IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1306-1325/5/7/19(T) 1349-1350/5/7/20(T), 1383-1384/5/7/21(T)

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

Wednesday 12th May 2021

Before:
The Honourable Mr Justice Roth
Tim Frazer
Paul Lomas
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Dune Group Limited and Others

-v-

Visa and Mastercard

A P P E A R AN C E S

Kassie Smith QC, David Wingfield and Fiona Banks (On behalf of Dune, Adventure Forest Limited and Westover Group)
Laurence Rabinowitz QC, Brian Kennelly QC, Daniel Piccinin, Jason Pobjoy and Isabel Buchanan (On behalf of Visa)
Matthew Cook and Hugo Leith (On behalf of Mastercard)

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Wednesday, 12 May 2021

(10.30 am)

Housekeeping and procedural matters

MR JUSTICE ROTH: Good morning.

These proceedings are being heard remotely, and as usual they are being transmitted over the CAT live-stream system. I must therefore start with a warning that this is, of course, as much a court hearing of the tribunal as if it were being heard in person in the courtroom in Salisbury Square House.

An official recording is being made of the proceedings. It is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings. To do so is punishable as a contempt of court.

That is no mere idle threat. There have been at least two occasions now, one where the BBC was fined for contempt and another in which a solicitor was reported to her regulatory body for breaching this prohibition.

We will take, as usual, a short break mid-morning and mid-afternoon for everybody's convenience.

There is some confidential material in the Visa evidence. If it is necessary for anyone to refer to that -- I believe that all counsel are in the confidentiality ring, but if we have to look at that, other than simply being referred to the passages for us to read to ourselves, we can turn off the live-stream. But it will also be necessary to ensure that no one attending on the Teams platform is outside the confidentiality ring.

We hope that's something that Visa's solicitors have checked. It's not something really that's possible for us to check. If that's not the case then we'll have to see what measures can be taken to protect Visa's confidentiality.

We have read the skeleton arguments. The CAT Practice Direction places a limit of 20 pages

on skeletons unless special permission is sought.

Mr Cook, why was that ignored?

MR COOK: Sir, I'm afraid that wasn't ignored. A letter was written asking permission to put in a longer skeleton argument.

MR JUSTICE ROTH: Well, it was written about an hour -- or less, seven minutes, I think -- before the skeleton was due. That's no application for permission. Visa replied in good time, specifying the limit. It is no good applying just as the deadline is there, giving the tribunal effectively the position of saying either "no skeleton" or "in it goes". That's why we didn't respond.

The skeleton must have been prepared some time before that.

MR COOK: I apologise, Sir. When it came to drafting the skeleton we simply felt, given the number of issues, that it was difficult to fit that in in a way that was going to assist the tribunal as much as we wanted to do so, for the purpose of a hearing of this length and complexity, Sir, given the number of issues.

I apologise that that wasn't addressed more promptly, Sir, and the issue wasn't raised with the tribunal at an earlier stage.

MR JUSTICE ROTH: I'm not sure this is a hearing of particular complexity, certainly not of length, compared to many that we have. It's a matter that should have been applied for when you started drafting and realised that it's going to exceed the limit and you wished to do so.

I'm not at all sure that we would have granted permission for a skeleton so much longer than Visa's and the claimants'. But I accept your apology. I can only say that in future -- these proceedings obviously are not coming to an end today -- if permission has not been granted and a skeleton that exceeds the length is submitted it will be returned immediately, unread.

MR COOK: Yes Sir.

MR JUSTICE ROTH: Yes. Ms Smith. There are, of course, two applications.

Just one moment.

THE CLERK OF THE COURT: We are having a problem with the live-stream audio. It is being fixed now.

MR JUSTICE ROTH: You heard that message. We will just pause for a moment. (Pause).

We have two applications before us in all the actions. One is the claimants' application for summary judgment on the issue of Article 101(1) infringement, but also Visa's application to amend its defences -- or, I think, technically the balance of the application to amend, because we granted permission to amend.

(Pause). Just one moment. We have a further problem here. I'm sorry. I'll just finish what I'm saying and then we'll have to pause again.

I would have thought it sensible that, Ms Smith, you should go first and perhaps deal with both applications, because the issue on the amendment is of course whether it would be arguable, and in which case it would be granted.

What is happening is we're getting a strong echo in the courtroom, which is quite disturbing for us. I don't think you hear it. So we'll pause for a moment again. (Pause).

Yes. Ms Smith.

Application by MS SMITH

MS SMITH: Thank you, Sir. Good morning, Sir, members of the tribunal.

I appear with Ms Fiona Banks for the claimants. Matthew Cook QC and Hugo Leith appear for Mastercard. And Laurence Rabinowitz QC, Brian Kennelly QC, Daniel Piccinin, Jason Pobjoy and Isabel Buchanan appear for Visa.

From a housekeeping point of view, I hope you should have the six original bundles from the February CMC, to which various documents have been added: two further summary judgment bundles, 1A and 1B, and four authority bundles.

MR JUSTICE ROTH: Yes. They've been slightly re-labelled for us but I think we have all

the bundles, yes.

MS SMITH: Thank you, Sir. I hope I will be able to find the right references when I need to take you to the bundles.

We apply for summary judgment in respect of our claims under Article 101(1). Our claims as regards Article 102 have been stayed pending resolution of this summary judgment application. And following judgment on these applications, we will seek further orders from the tribunal on next steps as regards Article 101(3) exemption issues.

As regards our summary judgment application, we seek summary judgment in the terms set out in our draft order, which for your note is original CMC bundle 1, tab 4, page 90.

The draft order reflects our claims, which assert that, throughout the relevant claim periods, the rules of the payment card schemes operated by Mastercard and by Visa, which impose an obligation on acquirers to pay issuers a default interchange fee -- what we call the default MIF settlement rule, in the absence of bilateral agreement -- including as regards commercial and consumer domestic MIFs, intra-EEA MIFs and inter-regional MIFs, are in breach of 101(1) of the TFEU.

Sir, we apply for summary judgment in respect of all of those claims on the basis that the essential factual basis on which the Court of Appeal and the Supreme Court in the Sainsbury's judgment and the Court of Justice in Mastercard held that there was a breach of Article 101 is materially indistinguishable from the facts of the present claims.

So applying the test for summary judgment set out in the case law, which I won't take you through in any detail, our argument is that the resolution of the claims has been determined as a matter of law by those judgments which are binding on the tribunal.

The defendants have been given a full opportunity to put in what they say is the relevant evidence for the purposes of these applications. In our submission, and despite what the defendants say, a fuller investigation of the facts by way of disclosure and expert

commentary, we will say, will not alter the outcome of those claims. And in light of the Court of Appeal and the Supreme Court judgments and the CJEU judgment, we say the defendants have no realistic prospect of defending the claims. They have no real prospect of success.

MR JUSTICE ROTH: Could I interrupt you. You said you weren't going to the law on summary judgment, which we quite understand. Is it common ground that what one might call the Easyair principles -- which are summarised in Mr Cook's skeleton and of course have been applied many times -- that's accepted, that they are the principles we apply?

MS SMITH: That is accepted, yes. I think that is incorporated into our skeleton as well, by cross-reference to our previous skeleton of January.

MR JUSTICE ROTH: Yes. I thought so. Thank you.

MS SMITH: So in those circumstances we say that the tribunal should, as was said in the Easyair judgment, grasp the nettle in this case and decide the summary judgment application in our favour.

The structure of my submissions this morning, and probably this afternoon, is going to be as follows:

I will address the four ways in which the schemes say our claims can be distinguished, and that will cover both our summary judgment application and Visa's application to amend.

First, I will deal very briefly with Visa's asymmetric counterfactual.

Secondly, I will deal with Visa's and Mastercard's alternative counterfactuals for the period after the Interchange Fee Regulation came into force in December 2015.

Thirdly, I will deal with an argument which is made only by Visa, which is based on change of control of Visa Europe after June 2016, when they say control of the setting of the level of the MIFs moved to Visa Inc and, as regards inter-regional MIFs, the fact

that Visa Inc always set the level of those fees.

Then fourth and finally I will deal, in combination with the various arguments made by the defendants, as regards different types of MIFs. That is inter-regionals, commercial cards and other domestic MIFs.

MR JUSTICE ROTH: Yes.

MS SMITH: So dealing first, then, with Visa's asymmetric counterfactual --

MR JUSTICE ROTH: I think that's -- again, if I can interrupt you. As I understand it, that is, in these proceedings, it's only Visa that is raising that defence.

MS SMITH: That's right. Mastercard accepts that, following the Supreme Court judgment, its UK and Irish domestic consumer MIFs and its EEA consumer MIFs breached Article 101 for the period before 9 December 2015 when the IFR came into force.

MR JUSTICE ROTH: And you won't need summary judgment on that because it's admitted in their pleadings, I think.

MR COOK: I'm sorry, just to interject, and I'm sorry to do so, Sir. We do not accept that our MIFs breached 101. We accept there was a restriction of competition under 101(1). We do say, obviously, they are nonetheless exempt under 101(3). I am sure that was a slip of the tongue but just to --

MS SMITH: Yes. Thank you. To make that clear, I said they accept that they breached Article 101(1) for that period. As I said in opening, all issues under 101(3) are to be considered and dealt with at a later stage in these proceedings.

So the cross-references for your note, Sir, for that are at paragraph 3 of Mastercard's skeleton for this hearing and paragraphs 9A and 52A of its defences. That is where it makes that admission.

So Visa, however, still maintain the argument that the Supreme Court judgment can be distinguished for the period before the Interchange Fee Regulation came into force, on the basis that the correct counterfactual for that period is not 'no default MIF and

settlement at par', but instead an asymmetric counterfactual in which if Visa reduces its MIFs to zero or gets rid of its MIFs, no default MIF, Mastercard remains free to set its own MIF.

And Visa base their arguments in that regard on the Budapest Bank judgment in the European court. Visa recognise in their skeleton that this argument has already been rejected as, and I quote, "hopeless" by the tribunal in its judgment of 22 December of last year.

As a result, Visa states in paragraph 72 of its skeleton that it will not waste the tribunal's time with further consideration of this issue but, in the event that the tribunal gives summary judgment on this issue, Visa will pursue it on appeal.

So in light of the position taken by Visa in this regard, its acceptance that its argument has already been rejected by the tribunal as hopeless, we would ask the tribunal to make an order granting summary judgment against -- or in effect to reject Visa's argument in this regard and to make an order granting summary judgment against Visa as regards the claimants' claims in relation to the UK and Irish domestic consumer MIFs and EEA consumer MIFs before the period of 9 December 2015.

Without prejudice to that -- that's effectively the end of the matter under the asymmetric counterfactual issue. But I do think, Sir, if I may, I will briefly refer you to your judgment, the reference judgment, the judgment of 22 December of last year, because it's an important starting point, in my submission, not only of relevance to the asymmetric counterfactual point but also of relevance to all the other arguments, I say, which Visa and Mastercard make in seeking to distinguish the present claims from the Supreme Court and Court of Appeal judgments.

So if I could ask you to turn to your judgment. You probably don't need reminding of it, but there are various paragraphs I wish to highlight. It's in authorities bundle 4, tab 26.

In authorities bundle 4, tab 26, if I could first ask you to turn to page 1984 and to paragraph 24 of your judgment, where you state that the Court of Appeal held that the

correct counterfactual had been established by the Court of Justice in the Mastercard decision as a matter of law, which was therefore binding on the English courts.

Then at paragraph 26 you set out what that counterfactual is by summarising the Court of Appeal's summary of its conclusions at paragraphs 185 to 188, and the correct counterfactual there, paragraph 185 of the Court of Appeal's judgment:

"For schemes like [and I underline the word "schemes" there] the Mastercard and Visa schemes before us ...(Reading to the words)... was identified by the Court of Justice's decision. It was a no default MIF and a prohibition on ex post pricing or a settlement at par rule. The relevant counterfactual has to be likely and realistic in the actual context but [and again I emphasise] for schemes of this kind the CJEU has decided that the test is satisfied."

If I could then ask you to turn to paragraph 37 of your judgment, which is on page 1991. This then turns to the death spiral argument, which was addressed by the Court of Appeal and was not challenged in the appeals to the Supreme Court, as you record at paragraph 37 of your judgment. And you make the point again that subject to any further judgments of the EU courts or the Supreme Court, the CAT is bound by the Court of Appeal judgment to the following effect:

"(a) the death spiral argument isn't relevant to the question of whether there is a restriction of competition, since that question is to be asked by reference to the acquiring market;

"(b) the death spiral argument and so-called asymmetric counterfactual is not relevant to the question of ancillary restraints or objective necessity under 101(1); and (c) the death spiral argument could apply, if at all, under 101(3) but is to be rejected as not only unrealistic but highly improbable."

So again, I would remind you of those findings of what you are bound by as a result of the Court of Appeal judgment.

And then finally, if I could ask you to look at paragraph 38, where you say again:

"The court is bound by the Supreme Court judgment to find that the Mastercard Court of Justice judgment is binding, to the effect that the Visa scheme at issue in the present actions constitutes a restriction of competition by effect, contrary to Article 101(1)."

So again I would emphasise that it was the Visa scheme at issue that you were referring to there, not the particular MIFs set at particular levels.

And we say that approach, taken by you and the tribunal in your reference judgment, is consistent with the approach taken by the Court of Appeal and the Supreme Court in Sainsbury's.

The effect of those judgments, we say, is that it is the rules of the Mastercard and Visa schemes that impose an obligation on acquirers to pay issuers a default interchange fee -- what we have called the default MIF settlement rule -- which restricts competition in breach of 101(1) and not the imposition of any particular MIF at any particular level.

Now, I made submissions on that point about a month ago to this tribunal at the applicable law hearing, and I would ask you to refer, in considering the issues before you today, to those submissions as well. I'm not going to repeat everything I said then but I am going to highlight particular points.

Moving on, then, to the second issue I'd like to address. That is the counterfactuals for the period after the introduction of the Interchange Fee Regulation in 2015.

Now, Visa and Mastercard seek to rely on different counterfactuals for the period after the IFR came into force. First, I think it's important to recall -- I don't think you need to, Sir -- but it's important to recall the purpose of a counterfactual. Of course, the purpose of the counterfactual is to consider competition in the relevant market if the measures at issue did not exist.

Now, in this case we say the measures in question, and I quote, were made clear by the Court of Appeal in paragraph 127 of its judgment. I won't need to take you back to

that at this precise moment, but the Court of Appeal made clear in that paragraph of its judgment, in our submission, that the measures in question are the agreements between the issuers and acquirers to be bound by the scheme rules which set default MIFs payable in the absence of bilateral agreements being reached.

In the absence of such rules, those measures in question, the Court of Appeal said the schemes would operate on the basis of no default MIF and settlement at par.

Both schemes argue, nevertheless, that after the IFR came into force in December 2015, in the absence of the rules imposing a default MIF, a different counterfactual should be used.

Visa says the schemes, specifically Visa itself, would have operated on the basis of a unilateral interchange fee model, or UIFM -- we all like our shortenings.

Mastercard, by contrast, says that the schemes, specifically Mastercard, would not accept any default rules of any kind, so that issuers and acquirers would have entered into bilateral agreements.

Now, it's important to note that neither scheme argues that these particular counterfactuals were appropriate for the period before the IFR came into force. Subject, of course, to Visa's asymmetric counterfactual, but leaving that to one side, both schemes accept that the appropriate counterfactual for the period before the IFR came into force was no default MIF with settlement at par, as found by the Court of Appeal.

So we say, on the schemes' cases, something fundamental or material must have changed upon the introduction of the Interchange Fee Regulation and the interchange fee caps.

But we say, in response to that, we make three submissions. First, the introduction of the IFR is a red herring. It's not a material change in circumstances justifying a change in approach to the appropriate counterfactual, which was found to apply as a matter of law by the Court of Justice and the Court of Appeal, and held to be binding by this tribunal in its reference judgment.

Second, we say that neither counterfactual in fact removes the alleged vice. That is, the restriction arising from the impugned measure or the measure in question as found by the Court of Appeal.

Because neither counterfactual removes that restriction, neither counterfactual does the job that a counterfactual is meant to do. So neither counterfactual allows the court or the tribunal to properly assess whether the impugned measures -- and I now quote the test from Cartes Bancaires -- whether the impugned measure restrict the competition that would have existed in their absence.

And that, as I said, is the role of the counterfactual as set out in Cartes Bancaires. And in that regard we also rely on the citations from the Court of Appeal in Sainsbury's and the Court of Justice in Mastercard, which are set out in footnote 8 of our skeleton.

But in our submission, each of the schemes proposed counterfactuals are illusory. It's nothing more than the unlawful default MIF scheme rules brought back to life again but wearing different clothes. The proposed counterfactuals involve no less a restriction than the actual default MIF rules.

I will develop my second argument in relation to that in due course.

Our third and final argument that I will make in relation to these counterfactuals is that we argue that neither counterfactual is realistic or appropriate. We know from the case law that counterfactuals need to be realistic and appropriate. And we say neither of these schemes' counterfactuals is realistic or appropriate because it is based on the introduction of a regulation which would not have existed had the schemes not engaged in the prior conduct of imposing default MIFs, which was found to be a breach of Article 101(1).

So as a result of those three arguments, which are both cumulative and alternative, we say it's unarguable that either of Visa's UIFM or Mastercard's bilateral counterfactual is an appropriate counterfactual for the period after the introduction of the IFR.

MR JUSTICE ROTH: Yes. Your third proposition, you are really saying -- I'm not quite sure I follow why it's not realistic, but I think you are saying it's not appropriate, is that right?

MS SMITH: Yes.

MR JUSTICE ROTH: I mean, the IFR was introduced, but you say because of the circumstances in which you say it was introduced and the reason why it was introduced, it's not appropriate to rely on it.

MS SMITH: Yes.

MR JUSTICE ROTH: Yes.

MS SMITH: That is our third argument but I will address the other two arguments, if I may, first. There are three submissions I make.

The first submission is that the IFR doesn't introduce material change in circumstances. If I could start by asking you to -- sorry, I don't need to turn to case law yet because we've been there a number of times. I will come back to the case law.

So the first submission. The Court of Appeal held in paragraph 185 of its judgment that the correct counterfactual for schemes like the Mastercard and Visa schemes before us was identified by the Court of Justice's decision.

For your note, that is paragraph 185 of the Court of Appeal's judgment.

Now, in that regard the Court of Appeal held that the facts of the cases before it during the relevant periods of those cases, of those claims, were materially indistinguishable from the facts before the Court of Justice. And that's paragraph 174 of the Court of Appeal's judgment.

Now, it's clear from the pleadings and the judgments of the court below that the relevant periods of the claims before the Court of Appeal included not only periods before the Interchange Fee Regulation came into force in December 2015 but also periods after the Interchange Fee Regulation came into force.

Of course, that's a necessary result of the fact that the claims were made for six years before the issuing of the claim forms up to the date of judgment, and continuing until the date of judgment, the claims for damages.

If you need that point to be made good, we have appended to our skeleton argument -- and I hope you got it -- the further amended Particulars of Claim in the Arcadia v Mastercard and the Arcadia Group v Mastercard proceedings. And we cross-referred -- and we can look at these if it assists. They are attached to our skeleton argument. They don't have page numbering on them, and the paragraph numbering is a little haphazard, but the paragraphs that we refer to in our skeleton argument were paragraphs 37, heading 2, "Particulars of breach in relation to the EEA MIF", and then under that heading, subparagraph (3), which says that in relation to the setting and imposition of the EEA MIF, from 20 December 2007 until the determination of this claim, they argue there's a breach of 101.

And then the same point under the heading just below (3) "Particulars of breach in relation to the UK MIF", subparagraph (i):

"In relation to the setting and imposition of the UK MIF between 1 March 2000 and, in the case of the Fourth Defendant, 12 December 2002 until the determination of this claim."

Then the same point we rely on two pages later, paragraph 38, under the heading "Loss and damage":

"The said breach caused and continues to cause the claimants loss and damage."

So in common with all of these types of damages claims, the claims were based on a continuing breach up to the date of determination, for damages up to the date of determination.

The judgments of the court below all post-dated by about 18 months, a year and 18 months, the introduction of the IFR. So they related to periods both before and after the IFR

came into force.

MR JUSTICE ROTH: You've taken us to the Arcadia pleadings, which was one of the cases in what's been referred to, I think now universally, as the AAM judgment. There were, of course, three separate judgments. Does this apply, however, to all of them?

MS SMITH: The Popplewell judgment, which was the judgment in this case -- I won't take you to it but it's at authorities bundle 3, tab 16. The judgment was given on 1 March 2017, and paragraphs 25 to 27 of that judgment set out the claim periods up to the date of determination on 21 March 2017. And the IFR is considered in paragraphs 77 to 79, for your note, of --

MR JUSTICE ROTH: Just a minute. You say that's at 25 to 27.

MS SMITH: Yes. Tab 16 of volume 3, paragraphs 25 to 27, pages 1460 and 1461. It sets out the dates from which the claims run in relation to the various different MIFs.

MR JUSTICE ROTH: Yes.

MS SMITH: It doesn't say they end as of today --

MR JUSTICE ROTH: It doesn't say when they end.

MS SMITH: No, but that is clear from the pleadings, which is why we --

MR JUSTICE ROTH: Yes, I mean, presumably -- I suspect you looked at all the pleadings. This was the Arcadia pleading. There were two pleadings, I think, is that right? Were there three actions?

MS SMITH: Yes, the CAT judgment, which is the other Mastercard --

MR JUSTICE ROTH: No, I'm talking about the AAM case. That was, I think, was it not, three claims being tried together? Mr Justice Popplewell says at the beginning of paragraph 2:

"There are 12 separate actions. Two have been terminated."

So that leaves ten. They are referred to -- I think either the Court of Appeal or the Supreme Court identified the different claims -- I think maybe the Supreme Court -- that were

actually involved in that trial. It's at paragraph 29 of the Supreme Court judgment. Asda and Morrisons issued like claims. Argos issued a claim. And the parties' various claims were combined. So that's where I got the point about three claims. They don't actually say. It looks as though, from the summary in paragraph 29 of the Supreme Court, they did indeed, as you submitted, run onwards to date of trial or date of judgment.

MS SMITH: Yes.

MR JUSTICE ROTH: That's the AAM --

MS SMITH: Yes.

MR JUSTICE ROTH: -- proceedings.

MS SMITH: Sorry, yes, Sir. I think the Arcadia claims were settled at least by the time of the Court of Appeal judgment. But the Asda, Argos and Morrisons claims continued. As I understand it, all claims ran to the date of judgment. The Mastercard claims ran to the date of judgment. That's Popplewell on 1 March 2017 and the CAT judgment in Sainsbury's v Mastercard on 14 July 2016.

MR JUSTICE ROTH: The CAT judgment, it's in bundle 3, isn't it?

MS SMITH: Yes, it's in tab 15.

MR JUSTICE ROTH: And if we look at that judgment at -- is it paragraph 17, on page 14 in the judgment, 1157 in the bundle, at (iii) at the bottom:

"We form the strong impression that it is common ground, at least not contested by Sainsbury's, Sainsbury's could not claim in respect of transactions made after the entry in force of the IFR."

"For present purposes, it is simply necessary to note that they came into force 9 December 2015. This date provides a temporal endpoint for the Sainsbury's claim. We shall refer to the period commencing 19 December 2006 and ending 9 December 2015 as the claim period."

MS SMITH: I was coming on to that point, if I may, which is that as regards the claims brought by Sainsbury's we do accept that those claims were limited to the period before the IFR, but we understand that to be only because Sainsbury's conceded. And Sainsbury's -- and you will be aware of this because I think it's an issue that came up in recent case management conferences for Sainsbury's -- Sainsbury's conceded that the exemptible level of the MIF under Article 101(3) was the level of caps imposed by the IFR.

As a result of that concession as to exemption under 101(3) our understanding is that Sainsbury's did not -- yes, that is right -- they did not make a claim for the period after the introduction of the IFR.

So our point is limited, Sir, as we set out in the skeleton, to the fact that at least the AAM claims ran for a period after the introduction of the IFR. The Sainsbury's claims didn't, but for a reason which we say is a different reason.

MR JUSTICE ROTH: Whatever the reason, you accept they didn't. So it's --

MS SMITH: That's right, Sir.

MR JUSTICE ROTH: So in the Court of Appeal, when they were looking at these matters, it was only the AAM claim that ran post IFR and ran to the date of, you say, the date of judgment, which was actually 30 January. The date in the authority is wrong. 30 January 2017. That's the point you are making, is it?

MR RABINOWITZ: Again, with apologies to Ms Smith, I just note that what Ms Smith has said about the Sainsbury's claim against Visa on terminating at the time of the IFR is not accepted. As the tribunal, or at least the chairman will know, in the Visa/Sainsbury's matter Visa actually says the claim brought by Sainsbury's against Visa did continue beyond 2015. And that is a live issue in those proceedings.

MR JUSTICE ROTH: Although the judgment says that it goes to November 2015.

MR RABINOWITZ: I'll take the tribunal to it in my submissions --

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: -- but I just want to put down a marker that what Ms Smith says is inaccurate.

MR JUSTICE ROTH: As regards the Sainsbury's/Visa claim?

MR RABINOWITZ: Correct.

MR JUSTICE ROTH: Right. Okay.

Well, in a sense, Ms Smith, if that's the case, that helps you on this point.

MS SMITH: Well, Sir, yes. If that is the case. We had been relying in that regard --

MR JUSTICE ROTH: We'll see what Mr Rabinowitz says about it. Either it does or it doesn't, but in any event the AAM claim does. And that's the point you say that's good enough because that was one of the judgments the Court of Appeal was considering.

MS SMITH: Yes. And we say that if it's the case, as Mr Rabinowitz suggests, that the Sainsbury's claim against Visa was not so limited, we say it makes it even more surprising in this case that although it was clearly the case -- and I refer to paragraph 77 of the judgment of Mr Justice Phillips in the Sainsbury's and Visa case -- that the Interchange Fee Regulation was in play and was considered by the judge. However, in paragraph 98 of the Sainsbury's and Visa judgment before Mr Justice Phillips, it's recorded as common ground that Visa agreed that the relevant counterfactual was no MIF and settlement at par.

If it is the case, as Mr Rabinowitz just suggested, that the Sainsbury's claim continued after the period that the IFR came into force, I say it's even more surprising that Visa did not argue at that stage that there had been a material change in circumstances upon the coming into force of the IFR such that this counterfactual that they agreed was the relevant counterfactual at that stage was no longer valid.

Now, the schemes didn't seek to argue that there had been a material change in circumstances

as a result of the introduction of the IFR in these first-wave claims. They could have done so. They didn't, in front of the first instance court or to the Court of Appeal. And we say, then, that is the end of the matter. The Court of Appeal judgment is binding on the tribunal as to the relevant counterfactual both before and after the introduction of the IFR. And we say that's the end of the matter.

For completeness, however, I do make the additional submission that there is nothing in the schemes' arguments that there was a material change in circumstances so that a different counterfactual should apply after the IFR came into force. And the schemes' arguments in that regard are a little different, so I will address each of them in turn if I may.

First of all, for Visa, they rely on the UIFM. And that is described by Mr Stait in a number of places. It's described in the evidence, but if I could take you to Mr Stait's third witness statement, which is at the original CMC bundle, bundle 1. Mr Stait's third witness statement is tab 13 of that bundle. If I could ask you to turn to paragraphs 16 to 18, which is where he sets out Visa's UIFM.

And this reflects what is subsequently pleaded in their draft re-re-amended defence, which is at tab 14 of the bundle.

If we can start with Mr Stait's third witness statement at paragraph 16. He says, about four lines in:

"Visa would not simply have set a zero MIF or adopted the settlement at par rule in respect of domestic transactions. Instead, Visa would have altered its rules to provide that [so this a provision in Visa's rules] absent bilateral agreements, transactions should settle at par unless the relevant issuer had previously stipulated it was only willing to settle on the basis of the addition or subtraction of an interchange fee that the issuer had itself chosen unilaterally."

That's the first aspect that's going to be in the scheme rules.

The second aspect of this UIFM, Mr Stait then sets out:

"Under this model, the scheme rules [again this is to appear in the scheme rules] would have required each issuer independently to (1) notify Visa of any such interchange fees and (2) publish them."

So those are the changes to the rules that Visa say would be made under the UIFM.

Then Mr Stait says:

"Visa contends that what the result of this would be is, in this counterfactual issuers would have been likely to choose to set the maximum interchange fee permitted by the IFR or other applicable regulation because it would have been in each of their economic interests to do."

In other words:

"Issuers would in those circumstances impose exactly the same interchange fees as are currently set by Visa, with the same effects on competition."

And then he explains that this version of -- this same model in effect has been adopted by Visa in New Zealand.

MR JUSTICE ROTH: Yes.

MS SMITH: Then he says over the page on paragraph 18:

"The unilateral interchange fee model is of particular importance to Visa because it demonstrates that Visa's positive MIFs, at least in the period from 9 December 2015, had and continues to have no effect on competition by comparison with the counterfactual."

Because, as he says, quite candidly, in paragraph 16:

"The UIFM would have exactly the same effects on competition as the default MIF settlement rules."

MR JUSTICE ROTH: Yes.

MS SMITH: And the UIFM is set out as well, just for your note, in the draft Re-Amended

Defence, volume 1, tab 14, paragraphs 42A(d) and (e).

Now, Visa asserts that its UIFM is a realistic counterfactual for the period from 9 December 2015 because -- and I quote from paragraph 19 of its skeleton argument:

"In that period, issuers could not have set interchange fees for those transactions above the caps set out in the IFR, and so this model would not have resulted in issuers setting exorbitantly high fees that might otherwise have damaged the Visa scheme."

But I say, as we can see from the description of the UIFM in Mr Stait's evidence, Visa's reliance on the IFR caps and its argument that something changed, or it must argue that something changed, so that a different counterfactual should apply after the introduction of the IFR.

The IFR is actually a red herring. Visa's UIFM does not depend on the existence of the IFR caps. Any external reference point could be set as a cap for the MIFs imposed by issuers. Caps could have been set by Visa, as they are, we are told, in the New Zealand model and have been for many years in New Zealand.

Caps could have been set by an independently appointed economist, or after arbitration. The IFR did not change anything. It was certainly not a material change in circumstances justifying a change in approach to the appropriate counterfactual. Nor is it, in our submission, a basis for distinguishing the claims made after that date.

That's my first point on Visa's UIFM.

MR JUSTICE ROTH: I'm sorry, perhaps I'm being a bit obtuse. I haven't quite followed that. You are right, of course, Visa could have done all sorts of things. But they didn't. They had the MIF rule, which, subject only to this asymmetric argument, contravened Article 101(1), for the reasons the Court of Justice and Supreme Court and so on have set out.

The fact is, from the date when it came into force there was a cap set. And that happened, and that, on Visa's evidence, therefore would have enabled them then -- or in the light

of that, they say, well, this is what we would have done if our rule is said to infringe.

I don't quite follow why it's a red herring, because they could have set caps when they chose not to. Somebody has decided to set a cap, and they're stuck with it. They may not like it, but they've got it. And that's the world they have to work in.

MS SMITH: We say -- it's a simple point, Sir, and it may or may not appeal to you, but we simply say that the purpose of the counterfactual is to assess what competition would have existed in the absence of the measures at issue.

The measures at issue are the default MIF settlement rules. Take those away, and what do you get? The Court of Appeal said you get settlement at par and no default MIF rule.

Visa say, well, that's certainly the case before the IFR came into force. However, after the IFR came into force something changed, so that that's no longer the correct approach.

The correct approach, we now say, is we would have put in place a rule that has the same effect on competition. We say nothing actually changed as at the date of the IFR, because you could have done that before; you could have pointed to the New Zealand model, for example, before the IFR came into force, and you could have said that the appropriate counterfactual before the IFR came into force is a New Zealand type model where we set the caps.

And the IFR doesn't change the position, because that position was open to you, that UIFM was open to you, both before and after the introduction of the IFR.

MR JUSTICE ROTH: But suppose Visa says, well, we don't like the idea of caps. We had to do it in New Zealand because of what the New Zealand Competition Authority did. We were stuck here because the commission -- or the EU, whether it was the commission or the council -- anyhow the EU regulation imposed a cap. So now we have to work in a world of caps, which is not our favoured preferable choice. And that then affects what we do.

MS SMITH: The point simply is this, which is that, just as in New Zealand, Visa responded

to the regulator finding that their rules breached New Zealand competition law by setting a cap. They were in the same position in the UK, we say, both before and after the IFR.

The courts found, before the IFR, that their rules breached Article 101(1), are a restriction of competition. And similarly to the position in New Zealand, being faced with that decision by a court -- although New Zealand was a regulator, but here a decision of the court -- that their rules restrict competition.

They could very easily have said before the IFR, as they did in New Zealand, in the light of that regulatory court ruling, what we would have done is put in place caps.

And it's a simple point, Sir, and I push it no further than that, that the IFR did not change the situation materially so that both -- there is a different situation after the IFR.

The argument or the point as a matter of principle would have been open to Visa before the introduction of the IFR as illustrated by New Zealand. But the Court of Appeal held, no, as a matter of law the relevant counterfactual for before the introduction of the IFR is no default MIF and settlement at par.

That's as far as I take the point, Sir.

MR JUSTICE ROTH: Yes. I'm still trying to understand exactly what the submission is. Are you saying this is implausible because they could have done it following the Commission decision in, I think, 2007, or the General Court judgment when they failed in their appeal, but they didn't. And so if they didn't do it then voluntarily, which they could have, there's no reason to think they would have done it once the IFR came in. Or -- I don't think that's what you are saying.

MS SMITH: No, sorry, Sir, I'm not. I'm not saying what as a matter of fact Visa did, because that's not what the counterfactual is about. I'm saying what as a matter of fact would have happened had the measures in question been taken away, which is what the counterfactual is about.

Now, the Court of Appeal said, what would have happened in the absence of the measures in question, the default MIF settlement rule, is that we would have reverted to settlement at par and no default MIF. And that hasn't happened.

But we say, no, both before and after the IFR, what could and would have happened on Visa's argument is that they could have introduced a rule which says, as the UIFM now does: issuers, you put in place an interchange fee in the absence of a bilateral agreement, you impose unilaterally an interchange fee, and you independently notify us of that interchange fee and publish them.

That's all the scheme rules say.

MR JUSTICE ROTH: Do you accept that pre-IFR, to make it work, Visa would have had to impose a cap?

MS SMITH: Yes, as they do in New Zealand.

MR JUSTICE ROTH: Yes.

MR LOMAS: Can I understand, Ms Smith, why would that imposition of a cap not itself be a restriction on competition.

MS SMITH: That is my second and perhaps more fundamental point, which is: we say it is. And I will explain why. But I can get to that point in the course of my submissions, because we say it is.

But perhaps before I get on to that, which is my second submission, which is that the counterfactual does not remove the alleged vice, does not remove the restriction on competition, the counterfactual suggested the UIFM and the bilateral --

MR JUSTICE ROTH: Yes, that's a quite separate point, isn't it?

MS SMITH: It's a separate and next point, which I hope is what Mr Lomas -- that's how I understood Mr Lomas' question. I'll get to that second point,

MR JUSTICE ROTH: Well, I'm not sure it is. If I understand Mr Lomas' question, but no doubt he will explain -- I thought his point was, well, you could not have done that

pre-IFR because that would also have been a restriction of competition, so that course wasn't open to you.

MS SMITH: We say, post IFR it also is, because the rules say -- so it's an externally-set cap, which is not set by Visa, it's not set by an economist and it's not set by an arbitrator. It could have been set pre-IFR by an independently appointed economist. It could have been set pursuant to arbitration, the cap, rather than being set by Visa, if that is the problem.

We say that the problem is more fundamental than that. It is that the scheme rules to which everyone signs up says that in the absence of bilaterals you can issue or set a cap. You tell us what that cap is, and you publish it.

But we all agree, issuers, acquirers, schemes, that you can impose an interchange fee. That's the problem. And I will come to that point.

Before I come to that point, I don't know if this a good time to stop for a break. We did start rather late.

MR JUSTICE ROTH: Yes. I think, why don't you go on for now and we will stop a bit later on.

MS SMITH: Going back to my first point about saying that there's no material change in circumstances, and to address the Mastercard counterfactual that they say should apply after 9 December 2015.

They say the counterfactual is one in which there's no rule at all in their rules, no default rule, with the result that issuers and acquirers had to negotiate settlement terms, including interchange fees, bilaterally. For your note, that is their Amended Defence, paragraph 93B(ii), bundle 2A, tab 39, page 489.

Now, the nature of Mastercard's bilateral agreements is not set out in their pleading. In particular, the pleading does not say whether these bilateral agreements would be agreed between issuer and acquirer before the transactions took place, or whether they

would be agreements after or at the time that a transaction takes place.

If you look at the evidence that Mastercard have put in, it's still not clear what they mean. If you look at Ms De Crozals' evidence first. That is in bundle 1A, the summary judgment bundle, at tab 22. It's summary judgment bundle 1A and --

MR JUSTICE ROTH: I think it's --

MS SMITH: -- paragraph 22 of her witness statement, tab 10L, paragraph 22 of Ms De Crozals' witness statement, on page 284.625. She says at the top of that page, if you have her witness statement, at paragraph 22:

"In short, in the post IFR world it would have been realistic for Mastercard not to set any default settlement rules and instead ...(Reading to the words)... issuers and acquirers to negotiate bilateral agreements, and the level of compensation to be provided pursuant to them. They could have done so in advance of transactions to ensure that the issuer/acquirer pair knew their terms of dealing before the issuer's cardholder presented the card.

"Alternatively, if no fee or other terms had been agreed in advance, they could agree a fee after the transaction, when the acquirer sought payment of the purchase price from the issuer."

So she says they could be ex-ante or they could be ex-post, these bilateral agreements, and then she makes the point that:

"In my view it is inevitable that this would have resulted in interchange fees being agreed bilaterally at the level of the caps."

So she says they could have been one or the other. But there is, and I will explain why, a fundamental difference between ex-ante bilateral agreements and ex-post bilateral agreements.

What does Dr Niels say about these bilaterals? He put in an expert report, which is in section 2, addressing the bilateral counterfactual. And his report is at tab 10K, the

previous tab in that bundle.

He addresses this point at paragraph 2.15 of his report, internal page number 10. At paragraph 2.15 he says:

"In the suggested post IFR counterfactual, with no default rule of any kind in relation to settlement, I would expect the resulting bilaterally agreed interchange fees (whether agreed before or at the time of the transaction) to be at the same level as the IFR caps."

Then in footnote 24 he cross-refers to Ms De Crozal's witness statement which we have just seen at paragraph 22.

Now, he then goes on to say that he thinks this is a realistic counterfactual because of the issuer holdup problem.

But the nature of the bilateral agreements is fundamental to the question of whether issuer holdup is a problem or not, and this very issue was addressed in front of Mr Justice Popplewell.

If I could ask you to turn to Mr Justice Popplewell's judgment, because these bilateral counterfactuals or bilateral type counterfactuals, it is not the first time they've been argued by Mastercard. On the contrary, they've been argued, and, once they died, they are now trying to get them resurrected in front of this tribunal on a different basis.

So if you go to Mr Justice Popplewell's judgment, which is in authorities bundle 3, tab 16, the judgment of Mr Justice Popplewell, paragraph 128, which is internal page numbering 1336.

MR JUSTICE ROTH: Sorry, paragraph 128?

MS SMITH: Yes.

MR JUSTICE ROTH: I think that's our page 1489.

MS SMITH: 1489, yes. Internal page numbering 1336. The bundle numbering --

MR JUSTICE ROTH: I see.

MS SMITH: Sorry, so many numbers.

Paragraph 128. Let's look at paragraph numbers because it's easier.

He then looks at the various counterfactuals that were canvassed in the trial before him. Subparagraph (1), no MIF:

"This counterfactual posits that the scheme rules say nothing about a MIF. Mastercard does not set any default pricing, and interchange fee pricing is left to the acquirers and issuers."

There are then five possible scenarios:

(a) ex-post bilaterals, which were referred to during the trial as 'pure bilaterals'. This counterfactual posits there are no bilateral agreements in place between the issuer and acquirer prior to the relevant transactions or the time when they come to be settled.

"Absent any MIF, issuers would have been entitled unilaterally to deduct interchange fees at the level of their choice upon settlement or to refuse to settle at all until acquirers assented to such fees."

So this is the bilaterals that are entered into or imposed at the time of or after the transaction. Ex-post bilaterals.

And that is different from what he identifies at paragraph 128(1)(c) on the following page:

"Voluntarily ex-ante bilaterals. This posits the emergence of voluntary bilateral agreements between each pair of issuers and acquirers reached by negotiation between all issuers and acquirers in advance of the time of settlement ("ex-ante"), which would provide for a positive interchange fee. This was the counterfactual adopted by the CAT."

So it's the ex-ante bilateral model or counterfactual that was adopted by the CAT, and that is what is considered at subparagraph (c) of the Popplewell judgment.

Now, Ms De Crozals and Mr Niels say, well, it could be one or the other. So let's look at each of them. If we are talking about ex ante bilateral agreements -- and this is the

counterfactual that Mastercard are talking about -- and both De Crozals and Niels suggest that that was at least an option, then my submission is that this counterfactual has already been considered and rejected by the courts in the first wave cases but, importantly, was rejected for reasons which are unaffected by the introduction of the Interchange Fee Regulation.

Let's take this step by step. The Court of Appeal considered this ex-ante bilateral counterfactual and rejected it as a realistic counterfactual, but not on the basis of issuer holdup, which is what Dr Niels now relies upon and, for that matter, Ms De Crozals. Issuer holdup did not feature in the court's reasoning at all.

If I could take you to the Court of Appeal judgment.

MR JUSTICE ROTH: Before we go there, while we have Mr Justice Popplewell's judgment open, would it be appropriate to see why he rejected it? Or do you want to come back to that? I don't want to take you out of course.

MS SMITH: I will come back to that.

MR JUSTICE ROTH: But we have this one open, and he presumably goes on to discuss them before we get to the Court of Appeal.

MS SMITH: Yes. If I could first take you to the Court of Appeal, because that is obviously binding on you, and then they refer back to --

MR JUSTICE ROTH: Okay.

MS SMITH: -- the Popplewell judgment.

The Court of Appeal judgment, which is in the same authorities bundle at tab 20, and the Court of Appeal's consideration of the ex-ante bilateral counterfactual starts at paragraph 176.

They are considering here at 176 what was appealed to them, which is the CAT's finding that this was a realistic counterfactual. And we have seen that the CAT's counterfactual bilaterals counterfactual was an ex-ante bilaterals counterfactual. And that is

considered and rejected by the Court of Appeal.

I'm not going to read all the paragraphs out. Paragraphs 176 to 184. And nowhere is there any suggestion that this ex-ante bilateral counterfactual is to be rejected on the basis that it wouldn't work because of issuer holdup. It doesn't.

Primarily, you'll see from paragraph 180 of the Court of Appeal's judgment, the main reason why the Court of Appeal rejects the ex-ante bilateral counterfactual that the CAT had accepted is because it is not in line with the Court of Justice's decision, which, they say in paragraph 180:

"... plainly approved a counterfactual in the same factual circumstances as the Mastercard scheme of no default MIF and a prohibition on ex-post pricing."

That's the primary basis upon which the Court of Appeal rejected the CAT's ex-ante bilaterals counterfactual.

MR JUSTICE ROTH: But the CAT's ex-ante counterfactual was dealing with a period pre-IFR.

MS SMITH: Yes.

MR JUSTICE ROTH: And as was the Court of Justice, of course, obviously.

MS SMITH: Yes.

MR JUSTICE ROTH: So --

MS SMITH: Sorry, if I could then take you also --

MR JUSTICE ROTH: There is also, I suppose, the next paragraph, 181.

MS SMITH: They say effectively, the Court of Appeal, that the evidence did not stack up that such ex-ante bilateral agreements would have been realistic, because Sainsbury's witnesses effectively said that they wouldn't have entered into them and no such agreements had been entered into.

This is a rather tortuous trail through the judgments but what I'm trying to get to is that this issue was also considered -- if I could ask you to look at the Supreme Court judgment.

MR JUSTICE ROTH: Before we go off there, just to be clear, the Court of Appeal, as you rightly say, was saying, no, we don't think that's open to the CAT because of what the Court of Justice had said.

The CAT was dealing with the period pre-IFR. The Court of Justice was dealing with the period pre-IFR. So one can understand the Court of Appeal saying, well, given that there's no real difference, you are bound --

MS SMITH: Yes.

MR JUSTICE ROTH: -- and what was the CAT doing going off on what one might crudely describe as a jolly of its own, coming up with this theory?

But they go on to say in 181:

"It might have been possible to show that the economic background was so different to that being considered by the commission, the General Court and the Court of Justice, a different outcome would have occurred in a similar counterfactual world."

Aren't they there getting to the point of saying, well, if the reality is different, then one might consider such a counterfactual?

MS SMITH: Yes.

MR JUSTICE ROTH: And Mastercard and Visa saying, well, post IFR, the real world was different, so that the reasoning of the Court of Appeal here isn't relevant.

MS SMITH: Yes, Sir. And Mastercard's argument is that what has changed is that prior to the IFR the reason why people would not have entered into bilaterals -- and I use that term broadly, because Mastercard on their evidence appear to be referring both to ex-ante bilaterals and ex-post bilaterals -- we would not have entered into these types of bilaterals or these types of bilaterals would not have emerged because of the issuer holdup problem.

That is, it could charge whatever it wanted for a MIF, and there was no upper limit on what it could charge.

MR JUSTICE ROTH: Yes.

MS SMITH: They say -- and that problem has been got rid of by the interchange fee caps.

MR JUSTICE ROTH: Yes.

MS SMITH: Now, we say, first let's look at ex-ante bilaterals. That is bilaterals entered into by an issuer and an acquirer before the transaction takes place. Actually, the evidence which is described by the Supreme Court, which I'll take you to in a minute, at paragraphs 42 to 44 of the Supreme Court judgment, the evidence that was before the first instance courts as regards the ex-ante bilaterals, referred to by the Supreme Court as being unanimous and unequivocal, was that bilateral ex-ante bilateral agreements would not emerge because of the free rider problem.

That is that no acquirer would agree to an ex-ante bilateral MIF agreement in the absence of a default MIF, because there was no individual benefit to it in doing so, and certainly no individual benefit to it in doing so before everyone else had done so.

And that was the evidence before Mr Justice Phillips as regards ex-ante bilaterals. And that was also the evidence before Mr Justice Popplewell as regards ex-ante bilaterals, and the evidence considered by the Supreme Court which I was going to take you to -- as being unanimous and unequivocal that these ex-ante bilateral agreements were not a realistic counterfactual because of this free rider problem. And in my submission that free rider problem exists and applies regardless of whether or not IFR caps had been introduced.

So if I could take you, Sir, to the Supreme Court judgment in that regard. That's volume 4 of the authorities bundle, paragraph 42, sorry, volume 4 of the authorities bundle, tab 25, page 151.

MR LOMAS: Sorry, could you confirm the page number?

MS SMITH: Page 15. It's volume 4 of the authorities bundle, tab 25. Sorry, I have different numbering, I think.

MR LOMAS: I was going to say. I am in the right tab --

MS SMITH: There are so many of these.

MR LOMAS: -- but give me the internal page numbering.

MS SMITH: The internal page numbering is 822.

MR LOMAS: Thank you.

MS SMITH: Internal page numbering 822, paragraph 42.

Under the heading "Issue 1, the restriction issue":

"In the CAT proceedings, the CAT decided two issues which are no longer in dispute, namely the MIF didn't amount to a restriction of competition by an object and, two, the restriction issue fell to be considered in ...(Reading to the words)... in which transactions would be settled apart. It is also not in dispute that the setting of the UK MIF was pursuant to an agreement between undertakings."

I will come back to that.

Paragraph 43:

"The CAT considered that bilateral MIF agreements would be made in the counterfactual [and these are the ex-ante bilateral MIF agreements] but Popplewell J and Philips disagreed with this conclusion. As Philips J stated at paragraphs 126 to 129 of the Visa restriction judgment, despite the fact that MIFs have provided a default level of interchange fee for many years, bilateral agreements are unknown in the UK market. This demonstrates the very considerable strength of the market forces which keep the interchange fee at the level of the default. No party has persuaded another to move away from the default and no party has volunteered to do so for some perceived benefit. In my judgment, it would require clear evidence to support a finding that bilateral agreements would emerge in a default settlement counterfactual when they do not arise in the actual default scheme. It is clear there was no such evidence in these proceedings. On the contrary, the evidence was unanimous and unequivocal to

the opposite effect."

And then the Supreme Court says:

"It is now common ground that Popplewell J and Philips J were correct so to find. It follows that the findings made by the CAT on the counterfactual on the basis of bilateral agreements being made are not relevant to the appeal."

And on that, because the Supreme Court accepts this, I wanted to take you here before I took you back to what that unanimous and unequivocal evidence was that was before Mr Justice Phillips, which was similarly before Mr Justice Popplewell. But the evidence is considered in some detail by Mr Justice Phillips in the paragraphs selectively quoted by the Supreme Court, but it is useful to go back and now look at those paragraphs in the Philips' judgment.

Mr Justice Phillips' judgment is in authorities bundle 3, tab 17, starting on page 1608, the internal page numbering 673, under the heading "(b) The Asda judgment". Starting in paragraph 109, he considers Popplewell's judgment to the effect that there would be no bilateral agreements. I'm not going read this through to you in detail because it's paragraphs 109 through to 129, there is a very detailed assessment of the evidence by Mr Justice Phillips and the evidence which he describes as unanimous and unequivocal at paragraph 118 and again at I think paragraph 129, the evidence from the witnesses of fact and all the experts in the proceedings in front of Popplewell and Phillips is that acquirers and issuers would not enter into ex-ante bilaterals because of this free rider problem. He refers to that when quoting or paraphrasing Mr Justice Popplewell's judgment, paragraph 110(3) at the top of internal page numbering 638B, he describes it as the free rider problem. Then he considers the evidence and argument in the proceedings in front of him and he describes the expert evidence as being about -- paragraph 116 -- what Mr von Hinten Reed describes as the problem of free riding. So all the evidence in front of Popplewell and Phillips is

that the reason why ex-ante bilateral agreements would not be entered into is because of the free rider problem.

And we say that for those types of agreements, the position doesn't change. The reason why they would not be entered into, which was accepted by the Supreme Court, does not change or is not affected by the introduction of the IFR. So that --

MR JUSTICE ROTH: Would that be then a convenient -- if that concludes that submission, if we take a slightly longer break, we could read that section of Mr Justice Phillips' judgment which is obviously important for your submission, the one at paragraphs 109 to 129. Would that be helpful?

MS SMITH: That would. I will then, if I may, move on to the alternative bilateral counterfactual, which is one of ex-post or pure bilaterals as described by Mr Justice Popplewell, which is where as a matter of principle you can see that the issuer holdup might be a problem but we say was rejected in any event by Mr Justice Popplewell on the basis that we say this tribunal should also employ. But it would be useful if you could look at paragraphs 109 to 129 of Mr Justice Phillips' judgment because in my submission, that puts an end to Mastercard's bilateral counterfactual insofar as it relates to ex-ante bilateral agreements.

MR JUSTICE ROTH: Yes, I understand. We will return at 12.15.

MS SMITH: Yes Sir.

(12.03 pm)

(A short break)

(12.19 pm)

MR JUSTICE ROTH: Yes, thank you, Ms Smith. We have read those paragraphs.

MS SMITH: Thank you, Sir.

Sir, can I then move from ex-ante bilaterals to ex-post bilaterals and ask you in that regard to have open Mr Justice Popplewell's judgment, which is authorities bundle 3, tab 16.

MR JUSTICE ROTH: Yes, it's the same bundle. It's the tab before, isn't it, conveniently?

MS SMITH: And it's internal page numbering 1336. If we can go back to paragraph 128 of Mr Justice Popplewell's judgment --

MR JUSTICE ROTH: Yes.

MS SMITH: -- where he addressed the various counterfactuals. On internal page number 1336, as I've shown you at subparagraph (a) at the bottom of that page, he talks about ex-post bilaterals or pure bilaterals, that is:

"There are no agreements between acquirers or issuers in place before a transaction takes place but there is an agreement or imposition of a MIF by issuers at the time of or after transaction takes place."

Over the page on paragraph 131 of Mr Justice Popplewell's judgment, he considers that no MIF with pure bilaterals, what he has described as pure bilaterals or ex-post bilaterals, and it is true that he rejects that counterfactual on the basis, paragraph 131, that:

"This would give rise to the holdup problem and is for that reason unrealistic."

And he refers to Mastercard's argument before the commission, Mr Dryden's view, and Dr Niels, who has suggested in evidence that the result of the holdup problem would be to produce higher interchange fees on the MIFs set by Mastercard. My conclusion is simply that such a system of ex-post bilaterals is wholly unrealistic because of the uncertainty that it would involve."

Ultimately that was also Mastercard's primary case in agreement with the claimant's position.

So that counterfactual, the pure or ex-post bilateral counterfactual, was rejected, or the holdup problem does apply to that counterfactual, perhaps let's say, the holdup problem does apply to that counterfactual because issuers can effectively charge what they want. And Mastercard's case, which is what Dr Niels' evidence before you on these applications goes before you, is that the issuer holdup problem is removed by the introduction of the IFR caps. That leads to "a significant change in the economic

context", paragraph 45 of Mastercard's skeleton, which means that this counterfactual is now realistic and appropriate.

Dr Niels explains that the issuer holdup is now avoided because the level of the interchange fee is limited to the cap and Ms De Crozals also relies upon that issue, the holdup point. If I can ask you to go back to her statement -- please leave open Mr Justice Popplewell's judgment. If we can go back to Ms De Crozals' evidence, which is what Mastercard relies on for today's purposes, Ms De Crozal's evidence, we go back to summary judgment bundle volume 1A, tab 10L. If I could ask you to turn to internal page number 6 of Ms De Crozals' evidence, paragraph 19. I'm not going read it out, but she explains there what the issuer holdup problem is. Then in paragraph 20, she says:

"As a result, in markets without any restrictions on interchange fees [I interpose here for example the market before the introduction of the IFR] bilateral agreements have only really existed where there was also in place some default machinery which prevents excessive fees, such as arbitration, often coupled with a system of temporary default interchange rates to apply pending arbitration."

So that was the position before in effect the IFR. Then she says in paragraph 21:

"However, the introduction of the caps in the IFR meant that it would no longer have been open to issuers to hold up acquirers with demand for excessive interchange fees. Although acquirers still have no choice about dealing with issuers, an issuer can only demand interchange fee up to the regulated level of the caps."

So what she's saying, in my submission, is that after the introduction of the IFR, the IFR caps play the same role as was played previously by arbitration, often coupled with a system of temporary default interchange rates to apply pending arbitration.

In effect, what Ms De Crozals is saying is that the IFR rates caps are now the arbitrated rates but set by the commission as regulator, rather than by an independent arbitrator, still

set by an external body.

If you go back to Mr Justice Popplewell's judgment, you will see at paragraph 128(1)(e) on internal page 1337, the mandatory arbitration possibility was a further possibility floated by Mastercard, mandatory arbitration in the absence of bilateral agreement with some temporary arrangement pending the award, pretty much exactly the same words as used by Ms De Crozals in paragraph 20 of her witness statement.

Mr Justice Popplewell says that this was not ultimately pursued. Why it was not pursued, he says, is because both parties agreed that:

"For practical purposes, it would be the same as having a MIF and neither party espoused it as a realistic counterfactual. I do not need to address it further."

So that point, that this in effect arbitrated rate, arbitrated cap, has been rejected -- or was not seriously pursued by the parties in front of Popplewell, leads on -- because it is in effect a MIF -- leads me on to my second argument. I said I would come to this in response to Mr Lomas' question, but it's my second and perhaps most fundamental argument, which is -- and I start by asking you to turn in Mr Justice Popplewell's judgment a few pages on, internal page number 1347, paragraph 160.

Paragraph 160 of Mr Justice Popplewell's judgment records the submission that was made by Mr Hoskins for Mastercard. Mr Hoskins submitted that it was contrary to principle to assess whether there has been a restriction of competition by assuming a counterfactual which suffers from the same alleged vice as the actual.

We gratefully adopt and absolutely agree with that submission, that in principle it cannot be correct to assess whether there has been a restriction of competition, which assumes a counterfactual which suffers from the same alleged vice as the actual, as Mr Hoskins said. But what the court was being asked to do then was to say that a no MIF or a low MIF created a floor for the MSC just as much as the MIFs at the level set.

Now, we say that neither Visa's nor Mastercard's proposed counterfactuals for the period after 9 December 2015 remove the alleged vice. Neither of them remove the restriction arising from the impugned measure, the default MIF settlement rule. Therefore, neither of them can be used in principle to assess whether the impugned measures restrict the competition that would have existed in their absence, because in effect they reproduce the same restriction of competition, the same alleged vice.

Addressing each of the counterfactuals proposed by Visa and Mastercard in turn, first of all we say that Visa's UIFM, unilateral interchange fee model, is nothing more than the unlawful default MIF scheme rules, called something different. The Court of Appeal made it clear that the correct counterfactual approach that should be taken to determining whether particular measures restrict competition, paragraph 126 -- it might be useful to have this open, Sir, while I make these submissions. If I could ask you to have open the Court of Appeal judgment, which is bundle 3, tab 20 of the authorities bundle. They're pretty much all there.

MR JUSTICE ROTH: Paragraph?

MS SMITH: 126, which is on internal page number -- I don't have an internal page number, apologies -- maybe we have, 939. Internal page number 939, bundle number page 1743.

MR JUSTICE ROTH: That's the quote from Cartes Bancaires.

MS SMITH: Cartes Bancaires. You need to look at determining whether in the absence of the measures in question, the competitive situation would have been different on the relevant market. That is to say whether the restrictions on competition would or would not have occurred on this market, it's common ground that that's the test.

Paragraph 127 the Court of Appeal makes it clear, second sentence:

"The measures in this case are the agreements between the issuers and the acquirers to be bound by the scheme rules set by the scheme defendants, or put even more simply the

scheme rules set by the scheme defendants. Those rules set default MIFs payable in the absence of bilateral agreements being reached."

So the measures in question are the scheme rules collectively agreed to by the schemes and their members -- that is the schemes, the issuers and the acquirers -- which provide that default MIFs are to be paid in the absence of bilateral agreements; not, and I stress, the level of particular MIFs set by the schemes, but the scheme rules that collectively provide that default MIFs are to be paid.

MR JUSTICE ROTH: Isn't it default MIFs at a level, whatever the level might be -- take your point, doesn't matter what level -- default MIFs at a level set by the scheme rules?

MS SMITH: Sir, we say that the fact that the MIFs are set by the schemes is not the crux of the restriction. The crux of the restriction is that the issuers, acquirers and schemes agree to be bound by the rules that impose a positive MIF or a default MIF on issuers in the absence of bilateral agreements. Agreements, regardless as they said in 128 that the MIF is negative or positive or zero, the measures in question are the agreements to impose default interchange fees. And why that is a problem is because that agreement is entered into on a market which is separate from the acquiring market but has a knock-on impact on the acquiring market because once there is that agreement, there is a common cost, a default MIF at whatever level, a positive default MIF, which forms a part or affects the MSC, the price charged by acquirers to merchants on a separate market, the acquiring market. That element of the MSC, that effect on the MSC, that common cost which is agreed on a different market between different players cannot be negotiated away by the merchants. So the merchants cannot negotiate with the acquirers the price they pay the acquirers down to the acquirers' marginal cost because the MSC contains an element, the MIF -- or regardless of the level at which it is set, or regardless who sets it, but by agreement on

a separate market forms a common cost which the merchant cannot negotiate down, cannot negotiate with the acquirers, and therefore affects competition on the acquiring market.

MR LOMAS: Ms Smith, I think I follow that, but you are attacking both the Visa and Mastercard counterfactuals by reference to paragraph 127 and what I'm struggling with is where in those counterfactuals you say there are rules setting default MIFs.

MS SMITH: Right. If I may, I'll then deal with each of them in turn.

The Visa unilateral interchange fee model, Mr Stait's evidence, paragraphs 16 to 18 of his witness evidence, is that the scheme rules provide that in the absence of having agreed to settle at par, or having reached bilateral agreements, a default MIF is to be imposed by the issuer. That is what the scheme rules say, according to Mr Stait. They also say that once the issuer has elected to impose a default MIF, they have to tell Visa about that and they have to publish the level.

So there is a provision in the scheme rules that issuers are either to settle at par or enter bilateral agreements, or they are allowed under the scheme rules to impose a default MIF. So there's a provision in the UIFM, in the scheme rules, that a default MIF can be imposed by the issuer.

MR LOMAS: But by an issuer in relation to an acquirer.

MS SMITH: I'm not sure they descend to that much detail, actually. Yes, the issuer ... no, I'm not sure that's right from Mr Stait's evidence actually, sorry, Sir. That's a good point. He says -- paragraph 16 of Mr Stait's third witness statement original CMC bundle 1, tab 13, internal page number 296:

"Visa would have altered its rules [so this is going to be provided in the rules] absent bilateral agreements, transactions that settle at par unless the relevant issuer had previously stipulated it was only willing to settle on the basis of an interchange fee that the issuer had itself chosen unilaterally."

So as I understand it, each issuer is required to elect either they're going to settle at par or enter into bilaterals or they are going to impose an interchange fee. Further, that's borne out by the fact that Mr Stait then says under this model, the scheme rules would have required each issuer independently to notify Visa of any such interchange fees and publish them.

MR LOMAS: That was how I understood it, but how is that different from an issuing bank saying "I'm prepared to issue and trade with you and my price for doing this is X. You can like it or not, you can trade with me or not, but my price is X".

MS SMITH: Because the agreement as to this price has been entered into by the issuer, the acquirer and the schemes on one market, but it affects then the price to be paid by a separate entity, the merchants on different market, and effectively sets a floor then to the price that can be charged on that different market, the acquiring market, the floor that can be -- the price that can be charged by the acquirer to the merchant, which the merchant cannot --

MR LOMAS: But isn't that true of any input price? If I'm selling an intermediary chemical and I say, "I will sell you sodium chloride at a price of X, I'm not going to sell you it at another price, that's my price", somebody down the chain can take that and that is part of their input cost.

MS SMITH: Sir, yes. But that input price, what distinguishes this case, in my submission, is that the input price has been determined collectively.

MR LOMAS: Sorry, I thought if the issuer is setting his price independently, it hasn't been.

MS SMITH: Well, the fact that there will be a positive MIF which Visa says in principle is set by the issuer, but everyone knows that it would be set at the level of the cap, if they're saying -- let's say -- we say that the level is in principle up to the issuer, but there is an agreement between the issuer and the acquirer and the scheme as to -- there will be a default MIF imposed by the issuer. Visa says, "We are not going to say

what that is but everyone knows it's going to be the level of the cap". It's inevitable, I think, Ms De Crozals' evidence, but Mr Stait says it would be the level of the cap.

MR FRAZER: But the absence of an agreement is settlement at par, according to Mr Stait.

MS SMITH: Yes. Let's take it step-by-step as to what they say the distinguishing features are, why this is different from the default MIF rule. We say first that this is a construct because the very point -- it's self-serving because the very reason why Visa wants to rely on this counterfactual is because it has exactly the same effect on competition as the default MIF settlement rule because, they say -- this is Mr Stait at paragraph 16, he says:

"This would have the same effect on competition and that in effect is the very reason why we want to rely on it as a counterfactual."

Because it will lead to exactly the same result.

Then okay, we say fine. It is the same -- it will lead to the same result. We say not only does it have the same effect, but the operation and form of that model is also indistinguishable from the default MIF rule because it does exactly the same thing as the default MIF rule in the existing scheme rules. It puts rules in place that allow default fees to be imposed on the acquiring market that can't be competed down by merchants because they are imposed by entities which don't operate on that market.

Under the new rule, the UIFM, the issuer sets an interchange fee unless there is a bilateral agreement or a settlement at par; under the old rule, the default MIF settlement rule, Visa sets an interchange fee unless there's a bilateral agreement. But in both situations, the scheme rules provide for the imposition of an interchange fee as a result of a collective agreement between the issuers, the acquirers and the scheme.

Now, Visa seeks to distinguish this new model on a number of grounds. First, they say it leaves the issuer free to decide whether to impose an interchange fee or to accept settlement at par, but Visa's own evidence is that every issuer would not in fact

exercise this freedom, they would impose interchange fees. In any event, the fact that the default MIF settlement rule leaves open the theoretical possibility of bilateral agreements didn't make it any less of a restriction.

Alternatively, Visa seeks to distinguish the UIFM on the basis that it is unilateral and that is their pleading in paragraph 42A(e) of their draft re-re-amended defence. They say:

"Because the MIF would not have been determined by a collective agreement and so the whole of the MSC would have been determined by competition, we can distinguish this new model from the circumstances in front of the Supreme Court [paragraph 93(1)] because it's unilateral it's not determined by collective agreement."

That is stressed in their skeleton argument, paragraphs 20 and 43 of their skeleton. But that's not the case.

The Court of Appeal made it clear that the measure is the scheme rules agreed between issuers, acquirers, the schemes, and that is the collective agreement. And under the UIFM, the collective agreement, the scheme still provides that the issuers' interchange fee is to be subtracted unless it's previously indicated that it will accept settlement at par or a bilateral has been agreed, and it's notified that fact to Visa. It's not unilateral conduct on the part of the issuer, it's action taken pursuant to the collectively agreed scheme rules, which provide that an interchange fee will be imposed in default of settlement at par or a bilateral.

The level of the MIF, Visa might seek to rely on the argument that it's for the issuer to unilaterally decide on the level of MIF, but that's just another sleight of hand by Visa, quite apart from the fact that Visa's own pleaded case is that all issuers would set the MIF at the same level, that is the caps in the IFR. In any event, it's not the setting of a particular level of MIF which is the objectionable restriction. As the courts have made clear, it's the imposition of a MIF --

MR LOMAS: I'm struggling with paragraph 16 to see from where you draw the conclusion

that the MIF is going to be imposed. I have problems simply understanding your basis for that assertion.

MS SMITH: It's a combination of the structure of the rule and the economic context in which it says it's going to be applied, which Visa says it's going to apply. The structure of the rule is: issuers, you face the following choice; settlement at par, bilaterals or default MIF, which you set. And that is our agreement. The economic context in which that rule is being applied, quite admittedly on the face of Visa's evidence, is that all issuers would agree to set a default MIF at the level of the interchange fee regulation.

MR LOMAS: Is it quite that, that they would be setting at default, or is it actually that market forces would drive the MIF to the cap?

MS SMITH: That's not what they say. They say because of their interests -- sorry, I will find the relevant part if I may -- but what Visa say is it's in the interests of issuers to get as much by way of interchange fees as they can because they want to cover their costs. That will be an issue that will come down, whether that is acceptable and the level, and all the rest, will come to in 101(3). They say it's in the issuers' interest to get as high an interchange fee as they can, therefore they will, if we allow them in our rules, impose an interchange fee on acquirers.

The next step of the analysis, and this is where the restriction takes place, is that that MIF, which has been agreed, as I say, as a result of the combination of the rules and the economic context in which those rules are being entered into, affects the level of the MSC, the price charged in a different market.

MR JUSTICE ROTH: I think we follow that latter point. Can I ask this: suppose Visa said, "Okay, if we can't have our rule, we will have no rule about interchange fees. There's a cap. We say nothing. Our issuers and acquirers can do whatever they want".

They could say, in that model, issuers, who, as you say, want to get the maximum they can

do, in that market they will unilaterally say, "We're only willing to deal with you, acquiring bank, at this level of interchange fee. You can come to us or not".

That obviously -- and they say that's what market forces will produce and therefore that's no different.

Now, clearly there's no restriction of competition there because Visa's doing nothing. What I'm struggling with is what actually is the difference of them saying, "By rules if you don't have bilateral agreement, then you settle at par, which is not a restriction of competition, unless you've said in advance that you'll only settle on this basis of an interchange fee which you, individual bank, issuing bank, have decided and that you have to announce it". Okay, they require it by the bank to publish it, but I don't think that's a restriction of competition to say that they must publish it. Certainly that's not the restriction the commission and the Court of Justice and the Court of Appeal were concerned with.

MS SMITH: Well, let's start with what Visa is trying to do by introducing this counterfactual. The whole point of Visa introducing this counterfactual is they say exactly the same effect on competition, exactly the same situation would result under this counterfactual as occurs with the default MIF settlement rule.

MR JUSTICE ROTH: Yes.

MS SMITH: And it's a necessary part of their case that the issuers and acquirers and the scheme act together, they put in place this rule, and Visa does require a rule, which in effect does not, because of the economic context in which it is entered into, leave any freedom to issuers, because everyone understands, and it's the whole point of this counterfactual, that the supposed option of having no default MIF and leaving settlement at par will not be one that the issuers take advantage of. Because the whole point of Visa's counterfactual is that issuers will impose a default MIF.

So the agreement cannot be looked at -- and this is fundamental to competition law -- the

rules that are being put in place cannot be looked at in isolation, they have to be looked at against the economic context, which is that Visa says everyone will either enter into bilaterals, which they don't say is an option, or the issuers will impose a default MIF. Because if they didn't, the whole point of this counterfactual is it's pointless for Visa because the whole point of this counterfactual is that issuers would impose default MIFs. And therefore the situation is the same as the one which needs to be -- the actual. That's the whole point. And this is what we say is the fundamental problem with these counterfactuals.

MR JUSTICE ROTH: It is because they have to publish it, and therefore every issuer knows what every other issuer is choosing as its MIF, that in fact they will coalesce at the level of the IFR, because there's the --

MS SMITH: They also need to be published. Because the evidence that Visa puts in is that issuers will charge at the level of the caps because the caps are there and because everyone knows they are there, and because they can.

MR FRAZER: Sorry to interrupt you, Ms Smith, the situation, the scenario which was put forward by the President as to what happens if Visa did nothing, highlights I think the possible difference that the reason why the issuers are charging up to the cap is because of the presence of the cap; in other words, the economic reality is that if a cap is imposed the natural tendency will be to charge up to it and not beyond that. But that the difference, it seems to me, between what's described by Mr Stait in paragraph 16 and what happens pre-IFR is that this arises as a result of the economic realities rather than because a default MIF is actually part of a collective agreement or imposed by Visa. This is the natural -- as described by Mr Stait at least, this is the natural tendency, in the absence of a default-imposed MIF, you do talk about -- and I have listened very carefully -- you talk about a default MIF, but I think what's happening here is not a default MIF as described by Mr Stait at least, but just the

tendency from economic reality, that people will charge up to the cap if a cap exists. Have I misunderstood you in that respect?

MS SMITH: There is an externally-set cap. The level of that is set externally. But the scheme rules everyone has agreed to -- against the background of knowledge of the cap that the issuer can, and against the knowledge that that is what will happen, is the issuer can stipulate: I will set a unilateral interchange fee, I will set an interchange fee, we all know what that will be because of the presence of the cap.

And the evil is the fact that the acquirers and issuers of the schemes are agreeing to enter into this, what effectively and what the Commission in the most recent inter-regionals decision that I will take you to has described as effectively horizontal price-fixing. The evil isn't the issuer choosing the price unilaterally or deciding to go with this externally-set MIF, it's a fact that all acquirers are agreeing to accept and impose that price on merchants.

And this leads to my third point, which I'll come to, but the external cap would not ever have existed, the IFR would never have existed had the schemes not engaged over a number of years in what now the Supreme Court has held and the Court of Justice has held to be conduct that restricts competition.

MR JUSTICE ROTH: We know you've got that point. Ms Smith, I'm sorry to interrupt you, but isn't that a separate point? You introduced it to us and we all appreciate that you are making that submission.

MS SMITH: It is a separate point. It is a separate point, Sir, but it is difficult to just say in neutral terms this is just what's going to happen naturally economically. Because it's not just what's happening naturally economically that everyone is going to price up to this cap. The only reason the cap is there is because there has been this previous anti-competitive conduct, restrictive conduct. So they do interlink and they do affect each other, these points, although I'm presenting them as separate points. You can't

ignore the fact that this is not a market operating in a "completely competitive way", it is operating against the background of a cap that has been imposed.

MR JUSTICE ROTH: I understand that if you are right on that point, namely that the IFR only arose, you say, because of the previous anti-competitive conduct and therefore one should not have regard to it, then this doesn't matter. I see that, it's a knockout point and we'll come to it after lunch. But if that point's not right, what we are dealing with at the moment is your submission saying that this counterfactual, the Visa counterfactual, has the same vice, as you put it, as the existing condemned Visa-determined MIF. That's the point we are focusing on and trying to follow.

MS SMITH: I'm trying to put it in a different way.

MR JUSTICE ROTH: Sorry if we are being difficult.

MS SMITH: No, no. There is still collusion, on our submission, between all participants: issuers, acquirers and schemes. There is still collusion that the scheme, the issuers and acquirers will all act in the same way. It is collusion which comes not just from the face of the rules, but what they say is the economic context of those rules, which means that the issuer imposes a collusively-agreed price on the acquiring market which has effects on the acquiring markets. And that is what we say is at the heart of the problem that the Supreme Court was grappling with, that is at the heart of what the Supreme Court found was the problem, and that is exactly the same thing that will happen under the unilateral interchange fee model.

MR LOMAS: Sorry, under the unilateral interchange fee model which the Supreme Court was not considering, isn't -- in a sense to tritely paraphrase it -- the collusion is to set your prices independently? That is the thing that's been agreed. That people -- they can set a fixed price or they can negotiate a price, but they are agreeing that they will independently set prices. That's why I'm struggling to see the restriction.

MR JUSTICE ROTH: Unless it is -- if I can interpose -- unless it is that some restriction

arises from the requirement to publish the price, which in certain circumstances I see could distort competition. But I don't think that's the point you are making.

MS SMITH: My Lord it can't. The point I'm making is that there is no real independence in the context that these market participants are operating. Because they all know what is set out in Mr Stait's witness evidence. They know: one, the existence of the IFR caps; they know two, that issuers will price up to the level of those IFR caps because it's in their economic interests to do so. They know that if this happens -- that together, therefore, under the rule that is what will happen.

MR LOMAS: So in a sense, Ms Smith, you are almost putting it in the sense of a sort of tacit coordination of behaviour, that because there is a price point in the market set by the IFR limit there's tacit behaviour that everybody on the issuer side will simply move to that price point, whatever the rules say.

MS SMITH: Exactly. And the rules may stop short of explicitly saying that, but that is effectively what the rules say in the context that they are being applied. And we get back to the same point, which is what Mr Stait says -- and this is the very purpose of the unilateral interchange fee model, is that issuers would in those circumstances impose exactly the same interchange fees as are currently set by Visa with the same effects on competition.

That is the purpose, the same impact on the acquiring market, the same effects on competition. That is the purpose of these rules. And if there was not this tacit collusion or application of the rules in this particular context, however you want to put it, the rules would not do what Visa says they are intended to do and they will do.

MR FRAZER: Is that more to do with the level of fees?

MS SMITH: Prior to the IFR independence, this unilateral interchange fee would not work. The model would not work for Visa --

MR FRAZER: Is that more to do -- I am sorry to interrupt you. Is that more to do with the

level of fees though, rather than the data. Let's just come back to the present question. If instead of setting these rules Visa had just thrown their hands up in the air and said, "Right, we give in, just do what you want", and if the effect of the cap was to in fact encourage and drive issuers to the maximum cap in any event, would that still have been a problem in your view?

MS SMITH: I think that's where we move on to the third point, with respect. I know I'm not exactly answering your question but I think it is, that's why I say that it is artificial to ignore the impact in the context and the fact that the -- my third point, which is that the IFR would never have existed had there not been this conduct restricted conduct.

MR FRAZER: Okay.

MS SMITH: I'm sorry, Mr Frazer, that doesn't quite address the point but it is to me fundamental that you can't ignore all the interlocking aspects of this case. And when you step back, when you step back from all of this, you say: well, this is wholly self-serving on the part of the schemes, they are trying whatever they can to get to the same results and they'll put in whatever -- this is a market that's operated in a certain way for decades. Everyone knows how it operates, the issuers, the acquirers and the schemes, they know what they want. They want to pass on a fee to the merchants which cannot be negotiated by the merchants, and they will find whatever counterfactual or set-up that they can, in order to achieve exactly the same result. And that is what this is doing and it's the whole purpose of this counterfactual.

But the purpose of a counterfactual is: here is a restriction, would there be competition in the absence of this restriction? And obviously we say the Supreme Court got it right that yes, there would.

MR LOMAS: Ms Smith, do you accept that on this counterfactual the supply and demand situation is such that prices would in fact go to the cap? Or is it any part of your argument -- I don't think there's any evidence on the point -- that in fact there might be

increased competition on the issuer side or a reduction of demand on the acquirer side, so that, if you like, the market clearing price for the interchange fee would be lower than the cap?

MS SMITH: There's no evidence from us on that issue, because this is a summary judgment application. The evidence that we proceed upon is the evidence from both Visa and Mastercard that, and I'm quoting again here from Mr Stait:

"Issuers would, in the circumstances of their UIFM, impose exactly the same interchange fee the current ..."

MR LOMAS: I understand, thank you.

MS SMITH: So that is the evidence that we need to proceed upon for the purposes of this summary judgment application.

I see that it's 1.10, Sir. I don't know if that's a point at which to stop.

MR JUSTICE ROTH: Yes. We have probably exhausted the Visa counterfactual, and then you will, presumably after the lunch adjournment, come on to the Mastercard counterfactual; is that right?

MS SMITH: Sir, yes. And the third argument of the -- I think I need to address relatively shortly about the role that the IFR plays.

MR JUSTICE ROTH: Yes. That you haven't started on. We understand that, about why the IFR came into being at all. But at the moment we are on your second point, that the two counterfactuals are no less restrictive than the original rule.

MS SMITH: Yes.

MR JUSTICE ROTH: And you've been covering the Visa counterfactual, so you obviously need to address the Mastercard counterfactual.

Very well, we will come back at 2.10.

(1.11 am)

(The short adjournment)

(2.10 pm)

MR JUSTICE ROTH: Yes, Ms Smith, good afternoon.

MS SMITH: Thank you, Sir.

If I can continue, then, on the counterfactuals. First, can I emphasise what was said in paragraph 129 of the Court of Appeal's judgment and paragraph 47 of the tribunal's reference judgment of 20 December last year, which is that in these cases the focus should be on the acquiring market. That is where the restriction applies and it is where the effects of the restriction have to be assessed.

So it is the acquiring market where our focus should be. The Court of Appeal made that absolutely clear, and that was recognised in paragraph 47 of your judgment of 20 December.

As to the effect of the Visa and Mastercard proposed counterfactual, the UIFM and the bilaterals counterfactual, it is common ground, and in fact integral to both Visa's and Mastercard's cases that those counterfactuals have the same effect on competition in the acquiring market as do the rules against which they are to be assessed, the actual situation.

And that is Mr Stait's evidence in paragraph 16 of his third witness statement, and Ms De Crozals' evidence for Mastercard in paragraph 22 of her witness statement. She says, under "Mastercard's proposed alternative bilaterals counterfactual":

"It is inevitable [is the word she uses] that interchange fees would be imposed at the level of the IFR caps."

So the effect is the same, in that both counterfactuals would lead to the persistence of uniform positive interchange fees in the acquiring market. That's setting a minimum price floor which cannot be competed away by merchants. So the effect, the competitive effect, is the same in the acquiring market.

As Mr Justice Popplewell said, for this type of bilaterals he was considering: for practical

purposes it would be the same as having a MIF.

So if the purpose of a counterfactual is to assess competition without the restrictions, the effect is exactly the same.

So the effect is the same. The next question is, what is the collective or concerted action or the collusion that's the problem with these counterfactuals, so that they are in fact the same alleged vice?

When you consider the arrangements, to put it at its highest, that Visa and Mastercard say they would have put into place, and therefore the counterfactuals that they say should be employed by the tribunal, you cannot ignore the background against which those arrangements are put into place. Particularly, you cannot ignore the fact that there have been decades of explicit scheme rules which set a default multilateral interchange fee.

So when the explicit is replaced by the imminent implicit, you cannot ignore the fact that the explicit has been in operation for a number of decades. Moreover, you cannot ignore the fact that the interchange fee regulation has entrenched the position, has effectively entrenched the explicit arrangements that were in place, because the effect, or what the IFR does, to put it crudely, is that the IFR has given approval to the imposition of multilateral interchange fees.

It just says that they cannot be set at a level higher than the caps.

Against that background of explicit arrangements, plus an IFR that entrenches the position, we say that allows the parties effectively to enter into arrangements that may be tacit but certainly do not involve the setting of an independently set input price.

Either by way of rules, in the Visa UIFM, or by way of saying to issuers and acquirers, "You can enter into bilaterals", there is concerted action when you look at the arrangements against the background of what has already taken place.

I think it's also helpful in this regard, although I accept it is not binding on the tribunal, to

look at the way in which the Commission has most recently characterised the arrangements entered into by the schemes.

If I can ask you in that regard to look at the European Commission's inter-regional decision, which is in volume 3 of the authorities bundle, tab 22. I will come back to this for other purposes, but for the purposes of the submissions I'm making --

MR JUSTICE ROTH: This is the commitments decision of 2019.

MS SMITH: I accept, absolutely, the points that would be made against me: it is not binding in any effect, and also it's only a preliminary conclusion because it's a commitments decision, but it is useful to look at the way in which the Commission approaches these issues.

So if I can ask you to turn to page 9. This is the full decision that was sent round to the parties by the tribunal. The full decision, internal page numbering, page 9, paragraphs 34 and 35.

At 34 the Commission sets out its preliminary conclusion that Visa's rule on inter-regional MIFs amount to horizontal price-fixing.

"The inter-regional MIFs fix a significant component of the price ...(Reading to the words)... MSCs. The Commission came to the preliminary conclusion that the restriction on competition on price follows from the very substance of Visa's rules on inter-regional MIFs."

Then they talk about the objective. But what is important, I think, is not just about the point I've already made about the effects, that the inter-regional MIFs fix a significant component of the price charged by merchants for acquiring services, thereby setting a floor. It's the Commission's characterisation of this as horizontal price-fixing.

So there, the arrangements that the Commission no doubt has in mind are arrangements between, in effect, the acquirers -- all the acquirers set the same price, the common cost, which is referred to by the Court of Appeal. And the acquirers can set that

common cost. They all set the same common cost, and the same price, which is then passed on to the merchants.

MR JUSTICE ROTH: When you say "the acquirers", isn't it the issuers who have -- well, it's the scheme that fixes the price, but --

MS SMITH: Well, there's the price, but there's also the importance between the impact of the price and the impact of the rule.

The issuers have set a common cost. The acquirers have all agreed to pass on that common, set cost to the merchants.

MR JUSTICE ROTH: Have they?

MS SMITH: Well, they all --

MR JUSTICE ROTH: I thought they hadn't. I thought the point is that the scheme sets it. It forms a common cost and therefore the acquirers inevitably want to pass it on to the merchants. But I don't think there's any suggestion that they have actually agreed it's got to be part of the MSC, have they?

MS SMITH: I'm sorry, this is again the confusion between the price and the setting of the MIF. The issuers set the price. The acquirers have all agreed to accept, in effect, the charging of an interchange fee by issuers to them.

MR JUSTICE ROTH: Yes.

MS SMITH: And they have all accepted that as a part of the arrangements that they have with the issuers and the schemes. And then pass that on to the merchants.

Now, whether we're talking about Visa's amended rules under the UIFM or the introduction of bilaterals under Mastercard's counterfactual, both of those sets of arrangements -- which do involve a number of different parties and therefore are in effect concerted action -- need to be, as I've said, assessed against the background of the history of the scheme rules and the introduction of the IFR, because whether it's by way of explicit agreement or by way of different rules that have been introduced or different

arrangements that have been introduced against the background of the explicit arrangements and the IFR, those arrangements are entered into specifically for the purpose of and have the effect of enabling the acquirers to set a common price element which they pass on to the merchants.

And that argument does have overlaps with and leads on to my third argument, which is that the proposed new counterfactuals are not just inappropriate because they rely on the IFR, but also they are unrealistic.

And this is because, I say, and my argument is as follows:

Both of the proposed Visa and Mastercard counterfactuals are expressed only to apply in respect of the period after the introduction of the IFR. It follows from the decision of the Court of Justice in Mastercard and the Court of Appeal judgment, and subject to the asymmetric counterfactual, it is accepted by Visa and Mastercard that the appropriate counterfactual before that date was a no MIF counterfactual and settlement at par.

So when looking at that counterfactual, in our submission that position assumes that the schemes would have operated on that basis prior to the introduction of the IFR.

Then the schemes are asked what we say is a both inappropriate and irrelevant question: what would you have done if you were told you can't lawfully operate with positive MIFs from the 9 December 2015?

That's Mr Livingston's witness statement at paragraphs 7 and 9 and Ms De Crozals' witness statement at paragraph 17.

That is a question that has been put to the witnesses: what would you do if you were told you can't operate positive MIFs from 9 December 2015?

But underlying that question is an assumption which we say is both unrealistic and inappropriate, that before that date the schemes would have been able to operate with positive MIFs, when we know that before that date the counterfactual assumed that

they should have operated on the basis of no default MIFs and settlement at par.

So it's a necessary part of the schemes' case that they would have adopted models to achieve the same thing as positive interchange fees.

But the question should not be: what would you do in order to achieve the same end as imposing positive interchange fees? The relevant question for the purposes of the counterfactual is: how would competition have evolved in the absence of the scheme rules in question?

And that question cannot be answered by simply ignoring the Court of Appeal and Court of Justice judgments, one, as to the appropriate counterfactual and, two, as to the findings by the Supreme Court that the scheme rules restricted competition contrary to Article 101(1).

That question is also inappropriate because it is unrealistic, because it again proceeds on the assumption that the IFR, the Interchange Fee Regulation, exists and the caps exist, whereas, as we've said in our skeleton, they would not have existed had the schemes not acted for many decades in a way which has been held by the Court of Justice and by the Supreme Court as being a restriction on competition.

The IFR itself in paragraph 14 of the recital says:

"The application of this regulation should be without prejudice to the application of Union and national competition rules."

So we say you can't say one looks at the application of this regulation and in fact relies upon this regulation in order to argue, by devising a counterfactual which has the same effect as the scheme rules, that this is the appropriate and realistic counterfactual.

MR JUSTICE ROTH: Can I interrupt you. I'm not sure recital 14 has quite the meaning that you are suggesting.

I understand recital 14 to say: we, as a matter of regulation, are setting these caps. We are not therefore saying that a MIF at that level is necessarily immune from challenge under

competition law.

In other words, it wouldn't be an answer for Visa and Mastercard to say in response to your claim post December 2015: oh, we've set a MIF at the level of the IFR, so it can't be anti-competitive.

That argument is not open to them, because the IFR is not determining that. But that's not the argument they're running.

MS SMITH: No.

MR JUSTICE ROTH: That's what I understand recital 14 to say. They're simply saying, a MIF at the level of this cap is not immune from competition or challenge. Isn't that what it is saying?

MS SMITH: That's right, Sir, it's a fair point. The point I made, which is the relevant question for the purposes of the counterfactual, is how competition would have evolved in the absence of the scheme rules in question.

And in answering that question, you cannot just focus on the position as of 9 December 2015 and say: because as of 9 December 2015 the Commission has introduced the IFR, which it would not have done had we not acted in a way which restricted competition by imposing multilateral interchange fees, we are entitled to answer the question as to what is the appropriate and realistic counterfactual by relying upon the IFR.

MR JUSTICE ROTH: Why shouldn't one take, in just the same way -- although the analogy can perhaps be pushed too far. But we rejected, as you know, helped by your persuasive arguments, back in December, the asymmetric counterfactual because we said that just ignores the real world.

Now, we know that Visa may want to pursue that further. But the argument, as it were, applies the other way. In present circumstances the real world post December has this regulation. Whatever the reason why it came in -- maybe it came in because Visa and Mastercard behaved in an appalling anti-competitive way. Maybe it came in for other

reasons. I'm not sure it's necessary to investigate that. Or maybe it was a mixture of reasons, as so often with legislation, that led to its introduction.

But the fact is, it's there, and the world post December 2015 is one where there is a regulatory ceiling on caps.

Suppose someone started a case today in May 2021, which could only go back, because of the limitations, to 2015, and says the level of the MIF set by the schemes is anti-competitive. Wouldn't one be asking the Cartes Bancaires counterfactual question in a world where there is this regulation?

MS SMITH: Sir, there are a number of answers to that question. First, for the reasons which I have laboured in this hearing but also the hearing before you, it is not the level of the MIF which is the restriction on competition. It is the existence of the rule.

And that's clear from what the Court of Appeal said.

MR JUSTICE ROTH: No, I understand that. But the counterfactual of saying: does this rule restrict competition by looking at what would happen in the absence of the rule? And in answering the question, what would happen in the absence of the rule, why don't you take account of the existence of the regulations?

MS SMITH: Because one needs to strip out the anti-competitive rules. And the anti-competitive rules are the imposition of the default MIF settlement rule, and it is the default MIF settlement rule which led to the introduction of the IFR.

And through the Interchange Fee Regulation, the Interchange Fee Regulation has effectively crystallised to the position which was previously held to be the restriction on competition. That is, the imposition of a default MIF settlement rule.

So it has crystallised the restriction on competition. And so you are not stripping out the restriction on competition by simply going back to the position with the IFR in place. You need to strip out the restriction on competition as a whole, which means you go back to the position before the IFR is put into place.

MR JUSTICE ROTH: So have I understood this? You are saying that the IFR, because it has, you say, crystallised the restriction of competition, if you are, for the purpose of the counterfactual, looking at the world without a restriction on competition, you therefore look at the world without the IFR?

MS SMITH: Yes.

MR JUSTICE ROTH: Is that the point?

MS SMITH: Yes, that is what I'm saying. And I'm saying it because there is a difference between the level of the MIF and the existence of a rule imposing a positive default MIF.

For the purposes of the restriction under 101(1) the Court of Appeal and the Supreme Court have held -- or the Court of Appeal explicitly -- in paragraph 129 that the restriction is the rule that imposes a default MIF.

And that has been crystallised in the Interchange Fee Regulation.

The next stage of analysis, in order to make our claims good, will look at the level of MIF but only for the purposes of assessing the position under 101(3). And 101(3) asks us the question: assuming a restriction on competition, which we have already found to exist as a result of 101(1), can the restriction be outweighed by benefits so that the exemption applies as a result of 101(3)?

And when answering that question, then it may be that you look at the level of the MIF, because it may be that you are able to say, without prejudice to anything we might say subsequently on 101(3), you might be able to say that in certain circumstances only the restriction which is constituted by the default MIF settlement rule can be outweighed by the benefits, but only in circumstances where it is set at a certain level, because it is only at that level that the benefits outweigh the restrictions on competition.

But that does not mean there's no restriction on competition, because the restriction on

competition is the rule. It is just that when the rule is applied in certain circumstances it may be that the benefits outweigh the negative effects of the restriction.

So what I say is that the IFR crystallises the restriction -- that is the ability to impose a default MIF settlement rule -- but says only at a certain level, and without prejudice to that level being a level that can or cannot be exempted subsequently.

So the question you ask when you consider a counterfactual is: how would competition have evolved in the absence of the scheme rules, the absence of the restriction, the absence of the measure in question? Which is how the Court of Appeal puts it.

MR JUSTICE ROTH: Yes.

MS SMITH: You cannot, in that case, ignore the judgment as to the appropriate counterfactual and you cannot say those judgments now should not be applied because we have the IFR, because the IFR simply, as I say, crystallises the restriction.

MR FRAZER: Does it crystallise the restriction or does it crystallise the level at which the MIFs have been and can be set?

I'm listening to your argument about whether this is just a replication, if you like, of an anti-competitive agreement, as you would say, or whether it's a crystallisation of the level which is set in the absence of an agreement, and therefore is a part of the legal and economic context which simply has to be taken into account when assessing both the nature of the agreement and the nature of the market in which it exists. That's what occurs to me at the moment.

MS SMITH: I would say the former. Obviously the level of the MIF -- and this is where recital 14 does come into play. It's clearly not the purpose of the regulation to say that it may not be -- it is certainly not the intention and purpose of the regulation to prejudge any arguments about the level of the MIF or whether the existence of the MIF is appropriate as a matter of competition law.

But to rely upon the existence of the MIF in order to argue what is the appropriate

counterfactual for the purposes of assessing whether the scheme rules are a restriction, we say is wrong, for the reasons which I've just set out.

It's also wrong -- and an analogy perhaps can be drawn between the Court of Appeal's rejection of the asymmetric counterfactual and -- in fact I think the analogy goes a different way from that suggested by the President, which is, the Court of Appeal said, when considering the asymmetric counterfactual and the death spiral argument for the purposes -- this was for the purposes of ancillary restraint. So it's applied in a different context to what we're considering here, which is about the counterfactual for the purposes of assessing the effects of a restriction.

But they said -- and I'm quoting from the Court of Appeal in paragraph 204 and 298 of its judgment where the Court of Appeal upheld Mr Justice Phillips' rejection of the death spiral, because they said, and I quote:

"It should not be open to one unlawful scheme to save itself by arguing that it would otherwise face elimination by reason of competition from the other scheme, which is itself unlawful."

And obviously this was in a different context. But we say a similar approach should be taken by analogy here. It should not be open to the schemes to rely upon a regulatory response to arrangements which have been found to breach Article 101(1) in order to argue that other arrangements, which have exactly the same effect on competition in the acquiring market, in order to prove that the original scheme rules don't have the effect of restricting competition in breach of 101(1) in the acquiring market.

And that really is the point, perhaps, made by analogy to the Court of Appeal's approach to the death spiral argument. You can't rely on one wrong in order to justify another. You can't rely on a regulatory response to one restriction in order to justify another restriction which has exactly the same effect.

And the third argument -- in conclusion for the three arguments which I've set out, we say

that each of the schemes' proposed new counterfactuals for the post IFR period should be rejected.

MR JUSTICE ROTH: Thank you. Ms Smith, you spent some time before the lunch adjournment on the question of whether the Visa counterfactual had the same vice as the MIFs that have been condemned.

But then you went on to your third argument, about the reliance on the IFRs is not appropriate. But I don't think you covered the Mastercard counterfactual as to why that has the same vice, have you?

MS SMITH: Sir, I think I had, before going on to the third argument, because it's the point about, one, the effects are exactly the same, whether you are looking at the UIFM or the bilaterals arrangements, and then, two, where is the collective action or the collusion or the concerted action?

And I say, when looking at that, the UIFM is more explicit because it's reflected in the rules. The bilaterals arrangements are not reflected in the rules, as I understand it, but they are still a series of agreements, a series of arrangements.

And you look at those arrangements, which Mastercard say would inevitably exist across the market and are all in the same terms and are all entered into Ms De Crozals' paragraph 22 "inevitable":

"... inevitable that interchange fees would be imposed across the market at the level of the IFR caps pursuant to bilateral agreements between acquirers and issuers."

You have that necessary concerted or collective nature of those arrangements, which we are told would apply across the market, and so there is the necessary element of concerted collective collusive action, a conduct which you need to consider against the background of explicit rules that were in place for a number of decades and are then reflected in the arrangements subsequently entered into.

MR JUSTICE ROTH: Yes, I see.

MS SMITH: So they're not explicitly clear on the Mastercard bilaterals point, but that's effectively the similar points, arranging the bilaterals.

MR JUSTICE ROTH: Yes, thank you.

MS SMITH: If I can then move on to arguments that I hope will be slightly briefer. This is the third heading in my submissions, the third basis upon which in this case only Visa argue that the Supreme Court judgment should be distinguished.

And these are the two points raised by Visa, which arise from Visa Inc's acquisition of Visa Europe in 2016 and from Visa Inc's setting of the inter-regionals before that period as well.

They appear as issues 2 and 3 in Visa's skeleton argument. They also appear in Visa's witness evidence.

If I can start by taking you to Visa's witness evidence in this regard, which is found in Mr Stait's witness statement, which is in the summary judgment bundle A1. Mr Stait's fifth witness statement is found in tab 10G of that bundle.

MR JUSTICE ROTH: Just one second. (Pause). Yes, Mr Stait's fifth statement at bundle 1A at tab 10G.

MS SMITH: Thank you. This is the statement he produced specifically for the purposes of the summary judgment applications.

He deals with these points, starting on page 284.506 in his paragraph 32 and following, internal page number 8. The first point is summarised in the heading of paragraph 32 of his statement, which is that in the period post 21 June 2016 the MIFs did not constitute a decision of an association of undertakings or a collective agreement between undertakings.

He refers to the Visa pleadings in this regard, which relate to the setting of MIFs in the period following Visa Inc's acquisition of Visa Europe on 20 June 2016. And the factual position, he summarises. It's set out in more detail in the statements of Mr Butler and

Mr Steinmetz, and is summarised in paragraph 34 of Mr Stait's fifth witness statement.

And the point is, in summary, what's set out in paragraph 34(4) of his witness statement:

"Since 21 June 2016, the banks and financial institutions that were previously Visa Europe members have had no decision-making powers at all in relation to the operation of the Visa system in the Visa Europe territory and, in particular, have no role in relation to the setting of the level of domestic or intra-EEA MIFs or indeed any other MIFs."

So the point is that when Visa Inc bought or acquired Visa Europe -- it's effectively the conclusion that he sets out in paragraph 40, the level of the MIF is determined unilaterally by Visa, because the level of the MIF was set post 21 June 2016 as regards domestic and inter-regional -- intra-regional EEA MIFs were set unilaterally by Visa Inc.

So since 21 June 2016 the level of all MIFs has been set unilaterally by Visa Inc, therefore there is no collective agreement determining the level of the MIF and we do not fall within paragraph 93(1) of the Supreme Court's judgment.

MR JUSTICE ROTH: Sorry, you are in Mr Stait at paragraph 40?

MS SMITH: Yes. Last sentence:

"Contrary to what appears to be suggested by the claimants, the Supreme Court's reasoning in the Supreme Court judgment provides no support for --

MR JUSTICE ROTH: Well, that's not evidence, that's just legal argument from Mr Stait, isn't it? Ms Smith, that's not evidence, that's just legal argument. What he says is of no particular relevance in that respect; it's just argument.

MS SMITH: Exactly. It's argument that appears here, as do lots of arguments, and also appears in Visa's skeleton.

MR JUSTICE ROTH: Yes, I mean, it's an argument to be addressed but it's no better because it's put in a witness statement.

MS SMITH: Obviously not. He has set out the factual background that leads Visa then to make that argument.

MR JUSTICE ROTH: What I think the evidence is, as I understand it, the factual evidence, which is what evidence is for, deals with the question of whether post 21 June 2016 Visa should still be regarded as an association of undertakings and therefore a decision by an association of undertakings.

But as we understand your position, you say, well, whether that's right or not, we have claimed in the alternative that this is an agreement or concerted practice so we don't need to establish that it was still an association of undertakings. Is that not right?

MS SMITH: That is so, yes.

MR JUSTICE ROTH: So the question is whether it's properly to be regarded, then, as an agreement between the Visa members and the scheme.

MS SMITH: Yes. And the same point is made in response to Visa's second argument, which is that the level of inter-regional MIFs has always been set by Visa Inc, so the level of the inter-regional MIFs has never been determined by collective agreement between undertakings. And they say that that means that we have in effect sued the wrong defendants as regards the inter-regionals and sued the wrong defendants as regards all of the MIFs post June 2016.

MR JUSTICE ROTH: That argument, I thought, goes to the inter-regional MIFs pre- and post- 21 June. It goes throughout, doesn't it?

MS SMITH: It does, Sir, yes.

MR JUSTICE ROTH: So there is a difference.

MS SMITH: Yes, that's the difference. That's why there are points -- issues two and three, separate issues in Visa's skeleton argument.

However, before we leave Mr Stait's witness evidence, because it's there and we have it open it's useful to look at paragraph 47 of his statement, because that reproduces Visa's

pleaded case on inter-regionals.

He says, as set out there -- it reproduces their IFR response, which of course we can go to the pleading itself, but it's useful as it's set out here verbatim.

"The Visa Europe arrangements, for which the first defendant is at least partly responsible [the first defendant being Visa Europe] have at all material times [so pre-IFR and post IFR], consistent with Visa's global rules as set by Visa Inc, required that acquirer members of the Visa platform in Europe pay inter-regional MIFs when a Visa payment card issued outside of Europe is used to pay merchants for goods and services.

"The defendants have not at any material time, however, participated in the determination of the level of inter-regional MIFs, nor could they have done."

So there's a distinction there, which is an important distinction, between the Visa Europe arrangements, which Visa accepts the first defendant is at least partly responsible for, and the level of inter-regional MIFs, which it is only Visa Inc who has determined the level of inter-regional MIFs at all times.

Now, the Visa Europe arrangements, as we say in our skeleton, are defined in our pleadings -- that's a term which we have defined in our particulars -- as the provisions in Visa's rules, which include the obligation to pay a default MIF in the absence of a bilateral agreement.

And by their RFI response, Visa accept that those arrangements which have at all material times required acquirers to pay inter-regional MIFs, and also with other MIFs, have at all material times, the first defendant has been at all material times at least partly responsible for those arrangements. It is the level of the MIFs which have been set by Visa Inc.

MR LOMAS: Ms Smith, if I have the point, in essence what you are saying is that it doesn't matter who sets the level; what matters is whether you have agreed to abide by it.

MS SMITH: Exactly. And that's the point we make in our skeleton argument. And that point applies both for the inter-regionals at all periods in time and for the domestic and EEA MIFs after June 2016 which were set by Visa Inc.

So that is exactly the point.

Visa says that if central fact number 1, subparagraph (i) in paragraph 93 of the Supreme Court judgment, which states that the MIF is determined by a collective agreement between undertakings, they say it's not fulfilled as regards any Visa MIFs after 21 June 2016, because the level of those MIFs has been determined by Visa Inc alone after that date, and that essential fact number (i) has not been fulfilled as regards Visa's inter-regional MIFs at any time, because the level of those MIFs has always been determined by Visa Inc alone.

We say that that is unarguable, because in our submission the Supreme Court's reference to the MIF being "determined by a collective agreement between undertakings" at paragraph 93(1) of its judgment was no more than a reference to the MIF being determined pursuant to a collective agreement between undertakings.

That is our submission. And in order to make that good, I need to take you to the Supreme Court judgment.

We say -- just to clarify that submission, sorry -- the reference in the Supreme Court in paragraph 93(1) is a reference to the MIF being determined pursuant to a collective agreement, and that collective agreement, as Mr Lomas has identified, is the agreements between issuers and acquirers to be bound by the scheme rules, which set the default MIFs in the absence of bilateral agreements.

So if we can turn to the Supreme Court judgment, please, which is in the fourth of the authorities bundles at tab 25, internal page numbering 831.

We have paragraph 93, and the first essential fact set out by the Supreme Court is:

"(i) the MIF is determined by a collective agreement between undertakings."

And that needs to be read, in our submission, by reference to or subject to and in the context of what the Supreme Court says in paragraph 42 of its judgment, internal page numbering 822, which provides the context for this essential fact.

Paragraph 42, the second sentence, which I said I would come back to when we looked at it in that different context, the Supreme Court says:

"It is also not in dispute that the setting of the UK MIF was pursuant to an agreement between undertakings within the meaning of Article 101(1). See paragraph 95 of the CAT judgment, paragraph 34 of Popplewell J's judgment and paragraph 5 of the Visa restriction judgment."

We say that that language there is taken across to what the Supreme Court says at paragraph 93. And clearly, except it misses out the words "pursuant to an agreement", it is meaning exactly the same thing.

And that is the basis for the Supreme Court's first essential fact.

And just for completeness, if we could please look at the paragraphs in the first instance judgment, which the Supreme Court there adopts in effect. The CAT's judgment -- and luckily they are in different bundles so you can keep open the Supreme Court judgment there at paragraph 42 and also look at the CAT judgment in authorities bundle 3, tab 15.

The Supreme Court referred to paragraph 95 of the CAT's judgment, which is on internal page number 58. And paragraph 95 says:

"In conclusion, we find that the setting of the UK MIF was an agreement or agreements between undertakings, the agreement between being between Mastercard and its licensees."

And it explains that in paragraphs 93 and 94 of its judgment on the previous page. I'm not going to read both of those out for you, but just to make it clear that the agreements that the CAT was referring to here are the agreements between licensees and the

schemes.

Last clause of paragraph 94:

"Positive agreement on the part of all parties, Mastercard and the licensees, that Mastercard would set the default UK MIF, which, absent bilateral agreement, the ...(Reading to the words)... licensees would be obliged to pay and the issuing bank ...(Reading to the words)... entitled to receive."

So it's the agreement -- in effect what the Court of Appeal have said is to abide by the scheme rules.

The Popplewell judgment, which is at tab 16. The Supreme Court referred to paragraph 34 of Mr Justice Popplewell's judgment, which is at internal page 1309. And there he is looking at the existence of an agreement between two or more undertakings or a decision by an association of undertakings or a concerted practice.

That's the first requirement he sets out in paragraph 33 for an arrangement to fall within Article 101. He says in paragraph 34:

"The first requirement identifies three alternatives: that it is fulfilled by an agreement between ...(Reading to the words)... undertakings."

Et cetera:

"There was ultimately no real argument that the first requirement was fulfilled in this case. The MIF is set as a default ...(Reading to the words)... between each issuer and acquirer. The payment of the MIF is paid pursuant to the terms of the agreements. Moreover, the payment of the MIF at the level set is a concerted practice. This was not in issue in anything other than a formal sense. The claimants were also alleging that Mastercard constituted an association of undertakings. In the course of the trial it was agreed between the parties that the claimants would not pursue such an allegation in return for Mastercard's undertaking that it would advance no argument against the proposition that there was a relevant agreement or concerted practice. This was not

a formal concession but Mastercard's position was plainly realistic. The setting of the MIF was pursuant to an agreement between undertakings and was a concerted practice."

So that is again the agreement which we rely upon and which we say the Supreme Court confirmed.

Then the Phillips judgment, which is the Visa judgment, which is at tab 17. The Supreme Court refers there to paragraph 5 of Mr Justice Phillips' judgment, on internal page numbering 615.

Now, that paragraph says:

"It is common ground that Visa, or at any rate the second defendant Visa Europe, and/or the third defendant Visa UK is an association of undertakings within the meaning of Article 101 and that the UK MIFs are set by a decision of that association or agreement between those undertakings. It is also not in dispute that there's an ...(Reading to the words)... on trade."

Now, there is no consideration, we accept, in that judgment, of the agreement between Visa and its licensees as there was in the Mastercard first instance judgments. And that is unsurprising, given the common ground that is recorded in paragraph 5 of the Sainsbury's and Visa judgment.

But we say that the argument, upon which we rely, that there is an agreement between Mastercard or the scheme and its licensees, applies with equal force to Visa. Its scheme rules obviously -- this is non-contentious -- also provide for payment of a default MIF by an acquirer to an issuer. And that is set out in paragraphs 26 to 34 of Mr Justice Phillips' judgment.

And perhaps more importantly, the Court of Appeal, which was the judgment that came in between the Phillips judgment and the Supreme Court judgment obviously, held that for all of the cases before it, both of those relating to Mastercard and those relating to

Visa, that for all of those cases the measures in question, in its judgment the agreements were to be bound by the scheme rules.

So if you can look at the Court of Appeal judgment, which is at tab 20 of authorities bundle volume 3, and if I could ask you to turn to paragraph 127 of that judgment. You've been here before. It's bundle page numbering 1744.

MR JUSTICE ROTH: Yes.

MS SMITH: The Court of Appeal says:

"The measures in question are the agreements between the issuers and the acquirers to be bound by the scheme rules set by the scheme defendants, or, put more simply, the scheme rules set by the scheme defendants. The rules set default MIFs payable in the absence of bilateral agreements being reached."

Et cetera, et cetera. And so in our submission it's irrelevant whether or not the particular level of any MIF was set by Visa Inc alone or by an association of undertakings made up of members of Visa Europe. The requirement to pay a default MIF was part of Visa's scheme rules, which formed an agreement or series of agreements between Visa and its members, its issuer and acquirer members, and all default MIFs for the relevant periods, domestic, EEA and inter-regional, were paid pursuant to the terms of those agreements.

Moreover, although we say it's not strictly necessary given what I have already said and what the Court of Appeal have held, Visa has admitted that even after 21 June 2016, not only Visa Inc but also Visa Europe were responsible for its scheme rules, the Visa Europe arrangements.

And I've shown you paragraph 47 of Mr Stait's fifth witness statement which quotes Visa's IFR response.

So on their pleadings Visa accept that both Visa Inc and Visa Europe were responsible for the scheme rules even after 21 June 2016, although the level of the inter-regional MIF

was set by Visa Inc alone.

So those briefly are my submissions on that point, the two arguments run by Visa.

MR JUSTICE ROTH: Yes.

MS SMITH: Sir, I don't know if this is a good point to break.

MR JUSTICE ROTH: Yes, because you are coming on to your fourth point about the different types of MIF.

MS SMITH: About the different MIFs, the commercial, inter-regional and other domestic.

MR JUSTICE ROTH: Yes. Shall we take just ten minutes. Thank you.

(3.09 pm)

(A short break)

(3.20 pm)

MR JUSTICE ROTH: Yes, Ms Smith.

MS SMITH: Thank you, Sir.

Then if I can move on to the fourth and final heading of my submissions, which is the MIFs set at different levels, from the decision of the Supreme Court.

Visa and Mastercard seek to distinguish the Supreme Court judgment on the basis that it only concerned claims for EEA, UK and Irish consumer MIFs, while the current claim also includes commercial, inter-regional and other domestic MIFs, including Italy, Gibraltar and Malta.

Visa and Mastercard both submit evidence from their expert economists, Mr Holt and Dr Niels, both of whom raise various points and say that further investigation of these facts is required.

Now, we say in summary that the analysis of the Supreme Court and the Court of Appeal before it did not turn to any extent on the type of MIFs which underlay the claims appealed to those courts.

The analysis of and reasoning employed by those courts, we say, apply equally to the current

claims brought by my clients, including those based on commercial MIFs, inter-regional and the other domestic MIFs. They can't be distinguished, we say, as a matter of law and therefore the Supreme Court judgment applies.

There are two steps to my submissions in this regard under this fourth heading. First, I propose to make submissions, I hope relatively quickly, on what was held by the Supreme Court and the Court of Appeal as regards the nature of the restriction found by it to exist for the purposes of Article 101(1).

And secondly I will make submissions by reference to the expert evidence submitted by Visa and Mastercard to the effect that that evidence is irrelevant. It can't be used to distinguish the current claims. And so the Supreme Court's conclusion that there had been a breach of Article 101(1) applies equally to the claimant's claims where damages are calculated by reference to those MIFs.

So first, in summary, I come back to the point which I have made on numerous occasions in the past, and the defendants' case, I say under this heading, ignores the critical point that the analysis of the Supreme Court, and the Court of Appeal before it, was directed at the collective agreement to impose a price on the acquiring market. The default MIF settlement rule.

The court's analysis did not turn on the level of particular MIFs or the type of MIFs that were before the court. The level of particular MIFs are simply different price levels, in our submission, imposed upon the same default MIFs settlement rule. As a result, we say the court conclusions apply equally to the current MIFs, all of them.

Before turning back to the Court of Appeal's and the Supreme Court's judgments -- and I've read them on a number of occasions now, as I'm sure the tribunal members have -- it's striking that the level of the particular MIFs which formed the basis of the claims before those courts, or even the fact that particular MIFs formed the basis of those claims, were noted perhaps at the beginning of the judgments but formed absolutely

no part of the court's subsequent reasoning and analysis for the purposes of 101(1).

They did not say, well, we have looked at English MIFs and we have come to the conclusion that that is a restriction; we have looked at EEA MIFs and we have come to the conclusion that that's a restriction; we have looked at the Irish domestic MIFs and we have come to the conclusion that that's a restriction.

They certainly did not take that approach. On the contrary, the court's analysis was of the impact of the scheme rules setting a default MIF, and the effect of that rule or those rules on competition, on the acquiring market.

So if you go back to the Court of Appeal judgment. I'm not going to go through this in minute detail but just to highlight a few paragraphs, to make good my submissions in this regard and to respond to various points made under this heading in the defendants' skeletons, if I may.

So let's start again where we have been on a number of occasions, at paragraph 129, paragraph 126 and then if I ask you to turn to paragraph 129 on the court's judgment.

Paragraph 129, internal page numbering 940, sets the question, the relevant question, that the Court of Appeal identified it should ask itself in determining whether there was a restriction of competition for the purposes of Article 101(1).

In paragraph 129 the court says:

"It's therefore necessary to ask whether, in a world without the scheme rules that set a MIF in default of bilateral interchange, fees being agreed, there would or would not be more competition in the acquiring market."

Two points to be made, in my submission, in that paragraph: first, the Court of Appeal's focus is on the scheme rules that set the MIF, not particular MIFs or levels of particular MIFs, nor, for that matter, particular markets or geographic markets.

Now, that echoes what the Court of Appeal has said previously in paragraph 128. They need to look at the absence of the measures in question, namely the agreements that impose

default interchange MIFs.

The second point I take from paragraph 129 is that the focus of the Court of Appeal is on competition in the acquiring market. I've already made the point in submissions under other headings today that it is the acquiring market, which the Court of Appeal, the Supreme Court and this tribunal in its reference judgment have said they are focusing on the acquiring market.

The Court of Appeal set out the relevant question that it was asking itself in paragraph 129 and then proceeded to answer that question by reference to the Court of Justice's judgment.

At paragraph 133, the Court of Appeal says, when looking at, first, the Commission's decision, and it then looks at the General Court's decision and the Court of Justice's decision, but first looking at the Commission's decision. The Court of Appeal says in paragraph 33:

"Looking at the Commission's decision as a whole, it can readily be seen that the Commission was dealing with the same factual situation as in these cases in relation to both Visa and Mastercard."

And it says the factual situation that was at issue both in front of the Commission and in front of the Court of Appeal in the cases before it, the factual situation is a default MIF set by the scheme in the absence of any bilateral interchange fees being agreed between issuers and acquirers."

So the Court of Appeal comes to the conclusion that the same factual situation was before the Commission as is before us in these cases, and that same factual situation was the default MIF being set by the schemes in the absence of bilateral agreements.

They did not say the same factual situation is because the cases before the Court of Appeal and before the Commission were about the same type of MIFs.

In paragraph 135, the Court of Appeal quotes 410 of the Commission's decision and it says:

"Mastercard's MIF constitutes a restriction of price competition in the acquiring markets. In the absence of a bilateral agreement, the multilateral default rule fixes the level of the interchange fee rate for all acquiring banks alike, thereby inflating the base on which acquiring banks set charges to merchants.

"Prices set by acquiring banks would be lower in the absence of this rule and in the presence of a rule that prohibits ex post pricing. The Mastercard MIF [for which the rule that they've just set out] therefore creates an artificial cost base that is common for all acquirers, and the merchant fee will typically reflect the cost of the MIF. This leads to a restriction of price competition between acquiring banks, to the detriment of merchants."

Now, my submission is that one can see from the context when reading the full recital 410 that when the Commission refers to Mastercard's MIF, that is shorthand for the default rule, which it sets out, fixing the level of the interchange fee rate for all acquiring banks alike.

And you can see that that is also, in my submission, the Court of Appeal's reading of recital 410 of the Commission's decision by the sentence that follows the quotation, where the Court of Appeal says:

"The reference to an absence of a bilateral agreement is to describe the nature of the rule, which provides for a MIF to be the default absent a bilateral agreement."

So the Court of Appeal is concerned with the rule. The Court of Appeal then refers to the Commission in paragraph 37 of its judgment. The Court of Appeal refers to the Commission, explaining what the decisive question is at recital 448 of its decision. And the quotation from recital 448 of the Commission's decision is:

"The decisive question is whether, in the absence of MIF, the prices acquirers charged to merchants at large would be lower. This is the case because the price each individual bank could charge to merchants would be fully determined by competition rather

than, to a large extent, by collective decision or on behalf of the banks."

So the decisive question is that in the absence of the MIF -- which we have seen the Commission talk about the rule -- the prices that acquirers charge to merchants would be fully determined by competition. And that is the decisive question, not what the level of a particular price would be or the level of a particular MIF that is then passed on by the acquirers to the merchants.

MR JUSTICE ROTH: Can I interrupt you. Is it only that it would be fully determined by competition? Or is it also that it would be lower, never mind how much lower or at what level it was, but that it would be a lower price?

MS SMITH: I think that's right. I think it's both fully determined by competition, which could drive it down to the marginal costs of the acquirer. I will come to this later if I may, and we will see how the European Courts dealt with the factual situation where because of the blending of MIFs -- or because of the way in which MSCs are set, that they reflect a blended rate often, or a particular -- they reflect a blended rate it may be the case that sometimes MSCs fall below the level of a MIF or a particular MIF, because they reflect a blended rate of all of the MIFs that go into making up the MSC.

So it may be that when you compare the average rate of an MSC against the particular rate of the MIF, that MSC may fall in particular circumstances below the level of a particular MIF.

And the European Courts found that even in such cases the restriction of the objectionable anti-competitive restriction still arises.

MR JUSTICE ROTH: Yes.

MS SMITH: And still, in fact, the prices would be lower, even though sometimes a particular MIF may fall below an MSC. But I'll come to that if I may.

So yes, it's set by competition rather than collective decision, and it would be lower because without the MIF, the default MIF rule the merchants would be able to negotiate with

acquirers down to their marginal costs and whatever, rather than hitting this floor.

So the Court of Appeal then goes on to consider the General Court's decision. And if I could ask you to look at paragraph 146 of the Court of Appeal's judgment. The Court of Appeal refers to the General Court in paragraph 143 of its judgment, explaining that by comparison with an acquiring market operating without them, the MIF limits the pressure which merchants can exert on acquiring banks when negotiating the MSC by reducing the possibility of pricing dropping below a certain threshold.

This reasoning seems to us to be a conclusion of law, based on the factual premises stated, which it may be noted are precisely the same factual premises as are agreed in this case.

And you have seen from the Court of Appeal -- I've taken you to the relevant paragraphs -- that the factual premises which the Court of Appeal said applied in the cases before it, that were the same, exactly the same, as those before the General Court, was that there were scheme rules which imposed a default MIF to be applied in the absence of bilateral agreements.

So just the same factual premise applied in the core cases before the Court of Appeal also applied in the cases before the European Courts, and we say in turn applies to all of the claims before you. That is the application of the default MIF rule.

The Court of Appeal then goes on to consider the Court of Justice's judgment, starting from 147 of the Court of Appeal's judgment onwards. If I could ask you to look at paragraph 156 of the Court of Appeal's judgment. In paragraph 156 of the Court of Appeal's judgment they say:

"In our judgment, the proper analysis of the CJEU's decision on these points is that it endorsed the counterfactual adopted by the General Court as a matter of law. Further, it rejected the argument, 1 [and this is where we get into double negatives, so it's

slightly confusing], the Court of Justice rejected the following arguments:

1, no default MIF and a prohibition on ex post pricing counterfactual was inappropriate.

So in effect, the Court of Justice held that that counterfactual was appropriate:

2, that there was no reason for saying that the MIF set a floor on the merchant service charge.

So the Court of Justice held that there was a basis for saying it set a floor.

And 3, it rejected the submission that the imposition of MIFs did not restrict competition between acquirers because the merchants could still compete in relation to the parts of the MSC that were unaffected by the MIF, so it held that the imposition of MIFs did restrict competition even in those circumstances.

Then in paragraph 157 -- and I've referred you to this paragraph I think in the applicable law submissions but I refer you to it again.

"The Court of Appeal said it would be remarkable if the same scheme rule requiring the payment of MIFs in default of the agreement on bilateral interchange fees were held to be in breach of Article 101(1) in one member state but not in breach of it in another member state, whatever the factual or expert evidence might have been as to what might have happened in the related counterfactual."

So I refer you to that again to support my submission, which is the restriction which the Court of Appeal and the Court of Justice found to have the effect of restriction was the rule of the scheme itself.

The Court of Appeal then considered each of the judgments below, the first instance judgments, and I will just ask you to look at a couple of paragraphs in the Court of Appeal's reasoning in that regard.

First of all, the Court of Appeal considered Mr Justice Popplewell's judgment. And then Mr Justice Phillips' judgment, and I'd ask you to look at paragraph 168 of the Court of Appeal's judgment.

About halfway down that paragraph the Court of Appeal says -- and this is in response to

when Mr Justice Phillips was considering the question about whether or not there was any magic in the numbers. The Court of Appeal says, halfway through paragraph 168:

"We take the view that paragraph 137 of Phillips J's judgment is beside the point. As we have already said, the exercise under Article 101(1) is to consider whether there would be more competition in the absence of the measure in question. The measure in question here was the rule that, in the absence of bilateral agreements, a default MIF would be imposed.

"In the absence of such a rule there would have been no bilateral agreements and no MIFs would have been charged, because there would have been either a settlement at par rule or ex post pricing restriction, as the Court of Justice held.

"Accordingly, we think that Phillips J was wrong to think that there was no magic in zero just because of the possibility of negative MIFs. Moreover, the Commission saw any positive MIF as setting a floor under and inflating merchants' service charges, as it said at paragraph 522. " So any positive MIF sets a floor and any positive MIF in my submission has the effect of restricting competition in the acquiring market.

The Court of Appeal explains its thinking in paragraph 169. Again, this is the point about setting a floor to the merchants' service charges.

At the end of that paragraph the Court of Appeal says that without a default rule that fixed a MIF in the absence of such bilateral agreements, merchants could shop around to contract with the acquirer who incurred the lowest interchange costs.

So it's the same point: it's about the fact that, as a result of the default rule, merchants cannot negotiate with acquirers down to the acquirers' marginal cost. And that leads the Court of Appeal to reach the conclusion it reaches in paragraph 171:

"In these circumstances and for the reasons we have already given, we take the view that Phillips J was mistaken at paragraph 148 to conclude that the CJEU had not decided

that positive MIFs of the kind charged by Mastercard are, as a matter of law, a restriction on competition. That, in the circumstances of the Mastercard decisions and these cases, was precisely what the Court of Justice decided."

And you have seen what factual circumstances the Court of Appeal says were in common between the Court of Justice's cases and the cases before the Court of Appeal and, we say, the cases in the present claims.

And again, in paragraph 172, the Court of Appeal sets out the point that it's the default rule which is the restriction and not the level of any particular MIF.

In that context, and in response to what's said in the skeleton arguments, it's important, having set the scene, to look then at what the Court of Appeal says about the CAT judgment below, and in particular what the Court of Appeal says in paragraph 174 of its judgment.

This is because in paragraph 37 of its skeleton argument Mastercard, in isolation, relies upon paragraph 174 of the Court of Appeal's judgment. Mastercard relies upon what the Court of Appeal says in paragraph 174 to make the submission, and I quote:

"The Court of Appeal had made it clear that it was not finding that all default interchange fees would be a restriction of competition, but rather the specific MIFs before it involved a restriction of competition."

That is the submission that Mastercard seeks to make on the basis of what the Court of Appeal said in paragraph 174.

I say that that is clearly not what the Court of Appeal says in that paragraph. It does not say that it is only the MIFs before us in the cases below -- that is the UK, Irish and EEA MIFs -- which involve the restriction of competition, and we are not finding that all default interchange fees would be a restriction of competition. That submission stretches far too far what is said by the Court of Appeal in paragraph 174, particularly when read in the context of the previous reasoning that I have taken you to.

What the Court of Appeal says in paragraph 174, in the part that Mastercard particularly relies on, is the second sentence. In fact, we should start at the beginning. This is in response to the arguments before the CAT that any MIF is a restriction because it precludes the agreement of a true market price. The Court of Appeal says at paragraph 174:

"The argument before us did not give much consideration to this approach, save that the schemes argued that it demonstrated that the decision was one of fact and submitted that one of the vices in the merchants' submissions was that any level of MIF would be unlawful, even one allowed by the Interchange Fee Regulation.

"We accept that in theory it could have been argued that the schemes' actual MIF rates during the relevant periods were so low as to differentiate themselves from the legal position determined by the CJEU's decision.

"Plainly, the reasoning of the CJEU to which we have referred does not mean that any small default MIF would automatically be a restriction on competition."

Then they go on to say:

"The factual premise, however, of the Mastercard scheme that the Commission was considering and the schemes that we are considering is that the default MIF made up a large percentage, some 90 per cent, of the merchants' service charge. In these circumstances, the fact that the CAT may have been correct to say that not every default MIF, however small, would automatically be a restriction on competition violating 101(1) does not deprive the CJEU's decision of binding effect where the facts of these cases are materially indistinguishable."

Now, in my submission, and in light of what has previously been said by the Court of Appeal, the nature of the restriction at issue and the impact that it has on the acquiring market -- that is that the restriction at issue is the default MIF rule and it sets a price floor in the acquiring market -- in my submission, all that the Court of Appeal is

saying here in paragraph 174 is that, in principle, in theory, it may be open to the schemes to argue that MIFs at a very low level, so low, can be differentiated from the legal position determined by the Court of Justice's decision.

That is that MIFs are at such a low level that they may be effectively irrelevant to the bargaining process between merchants and acquirers in the acquiring market.

So one could see that MIFs may be set at such a low level that they are irrelevant to that bargaining process, but in my submission that would only be the case where the MIFs are so low that they have no effect on the merchant service charge. That is the MIFs effectively do not -- they are not added as a common cost to the MSC, to the merchant service charge, so they have no effect on the merchant service charge. And it is only in that situation where they do not set a floor to negotiations on the acquiring market, because they do not then feature as a common cost or a floor in the MSC.

That must be the interpretation of paragraph 174 in light of the previous paragraphs of the Court of Appeal's judgment that I have drawn your attention to.

Put simply, in my submission the arguments set out in paragraph 174 would only be open to the schemes where the MIFs are set so low that they don't affect the merchant service charge. But where the MIFs do affect the merchant service charge, when they do set a floor on the merchant service charge, straight competition between acquirers, it is the case that in the cases that the Commission was considering and the schemes that the Court of Appeal are considering, the default MIFs made up a large percentage, some 90 per cent of the merchant service charge, that is the common issue as a matter of fact. But the Court of Appeal certainly does not say that the MIFs need to be at that sort of level or that sort of proportion of the merchant service charge in order to be a restriction. All they say is that insofar as they set a price floor on the merchant service charge they restrict competition between acquirers -- this is the whole of the rest of the Court of Appeal's judgment -- because they cannot be negotiated away by

the merchants. So a comparison is made by the Court of Appeal between a position where a MIF does set a floor, and the position where the merchant service charge is wholly open to competition and therefore the price is lower. The Court of Appeal certainly does not say there is a point at which say 90 per cent of pass-on, that needs to be proven in order to show that the MIFs set a floor in the merchant service charge, they simply say that it may be in principle open to the schemes when MIFs are set so low to argue that they do not have a restriction on competition, the restriction on competition being competition on the acquiring market.

Now, in the present cases, all of the cases in front of the tribunal brought by my claimants, including the claims based on inter-regionals, commercial cards, et cetera, both Mastercard and Visa admit, on the face of their pleadings in their defences, that the prices charged by acquirers to merchants -- that is the merchant service charge -- take into account the MIF. That is unsurprising, particularly as regards the inter-regionals and commercial MIFs because we know, as a matter of fact and it's set out in the schemes' expert reports, Dr Niels' expert reports and Mr Holt's expert reports, the MIFs that the schemes are seeking to distinguish, the inter-regionals and the commercial MIFs, are generally set at much higher levels than the consumer MIFs and they are not actually capped by the IFR.

For your note, the references in Dr Niels' report at paragraph 3.6 for inter-regionals, and paragraph 4.12 for commercials --

MR JUSTICE ROTH: Sorry, what was the first reference?

MS SMITH: 3.6. This is simply the expert --

MR JUSTICE ROTH: I understand it's Dr Niels' report but it got muffled, the sound.

MS SMITH: Paragraph 3.6 and paragraph 4.12 for commercials. In Mr Holt's third expert report it's paragraphs 29, 35 and 53. And as I've said those MIFs, the commercial and inter-regional MIFs, are not regulated under the IFR caps, although obviously they are

now subject to various commitments by Visa.

So we say that in the circumstances which I've set out the schemes cannot rely on what the Court of Appeal says at paragraph 174 of its judgment to seek to distinguish the claims based on commercial inter-regional and other domestic MIFs. I'll come back to the schemes' pleaded cases to make good this point, but if I can just finish referring to the relevant judgments while we have it open.

The next paragraph I want to refer you to in the Court of Appeal's judgment is paragraph 185. Paragraph 185 the Court of Appeal says, and this is summarising their conclusions on the question of whether the scheme rules, setting default MIFs restrict competition under Article 101(1) in the acquiring market, which is the relevant question they set out. Paragraph 185:

"Our conclusions on the primary article 101(1) issue can be summarised quite shortly. The correct counterfactual for schemes like the MasterCard and Visa schemes before us was identified by the CJEU's decision. It was 'no default MIF' and a prohibition on ex post pricing (or a settlement at par rule). The relevant counterfactual has to be likely and realistic in the actual context [...] but for schemes of this kind, the CJEU has decided that that Test is satisfied."

Paragraph 186:

"The CJEU's decision also made clear at [195] that MasterCard's MIFs, which resulted in higher prices, limited the pressure which merchants could exert on acquiring banks resulting in a reduction in competition between acquirers as regards the amount of the merchants' service charge."

So there is a reduction on competition, regardless, I would submit to the extent of that reduction:

"This is not a decision from which this court either can or should depart. It answers the schemes' argument that, whether as a matter of evidence or not, the competitive

process will not differ in the counterfactual. The default MIFs may be a transparent common cost, which is passed on by acquirers to merchants, and which does not figure in the negotiations between them, but it does not follow that acquirers nonetheless compete as strongly for merchants' business in relation to the acquirer's margin and the additional services they offer, as they would in the absence of the default MIFs."

In my submission that also needs to be read as I have submitted in paragraph 174 -- sorry, then go on to look at paragraph --

MR JUSTICE ROTH: I'm always puzzled about that sentence, whether there isn't a "not" missing:

"The default MIFs may be a transparent common cost, which is passed on by acquirers to merchants, and which does not figure in the negotiations between them, but it does not follow that acquirers nonetheless compete as strongly ..."

It seems to me it should say "does not follow that acquirers nonetheless [do not] compete ..."

I don't think you can help me on that, but it's --

MS SMITH: That last sentence I'm afraid has puzzled me in the past as well. There's a missing "not". I think overall the thinking of the Court of Appeal is clear, which is that default MIFs are a common cost, passed on --

MR JUSTICE ROTH: It may not matter, but I just --

MS SMITH: And therefore competing strongly, the acquirers, as they would for merchants' business. Because they don't compete just on the basis of the margin, it's their margin and the additional services, as they would in the absence of default MIF.

So yes, the wording is clunky there and I'm not sure there's not a missing negative.

But then I think it is important, again because of what Mastercard says, to address paragraph 187 where the Court of Appeal refers to Ms Rose's submissions, and they say she's wrong to submit that all MIFs will infringe Article 101(1):

"... even those permitted under the Interchange Fee Regulation."

And they say:

"We do not discount the possibility that some evidence might conceivably enable other schemes to distinguish different MIFs from those upon which the CJEU was adjudicating. In the present case, however, the MIFs are materially indistinguishable [...] In both cases, the MIFs represented the vast majority of the merchants' service charge, and the appropriate counterfactual was a 'no default MIF' plus a prohibition on ex post pricing."

Now, we say that this paragraph effectively reflects what was said in paragraph 174 and should be read in the same way, that as a matter of principle it may be that MIFs may drop to such an extremely low level that they don't feature in the MSC, they don't affect the merchant service charge and therefore don't affect competition on the acquiring market. But that's clearly not the case for the MIFs before the Court of Appeal, it's clearly not the case for the MIFs in these proceedings.

The slightly puzzling reference in paragraph 187 is that the Court of Appeal there in fact, over and above the submission I've just made, says:

"We do not discount the possibility that some evidence might conceivably enable other schemes to distinguish different MIFs."

And there appears at least to be some thinking, although it's not made clear, that what they're talking about in paragraph 187 is not the Visa and Mastercard schemes but other schemes. So we say either they are talking about other schemes, not the Visa and Mastercard schemes, or if they are talking about the Visa and Mastercard schemes paragraph 187 should be read in same way as paragraph 174.

I can deal with the Supreme Court judgment more briefly because the reasoning is not quite as developed or lengthy as the Court of Appeal. If I can ask you to turn now then to the Supreme Court judgment, authorities bundle 4, tab 25, and if I could start with the

Commission decision at paragraph 51 of the Supreme Court judgment, internal page numbering 824. Here the Supreme Court cites recital 410 of the Commission's decision, which again refers to the multilateral default rule, which creates an artificial cost base that is common for all acquirers and the merchant fee will typically reflect the costs of the MIF which leads to a restriction of price competition on the acquiring market.

So the same theory of harm.

Paragraph 67 on internal page numbering 827. This is the Supreme Court quoting the Court of Justice. In paragraph 67 the Court of Justice endorsed the General Court's rejection of the zero MIF argument in the following term:

"The appellants cannot criticise the General Court for having failed to explain how the hypothesis applied had less restrictive effects on competition than the MIF, given that the only difference between the two situations lies in the pricing level of the MIF. ...(Reading to the words)... competition between acquirers as regards the amount of the MSC."

So the pricing level of the MIF is not the problem, the problem is not that high prices in themselves constitute an infringement of 81(1); it's the fact that the MIF limits the pressure which merchants can exert on acquiring banks and therefore competition between acquirers on the acquiring market is reduced.

The Supreme Court considers Visa's and Mastercard's arguments over the page. At paragraph 73 the Supreme Court says that Visa's and Mastercard's arguments involve a misinterpretation of the various decisions and judgments.

Paragraph 74 of the Supreme Court judgment, they say that the Mastercard Commission decision recital 459 bears repetition. And this makes the point that in the absence of Mastercard's MIF the prices acquirers charge to merchants would not take into account the artificial cost base of the MIF and would only be set taking into account

the acquirers' individual marginal costs and his mark-up.

And that's the point I make, that the merchants cannot negotiate with acquirers down to their marginal cost and choose between different acquirers based on their marginal costs and mark-up.

And Supreme Court makes the point at paragraph 75 that the Commission was here focusing on the process by which merchants bargain with acquirers over the MSC.

And it's contrasting the position where the charges negotiated by reference to a minimum price floor, and the situation where the charge is fully determined by competition:

"In the latter situation the merchants have the ability to force down the charge to the acquirers' individual marginal cost and his mark-up and to negotiate on that basis."

This is the pressure which is referred to in recital 460.

So the Supreme Court makes the point that it's the process, not the level of the price or the nature of the MIF, it's the fact that the process of negotiation and competition on the acquiring market, and the contrast between a negotiation that takes place in the presence of a price floor set by the MIF and a negotiation that takes place where merchants have the ability to force the charge down in the absence of a MIF to the acquirer's individual marginal costs and mark-up to negotiate on that basis.

In paragraph 77 of the Supreme Court's judgment they analyse the General Court's judgment. They say the General Court judgment is properly to be interpreted in a similar way. And they quote 143 of the General Court's judgment where they say, the General Court, that it necessarily follows the MIF has effects restrictive of competition.

And the Supreme Court say this is the context in which pressure referred to in the next sentence falls to be considered.

It's the same point, about being able to negotiate down to marginal mark-up in the absence of the default MIF rule.

And the same point is made about the CJEU judgment in paragraph 78. This is important, what the Supreme Court says in paragraph 79:

"Accordingly, we do not consider that Mastercard CJ [Court of Justice] judgment can be factually distinguished in the manner suggested by Visa and Mastercard."

What those cases had factually in common is that the default MIF rule sets a minimum price floor for the merchant service charge, the MSC, thus limiting the competitive pressure that merchants can exert on acquirers. That, in my submission, is the critical common factual thread running through the European Commission decision and the European Court judgments and through the Court of Appeal and Supreme Court judgments. And the same factual situation is present in the present claims, regardless of whether the claims are based on inter-regionals, commercial MIFs or on UK domestic and intra-EEA consumer MIFs.

And in light of that, then one has to read -- we finally come to paragraph 93 of the Supreme Court judgment. And in paragraph 93 the Supreme Court says:

"In our judgment the essential factual basis upon which the Court of Justice held there was a restriction on competition is mirrored in these appeals."

Then they set out what Mastercard and Visa have said are the essential facts. And Visa and Mastercard, under this heading, the different MIFs heading, they rely upon essential fact (ii) and essential fact (vi) in order to distinguish the claims based on inter-regionals, commercial cards and other domestic MIFs. Essential fact (ii) the Supreme Court says it, the MIF, has the effect of setting a minimum price floor for the MSC.

What we say the Supreme Court was referring to there was the creation, as a result of the default MIF settlement rule, of an artificial common cost to acquirers reflected in the MSC.

Then essential fact (vi) is the second essential fact that the schemes are relying on, that in the

counterfactual the whole of the MIF would be determined by competition and the MSC would be lower.

You have heard my submission on that. For that essential fact, the 6th, we say the Supreme Court was referring to the fact that in the counterfactual world merchants would have the ability to negotiate down the merchant service charge to the acquirers' individual marginal cost plus a mark-up and to negotiate on that basis without the reference to the MIF, with the result that merchant service charge will be wholly determined by competition and lower, though they do not say it has to be lower to any certain extent.

The same reasoning is set out in paragraphs 95 to 104 of the Supreme Court's judgment where it holds that even if we were not bound to follow the Court of Justice's judgment it would come to the same conclusion. I am not going to read those out again but I would stress the following paragraphs: paragraph 100, where the Supreme Court emphasised that it's the default MIF settlement rule that creates a non-negotiable known common cost to the MSC, and it's that, paragraph 103, which impairs competitive bargaining.

MR JUSTICE ROTH: We have read this of course.

MS SMITH: I have taken you to the Commission decision on inter-regionals. I don't think I need to take you back to that, but I would ask you to look in this context to the relevant -- actually no, please could I ask you to look at that. It's in authorities bundle 3, tab 22. Subject to the same caveats I said before, it is useful to look at this decision because it clearly explains the process of reasoning. And I would ask you to look first at the relevant factual background. It's tab 22 of the third authorities bundle. Relevant factual background is set out in the full decision at paragraphs 15 through to 17; it's on page 1830.7.

And the relevant factual background I would emphasise is Visa's network rules at paragraph 15, and that is the default MIF settlement rule.

Paragraph 16, the Commission accepts that different MIFs apply depending on the transaction type.

Then in paragraph 17 the Commission considers the impact of the MIFs on the MSC. They say, last sentence paragraph 17:

"The level of the MIF directly affects the MSCs because acquirers treat the interchange fees as a cost and take them into account when setting the level of the MSC. Interchange fees are a significant price component of the MSCs."

Paragraph 22, the relevant market is the market for acquiring card payments. In the last sentence of paragraph 22:

"The finding of such a product market is in line with the Commission's established practice and the case-law of the Court of Justice of the European Union."

You have seen paragraph 34 and 35. 34 talks about an object infringement, horizontal price-fixing.

And in paragraph 35:

"... the Commission also came to the preliminary conclusion that Visa's rules ..."

So it's the rules:

"... on inter-regional MIFs have the effect of restricting competition in the market for acquiring card payments [...] They determine a significant component of the price charged to merchants for acquiring services ..."

So it's the same process of reasoning.

MR JUSTICE ROTH: Yes.

MS SMITH: And they refer back to recital 17 which simply says that the MIFs are taken into account by acquirers when setting the level of the MSC. And as I have already said, both Visa and Mastercard admit in their defences that the prices acquirers charge to merchants, that is the MSC, take into account the MIF. And the detailed cross-references to the schemes' pleaded cases in that regard I'm not going to take you

to it given the time, but those cross-references are set out in paragraphs 43 of our skeleton argument. And I would ask the tribunal to look at those pleadings in your own time.

But also what I think is extremely telling is what Mr Holt says in his evidence, and we will come now to the evidence. But what Mr Holt says in his third expert report --

MR JUSTICE ROTH: Can I interrupt you. I know you want to come on to the expert evidence. You've said that's the second step --

MS SMITH: Yes.

MR JUSTICE ROTH: -- of the two steps. Probably it would be a sensible time to break before we get into the expert evidence, given the time, unless it's a short point you want to supplement. The journey, you've taken us through the case law and the critical cases, the Court of Appeal, Supreme Court and the Commission decision.

MS SMITH: No, it probably -- well, perhaps I could just make this one point on Mr Holt's evidence and then turn to the second aspect of my submissions after we rise. If I could just ask you to turn to Mr Holt's third expert report, which is in the summary judgment volume 1A, tab 10(i), and ask you to look at internal page number 7. Internal page 7, footnote 12 is incredibly important, in my submission. He seeks to distinguish -- you will see it refers back to -- footnote 12 is on paragraph 18. He seeks to distinguish the inter-regionals and commercial transactions on various bases set out in paragraph 18, but what is important is in footnote 12 he says:

"To be clear, I am not suggesting that acquirers would not have taken account of inter-regional MIFs or commercial card MIFs when setting their MSCs."

So he accepts, despite what he says in the rest of his report, as is accepted on the Visa and Mastercard's pleaded cases as set out in paragraph 43 of our skeleton argument, that for the MIFs at issue, in the absence of a default MIF settlement rule the prices acquirers charge to merchants by the MSC would not take into account the artificial

collusively-agreed MIFs, they currently do take it into account, in the absence of the default rule they would not take it into account.

MR JUSTICE ROTH: Sorry, where is that second point?

MS SMITH: Okay. What is admitted on Mr Holt's footnote 12 -- I've jumped from my reasoning, it's getting late. What is on Mr Holt's footnote 12 is that the acquirers do take into account the regional MIFs and commercial card MIFs when setting their MSCs. We say in the counterfactual when there is no default MIF settlement rule it follows from this acceptance, or it follows on our submission, that even for the MIFs at issue, in the absence of the default MIF settlement rule the prices acquirers charge to merchants would not take into account that MIF, would be set only taking into account the acquirer's individual marginal cost and mark-up and would be fully determined by competition. And in those circumstances we say --

MR JUSTICE ROTH: I have to say for myself I don't follow why it follows, if I can put it that way rather inelegantly, but equally I'm not sure that it matters. I mean, your point is that they do take it into account and it's a commonly set MIF.

MS SMITH: It is the commonly set MIF.

MR JUSTICE ROTH: What you would have instead of the commonly set MIF -- you might have different MIFs, but most people take into account their input price when setting what they charge.

MS SMITH: Yes. I would say that those claims, regardless of the level of the MIF, of the inter-regionals and the commercial card MIFs, cannot be factually distinguished from those before the Court of Justice and the Court of Appeal.

MR JUSTICE ROTH: I mean that's the point you want to make, isn't it?

MS SMITH: We say that's the end of the matter. However I do need to -- given that so much effort has been put into it, I do need to address the expert evidence on the facts of why we say, even if these points that are made in the expert reports could be made good, as

a matter of fact they are irrelevant. And if I may just finish those submissions in that regard tomorrow.

MR JUSTICE ROTH: Yes, that obviously is important because a lot of reliance is placed on Mr Holt and Dr Niels.

So we will resume at 10.30 tomorrow morning.

MS SMITH: Thank you, sir.

(4.16 pm)

(The hearing adjourned until the following day at 10.30 am)