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)

Thursday 13th 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 QC and Hugo Leith (On behalf of Mastercard)

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Thursday, 13th May 2021

(10.30 am)

MR JUSTICE ROTH: Good morning. In case there should be someone observing today's proceedings who was not observing yesterday, I should just repeat the warning that while an official recording is being made of these proceedings, it is strictly prohibited and a contempt of court for anyone to make an unauthorised recording, whether audio or visual of the proceedings. Ms Smith.

Submissions by MS SMITH (cont.)

MS SMITH: Sir, thank you. I am moving on to the final point in my submission, and that is the relevance or we say the irrelevance of the points made in the expert reports on which Visa and Mastercard rely in order to argue that our claims based on interregionals, commercial MIFs and other domestic MIFs should be factually distinguished from those before the Supreme Court.

Reports have been submitted by Mr Holt for Visa, the third expert report of Mr Holt, and by Dr Niels for Mastercard, although they make similar points and the schemes' skeleton arguments refer to both reports interchangeably.

First, by way of preliminary submission, I make the point that it is telling that this evidence quite properly is made subject to a fundamental caveat. In that regard, can I ask you to turn to Mr Holt's third expert report, which is in summary judgment volume 1A, bundle 1A, tab 10I, and internal page 5, paragraph 8. He says:

"However, depending on what exactly the Supreme Court meant by the second fact and sixth fact, it is possible that those facts may not apply to the further MIFs at issue."

So he is specifically caveating his evidence by regard to what exactly the Supreme

Court meant. You will see that he repeats that caveat on internal page 10, paragraph 32, where he deals with interregionals, and he says, last sentence of paragraph 32:

"How far this is relevant for the Article 101(1) analysis depends on the correct interpretation of the Supreme Court's findings."

That's absolutely the case, obviously. He makes the same point on page 12 as regards commercial MIFs. Paragraph 43 of his report, the same thing is reproduced in the last sentence:

"How far this is relevant for the Article 101(1) analysis depends on the correct interpretation of the Supreme Court's findings, as discussed in paragraph 22."

We say that's absolutely a proper caveat to make. The relevance of what he says all depends on the correct interpretation of the Supreme Court's findings, and we say that even if the points made in Dr Holt's expert report and Dr Niels' expert report were ultimately borne out as a matter of fact and evidence, they are irrelevant on a correct interpretation of the Supreme Court's judgment.

In particular, as I will explain when I go to the specific points, this is because, in our submission, the main arguments made by the experts as regards these other MIFs arise from the impact of other payment schemes, such as American Express and Chinese payment schemes, on competition in the market between payment systems, what we have called in our pleadings "the platform market", and what the Court of Appeal and Supreme Court and Court of Justice have called the "inter-systems market". That's the focus of the expert reports, to a large extent.

However, the Court of Appeal made it clear that what is relevant for the purposes of the Article 101(1) analysis is competition on the acquiring market. In that regard, before I address the particular points that have been made by the

experts, I would remind you of the point that you, the Tribunal, made in paragraph 47 of your referenced judgment, which for your note is in volume 4 of the authorities bundle, tab 26, page 1996. You can look at that or I will read it out. Paragraph 47 in the referenced judgment, you said:

"Furthermore, in the various English proceedings, the anti-competitive effect alleged concerned only the acquiring market. The Court of Appeal held, on the basis of EU jurisprudence, that when considering the acquiring market the counterfactual comprised a situation on that market, and it was not permissible to consider the effect of competition on another market, and thus the death spiral through competition from the other payment scheme on the issuing market."

So you recognised, properly obviously, the fact that when we are considering the question of restriction of competition for the purposes of Article 101(1), what we are concerned with is the effect on competition in the acquiring market.

With that introduction, I then turn to address each of the points made by the experts by reference in the first instance to Mr Holt's third report, and then addressing any additional points made by Dr Niels as necessary. I hope you still have open Mr Holt's expert report, which is bundle 1A of the summary judgment bundle, tab 10I.

He says, essentially, as I think I said yesterday, that the second fact and the sixth fact set out in paragraph 93 of the Supreme Court judgment might not apply to the different MIFs.

He deals first with interregional MIFs. His points in that regard are summarised on internal page 11, paragraph 37 of his report. You can see paragraph 37 on internal page 11. In conclusion he makes two points about interregionals, which he says can distinguish interregional MIFs. The first point at

paragraph 37A is that:

"The different nature of competition in respect of interregional payments means that the elimination of Visa's and Mastercard's MIFs may have led to a price increase in the acquiring market."

He develops that point at paragraph 32 on the facing page, where he says:

"In particular, it is possible that a reduction of Visa's and Mastercard's interregional MIFs to zero could have led to an increase in prices in the acquirer market, ie increase in MSCs paid to merchants. This could have occurred if a large share of interregional travellers had switched from Visa and Mastercard to competitors, and the cost of merchants associated with those competitor payment methods exceeded the cost of using Visa and Mastercard cards."

So the point there is that merchants might switch to competing card schemes, such as Amex, but, as I have already said, the Court of Appeal made it clear --

MR JUSTICE ROTH: Sorry to interrupt. I don't think it is the merchants that switch. It is the cardholders, the travellers that switch.

MS SMITH: Absolutely. The travellers, the cardholders would have switched. But the point I want to make is the same. It is a switch to competing schemes, which has the effect that it could lead to prices in the acquirer market, if the costs associated to merchants associated with those competitor payment methods exceeded the cost of using Visa and Mastercard cards. So it is an effect that arises from competition on the inter-systems market between Visa and Mastercard on the one hand and competing payment schemes such as Amex, on the other hand, but the Court of Appeal made it clear that competition on the inter-systems market, as I have said, is not relevant for the question of whether there is an anti-competitive effect under Article 101(1).

The Court of Appeal said that was the case even if the competition on the inter-

systems market might affect the level of business in the acquiring market. That, for your note, is paragraph 162 of the Court of Appeal's judgment, which is reproduced at paragraph 56 of our skeleton. They say:

"Inter-systems competition, competition on the inter-systems market, is not relevant, even if it has effects on prices, etc, in the acquiring market", which is the very point Mr Holt is making in paragraph 32.

The second point Mr Holt makes, seeking to distinguish interregional MIFs, is in paragraph 37B of his report:

"Interregional MIFs do not set a floor under the MSC, as the former possibly exceeds the level of the latter for a large share of merchants."

So he says interregional MIFs don't set a floor, because they, interregional MIFs, may possibly exceed the level of the MSC.

That argument he developed in paragraphs 35 and 36 of his report on the opposite page.

In paragraph 35, you will see that in support of this submission he compares blended MSCs for all debit and credit cards in the UK, the first bullet point, the average MSCs for all debit and credit cards, with average MIFs, the second bullet point, for interregionals only.

So, first point, he is not comparing like with like, because the average MIFs for all debit and credit cards will include a range of MIFs, including a small proportion of interregionals.

Dr Niels makes the point in his report that volumes of interregional and commercial transactions are much lower than those of domestic and intra EEA cards, consumer cards, even though interregionals and commercial tend to be generally higher. That's my first point.

In any event, my second point is that even if it could be established, as a matter of

fact, that MSCs on interregional transactions are lower than the MIFs on such transactions, it does not mean that there is not a distortion of competition. Sorry, that was a double negative. There is still a distortion of competition, because for there to be a floor on the MSC price, which is the effect on competition which the courts found to exist in the case of the default MIF rule, it is not necessary for the average MSC to be higher than the MIF.

It is enough simply that the MSC is negotiated by reference to the collectively imposed MIF, as compared to a counterfactual in which negotiations take place only by reference to the acquirer's individual marginal costs and mark-up.

In fact, the European courts specifically considered this factual situation, where a MIF might be higher than the MSC, and held nevertheless there was still a distortion of competition in this factual situation.

Just to make good that submission, leave open Holt's expert report, but if I can take you to the General Court's judgment, which is in authorities bundle 2, tab 11, internal page number 400, paragraphs 163 to 165.

MR JUSTICE ROTH: Just a moment. Yes.

MS SMITH: Paragraph 163 of the General Court's judgment they say:

"It is apparent from this analysis", the preceding analysis of facts, "that the Commission could legitimately conclude in recital 435 to the contested decision that the MIF of the Mastercard payment organisation sets a floor to MSCs for both small and large merchants. The validity of that conclusion is moreover reinforced by the statements of merchants mentioned in 146 above."

Then this is the paragraph we would highlight:

"The various examples of MSCs that are lower than the MIF do not invalidate that

conclusion. As the Commission correctly pointed out in recital 450 to the contested decision, the fact that an acquiring bank is prepared to absorb a portion of the MIF does not prevent the MIF from affecting the price of the MSC. First, that applies only in regard to a proportion of merchants, those with particularly significant negotiating power. Secondly, and as a matter of principle I interpose, "the view may legitimately be taken that even in the case of those merchants the price charged would still be lower if there were no MIF, since the acquiring banks would then be in a position to offer larger reductions."

The General Court addresses in paragraph 165 the position in Spain where, as a matter of fact, the MSCs charged were equivalent or even lower than the MIF, and make the point again that:

"Such an argument cannot in itself demonstrate the Commission's conclusion regarding the effect of the MIF on the MSC was wrong."

They make the point again that:

"Even in those situations, the MIF sets the floor for MSCs, because even in these cases the banks could reasonably be expected to be in a position to offer lower MSCs in the absence of a MIF."

So that point, factual distinction was specifically considered by the General Court and was rejected as a matter of principle. For your note, those paragraphs of the General Court judgment were upheld by the Court of Justice in paragraph 139 of its judgment.

So those are the two points made by Mr Holt as regards interregionals.

MR JUSTICE ROTH: Yes. Can you pause just a moment? Yes. Thank you.

MS SMITH: If I could go on to address the additional points made by Dr Niels on interregionals. His report is at tab 10K of the same bundle. Dr Niels

addresses interregionals in chapter 3 of his report, which starts on internal page 14. These numbers are extremely small on the page.

MR JUSTICE ROTH: Yes.

MS SMITH: So page 14, interregional MIFs, chapter 3 of Dr Niels' report. In Section 3(b), at the bottom of page 14, he sets out what he sees as various factual differences between the interregional MIF and UK MIFs and the implications for restrictive effects in the form of a price floor.

Under Section 3 (b) (i) his point is made in conclusion in paragraph 3.8 where he says at the bottom of page 15:

"By contrast, MSCs for any given acquirer are likely to be lower on average than interregional MIFs, in respect of transactions overall. As a result, for claimants who do not have a MIF plus plus contractual agreement with their acquirer, the MSC paid for interregional transactions may be lower than the interregional MIFs."

I have already addressed that point when I addressed Mr Holt's evidence. It is the same point about MSCs may be lower on average than interregional MIFs.

Mr Niels makes an additional point in section 3 (b) (ii), which starts on the bottom of page 16, internal page numbering, about the transparency of the price floor.

MR JUSTICE ROTH: He also says at 3.7 the fact there are unlikely to be many separate MSCs or interregional transactions, doesn't he?

MS SMITH: He says that MSCs will be set with reference primarily to domestic MSCs, yes.

MR JUSTICE ROTH: Domestic MIFs, yes.

MS SMITH: Sorry. It should be domestic MIFs, shouldn't it?

MR JUSTICE ROTH: But that's as opposed to being some sort of blended MSC. Yes.

MS SMITH: In our submission, the reasoning of the European court still holds good in that situation. Blended MSCs was the factual situation that obtained in Spain was addressed you will recall in paragraph 165 of the General Court's judgment.

As I was saying, Dr Niels makes the additional point in Section 3 (b) (ii) about transparency of the price floor. He says:

"Interregional MIFs are likely to be less transparent because of the volume and mix of transactions which make up the MSC."

That's a point he makes in paragraph 3.12 of his report. He refers in paragraph 3.11 of his report to the recital:

"The Commission's decision on the recital referenced by the Supreme Court is in paragraph 55 of its judgment", which he sets out and quotes there in paragraph 3.11 of his report.

But we say interregional MIFs are transparent, in the sense understood by the Supreme Court, as cited in Dr Niels' report here in paragraph 3.11, in that each acquirer knows that the MIF is a common cost for all other acquirers in the defendant's scheme. They know that all of their competitors pay the very same fees and they are quoting from the Supreme Court's judgment. They don't need to know, in order to know that fact, the exact level of the MIF or the exact level of the interregional MIF. All they need to know is that all of their competitor acquirers will be paying the same MIF.

The important point, at the risk of repetition, is that in the absence of that known common cost, the price charged by each acquirer, the MSC, would not take into account that MIF and would instead be fully determined by competition, and that is the restriction found by the courts for the purposes of Article 101(1).

Moving then to section 3 (c) of Dr Niels' report, which starts at page 18, internal page numbering, in paragraphs 3.14 through to 3.23 Dr Niels argues that the Court of Appeal's finding with respect to the UK MIF not being objectively necessary to the operation of a four-party card scheme in the UK, it is not an ancillary restraint, cannot necessarily be applied to interregional MIFs because of competition on the inter-systems market from American Express and various Chinese payment schemes.

He refers to those under the bullet points in paragraph 3.16 in particular. American Express, Alipay, We Chat Pay and China Union Pay.

He says that because of this competition on the inter-systems market, particularly for interregional transactions, issuers and consumers would be likely to divert to alternative schemes and payment methods, and that this may impact on the finding as regards objective necessity.

He says at the end of paragraph 3.21:

"This is an economically distinct line of factual inquiry with a consideration of the death spiral against Visa in the UK market which the Court of Appeal considered."

He sets out in paragraph 3.23 the further disclosure and witness evidence that he would want to look at in this regard.

Our answer to that is the following. The relevant question for the purposes of objective necessity or ancillary relief was set out in paragraph 200 of the Court of Appeal's judgment, which is reproduced in paragraph 58 of our skeleton argument. I will not take you to it, but I will read it out to you.

The relevant question that was identified by the Court of Appeal was whether, without the restriction of a default MIF, which is the relevant counterfactual, this type of main operation, namely a four-party card payment scheme, could

survive.

"The short answer to that question is in the affirmative and the contrary was not suggested by Mastercard or Visa. There are a number of such schemes in other parts of the world which operate perfectly satisfactorily without any default MIF and only a settlement at par rule."

In other words, what the Court of Appeal was saying -- it goes back to the very test for ancillary restraint -- for a restriction to be an ancillary restraint, it needs to be objectively necessary for the main operation to survive.

The main operation in these cases is the operation of a four-party payment scheme. That was clearly found by the Court of Appeal in paragraph 200 of its judgment.

Dr Niels' evidence does not go to that point at all. Instead, he effectively seeks to treat each different type of MIF as giving rise to a separate payment scheme when, in fact, they are just different prices imposed under the same four-party payment scheme.

So therefore we say his approach is misconceived and irrelevant, as a matter of law, to the question set out by the Court of Appeal and answered by the Court of Appeal on ancillary restraint and objective necessity.

Then, if I can move to the evidence on commercial card MIFs. If I could go back to Mr Holt's third expert report, back in tab 10I, his points on commercial card MIFs -- this is in chapter 4 -- start on page 12, internal page numbering. The conclusion is found in paragraph 56 on page 15.

Just to deal with the four points that he makes in paragraph 56, 56 (a) he makes the same point as regards commercial card payments as he made as regards interregionals. He says:

"The degree of competition in the commercial card payments market may be so

intense that the elimination of Visa's and Mastercard's MIFs would have led to switching to more expensive payment methods, resulting in a price increase in the acquiring market."

So this is a point about switching and competition in the inter-systems market. I have already addressed that point on the switching to alternative schemes in my submissions on interregionals, and the same point applies.

(b). He says:

"Merchants may be able to constrain the level of the MIF, as they can and often do, selectively declining commercial cards or surcharge their use."

That is a point that he explains in paragraph 52, on the facing page. He says:

"All of this suggests that the card scheme members do not exert market power vis-a-vis merchants and their customers in relation to commercial cards, contrary to what was highlighted by the Supreme Court, paragraph 59 of its judgment, in relation to consumer cards. Overall, merchants may be able to restrain the level of MIFs, which suggests they do not set a floor and that it may not be possible to apply the Supreme Court's findings to this case."

However, in my submission, as the Supreme Court and the Court of Appeal judgments make clear, that's not the relevant question to ask as regards whether or not there is a restriction and effect on competition for the purposes of 101(1).

The relevant question, as was made clear by the Court of Appeal and the Supreme Court to ask is whether the MIFs set a floor to the merchant service charge, thus imposing a non-negotiable common cost on merchants.

As I have already explained, in their defences both Visa and Mastercard accept that acquirers will take account of their costs, including the MIF, in negotiating the MSC, as does Mr Holt specifically in footnote 12 of his report. You will recall

I took you to that yesterday. He specifically accepts that acquirers will take into account both interregional and commercial card MIFs in setting their MSCs.

So the MSCs will reflect the MIFs, including commercial card MIFs. That is the relevant question as set out by the Court of Appeal and the Supreme Court.

The same point addresses the argument that Mr Holt makes in paragraph 56 (d), where he says that a reduction in MIFs for commercial cards may not have led to a reduction in MSCs.

He makes that point at the last sentence of paragraph 55, where he says:

"Depending on how acquirers reflect commercial card transactions in their pricing, it may be that a reduction in MIFs would not have translated into a reduction in MSCs."

My point is simply, as I have said before, that does not have to be proven. The issue, for the purposes of effect on competition held by the Court of Appeal and the Supreme Court, is whether the MIF is a price floor to the MSC or whether the MSC is completely determined by competition in the counterfactual.

The last point --

MR JUSTICE ROTH: When you say "price floor", I mean, the concept of floor suggests that the MSC has to be higher than the MIF, otherwise it is not a floor, but aren't you really saying that it distorts -- it is a factor, an external factor imposed by the scheme rules which distorts the competitive bargaining process between merchant and acquiring bank.

MS SMITH: Absolutely, Sir. I am very grateful for that. A lot of the language, including "price floor" that has been used in these cases I think reflects the misunderstandings and perhaps the way the thinking has developed through

the case law, moving away from looking at the level of the MIFs to looking at the existence of the rule, which is the problem, and some of the language which may have been used by parties early on such as "price floor", or even by the courts early on, reflects on I say that misunderstanding when one looks at the reasoning, and the reasoning you are absolutely correct, Sir, is about the distorting effect on competition in the acquiring market.

MR JUSTICE ROTH: Yes.

MS SMITH: The final point made by Mr Holt is paragraph 56 (c). This is the point we have just been discussing:

"MIFs for commercial cards may not set a floor under the MSC as the former possibly exceeds the level of the latter for a large share of merchants."

I have already addressed that point when I addressed it as regards interregionals.

Just for completeness, if we could look at Dr Niels' report on commercial MIFs, he addresses those issues in chapter 4 of his report, which starts on internal page 23. Section 4 (a) just sets out the factual background.

MR JUSTICE ROTH: Just a second. Page 23 you say? Yes. The way the page numbers are done they run into the date at the top, but I think we have got it. 23, section 4. Yes.

MS SMITH: Perhaps we can arrange a different print out. So it is commercial cards in section 4. Section 4 (a) is an overview of the facts. That goes on to section 4 (b).

He makes the point in paragraph 4.12 about the MSCs being on average lower overall than the commercial MIF, and the average MSCs for commercial card transactions may also have been lower than the associated commercial MIFs. I have already addressed that point in my submission on interregionals.

He also makes the point about transparency over the page in paragraph 4.13, the

same point he has already made and has already been addressed as regards interregionals.

Section 4 (c), he starts just above paragraph 4.15, he argues that there may be a different counterfactual as regards commercial cards, basically because of the availability of alternative business structures for commercial cards, particularly, for example, three-party schemes may be viable. But we rely on, and you have my submissions on, the Court of Appeal's and Supreme Court's findings as a matter of law on what is the relevant counterfactual for a scheme of this kind, the Visa and Mastercard schemes. If, as the Court of Appeal found, the measure in question for the purposes of determining the relevant counterfactual is the scheme rule imposing default MIFs in the absence of a bilateral agreement, then the counterfactual cannot change with reference to the particular MIF at issue or the level of the particular MIF. That counterfactual has been determined by the CJEU and adopted by the Court of Appeal and not appealed to the Supreme Court.

Section 4 (d) in Dr Niels' report addresses, on internal page 32, the question of whether he says:

"Commercial MIFs are objectively necessary to Mastercard's continued operation in the commercial card market."

I have already addressed the point on objective necessity and ancillary restraints in my submissions on interregionals. I simply repeat the same point there. What we are concerned with for the purposes of objective necessity and ancillary restraints, as held in paragraph 200 of the Court of Appeal's judgment, is what is necessary for the survival of the main operation, the four-party scheme.

Finally, both Mr Holt and Dr Niels briefly address Italian and other domestic MIFs --

in fact, they only really address Italian MIFs -- by referring to the fact that there is a competing debit card scheme in Italy, PagoBANCOMAT, and there is a competing credit card scheme in Italy, CartaSi, but the points they make about these competing schemes suffer from the same misconception as the points that I have already addressed about inter-system competition as regards interregionals and commercial card MIFs. That point is that the Court of Appeal and the Supreme Court made it clear that as regards the effect on competition, the restriction of competition for the purposes of Article 101(1), it is competition on the acquiring market that is relevant, not inter-system competition.

As regards objective necessity and ancillary restraint, this is to be considered at a scheme level, not as regards the different MIFs charged.

Those are my submissions on the --

MR JUSTICE ROTH: Sorry. Can I just ask -- as you say, it is headed "Italian" and they focus on Italy. We have not heard much about these other countries, Malta, Gibraltar, I think, and indeed the foreign law argument that we heard recently. It was all about Italian law. Is it that, in effect, they are so insignificant as a part of this case that there's only one Maltese claim and one reported claimant? How do they come in, Malta and Gibraltar, just by way of background?

MS SMITH: I will check that and come back to you on that, Sir.

MR JUSTICE ROTH: I confess I was not even aware there was a Malta/Gibraltar element to these claims until I saw it referred to in the skeletons.

MS SMITH: I will come back to you, if I may, on that situation, Sir, but those are my submissions on Dr Niels and Mr Holt's evidence and those are my submissions.

In conclusion, we ask the Tribunal to give summary judgment in the terms set out in our draft order. Unless I can assist you or your colleagues with any further questions.

MR JUSTICE ROTH: Yes. We will just confer amongst ourselves for a moment. Although it is -- yes, it is -- early, it might be sensible to take a ten-minute break at this point before we turn to the defendants. If we have a question, we will put it to you when we return at just before 11.30.

MS SMITH: Thank you, Sir.

(Short break)

MR JUSTICE ROTH: Ms Smith, we have nothing further to ask you. Thank you.

Mr Rabinowitz, Mr Cook.

MS SMITH: Sir, sorry, just to make sure the thing is tidied up before I stop talking, you asked about Malta and Gibraltar and MIFs. I have managed to get an answer in that very short break that there are three entities in the claim amongst our claimants who pay Gibraltar domestic MIFs as well as the UK MIFs. They pay both Gibraltar domestic and UK MIFs. They are all instructed within the Ladbrokes Coral Group. There is one entity which pays Malta domestic MIFs as well as UK domestic MIFs, and that entity is within the Paddy Power Betfair Group. So it is the off-shore gaming company who pay as well as the UK domestic pay Gibraltar and Malta domestics MIFs.

MR JUSTICE ROTH: So three Gibraltar, one Malta.

MS SMITH: I am instructed it is only on certain of those transactions they pay those Gibraltar and Malta domestic MIFs. They also pay UK domestic MIFs on various transactions.

MR JUSTICE ROTH: Thank you for that. Mr Rabinowitz, Mr Cook, as regards the argument concerning the effect of the IFR and the post-IFR period, we would

like to know, please, whether, as submitted, the judgment of Mr Justice Popplewell covered the post-IFR introduction in the AAM case, and whether he made any distinction between pre-IFR period and post IFR period. If it does cover the period after the introduction of the IFR, given that, as we understand it, Mr Justice Popplewell found that there was a restriction of competition within Article 101(1), save for the death spiral argument, and that finding -- the death spiral argument, of course, was disapproved by the Court of Appeal and rejected, but in other respects his finding was upheld by the Court of Appeal and the Supreme Court, and whether in those circumstances we are bound by the Court of Appeal and the Supreme Court to find that there is a restriction of competition post the introduction of IFR.

So we would like you, please, to help us on those two questions. Otherwise, we need not trouble you with the submissions about the IFR. We do want to hear from you on the other points, but we recognise that as regards Visa's asymmetric counterfactual argument, I think counsel have very realistically recognised there is no point repeating the arguments you addressed to us on the reference hearing. We acknowledge you maintain those arguments. You need not repeat them. We will reflect your position in our judgment.

I don't know what you have agreed as to who goes first.

Submissions by MR RABINOWITZ

MR RABINOWITZ: I had agreed with Mr Cook that I would go first. I am very grateful for the indication from the Chair about the UIFM point. On the point that you make, Mr Cook may want to deal with the position in relation to Mr Justice Popplewell, although I suspect the position is going to be the same as ours.

So far as concerns Mr Justice Phillips, it is certainly the case, certainly so far as Visa is concerned, the claim period did extend beyond the introduction of the IFR.

Of course, Sainsbury's, as the Chair might recall, takes the position that their claim did only extend to I think November 2015, but that is a live dispute between Sainsbury's and Visa. That is why, when Ms Smith was making her submission, I intervened to say actually Visa's position is that it did extend, notwithstanding that it is plainly not a point in my favour so far as this is concerned.

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: I had to make clear that that's the position.

MR JUSTICE ROTH: Can I try to understand it? Sainsbury's are saying they are not claiming beyond November 2015 but you, as defendant, saying "yes, you are".

MR RABINOWITZ: "Yes, you did claim. Your damage only went up to November 2015 but the claim was without limits". That all depends on the effect of their concession, because you recall in that case they make a concession as to what would be a valid and lawful MIF. I can't remember the exact position. But Sainsbury's want to say that only extended to November 2015. We say in those proceedings: "No, it didn't. It was without limit." That has led Sainsbury's in those proceedings to start -- sorry -- to start new proceedings, which we say there is no point, because the previous proceedings covered the full period.

So there is a live dispute there as to whether it did or didn't extend beyond November 2015, but you can hold against us, if I can put it that way, that we say it did extend beyond the introduction of the IFR.

In my respectful submission, that does not mean that you are bound by anything said

either by Mr Justice Phillips in our case, or indeed Mr Justice Popplewell, in the case of Mr Cook's client, or indeed the Court of Appeal or indeed the Supreme Court.

The first point to make is if you were bound, no doubt Ms Smith would have been making a submission, like she had previously made you will remember I think in relation to the asymmetric counterfactual point that this was somehow an abuse of process and that there was some res judicata, but she doesn't.

MR JUSTICE ROTH: Abuse of process might be slightly different, might it not?

MR RABINOWITZ: Yes and no. But she says neither, if I can put it that way. She says neither, because the argument was not raised or run in front of either Mr Justice Popplewell or indeed in front of Mr Justice Phillips. Certainly speaking for myself, or at least my clients in relation to the hearing before Mr Justice Phillips, this argument was not run because the period of time that would have been covered by the post-IFR period was so short that I think parties were just not focusing on the fact that in relation to that period there may have been another counterfactual.

Perhaps I need to deal with it separately. The first thing is it cannot be said that there is a res judicata on this, that you are bound by it, because no argument was run about the possibility of a different counterfactual in the period post-IFR. Since no argument was run in relation to that period, you do not have a judgment which deals with whether the period post-IFR does give rise to the possibility of a different counterfactual, having regard to the fact that you no longer have the hold-up problem, which is, of course, why the European courts and indeed the English courts were driven to the conclusion that the correct counterfactual was zero MIFs and no ex post pricing.

The introduction of the IFR gives the ability to say you do not have a hold-up

problem, because the IFR takes care of the hold-up problem, and that gives rise to the possibility of a different and indeed likely counterfactual, as you have seen from the evidence. So that was not an argument which was raised or run, and therefore was not ruled upon.

In those circumstances, given that we have a different party here, different claimants, it cannot be a res judicata point, and then taken on to the abuse of process. Nor, for the same reason, can it be an abuse of process. As you may recall, in the context of the hearing of the asymmetric, when Ms Smith was running the abuse of process point, we made the point -- that was, with respect, a hopeless argument then and would be even more hopeless now. Different Claimant.

MR JUSTICE ROTH: Yes. It is not suggested it is an abuse of process.

MR RABINOWITZ: In our submission, this is just not an argument which has ever been decided upon and you are not bound by anything said by the Court of Appeal. Indeed, I note that Ms Smith doesn't suggest that you are, in relation to the extent to which the IFR makes a difference.

MR JUSTICE ROTH: Yes. What was the claim period, just to be clear, according to you, in the Visa case? Was it up to judgment?

MR RABINOWITZ: Up to judgment, but it may just be worth looking at the Visa case. I think it is paragraph 9.

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: So if you go to authorities bundle 3 behind tab 17. I am going to give you bundle references, which hopefully you may find helpful. If you go to page 1587, you then have paragraph 9 there.

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: You see the claim period starts, damages from 18.12.2007. In

its original particulars, dropping halfway down to (b):

"Sainsbury's estimated the lawful level of the UK MIF was 0.17, 0.15, on that basis, claiming damages for the period ending November 2015. In closing submissions ..."

MR JUSTICE ROTH: Yes. So the damages were claimed for the period ending November '15.

MR RABINOWITZ: Yes, but the claim period we say went up to the date of trial.

MR JUSTICE ROTH: Yes. That's not evident from the judgment, you see.

MR RABINOWITZ: No. That is why -- you may recall this from the Sainsbury's hearing, where there was an argument as to whether or not they could, in a sense, limit their concession to November 2015 -- it is clear that there was no limit in the claim -- we say it is clear from the claim form that it is not limited to the period ending November 2015, but extends to the date of trial, and, reflecting that, we said, therefore, that the concession extended throughout.

Sainsbury's raised an argument which suggests that it is limited to November 2015, but, as I say, you can hold against us that we say it isn't limited.

MR JUSTICE ROTH: Yes. Well, it would be apparent from the pleadings, wouldn't it?

MR RABINOWITZ: It would be. We obviously don't have the pleading in the Sainsbury's case here.

MR JUSTICE ROTH: Yes, because the Sainsbury's claim in the CAT against Mastercard did appear to be limited, or was it the same way, only a damages claim? It is in the same bundle, is it not, if we turn back to tab 15.

MR RABINOWITZ: It may be the first tab. If you go to page 1158, there does seem to be -- this is in paragraph 17, sub-paragraph 4.3, there is a reference to that being the claim period, before you get to sub-paragraph 5.

MR JUSTICE ROTH: Yes. It does seem that that was the end point --

MR RABINOWITZ: Yes.

MR JUSTICE ROTH: -- for the claim there, but you say the claim against Mastercard was not subject to the same limit.

MR RABINOWITZ: The claim against Visa.

MR JUSTICE ROTH: Sorry. The claim against Visa, Yes. That's how you dealt with our questions. I don't know if it might be convenient -- Mr Cook, you, of course, were in the AAM case before Mr Justice Popplewell. If you would rather reserve this till your primary address to us, that's fine, but if you are able to comment on this point here, that may be convenient.

MR COOK: Sir, I am certainly very happy to deal with it now, while minds are focused upon it. Just in terms of the factual position, I think it is going to be sensible if we ensure that there are copies of the pleadings put before the Tribunal, just to make sure that what I am saying -- I am afraid I have not had the chance to dig out from my room the pile of papers in the other cases immediately, but everything I will say is subject to checking it, but briefly, firstly, Sainsbury's versus Mastercard, my recollection of that case was, on the pleadings at least, which obviously were filed originally back in I think 2012 or so, December 2012, at that stage Sainsbury's sought damages going back six years, and going forwards. I believe it also sought -- I have to check the prayer -- I believe it was generally sought by a number of claimants, both damages and also declarations of illegality, which was obviously intended to be sort of the prospective remedy, that what they wanted was damages for the past and a ruling interchange fees wouldn't continue going forwards.

So at least at that stage, which was three years before the IFR, I think at the stage when it was barely a twinkle in the legislator's eye.

MR JUSTICE ROTH: This is Sainsbury's --

MR COOK: Sainsbury's v Mastercard. At least on the pleadings it was an open running case. The IFR or the caps come into effect in December 2015. The Sainsbury's trial starts in January 2016, so it is essentially a few weeks later. At that point nobody has put in any evidence or focused at all upon the IFR in those circumstances, and the CAT says -- you see the relevant paragraph of the judgment says it had formed the view that Sainsbury's was not pursuing the point. I think, you know, was actually something Sainsbury's was not entirely sure that it agreed with, but in the light of the amount of money it had been awarded by the CAT, it chose not to appeal the CAT's impression of its concession in that regard. So the CAT treated there as being essentially they have not really pursued their case in relation to that post period, albeit the pleading at least left it open for them to do so.

In relation to Mr Justice Popplewell, that case came to trial in June 2016. Again, on the pleadings at least, it was an ongoing claim. As the Tribunal will anticipate, for a trial that started in June 2016, only six months after the IFR had come into effect, at that point, you know, all of the evidence, both factual and expert, had been filed some considerable period earlier, and it simply did not focus upon the distinction.

You were taken to the relevant paragraphs of Mr Justice Popplewell's judgment, which just for the Tribunal's note is in authorities bundle 3, tab 16, and you were taken to paragraphs 25 to 27 of that judgment, which identifies the claim period, which starts from May 2006.

So you had a situation in which that was a claim which covered near enough ten years up to the IFR. Then there was a tiny little rump of a few months, which essentially nobody had really turned their mind to, and not addressed in the

evidence, whether anything really shifted as a result of that.

MR JUSTICE ROTH: It would be more than a few months. Obviously it was a long trial and then there would be a little gap, or perhaps a big gap with a trial of that length, until judgment. So it's not financially insignificant, that period. It is a bit different from the CAT, I think.

MR COOK: It is a little bit different, it is right to say, Sir, but nonetheless the factual position is a trial starting in June, nobody turned their minds to whether or not the IFR -- and the trial ended up taking much longer than anticipated, because it ended up being adjourned over the long vacation rather than finishing, so the judgment was put back longer than anyone anticipated.

Whether we should have thought about it, the financial value of it, to some extent, essentially, this was not a point that we sought to argue at the time, in circumstances where, you know, in financial terms, in giving of course, once the caps had come in, the rate of interchange fees fell dramatically. You were talking about something that was a very small, you know, 2% or 3% of the potential value of the claim. So we simply did not focus on it, did not take the point. There was no specific evidence by anybody dealing with the position.

What we say in relation to that, of course, is, you know, we are obviously bound, in the context of the AAM trial, by the findings made by Mr Justice Popplewell, because we did not take the point. But for the purposes of different proceedings brought by different parties, my learned friend has simply not made any attempt at all to identify any authority or establish any proposition of law that says "Because we chose not to take a particular argument in a different case, where it was of minimal relevance, when it comes to this case, where we are now dealing with a period which is five and a half years post the IFR, and continuing to grow, it therefore is very much the core of

what we are fighting about", we are therefore prohibited by a doctrine of abuse of process, res judicata, issue estoppel. It is not suggested any of those kind of doctrines apply, such that we are, you know, no longer permitted to run an argument, because we did not run it in different proceedings, where it really didn't matter.

Ultimately, therefore, recognising sort of general principles of what are the legally binding precedent principles of a previous decision, obviously this court is bound by the conclusions of law or the principles of law stated by the Supreme Court, the Court of Appeal, but it is not bound by essentially factual findings made, particularly not factual findings made on the basis of arguments that were not made. In those circumstances, we simply say, without any of those general doctrines that bind you to previous factual findings, issue estoppel, res judicata, etc, Mastercard is free now, in a case where it does matter, to put forward specific evidence on the point, and this Tribunal is free to consider that evidence, or the trial Tribunal will be free to consider that evidence on its own merits in relation to the point now where it actually arises and we wish to fight the point.

MR JUSTICE ROTH: Yes. Thank you very much:

MR LOMAS: Can I clarify one aspect. The difficulty seems to be that the Supreme Court decision has elevated almost to a legal conclusion the approach taken in the Court of Justice that the appropriate counterfactual in these circumstances is the one we have been talking about. The question that was troubling us was that if the case contained a part of the period that was post IFR December 2015 implementation, are we not bound by that determination, whatever factors submitted in the underlying cases, the Court of Appeal and the Supreme Court were considering?

MR COOK: Sir, with respect, I am afraid there are a number of propositions I take issue with in that question. I will just make them good, by reference to the Supreme Court's judgment, which is in authorities bundle 4, tab 25. You will be very familiar with it now. The starting point, of course, is that the Supreme Court sort of records the counterfactual point at paragraph 42 of the judgment, only on the basis that it was a factual finding made by the CAT in the Sainsbury's proceedings, and it was not subsequently in dispute.

So, as is ordinarily the case in relation to the higher appeal courts, it starts with "This is the facts as found below. They have not been challenged." Therefore, it adopts that as being one of the factual bases for its judgment. With respect, that doesn't turn that unchallenged fact found at first instance into a universal principle of applicable law, in any other circumstances, particularly following a change of circumstances, recognising, of course, that where it quotes it from is the CAT judgment, which only applied up until December 2015, in any event.

Then, when the Supreme Court comes to consider the legal principles in the basis of this decision, with respect, I would say at paragraph 93, the paragraph we are all very familiar with, sets out the essential factual basis of the Court of Justice decision, and I do emphasise the word "factual", which is repeatedly used by the Supreme Court in that paragraph. It says:

"The essential factual basis on which the Court of Justice held there was a restriction of competition is mirrored in these appeals. Those facts include ..."

Of course, fact number 4 is the counterfactual is no default MIF with settlement at par. That's a prohibition on ex post pricing. With respect, the Supreme Court does not elevate this to any principle of law. It explicitly says that it's a principle -- not a principle of fact -- it is a fact. It is a factual basis upon

which the Court of Justice makes its decision, and it's saying: "Yes, there is a conclusion of law that if those six facts apply in a case, there is a restriction of competition, but if one of those facts does not apply, then the conclusion of law does not follow."

That is in no way, with respect, Sir, the Supreme Court saying as a matter of law the counterfactual must always be, in all circumstances, no default MIF with settlement at par.

With respect, I would say quite the reverse. By explicitly saying that it's one of six facts that must apply, it's recognising that they may not apply. If they thought it was a conclusion that would follow in all circumstances, as Ms Smith has urged upon you, it wouldn't be in that list. They would say in every case this would be the counterfactual, and it is only if these following other five facts are met, the situation -- that is the essential factual basis of the decision, because the other one will be a matter of law in all cases.

We then see at the end of that paragraph -- well, it is actually at the start of paragraph 93, which says:

"On the basis of that factual basis, it is mirrored in these appeals."

That reflects again the factual findings made below. For our present purposes, the central one is the relevant counterfactual, which we have just seen is a factual finding made by the CAT at first instance and then not disputed. They say those six facts are mirrored in that case, largely by concession or admission by the parties. So everyone agreed that those six facts applied, and the question was what was the correct analysis in those circumstances.

With respect, we simply would not accept that any part of adopting of that analysis concludes that counterfactual becomes a point of law in all circumstances, or that you can really say the Supreme Court could have reached any decision

on whether the counterfactual could always apply universally, regardless of what different facts were actually before the initial decision maker who had to reach a view on what is the appropriate counterfactual. We can see that once it comes -- certainly we say, and our evidence bears out, and for the purposes of today I would say is more than realistically arguable that it bears out, that once you have the IFR change, the likely counterfactual becomes factually different.

I hope that answers the question, Sir.

MR RABINOWITZ: Can I jump in again. I am afraid I misunderstood the Chair's question. I had not realised that what you were raising with us was in effect Ms Smith's second objection, which is the courts have determined there is only one appropriate counterfactual.

MR JUSTICE ROTH: Yes, that was the point.

MR RABINOWITZ: Okay. I thought you were dealing with a number of different points. It may be that I can develop that point and answer that point in the way I was going to do anyway, which is to take you back to some of the European authorities, just to see how the issue of the counterfactual developed.

What you will see in due course is that certainly so far as Visa is concerned, by the time we got to Mr Justice Phillips, there was not a dispute about the relevant counterfactual on the facts that were before the court at that time, and I don't mean in relation to the position post IFR, which would raise the point about an abuse of process.

When we go back, you will see that the way in which this develops before the European court, and in particular the General Court and then the CJEU, and you may recall this from the reference hearing, the General Court adopted

a view of the counterfactual, which is to say zero MIF, no ex post facto pricing, on the basis that that is the counterfactual that they look at in the context of ancillary restraint, where you are just looking for a realistic counterfactual. They then adopted that also for the purposes of restriction of competition, without considering whether that was the likely counterfactual, and you may recall this, and I will take you back to see that.

The General Court were criticised by the CJEU, on the basis that they never did consider what was a likely counterfactual, but just assumed that because this was a relevant and appropriate counterfactual for the purposes of the ancillary restraint, it was also the relevant counterfactual without further analysis for the purposes of restriction of competition.

The CJEU said that is an error of law, because you have to ask yourself what is the likely counterfactual.

Now, in that context, in the context of the likely counterfactual analysis, what the CJEU noted was that Mastercard itself, in the Mastercard hearing before the Commission, and indeed before the General Court, had basically looked at two possibilities. This is all pre-IFR world.

One possibility is that you have no rule fixings MIFs, and that gave rise to the hold-up problem, that is to say if you had no rule fixing MIFs at any particular level, and every acquirer was free to simply identify the amount that it had acquired for a MIF, on the basis of an honour all cards rule, that would lead to the demise of the Mastercard scheme.

What the CJEU said is that in those circumstances the only other possibility which has been identified at that stage was zero MIF, and because of that it said, even though the General Court's analysis was wrong, on the basis of what Mastercard itself was saying about the only other possibility identified, viz no

restraint on MIFs leading to a hold-up problem, you were going to get forced into a zero MIF counterfactual as being the only one on the table.

In the pre-IFR world, everyone actually accepted that. I can show you at paragraph 98 of Mr Justice Phillips' judgment, he identifies the fact that there was not a dispute as to the relevant counterfactual here. It was going to be zero MIF, precisely because of the hold-up problem. But once you get into the IFR world, the world of the IFR, in which you do not have the hold-up problem, that gives rise to the possibility of a further counterfactual, which the evidence is, and Ms Smith has put in no evidence about this, is the more likely counterfactual than zero MIF. It is more likely for the obvious reason that people want to get some payment for an interchange fee, and they are bound to go for something -- Ms Smith may not like this -- they are bound to go for something which enables them to get some interchange fee rather than no interchange fee, and as long as it is lawful, in the sense of not being anti-competitive, that's what they go for rather than zero MIF.

I suppose I am making two points and I will develop this. I am sorry to have taken the roundabout route here. That was not on the table before the Commission. It was not on the table before the General Court. It was not on the table before the CJEU. That is why, by the time you get to the English courts, everyone just proceeds on the basis of what is the relevant counterfactual.

As I say, paragraph 98, Visa don't dispute this. That is all because at that point no-one is thinking: "Hang on. If you have got the IFR, you do not have the hold-up problem", and once you do have the IFR, that is a relevant counterfactual, which is actually the more likely one.

Just going back to what Mr Cook says, no-one at any stage -- and we will go back to the CJEU -- is saying it doesn't matter what the evidence is. This is as a

matter of law the right counterfactual. Whatever the evidence is as to what is the most likely counterfactual, there is only one possible right counterfactual, and that is zero MIF. You never have an analysis like that. At no stage in Europe and at no stage before the English courts. The English courts just proceed on the basis of what Mastercard CJEU said. Mastercard CJEU said: This is the right counterfactual because of the problems with hold-ups, and in the circumstances of what was being submitted at the time, there is only one other possibility on the table, and that's zero MIFs.

MR JUSTICE ROTH: Yes. Thank you.

MR RABINOWITZ: Having given you that introduction, I probably am now going to take you through -- I am sorry, I completely misunderstood --

MR JUSTICE ROTH: I think you have answered between you the question we raised. Of course, we don't have to decide whether either your counterfactual or Mr Cook's -- I say your -- Visa's or Mastercard's counterfactual is the more likely, only whether it is arguable, but it may be more likely for present purposes.

MR RABINOWITZ: Exactly. With that in mind, subject to anything Mr Cook or indeed the Tribunal wants to say, perhaps I can do what I was going to do, which is to take you through the development of not just this point, because I will show you this point along the way. I need to take you through how this case developed in order to deal with what we have been calling the Visa Inc point, but you may be calling the merger point and it is the point about whether post the merger or re-merger, if you like, in June 2016, there is the agreement between undertakings and whether that's relevant. I know Ms Smith wants to put it on the basis of it doesn't matter whether there is an association, because she says it is enough that there's a rule with respect --

MR JUSTICE ROTH: It is not a question of whether it is relevant. There is a case against you claiming on the basis of agreement in the alternative --

MR RABINOWITZ: Indeed. What I want to develop is -- once you go through the way in which this case has developed, particularly when you look at what happened in Europe, at no stage has anyone put the case against us or made any finding on the basis that it is enough that Visa has a rule to which people sign up.

MR JUSTICE ROTH: The CAT's judgment is based on agreement, isn't it?

MR RABINOWITZ: There is no argument in the CAT's judgment, nor is there argument in front of Mr Justice Popplewell, as you will see, and indeed the point did not arise in front of Mr Justice Phillips. So what you have in Europe, through the European courts, is a determination on the basis of --

MR JUSTICE ROTH: That's clear. You don't have to take us through it. It is quite clear. I don't see why that -- that obviously does not preclude the claimants from saying there's an agreement.

MR RABINOWITZ: Of course.

MR JUSTICE ROTH: And the CAT does in its judgment analyse the way in which there's an agreement and I don't think anything was necessarily conceded. Clearly, there are agreements. Obviously, the banks agreed to be bound by the scheme rules. The question is does that agreement give rise to a restriction?

MR RABINOWITZ: Indeed. One of the problems one has about that is what you have there -- I mean, the relevant problem here is said to be an agreement between acquirers to restrict competition.

MR JUSTICE ROTH: No. I thought it is an agreement between acquirers and the

Visa scheme to abide by --

MR RABINOWITZ: Indeed.

MR JUSTICE ROTH: -- in your case. The Mastercard scheme in Mr Cook's case.

MR RABINOWITZ: Indeed. That's what reliance on the rule would establish, an agreement between each acquirer and Visa. But what that doesn't give rise to is an agreement between the acquirers to restrict competition, and that's one of the difficulties that --

MR JUSTICE ROTH: Why does that matter? If Visa makes a whole lot of agreements with people saying "You can only trade with third parties, with a minimum price of X"?

MR RABINOWITZ: Well, then we get into the platform point. I am really jumping to the end of our submissions on this. Maybe that's not a bad thing.

You will have seen the point -- I think we make it at paragraph 55 of our skeleton argument -- just to pick this up:

"The Supreme Court made clear that its finding of breach depended on the fact that the MIF was determined by collective agreement between undertakings. The court went on to explain that it was the collective agreement that gave rise to the unlawful restriction, not the fact of the MIF being imposed", etc. In Visa's respectful submission this is obviously correct. Otherwise, any undertaking that sets a price to be paid by all of its business customers could be found to be unlawfully restricting competition.

MR JUSTICE ROTH: I did not understand that point. I mean, first of all, retail price, resale price maintenance is a well known restriction of competition. Secondly, here you have an arrangement, Visa saying to each acquiring bank, and they all know this is a common MIF -- it is the same for all their competitors -- that this is the basis on which you must reimburse all issuing banks. Why isn't that

a concerted practice? I just don't understand the point you are making.

MR RABINOWITZ: Because if that were a concerted practice, then any time where you have a platform where the person who runs the platform sets a price which it knows is going to get passed on by the people, for example, Spotify or whatever -- maybe I will show you the Apple Inc statement which we have put in the bundle. You have someone who runs a platform. Take the airport. The airport says: "Landing charges are going to be" I don't know what they are, "£100,000". Everyone has to pay the £100,000 and everyone is going to pass that cost of £100,000 --

MR JUSTICE ROTH: But they pay the £100,000 to the airport. Obviously you set your own prices, but that's not what Visa is doing. It is telling the banks: "This is what you must charge each other". That's the point. Why is RPM a restriction of competition on your analysis?

MR RABINOWITZ: We say there is no resale price maintenance here because --

MR JUSTICE ROTH: No, it is not resale price maintenance here, but the evil of resale price maintenance is you are telling people, your customers, what they must charge third parties. That's what you are doing, isn't it?

MR RABINOWITZ: No, we are not. We are not saying you have to pass on the --

MR JUSTICE ROTH: No, but you are saying the acquirers must pay the issuers, unless they agree otherwise, that's what they must pay each other. So you are telling the licensees what they must charge each other, not what they pay you. Visa doesn't get the MIF, does it? The MIF goes from acquirer to issuer.

MR RABINOWITZ: The MIF goes from acquirer to issuer, but again, just picking up a point that Ms Smith made, the acquirer market, and it is said to be by virtue of what is passed on to consumers. We don't require anyone to pass on the MIF to consumers or to include the whole of the MIF in the MSC. In that

sense it is not at all different to the Heathrow example, where you have a landing charge. Whether or not Virgin, British Airways pass that on, it is up to Virgin or British Airways. We don't require --

MR JUSTICE ROTH: Everyone sets their own prices. As Mr Lomas said to Ms Smith, any input price will be passed on downstream, but this is not a charge that you are setting to your customers.

MR RABINOWITZ: No, but equally, when he first sets a charge, it is not setting it to the customers of British Airways or Virgin. It is setting it to British Airways and Virgin. Whether or not --

MR JUSTICE ROTH: Yes, to its customers, British Airways as a customer of Heathrow, wishing to land planes at Heathrow, must pay Heathrow. Visa is not saying to the bank: "You must pay us X for the service that we are giving you by running this scheme". That's not the MIF.

MR RABINOWITZ: No, Visa is identifying --

MR JUSTICE ROTH: It is quite different from the airport, isn't it? Completely different.

MR RABINOWITZ: In relation to the effect of it, I am not sure that it is, because what in the end you are looking for here is something which says that simply by virtue of someone signing up, the acquirer or issuer signing up with Visa, the mere fact of signing up to that rule produces a concerted practice as between acquirers. That is the case which has to be made and, with respect, that case is not made at all.

It is not clear at all why simply by virtue of -- on the basis that there is no association of undertakings here, the customers who are signing up with Visa and agree to be bound by their rules, why agree to be bound by the Visa rules as customers, because one is putting to one side the possibility that there is

an association of undertaking, why does the fact that these banks who are customers of Visa agree to a MIF at a particular level, which they are not obliged to pass on, create the restriction of competition in the acquirer market?

In my respectful submission, it is not that different to the Heathrow example.

MR JUSTICE ROTH: I see.

MR RABINOWITZ: It is also, we would say, simply not the basis upon which any court on the basis of argument has made a finding against us, because, as I say, when you look at the European cases, all made on the bases of an association of undertakings --

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: -- for the English cases, you can see from Mr Popplewell's judgment, which we can look at, that there was no argument at all on whether it was sufficient that the parties had signed up to Mastercard's rules. When you get to Mr Justice Phillips' judgment, it is clear that this wasn't an argument being run there. In relation to the CAT, when you look at the CAT, it is true that before the CAT there was a pleaded case, and Mastercard did, on its pleadings, dispute whether it was sufficient that the banks signed up to its rules, but there is no argument about it.

MR JUSTICE ROTH: There is clearly a reasoned decision. Indeed, on the basis of that decision -- we can have a look at the CAT -- I think the CAT says: "In the light of that, having found an agreement, we don't have to consider whether there is an association of undertakings or not, because that's sufficient".

MR RABINOWITZ: Indeed, I accept that the CAT says that and it says that on the basis of -- it does give reasoning, but when one looks at it, one sees that Mastercard did not advance an argument beyond what it had in its pleadings.

It didn't advance -- didn't develop the argument.

MR JUSTICE ROTH: It is a reasoned conclusion, and they explain in a whole section why there is an agreement that is restrictive.

MR RABINOWITZ: That is correct.

MR JUSTICE ROTH: So I think you are saying they are wrong.

MR RABINOWITZ: Well, I am saying we could argue that they are wrong, and it is not unarguable that they are wrong, for the reasons we are advancing --

MR JUSTICE ROTH: Well, perhaps we should look at their reasoning and you tell us where they've gone wrong?

MR RABINOWITZ: Can you just identify -- if you go to 93 and 4.

MR JUSTICE ROTH: I think it starts at 87.

MR RABINOWITZ: 87.

MR JUSTICE ROTH: Actually at 86, where, as you see, at 86.1:

"Mastercard denies that the said was an agreement or agreement between undertakings or concerted practice."

So it was in dispute. "Accepted an association undertaking for an earlier period."

Then, at paragraph 87, CAT I think deals with the point that these aren't actually wholly discrete categories. You can have an overlap between agreements, decisions by association and concerted practices, and it cites authority for that.

It explains, at 88, why there are overlapping concepts to cover all types of arrangements by which undertakings mutually accept a limitation of their freedom of action, instead of independently determining their future conduct on the market, which is a fairly textbook statement.

Then, under heading C, at paragraphs 89 to 94, they discuss whether this is an agreement between undertakings. At 95, they come to the conclusion:

"UK MIF was an agreement or agreement between undertakings, the agreement being between Mastercard and its Licensees."

Then they say:

"Given this conclusion, it is not necessary to consider whether or not there was a concerted practice, nor subject to whether there was decision by association of undertakings."

That's subject to one qualification. You may say that I have misunderstood it, but as I read it, it was not accepted or admitted. The CAT considered it. They reached a conclusion, which you may say is wrong, and they then say: "We actually need not bother with association of undertakings".

MR RABINOWITZ: Just to be clear, we don't dispute that there is an agreement. There plainly is an agreement. What we are disputing is that that is an agreement that restricts competition.

MR JUSTICE ROTH: Well, it can restrict competition in the acquiring market.

MR RABINOWITZ: Just to be clear, the CAT's analysis of restriction of competition was overruled by the Court of Appeal.

MR JUSTICE ROTH: Well, yes. That may be, but you can have an agreement between undertakings that restricts competition in a different market. That's well-established, isn't it?

MR RABINOWITZ: Well, that may be so, but what one is looking for is an agreement that restricts competition in the relevant way found to have been a restriction of competition for the purposes of this case.

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: The CAT found an agreement that restricted competition by reference to the rules, but the restriction of competition that it developed in this case, which depended on the bilaterals analysis and an asymmetric

counterfactual was overruled by the Court of Appeal.

MR JUSTICE ROTH: Yes, but how does that change the analysis of an agreement? The restriction that's found by the Court of Appeal is the way that the agreed MIF sets a floor in the acquiring market, but it is still a MIF that results from these agreements. So you have agreements between undertakings that have a default rule setting a MIF, and the Court of Appeal have said that the result of that default rule is a restriction of competition in the acquiring market. So I am lost, Mr Rabinowitz. Maybe it is my fault. I just do not follow your argument.

MR RABINOWITZ: Perhaps I can just take you through the way in which this did develop in Europe, because, of course --

MR JUSTICE ROTH: Yes. We have seen that in Europe it was put, and Mastercard to some extent here also accepted for a certain period that it was an association of undertakings. That's how the Commission did the case.

MR RABINOWITZ: And, indeed, the basis upon which the General Court did the case and --

MR JUSTICE ROTH: They had to, because it is an appeal.

MR RABINOWITZ: Okay. Indeed, and that's the basis upon which the CJEU decides the case as well. The Supreme Court judgment actually reflects the analysis, both in terms of the restriction of competition, which is developed in the European cases, where in our respectful submission if you want to see the link between the restriction of competition and the agreement, one does have to go through that analysis.

MR JUSTICE ROTH: Well, fine. You had better take us through it then.

MR LOMAS: In doing that, as I understand the pleaded case against you in paragraph 17 of the points of claim, that is on the basis of an agreement

between undertakings.

MR RABINOWITZ: I will take that into account --

MR JUSTICE ROTH: That is the case we are looking at. We accept that Ms Smith did not seek to argue the contrary. You have an arguable case, post whatever the date is in June 2016, or something, that Visa was no longer an association of undertakings. That must be right. That's arguable. So the question is whether we have an agreement. The alternative case, if you like, as the CAT found, this is a case of agreement between undertakings which have an anti-competitive effect, the effect being in the acquiring market.

MR RABINOWITZ: Yes. All right. Perhaps I can just try and do the European story as quickly as possible and see whether that --

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: So can we then begin with the Commission's decision on Mastercard. That's volume 1, tab 8, page 580.

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: If we can start with 584. Paragraph 2, you have a summary of the Commission's case on restriction in two short sentences:

"The MIF in Mastercard scheme restricts competition between acquiring banks by inflating the basis on which acquiring banks set charges to merchants and thereby set a floor under the merchant's fee. In the absence of a multilateral interchange fee, the merchant fee set by the acquiring banks would be lower."

Then, at paragraph 3:

"The European Board and the Global Board of Mastercard decisions on the level and structure of intrabank EU fallback interchange fees and related rules adopted by the Global Board of Mastercard Inc are decisions of association of undertaking within the meaning of Article 81 (1). They remain decisions of an

association also after the IPO. The banks agreed to the IPO and the ensuing changes in the organisation's governance in order to perpetuate the MIF as part of the business model, in a form where they are perceived to be less exposed to antitrust scrutiny. Even after the IPO, Mastercard Incorporated interchange fees in the Mastercard organisation are not unilaterally imposed. Mastercard's member banks still show a common interest", etc.

So this is the basis upon which the Commission saw the necessary position in relation to an association of undertakings.

Mastercard and the banks were, for the purpose of EU competition law, the decisions they were making were decisions by the banks themselves. All of those competing acquirers effectively agreed with each other on the level and structure of the interchange fees they would pay.

The CJEU's analysis was different. What one does see here is that this finding was that the banks were agreeing between themselves on what the level and structure of the MIFs should be. That we say is fundamental to the theory of harm that permeates through the European authorities and, indeed, is what underlies the Supreme Court approach as well.

Again, one might just note what the Commission did not say here. They did not say that just by signing up with Mastercard to participate in a scheme that was enough to make a collective agreement or concerted practice between acquirers as to the level of MIF that they would pay. It would obviously have been a much simpler thing for the Commission to show if it had been thought compatible with the Commission's theory of harm, but instead it set itself the challenge of establishing that Mastercard was an association of its members, so that its decisions could be treated as an agreement made by the members.

As the Tribunal will see, it expressly rejected the argument that after the IPO

Mastercard's MIFs were unilaterally imposed.

Again, it goes without saying that this whole analysis would have been unnecessary, had the Commission considered that both pre and post IPO, the mere participation in the scheme would have been enough.

Just going back to the decision, as the Tribunal may recall, much of the Commission's factual analysis of the association of undertakings point is redacted, but you can see the conclusion that it reaches on the facts at paragraph 99. That's on page 615.

"The banks were a driving force behind the IPO of Mastercard Incorporated. They agreed to it as they knew that the new management on the Global Board would continue to act in their common interests. While the European banks were aware that they would lose control over the body setting intra EA fallback interchange fees, they consented to the change in the organisation's governance, with the expectation that the independence of the Global Board would reduce each individual bank's exposure to regulatory scrutiny, and anti-trust litigation, thereby safeguarding their proceeds from interchange and maintaining the Mastercard MIF as part of the business model. Considering the IPO in its overall context, the banks voting in favour of the corporate changes that Mastercard Incorporated outsourced the coordination of the competitive behaviour to an independent body, while maintaining control of the decision-making on other key matters that are not sensitive from an anti-trust perspective."

One can see there the seeds of what the CJEU would later say about this. In particular, the Tribunal see the Commission say that the banks outsourced the coordination of their competitive behaviour to an independent body that would continue to act in their common interest, and that's one of the two elements on

which the CJEU later placed emphasis. In addition, they maintain control of decision-making on other key matters, and that is the other element, as the CJEU later emphasised.

So, as one sees from this, the Commission is finding that both pre and post the IPO the competitive banks are jointly setting the interchange fee that they will pay. Before the IPO, they do it directly. After the IPO, they delegate it to an organ of the company that is independent of them, but where they still control the company more generally, and can trust that the MIF-setting body will set MIFs in the interests of the banks.

One can pick up the Commission's legal conclusion on this topic if you go to page 693, paragraph 397:

"The Commission disagrees with Mastercard's argument that since the IPO interchange fees are unilaterally imposed on member banks in a supplied customer-like relationship. Rather, as any other decision of the organisation's managing bodies, the MIF remains to be the faithful expression of the association's resolve to coordinate the commercial conduct of its members."

If we just look at paragraph 399:

"Even if after the IPO Mastercard incorporates its relation to banks qualified as that of a franchise or to franchisee, rather than being a horizontal form of cooperation within an association of undertakings, this is no reason why the MIF should fall outside the scope of 81(1). As is apparent from the Commission regulation 2790, anti-competitive aspects of franchise agreements may restrict 81(1) of the treaty too. Mastercard has provided no reasons, let alone evidence, why the MIF would escape the prohibition of 81(1) if it were a vertical restraint."

So the Commission is saying here that even if Mastercard was not an association of

undertakings, the MIF could still restrict competition, but the case that the Commission is describing here is a completely different one, not a horizontal form of cooperation between banks, but a vertical restriction, similar to a franchise agreement.

As one sees, the Commission does not provide any analysis of it. It simply notes Mastercard has not explained why it wouldn't be anti-competitive. This alternative case is not one that was approved by the EU courts --

MR JUSTICE ROTH: It was not challenged. I think the basis -- although the conclusion of the Commission was challenged, so implicitly I suppose, if it is an alternative basis, it would have been challenged on appeal.

MR RABINOWITZ: That is not the basis approved by the EU courts as to why there was the relevant agreement of concerted practice --

MR JUSTICE ROTH: That is there the Commission saying even if it is not an association, it would be an anti-competitive arrangement, because it is like a franchisor and all its franchisees.

MR RABINOWITZ: It is identifying that as a possibility and saying Mastercard did not deal with that, but that is not --

MR JUSTICE ROTH: Well, it is saying there is no reason -- I don't know whether Mastercard dealt with it or not. I don't think it does say that, does it, whether Mastercard dealt with it? It just says there is no reason why that should take it outside Article 81(1).

MR RABINOWITZ: That is true, but as you go forward, it is perfectly plain that the basis upon which the General Court, and indeed the CJEU find there is the relevant agreement, the agreement of concerted practice, depends upon the association of undertakings. It doesn't have a further limit, otherwise there would have been no relevance in looking at the association of undertaking

points in the way that they do. They could just have said: "Well, none of this matters".

MR JUSTICE ROTH: Well, they are hearing an appeal and they don't have the same scope as an English court on an appeal.

MR RABINOWITZ: What would have been the point of looking at the association of undertaking argument if, in fact, that was not going to lead to any different outcome? But they do. That's what they focus on.

MR JUSTICE ROTH: Yes, I understand.

MR RABINOWITZ: If we just stay with the Commission's decision, if we then look at the Commission's analysis of restriction on competition, you can pick that up at page 696, paragraph 410:

"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 of all acquiring banks alike, thereby inflating the base on which the acquiring banks set charges to merchants."

MR JUSTICE ROTH: I am sorry, which paragraph?

MR RABINOWITZ: 410, on page 696.

MR JUSTICE ROTH: Sorry. I went to paragraph 696. 410, restriction of competition, yes.

MR RABINOWITZ: "Mastercard's MIF constitutes a restriction on price competition in the acquiring markets. In the absence of a bilateral agreement, the multilateral default rule fixes the level of 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, therefore, creates an artificial cost base that is common for

all acquirers of a merchant fee will typically reflect the cost of a MIF. This leads to restriction of price competition between acquiring banks, to the detriment of merchants and subsequent purchasers."

Then, over the following pages, one has a lot of factual analysis why that is so, but we can skip that.

If we go to paragraph 455.

MR LOMAS: Sorry, Mr Rabinowitz. 413:

"According to Mastercard's network rules, and as set out in 3.1.1 central acquirers are to respect domestic rules in the target country, in the sense that they must pay the issuing banks", etc. Is that not the Commission expressly contemplating the debate we are having?

MR RABINOWITZ: With respect, I am not sure that it does. It certainly refers to the rules and the fact that people abide by these rules, but in my respectful submission the point which is being made there is simply it relates back to the fact that you are still dealing with an association of undertakings. So these are rules which the banks have made for themselves. So although it is talking about what the rules say, that doesn't detract from the point, the overall point, which is that the rules are made by the association of undertakings. Therefore, it is the banks themselves which are making these rules, rather than simply the rule itself which gives rise to the necessary concerted practice. I think that's the context of that point.

If we can then go to page 710, paragraph 445, Mastercard puts forward -- this is the Commission's response to an argument that later became the focus of Visa's defence in the UK litigation.

"Mastercard puts forward that the interchange fee does not favour a particular acquirer or type of acquirer over other acquirers or types of acquirers. The

interchange fees are common identical costs, borne by all acquirers. That does not influence price competition between acquirers in terms of determining the level of MIFs. Visa's expert raises a similar argument, that they are all herein, by comparing the MIF to an excise tax."

Then, if we look at footnote 515:

"Visa's expert argued that competition among acquirers could not be stronger with at par clearing than with a MIF, just like it would be hard to assume that if one scraps excise taxes, breweries would compete more keenly."

The Tribunal may recall the argument, which in short was that it would be irrational to describe an excise tax or any other common cost as a restriction. So the argument went, what was different about a MIF?

As the Tribunal may recall, the Commission gave several answers to that point. We can just very quickly look at them.

In paragraph 456, it made the factual argument that MIFs affect some acquirers differently from others. I don't think we have to spend time on it. It was not picked up in the appeal.

If you look at paragraph 457, this is I would suggest an important answer for present purposes:

"Besides this fact, even if one were to qualify a MIF as a kind of excise tax, this is no reason why the MIF should fall outside Article 81(1) of the treaty. The collective act of competing undertakings to raise charges for consumers is subject to the prohibition of Article 81(1) of the Tribunal."

So the point which is being made there by the Commission in the second sentence is that although an excise tax does not restrict competition, if a group of competitors, here the acquirers, get together to agree amongst themselves that they will incur some costs, which then raises charges for consumers, that

is anti-competitive.

Again, that is the theory of harm which permeates the Supreme Court judgments, but you do need as a predicate for that conclusion, that theory of harm, that restriction of competition, that you have a scenario in which a group of competitors, in this case the acquirers, get together to agree among themselves that they will incur some costs. You get that with an association of undertakings. You do not get that via the rule route, if I can put it that way. You need the association of undertaking in order to establish this theory of harm, this restriction of competition which is the restriction of competition found by the Court of Appeal and found by the Supreme Court. You do not get this on the basis of a rule-based concerted practice analysis. We will see that as you go forward.

If you then go to paragraph 458, we see that the Commission makes a further point between 458 and 460 about transparency. Again, that was important in the UK but I don't think we need to worry about that.

Then, if we go to the General Court's judgment, tab 11, page 870. If we can start at page 890, this is where one begins with the analysis by the General Court about restriction of competition. You can see the topic identified in the heading just above paragraph 74. If we just look at paragraph 74:

"The plea is expressed, in essence, in two parts. In the first paragraph the applicant submits that the Commission wrongly found that the MIF had the effect of restricting competition. In the second part the applicants claim that the Commission ought to have concluded that the MIF was objectively necessary to the operation of the Mastercard system."

Now, those are the two points which were identified. The court deals first with objective necessity. We don't need to worry about that for present purposes.

But can I invite this Tribunal to go to page 898, where we have paragraph 129 dealing with the complaints relating to the assessment of competition in the absence of a MIF.

Just looking at paragraphs 129 and 130:

"The applicants and a number of intervenors submit that the Commission failed to fulfil its obligation to assist the competition in question within the actual context in which it will occur in the absence of the MIF. Essentially, they raise two complaints. In the first complaint the applicants refer to the absence of a competitor relationship between issuing and acquiring banks in forming the view that the Commission was not entitled to conclude that the MIF restricts competition, since its absence does not mean that there is a competitive process that would result in the reduction of interchange fees. They observe that the Mastercard system could not function without a default transaction settlement procedure. The applicants also take the view that the Commission wrongly concluded that in the absence of the MIF bilateral negotiations would be held between issuing banks and acquiring banks, and that such negotiations would in due course lead to the disappearance of the interchange fees, and moreover that the Commission took the prohibition of ex post pricing into account in its reasoning."

The court rejects that argument made by Mastercard for two cumulative reasons. If you go first to paragraph 132, you see that the court here says:

"The counterfactual of a prohibition of ex post pricing is legitimate, because Mastercard would be economically viable in that counterfactual", and that is all the Commission needs to show to establish that it is a legitimate counterfactual.

As you will recall, that is reasoning that was later criticised by the CJEU.

Then just going on to paragraph 133 and 134, these are paragraphs that later became important in the UK litigation. As the court sees, Mastercard have criticised the Commission's finding that there would be bilateral negotiations. You can read the court's answer to this at paragraph 134 to yourselves, if you would. I just draw that to your attention because it was the subject of much UK litigation. It is not directly relevant to what this Tribunal is considering today, other than to assist in seeing how the UK courts got to where they did get to.

The second part of Mastercard's argument is more significant for present purposes, and one sees this at paragraph 142 on page 900:

"In the second place, the applicants submit, in essence, that the fact that the MIF had an impact on the level of the MSC does not affect competition between acquirers, because the MIF applies in the same way to all acquirers and operates as a cost that is common to all of them. Thus, the prohibition of ex post pricing would effectively impose a MIF at zero which, from a competitive aspect, would be equivalent to and just as transparent as the current MIF, the only difference being to the level at which it is set."

Then one sees the court at paragraph 143:

"This line of argument cannot be accepted. Since it is acknowledged that the MIF sets a floor for the MSC, and insofar as the Commission was legitimately entitled to find that a Mastercard system operating without a MIF would remain economically viable, it necessarily follows that the MIF affects restrictive competition. 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 prices dropping below a certain threshold."

Again, the interpretation of this was also the subject of a lot of focus in the UK litigation, as you will recall.

Can I just show this Tribunal what the General Court said about the association of undertakings point? I know you are familiar with this. Page 914. It is paragraphs 238 and 239.

"The applicants, supported by the intervenors, complained that the Commission found wrongly that there was an association of undertakings within the meaning of Article 81(1), while failing to take into account the changes made by the IPO to Mastercard's structure and governance, even though it is clear that the banks no longer control it and that it determines the MIF unilaterally. They submit inter alia that whether or not the banks exercise control is a relevant factor. The Commission was also wrong to take the view that after the IPO the European banks had remained in charge of the business of the Mastercard payment organisation in Europe through the European Board.

In addition, both the applicant and a number of intervenors are critical of the criterion applied by the Commission concerning the existence of commonality of interest between Mastercard payment organisation and the banks in relation to the setting of a MIF. It is claimed that the Commission failed to establish that the Mastercard payment organisation was continuing to act in the interests of the bank's behalf rather than on behalf of the Mastercard shareholders in setting the MIF. One intervenor also states that the criterion is not based on any legal authority. A number of intervenors submit that they are not in a position to exert any influence over the Mastercard payment organisation and that they are treated as customers of that organisation."

The General Council then summarises the law in this area. We don't need to worry about that.

The upshot one sees on page 915. It is the same page.

"It is necessary to ascertain in this instance whether, in spite of the changes made by the IPO, the Mastercard payment organisation continues to be an institutionalised form of coordination of the bank's conduct."

One sees the first part of the court's answer to this as paragraph 245:

"In the first place, while it is common ground that since the IPO decisions relating to the MIF had been taken by bodies of the Mastercard payment organisation, and that the banks did not take part in that decision-making process, it is nevertheless apparent from the matters of facts and of law pertaining at the date of the contested decision, which is the relevant date for examination of its lawfulness under the case law cited in 64 above, that the banks continued collectively to exercise decision-making powers in respect of the essential aspects of the operation of the Mastercard payment organisation after the IPO, both at a national and at a European level."

That last sentence we would respectfully submit is crucial:

"The banks continued collectively to exercise decision-making powers in respect of the essential aspects of Mastercard after the IPO."

Then, if we go to paragraph 250, just to see the second part of the court's answer, which is at page 916:

"In the second place, the Commission could properly conclude that the MIF essentially reflected the bank's interests, even though they no longer control Mastercard after the IPO or participated in the setting of the level of the MIF, because there was a commonality of interest between Mastercard payment organisation and the banks on that point."

If one then reads on, one finds importantly at paragraph 259 that the court combines the two points. So this is 917, paragraph 259:

"It must be held that in view of the two factors mentioned above, namely the retention after the IPO of the bank decision-making powers within the Mastercard payment organisation and the existence of a commonality of interest between that organisation and the banks on the issue of the MIF, the Commission was legitimately entitled to take the view, in essence, that despite the changes brought about by Mastercard's IPO, the Mastercard payment organisation had continued to be an institutionalised form of coordination of the conduct of the banks. Consequently, the Commission was fully entitled to characterise its decisions by an association of undertakings, the decisions taken by the bodies of the Mastercard payment organisation in determining the MIF."

As this Tribunal says, those two points taken together justify the finding of association of undertakings.

MR LOMAS: Sorry. Just to pick that up, of course the court is dealing with the approach taken by the Commission in the decision, but in the sections you just mentioned, you glided over 242, which I accept is a general statement of law, but it goes:

"It should be borne in mind the definitions of agreements, decisions by association of undertakings in concerted practice are intended from a subjective point of view to catch forms of collusion having the same nature which are distinguished from each other only by their intensity and the forms in which they manifest themselves."

MR RABINOWITZ: That is true. That is a general statement of law, but, with respect, the point I am on is this. When you look at the restriction of competition which was found here, which is the setting of a MIF at a particular price point, a positive setting, Commission, the General Court, the CJEU and

indeed the Supreme Court basically say there is not a problem in having a positive MIF as compared to a zero MIF. Both would be exactly the same, in a sense, similar to an excise tax. What makes this offensive is that the banks collectively have decided to set the MIF at a particular level . You only get, therefore, to that identification or that restriction of competition via the association of undertakings route. You cannot get there through the rule route. That's really the point I am trying to establish.

Of course it is true that in a different case having a rule whereby one party agrees or all the other parties agree to be bound by a particular organisation's rules, Visa, that might give rise to a restriction of competition which you can tie into that agreement, but that is not the case in this particular case.

In this particular case, once you identify the restriction of competition with which we are concerned, the only relevant way in which you get there is by the association of undertakings route.

MR JUSTICE ROTH: Recital 397 in the Commission's decision, you submit, is wrong.

MR RABINOWITZ: I need to look at that.

MR JUSTICE ROTH: We looked at that, remember. That's where they say "alternatively". There is no reason why this couldn't be seen as ...

MR RABINOWITZ: They say that but that's not the theory of harm that's developed --

MR JUSTICE ROTH: You talk about theory of harm. Harm is the distortion of competition. The agreement of concerted practice is the means by which you get there. As Mr Lomas points out, it's the different forms of collusion. Just making an agreement isn't harmful. It is the anti-competitive effect that's the theory of harm.

MR RABINOWITZ: The way I put my point is this. As you go through the European Court's judgments, and they develop their restriction of competition theory, which is the theory of harm, what they rely upon, the agreement of concerted practice that is relied upon is the association of undertakings. I accept that at paragraph 397 the Commission makes the point that you might also have a vertical restraint, but it never ties that to the theory of harm which forms the basis for both the General Court's decision, for the CJEU's decision and importantly for the Supreme Court's decision.

MR JUSTICE ROTH: Do you say 397 is wrong? That's what I was asking you.

MR RABINOWITZ: Let's see exactly what it says.

MR JUSTICE ROTH: What it says, as I -- perhaps we should look at it. It is only fair we should look at it. It is on page 693. Sorry. I said 397. I meant 399. I am so sorry.

MR RABINOWITZ: We do say that that is wrong. We do say that's wrong.

MR JUSTICE ROTH: That is how I understand your argument.

MR RABINOWITZ: I think we were at paragraph 260 of the General Court's decision. One sees at paragraph 260 they say:

"The third plea in law must therefore be rejected. There is no need to examine the applicants' objections concerning the other matters identified by the Commission as supporting its conclusion, in particular, the bank's acceptance of the new mode of governance in respect of the MIF."

Recital 394 to 396 is a contested decision.

So the General Court does not deal with that at all, because it is satisfied on the association of undertakings point.

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: What one gets next, if we can go next to the CJEU, behind

tab 12, beginning at page 928, if we go to page 995, this is where the discussion begins on the association of undertakings point. In the middle of 995, just above paragraph 48, you see the heading in italics:

"Second plea in the main appeal alleging error of law and inadequate reasoning with regard to the assessment of the question of whether Mastercard is an association of undertakings."

Then the court starts at paragraph 48 with the General Court's analysis at 259, which we have seen.

Then, after identifying the arguments of the parties, its own analysis on the substance of the point begins at page 998, paragraph 62.

The court begins here with the proposition that:

"Economic operators have the right to adapt themselves intelligently but independently to the existing or anticipated conduct of their competitors."

The court cites there, among other cases, its decision in Walpole, that's the Alstrom case, in which the court found that the mere evidence of parallel pricing could not establish an infringement of what is now 101. Just going on, if the court sees there, about halfway down, it again relates to the point Mr Lomas drew my attention to in that earlier paragraph:

"Article 101 catches all forms of cooperation and of collusion between undertakings, including by means of a collective structure or a common body, such as an association, which are calculated to produce the results which that provision aims to suppress."

I just make the obvious point that an association of undertaking is a particular form of collusion and here of course that would suggest collusion between competing acquirers.

Now one sees the same point at paragraph 63, over the page at 999. I just read

that:

"Thus, it is settled case law that although Article 81 distinguishes between concerted practice agreements between undertakings, decisions by association of undertakings, the aim is to have the prohibitions of that Article catch different forms of coordination between undertakings of the conduct on the market."

Picking it up:

"And thus to prevent undertakings from being able to evade the rules of competition on account simply of the form in which they coordinate their conduct."

Then paragraph 64, one sees at the end of paragraph 64:

"The question was whether, as the General Court have said, after the IPO, Mastercard remained an institutionalised form of coordination of the bank's conduct."

So that is still the basis upon which the coordination of concerted conduct is sought to be established by the CJEU.

Paragraph 66, same page:

"The court identifies the two limbs of the General Court's reasoning. First, the retention of the bank's decision-making powers within Mastercard. Secondly, commonality of interest on the issue of the MIF."

Then, at paragraph 67, the court expressly states, a couple of lines in, that:

"The two factors in which the General Court concentrated in its analysis ... "

One sees the reference to them:

"... must be read together."

So it is the combination of those. Paragraph 68:

"In that regard, in paragraphs 245 to 249 of the judgment under appeal, the General Court essentially found in its definitive assessment of the facts first, at the time of the adoption of the decision at issue, even though the Mastercard

member banks were no longer taking part in the decision-making process within the bodies of their organisation in relation to the MIF, Mastercard seem instead to be continuing to operate in Europe as an association of undertakings, in which the banks would not be only customers for the service provided but participated collectively in a decentralised manner in all essential elements of the decision-making powers. It should be emphasised in that regard that notwithstanding the General Court's inappropriate use of the word 'seem' in that context, it is evident from a reading of the whole of those paragraphs that the General Court did ascertain that at the date of the decision at issue, the banks were continuing collectively to exercise decision-making powers in respect of the essential aspects of the operation of the Mastercard payment organisation after the IPO, which meant that the conclusions to be drawn from the IPO were very much to be set in perspective. Secondly, from 250 to 258 of the judgment under appeal, the General Court also found, in essence, that the Commission had been able properly to conclude that the MIF protected the bank's interest, because there was on that point a commonality of interests between Mastercard and its shareholders."

Paragraph 69 again stresses that those two factors have to be taken together. That's the way in which the CJEU reached the conclusion that there was the necessary coordination and concerted conduct. The banks are all part of the association of undertakings.

Again, no suggestion here that this might have been established simply by saying, even if Mastercard were entirely independent of the banks, it would have been enough to establish coordination between the acquirers for the purposes of the restriction with which they were concerned to point to the fact that the

acquirers had agreed to comply with Mastercard's imposed rules.

MR FRAZER: If I could interrupt you there. The question for the CJEU is did the General Court err in law in finding that there continued to be a decision of an association of undertakings post IFR and, as you very properly said, it found that the court was correct in doing so because of the combination of those reasons.

You helpfully took us in paragraph 63 to the general statement by the CJEU that the purpose and breadth of Article 81, as it was is to prevent undertakings from being able to evade the rules of competition, on account simply of the form in which they coordinate their conduct.

It is that which prompts me to ask again questions which have been raised by other members of the Tribunal. What is it that prevents such a coordination of conduct arising simply through the rules based route? I know the route that has been found here and the questions which arose in the appeals was whether or not there was a decision of an association of undertakings, and you have very clearly taken us through that, but I have still not understood why the same conclusion could not have been reached, albeit it that it was not, but could not have been reached as it is now currently claimed by the claimants through the coordination by the banks as a result of the acceptance of the rules?

MR RABINOWITZ: The way I answer this is as follows. What one is positing is a situation in which you have a series of banks who make agreements with Visa. So they don't have agreements with each other. They simply have an agreement with Visa. You can't simply infer from that that there is an agreement between the acquirers -- sorry. You can't conclude that simply because they have an agreement with Visa, there is also an agreement

between acquirers. Because of that, when you look at -- so I don't dispute that it is possible to have a restriction, a concerted practice, by reference to the fact that people have signed up to Visa's rules or any provider of services rules. You can have that.

The point I'm trying to make is this and I obviously have not made it very clearly. I don't dispute that that can, in an appropriate case, give rise to a concerted practice. One cannot look at that in the abstract, though. One has to look at what is the restriction of competition with which we are concerned here, and then one has to ask whether the particular concerted practice which is being identified can elide or can give rise to that particular restriction of competition.

MR FRAZER: In the acquiring market?

MR RABINOWITZ: In the acquiring market. Now, in circumstances where what is being posited is not an agreement between acquirers, but simply an agreement by each acquirer with Visa, the question that arises is whether the restriction of competition with which we are concerned here, which involves the suggestion that the banks themselves and the acquiring market themselves decided on the costs that were going to be incurred is one that can arise. In my respectful submission, it can't, simply by virtue of them having an agreement, a vertical agreement with Visa doesn't give you the link between the restriction of competition which is relied upon in these cases, which is that the banks themselves got together and together decided on what the MIF should be.

Having an agreement with Visa does not get you there, unless it is an association of undertakings. But if it's an association of undertakings, you don't need the rule.

Merely having the rule, ie everyone agrees to abide by Visa's rules, does not get you

to a point of saying the banks between themselves agreed on what the positive MIF should be.

MR FRAZER: Even though each acquiring bank would be aware that the same agreement has been entered into by all of the others?

MR RABINOWITZ: They may be aware of that but they are aware of that just because that happens to be Visa's rules, yes.

MR JUSTICE ROTH: Would that be a convenient moment to break and we will return at 2.10.

MR RABINOWITZ: Thank you.

(Lunch break)

MR JUSTICE ROTH: Yes, Mr Rabinowitz.

MR RABINOWITZ: Thank you. We were in the judgment of the CJEU. I had been showing you passages relating to their analysis of the association of undertakings point. I think I had just answered Mr Frazer's question about why rules don't work here.

Just putting that to one side, can I invite the Tribunal, still in this judgment, to go to page 1016, paragraph 161. Now, the Tribunal might recall this from the asymmetric reference analysis. This is where the CJEU considers the criticism which was made of the General Court's counterfactual position, and to some extent I have already addressed the Tribunal on this.

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: It obviously arises -- I can take this fairly quickly. If I just identify the paragraphs for the Tribunal. Paragraph 161 is where the discussion about establishing counterfactuals begins.

At paragraph 162 and 163 the CJEU considers the General Court's analysis of the counterfactual. This is where one finds identification of the criticism that

simply because something works as a counterfactual in the context of ancillary restraint, that doesn't answer the question of whether it's the likely counterfactual, and that is identified at paragraphs 162 and 163.

Then, at 166 and 167, the General Court failed to consider the likelihood question.

Then, 169, you have this:

"In the circumstances correctly submitted in the present case, that in relying on the single criterion of economic viability, notably in 132 and 143 of the judgment under appeal, to justify taking into consideration the prohibition of ex post pricing in the context of its analysis of the effects of a MIF or competition, and by failing therefore to explain in the context of that analysis whether it was likely that such a prohibition would occur in the absence of a MIF other than by means of a regulatory intervention, the General Court made an error of law."

So that's the identification of the fact that there was an error of law.

Then we have, between paragraphs 170 and 174, the CJEU saying notwithstanding that was an error of law, it doesn't matter, because when you consider the evidence which was put forward before the General Court, zero MIFs, prohibition of ex post pricing was really the only other counterfactual that they were going to find. Perhaps because it is important, I will take the Tribunal through that:

"It should be noted, however, that if the grounds of a ..."

MR JUSTICE ROTH: Sorry to interrupt you. Would you like us to read it to save you reading it out?

MR RABINOWITZ: I am very grateful.

MR JUSTICE ROTH: We will read those five paragraphs. (Pause.) Yes.

MR RABINOWITZ: The Tribunal will understand the importance of that to what we

call the UIFM and what Mr Cook's clients have as their bilateral case as to the counterfactual point I addressed you on earlier.

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: It really had to do with the fact that the only other option presenting itself, as the court says at paragraph 73:

"The only other option presenting itself at first instance was, if it wasn't going to be unrestrained, you could set wherever you like. It was going to be zero MIFs."

The problem with the "you could set whatever you like" --

MR JUSTICE ROTH: No. We got it.

MR RABINOWITZ: Thank you. Can I invite the Tribunal next to go to paragraph 195 on page 1021. This paragraph here:

"Similarly, 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, as the Commission rightly points out, judgment on appeal is not based on the premises that high prices in themselves constitutes an infringement of Article 81. On the contrary, as is apparent from the very wording of 143 of the judgment under appeal, higher prices merely arise as the result of the MIF, which limits the pressure which merchants could exert on acquiring banks, with a resulting reduction in competition between acquirers as regards the amount of the MSC."

So that is relevant to the nature of the restriction on competition.

If we can then move away from the European courts to the decisions of the courts in this jurisdiction. Starting with Mr Justice Phillips, and again I am going to take this as quickly as I can, because most of the references I took you to are on the counterfactual points, which were relevant to the UIFM point.

If we go to authorities volume 3, tab 17, at page 1582. That's where it begins. Just picking it up at paragraph 5 at page 1,586 -- I think this is a paragraph my learned friend took you to yesterday.

"Common ground that Visa and/or the third defendant is an association of undertakings within the meaning of 101 and that the UK MIFs are set by a decision of that association of agreement between those undertakings. It is also not in dispute that MIFs have been appreciable effect on trade."

So at that stage it was common ground that Visa was an association of undertakings, and that's the basis upon which that court proceeded.

Then, as the Tribunal can see from paragraph 6:

"The issue before Mr Justice Phillips was whether UK MIFs", which as we have just seen were set by all the UK acquirers and issuers "had the effect of restricting competition in the acquiring market."

The learned judge says, as you see:

"That is to say the market in which the acquirers compete with each other to sell their services in relation to the processing of payment cards transactions to merchants."

So that's obviously important. That is the market, as I think my learned friend stressed earlier, with which we are concerned. Again, I think I may have taken you to this when we began, but just to get a sense of the time period in issue before Mr Justice Phillips, if we go to paragraph 9, page 1587.

MR JUSTICE ROTH: Yes, you showed us that.

MR RABINOWITZ: If we then go to page 1589, halfway down the page, you see the heading "Ownership and decision-making under the background and the scheme".

The tribunal may just want to note paragraph 22. Perhaps I can invite you to read

that to yourselves.

MR JUSTICE ROTH: Right.

MR RABINOWITZ: The background facts to the Visa Inc point. (Pause.) Obviously that deals with the situation up to 21st June 2016. In paragraph 23, just looking at that, which is obviously the Visa Inc acquisition:

"On 21st June 2016, Visa Inc completed the purchase of the share of Visa Europe, pursuant to the terms of a put and call option contained in the framework agreement. It is unclear to what extent since that date the scheme has been integrated into the Visa system but that question is not relevant for any of the issues in these proceedings."

What that reflects is the fact that at that stage Visa was not attempting to make the sort of arguments that Mastercard had made in Europe about the effects of Mastercard's IPO.

Now, it is fair to say that Visa could have made those arguments. It chose not to. At this stage the post merger position had only accounted for a few months of the claim period. I have already made the point, but the fact that Sainsbury's now says the claim was always limited to the period up to November 2015. We say it wasn't. But certainly the damages were limited up to November 2015, and there was therefore not much at stake for this argument about the merger.

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: That argument was not made then, but I don't understand any point to be taken by my learned friend about an abuse of process or anything else. So the fact that it was not taken in that case does not --

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: -- mean anything. Just going on with the judgment, the learned

judge at page 1590 sets out the scheme rules that he was considering. Again, can I just identify the paragraphs for the Tribunal without spending time on them.

Paragraph 27, you see a rule obliging issuers to pay the face value of the transaction. That's rule 7.1H.

Paragraph 29, there's a reference to rule 9.9, which describes the interchange fees.

Over the page, in paragraph 30, there is a UK specific rule. That's page 1591.

Again, the Visa rules which were being considered here were a decision of UK acquirers and issuers as part of the association of undertaking. They together specified what interchange fees should be paid in default of a bilateral agreement between issuer and acquirer for any particular transaction.

If we then go on to 1605, one has the heading there, "The Relevant Counterfactual".

At paragraph 98 -- again I think I took you to this this morning -- Sainsbury's and Visa were in agreement as to the appropriate counterfactuals, save for the question of whether it should be asymmetric at that stage. So there was no argument of the sort being run in this case. But the Tribunal may just want to look at (i) and (ii), which are relevant to the issues then.

Just picking up paragraphs 99 and 100:

"The crucial aspect of the above counterfactual is that it sets a default position for the settlement of transactions, just as does the rule which provides for MIFs in default of agreement. This reflects the fact that Sainsbury's accepts and the claimant accepted that some collectively agreed default rule for settlement of transactions was essential for the scheme to function. It is common ground that a scheme without a default, pure bilaterals on a decentralised counterfactual, would not work. In a joint statement, the economist experts concluded: 'We agree, absent a default rule and in the presence of an Honour

All Cards Rule, issuers would have the ability and incentive to demand high interchange fees, to the detriment of all scheme participants, and such a system would be unlikely to be workable in practice. The default rule proposed is the appropriate basis for the counterfactual settlement at par, but no ability to hold out for an additional fee, which is plainly an exact equivalent in economic terms to setting a MIF at zero.'. All of the expert economists accepted that this was the case."

This is the pre-IFR.

MR JUSTICE ROTH: This is the hold-up problem.

MR RABINOWITZ: Exactly. At paragraph 103 one sees the argument that Sainsbury's make:

"Sainsbury's asserts that the UK MIF restricts competition in the acquiring market in two respects. First, the MIF distorts the competitive process because it removes uncertainty among acquirers about what the competitors are paying issuers and reduces dramatically the scope for them to compete on price. In other words," and this is my interpretation, "the MIF reduces competitive intensity as to the level of interchange fees to nil. Second, the MIF acts as a de facto floor price that merchants must pay."

Visa's response one sees at paragraph 104:

"I do not understand Visa to dispute that the MIF does indeed restrict competition in the above respects in absolute terms. The area of disagreement is that Visa contends that Sainsbury's cannot establish that the market would be any more competitive in the counterfactual situation where no MIFs were set, and there was a default of settlement at par. Visa's key contentions are in a no MIF counterfactual, issuers and acquirers would still not negotiate the bilateral interchange fee, but would proceed on the basis of the default provisions.

Settlement at par with an implicit MIF for exactly the same reasons as apply with a positive MIF in force.

2. There would therefore be no difference in the competitor forces, the competitor processes or the competitive outcome. Issuers and acquirers would proceed on the basis of a default set by the scheme equivalent to zero MIF and merchants would have no ability to negotiate an even more favourable interchange-free outcome.

3. The only difference would be in the level of interchange fee, not by reason of increased competition, but because of the default interchange fee would implicitly be set at zero rather than a positive figure. Visa contends that the mere fact that the setting of a positive MIF results in a higher price sets a higher floor, does not, absent any other restriction in competition, amount to an infringement of 101."

In the next section of the judgment, Mr Justice Phillips considered the question whether in the counterfactual merchants and acquirers would agree to pay positive interchange fees, even though the rules empowering them to insist that their transaction is settled at par.

One sees his conclusion at paragraph 129, 1614. His conclusion is no, merchants and acquirers would not agree to pay positive fees in the counterfactual.

The next section of the judgment, Mr Justice Phillips considers Sainsbury's arguments.

MR JUSTICE ROTH: Sorry, you were at 129?

MR RABINOWITZ: 129.

MR JUSTICE ROTH: That's the rejection of the bilaterals.

MR RABINOWITZ: Exactly that. Beginning at (ii), just below that:

"Mr Justice Phillips", as he then was, "considered Sainsbury's arguments as to why

even though there would no bilaterals in the counterfactual, there would be some competition in the counterfactual that was not present in the real world."

In other words, if counterfactuals were set at zero rather that at a positive number, Sainsbury's said there would be more competition at zero than there was at positive MIF. The learned judge analysed this, and of course he concluded that there would not be any more competition. No matter whether you set it at zero or positive MIF, it didn't make any difference. You wouldn't get any more competition.

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: He gave five answers to that.

MR JUSTICE ROTH: Do we need to go through those? I mean, that was all overruled, wasn't it?

MR RABINOWITZ: It was all overruled and I don't think you do need to go through that. that runs from I think paragraph 130 through to 137.

MR JUSTICE ROTH: 151, doesn't it?

MR RABINOWITZ: 138, he says he is not bound by the Commission. That goes all the way to 151. Then I think I can skip the bit about Arcadia. We can probably go next to the Court of Appeal decision actually, volume 3, tab 20.

MR JUSTICE ROTH: Yes. Just a moment. Yes.

MR RABINOWITZ: Just picking this up at 1743.

MR JUSTICE ROTH: Can you give me the paragraph, because I am in a different copy.

MR RABINOWITZ: 126. Internal page 939, if you have that, page 1743 in the bundle, paragraph 126. This is where the Court of Appeal have the quotation from Cartes Bancaires, which I think my learned friend took you to.

MR JUSTICE ROTH: Yes, she took us to this section I think.

MR RABINOWITZ: Yes. Paragraph 129, one sees that the Court of Appeal ask, which is the issue in this case:

"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."

Then, at paragraph 130 onwards, the court begins its analysis of whether it was bound to follow the CJEU judgment in Mastercard.

Between paragraphs 133 and 139 the Court of Appeal considers the Commission decision and, as you will recall, it rejected Mr Justice Phillips' conclusion that he was not bound by the Commission's decision. I don't think I need to take you through that.

Paragraph 147, however, is relevant. This is beginning at paragraph 137, page 748. This is where the court considered what had been decided by the CJEU. The discussion here starts with the error that the CJEU identified in the General Court's analysis relating to the counterfactual. Again, I was not proposing to take you through that again, but you can see paragraph 149 and 150 and 151 there is a discussion about --

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: Which I have already taken you to.

MR JUSTICE ROTH: Which you have shown us, yes.

MR RABINOWITZ: 153 and 154, the court considered the reasons why the CJEU concluded that MIFs restricted competition by comparison with the counterfactual -- I am just reading that again.

153:

"It is true that at paragraph 193 the CJEU approved the licence of paragraph 143 of the General Court's decision to the effect that the MIFs had restrictive effects,

in contrast with the acquiring market operating without MIFs, and if they limited the pressure which merchants could exert on acquirers when negotiating the merchant service charge by reducing the possibility of prices dropping below the certain threshold. This passage makes it clear that the counterfactual approved by the CJEU is one that involved an absence of MIFs and the abrogation of the default MIFs rule and the imposition of an ex post pricing rule."

Then 154, paragraph 195. The CJEU dealt with the argument that:

"The General Court's decision was based on the premise that the high prices in the sales constituted an infringement of 101. CJEU said expressly that it was apparent from 143 of the General Court's decision that high prices arising as a result of the MIFs themselves limited the pressure which merchants could exert on acquiring banks as a result a reduction in competition between acquirers as regards the amount of merchant service charge. The General Court had not merely assumed that the MIFs hit a floor but the merchant service charges had undertaken detailed analysis."

Then one finds the conclusion at 156 that my learned friend took you to earlier:

"In our judgment, the proper analysis of the CJEU's and our decision on these points is that it endorsed the counterfactual adopted by that General Court, as a matter of law, rejected the arguments, no default and prohibition of ex post pricing counterfactual was inappropriate.

2. There was no basis for saying that the MIF set a floor on the merchant service charges.

3. That the imposition of the MIFs did not restrict competition between acquirers because the merchants could still compete in relation to the part of the merchant service charges that weren't affected by the MIF."

Now that's all I am going to show you in the Court of Appeal.

MR JUSTICE ROTH: Yes. I think that was the basis of the question which you addressed earlier about whether we are bound.

MR RABINOWITZ: Indeed.

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: If we can go to the Supreme Court's decision, volume 4, tab 25, beginning at page 1906. I was going to pick it up at paragraph 12, page 1916, internal page, if that's what you are working from, 1817.

"Again, this is common ground that a rule specifying the terms on which a transaction is to be settled between issuer and acquirer, at least in default of bilateral agreement, is necessary in order for a four-party scheme to operate. Also common ground that a rule providing for positive MIFs is not necessary for the operation of a four-party scheme."

Then, if we go to page 1923, internal page 824, beginning here the Supreme Court --

MR JUSTICE ROTH: If you could give me paragraph numbers, that would help, because --

MR RABINOWITZ: I am sorry. It begins at paragraph 49.

MR JUSTICE ROTH: 49, yes.

MR RABINOWITZ: You see the heading just above that: "Is the court bound by Mastercard Court of Justice?" The Supreme Court starts its analysis of this question, setting out key passages in the Commission decision. Those will be familiar territory by now, because we have been over those passages. I just want to glance at paragraphs 50 to 52, which we have seen.

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: Then 53 and 54 we have this:

"At recital 455 to 460 the Commission addressed the argument of Mastercard and

Visa that the MIF was not a restriction because its effect would be like an excise tax."

MR JUSTICE ROTH: That was the argument that Mr Justice Phillips accepted, yes.

MR RABINOWITZ: Exactly. The argument is recorded in recital 219. Then 54:

"This is essentially the same argument as that advanced successfully by Visa before Mr Justice Phillips again on this appeal. In summary, in a counterfactual with settlement at par, equivalent to zero rate of MIF, there is no process of competition as to that default term of settlement, just as there would not be if there was a MIF, a common and transparent cost, which was also a default in a settlement, not a price or charge. In both the factual scenario and the counterfactual, competition is limited to the acquirer's individual marginal costs and mark-up. There is accordingly no difference in the competitive process and no restriction on competition, the zero MIF argument."

Then, over the page, the Supreme Court refers to the General Court's decision. The key points are in paragraphs -- there are a few pages -- 61 and 62, where we see the Supreme Court refer to --

MR JUSTICE ROTH: Yes, and you have taken us to those.

MR RABINOWITZ: Then the key point is at -- we then get a heading just above paragraph 63, "Mastercard Court of Justice". The key point I think for that is at paragraph 67:

"The Court of Justice endorsed the General Court's rejection of the zero MIF argument in the following terms."

You have seen that paragraph. So all of this is based upon the European court's analysis.

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: Page 1927, paragraphs 69 to 72.

MR JUSTICE ROTH: This is the argument of Mastercard.

MR RABINOWITZ: The argument of Visa begins at paragraph 69.

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: Ms Rose was submitting.

Paragraph 73, the court says that Visa had misrepresented the CJEU decision. My learned friend took you to that yesterday. If you look then at paragraph 75, this is the key reasoning on what Mastercard CJEU established:

"The Commission was here focusing on the process by which merchants bargain with acquirers over the MSC. It was contrasting the position where the charge is negotiated by reference to a minimum price floor set by the MIF and one where it is negotiated by reference only to the acquirer's individual marginal costs and his mark-up, ie between a situation in which the charge is only partly determined by competition and one in which it is fully determined by competition. In the latter situation, the merchants have the ability to force down the charge to the acquirer's individual margin or costs and his mark-up and to negotiate on that basis. That is the pressure which is referred to in recital 460. This is made clear in the first sentence of recital 450 to that question, etc."

One is very familiar with that now.

MR JUSTICE ROTH: As I understand it, the Supreme Court is effectively summarising this as the key reasoning of the Commission.

MR RABINOWITZ: Exactly that.

MR JUSTICE ROTH: Which it says is then upheld by the General Court and the Court of Justice.

MR RABINOWITZ: Exactly that.

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: Then go to paragraph 92, which is what all of this leads to. This is on page 1930. One has this:

"Whether Mastercard Court of Justice is binding depends on whether the findings on which that decision is based are materially distinguishable from those made or accepted in the present appeals. We have rejected Visa's and Mastercard's arguments that it can be distinguished in the manner suggested by them and that their case is made out or supported by Budapest Bank."

Then crucially one has paragraph 93:

"In our judgment, the essential factual basis upon which the Court of Justice held ..."

MR JUSTICE ROTH: Yes, we have read it a couple of times, yes.

MR RABINOWITZ: The key point so far as we are concerned is this. When you look at that essential basis and you go through it, our submission obviously is that in a number of respects that essential factual basis is not made out in the present case. Just running through the points, looking at 1 --

MR JUSTICE ROTH: Just to be clear, in the present case -- the present case has various aspects to it. As I understand it, for the period post IFR you say it is not made out and we don't need to hear you on that.

MR RABINOWITZ: That's right.

MR JUSTICE ROTH: You have a separate point therefore, but you are addressing both the post acquisition, the 21st June acquisition point, and then the other MIFs. That's what you aim to address, isn't it?

MR RABINOWITZ: That's right. Just to be clear, so we say UIFM and the post acquisition point (i) is not established, and if you look at (ii), it has the effect of setting a minimum price for, that is obviously relevant to the interregional commercial and domestic Italian MIFs. And then (iii), the MIF element is set by collective agreement, rather than by competition. Again, that's relevant to

UIFM and post-merger, the position post Visa Inc merger. (iv) counterfactual is no default, MIF with settlement at par. Again, that's relevant to UIFM and the asymmetric counterfactual.

Then (vi): "In the counterfactual the whole of the MSC would be determined by competition and the MSC would be lower."

The first part of that is relevant to UIFM again. The second is relevant both to UIFM and also to the interregional, commercial and domestic Italian MIFs.

Then just on this, one does see the language in (i):

"The MIF is determined by a collective agreement."

So it is the MIF itself which has to be determined by a collective agreement. That is clear if there is an association of undertakings.

I ought -- I think just to show you what is said in the section below -- you have paragraph 93: "Should the court follow Mastercard Court of Justice". Again, I think my learned friend showed you this. It is really paragraphs 101 to 103, which I think you have seen. Just looking at 101:

"Whilst it is correct that higher prices resulting from a MIF do not in themselves mean there is a restriction on competition, it is different where higher prices result from a collective agreement and are non-negotiable."

So again one has the collective agreement element there being stressed by the Supreme Court.

Given what we are talking about, that is an agreement between all competing acquirers, because that is where the restriction is to be found.

Then paragraph 102:

"Whilst it is correct that settlement at par sets a floor, it is a floor which reflects the value of transaction. Unlike the MIF, it involves no charge resulting again from a collective agreement."

Again the stress is on there having been a collective agreement.

Again, at 103, here the Supreme Court emphasises:

"The difference between the counterfactual and the real world is that in the real world there is a collective agreement that determines a large part of the MSC."

Again, the point that is made by the Supreme Court is that it is anti-competitive acquirers, who are competing with each other in the acquiring market, to agree with each other on a positive charge that they will all incur and which will then set a floor under their MSCs.

This really all goes back to what the Commission said at paragraph 457 of its decision. Perhaps we can just turn that up again. It is at volume 2, page 710. It is behind tab 8. Volume 2, page 710. 457:

"Even if one were to qualify a MIF as a kind of excise tax, this is no reason why that should fall under the Article 81 duty."

It is the collective act of competing undertaking. So one needs a collective act of competing undertakings, being here the acquirers. It is the decision of an association of the acquirers and issuers that amounts to horizontal collusion between those acquirers as to the amount of the interchange fee that they will pay.

That is all I was going to show the Tribunal in relation to the judgments. I am not going to address you on UIFM.

So far as Visa Inc is concerned, I don't understand there to be any dispute that Visa Inc was not an association of undertakings after the acquisition.

MR JUSTICE ROTH: Well, I am not sure it has been conceded. I think it is accepted that it is arguable. It is not a basis for summary judgment. I am not sure it went beyond that, but that's good enough for you I think.

MR RABINOWITZ: Good enough for me. So I wasn't going to, in those

circumstances, take you to Mr Butler and Mr Steinmetz to see what they say, or indeed to go through that analysis. It is really the point about the rules being enough. That's the point on which my learned friend rests her case for summary judgment purposes.

MR JUSTICE ROTH: Yes, the agreement.

MR RABINOWITZ: Just on that, if you go to paragraph 19 of my learned friend's skeleton argument -- this is page 6 -- one sees the case set out with clarity there. My learned friend says, just picking it up in the third line:

"The default MIF settlement rule itself is an agreement or series of agreements between undertakings. Payment of the MIF is made pursuant to those agreements, and there is concerted practice whereby acquirers coordinate their conduct by paying a single MIF set by Visa."

It is really the last sentence which matters there:

"There is a concerted practice whereby acquirers coordinate their conduct by paying a single MIF set by Visa."

It follows from that that even if the claimants could establish some sort of agreement or concerted practice, which we would dispute, they also need to show that the acquirers coordinate their conduct between themselves by paying a single MIF set by Visa. My learned friend accepts that, and it is clear from what she says here. It is coordinated concerted practice between acquirers that matters.

The suggestion appears to be that simply by acquirers or issuers signing up to rules determined solely by Visa Inc, determined without any involvement of the acquirers at all, because, on the premise on which this argument is based, my learned friend accepts it's at least arguable that there wasn't an association of undertakings and that Visa Inc alone sets these rules and their contents. So

you have a series of rules determined solely by Visa Inc, without any involvement by the acquirers, simply by signing up to that, there is, she must say, the necessary concerted practice. It is a necessary concerted practice which results in the restriction of competition with which we are concerned, namely actually the setting of the MIFs, because you will recall that that is the problem here, that these parties together collectively decided on the positive MIF. With respect, that argument just cannot succeed, in circumstances where for the purpose of the argument my learned friend accepts that Visa Inc alone decides on the MIF.

MR FRAZER: Can I just test that? Suppose a group of people got together and said "We will choose between us a price that is set not by another company in the group, Visa Inc or whatever, but by an independent third party, whether it is an arbitrator or whether it's a random process, or whatever it is, the price is essentially outside the model. It is supplied by an outside party. But we all agree that we are going to abide by it, both paying side, acquirers, receiving side, banks. That's going to be the price in the market." Why wouldn't that be a problem?

MR RABINOWITZ: That would be a problem because there --

MR FRAZER: It would be a problem or it wouldn't be?

MR RABINOWITZ: It would, because in your example you started by saying a group of people get together and agree among themselves that they will all agree on something.

MR FRAZER: They will observe a particular price, set externally.

MR RABINOWITZ: You have an agreement between the acquirers that they will do something. There you have the necessary agreement between the acquirers that they will do something. That's not the premise of the argument which is

being made against me. The argument that is being made against me is simply by the acquirers agreeing with Visa that they will agree to something that gives rise to the necessary concerted practice. There is no suggestion here, nor any evidence, that the acquirers or the issuers got together between themselves and reached an agreement that that is what they would do, and that is the difference between --

MR FRAZER: Is it not common ground that there are a set of obligations between the issuing banks, the acquiring banks and at least some Visa entities, by which they all make legal commitments to apply a certain set of rules as to how the pricing will operate?

MR RABINOWITZ: With respect, it is not common ground that the acquirers got together or the issuers got together, in circumstances where there was no longer an association of undertakings, and agreed that they would abide by particular sets of rules.

The premise of the argument is that from 2016 Visa Inc alone set the rules. All you have -- this is the theory, my learned friend's case theory -- simply by acquirers agreeing with Visa, not agreeing with other acquirers, not agreeing with issuers, but simply by agreeing with Visa that they would abide by Visa's rules, MIF rules, you have the necessary concerted practice. That is the difference between the present case and the example that you give.

Now, as I say, the trouble about my learned friend's case is that it really seeks to rely on random comments made in the Court of Appeal and in the Supreme Court where there's a reference to the rules in circumstances where -- I can take you through it -- there just was not an issue. They were not argued -- these points were not argued in the Court of Appeal or the Supreme Court.

There is a reference to the rules being agreed as providing a basis for the necessary

concerted practice. With respect, that simply does not match up to the restriction of competition with which we are concerned.

As we have seen, as I have shown you, the analysis of the Commission, the analysis of the General Court, the analysis of the CJEU is all based on the proposition that Mastercard was an association of undertakings. None of them rest on --

MR JUSTICE ROTH: Yes. Well, we have got the point.

MR RABINOWITZ: You have got that point. Let me just see what else.

MR JUSTICE ROTH: Would you like a short break? Would that be helpful?

MR RABINOWITZ: Just a few minutes to see where I am.

MR JUSTICE ROTH: It is 2.57. We will come back at 3.05.

MR RABINOWITZ: Thank you very much.

(Short break)

MR JUSTICE ROTH: Yes, Mr Rabinowitz.

MR RABINOWITZ: Thank you. I was just going to finally move on in this section to deal with the platform point, if I can. It is a point which didn't find much favour with the Tribunal when I first tried it. So I am going back just to see if I can try again.

It is a point that we touch on at paragraph 55 of our skeleton, where we give the example of landing rights at Heathrow. Perhaps I can take, by way of an example, a statement of objections that the Commission recently sent to Apple about its app store rules for music streaming providers. The Tribunal ought to have the press release for this at volume 4 of the authorities bundles, at page 2471, so right at the back of the authorities bundles.

Just to explain to the Tribunal what you are looking at here, you can see it's a press release identifying the fact that the Commission has sent a statement of objections to Apple on its apps store rules for music streaming providers.

MR JUSTICE ROTH: Yes. It is the same point we had in the case here. Maybe you are not aware of that. We have had a case that Epic Games, which was I think the principal complainant to the Commission brought against Apple.

MR RABINOWITZ: The Tribunal will be more familiar with that --

MR JUSTICE ROTH: I don't think my colleagues are. And indeed against Google.

MR RABINOWITZ: Okay. Just looking at it for the sake of your colleagues and for the sake of everyone --

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: If you look at the first paragraph here, one sees a summary of the Commission's concerns:

"The European Commissioners informed Apple of its preliminary view that it distorted competition in the music streaming market, as it abused its dominant position for the distribution of music streaming apps through its apps store. The Commission takes issue with the mandatory use of Apple's own app purchase mechanism imposed on music streaming app developers to distribute their apps by Apple's App Store. The Commission is also concerned that Apple applies certain restrictions on app developers, preventing them from informing iPhone and iPad users of alternative cheaper purchasing possibilities."

As the Tribunal sees, it is an abuse of dominance case, not an allegation of an infringement of 101. That's much harder for the Commission, because it needs to show that Apple has a dominant position.

If we then look at the Commission's concerns set out in the two bullet points towards the bottom of the page:

"The mandatory use of Apple's proprietary in app purchase system for the distribution of paid digital content. Apple charges app developers a 30% commission fee on all subscriptions bought through the mandatory IAP. The

Commission's investigations show that most streaming providers passed this fee on to end-users by raising prices.

Secondly, anti-steering provisions."

I am not sure we need to worry about that particularly.

So you see that Apple entered into these standard form platform agreements with all music streaming app developers, in which the developers agreed to pay Apple a fixed 30% commission, and the Commission's investigation showed that they passed this on to their customers.

Now, the Commission's concern about all of this is that Apple, which has its own subscription music streaming service, is raising the cost of its competitors in music streaming to operate from the app store. That's obviously a very different concern from the concern in our case.

The point we make about this, however, is that even if Apple did not have its own music service, and even if Apple did not have a dominant position, the Claimants' analysis in the present case would establish that any commission, other than a zero per cent commission, would amount to an agreement between all music streaming service providers who use the app store, that has the effect of restricting competition. That's because you have a platform, you have a series of rules, and people unilaterally -- it is never unilaterally -- but without coordination with each other, everyone signs up to the rules, which requires them to pay a fee to Apple.

So if one takes, for example, Spotify and Deezer, which is its French-based competitor, both Spotify and Deezer sign up to Apple's App Store term and conditions, and in doing so both Spotify and Deezer agree to pay a 30% commission on the value of the transactions that they undertake using the Apple Store. Now, according to the Commission, both Spotify and Deezer

pass their common transparent costs on to their end-users. That's what one sees in the first bullet point. Spotify and Deezer are, therefore, we say, in the same position as Visa's acquirers.

Now, I accept the analysis is slightly different, in that one has to interpose issuers in the present case. But, as I will be submitting, that makes absolutely no difference to the analysis.

Spotify and Deezer are horizontal competitors in the downstream market, just like the acquirers in the acquiring market. They sign up to individual agreements with the platform operator, just like the Visa scheme rules and the acquirers sign up to. These parties sign up to individual agreements with Apple, pursuant to which they agree to incur a common transparent cost, just like the MIF.

In the one case, the cost is being paid to Apple and in the other case it is being paid as between acquirers and issuers, but I am going to submit that that makes no difference at all to the analysis, and that cost then gets incorporated into their own price in their own downstream market, just as with the MSC and the MIF.

On the claimants' logic, therefore, Spotify and Deezer are parties to a collective horizontal agreement or collective practice, pursuant to which they will both pay Apple's 30% commission. So any commission, other than zero, on the claimants' analysis, restricts competition, because you have these agreements with the platform provider to pay a particular cost or to charge a particular cost -- it doesn't matter -- and that is then passed on to the consumer.

We would respectfully submit, that is plainly a nonsense. It is obviously not the commission's analysis in the Apple app case, which is why the Commission is

going to the trouble of proving dominance, and is focused on this question of whether Apple is giving an advantage to its own music service.

The fact that both Spotify and Deezer separately agree with Apple that they will pay Apple's fee does not amount to collusion between Spotify and Deezer. That has to be a necessary part of the claimants' analysis.

In the same way we say, the fact that, for example, Worldpay and Barclaycard, who are two UK acquirers, both agree with Visa that they will pay the interchange fees that Visa sets does not amount to collusion between Worldpay and Barclaycard.

We give other examples in our skeleton at paragraph 55, page 19, not all from the tech context, but they all make the same general point, and it is a general point that would arise any time a supplier sets transparent and non-discriminatory prices for its customers, who then compete with each other in a downstream market. I said I would come back to does it matter --

MR LOMAS: Just before you do that, Mr Rabinowitz, does it affect your analogy at all that Spotify and Deezer don't have to pay any fees as between each other or between each other and any other third party also contracted to Apple, because in the Visa scheme, unlike in the Apple scheme, obviously there is a continuing relationship between players below the platform, whereas here there isn't, other than their final competition in the market to downstream users.

MR RABINOWITZ: You say in Visa there is a continuing relationship between acquirers --

MR LOMAS: In the sense they pay each other, as it were -- there are accounts going between each other.

MR RABINOWITZ: Between the issuers and acquirers?

MR LOMAS: Correct.

MR RABINOWITZ: In my submission, that makes no difference either, because what you are actually requiring here is an agreement between the acquirers, because that's the market in which the restriction of competition is said to be found. So the fact that you interposed the issuers, and payments have been made between issuers and acquirers adds nothing. In the end you are still dealing with a cost which is being paid, a standard cost, which is being paid as between -- set by someone, in our case Visa. It doesn't really matter, I would submit, whether that is a cost which is paid to Visa or a cost which is paid to the issuer by the acquirer, because in the end the harm that you are talking about is one of that cost being transmitted on to the consumer at the end, the merchant.

MR LOMAS: I understand your point. Thank you.

MR FRASER: Could I just pursue that a step further, Mr Rabinowitz, really in the sense of information, because I don't think we have looked at the way the Visa rules operate, for want of a better term, but presumably they create contractual obligations between a given acquirer and a given issuer, creating debts, because the acquirers have laid out cash to the merchants. They are recovering that cash from the issuing banks. Presumably, that's shown as a debt in their accounts. There are contractual obligations as to when accounts are issued, by when they have to be settled, you know, due diligence terms or whatever it may happen to be. There will be a set of relationships under the rules between a group of people called acquirers and a varying group of people called issuers. Are there legal obligations created between them in that way and enforceable debts?

MR RABINOWITZ: My understanding is that what you suggested is the position is

denied. If I can show you volume 2A, tab 38, page 423.

MR FRAZER: 2A I have, yes.

MR RABINOWITZ: You are ahead of me. Just give me one moment, please. 2A, 38, page 423. It is really paragraph 16 here. You will recall you referred me earlier, Mr Lomas, to paragraph 17 of the Claimants' claim. If you look at paragraph 15 and 16:

"As to paragraph 16, it is admitted that issuers and acquirers individually undertake to comply with Visa Europe arrangements. The claimants' reference to an undertaking to comply with the collective conduct and practices of the Visa platform, however, is denied. It is admitted that Visa Europe set inter alia the Visa fees, save for the interregional MIFs referred to below.

Paragraph 17 is denied. The Visa Europe arrangements constitute contracts between Visa and each of its members individually. They do not constitute contracts between members, save insofar as one member sponsors other parties to become members. In those circumstances, sponsoring member commits to Visa that the sponsored members will comply with Visa Europe arrangements."

So there is an allegation at paragraph 17 about obligations being made inter se, and that is denied.

MR JUSTICE ROTH: They may not be legal contractual obligations, but each issuer agrees with Visa that the fee it will charge, unless it agrees a bilateral, will be the default MIF.

MR RABINOWITZ: Okay.

MR JUSTICE ROTH: And each acquirer agrees with Visa, that's the contract, that it will be paying the issuers in the scheme that default MIF. So it gives rise to that understanding as between them. Whether it's legally binding or not may

not matter.

MR RABINOWITZ: You say it gives rise to an understanding. What you have, what you have described are two sets of contractual obligations, none of which are between the acquirers and the issuers, but all of which are with Visa.

MR JUSTICE ROTH: Yes, but as I say it gives rise to the common understanding that that is what they will charge each other, because they have undertaken that commitment to Visa, and that's presumably why every time an acquiring bank has to reimburse or is reimbursed by an issuing bank, they don't enter a separate contract each time, and you don't have a series of thousands of bilateral contracts.

MR RABINOWITZ: Can I just make two points about that, if I may? You referred to it giving rise to an understanding, and I can understand the basis upon which you say that. Whether or not that's enough of a basis for saying in a summary judgment application there is enough there is one thing, but I would just say this, that the obligation between acquirers and issuers is not relevant to the theory of harm in this case, which concerns a restriction of competition between acquirers.

MR JUSTICE ROTH: We have got that point. The point Mr Lomas was asking was a different one. It is what gives rise to the relationship between issuers and acquirers whereby the issuer has to reimburse the acquirer?

MR RABINOWITZ: I understand, with respect, the point that the Chair is making, Sir, which is that there is an understanding, by virtue of the separate agreements that they exist with Visa, that the acquirer will pay the issuer, in accordance with its obligation to Visa, a particular amount, and that's what the issuer expects, because the issuer also has a contract with Visa which anticipates that that will happen.

MR LOMAS: I was wondering if you were answering a slightly different question from the one I asked. It may come down to the definition of Visa arrangements. It may be I have got a prior misunderstanding. If you look at the cashflow in relation to this, the cashflows associated with this must be enormous on a daily basis around the world. You have got an acquirer who has settled accounts from a merchant, because they are owed the money for the goods they have sold. Does the flow of cash run through a Visa account, and then Visa settles, and reconciles with the issuing bank, or does the cash flow from the issuing bank to the acquiring bank.

MR RABINOWITZ: If you give me a moment. I don't know the answer to that.

MR LOMAS: The reason I ask that is if you look at the position from an acquirer, they will have a massive asset, which is the money they are owed by the issuing banks, and it seems surprising that there isn't a contractual obligation underlying that asset. Now, if the payment comes from Visa, I can understand there may be a Visa credit risk, but if it comes directly from the issuing bank, and it is an issuing bank credit risk, you would have thought there was some contractual underpinning of that. I don't want to get too tied up in the technicalities, but it goes back to Mr Fraser's point about whether relationships are being created between acquirers and issuers at a price system which is being set by Visa.

MR RABINOWITZ: I don't know the answer to that. I can say there is no evidence about that before the court. In my respectful submission it is perfectly possible to -- I understand your point that there is an asset there, but you would have that asset regardless of whether the contractual arrangement which requires that payment to be made is a contractual arrangement that exists as between Visa and the acquirer or as between Visa and the issuer --

sorry -- the acquirer around the issuer.

MR LOMAS: Correct. The question is which is which.

MR JUSTICE ROTH: I thought all the evidence in these cases and all the trials is these are four-party schemes, where it goes issuer to acquirer, the reimbursement, less a deduction of the MIF. It doesn't go -- if we go to Mr Lomas' questions, it is not a five-party scheme, that the money goes through the scheme provider.

MR RABINOWITZ: That's true, but I am not sure that that answers Mr Lomas' point. I accept the money may go in the way that you described. Mr Lomas' point related as I understood it, to the contractual underpinning of that relationship, and whether the issuer somehow had a contractual right as against the acquirer to call for that money.

MR JUSTICE ROTH: And vice versa, the acquirer has the right to call for reimbursement.

MR RABINOWITZ: I don't know whether, as between each other, there is contractual rights or whether the only underpinning is the fact that they are all parties to the Visa rules.

MR JUSTICE ROTH: I think that would make it a five-party scheme. It doesn't matter who actually pays, because it's the contractual arrangement of the scheme, isn't it, that makes it four-party?

MR LOMAS: I am not trying to raise a purely technical point of obscure interest but it goes back to this question of whether your scheme creates a network of contracts between acquirers and issuers that operate at a price that is struck by whoever, which applies across that network.

MR RABINOWITZ: I am taking instructions. I will get an answer. The only thing I would say, with respect, we are in the context of a summary judgment

application. I will get the answer, I will give it to you, on instructions, but at the moment, factually, I don't know what the position is. Neither does the court, and there is no evidence before the court on this.

MR LOMAS: Yes, exactly. That is the assumption on which the CAT --

MR RABINOWITZ: I am not sure if that was addressed to us all or a separate conversation.

MR JUSTICE ROTH: Yes, Mr Rabinowitz.

MR RABINOWITZ: Sorry, Sir. I wasn't clear. I haven't yet had any answer to your question I am afraid. I am not sure that anyone knows that.

MR JUSTICE ROTH: Yes. Well, I don't think we need take up more time with it at the moment. We can come back to it later.

MR RABINOWITZ: As I say, I don't know the answer to your point, but they are, as we say, at paragraph 16 -- the arrangements exist between Visa and each of its members, and those arrangements don't constitute contracts between members.

MR JUSTICE ROTH: You are at paragraph 16 of the?

MR RABINOWITZ: The defence.

MR JUSTICE ROTH: Yes.

MR RABINOWITZ: I think what gave rise to them -- it seems looking at that, the answer to Mr Lomas' question is there are no contracts. There may be understandings of the sort that the Chair suggested, but this does suggest there are no contracts in existence between the members, or maybe it just suggests that the fact that there is a contract between Visa and its members does not constitute a contract between the members.

MR JUSTICE ROTH: I think that's what it is saying.

MR RABINOWITZ: I don't know the answer to your question and, as I say, I still

don't have an answer to the question.

MR JUSTICE ROTH: Why don't you move on? You are going to deal with the individual MIFs, are you, the other MIFs?

MR RABINOWITZ: Well, happily for me, Mr Kennelly is going to deal with that. It may be, and I am sorry to do this, it may be if the Tribunal is happy to do so, because I am going to have to change chairs with him.

MR JUSTICE ROTH: Would you like us to rise metaphorically?

MR RABINOWITZ: Maybe I will have an answer to your question and maybe I won't --

MR JUSTICE ROTH: If you have an answer, presumably you will have to play musical chairs again. I leave you to work out the gymnastics.

MR RABINOWITZ: Thank you.

MR JUSTICE ROTH: We will withdraw for just a few minutes.

(Short break)

MR JUSTICE ROTH: Good afternoon, Mr Kennelly.

Submissions by MR KENNELLY

MR KENNELLY: Good afternoon. Members of the Tribunal, I have two points to make. The first is a specific point about the interregional MIFs arising from the fact they have been set at all material times by VI, and that's the point that the claimants have the wrong defendant in relation to the interregional MIFs.

My second point deals with the materially different characteristics of the interregional MIFs, the commercial cards and Italian MIFs.

I will deal first, if I may, with the point that the defendants aren't responsible and never have been for the interregional MIF, and therefore the claimants have sued the wrong defendant.

Now, it is not seriously disputed that VI, Visa Inc, alone set the interregional MIFs at all material times. That has not been disputed by Ms Smith for the purpose of this application. The references to our evidence are in paragraphs 58 and 59 of our skeleton argument. Even if the claimants had a basis for challenging that evidence, of course, it wouldn't be suitable for summary judgment.

So what do the claimants say? They say that it is irrelevant that Visa Inc alone set the interregional MIFs. They say there is no need to show that VI, Visa Inc, and the VE acquirers are in a single association of undertakings.

We have heard the argument that since VE runs the platform, the Visa Europe arrangements, through which the interregional MIFs are paid, that means VE is liable for the infringement arising from the MIFs set by VI.

Now, Mr Rabinowitz has addressed you on that at length, and I repeat the submission he made that the formulation of the Supreme Court at paragraph 93 is important. It says in terms that the MIF needs to be determined or set by a collective decision. That's not an accident of language. That reflects the approach of the Court of Justice of the EU, but you have heard the submissions we have made on that.

I have only one further point to make, a further separate point, which reveals the problem of the claimants' analysis in this regard. It goes to the fact that the counterfactual doesn't work if VI is not the defendant to the claim relating to the interregional MIFs, because the Tribunal will recall that my learned friend, Ms Smith, said that the vice is the collusion between VE's acquirers to impose the default MIFs.

It is right to say that the Visa Europe arrangements do require Visa Europe's acquirers to pay interregional MIFs. This is Mr Lomas' point. We acknowledge that in our response to their request for further information.

That's common ground.

In our submission, the Tribunal should look more closely at what's going on, because the interregional MIFs are received by issuers based outside of Europe, and those issuers are not members of VE. Visa Europe has no control, no ability to control what they do. Those issuers settle transactions with European acquirers because of commitments that they have made to VI, not VE. Visa Europe doesn't have the power to require interregional issuers to settle transactions in Europe on any terms other than those provided by VI.

What that means is that Visa Europe can't deliver the counterfactual. Visa Europe cannot require settlement at par. The counterfactual does not work if Visa Europe is a defendant.

It goes back to the example given by Mr Lomas, where he said: "What if the acquirers, the Visa Europe acquirers, agreed or could agree MIF levels, but have delegated that to someone else who sets them, a third party, or somebody unrelated?" But in that example the Visa Europe acquirers are still delegating a power which they have to settle at par for the counterfactual to work. But here that's not the case. If VI sets the MIFs independently, then there's nothing that VE acquirers can do about it. They could, I suppose, refuse to settle. There is no evidence about that. What they cannot do is insist on the MIF level being settlement at par. They have no ability to do that. That's a further reason to support the submissions made by my learned friend Mr Rabinowitz.

MR JUSTICE ROTH: Could I just understand factually what the structure is? The European banks' issuers and acquirers, their licence or contract is with Visa Europe, is that right, and it continues to be with Visa Europe?

MR KENNELLY: Yes. I am referring here to the whole period. I am not dealing with

post IFR. This is pre-merger.

MR JUSTICE ROTH: The contract pre-merger --

MR KENNELLY: Yes.

MR JUSTICE ROTH: -- was with Visa Europe.

MR KENNELLY: Yes.

MR JUSTICE ROTH: What I call the overseas -- the non-EEA banks, their contract, their licence, the platform is with whom?

MR KENNELLY: With Visa Inc, what I have been calling VI.

MR JUSTICE ROTH: Wherever they are in the world, it is with VI. It is pursuant to the European banks, acquiring banks for all the claimants in this case, whether they are in Italy or the UK or Malta, their obligation to abide by the Visa rules and therefore the MIF rule is through their licence with Visa Europe. Is that right?

MR KENNELLY: That's correct.

MR JUSTICE ROTH: Because that's their contract. You say for the non-EU banks it is by analogy through their obligations to VI.

MR KENNELLY: Correct.

MR JUSTICE ROTH: Then the actual level of the interregional MIF is set by VI.

MR KENNELLY: Yes.

MR JUSTICE ROTH: Yes, I understand.

MR LOMAS: Can I just check? Does the reverse apply if the acquirer is in Europe and the issuing bank is in, say, Japan, with a Japanese consumer, who is in Europe and spends money, presumably the acquiring bank in Europe's obligation is to Visa Europe and the issuing bank in, say, Japan is with VI?

MR KENNELLY: That's my understanding also. I will be corrected if that's wrong.

MR LOMAS: Thank you.

MR JUSTICE ROTH: Yes. Thank you. I was just trying to get that clear.

MR KENNELLY: The rule, the thing that VE's acquirers have some control over is the rule which requires them to honour these interregional transactions, but that rule is not an issue today, on this summary judgment application. Of course, that's formed no part of the analysis of the Supreme Court or the Court of Appeal or any of the European jurisdictions that you have looked at so far.

That's a further reason why it is not suitable for summary judgment. There may be a debate we had at trial about this, but it is not something you can resolve today on the basis of the settled case law.

MR JUSTICE ROTH: But the claim of the claimants, which is based on what they pay to the acquiring bank, that will be in almost all cases -- probably all cases -- that will be a European bank, because these are European claimants. What the acquiring bank charges them will be the MIF which the acquiring bank is obliged to -- the level of which it's got to reimburse the issuing bank is under the rules of Visa Europe.

MR KENNELLY: Yes. Turning then to the characteristics of the different MIFs, the claimants argue, as you have heard, that it doesn't matter if the characteristics and relevant context of these other MIFs are different. It doesn't matter that these other MIFs were never considered by the General Court or the CJEU in the Mastercard case or any of the parties before you.

My learned friend's submission is that the vice which those authorities identify is merely a collective agreement to impose a price on an acquiring market, and on that basis they say any positive MIF anywhere in the EU will breach Article 101(1) automatically.

Now, our submission is that was not the vice which the Commission or the General

Court or the CJEU identified in the Mastercard case, or what the domestic authorities established, as Mr Rabinowitz showed you earlier. Neither the Supreme Court, nor the Court of Appeal, nor any of the European courts said simply the sole question is whether there is a collective agreement to pay a default MIF. They all agreed the need to examine the impact of the MIF on the price on the MSC. Indeed, my learned friend said many times the key question is the impact of the MIFs in the acquiring market. That's how you identify the restriction of competition.

My point here is not about the level of the MIF, as my learned friend suggested. It is whether these other MIFs are producing the effect in the acquiring market that was seen in the Supreme Court, this effect that was found to give rise to the restriction of competition.

MR JUSTICE ROTH: I mean, is it fair, Mr Kennelly, to take paragraph 75 of the Supreme Court's judgment as summarising the concern?

MR KENNELLY: Yes, it is.

MR JUSTICE ROTH: That’s the concern.

MR KENNELLY: It is indeed and I will get there.

MR JUSTICE ROTH: I don't want to take you out of order, but it helps me.

MR KENNELLY: If the President will let me tee up to that, I will get there eventually. I will try not to repeat what Mr Rabinowitz did but I will have to go back to some authorities with a different emphasis for the purpose of this submission.

My learned friend went to the Court of Appeal in particular. That is a useful authority because it summaries much of the Commission decision of the General Court. So if I may go there first in authorities bundle 3, behind tab 20. For my purpose, members of the Tribunal, if you could go to paragraph 133. 133 on internal page 941, bundle number 1, 745. My learned friend took you to this.

He said:

"Looking at the Commission's decision as a whole, it can readily be seen that the Commission is dealing with the same factual situation as in these cases in relation to both Visa and Mastercard, and default MIFs set by the scheme the absence of any bilateral interchange fees being agreed between issuers and acquirers."

The facts were the same in those cases, but those are not the only facts that are relevant, as becomes crystal clear when one goes through these authorities.

MR JUSTICE ROTH: Before you go on, to that extent would that be the same with these other MIFs? In other words, a default MIF set by the scheme in the absence of any bilateral interchange fee being agreed between issuers and acquirers. That would be true of the interregional MIFs and the commercial cards. Is that right?

MR KENNELLY: Yes. My submission here is that that is not an exhaustive list.

MR JUSTICE ROTH: I fully understand.

MR KENNELLY: We see that when we turn to paragraph 135, which is quoting recital 410 of the Commission decision. We see at 135 the Court of Appeal says:

"The Commission stated its conclusion."

This is the conclusion of the European Commission:

"That the MIF ..."

Skipping downing four lines:

"Thereby inflates the base on which acquiring banks set charges to merchants. Prices set by acquiring banks would be lower in the absence of this rule."

Those are the conclusions the Commission reached on the basis of the factual analysis undertaken by the Commission. We get that from paragraph 136,

immediately below:

"The Commission then described the two quantitative analyses that it had undertaken to see whether and to what extent the EEA fallback interchange fee set a floor under the merchant fees."

This is critical, because it demonstrates the particular factual findings the Commission made and how they made them. To understand those quantitative analyses, we need to go back to the passages in the General Court to which you were taken by my learned friend Ms Smith. We get that in bundle 2, behind tab 11. I take you briefly to the General Court where it analyses these same points. That's on page 902.

So if you go, first, please, to paragraph 157, you see the basis for the Commission's conclusions, which, of course, are challenged in this appeal to the General Court.

So as regard the merits of the conclusions which the Commission due from the merchant market survey, all that is significant at this stage is the criticism expressed in relation to the finding that merchants are unable to constrain the level of the MIF sufficiently.

This is about whether merchants can, in fact, constrain the level of the MIF. They say:

"It is observed it is reasonable for the Commission to reach that conclusion, on the basis of the answers which merchants gave to its request for information. It is clear from para 22 of annex 2 of the decision that the vast majority, 91% of merchants, stated they had never refused to accept a card as a means of payment."

They give the reasons for that in the rest of the paragraph.

Over the page, at paragraph 162, and these paragraphs are the ones that Ms Smith

took you to to make her point that even if an acquirer absorbs some of the MIF in setting its MSC, that does not mean there is no restriction of competition. So it is important then to look closely at the basis for that submission, because it is only from this.

So 162:

"Next, as regard the matters on which the Commission relied in the contested decision in connection with its second quantitative analysis, summarised in recitals 432 to 436 to the contested decision it must be noted the comparison was made of the share of the MIF and the MSCs, for which 17 acquirers charged their smallest and largest merchants."

They say:

"It is clear from the total of 17 acquirers, 12 charged MSCs higher than the MIF, even to their largest merchants, meaning the ones with the greatest bargaining power, and in the case of the smallest merchants the MSC was always higher than the MIF. It was observed the average share of the MIF of the MSCs was 84% for large and 45 for small."

So the finding here is that the MSCs were higher for large and small alike.

Then, at 163:

"It is from this analysis that the Commission can legitimately conclude that the MIF of the Mastercard payment organisation sets a floor for MSCs for both small and large merchants."

Then:

"The validity of that conclusion is reinforced by the statement of merchants mentioned above."

Then, at 164:

"The various examples of MSC that are lower than the MIF does not invalidate that

conclusion. The Commission put in recital 450 the fact the acquirer was able to absorb a proportion does not prevent it from affecting the price."

Why is that:

"First, this applies only in regard to a proportion of merchants, those of particularly significant negotiating power."

That's the finding which the Commission has made, a finding of fact:

"Secondly, the view might legitimately be taken that, even in the case of those merchants", ie the ones surveyed, the ones who have given statements, "the price charged would still be lower if there were no MIFs since the acquiring banks would then be in a position to offer larger reductions."

That's all based on evidence. The extent to which the MIF takes up space in the MSC, reducing the space for competition, is a finding of fact which the Commission has made.

Then at 165, in relation to Spain, it is noted that:

"It is clear from documents provided that MSCs were charged equivalent to or even lower than a MIF. However, that cannot in itself demonstrate that the Commission's conclusion regarding the effect of the MIF on the MSC is wrong."

So that simple fact alone is not enough:

"Insofar as the matters mentioned at 162 and 163 above tend to show, in other member states it does set a floor."

That's relevant to its conclusion. Then:

"The Commission's arguments to the effect the situation in Spain may be explained by factors specific to that country."

Again, questions of fact:

"Not manifestly erroneous. Even in such a case the banks could reasonably expect

to be in a position to offer lower MSCs in the absence of a MIF."

Again, those are questions of fact which the General Court is analysing there, based on findings made by the Commission.

Now, the point my learned friend was making from those passages, they are effectively universal application, and it can be assumed to be equally applicable here. That's simply not the case on the evidence before you. I will come to that, but I am dealing with the question of principle first.

If I may now go back to the Court of Appeal. That was an interlude from the Court of Appeal's judgment.

MR LOMAS: Before you do that, can I just check one thing, going back to the Commission decision, on which I think the comments you have just cited are hinged as a whole. That seems to deal, if my memory serves me right, by reference to payment cards. Payment cards I think it defines quite widely as domestic cards across EEA, and certainly commercial cards. Are we on common ground there, that the scope of the Commission's findings was a quite widely defined set of cards under the heading "payment cards"?

MR KENNELLY: I will check that, Sir. I am not sure that's right, but I will be told if it's ...

MR LOMAS: Thank you.

MR JUSTICE ROTH: Yes.

MR KENNELLY: Because commercial cards have generally been excluded.

MR JUSTICE ROTH: Well, the Commission decision as regards 101(1) was a decision about commercial cards as well, wasn't it? I mean, I would have thought that's --

MR KENNELLY: Quite right. The definition of cards is contained in the Commission --

MR JUSTICE ROTH: There was even a separate statement -- if you look at the title page, start there, at page 580 in our bundle.

MR KENNELLY: It is page 580.

MR JUSTICE ROTH: It finds on the evidence that the restriction of competition, based on the factual finding, covers commercial cards.

MR KENNELLY: Yes, indeed. Based on the findings made in that decision, yes.

MR COOK: Sir, if I can interject, I am going to be saying that that's not right. If you actually go to the articles and the decision itself --

MR JUSTICE ROTH: They are excluded from the remedy, because there was a question of Article 101.3, exemption. That's right. But we will wait till you make your submissions.

MR KENNELLY: If the merchant surveys that I have been discussing and the quantitative analysis which the Commission undertook did not deal with commercial cards, I will be told that and I will be able to assist the Tribunal. From the recitals I have taken you to, it is not clear if it is or not, but I will be told.

MR JUSTICE ROTH: I think they discussed the evidence on commercial cards in the decision, but perhaps we can come back to it.

MR KENNELLY: Yes. Even if they have, the point is these -- we will see what they say, but the point is the particular findings made and particular analyses undertaken, which then were either challenged or not challenged, and the extent to which they are challenged we have seen in those decisions, but the point I am making here is that it is necessary to examine the facts.

My learned friend simply said there is no need to look at those facts. All you have to ask is, is there a collective agreement setting a default MIF? There is no need to examine the extent to which in a particular case the merchants can

negotiate part or all of the particular MIF out of the MSC. That's completely irrelevant. There is no need to engage with that question at all.

That's the submission that I am addressing before you. The Court of Appeal again, if you go back to that, that's in volume 3, behind tab 20. I am continuing from paragraph 137.

MR JUSTICE ROTH: If you go back before 137 to 135, where the Court of Appeal quotes the Commission:

"The multilateral fixes the level of the interchange fee for all acquiring banks alike, therefore inflating the base. It would be lower in the absence of this rule. The Mastercard therefore creates an artificial cost base that is common for all acquirers and the merchant fee will typically reflect the costs. This leads to a restriction of price competition between acquiring banks to the detriment of the merchants."

MR KENNELLY: Absolutely.

MR JUSTICE ROTH: So it restricts the price competition and that relates also to that paragraph in the Supreme Court decision, doesn't it, we looked at before?

MR KENNELLY: It does, sir. As I said, why does the Commission make that finding? How does it reach that conclusion? It does it on the basis of the two quantitative analyses that it refers to in the following paragraph 136 in the Court of Appeal. That's the Commission's conclusion, finding a floor and that prices would be lower in the absence of a rule. They are both findings made on the basis of the analysis which it undertook that are cited by the Court of Appeal in 136.

MR JUSTICE ROTH: But the Court of Appeal applies that to the UK MIF, the domestic situation, which was not the subject of the Commission's factual analysis.

MR KENNELLY: Indeed, because the parties in those proceedings accepted that the factual situation was the same for these purposes. That is certainly not the case here in relation to the interregional MIFs, the commercial card MIFs and the Italian MIFs. That is not accepted here, because here the facts are materially different, and I will come to that when I look at Mr Holt's evidence, but the first question of principle, dealing with Ms Smith's submission, is: is it necessary to look at the facts at all or is it enough simply to say there are collective agreements setting a default MIF or a collective decision setting a default MIF? That's what I am answering and the answer is plainly not. It is plainly necessary to look at the facts, because that's exactly what the court did leading up to the Supreme Court in this case, in the Mastercard case.

So if we go back to the Court of Appeal at 137, and 137, again quoting the Commission, it describes the decisive question at recital 448 of its decision:

"And the purpose of the second quantitative analysis was to assess the differential between merchant fees paid by larger and small merchants to assess the extent to which larger ones were in a position to negotiate. Again I see below the MIF."

It concludes over the page:

"The decisive question is whether in the absence of a MIF the prices acquirers charge to merchants at large would be lower. This is the case", says the Commission -- and I interpose because of the findings the Commission has made -- "because the price each individual bank could charge to merchants would be fully determined by competition rather than to a large extent by a collective decision among and on behalf of the banks."

That finding "rather than to a large extent" is the finding that they have made, which is that the MIF takes up a large proportion of the MSC.

If you go down -- now I am going over the page -- over two pages to paragraph 152. We see that the CJEU also recognised the importance of these factual findings, and you get that from 152 of the Court of Appeal, where the CJEU endorsed, at paragraph 192 of the Court of Justice's judgment, the counterfactual employed by the General Court, observing:

"The General Court had not regarded MIFs as by their very nature injurious to the proper functioning of normal competition, but they had properly analysed the competitive effects of the MIFs."

That's what we have looked at.

MR JUSTICE ROTH: Can I ask -- you referred -- sorry to interrupt you, but you referred to the quotation from the Commission by the Court of Appeal at paragraph 137, the decisive question, and you emphasise the words "to a large extent". I mean, if it was to a medium extent, do you say then it is not anti-competitive?

MR KENNELLY: It depends. It depends on the other factors.

MR JUSTICE ROTH: But if it is not determined by competition to some extent other than de minimis, doesn't it distort and restrict the competition? It doesn't remove the competition, but doesn't it restrict it unless it is de minimis?

MR KENNELLY: At the very least it has to be appreciable, as you say, and I'll come to paragraph 174 of the Court of Appeal's judgment that deals with that, recalling here --

MR JUSTICE ROTH: If it is appreciable -- I understand that, but provided it is appreciable, does it matter whether it is 100%, 80%, 50%, 30%?

MR KENNELLY: I say it depends, because it depends on the other factors that have to be considered, and you get the other factors in paragraph 93 of the Supreme Court's judgment, but at the very --

MR JUSTICE ROTH: I mean, I am not sure that quite answers my question. If as a result of the MIF the price is not determined by competition to some extent that's appreciable, why is that not as a matter of law a restriction of competition?

MR KENNELLY: I can accept for present purposes that it has to be at the very least appreciable. That's why I want to take you to paragraph 174 of the judgment. What is appreciable for these purposes will depend on the context, but if you will bear with me, I will come to that.

MR JUSTICE ROTH: Yes.

MR KENNELLY: We see what is appreciable for these purposes both from the point of principle in 174 of the Court of Appeal and then you look at the expert evidence of Mr Holt, but you will recall on this point -- the question you just put to me, Mr President -- Ms Smith's submission is that if the MIF forms any part of the MSC at all, then a restriction of competition can be assumed in the same way as it was -- the very same restriction was identified in the European judgments and the Supreme Court.

MR JUSTICE ROTH: Well, I don't know if she would go as far as saying that it is de minimis.

MR KENNELLY: She was very clear, Sir. She said "if it has any effect". That's what she said.

MR JUSTICE ROTH: Yes.

MR KENNELLY: On the Court of Appeal's judgment now -- it is at 152:

"The CJEU recognised that the competitive effects of the MIF ... The impact of the MIF on the MSC had been analysed",

and, of course, that was important. That's what I have taken you to.

154 again of the Court of Appeal, citing 195 of the Court of Justice, and I am looking

at the second half of that paragraph:

"The CJEU said expressly, 'The General Court's decision was that the high prices arising as a result of MIFs themselves limited the pressure which merchants could exert on acquiring banks with a resulting reduction in competition between acquirers as regards the amount of the MSC."

Then this important part:

"'The General Court had not merely assumed that the MIFs set a floor for the merchant service charge. It had undertaken a detailed analysis to determine that was the case'."

That was a detailed analysis of the factual findings made by the Commission, that that particular case, in fact, did operate so as to set a floor, because in that particular case the merchants didn't have the bargaining power to negotiate it down and the MIFs amounted to a very low proportion of the MSC.

Then still in the Court of Appeal we go to 174, and this is a passage that I was discussing a moment ago. So 174 the Court of Appeal note that:

"Not much consideration was given to the approach which has just been mentioned."

Then at four lines down -- five lines down the Court of Appeal says this:

"We accept that in theory it could have been argued that the scheme's 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 very small default MIF will automatically be a restriction of ..."

MR JUSTICE ROTH: Yes.

MR KENNELLY: Then I suppose the question is the point you raised with me: what is the significance of "low"? It is not just that the MIF is low. It is the impact on the MSC that's important. It's whether -- the level of the MIF itself does not

tell you the full picture. It is what impact the MIF has on the MSC that's relevant.

"The factual premise, however, of the Mastercard scheme the Commission was considering and the schemes we're considering was that the default MIFs make up a large percentage, some 90%, of the merchants' service charge."

That's how they can say that it was certainly appreciable in that case.

MR JUSTICE ROTH: Yes.

MR KENNELLY: Of course, we would argue that the low here is viewed not only by the impact on the MSC but also could be seen by reference to the benefits that merchants receive from the MIF. I do not have to go that far for today's purposes. It is simply enough to say that as a question of fact as to whether there is an appreciable impact or not that is to be determined in relation to these other MIFs. It cannot be assumed that that appreciable effect which is cited there can be carried across.

You see that actually in footnote 5 also. Footnote 5 just over the page in the Court of Appeal judgment, again the Court of Appeal notes that:

"The Commission decision refers to evidence of a merchant that MIFs represented the vast majority of the MSC."

So, with that, I turn to the Supreme Court and that's in authorities bundle 4 behind tab 25, and I am going first to paragraph 75.

MR JUSTICE ROTH: Yes.

MR KENNELLY: This is the point that the President raised with me earlier. The vice is described there. At 75, having referred to recital 459 of the Commission decision, the Supreme Court says:

"The Commission was focusing on the process by which merchants will bargain with acquirers of the MSC. It was contrasting the position where that charge is

negotiated by reference to a minimum price floor set by the MIF and one where it's negotiated by reference only to the acquirer's individual marginal cost and his mark-up."

Then two lines down:

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

That, members of the Tribunal, is a question of fact. In relation to the interregional MIFs, commercial cards and the Italian MIFs can the merchants force down the charge to the acquirer's individual marginal cost and his mark-up and what bargaining power do they have? Our evidence is they certainly have a great deal more bargaining power than the merchants surveyed by the Commission in the Mastercard case.

At 77 we see the Supreme Court saying:

"In paragraph 143 the General Court rejected the zero MIF, held that since the MIF set a minimum price floor, it necessarily follows the MIF has effects to restrict the competition."

So whether there is a floor or not is critical to that restriction finding.

With that we turn to 92. Again you have the point that the Mastercard Court of Justice finding depends upon whether the findings upon which -- sorry -- whether it is binding depends upon whether the findings upon which that decision is based are materially distinguishable from those made or accepted in the present appeals. That's critical. That's the Supreme Court making the point which I submit to you, which is that if the facts here are materially distinguishable, then the analysis cannot be applied automatically, as Ms Smith contends, and that's fortified by the beginning of 93:

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

MR JUSTICE ROTH: They did argue -- did the schemes not argue that the findings were not applicable?

"We have rejected these, that it can be distinguished."

So the argument was, was it not, that the situation is different?

MR KENNELLY: That's on the basis of Budapest Bank.

MR JUSTICE ROTH: No. This is -- I thought that's a separate point and that their case is made out.

MR KENNELLY: Again, unless I am corrected, Visa didn't argue in this case before this court -- sorry -- Mastercard did not argue, and neither did Visa, in the Supreme Court that the MIFs could be distinguished as a matter of fact from the findings of the Commission, that, in fact, the merchants had more bargaining power than the Commission had found, that, for example, the MIFs were of such low volume that they may not be material (inaudible). None of those points were made. That I am afraid (inaudible), but that's not -- those points weren't argued and rejected in the Supreme Court or the Court of Appeal.

So the Supreme Court decided --

MR JUSTICE ROTH: I am looking at paragraph 68 of the Supreme Court, which seems somewhat similar to the argument you are just making to us, and where Ms Rose for your client is emphasising that the European decisions were based on the factual findings of the Commission based on the evidence of competitive pressure, and saying that's to be contrasted with the evidence in this case. Is that not what Ms Rose is saying in paragraph -- as summarised in paragraph 68?

MR KENNELLY: She was making the point there about why Mastercard in the Court of Justice was not binding on the Supreme Court. She is referring to the specific factual findings made by the Commission in recital 460 I think I recall.

MR JUSTICE ROTH: Yes.

MR KENNELLY: What the Court of Appeal and Supreme Court said in rejecting that was the material facts for the purpose of the legal conclusion are materially the same. So for the purposes --

MR JUSTICE ROTH: But she was saying there is a factual -- the Commission's decision is based on factual findings and they are not factual findings that should be applied here.

MR KENNELLY: I am sorry, Sir.

MR JUSTICE ROTH: Is she not? Is that not the argument? She refers to 460 and the sort of negotiation that the Commission found could take place and then she says that's to be contrasted with the position in the UK.

MR KENNELLY: Sir, if you look back at 68, the paragraph that you took me to, we see Ms Rose's submission. She said:

"The decision of the Court of Justice and General Court depend on the factual basis of the Mastercard decision. Crucial to that factual basis was the Commission's determination of the evidence before it that the competitive pressure which could be brought to bear on acquirers by merchants is greater on the counterfactual because of the possibility of bilateral negotiations of interchange fees and the uncertainty that would create."

That was the factual distinction and, of course, there was no possibility -- it was accepted there was no possibility of bilateral negotiations in the case before the Supreme Court.

So again that was the factual point which she said distinguished the finding that the

Commission made, and the Court of Appeal and the Supreme Court said, "No, we don't think that is the factual basis for the Commission's determination. We find that the Commission's determination was based on", the evidence which I have shown you, "the two quantitative surveys, and the particular factual findings that the Commission made", and that's how they rejected the argument. So the argument she was making was nothing like the argument I am making before you.

If you turn to paragraphs 69 and 70, if you read below 68, you see the exact point that my learned friend Ms Rose is making there on the facts. She says she relies in particular on paragraph 460 of the Commission decision, the one I mentioned a moment ago:

"It describes how if there was no default MIF, merchants could shop around and contract with the acquirer who incurs the lowest interchange, and how the uncertainty in each individual acquirer about the level of the interchange fee which competitors bilaterally agree to pay to issuers will exercise a restraint on acquirers."

Then she contrasts that with the evidence before and the findings made by Phillips J. Now that's the bilaterals. Her point was since it is accepted there is no possibility of bilaterals in this case, that Commission decision, which was the foundation for the Mastercard judgment in CJEU, couldn't bind the Supreme Court.

MR JUSTICE ROTH: And the Supreme Court says -- I see -- "That's not right. She has misinterpreted -- her submission misinterprets the Commission decision". What the commission was doing was focusing -- and that's 75 that you took us to -- on the process by which merchants bargain with acquirers of MSC. That was the factual position the Commission was focusing on, not the one that Ms Rose was putting forward. Yes, I see.

MR KENNELLY: Yes. My submission, as you have seen, is I rely -- in contrast I rely heavily on the particular factual findings the Commission made which underlie the judgments in the General Court, the Court of Justice and the Supreme Court, because we can distinguish those in the case of interregional MIFs, commercial cards and Italian MIFs.

MR JUSTICE ROTH: Yes, I see.

MR KENNELLY: Now --

MR JUSTICE ROTH: Is that a convenient moment?

MR KENNELLY: Sorry. Yes, of course. I had not seen the time. Yes.

MR JUSTICE ROTH: Then you will come to looking at the factual distinction, the three cards -- yes -- for the three MIFs --

MR KENNELLY: Yes.

MR JUSTICE ROTH: -- tomorrow? We do have, of course, to finish tomorrow. Are we -- how long do you think you will be, Mr Kennelly?

MR KENNELLY: About half an hour.

MR JUSTICE ROTH: Yes. Then, Mr Cook, you, of course, are not concerned with the association of undertakings issue.

MR COOK: I am not, sir. I am obviously paying close attention to Mr Kennelly's submissions and will obviously not seek to duplicate them. I will be going over some of the points in relation to what we say is the absence of the essential factual basis for the Supreme Court's decision and also objective necessity, but I don't anticipate I will take more than an hour, subject to exactly what Mr Kennelly says in his half hour first off.

MR JUSTICE ROTH: Yes. So it looks as though we are not in any time difficulties. Thank you. Then we will say 10.30 tomorrow morning.

(4.23 pm)

(Court adjourned until 10.30 am

on Friday, 14th May 2021)