legal team:

"During this trip we met with a number of ... potential opt-in class members. We also met with lawyers active in the funds industry to inform them of the anticompetitive conduct and alert them to the litigation. [Because of its] ... prominence in the leading funds centre in Europe, this trip will have increased the potential opt-in engagement ..."

13, he met -- he went to the Institutional Investors conference in 2020 and:

"... spoke... to senior executives from the Fonds de Réserve pour les Retraites (The French Pension Reserve Fund ...) ..."

A prominent Austrian pension fund:

"... WTO Pension Plan and the Bank of Ireland Pensions Fund ..."

With very significant amounts under management and those are contacts he had secured.

Then, at 14, he describes how he managed online to keep in contact with class members through website updates and webinars, and communicated with industry associations.

If you go, please, to page {D/1/8} now, there is a reference to discussions with contacts, and then this,

in the "Mainstream and financial press", he says they also:

"... engaged a public relations agency, Questor Consulting, to manage press and keep in regular contact with an extensive list of national and international journalists from the mainstream, financial and legal press (... the FT, Bloomberg and Investment Week) ...the full list of publications and broadcasters is provided ..."

Then he says this:

"The Claim has received wide press coverage with articles published in ..."

Then a long list of particularly relevant publications which would be read by decision-takers and the class members -- the potential class members.

Then also the LinkedIn page.

Over the page to page 9, {D/1/9}, there is a reference to asset management associations, investor relations organisations, and Mr O'Higgins' attendance at a particular conference on class actions.

Then over the page at {D/1/10}, please, there is a reference to his solicitor contacts and other contacts within other organisations, and all this is consistent with what Mr Jowell said on Monday about Mr O'Higgins having significant contacts in pension funds, a very

important part of the class. It is odd then, we say, that O'Higgins, in their reply, should say that the financial press may be reluctant to give publicity to the collective proceeding for fear of prejudicing their own relationship with banks. We see that in the reply in paragraphs 58.2(e). Could we just take that, please. That is in {A/2/24}. This is in (e) indented:

"... the claim will not come to the attention of potential claimants in time. The financial press is more likely to be interested in publicising a case when money is available to distribute than when it is at an early stage and recovery remains speculative."

There is actually nothing to support that. In fact, Mr O'Higgins' own evidence shows a high level of interest by the financial press, notwithstanding the early stages.

Then this:

"The financial press may also be reluctant to prejudice its own relationships with banks by encouraging claims against them."

Again, that is completely contradicted by the evidence that Mr O'Higgins himself has adduced, and in fact, I mean, only yesterday, I myself read an article in the FT about this claim. The Financial Times

have not been slow to point out the failings of banks and to draw attention to ongoing litigation against them, so there is nothing to support the suggestion that it will be difficult to publicise these claims if they are opt-in on the basis that publications will be afraid of upsetting banks.

I turn then to funding and the point Mr Lomas raised with me earlier today. Now, as I said earlier to the Tribunal citing the transcript, and we saw it, both Mr Evans and Mr O'Higgins in discussion with Mr Lomas appeared to accept that an opt-in with the core class members, what they describe as the big institutions would work. Although they did not say it expressly, that strongly suggests that funding could also be secured on that basis, and that is not surprising, we say, if the claim were worth about £2 billion, or even significantly less than that if it was subjected to more rigorous scrutiny, that is still very attractive to funders, and to get to that level, it requires only about 3% of the potential class members to opt-in. That is the 1,414 class members from Mr Ramirez's evidence.

Here, the funders evidence has been quite carefully drafted. If you go to Mr Purslow's evidence, his second statement in D-- in bundle D --

MR LOMAS: Just to clarify, Mr Kennelly, that is a very

specific 3%, not any 3%?

MR KENNELLY: Oh no, absolutely, sir, a very specific 3%.

MR LOMAS: Right, okay.

MR KENNELLY: That is the -- they are the two final columns on Mr Ramirez's appendix B to his second statement. They are institutions with the very significant claims and we say they are the ones best placed to form the core, and if they opt-in, or even if just a proportion of them opt-in, the claim on the PCRs' case is worth nearly £2 billion, even if it is £1 billion, and that is obviously very significant from the funders' perspective.

If we go now to Mr Purslow's evidence at tab 4, his second witness statement, and page 4 of at that paragraph 8, just above paragraph 9 -- this is {D/4/4}. Thank you.

So above paragraph 9, near the bottom of paragraph 8:

"Of critical importance ..."

About six lines from the bottom:

"Of critical importance to the analysis is also the prospects of the claimant group reaching the size that is necessary to make the case economic."

In my submission, when he refers to size being critical, that is the value of the claim, not simply

the number of potential class numbers. From the funders' perspective, it is the amount of money that will be recovered that is important.

Then 14(b), on page {D/4/6}, we see the language Mr Purslow is employing. 14(b), he says:

"... at the time of funding, we did not have a precise number for the potential class members but we understood it to be a large number and likely in the tens of thousands. We were comfortable, based on our experience in other claims, that this figure would be manageable for the purpose of distribution of damages ..."

Yes, page 7, {D/4/7}, thank you:

"... would be sufficiently identifiable for the purpose of distribution ... However, we were not comfortable that it would be possible proactively to contact the relevant decision makers and sign up a sufficiently large group of class members from amongst a population of potential claimants of that size at a reasonable cost."

Now, you have my submission that for the core group covering 79% of the whole of the VoC, it is a much smaller group, much more easily identifiable. In our submission they can be contacted at reasonable cost, and once they are in, the claim is viable and momentum is

provided for the purposes of attracting the smaller claims.

At 15(b) -- sorry, 14(b), he continues to go on to say, about five lines down from what I have read:

"In our experience, institutional and large corporate clients typically need to be contacted and dealt with individually and require a higher degree of personal interaction before they will sign up in comparison to individuals who are more responsive to digital marketing techniques ... Accordingly, the time and cost involved in reaching numerous institutional and large corporate clients could be expected to be substantial. It also follows from this that the focus of any opt-in book-building exercise would inevitably be the largest claimants who would contribute most to reaching a book build threshold at which the claim is viable."

I rely on that, that is my point:

"There comes a point at which the marginal cost of approaching and signing up smaller claimants does not justify the additional investment of the sign-up exercise ..."

Just pausing there, first, he accepts that once the big class members are in, the claim becomes viable. He says after that point, the incentive on the part of

the funders to reach out to the smaller ones reduces because it becomes more costly and less worthwhile from the funders' perspective.

But you have my point that once the big class members are in, that itself means that the opt-in proceeding has momentum, it moves and it attracts the smaller claims. Mr Evans and Mr O'Higgins both have said, whatever the funders say, they are personally committed to ensuring that the largest possible proportion of smaller claims are included. But ultimately -- and you have my point that there is no injustice if sophisticated companies decline to sue because a claim for £3,000 is not worthwhile, even for minimum effort or because they regard it as speculative. Justice is served where they can make that decision on an informed basis and where the majority of the VoC is likely to be covered by those who do opt-in.

At 14(i) -- actually, it is 14(d)(i) on page 8, so page 8, please {D/4/8}. Mr Purslow says:

"The relative novelty of collective proceedings of this nature, which meant that class members would be unlikely to be familiar with the process."

And he says:

"A greater degree of education would be required before they would be willing to join the claim."

That is particularly the case for the institutional claimants. But this is precisely what the PCRs say they are very well placed to do and they have complex and sophisticated ways of providing information and reassurance to class members, and much of it if done for one potential class member could be done for the others because the question would be very similar from all of them. It is not as if a completely different explanation will need to be provided for each class member. That is what we see in the PCRs' plans, they will have to be adjusted per class member, particularly for the larger ones, and with the basic structure of the claim, its strong prospects of success and the way in which it is going to be managed, all of that will be common between potential class members.

Then 16 and 17, on page 11 {D/4/11}, his conclusion -- and again, I submit this is rather tentative. He says, at 16, three lines down:

"... Therium's agreement to fund was predicated on the opt-out approach. We did not have available a detailed, costed and credible plan to run the Proposed Collective Proceedings on an opt-in basis and so were not in a position to make a positive decision to fund the Proposed Collective Proceedings on that basis but, as I have sought to explain above, we considered

the practicability of an opt-in action and concluded that an opt-out approach would be in any event superior and have much greater prospects of succeeding ..."

And that is plainly their commercial preference, it does not say that opt-in is impracticable.

He says, at 17, if the Tribunal is with us and orders an opt-in action, four lines down:

"Therium would be forced to consider afresh ... the additional costs of running the ... proceedings in this way ... it would be necessary for Therium to be convinced that we could sign up sufficient claimants on an opt-in basis prior to a damages award so as to make the claim economically viable. At present we have not seen a viable plan to achieve this and for the reasons above such an approach would face significant challenges."

Pausing there, you have seen from the funding statements what the break even level is for the funders, what proportion of the claimed damages need to be recovered for the funders to get their -- to get their recovery and it is a very, very small fraction of the total amount claimed:

"Even if it may be possible to achieve a sufficient claim size to make the Proposed Collective Proceedings economically viable, for the reasons I have stated, such

an approach would favour claimants with larger losses over those with smaller losses meaning that, ultimately, a smaller proportion of potential class members would be compensated."

That is the point that is being made to you, but that is not the funders' concern, the funder's just need to know is there enough in the pot to make sure they get their recovery.

Then he says, at the bottom:

"Any switch to an opt-in model would mean (at the very least) revisiting the budget for the proceedings. Any such opt-in action could not proceed to be funded by Therium without fresh Investment Committee approval ..."

Which he does not think he would get. But Mr Purslow, very frankly, acknowledges that that question had not been asked and their investment committee had not considered those matters, so that is speculation by him at the end of his statement. He is not saying it is impossible.

Then, the evidence for Evans is in Mr Chopin's witness statement {D/10/1}, and the relevant part -- sorry, it is in Chopin 4, this is tab 13 {D/13/4}, paragraph 16:

"It is not possible for me to say, in the abstract, whether we would be able to fund an opt-in claim

instead. However, I can confirm that adding a bookbuilding stage to the proceedings would inevitably add significant upfront expenditure to the case and therefore significantly increase the required budget ..."

So again, we would say rather tentative language, not saying never.

Halfway down 17:

"As a general rule for a claim such as this one, the smaller the average size of each claimant's claim the harder it is to get those claimants to sign up because of inertia ..."

But from a funder's perspective, it must equally be true that where a small group of -- a relatively small group of potential class members have very substantial claims, it must be relatively more straightforward to get them in because of their sophistication and their very significant upsize, notwithstanding -- and the very limited costs and disruption to them if they do opt-in.

Then at 20, he talks about timing. That is on page 5 {D/13/5}. He says that time will be needed to do that book building exercise and ensure that class members' claims are validated.

And over the page, {D/13/6}, he says:

"To mitigate some of these risks ... I expect that

an opt-in period for these proceedings would need to be very substantial in order to determine whether a viable overall claim can be built."

We do not doubt that some time will be required, but from Mr Maton's evidence, for example, and indeed from Mr O'Higgins', they have already a substantial head start on book building, they have lists of particularly the larger pension class members who can be readily contacted and those communications have already commenced in order to do that exercise.

Those are my submissions on funding.

The last point I wanted to make before I hand over is in relation to what is needed for the purpose of calculating damages. You saw in the pleadings that both O'Higgins and Evans say that it is more efficient for the purpose of calculating damage from their perspective to do it by reference to the whole class in an opt-out model. But there is no dispute that the PCRs' experts are able to use the same general and economical statistical methods to model the harm for a defined set of class members. It might be easier to assume harm to all participants and model in that way, but what is easy for them is not determinative for what is practicable.

On the exchanges with the chairman on Monday, I think, regarding the need for class members' data to

prove individual loss, it is no part of our case that the class members' own data is needed to prove individual loss. When we talk about where data will be needed from them, we are quite specific and you get that from our skeleton. If you can just turn to our skeleton argument, it is in the advocates' bundle, tab 5 {AB/5}, it is paragraph 50 to 66, which is {AB/5/24}, please. So here we are talking about data availability and the headings that follow that tell you why we think -- where we think class members' data will need to be (inaudible).

Over the page, after 60 {AB/5/25}, you see, "Geographical location of trades/class members". Now, that is -- sorry -- because they accept that the classes are limited to transactions entered into in the EEA. They will exclude non-EEA transactions. Data from them will be needed for that, not least because, as you will have seen, a large proportion of their claim covers trade between the class members and banks which are not respondents. On the VoC, in Mr Ramirez's evidence, what he calls "class B" is nearly -- well, it is almost twice as big as class A in terms of VoC. So a substantial proportion of a claim or trade between the class members and banks which are not respondents to this action, so some data from them may be necessary to establish

the geographical location of the trades.

62 in the skeleton refers to, "Trades with non-respondents". Again, the data they needed for that.

63, {AB/5/26}, they propose to exclude --:

"Mr Evans proposes to exclude benchmark transactions, limit orders and resting orders ..."

Again, that will probably need to be substantiated with some of their trading data. Similarly, exclusion of claims of intermediaries and for the purposes of establishing jurisdiction, but none of that goes to proving individual loss by proposed class members, no data is likely to be necessary for that.

In relation to disclosure of information by class members and how that might be a deterrent, I am coming -- I am now at the very end of my submissions, but I want to come back to that because that is obviously a topic that is of concern to the Tribunal, to what extent will be that a deterrent and to what extent will it be needed. The point I make here is that, in an opt-out action, a certain degree of disclosure of the class members' own trading data is likely to be needed at the distribution stage anyway. So, the extent to which it is a deterrent for an opt-in really falls away; it is going to arrive anyway at the distribution stage.

We have an insight into how much disruption and pain class members are likely to bear in order to produce trading data where they have a prospect of recovery. We get that from Mr Mitchell's evidence. If I can just show that to you, this is the final piece of evidence I am going to show you, that is in the CPO bundle D, tab 5 {D/5/1}. That is paragraph 29 of Mitchell, which is on {D/5/8}.

So, we are looking here at the effort that Mr Mitchell was prepared to make to claim from the fund at the distribution stage. I am waiting for the page, it is {D/5/8}. Thank you.

Now, this is the distribution stage, but of course, even at this stage, it is clear from Mr Mitchell's evidence that his recovery was not certain, at the very least it is subject to him producing data, and so there is an analogy, we say, between this and trade data that might be in contemplation from the class members thinking about whether to opt-in in an opt-in action, but there are differences between what Mr Mitchell did in the US and what is likely to happen here.

So, 29:

"When DSquare decided to participate in the US claims settlement, we elected to go down the 'Option 2' route, which required us to produce data to support our

claim."

Pausing there. You will have seen from Ms Hollway's evidence -- there is no need to go to it, but it is paragraph 17, for your reference, {D/3/6} -- that in the US there were two options: the option 1, where class members could claim distribution relying only on the banks' own data, zero effort on their part; option 2 was an option available to class members where they had to produce their own trading data to support their claim.

Mr Mitchell says he was careful to keep records of all his trading:

"The process of gathering so much historic data was laborious. As well as obtaining DSquare's own data..., we obtained data from EBS, Reuters and ... other exchanges, and from the banks directly."

So, he went to a great deal of effort not only to produce data from his own records, but to go to third party providers and the banks to get that data. It is not necessarily going to be -- there is no question of that happening here in an opt-in case. He says that took a long time.

Then, 30:

"Unfortunately, due to an IT systems failure there was a period of several months for which DSquare was

missing data. Other than for that period, having obtained data from the banks and exchanges, we then reviewed against our own data to verify its accuracy. Trade-for-trade, the banks' data matched our own data almost exactly ..."

So he did a trade for trade comparison to verify the data. There is no question of that being necessary for class members in our case, if they opt-in, that they would have to do that kind of exercise.

Then he says, at 31:

"In total, I would estimate that the data-gathering exercise for the US claim has cost DSquare feet over $25,000 in staff hours."

Two points there, members of the Tribunal. First, that must reflect a huge amount of work which you have just seen which would not be necessary for opt-in class members in our case. But secondly, Mr Mitchell was prepared to do that work and spend that money in order to secure recovery. That was a price he thought was worth paying. He did not say how much he ultimately recovered, but plainly, in their own commercial interest, they thought that was worthwhile. In our submission, the costs for opt-in members would not come close to that, they would not be required to do that kind of work.

There needs to be provision -- we say, at the distribution stage, there needs to be provision of trading data by class members, not least because the Class B -- the class of class members, the proportion of -- the section of class members with whom the bank had not traded -- that Class B, as I have said, is almost twice as big as class A, and for that, it is likely that class members will have to produce trading data to show that they have traded; the banks will not have that data, so that will have to be produced anyway. So even on that basis the costs, such as they are, will be incurred and so to the extent that zero costs provides for opt-in, it is a neutral factor.

Unless I have missed something, I am told, from my submissions, those are my submissions on practicability.

THE CHAIRMAN: Well, thank you, Mr Kennelly.

Just before we move on, to pick up on that last point. Clearly you are right, there would have to be some form of qualification process if there was a successful outcome on the part of the applicants in -- whether it is opt-in or opt-out, you would have to show that your position as a class member met certain criteria to justify pay out, and that, depending on what those criteria were, would require a certain trawling through the files. I think, subject to what

the applicants say, that is pretty clear.

What we are getting at, though, is the importance of disclosure at an earlier stage, leaving on one side the qualification disclosure, and I think yesterday we saw, said a number of times by the economists, that the dataset that they needed access to was incredibly important, and also a number of times it was said that the dataset was either going to be incomplete or potentially hard to read when you had, for instance, the ordering of trades and the reconciliation of trades to other databases which might or might not contain the same trades. It struck me there that one way of supplementing the data or reconciling differences would be to broaden the data pool. So, if one has got within the class of claimants, a bank dealing with FX matters and its dataset, there will be something to be said for saying, well, look, put that in in its entirety for the relevant periods as well, so that one has, as it were, a cross-check or supplementation of the data that would enable the economists to be assured that they were at least working on a best case of what the data actually was.

Now, it seems to me this is a double edged sword for everyone in the sense that it makes an opt-in claim better because, within the control of the Tribunal,

there would be, looking at it from the present perspective, good reason to order that sort of disclosure; it would not be individual loss based, it would be to feed the econometric analysis.

On the other hand, and this is why it is a doubled edged sword from both sides, it would be a significant deterrent, given that we are talking about a speculative claim for a bank to say, as the effective likely price of opting in, you are going to be making a large extract of certain transactions in your database, which we all know does not come cheap; however efficient your data system, the price of identifying and extracting data is expensive.

So, really I am raising that point just to invite, to the extent you have not already addressed it -- and to a large extent you have -- to invite you to say anything more about the pros and cons of disclosure as indicating in both directions, as it were.

MR KENNELLY: Sir, thank you.

So, first of all -- and this has to be the overall point which the Tribunal ought to bear in mind, in our respectful submission that, to the extent that the concern is that this is speculative or extremely uncertain because of the need for an enormous and unprecedented data gathering exercise in which there is

huge uncertainty, that all points towards the strength of the -- the immediately perceptible strength of the claim which rule 79(3) directs you to opt-in. So to the extent that that is a concern in the mind of the Tribunal and how do I navigate that? The rules provide the answer, it is opt-in, and all those problems and difficulties are mitigated where one chooses the opt-in procedure.

But coming to the specifics of the Tribunal's question, there is no doubt that more data will assist the Tribunal at trial, that must be true. If it is too expensive, if it is too burdensome or laborious, then you will not order, it would not be proportionate. If it is readily accessible, if it can be produced more cheaply, then you are more likely it to order it and it would not be burdensome. But what is clear, in our submission, is that, if you are opt-out, you can have no guarantee that it will actually work, this idea of claiming disclosure from individual class members because that would be some form of third party disclosure. Those banks or institutions that would be providing data in an opt-out scenario would be equivalent to third parties. It is not at all clear how the Tribunal would police that, it would be extremely difficult for the respondents to supervise or to be

engaged in that process, and there would be real uncertainty. We do not accept that that would work or could work in an opt-out proceeding if the idea was that data could be produced from selected class members. That form of third party disclosure would be extremely difficult to police and supervise.

Ultimately, where the Tribunal is driven by what you have already heard from the experts is that data may well be required because of the speculative nature of the claims, but that we say points towards opt-in. That brings you right back to the very beginning of my submissions, which is what you are directed to consider in rule 79(3).

I think that is probably the answer I can -- the best answer I can give you on that question.

THE CHAIRMAN: No, thank you. Just to respond, more for the benefit of those who are following, it seems to me that you must be right, that if one was ordering disclosure on the basis of a putative class member in an opt-out process, you would have to treat that as third party disclosure, simply because the person against whom disclosure was directed, if they had not already opted out, would be able to opt-out and convert themselves into a third party anyway. So I think that would have to be the approach, but I raise that to entitle or

enable those who are following you to push back and say that would not be the case.

But unless you have got anything further, or -- no -- Mr Kennelly, thank you very much.

Is it Ms Ford now?

MS FORD: Sir, yes, it is.

THE CHAIRMAN: Ms Ford, thank you.

Submissions by MS FORD

MS FORD: Sir, members of the Tribunal, we are now turning to that part of the respondent's submissions which concern the merits of the proposed claims. As the Tribunal is aware, the strength of the claims is a factor which the Tribunal may take into account under rule 79(3)(a) in determining whether collective proceedings should be opt-in or opt-out.

You have already been shown paragraph 6.39 of the Tribunal's guide which states that the Tribunal would expect the strength of opt-out claims to be more immediately perceptible than opt-in claims, and the Guide gives two reasons for that. It says because of their greater complexity, costs and risks, and because, unlike opt-in claims, members of an opt-out class have not chosen to be part of the proceedings and cannot be presumed to have conducted their own assessment of the strength of the claims. That, in my submission,

goes directly to the matters that you, Mr Chairman, have been canvassing with Mr Kennelly, because you have been advancing the example of a claim which is speculative, and that, in my submission, is exactly the circumstance that the Guide says this claim should proceed on an opt-in basis. If it is speculative, it should be opt-in. The weakness of the claim does not point to opt-out, it directs the Tribunal towards an opt-in claim.

THE CHAIRMAN: Ms Ford, I do apologise for interrupting so early in your submissions, but I just want to put down a marker which you are not going to be able to address now, but there will have been sent out from the Tribunal -- not on grounds of self publicity -- but an article that I wrote post-BritNed, which concerned the treatment of economic evidence in courts.

The reason I have sent it out for the parties to just look at overnight is because there is a section right at the end, section 4, which deals with the notion of a trial on the merits being decided purely on the basis of statistical or econometric evidence. In other words, what one gets is a trial where there is no evidence of fact in any real sense, there is simply a series of experts, and they may be factual in part, but nevertheless they are all divorced from, as it were,

facts as litigators normally understand them to be, explaining why one or no doubt more models establish that there has been an overcharge in the sense of the widening spread that is the basis for both applicants' case.

The reason I raise it is because -- and the reason I raise it now is because one can see that opt-in/opt-out as a test for there being real traction in a case does provide a good indicator of merits on the facts when one talks about conventional facts. You know, if you have got someone who has been overcharged -- to take our printer cartridge example of this morning -- £5 per printer cartridge purchased, you can readily discern the factual basis on which that claim is made, and if the purchaser of the printer cartridge or cartridges says, "I am just not interested in my £5 or my multiple of £5, I am not opting in, I am opting out", that is an indicator of perhaps not the strength of the case, but of the desirability of proceeding with it.

The problem, I think, with that test in this context is that because it is run, removed from the facts, as we would traditionally understand them, one is looking at an outcome which is essentially expert-driven and where the class members do not really have a view one way or

the other.

So I am not expecting you for a moment to address that point now, but it did strike me that this, if it is certified, could well be the first case, at least to my knowledge, which is going to be determined purely and simply by reference to econometric analysis without any kind of factual data, and I know I am going to be very limited in how far I refer to BritNed because I know only some of you were in that case, but the fact is that case had some very valuable econometric data, but it was fundamentally resting upon a factual analysis, which you can see in my judgment, which was traditional fact, and I am wondering really -- and this is why I raise the point -- how far that should affect our view of the merits of this case broadly conceived, because we are not talking about being able to identify who purchased what in any individual sense, we are going to be looking at really the analysis of large data in a very sophisticated way and working out basically whose model is best.

MS FORD: Sir, I am grateful for that. We will certainly review the article and revert to you tomorrow with any submissions on that.

I would make this submission now, that insofar as a claim is being advanced which is divorced from

the facts in that way, in my submission that has to be taken into account in the Tribunal's assessment of the strength, or otherwise, of that claim. My submission would be that the facts available to the Tribunal are primarily those in the Commission decisions, and in the circumstances of these claims, they are very far removed from the factual background in the Commission decisions, and that really does feed into the Tribunal's assessment of how strong these claims, in reality, can be.

In the context of the Tribunal's assessment of opt-in/opt-out, it is common ground that the Tribunal is not required to conduct a full merits assessment, it will form a high level view based on the collective proceedings claim form. In my submission, the criticisms that we advance comfortably satisfy that threshold, because they are flaws in the PCRs' theory and methodology which are immediately perceptible on a high level review and they demonstrate, in our submission, that the proposed claims are not sufficiently strong to justify the burden imposed by opt-out proceedings.

Just to address the concern that you, Mr Chairman, expressed about the possible tension with the *Merricks* judgment, in our submission, that test is not in any way

inconsistent with what was said in *Merricks*. Of course, in *Merricks*, this was not an opt-in/opt-out debate, and so, in that respect, it was not expressly addressed. But, certainly, there was reference in paragraph 26 of Lord Briggs' judgment to the possibility of a Tribunal striking out either on an application or of its own motion a claim which is insufficiently strong. So, insofar as the Tribunal is concerned that it might end up, by virtue of this test, being saddled with a claim which is not sufficiently strong, the solution, in my submission, is that recognised by Lord Briggs in paragraph 26, which is it will be one that ought to be struck out.

Sir, the focus of my submissions in particular is going to be on the terms of the Commission decisions, and we ask the Tribunal to scrutinise those with some care because we say that the PCRs are seeking to bring expansive market-wide claims which purport to follow-on from what are, in reality, much more limited findings of infringement. In our submission, it is important for the Commission -- for the Tribunal to have clearly in mind exactly how far the claims extend beyond the scope of what has actually been found by the Commission and in some cases the assumptions which underpin the PCRs' respective theories of harm are actually inconsistent

with the findings that the Commission has made.

Ms Wakefield submitted on Monday that that doesn't matter because the findings in question are not binding recitals. It is novel to hear a claimant emphasising how few of the recitals of the decision on which they rely are actually binding, and I trust that if, in due course, it becomes necessary for the Tribunal to do the exercise of deciding which recitals are binding and which are not, the claimants will adopt a similarly restrained approach. But for present purposes, the Tribunal has not done that exercise and, in my submission, it is not open to the Tribunal to proceed on the assumption that none of the recitals in question are binding.

But even if they are not binding --

THE CHAIRMAN: Well, Ms Ford, this is a very important point, and I wonder if we could try and unpack that now, because I think it will make the applicants' submissions a little easier. I am not sure I understood Ms Wakefield to be saying that the findings in the decisions were, as it were, not relevant in an absolute sense. What I think the case is -- and I unpack this really so that I can be corrected -- is that what we have in the decisions is the identification of an infringement of competition law between traders in

various banks involved in FX transactions where they have, as the cornerstone of their naughtiness, been trying to adjust in an entirely illegitimate way the advantages of certain specific trades that they know are coming up.

Now, quite how they have done that I am not sure is in any way material for present purposes, but I think the starting point and why the decisions matter is that we have a finding of infringement that certain traders have caused the market price for a given transaction to be not the market price but to be something else, and that, I think, implies a winner and a loser to that transaction. That is why I think Ms Wakefield corrected me on Monday to say we are not focusing on the winner and loser in this particular transaction; we accept that there are winners or losers, but that is something which is not really part of our class of claimant. What we are looking at is something rather different, and I will unpack this because I do think it is important that I be corrected if I have got it wrong.

Given that one has got a form of market price that is not the market price, one has got, in other words, losers in the market, what one has then is a reaction to those losses on the part of banks which are either observing those losses or actually suffering them, which

results in an increased price, which is the spread, which then affects the other market participants who are paying more for what ought to be less. That is why I understand the asymmetry between winners and losers is lost on the part of the applicants, because what they are saying is that when you have a broadened spread, it does not matter whether you are a winner or a loser, a buyer or a seller, you are a loser each way.

So what one has got is, as I did put it to the experts yesterday, a kind of pass-on of a loss. What you have got is the integrity of the market is affected adversely by these illicit trades, that results in an additional cost to participants in the market, which causes them to adjust for that by widening their spreads because they want to adjust their risk profile in this particular market, and it is that which causes the loss.

Now, if that is right -- and I am very willing to be corrected on this by anyone -- if that is right, then I am not sure that your point regarding a moving away from the ambit of the Commission's decisions is right. What one has got instead is a taking the infringements that are found and running with them in a peculiarly complex causative chain which arises out of those facts which are accepted. But the reason I think Ms Wakefield

was saying that the individual recitals did not particularly matter was that, if one has got a transaction where it has been so rigged that the counterparty suffers a loss, it does not really matter how exactly that was done, what matters is that there was a trade at a non-market rate which then had these causative implications which we are debating.

So, I am sorry I am taking up a great deal of your time, but I think it is worth unpacking that, because you can, I think, then say, no, we have simply got the wrong end of the stick here -- I am sure Professor Neuberger will probably tell me that anyway -- but I think it is best if I am wrong that I hear it from the parties.

But that is how I think I see it at the moment.

MS FORD: Sir, that is very helpful. I would make a number of points in response.

First of all, we agree with the Tribunal's perception that the centre of gravity of the Commission decisions really is not on the spreads conduct. That is quite true. The Tribunal will appreciate that the mechanism by which it is said that the conduct found in the decision translates into some sort of impact on spreads is very much contested. It is certainly not accepted that this notion of pass-on can be taken for

granted. That is very much what is in dispute.

THE CHAIRMAN: Ms Ford, please do not get me wrong. I absolutely understand that and I am hoping -- and let me put down a marker here -- that I find the mechanism whereby the loss that we are assuming -- and let us assume a loss on the part of the counterparty, how that loss translates into a widened spread, I find, even with the benefit of the economic evidence, entirely opaque. It is something where I hope we will have some assistance in terms of just how it works not at a "we will crunch the figures" level, but at a level of much greater generality of: look, this is what we think is happening in the market, and that is something where, you are absolutely right, we entirely understand that it is contested between the parties, we completely understand that you are not adducing your own evidence here, all you are doing, entirely properly, if I may say so, is picking holes in what the applicants have served up.

But equally, the applicants are entitled to a significant following wind in the sense that we are at an extremely early stage here and the mere fact that something is speculative, and it is a word I have used several times today, I do not take as damaging a word as it might be in proceedings that were far more advanced.

If we were post-expert reports in a trial and I said this was a speculative point, then I think you could take that as a distinct red flag. At this stage, when we do not even have your defences and the applicants do not have your data, speculative is, I think, par for the course.

MS FORD: Well, sir, I would certainly agree with your observation that what the claimants seek to rely on is a complex causative chain, and Ms Kreisberger is going to be dealing with the specific questions of causation which arise, but my submissions focus essentially on a slightly earlier point, which is that the further these causal effects are from the findings in the Commission decision, in my submission, the greater the hurdle the claimants have to overcome to persuade the Tribunal that there is a credible case here, and my submission will be that we really are moving quite a material distance away from the matters that have been found in the Commission decisions.

THE CHAIRMAN: Yes.

MS FORD: I am proposing to make my submissions by reference to the Three Way Banana Split decision, which is in the Evans application bundle, tab 2, so {EV/2/5} starting at page 5, but the observations I propose to make apply equally to the Essex Express decision as

well.

The first point to emphasise is that these proposed claims are brought on the basis of the conduct of a small number of individual traders in private chat rooms, and you can see -- can we go to -- sorry -- the previous page, {EV/2/4}, recital 1. So, recital (1) is the recital that gives an overview of the conduct with which we are concerned, and actually going back over to page 5, {EV/2/5}, you can see a reference there to certain individual traders. In the case of the Three Way Banana Split decision, it was at most four individuals, and you can see that from recital (35) on page {EV/2/10}.

In Essex Express, it was, at most, five individuals, and the reason I emphasise "at most" is because the participation in the chat rooms varied over time. You can see an account of that in this decision in recitals (37), beginning on page 10, to (44). So, for example, if you see -- if you look at recital (41) on page 10, you can see that during the period 7 July 2011 to 9 October 2011, the chat room was bilateral, so there were only two individuals involved during that period.

Moving on to page 11 {EV/2/11} and recital (47), this is the recital that describes the underlying understanding between these individual participants, and

it includes, at point 3, that:

"The traders would not disclose shared information received from other chatroom participants to parties outside of the private chatrooms."

That means that not only was the conduct in question limited to a small number of individuals, but it was part of the understanding between them that the information they received would not be disseminated any further.

Secondly, it is important to appreciate the scope of the relevant conduct. What did it cover? What did it not cover? If we start with recital (4) on page 5, the Tribunal will see that each infringement relates to spot FX trading of G10 currency, but there are three limitations to keep in mind. The first is that the infringements only concerned voice trading, and so, you see, in footnote 6, the Commission recording that "the case does not concern FX spot e-commerce trading activity ..." and it gives a definition of that in that footnote.

If we then turn to recital (45) on {EV/2/11}, we can see a further restriction. It is that:

"... not all 55 combinations of the G10 currencies might necessarily have been discussed or actually implicated in the relevant conduct during the period set

out in section 6."

Then the next recital, recital (46), we see that there was a lot of information which was exchanged in the chatrooms which was perfectly benign and non-problematic. So, the decision makes clear that it:

"... does not concern the communications between the participating traders in the Three Way Banana Split chatrooms, in the ordinary course of their business, relating to matters such as the provision of information needed and intended to explore trading opportunities with each other as potential counterparties or as potential customers, or communications about market colour."

So it cannot be assumed that all communications in the chatrooms involved the exchange of commercially sensitive information.

Thirdly, when relevant information has been shared in the chatroom, it only had commercial utility for a short period of time, and you see specific findings to that effect in the decisions. So, for example, if we look at recital (52) on the next page, {EV/2/12}, you see the Commission recording that the information that was shared was:

"... of either immediate commercial value, or of commercial value lasting for a period of minutes or at

most hours after it had been shared ..."

So the duration of the usefulness of the information that was shared was limited.

Fourthly, insofar as the decisions made findings of coordination of trading activities either at the fix or standing down, those were expressly found to be occasional, and you see that reiterated at multiple points in the decision. To just give one example, recital (60) on page {EV/2/14}, the Tribunal will see the heading there "Occasional instances of coordination facilitated by the exchange of information". I think we have to go over the page to see actually what is said {EV/2/15}. The Commission states that:

"... the underlying understanding ... occasionally facilitated specific forms of coordination."

Then, if you look at the description of the specific types of coordination, in recital (61) and (62), in each of those you see the conduct being described as "occasional".

The findings concerning conduct specifically relating to bid-ask spreads are even more limited, in my submission. You see that, first of all, from recital (58) on page {EV/2/14}. So, first of all, the actual exchange of information on bid-ask spreads is itself described as "occasional", so you see that in

the second line:

"…the instances in which the participating traders occasionally discussed existing or intended bid-ask spreads."

And the nature of the information which is found to be the subject of these occasional discussions is really quite narrow and focused. So you see the Commission referring to:

"... existing or intended bid-ask spread quotes of specific currency pairs for certain trade sizes."

So, this information is focused in the sense that it relates to specific currency pairs and also in the sense that it relates to certain trade sizes.

This wording is not accidental because it is then repeated in the following sentence in the same recital. You see the Commission saying:

"The knowledge of existing or intended bid-ask spread quotes of specific currency pairs for certain trade sizes..."

Then, the extent of the exchange is actually focused down even further because the Commission says:

"... where there is a specific live trade..."

So the Commission is focusing on information exchange referable to a particular trade.

The Commission then says that such information:

"... may remain useful for the other traders for a [period] of up to a few hours depending on the market's volatility..."

So you have there another reference to the limited duration of the information's utility, and you see the Commission then say, it "could enable coordination of spreads to that client".

Two points in particular to emphasise about that last sentence. First, the Commission says that it could enable coordination, it makes no finding that it, in fact, did.

Secondly, the coordination in question is to that client. So again, the extent of coordination in contemplation by the Commission is to a particular client, it is not in a more general sense.

You see similar, very careful and very narrow language in recital (89) on page 21 of the decision {EV/2/21}. So the Tribunal will see there, the information -- if you look at the fifth line, the information provided pursuant to the underlying understanding is:

"... for a given client in a specific situation where there is a specific live potential trade..."

As to the potential effects of the information exchange, the Commission says it "may", and there is,

again, no finding that it actually did:

"... have facilitated occasional tacit coordination of those traders' spread behaviour..."

Two points again to emphasise there. Any coordination is described as "occasional" not "frequent", and any coordination is described as "tacit". Tacit conclusion means coordinating behaviour, but without either entering into an express agreement or being party to a concerted practice in the sense that you would find in article 101.1 of the Treaty, and we have cited in our response an authority for that. It is Whish and Bailey on *Competition Law* and just for the Tribunal's reference, CPO bundle B -- sorry, {B/31}.

The final sentence of this recital, the Commission considers that insofar as such occasional tacit coordination arose, it might have had one of two possible consequences. The Commission says:

"... thereby tightening or widening the spread quote..."

And the Commission again emphasises the limited extent of those anticipated consequences. So it says:

"... tightening or widening the spread quote in that specific situation."

So in my submission, the Commission's wording in

relation to spreads in particular is very careful and it is very narrow.

Finally, it is worth emphasising that in each case the Commission made no finding of effects. It found an object infringement, and you can see that in recital (93) of the decision, if we can go back to page 21 of the decision {EV/2/21}. Recital (93) there you see the finding of object rather than a finding of effects.

In my submission, the PCRs have failed to appreciate the really quite limited nature of the infringements which have been found by the Commission and they have sought to construct elaborate and expansive claims based on, purportedly, market-wide conduct and market-wide effects, and those claims go well beyond the scope of what the actual infringements found and in some cases they are actually inconsistent with them. If I --

THE CHAIRMAN: Just to be quite clear about this. I see a very clear distinction between market-wide conduct and market-wide effects. It seems to me that if the applicants are seeking to allege market-wide conduct, i.e. they are trying to say that what the traders did was more pervasive, then they are on a very sticky and dangerous wicket.

On the other hand, if they are saying that

the market-wide consequences of the findings that the Commission has made are as wide as they say, then, subject, of course, to the evidential problems that we are going to be discussing and have discussed in part, then that is open to them, it is a distinction between liability, as it were, and causative effects of that liability that we are talking about.

So, just to put out there how we are seeing it at this end.

MS FORD: Sir, that is an entirely fair distinction. The criticisms that we make, I think, cover both of those bases in the sense that, in some respects, we say that the PCRs have actually gone beyond the conduct that is found in the Commission decision, and I will elaborate upon that. In other respects, whether or not you find effects which follow-on from the conduct in the decision is, ultimately, a question of causation and as I have indicated, Ms Kreisberger will be addressing the Tribunal on that. But I do rely -- insofar as that is the situation, I do point to aspects of the Commission decision which I say mean that that causation case is inherently weak and implausible.

THE CHAIRMAN: Thank you.

MS FORD: The first aspect in which we say there has been an overly expansive reading of the Commission decision

concerns assumptions as to agreements to widen spreads. If we look, first, at the approach that is taken by the O'Higgins PCR, and that is in Professor Breedon's first report, so it is {MOH-B/0/36}, and Professor Breedon's report contained various references to agreements to widen spreads.

Starting with paragraph 4.4, the final sentence, the Tribunal will see:

"... whilst colluding market makers in principle could charge narrower spreads as a result of this informational [exchange] ..."

I am going to come back to that proposition. He then says:

"... there is implicit agreement within the FX cartels to keep spreads wide (at or close to those of the non-colluding group) and so to earn abnormal profits."

There is no finding in the Commission decisions of any implicit agreement to keep spreads wide.

If we then go to page 38. Sorry, page 38 in this document, please {MOH-B/0/38}. At paragraph 4.9(b), which is on this page, there is a reference to:

"Make excess dealer revenue on trades by collusively widening their Bid-Ask Spreads as a result of the information advantage, referred to for convenience

as 'spread manipulation'."

Then if we go to page 60 in this document the Tribunal will see a heading above 6.22, "Expected impact of the anti-competitive conduct on affected trades", and then a subheading, "Agreeing to fix or widen bid-ask spreads", and then an assertion:

"An agreement by the Cartelists to widen effective spreads will, all else being equal, result in greater Realised Spreads."

The Tribunal has the point that there is no finding by the Commission of any such agreement.

Now, it is fair to say that when we pointed this out in our response there was a certain amount of rowing back from the terminology that was being used in this report. If we look at the O'Higgins PCR's reply, which is in CPO bundle A, tab 2, at page 39 {A/2/39}, the Tribunal will see, in paragraph 100, subparagraph (2):

"The statement at para 4.4 of Breedon 1 that 'there is an implicit agreement within the FX cartels to keep spreads wide' was not intended to be a factual or legal assertion as to the existence of such an agreement within the meaning of Article 101(1). Rather, this statement appears in the context of an analysis of the information exchange aspect of the infringement

found by the Settlement Decisions."

It is said:

"Given the information exchange in which the respondents participated, it was clearly justifiable to regard it as an economically equivalent to an 'implicit' agreement."

If we look at Professor Breedon's second expert report, {C/1/1}, page 16 {C/1/16}, at paragraph 3.11 you see Professor Breedon clarifying:

"... for the avoidance of any doubt, I was not asserting or relying on an explicit agreement to widen Effective Spreads, but simply making a definitional point about the relationship between Effective and Realised Spreads."

I have shown the Tribunal the headings under which Professor Breedon's second -- Professor Breedon's observation about the existence of an agreement appeared. It did not seem to be focused on comparing effective and realised spreads.

But in any event, when it came to the teach-in, this time Professor Bernheim on behalf of the O'Higgins PCR was also referring to agreements to widen spreads, and we can see that, first of all, from the slides that Professor Bernheim used at the teach-in, if we look at the CPO bundle H, tab 578, page 1 {H/578/1}. This is

Scott+Scott's letter of 19 June which attached Professor Bernheim's slides, and if we turn to page {H/578/21}, you can see the slide there, "Understanding the cartels: how might FX cartel members' collusion have impacted prices?", and then point 1:

"Explicit agreements among cartel members to raise prices."

MR JOWELL: Forgive me, but you do need to read the intervening sentence between the 1 and the heading.

MS FORD: Well, I am sure the Tribunal can read it.

But if we then go to the transcript of the teach-in, which is at CPO bundle E tab 17, page 68 {E/17/68}, if the Tribunal looks at lines 9 to 16, this is Professor Bernheim speaking to his slide, and he says:

"... we now turn to the question of how the cartel members' collusion may have impacted prices, and as a general matter this is the competition economics question. Collusion may impact prices through a number of different channels, and I have listed them here.

"The first is explicit agreements among cartel members to raise their prices -- here spreads."

So, in my submission, although the slide was positioned in such a way to identify in theory how one might impact prices, he is here expressly referring to an agreement to widen spreads.

Mr Lomas then posed a question on {E/17/69} of the transcript, line 15. He said:

"Is there anything in the decisions that suggests there were explicit agreements among cartel members to raise the spread, to broaden the spread as opposed to price of a particular currency pair? Because your measure is the width of the spread, not the price, a point you made earlier. So is there anything in the decisions talking about agreement to broaden spreads?"

To which Professor Bernheim responded:

"... I am not remembering anything specific."

Which, in my submission, is quite right, because there is not anything specific in the decisions. But he did then go on to say is:

"But the agreements to affect the bids and the asks -- well, anything that impacts the bids ..."

If we could just go over the page {E/17/70}:

"... and the asks is going to broaden the spreads. So it could be that there was some understanding concerning bids and asks, or alternatively it could have been that there was simply information exchange which they understood would benefit them by reducing bids and raising asks in the end. So it does not have to be explicitly an agreement to widen the spread, it could be

an agreement that is focused on a piece of this."

So, in my submission, this is an example of the O'Higgins PCR proceeding on the basis of agreements to widen the spreads which are simply not found in the Commission decisions.

Turning to the Evans PCR, Professor Rime has expressed the view that the information exchange would have facilitated tacit collusion and we have made the point that the Commission decision recognised that the conduct could or may result in occasional tacit collusion, and in particular, even the information exchange about the spreads, let alone the actual potential for tacit collusion, was described as "occasional".

But it is important to look at the basis upon which Professor Rime expresses the view that this occasional information exchange between a small number of individual traders could have resulted in tacit coordination to any material degree, and what he does, in my submission, is he speculates about mechanisms by which the conduct of a few traders might somehow be amplified so as to give it a much wider effect, and he says two things about that in particular.

First, he makes the observation that the trading desk is a collegial environment, and so he says that

the information might have been used in such a way that it influenced the decisions of other traders at the same trading desk who did not participate in the chatroom -- that is his second report, paragraphs 70 to 71 -- and I make the simple point that there is no support for that in any of the decisions, and indeed it is, in my submission, very much in tension with the finding in the decisions that there was an understanding between the traders not to share the information outside the chatrooms.

Secondly, he speculates that the sharing of information might have had some sort of longer impact because it would enable cartel participants to infer each other's baseline spreads, and I think I am right in saying that he elaborated upon that theory yesterday, but he mentions it, for example, in his second report at paragraph 29. Again, there is no support for that in the decisions, and it is in conflict, in my submission, with the Commission's very careful wording that I have shown you that identifies the potential for tacit collusion in respect of spreads to that client or in that specific situation.

So, in my submission, the Evans PCR's theory of harm depends on an important assumption, that this limited conduct on the part of a small number of

individual traders can somehow be augmented and magnified so as to discern a much wider impact in a way that, in my submission, is not supported by the Commission decisions.

Turning to the second assumption that we say underpins the PCRs' theories of harm, that is an assumption that any coordination would have resulted in wider quoted spreads to customers, and of course the PCRs say, "Well, we do not make that assumption, we propose to test it empirically", but certainly the basis on which it is suggested that there has been some harm to the class is the assumption that spreads would have widened. If spreads narrowed as a result of the conduct, there will be no loss and no claim.

I have shown the Tribunal that the decisions expressly recognised that potential occasional tacit coordination might result in either tightening or widening of the spread quote in any specific situation. That was recital (89). In my submission, it is at least in tension with that finding by the Commission for the PCRs to be advancing a claim which is premised on the idea that the consequence would be consistently to widen spreads.

The PCRs have acknowledged that participating traders could, in theory, have narrowed their spreads

rather than widened them, and I showed you, when we looked at it, paragraph 4.4 of Professor Breedon's report where he made the observation that colluding market-makers could in principle charge narrower spreads as a result of this informational advantage. In my submission, there is a very obvious inconsistency in the PCRs' claims. They claim that information disadvantage on the part of non-colluding banks leads them to widen their spreads, that information advantage enjoyed by participating traders would not lead to them narrowing their spreads.

Now, the first answer the PCRs give to this is to say, "Well, of course the advantaged party would choose to widen their spreads, because they would wish to maximise their profits, but the advantaged party might equally wish to prioritise increasing their volume of trades", and that was a point that was put to Professor Bernheim during the teach-in. If we can look at the transcript in CPO bundle E, tab 17, at page 71 {E/17/71}. This is a question put by Mr Lomas, and he is saying, from line 20:

"By having the cartel, you increase the information that is available to the dealer, the point you just made about five cartel members covering 50% are of the market. That reduces the information asymmetry with

the user of the market vis-á-vis the customer of the dealer. So why does that not encourage them to reduce their spreads, because ..."

If we go over the page {E/17/72}:

"... because having more information means they can see and reduce their risk profile?

"So that should reduce their spreads, which may mean they can go for volume ..."

Professor Bernheim's response, at line 9, is:

"Well, it could be both and you are asking an empirical question as to where these things play out."

So as Professor Bernheim recognised, it is entirely possible that participating dealers might seek to maximise volumes.

The second answer that the PCRs give is that they say, "Ah, well, there were monitoring and punishment mechanisms which would have stopped participating dealers from using the information they gained in the chatrooms to undercut each other and to narrow their spreads", but again, this is where, in my submission, what is being said starts to stray away from the bounds of the Commission decisions, because the Commission decisions did not make any findings as to punishment mechanisms at all.

So insofar as Professor Rime has said, for example,

that there would have been credible sanctions for non-compliance, such as threatening to remove a member from the chatroom -- that is his second report at paragraph 47 -- that does not derive any support from the Commission decisions.

The decisions did find that the exchange of information helped in monitoring compliance with the underlying understanding. That is recital (81). But we have to ask, how does that work in the particular conduct of spreads? The exchange of information would only permit traders to monitor their competitors' spreads and identify undercutting if the traders actually chose to disclose them. We know from the Commission decisions that the traders only occasionally discussed bid-ask spreads in very specific factual situations, but those exchanges do not then permit the traders to identify any undercutting which might arise as a consequence of those exchanges. So, it is not surprising, in my submission, that when Professor Breedon gives an example of supposed monitoring -- this is paragraph 3.17 of his second report -- the example he gives is of a benchmark fix rather than of spread conduct.

Professor Rime has suggested that information would have to be received from customers outside

the infringements in order for any undercutting to be detected.

So, in my submission, the assumption that participating dealers' spreads would necessarily widen rather than tighten as a consequence of this conduct is a further assumption which we say is inconsistent with the Commission decisions.

Moving on to the third false assumption which we say underpins the PCRs' claims, that is the assumption that the non-participating banks would necessarily also widen their spreads in response to this infringing conduct and there are two mechanisms by which this effect will supposedly manifest itself.

The first is only advanced by Professor Rime, and he says that if participating banks widened their spreads to customers, then the market becomes less competitive and non-participating banks can also widen their spreads to customers, and so it is essentially an umbrella damages type theory. But in my submission, this is not a conventional umbrella damages claim, because normally it can be assumed that if a cartel had any effect, then that effect would manifest itself in the form of an overcharge, and that overcharge then reduces the competitive pressures on other market participants.

In this case we know, from the Commission decisions,

that it is not akin to a conventional cartel damages claim because they say that this occasional tacit coordination might result in either tightening or widening of spreads to customers. Insofar as, as was contemplated by the Commission, it might result in tightening spreads to customers, that would mean that non-participating banks would equally have to tighten their spreads to remain competitive.

The second mechanism by which it is claimed that non-participating banks would be prompted to widen their spreads is by reason of the effects of adverse selection in the interdealer market, and the interdealer market, as the Tribunal knows, is where the banks trade with each other, and it is said that information sharing between participating banks will give them an information advantage over non-participating banks in the interdealer market, and that is said to create adverse selection risk for the non-participating banks, who widen their spreads in response, and this is said to increase costs in the interdealer market and it is claimed that those costs are passed on to customers.

The Tribunal will appreciate that the Commission decisions make no findings about the interdealer market at all. They do not concern conduct on the interdealer market and they do not discern any potential adverse

effects on the interdealer market. So at the very least this element of the claim is moving quite substantially beyond the matters which are dealt with the in the Commission decisions, and in my submission that came through particularly clearly from Professor Rime's responses to some of the questions that were put by Mr Jowell yesterday, because he expressed the view that speculation in the interdealer market based on information advantage is a core business of dealers, but that certainly is not the focus of the Commission's decisions; they are not concerned with the interdealer market at all.

For the same reasons, and applying the same logic, the Commission expressly recognises that participating dealers might choose to compete by tightening their spreads rather than widening them. So too, in my submission, might not-participating dealers choose to compete by either holding constant or narrowing their spreads.

Fourthly, we say that there is a more pervasive and insidious assumption going on here, and we say that that is a general assumption that the extent of the infringing conduct found by the Commission is much broader and more market-wide than in fact was the case. You can see that from the reliance that the PCRs place

on the respondents' alleged combined market share. Just to show the Tribunal some examples, in Professor Breedon's first report -- so this is {MOH-B/0/23}.

I think that might be the CPO bundle B. Can we do MOH, Mr O'Higgins' bundle B, and within this page 23, please.

The Tribunal will see, at paragraph 2.21, he is making the observation that:

"... the total average worldwide market share of the Addressee Banks between 2007 and 2013 was in excess of 45%."

He then comes back to that at page 51 in this report {MOH-B/0/51}, paragraph 5.11. He is talking about the extent of injury which he perceives might result from the conduct, and says in the last sentence:

"Given their extensive and ongoing trading activities, in addition to their large joint market share, the Proposed Defendants' collusive conduct would affect the entire market."

So he is relying on market share to say that this is conduct which is going to affect the entire market.

You see a similar reliance in Professor Rime's first report. This is in {EV/9/52}, paragraph 165. Again, we are talking about -- this is another paragraph which is

talking about the effect of the conduct, or the supposed effect. If we can go over the page {EV/9/53}, you see him saying:

"This increases the market power of members of the cartels vis-à-vis their customers, especially in circumstances where: (i) the combined market share of the banks represented in the cartels is quite large; and (ii) the market shares of other competitors in the market are relatively smaller."

He makes a similar point if we look at page 61 {EV/9/61}. Paragraph 192, you see there a reference to market shares:

"... the market power of the persons with the information exchange (i.e. the Cartels) is quite large, given that the combined market share of the Cartels ranged between 23.9% - 48.0%."

So, in each case, in my submission, what the PCRs are doing is assuming that because the respondent banks had a particular share of the market that is the share of the market that is necessarily implicated by the conduct, and so they extrapolate the conduct across the entirety of the infringing banks' market share, and that, in my submission, is not right, because it was only certain individual traders at each participating bank who were engaged in the relevant conduct and those

individuals comprise a limited subset of those engaging in manual voice trading on behalf of the banks.

MR LOMAS: Ms Ford, I was wondering about this earlier. Is there anywhere in the papers -- I am not asking you to give evidence on it -- any estimate of the volume of Forex trading that was accounted for by the individuals is who were in the chatrooms as opposed to the banks they represented that may be derived from what percentage of each bank's trading was represented by that individual's trading?

MS FORD: I think that is a matter on which I will have to seek instructions and come back to you to give you an accurate answer on that. I am afraid I can't tell you.

MR LOMAS: The second question I had, which you may say is not for you but is for the claimants, is -- but it would be interesting to hear your thought -- it is really the point the Chair was making earlier -- I suspect the answer to all this from the claimant's side will be, "Give us the data, we will conduct an empirical exercise and see if we can identify the movement in spreads". What would your response to that be?

MS FORD: This dovetails with the submissions that Mr Hoskins will be making, but it is quite correct that the claimants do say, "A-ha, well, insofar as you have doubts, we will test it empirically", and that assumes

that you can rely on the models to give you an accurate answer, and if, as I understand will be Mr Hoskins' submission, you cannot necessarily make that assumption, then there is a very real risk that you get reinforcement for a perceived theory of harm from the models when in fact there is no reliability to that reinforcement.

MR LOMAS: So that topic is a joy for tomorrow morning.

MS FORD: Indeed.

Sir, I was just about to make the point that we know there was an underlying understanding between the traders that the information would not be shared outside the chatrooms and that prevented the broader dissemination, and that really does mean that, irrespective of the actual volumes, certainly their conduct, the effect of the conduct in question is confined in that respect to the participating traders and cannot be extrapolated across to the rest of the bank, and that is before you factor in --

MR LOMAS: That was the fact that was behind my question, yes.

MS FORD: Sir, yes, and we will revert to you in response to that.

Even among the participating traders we have seen that the information exchange, first of all, was not

comprised purely of commercially sensitive information, there was some information exchange which was not considered to be an infringement, and secondly, it became rapidly obsolete. The commercial value of the information was limited and so it became rapidly obsolete, so in temporal terms the conduct is limited as well. In any event, we know the conduct did not extend to e-commerce transactions, which comprised a large proportion of the market.

So, in my submission it is wrong for the PCRs to point to the respondent banks' overall market share and to assume that that is the proportion of the market which is actually impacted by the infringing conduct. It is indicative of a false assumption as to the actual nature and extent of the infringing conduct, and the infringement is actually much narrower than the PCRs assume to be the case.

Finally, there is a more practical problem and that is that, as the Tribunal will appreciate, there are two separate decisions, and they involve different chatrooms, overlapping time periods and different participating traders. Three of the respondent banks are party to both decisions, UBS, RBS and Barclays; MUFG is only party to Essex Express; JPM and Citi are only party to the Three Way Banana Split decision.

In general, the PCRs have shown a tendency to refer to the infringements collectively, but self-evidently those who are addressees of only one of the decisions cannot be held liable or required to compensate for any effects which are referable to an infringement which has been found in the other decision to which they are not a party. Mr Evans has offered no suggestion at all as to how liability should be apportioned as between the two decisions. Professor Breedon has suggested an apportionment based on the share of trading in each currency pair that is ascribable to the participants in each infringement, but what he does not grapple with is how you will separate the potential causal effects of the two separate infringements in circumstances in which, on their case, each infringement could, potentially, have impacted on the spreads achieved by the other. So we say that that is a further practical difficulty which arises from the fact that there are here claims pursued on the basis of two Commission decisions.

Unless I can assist the Tribunal further, those are my submissions and I am going to hand over to Ms Kreisberger to address the questions of causation.

THE CHAIRMAN: Well, thank you, Ms Ford. I do not think we have any questions for you, we have raised them in

the course of your submissions, so thank you very much.

Ms Kreisberger, before you start, I think we probably ought to take a short break, a little later in the afternoon than, perhaps, it ought to be, but we will rise for five minutes to enable everyone to stretch their legs and we will be back at just before 10 to 4.

MS KREISBERGER: Thank you, sir.

THE CHAIRMAN: Thank you.

(3.42 pm)

(A short break)

(3.49 pm)

THE CHAIRMAN: Ms Kreisberger, I think we are all assembled, so over to you.

Submissions by MS KREISBERGER

MS KREISBERGER: Thank you, sir. I fear Ms Ford has created quite a lot of anticipation about my ability to address your questions, but I will do my best.

I will address causation and I will structure my submissions in three parts. First, I will address the standard of review as it applies to causation, how should the Tribunal approach its review of causation; secondly, I will briefly summarise the PCRs' cases on causation; and lastly I will turn to my overriding submission, which is that those cases on causation are weak, and I will address the various sub-topics under

that heading.

So, beginning with standard of review. There are, of course, three pillars to any follow-on actions: infringements as found in the decision, causation and loss. The claimant must establish that the infringement caused the losses which are claimed.

Now, because the PCRs ask for permission to bring their claims by way of opt-out proceedings on behalf of the classes, the opt-out merits test applies to the causation pillar, as it does to all aspects of merits. So, as you have now heard many times today, the PCRs must each persuade the Tribunal that the strength of its case on causation is more immediately perceptible, in the words of the Guide, than in an opt-in action. But what does that mean? What is the standard which the Tribunal should apply in determining whether the case on causation is strong enough to support an opt-in? I hope it might assist the Tribunal to develop that point a little bit, given some of the exchanges today.

Now, Mr Jowell invited you in opening to find that the standard is a "realistic prospect" of establishing loss to the class, he said, but that is the strike out standard; Ms Wakefield volunteered the perhaps weaker standard of whether the claims for loss are "plausible";

and, sir, you asked today whether it is enough for the claims to be "arguable". So my core submission is, no, it is not enough. Each of those formulations sets the threshold far too low.

First of all, as respondents, we do not seek to strike out these proceedings. That is not the level at which we challenge these claims.

Secondly, the Guide pegs the merits standard in opt-out claims to something higher, more immediately perceptible than one would expect from an opt-in claim. Now, it must be right that we should assume for these purposes that the comparison is drawn with a viable opt-in case. That is one which is already above the strike out threshold. So we know we are above that. So it cannot be right for the PCRs to say you must simply ask yourselves whether there is a realistic prospect that they can establish causation of the various categories of losses which they claim. They have to meet a higher threshold than merely surviving strike-out; they have got to have a stronger claim than that.

Now, in my submission, the correct standard to apply given that, is whether the PCRs have shown, based on the pleaded case and the materials which they have put before you, that the infringements, as found by

the Commission, are likely to have caused the full panoply of losses which they claim, and that, of course, as we know, is the comprehensive widening of all spreads on all venues to class members across the board.

Now, if they have not convinced you of that, then these claims should not be certified as opt-out proceedings, because --

THE CHAIRMAN: Right, just pausing there. You, I think, are advocating then for a fairly hard-edged distinction between opt-in and opt-out. So, we started this morning with Mr Kennelly where we were beginning with a very hard-edged point that the applicants were making, namely that we simply couldn't consider this, and we gave a view, provisionally, as to how we saw that.

But you are, I think, saying that although there are multifactorial elements that go to the question of certification and its basis, namely opt-in or opt-out, there is a hard-edged merits test which is higher in opt-out cases than in opt-in cases and which, even if every other factor points towards opt-out, if not satisfied, means that that's it, you cannot have certification on an opt-out basis, and if certification on an opt-in basis is, for whatever reason, not going to happen, then certification just does not follow.

I just want to be clear, that is where you are

1 going.
2 MS KREISBERGER: Yes, I would accept that but put the point
3 in a slightly different way, which is, in the context of
4 these claims, this is a factor which weighs very heavily
5 in the balance. So we accept there is a multifactorial
6 balancing exercise to be done, but given the nature of
7 these claims -- and I will develop those points --
8 the merits standard is an important one, it is an
9 important factor.
10 THE CHAIRMAN: Okay.
11 MS KREISBERGER: Just to elucidate that a little, it is of
12 course right, and you have now heard a number of times,
13 that the Tribunal's scrutiny of merits is high level.
14 It has also got to be meaningful, given the burdens and
15 the complexities of opt-out proceedings. It should be
16 remembered that members of an opt-in claim do not
17 require this additional layer of review because, as you
18 have heard, they can assess the merits for themselves
19 and take their own decision, and as 6.39 of the Guide
20 makes clear, they are presumed to have done so.
21 But membership of an opt-out class is not
22 a conscious one, so it does not depend on proactive
23 steps to join the litigation. So in that case it is for
24 the Tribunal to ensure that the weak claims do not
25 proceed by way of opt-out procedure. In other words,

the Tribunal must stand in the shoes of the class for these purposes. So, that is what we say is the relevant standard, and it has got to be likely to establish the losses. There is a question of probability inherent in a standard above strike-out.

Sir, to use your word earlier which you put to Ms Ford, "speculative" is certainly not enough. That is well below the threshold. Speculative claims should not proceed by this procedure.

So then staying with the topic of standard of --

THE CHAIRMAN: Just pausing there, though, the trouble with "likely" is that I always have great difficulty in pegging probability of success between balance of probabilities -- which is, for present purposes, the gold standard; you win at trial if you establish that -- and sort of American Cyanamid or strike-out arguability the other end where you are just talking about: is it plausible even though are pretty confident it is going to lose.

So are you saying -- where does "likely" fit in that spectrum?

MS KREISBERGER: As I say, it must be higher than merely "arguable" or "plausible", and that can only take you to "likely", "more likely than not".

Now, I would emphasise --

THE CHAIRMAN: Sorry, you are saying the test is balance of probabilities?

MS KREISBERGER: Well, it is likelihood, yes. So, "likely" -- "likely to have a prospect of success" does mean above a 50% probability, or around a 50% probability. I am not suggesting a strict probabilities of success test, there is clearly a measure of discretion here. "Arguable" is not enough, but it is not akin to a trial, because you are approaching it on the basis of the material they have put before you now. They have got to be able to persuade you of a sufficient likelihood of being able to make out their case at trial.

THE CHAIRMAN: You see, this is -- readers of my decisions on interlocutory injunctions will know that I am a great fan of Lord Diplock's stage 1 in American Cyanamid on the basis that he kills off the sort of debate we are having now by saying there is a reason we have trials and that is because the shortcuts we try to short-circuit trials actually do not work. If someone had ascertained a quick and dirty way of getting to a reliable result, we have killed the trial, and there is a reason we have not. So, he says, there is no point in having a sort of debate: what do you mean by likely? Do you mean 20%, do you mean 30%, do you mean 40%, and

if so, 40% of what?

You just say we have a threshold test of: is this plausible, is it implausible, is it arguable, is it not? Once you have done that, there is no point in thrashing through how far that low level has been exceeded because that is the purpose of a trial, and that is why I am pressing you slightly unfairly, because I think it is an impossible question, of what do you mean by "likely".

You cannot mean balance of probability, because that is the test at trial. So you have got to mean something more than: does it pass the sniff test. But all I am doing now is rearticulating what I see as Lord Diplock's stage 1, which I think does very much inform the merits approach.

Now, I can see that if you see, in the high level view you are taking, a point that really is an extremely good one, a strong one that you just can see is a winner, then that is something which goes into the mix. But I am, I confess, not seeing the word "speculative" as as damaging as you would be submitting because of the early stage. I mean, I think there are an awful lot of injunctions that come to court where "speculative" is precisely the right word and we still grant the injunction.

Now, that is not because we like granting

injunctions in speculative cases, it is because it is actually extraordinarily difficult to work out where in the spectrum you pin the better test. So, if this is to be a hard line distinction between opt-in and opt-out, in the sense that unless you pass the test and you want an opt-out it does not happen, whereas you can have an opt-in in an altogether different stand, then that test has got to be really a workable and clear one.

MS KREISBERGER: I am grateful for that, sir. I would make a few observations --

THE CHAIRMAN: No, please do.

MS KREISBERGER: -- if I may. My starting point is this is a sui generis procedure, which is why American Cyanamid, I would suggest, does not assist here.

What the Guide is telling us quite clearly is there needs to be an extra filter for these opt-out claims. So the strike-out threshold clearly exists for all claims, opt-in, opt-out and the rest of the universe of competition claims, that will always exist, and the Guide is signalling there is an additional and higher filter and it pegs it quite deliberately to opt-in cases. So it has got -- so we must be above realistic prospect of success.

I agree then words sometimes do not have the precision to assist us, can one tie this down to

a particular degree of probability, I prefer to stay with the formulation of "likely". But it is right, whatever precise formulation, precise articulation of the concept we use, it is for the Tribunal to use its discretion to prevent claims going ahead in the form of opt-out proceedings if they should instead go ahead as opt-in. They are above strike-out but they are not strong enough to merit the burdens of opt-out, and as I said, that is because the class cannot do -- that cannot be done for them, and that is why it is such an unusual procedure.

MR LOMAS: Ms Kreisberger, forgive me, because I have not researched or understood this, but you have not yet, as defendants, been in a position whereby you could make a strike-out application. The case has not got to that stage.

Presumably if we were to certify one of the PCRs, you would, theoretically, have the right to make a strike-out application. If that is the case, how can the standard be higher than strike-out now rather than lower, otherwise your strike-out right would be illusory?

MS KREISBERGER: I am grateful for that. The Guide -- I do not have the rule in front of me -- does provide for strike-out applications to be rolled up with

the certification hearing, and in fact Ms Ford and I were against each other a couple of weeks ago at a certification hearing that was both a challenge to opt-out, a challenge to certification and a strike-out application.

MR LOMAS: But it does not require it. You could still bring the strike-out application later.

MS KREISBERGER: That is of course right.

MR LOMAS: Which could be nugatory if you had already passed a higher standard of proof.

MS KREISBERGER: Well, it would be a difficult thing to do in that case, but there is nothing which suggests that strike-out applications should be held back to a later stage. On the contrary, the Tribunal is entitled to hear the strike-out at the same time, and certainly the practice so far has been for the strike-out application to be brought at the same time as certification.

Now, the picture may change. Some evidence may emerge which means that a strike-out application is back in play. I cannot speculate. But what is very clear from the Guide, very clear, is that you are not being asked to apply the strike-out threshold, it has got to be something higher than a viable opt-in claim.

I would --

MR LOMAS: Yes, okay. I was not asking a question about practice. It just seems to me slightly odd that if you can bring a strike-out application later the standard of proof at this stage should be higher, or the degree of confidence, the degree of probability should be higher.

MS KREISBERGER: Yes. I do not think there is anything I can add to that save that there is no bar on a respondent bringing a strike-out application now, so it could be said at the same time there is no realistic prospect of success.

MR LOMAS: But that is a different point. But let us move on.

MS KREISBERGER: I would just add this. It is really the nature of the opt-out procedure, this sui generis procedure that changes the calculus, and just to be clear -- and I understand that goes to Mr Lomas' point -- one is not seeking to kill the trial, so the American Cyanamid objection does not apply, it is simply a question of whether the burden to the litigation is merited such that it justifies an opt-out claim.

My last response is also, sir, when you use -- when you articulate that it is a hard line test -- I am going to come back to this in just a moment -- I would not

want to suggest that it is not fact-sensitive and I do not want to deal too heavily in generalisations. My submissions are directed at this case, and in this case I say you do need to be satisfied that the PCRs are likely to establish that the infringement led to the losses they claim, and I will develop that point as I go on.

So then staying with standard of review, I would like to turn to some of the objections that the PCRs have articulated, and I address three points here.

First, they say, you can assume merits to be strong on the basis that it is a follow-on action; that is sufficient. But that is incorrect, because it depends on the facts.

In some cases, it is right that causation is obvious from the infringement decision itself. Now, the O'Higgins PCR relies on just such an obvious case for its proposition that a follow-on case is enough to tick the causation box. If we could just turn to that case. It is *Gibson v Pride Mobility*. That is at authorities bundle, tab 22, page 38 {AUTH/22/38}. That's it. If I could ask you to turn up paragraph 123. I will just catch up with my hard copy bundle. It is worth reading in full. The Tribunal said:

"Rule 79(3) ... provides that in determining whether

collective proceedings should be opt-in or opt-out, the CAT may further take into account the strength of the claims.

"As made clear by the Guide at paragraph 6.39, this does not require a full merits assessment but rather a high level view of the strength of the claims. [But] ... the fact that this is a follow-on case is significant, since the claimants do not have to establish a violation of competition law."

O'Higgins gave you that, but not the final sentence, which says:

"Further, the finding in the Decision that the infringements had an effect on prices, whether or not binding, shows that the claim for loss cannot be dismissed as weak."

In other words, implementation was part of the finding in the decision, so you have causation in that case.

Now, the same --

THE CHAIRMAN: Yes, I mean, just to make that point -- or to articulate my understanding of the point you have just made. We clearly need, because this is a claim in tort, in some form -- and it may be a slightly different form to the conventional individual action, but in some form you need to show -- the applicants need to show

actionable loss.

Now, it may be that that is actionable loss across the class, and it may be that the actionable loss is in the form of a non-monetary loss, like an impairment or damage to the market, which is what I found to be the necessary actionable loss in BritNed, but nevertheless, you have got to show something, and so, in some cases, the liability, the finding of infringement, which is always the driver of the regulatory decision, may also make the question of causation a no-brainer. But here, as I see it -- and again, I flag this so that the applicants can push back in due course -- the manner in which the spreads are affected is, it seems to me, a causation question that is not, or at least not clearly, answered by the decisions but is asserted by the economic evidence that we have seen in writing and orally yesterday, and at the teach-in.

So, that is something which needs to be established on the balance of probabilities at trial and on which we need to reach a view, according to the requisite standard, whatever that may be, here.

MS KREISBERGER: Yes, so, if I could take that in stages. It is not just a question of causation of some loss, and actually you have pre-empted the second point I was going to make, so let me take that one first. It is

right that I think the PCRs seem to be saying it is sufficient to show that the infringements caused some loss and on that basis they say, "The claims are meritorious, and we will have all the data, please, and see where we get to".

Now, I have a specific submission on that, which is that that approach is procedurally improper, because as you know, the governing principles, rule 4 of the CAT Rules, requires the Tribunal to ensure that cases are dealt with justly and at proportionate cost. Now, these claims of pervasive spread-widening will involve huge costs given their sweeping scope, as you say, for the econometric evidence.

Take the example of disclosure alone. Both PCRs do seek third party disclosure from non-respondent banks, third party disclosure from electronic and multi-bank platforms, but the sheer amount of data that they want to put through their models -- and as you heard on Monday, the costs of these claims run to tens of millions. Now, those costs vastly exceed the costs which would be incurred in a properly targeted claim for losses in relation to specific infringing exchanges.

Now, when Professor Bernheim and Professor Breedon quite candidly say, unlike Professor Rime, "Look, we just want to interrogate the data to see what empirical

answers it might throw up and we will find out the answers in due course", well, that might be an appealing proposition for the economists, but "suck it and see" is not a proportionate or a procedurally proper basis on which to bring opt-out claims. The claims and the methodology must be appropriately targeted, properly targeted from the outset.

That brings me back to my earlier point that this is a fact-sensitive assessment in your discretion, and I would say that it is the vast costs of these claims which are relevant here to the standard of review and your standard of review should be sensitive to that. Given the leviathan nature of them, that is what calls for closer scrutiny of whether they can be brought by way of opt-out than in a straightforward targeted claim.

I have a further point which might assist on your question, sir, and then please do tell me if I have not yet answered it, and that is this: Professor Neuberger put to Professor Bernheim yesterday that it would be possible to run the regression, and if it showed that certain subgroups had no spread difference, then they can be excluded from the class subsequently and Professor Bernheim agreed with that proposition. But that approach would be highly problematic under the opt-out framework, because class definition needs to

be clear at the stage of certification, from the outset, because once the CPO is granted, the class representative is required to give notice under rule 81 so that people can work out if they are represented persons and if they would prefer to opt-out, and of course non-domiciled persons have the opportunity to opt-in, so it is a very important step. That means that the class representative must be confident that the class is as defined at the time of the CPO.

But if the O'Higgins PCR accepts now -- now -- that the class may well prove to be overbroad and subsequent narrowing may well be inevitable, or likely, then that is not a class which is fit for opt-out certification. Again, we are not seeking to kill the trial, we are talking about the availability of the opt-out procedure which the Guide tells us is limited compared to opt-in claims.

Again, just to be clear, this objection is not one which simply goes to the quantum of the claims, it raises definitional questions about who is in the class and whether broad categories of represented persons will ultimately remain in the class.

For instance, to give an illustration, if algorithmic trades are in the pot now, as they are, for both PCRs, but the regression in fact shows no impact on

these trades given how remote they are, then customers who engage in algorithmic trades only, or perhaps primarily, and do not engage in voice trades will need to be taken out of the pot. That will need to be done subsequently. Or if the regression does not provide support for the ASR theory of non-respondent spread widening -- I will come back to that -- persons who only trade with non-respondent banks will ultimately also be booted from the class.

Now, I accept, of course, there is a formal power to amend a CPO as one goes along, but that cannot be relied upon to justify definitional uncertainty at the stage of certification. The class needs to know where it is.

So these are points that must crystallise now and weigh heavily in the balance against an opt-out procedure.

MR LOMAS: Ms Kreisberger, how far does that point go? Are you saying that you need something close to crystal certainty that the class definition at the outset is going to be the class definition that emerges from the trial before you can certify opt-out, because I have not seen that in the rules and that seems to be quite a high test at quite an early stage?

MS KREISBERGER: I am not sure I would adopt the formulation of "crystal certainty", but what is not appropriate is

for a PCR to come to the Tribunal and say, "We do not know, we cannot say, but we would like to test the data, so here is a very broad class definition and do not worry if it is inaccurate because, despite the fact that there is a very formalistic procedure for notifying the class, we can amend down the line". That is what I say is improper.

It should be remembered, again, as I said, I aim my fire at the facts of this case. This is not the only factor before you, but in the context of a case where we say opt-in is practical, this is a further factor which is a very significant one in your multifactorial balancing assessment. So I am not saying never, but I am saying in this case we have sophisticated class members, a practicable opt-in claim and a class which one PCR seems to accept is potentially overbroad, and as I say, the O'Higgins experts candidly say we need to see where we get to. Professor Rime noticeably puts things in more categorical terms and expresses rather firmer conclusions but -- so my submission is that is not a procedurally proper basis for an opt-out. The claim can go ahead but it does not justify the burdens of the litigation involved in opt-out proceedings.

MR LOMAS: Okay, thank you.

THE CHAIRMAN: Well, there are a number of points which

arise out of that, and I think the last point you made about certainty of class is perhaps one that we have not focused on enough, because it is important, because if the class is certified and it proceeds to trial and the claim fails, then those who are in, that is to say those who have not opted out, have lost their cause of action. That which they had before is converted into a declaration of non-liability and they cannot start again.

Now, it may be that one can have a salami slicing back so that one reduces the scope of the class over time, but I have to say, my initial take on how opt-outs ought to work is that that ought to be something which is a rare adjustment, because otherwise the defendants are put to excessive cost in dealing with a case which actually then vanishes into, literally, thin air.

So, it does seem to me that is an important point that you have made, and I stress that not because I want you to address me further on it but because it may be that is something that the applicants want to assist on.

I cannot recall -- and it is probably my fault -- whether there are draft CPO orders which define the class as the applicants wants us to certify it. If there are, then it might be worth us being sent overnight the references, and if there are not, then it

might be worth actually having a first shot from the applicants as to how they would define class, if we were minded at this stage to certify on an opt-out basis, because there is always a benefit in looking at the precise wording that is being put forward by the applicants.

Moving on, you said it is not enough to allege loss sustained. That was your opening point in this particular exchange. I think that is true, but one must distinguish between an argument that loss is sustained, as it were, floating there and a point that loss is being sustained by a particular class. Now, it seems to me that if you have got a workable allegation that the class defined has suffered the loss, then at this stage, my inclination would be to say there is a lot of latitude to be given in how you prove that.

On the other hand, if he is simply saying there is a loss out there because there has been some naughty behaviour but we cannot tie it to the class, then at that point I think that you are, as an applicant, batting on a very sticky wicket. So, that was a nuance which I think needed to be brought out.

Then my last point -- I do apologise for intervening so -- is just to go back to your very clear differentiation between opt-in and opt-out and looking

at rule 79(3). Is that differentiation between opt-in and opt-out so set in stone in rule (3), which obviously requires us to look at the strength of the claims as a relevant factor, but it does not say that it is a matter of hard-edged law that, when one looks at the strength of the claims, the opt-out claim needs to be stronger than the opt-in claim. Now, that may, in the general scheme of things, be the way it ought to go, and one can see why, but one can have, I am putting to you, the exceptional case where actually, considering the strength of the claims, the opt-out option, having regard to all of the other factors, actually is better even though the strength of the claim on an opt-out basis is weaker.

I mean, I am not staying that is a cast iron rule either, what I am saying is it all goes into the mix, but that rather suggests that your -- the hard-edged differentiation that you drew at the beginning is not really supported by sub-rule (3).

MS KREISBERGER: I am grateful for that, sir.

So, I agree with much of what you have said. So sub-rule (3) clearly puts strength of the claims in issue. It is emphasised as a relevant factor. But then one goes to the Guide for extra guidance as to how this should operate and 6.38 does say that the class

representative must make submissions on which form is more appropriate -- no mention as to whether opt-in is on the table, incidentally -- and then 6.39 is really the key passage and the language is striking. The strength of the claims are expected to be more immediately perceptible for an opt-out.

Having said that, I am loath to engage with the point surely at a level of generality, because I am in the fortunate position of not having to prove this to be the case for every CPO which will come up and the myriad factual circumstances which will arise, I tether my submission to the facts of this case.

THE CHAIRMAN: Okay, well, that may help the applicants, because it seems to me the CAT Guide is called a "guide" for a very good reason, that it is not intended to trump the rules and the rules are clearly not intended to trump the Act; it goes the other way.

So, I am -- and I am looking around the room -- quite prepared to proceed on the basis that the Guide is saying what it does say as a general proposition that you need to have a good reason to go for opt-in rather than opt-out because it is more invasive, it drags people in. Opt-out is a more difficult thing to justify than opt-in. Sorry if I misspoke then, you can correct it.

But it depends on all the facts, and I for one do not really want to spend time arguing about whether the open wording of rule (3), which puts strength of claims as a relevant factor but does not say how they are relevant, I am much happier if you are saying, "Look, on this case, opt-out is not justifiable because the claims are weak and that is a relevant factor in deciding against opt-out". But I think it is important to be clear now how you are putting it, because that will affect, inevitably, how the applicants put their case, and I can see Mr Robertson or Mr Jowell or Ms Wakefield spending a number of minutes explaining to me why the Guide is just a guide, and if we have to have that debate, fine, but if we do not, then we might cut to the real essence.

So, I think you are tethering yourself to the specifics of this case and you are not going to be saying on a later date, if we were to say, "Well, we are satisfied that even though it is very, very weak and indeed speculative", to use my word, "We are still going to certify an opt-out", you might say that we have got our discretion wrong, but you cannot say that we have got the law wrong.

MS KREISBERGER: Sir, I think we are in violent agreement.

THE CHAIRMAN: Okay, good.

MS KREISBERGER: I am going to make the specific submission that on the facts of these claims, particularly the very expensive leviathan claims which they seek to bring, strength is a highly relevant consideration to your assessment, and if you form the view, as I would urge you to, that these are speculative claims, then they are claims that are not apt to be brought by way of the opt-out procedure even though they may survive strike-out and we have not sought to strike them out.

THE CHAIRMAN: I think that is very clear. I mean, I am forcing you into a position. If, overnight, reading the transcript, you want to take a different stance, then of course you must, but that is very clear and helpful for the moment.

MS KREISBERGER: I am extremely grateful for that, sir. I will come back to you in the morning --

THE CHAIRMAN: I see Ms Wakefield is raising her hand -- sorry, Ms Kreisberger.

MS WAKEFIELD: I am sorry, sir, I assumed that we had come to the end of Ms Kreisberger's submissions for today, so I was just going to address the Tribunal, or direct you to where our draft collective proceedings order is in our bundle at least, and doubtless Mr Jowell will want to do likewise.

THE CHAIRMAN: Sorry, Ms Kreisberger, is that a convenient

moment for you to draw stumps and then I will deal with the references, but I don't want you to be cut off in mid-flow, as it were?

MS KREISBERGER: No, that is an ideal moment to break. Thank you, sir.

THE CHAIRMAN: Very grateful, Ms Kreisberger.

Yes, Ms Wakefield, you had a reference.

MS WAKEFIELD: So, our reference is EV (inaudible - audio interference).

THE CHAIRMAN: Sorry, could you repeat that? There was a bit of interference on the line.

MS WAKEFIELD: {EV/6/1}, and you will see the reference to the classes in paragraph 22, which is on page 4 {EV/6/4}.

MR JOWELL: Sir, if I may give you our reference?

THE CHAIRMAN: Thank you.

MR JOWELL: It is {MOH-A/1} is our draft collective proceedings order where you find the proposed class defined.

THE CHAIRMAN: I am very grateful to you both. Well, thank you.

I was going to explain -- but I already have now -- why we have sent you the article I referred to earlier, so I will not say anything more about that.

How are we doing for time? Are you on course,

Ms Kreisberger?

MS KREISBERGER: I am, sir. I should take an hour, I think, in the morning.

THE CHAIRMAN: Then you have got until lunchtime to finish, and you are happy that that is not going to excessively burden anyone?

MS KREISBERGER: I understand that Mr Hoskins will need up to an hour, so that should work well within the timetable.

THE CHAIRMAN: Very good. Well, with my thanks to everyone, we will adjourn until 10.30 tomorrow morning. Thank you very much.

(4.33 pm)

(The hearing adjourned until 10.30 am on Thursday, 15 July 2021)

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