IN THE COMPETITION APPEAL TRIBUNAL

Case Nos:
1306-1325/5/7/19 (T)
1349-1350/5/7/20 (T)
1373-1374/5/7/20 (T)
1376/5/7/20 (T)
1383-1384/5/7/21 (T)
1385-1390/5/7/21 (T)
1392-1400/5/7/21 (T)
1406/5/7/21 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 23 May 2022

Before:
The Honourable Mr Justice Marcus Smith
Ben Tidswell
Andrew Young QC
(Sitting as a Tribunal in England and Wales)

MERCHANT INTERCHANGE FEE PROCEEDINGS

A P P E A R AN C E S

Kassie Smith QC, Fiona Banks, Alexandra Littlewood (On behalf of Claimant Groups 1-3, 5-7)
Philip Woolfe (On behalf of Various Claimants Transferred from the High Court)
Matthew Cook QC, Ben Lewy (On behalf of Mastercard)
Laurence Rabinowitz QC, Brian Kennelly QC, Daniel Piccinin and Jason Pobjoy (On behalf of Visa)
Victoria Wakefield QC, Anneliese Blackwood (On behalf of Mr Walter Merricks CBE)

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Monday, 23 May 2022

(10.30 am)

Housekeeping

MR JUSTICE MARCUS SMITH: Good morning, Ms Smith, and welcome to everyone.

I am afraid it is a little cosier than we would like in Court 2, but Court 1 is otherwise engaged.

A few housekeeping matters before I invite the parties to begin.

First of all, the usual live-stream warning.

These proceedings are being live-streamed and it is being recorded officially by the Tribunal, but no one else should record, transmit or photograph what is being streamed.

That would be contempt of court.

Secondly, you will see that we are sitting not as a panel of two, we are sitting as a panel of three, but I am afraid Andrew Young, who you can see on the screen, tested positively for Covid this morning and that is why he is not sitting to my right.

That will, I fear, enable -- mean, that there will be interruptions which are less helpful because they are virtual, and I will ask you to bear with us on that point.

Staying with the Andrew Young theme, Mr Young, as he was, is now Lord Young, following his appointment as a senator of the College of Justice and a judge of the Outer House of the Court of Session, and we extend our congratulations

to him.

He continues as a chair in the Tribunal, but has now, as of, I think, last Friday, been nominated as a chair by the Lord President pursuant to section 12(2)(b) of the Enterprise Act 2002.

So there is a technical change of status as a result of his excellent appointment as a judge, which we are all very happy about.

Next, reading.

We have all read with some attention volume 1 of the various case management files that we have.

We have paid rather less attention to the other bundles in terms of our reading, so I hope that assists in terms of what we have looked at.

There have been a number of references in the correspondence and in the written submissions inviting, even urging, us not to make specific decisions about specific points.

We understand why those points have been made.

We have before us various expert reports which we have looked at and which we think are helpful to consider the general points that are before us, but I don't think anyone should be under any impression that we are going to be deciding specific pass-through points in the course of these two days.

We couldn't possibly do so because we haven't had a complete set of evidence and the hearing would be almost, by definition, unfair.

The reason we are here is because Ms Smith, last time we were assembled, made the entirely correct point that we needed to know what actually pass-on was before we could make directions properly as to the trial of these proceedings.

And that is what we are discussing today.

It is how we go about resolving the very difficult questions that arise in relation to

pass-on.

And it seems to us that there are three angles or facets to this question.

There are the very difficult questions of law, which the parties have addressed us on and which have been addressed in some detail in the Supreme Court in *Sainsbury's*.

But additionally, there are questions of how the proceedings before us should be configured; in other words, what parties one ought to have before the Tribunal at any one time.

We have at the moment got the Merricks claim before us.

That was done in response to a request by the Merricks class representative to be present, and we acceded to that.

That is, at the moment, for this hearing alone, but we would anticipate making a limited ruling in respect of how one approaches pass-through generally across all of the parties here, and we will be sensitive to the fact that we have got multiple actions, including different levels of claimant before us today.

The third facet, in addition to party configuration, but informed by party configuration, is how one goes about resolving these things.

We have got, broadly speaking, two approaches.

One is what I would call the "granular" approach, where one samples specific claimants and assesses what they say about pass-on in their specific context, and that, I think, is the retailer position and the Mastercard position.

Obviously, there are differences in nuance, but using a broad categorisation, that is, I think, what we have got.

We have also got on the other side what might be called a "market-wide" or "sectoral" approach, which seems to be the theory of how one proves pass-on of the Merricks claimants and the Visa defendants.

Now, we have no views at the moment as to which is right and which is wrong, but we would expect to articulate those views at the end of this hearing in the judgment that we hand down, which I say now will be reserved because these are not easy questions.

But the way one resolves these three nested or interlocking facets of pass-on I think will inform how we try matters going forward, in the sense that if we accede to the retailer/Mastercard approach of a granular sampling line, the notion of common issues going forward into liability probably doesn't work.

If, on the other hand, one takes a market sectoral approach, then a common issue approach is probably much more defensible and advisable.

So we see these as related questions and that is why we sent the note of preliminary thoughts on Friday -- and I apologise it was as late as Friday -- but it was very much provoked by what was said and not said in the written submissions that we received.

That brings me on to the question about Merricks.

I know -- and I am sure everyone has seen the correspondence -- that the Merricks class representative is extremely keen that the pass-on aspects of the case are transmitted to a different tribunal than the one presently constituted.

I want to make it clear that we have made no decision one way or the other on that fact.

What has been decided is that, so far as non-common issues are concerned -- and the Merricks claim does raise a number of these -- the Merricks constituted tribunal presided over by Mr Justice Roth will continue.

But if there are common pass-through issues, such that they would appropriately be tried by a single tribunal, then that will happen.

We will hear submissions on it before we make such an order, but if it is sensible, in

case management terms to deal with matters in one umbrella hearing, then that is what we will do.

We are, in this, assisted -- and I use that word rather carefully -- by the fact that Lord Young has got a number of other responsibilities on his appointment and may not be able to give the time that will be required to try these matters in his new status.

If that proves to be an issue, then he would exit stage right.

That would be regrettable, but if those are the demands of the job, that would have to happen.

But then it would be, I think, logical for Mr Justice Roth to take his place, so that one would have a common chair representative across all of the actions.

So I say that by way of articulation of our thinking.

We are not anywhere close to making any ruling, and as I say, we would want to hear from all of the parties concerned before any such ruling was made.

Lastly, a couple of minor points or more minor points.

We had some correspondence from Stephenson Harwood regarding the interesting point about the differences between acknowledgment of service in the High Court and acknowledgment of service in the Tribunal.

It is one for the connoisseur.

I hope we have answered it in correspondence and that the position is now clear, but if it isn't, do please raise it, but I hope you will not have to.

Then, finally, we note that some of the list of issue points are contingent upon some Visa amendments.

Can we deal with that in two minutes now, or is it a contentious question as to whether those amendments should be permitted or not?

We would like to get it out of the way, but only if it can be done very quickly.

What I am going to do now is hand over to Ms Smith as the ring master to corral everything there.

Ms Smith, over to you, but if we can do the amendments first, that would be helpful.

Submissions by MS SMITH

MS SMITH: I will put my top hat on and get going as ring master.

On the amendments, I did have a very short word with Mr Kennelly before we sat down.

It might very well be, if not the amendments but at least the list of issues, we can resolve matters, but if you could allow us perhaps to discuss that either at lunchtime or after court this afternoon, we can update you, I hope, on that.

MR JUSTICE MARCUS SMITH: That seems very sensible.

What we thought was we would leave the list of issues itself to the end and maybe reserve time from 3.00PM tomorrow to deal with those, because it is really the tectonic plates of the pass-on area that we wanted to devote the lion's share of our time to.

MS SMITH: I think the list of issues and the amendments do overlap, so perhaps if we can deal with them all together, that might be sensible.

MR JUSTICE MARCUS SMITH: Thank you.

MS SMITH: Thank you, then, sir.

I was proposing to start by addressing the note that the Tribunal sent us on Friday -- all the parties, on Friday afternoon; then I will move on to what we agree is the difficult but important question of law, which we have asked the Tribunal to determine today, or after this hearing, as to what pass-on actually requires to be proven.

If I can start by addressing the note that was sent by the Tribunal to us on Friday

afternoon, raising a number of extremely important and extremely difficult issues, if I may put it that way.

At the centre of the note, as we understood it, is the Tribunal, I think, questioning the bilateral model approach to assessing pass-on in particular.

We have agonised over this quite philosophical question, at the end of the day, certainly a policy question, I think, and I will explain why.

The note -- and we have come to the conclusion that the note states that the bilateral model is the orthodox approach.

Absolutely that is the case.

However, we have come to the conclusion, perhaps regrettably, that we are of the view that it is not only the orthodox, but the only approach open to the Tribunal in determining these claims.

And I will explain why we have reached that conclusion, if I may.

In common with any court in this jurisdiction, the Tribunal of course has the function and the sole function of adjudicating on claims that have been brought before it.

And it goes without saying of course that the Tribunal doesn't have jurisdiction to adjudicate claims which are not before it.

More specifically, the Tribunal is a creature of statute, whose powers are delineated, as you are more than aware, by the statutory framework set out in the Enterprise Act 2002 and the Competition Act 1998.

And I can take you to these if you want, my Lord, but I am sure you are fully aware of the provisions of the Competition Act in particular, which are in authorities bundle 4, tab 23.

You will be very familiar with section -- the jurisdiction of the Tribunal is found in two -- in these sections solely of the Competition Act, and tab 23,

page 1625 -- sorry, we will start with 1622 -- section 47A of the Competition Act gives the person a right to make a claim before the Tribunal for loss or damage arising out of an infringement of the Chapter I or Chapter II prohibition.

That is the right that is afforded to individuals by this Act, and the flipside of that is the Tribunal has jurisdiction to hear those claims, and only such claims.

Section 47B, which is on page 1625, sets out the provisions that allow for collective proceedings.

You will be very familiar with those, I am sure, sir.

Again, those collective proceedings are only proceedings which are brought under section 47A, but collected together.

So again, the subject matter is only limited to what is in section 47A, but they may be made in collective proceedings.

Section 47B(12), there is specific provision in the Act there for judgments in collective proceedings to be binding on all the persons who are represented.

Of course judgments in individual proceedings are not binding, and that goes again without saying.

What also is important, we say -- and I hope this has now been inserted into your bundle at 1628.1 -- it is also important to look at section -- for a number of the points I am going to make this morning, to look at section 47C about collective proceedings.

Section 47C(2) makes a fundamental modification to the normal approach that the Tribunal or any court can take in individual proceedings, for the purposes of collective proceedings.

That key modification is that the Tribunal may in collective proceedings, but in collective proceedings only:

"... make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person."

The Supreme Court said in *Merricks*, recognised in the *Merricks* -- its *Merricks* judgment, that, "radically modified" the compensatory principle, but only for the purposes of collective proceedings.

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: Then the powers as to who should be paid damages in this context are set out in the following subparagraphs -- subclauses of section 47C.

So for collective proceedings, but only for collective proceedings, you have a very precise regime which is a creature of statute.

And unless you fall within that regime, which is controlled by this Tribunal through the need to grant a CPO, your individual claims fall to be determined in accordance with normal principles.

So in other words, the Tribunal has the power to resolve individual disputes between parties which have brought claims, and which are before it -- and which are represented before it.

So again, it goes, I think, without saying, that the potential non-consumer claimants, as they are described in the Tribunal's notes, are not before the Tribunal, have not brought claims and may never do so.

The only claims before the Tribunal are a number of individual claims brought by a large number, but a very limited number in context of the UK economy as a whole; a number of individual claims brought by merchants, on the one hand, and consumer collective proceedings, on the other.

This is not a situation where we have a number of represented direct purchasers and a number of represented indirect purchasers.

It is different, even though the collective proceedings are brought on behalf of indirect purchasers, because a fundamental difference which is between the claims before the Tribunal and represented today, are that they are individual claims on the part of the merchants, a number of them brought separately, and one collective proceedings action on behalf of consumers.

And that collective proceedings action is brought under a wholly different regime, subject to completely different rules, particularly as regards assessment of damages, than the claims brought by the individual merchants are.

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: So it is not irrelevant, but it is not the most fundamental difference between the claims before you, that the consumers are further down the supply chain than the merchants.

The fundamental difference is the nature of the claims, and how they are run and how they are regulated under the statutory regime, in my submission.

MR JUSTICE MARCUS SMITH: Indeed, and it may make it more complicated or it may make things easier, but as I understand it, as matters stand, there is no overlap between the retailer claims and the consumer claims, at least as the sections are presently constituted, although we are talking about different periods of time.

So one point, perhaps, in your favour is that the need to bring everything under one roof is less clear because you can say: well, frankly, we have got two periods, and actually the claimants are each claiming in respect of different periods.

MS SMITH: My Lord, that's correct.

They are each claiming in respect of different periods.

And if I can develop that point.

But I do stand by -- the main distinction is the different statutory regimes, which you

may say causes problems, but that is the legislation we have to grapple with -- or the legislative statutory regime we have to grapple with --

MR JUSTICE MARCUS SMITH: Yes, out of interest -- I mean, I am sure there is an easy answer to this, but if you can give us an insight -- why have the retailers eschewed the collective regime?

Why have they not gone for collective action rather than individual matters?

MS SMITH: I am not sure I can give an answer.

It may very well be different for every individual retailer who has instructed solicitors to represent them.

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: I am afraid I can't answer that.

MR JUSTICE MARCUS SMITH: No, okay.

MS SMITH: As I said, though, if I could just develop the point helpfully made by you, sir, that the claims brought by merchants -- and of course those are my clients and my claims -- or a number of the claims and some of my clients -- some claims before you today -- as regards the individual merchant proceedings, it is of course open to the Tribunal to manage the claims that are before it in innovative, effective and efficient ways.

But looking at the case, the claims before the Tribunal -- I think this is the point you were making, sir -- unfortunately, they are not pieces of a jigsaw that can be fitted neatly together.

First -- and we often seem to forget this -- but first, the collective proceedings are only against Mastercard, they are not even against Visa.

So Visa are not even subject to any collective proceedings at the moment.

Second, I have already highlighted the fundamentally different legal tests which the Tribunal is required to apply under section 47A and 47B of the

Competition Act to the assessment of damages in the collective proceedings, as opposed to the test in the individual merchant claims.

That is a second fundamental difference.

The third is the point, sir, that you have already also picked up, the sets of claims do not overlap on a temporal basis.

They relate to different periods of time.

I think the collective proceedings relate to a period from 1992 to 2008, while our merchant claims, which I can speak about, at the very least to go back no earlier than August 2010.

It is also important, I think, for the Tribunal to bear in mind that any further claims for the period covered by the collective proceedings are now, in any event, time-barred.

So we are not going to be facing any proceedings for the period covered by the collective proceedings.

I understand, but again, this is simply on instruction and I cannot be 100 per cent sure that the vast majority of claims brought by merchants for the period 1992 to 2008 have now been settled.

I can't be absolutely sure that 100 per cent have been settled, but I know for a fact that a substantial number have been settled.

I think that is common knowledge, the cases that were meant to be heard in front of the Tribunal, for example, Sainsbury's, have been settled.

A fourth point of difference -- and again, this is quite an important point of difference -- is that Mr Merricks is claiming for loss on behalf of all consumers who made purchases in the relevant time period across the whole of the UK economy.

My merchant claims relate to a tiny fraction of merchants operating in the UK.

Although there are a large number of individual claimants, they are a tiny fraction of merchants claiming in the UK, but also claims are made for losses incurred outside the UK.

And you will have seen from the list of issues various claims are made relating to MIFs imposed outside the UK and other countries in Europe.

So the merchant claims are both wider and narrower than the collective proceedings.

So they -- the claims that are currently before the Tribunal don't concern at all the same unlawful overcharge, or the same unlawful cost that you have described in the note.

So in our submission, for that reason alone, I am afraid, the approaches canvassed in paragraph 7 and paragraph 8 of your note just can't work.

But to make some further points on those proposals, the proposal in paragraph 7 is that the person highest in the supply chain could bring a claim on behalf of themselves and all persons to whom the unlawful costs may have been passed on.

Now, as the Tribunal recognises in the note, fairly, it is difficult to see how such a claim could be configured without agreement between everyone concerned.

And quite apart from the, I would say, insurmountable difficulties of getting the agreement of everyone who is now concerned, or may in future be concerned as yet unidentified, speaking just for my clients -- and I have to be frank -- my clients have brought claims on their own behalf and, with respect, they are entitled to have those claims resolved by the Tribunal.

I don't understand the Tribunal to be proposing this, but of course it cannot compel my clients to, for example, effectively act on trust for others, and frankly it wouldn't be in their interests to do so.

But also importantly, even if they were prepared to do so, there is no substantive

regime that could govern such a fiduciary relationship that, effectively, they would be taking on for others down the chain.

So we do see real difficulties in that proposal.

The proposal in paragraph 8 is that the Tribunal could go about establishing and quantifying the unlawful cost if -- as I have said, I don't believe is the case -- but if there were a common unlawful cost, which should be paid into a fund with rival claimants then entitled to argue about their respected entitlements to the fund.

That proposal, as I have already said, runs up against the problem that, at least in the claims that are currently before the Tribunal, they don't concern the same unlawful cost at all.

In any event, again, there is no substantive regime to govern how such a fund might be established; how it might be held or by whom; how it might be administered.

And as things currently stand, I am afraid the Tribunal just doesn't have the powers to do any of those things or to create one.

Again, I do want and need to make the point that, in our submission, this sort of approach would lead to inordinate delay and cost for my clients, who again, with respect, have brought claims which they are entitled to have adjudicated.

So in conclusion, in our submission, the Tribunal cannot reasonably hope to, and simply doesn't have the tools available to it, to enable it to resolve the complex passing-on questions set out or the complex issues set out in that note.

Such questions can only be resolved at that sort of level by policy action, such as that taken by the US Supreme Court in *Hanover Shoe*, which as recognised in the note, is emphatically not open to any court in this jurisdiction; or it may be

open to regulators, who with respect, play a different role from that of the Tribunal, to an industry regulator, who may have powers in certain industries to take a more holistic approach.

But again, it is not -- the Tribunal doesn't have the tools to enable it to do that.

It may be open to the legislature to take such innovations, such as they did with the class action regime.

But in our submission, it is not open to the court and to the Tribunal in these cases in particular, to -- it just is not able to deal with the issues at that holistic level.

Instead, in our submission, the Tribunal has to do the best it can to resolve the claims before it in the most efficient way.

MR JUSTICE MARCUS SMITH: Ms Smith, you are making two points, I think.

One is that if this were a different world, one might be able to configure these claims differently.

And you are making the entirely fair point -- I think it is probably right -- that first of all, we don't have the tools to do the job anyway; and to the extent that we do have the tools -- I am thinking here of the collective action regime -- we cannot compel a claimant to forsake the individual claim for the advantages, if there are such, of a collective action.

So taking that as your first point, that there are simply some things that we cannot do.

The second point I think you are making, which I want to push back on a little, is whether these are complex questions which would take too long to resolve because what struck me when we were thinking about the variant in paragraph 7 and paragraph 8, was that assuming -- a big assumption -- we had the power, this was actually quite an efficient way of resolving fairly the issues that arise here.

Let me just unpack that a little bit, so that you can tell me just how wrong I am.

What we have here is, assuming an unlawful overcharge or an unlawful cost, really, once that cost has been identified, ***prima facie***, it ought to be paid to someone.

The question is: to whom?

And what you are saying, I think, is that we don't really need to trouble ourselves with anyone other than the persons who are before the court articulating a claim to damages.

And my question is: how far can that be right, given that our fundamental duty is to ensure that there is neither over nor undercompensation and fair compensation by reference to the persons who ought best -- or ought to be entitled to receive the damages because they have in fact borne the unlawful cost?

Now, if that is the holy grail of what we want to achieve, surely even when one is considering the claim of a single retailer, one needs to bear in mind the other moving parts in the market; in other words, one needs to work out whether there is a pass-on in the category 4 case, but equally, one needs to work out whether there is a pass-on in the category 3 case, even if there is no claimant class there, because if we don't take it into account, you are getting overcompensated.

So one of the advantages, as we see it, of the holistic approach is we get the benefit of everyone's submissions on how, in generic terms, the pass-through operates.

So we can hear from Visa, Mastercard, to say: look, if we have to pay damages to anyone -- and we don't want to pay damages to anyone -- but if we do, then this is the route by which they move to a particular class; and if that particular

class isn't actually articulating a claim, well then, we don't pay.

You have got to say: well, yes, the claimant -- for you at the moment, is the retailer class.

But we can't simply focus -- or can we -- on your claimants; surely we need to look at the whole picture, given that it is, I think, accepted that if there is a -- if there is an overcharge that is unlawful, it is transmitted to some group of people somewhere in the market.

MS SMITH: That may be the crunch, my Lord.

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: If I can address the two points you made.

On the first point about no compulsion to join a collective proceeding -- absolutely that is the case and it is absolutely baked into the collective proceedings regime -- you don't need to be reminded of the provisions of section 47B(3)(c), which explicitly says:

"... proceedings under section 47A may be continued in collective proceedings only with the consent of the person who made that claim ..."

And also for opt in/opt out proceedings, again baked into the regime is the possibility for individuals to opt out of those proceedings.

So the whole regime recognises that there has to be the possibility -- there has to be no compulsion and there has to be the possibility of individual cases basically running alongside a collective proceedings action.

That may cause very real difficulties, but that is the statutory regime.

As to the second point that you made, my Lord, about an efficient process and the note in paragraphs 7 and 8 in particular, whether it may be or whether we can develop an efficient process for identifying the cost that ***prima facie*** ought to be paid by the schemes, in my submission the Tribunal can and should, on

the basis of where we have been working for the last couple of months, get very far down the road in answering that question, in identifying what ***prima facie*** ought to be paid, if it ought to be paid.

And there is a step-by-step process, which you have identified at the last hearing, which we are now engaged in setting in train.

How do you get to the stage of identifying the ***prima facie*** unlawful overcharge?

The first step is the article 101(1) issues, which we hope the Court of Appeal will resolve, or at least they will be resolved first; then there are the article 101(3) issues, which, again, can be resolved at more of a holistic level, on the basis of the tests set out by the Supreme Court; then, on the judgment of the Supreme Court, if we can overcome both of those hurdles, we do have what the Supreme Court explicitly described as the ***prima facie*** loss, which is the overcharge in the MSC.

So we have got to the stage of identifying the ***prima facie*** loss.

Then -- and this is what I said is the crunch question, my Lord -- there is a very difficult question of law as to what is the test to be applied as a matter of law at that stage to determine what the claimants in any case, whether they have mitigated their loss.

And I put it that way because that is the question of law.

The question of economics, which, with respect, I think underlies the note we received from the Tribunal, is that from an economics point of view, there may be an assumption that, at some stage, things will be passed on.

But we say that is not an assumption that can be made as a matter of law.

There is a very different approach identified in the common law, reinforced, adopted and -- adopted by the Supreme Court.

The Supreme Court did not say: well, because we are dealing with competition

where there are economic issues, we are going to take a very different approach to the question of mitigation pass-on.

And I will come to develop these points, but the Supreme Court made it very clear pass-on is simply a species of mitigation.

Because it is also an economic issue, which might be dealt with in a different way as a matter of economics, it is a species of mitigation under English law.

And therefore, in determining how the court, as a matter of law, should approach the question of pass-on, we look at many decades, if not centuries, of law, common law on tortious litigation and the principles to be applied to that.

That is the first question, again, I think at a sort of holistic level, that the court needs to determine.

And then you have got quite far down the line of identifying ***prima facie***, the loss, or the money that ought to be paid by the schemes and the tests that are to be applied.

Then, having determined that question, which we will ask the court to determine after this hearing, on the back of what is said in this hearing, then the question is how should you approach matters, as a matter of evidence, and also whether you can approach matters on a category-by-category basis or more of a sector basis.

We say -- and I will come on to explain why -- that our approach is not the granular approach that you perhaps identified in your opening comments, my Lord, that there is a question between our granular approach and their common issue sector approach, and if you go with our granular approach, it is not feasible to take a common issue approach to these proceedings.

You have to, in effect, hear every claim, claim by claim.

We don't say that, and we have proposed what we think is a practical way of

ensuring that there are sample claimants from categories where the decision on the sample claimants can be binding.

And I will explain why -- I hope we have set out in our submissions why, but I can develop those points.

So it is not a question between granular, thousands of claims, each of which has to be determined individually, and sectoral, on the other hand. It is a question, we say, that the issues, if you answer the legal threshold question of what mitigating action has to be taken by the claimants in order to establish pass-on, it is a question that has to be determined on facts.

But it is a question that can be determined in a way that will enable there to be binding decisions that could be applied, so that we don't have to have thousands of individual claims.

MR JUSTICE MARCUS SMITH: Just to be clear, and just to ensure that Ms Wakefield can assist us properly, suppose we had a precise identity of period and claim, such that your retailer claimants and Ms Wakefield's consumer claimants were actually chasing the same overcharge, the same unlawful overcharge, there might be a difference in terms of the amount that you were claiming, because the retailer is a smaller group than the consumer group.

But I don't think that matters.

Your position is that in order to succeed, Ms Wakefield's clients would have to show that the ***prima facie*** loss sustained by your clients was in fact mitigated by the pass-on, and that would be a burden that they would have to assume -- I mean, not Mastercard or Visa, but Ms Wakefield.

MS SMITH: My initial response to that, my Lord, is they would have to prove their loss, obviously.

And that if we are correct -- although I have to think through the implications -- if we are correct, which I say we are, obviously, one has to apply a test of mitigation.

I think I am --

MR JUSTICE MARCUS SMITH: Sorry, I was interrupting.

MS SMITH: I think I may have to think through the implications of that because I think that probably is right.

But it is -- yes.

It is a hypothetical which I have not had to consider.

So it is -- because this is not the position that is in front of your Lordship.

MR JUSTICE MARCUS SMITH: It isn't, no, but I think I ought to be clear it is a question that I am going to be asking everyone because I think there are going to be radically different responses.

Ms Wakefield, I anticipate, is going to be saying that the burden is not so great on her clients, and Mr Rabinowitz and Mr Cook are going to be saying that seems like a recipe for double payment, if you have different tests for where the layers go.

MS WAKEFIELD: I don't know if I can assist.

I think, all of us, certainly Visa and we think, that what is sauce for the goose is sauce for the gander, it is the same test for both, but where we differ from Ms Smith is where the test is.

But were she to be right as a matter of law that it is necessary to prove on a merchant-by-merchant basis, in which you have a meeting where you ask yourself: oh look, there is a MIF, what am I going to do about it?

We say it would be right that I, too, need to meet that test for legal causation, but we just say the test is wrong.

MR JUSTICE MARCUS SMITH: That is the point, isn't it, because the nature of the test exerts a massive gravitational pull on where the damages exist?

MS WAKEFIELD: It does, my Lord.

MR JUSTICE MARCUS SMITH: So in a sense, what I am seeking to unpack is the burdens that Ms Kassie Smith's formulation would impose on those lower down the line.

MS WAKEFIELD: Would she be right, I would bear a very heavy burden.

MR JUSTICE MARCUS SMITH: Yes, and I don't think we are going to be arguing about the same test applying across the board.

I mean, it would be, frankly, absurd if we had a recipe for overcompensation, but it does seem to us that to ask the question of what would happen if one had a hypothetical consumer claim and maybe no retailer claim, you would be saying: well, actually, the hurdles to recovery, if you adopt a certain form of test, will be immense.

MS SMITH: My Lord, my hesitation -- and perhaps I can make this clear -- my hesitation, I don't obviously -- I see the force in the point of sauce for the goose is sauce for the gander, but unfortunately the goose and the gander in these claims, even if we were looking at the same temporal period, they are in entirely different positions, and that is because of the different test for assessment of damages which is given to the -- collective proceedings regime as set out in 47C(2), is that the burden on claimants, the representative claimant under a collective proceeding is that they are able to take an aggregated approach to damages, and one has to think through the implications of that in answering the question.

So it is not a -- despite the faces that are being pulled on the other side, it is not a simple question that the same rules necessarily apply -- so that's why I need

to think about it, because obviously my claimants -- clients obviously do not have a common claim or even for the same overcharge as Ms Wakefield's clients.

So that is not an issue which we say we need to consider.

But on the hypothetical, it is not us simply saying the same claims are passed down the chain, because the same regime is not applied when we are not, as I said before, we are not just simply thinking about individual -- under the general rules, individual claims by merchants, individual claims by consumers, for example, we are talking about a collective proceeding where different rules are applied to the assessment of damages.

MR JUSTICE MARCUS SMITH: Ms Smith, that is a very important point.

MS SMITH: Yes.

MR JUSTICE MARCUS SMITH: But I think it is probably important that I articulate how I read 47C(2) because if I am reading it wrong, I will want to be corrected.

As I understand that provision, is that it absolves, or doesn't require the court to compute the aliquot of damages to individual members in the class.

So if one has got a class of 1 to 10 million, one can test damages on the 10 million level, rather than the 1 to 10 million level and one doesn't need to work out just how many of Ms Wakefield's clients were buying marked up bananas versus marked up Mars Bars.

So that problem is eliminated and that is what the Supreme Court in *Merricks* decided, overruling this Tribunal which took a different approach.

But I don't understand that one can be absolved by section 47C(2) from properly assessing the overall claim; in other words, I don't think 47C(2) gets the consumer class a different test, so far as the amount of overcharge that had trickled down to that class is concerned.

And there, my initial take, but I raise it so I can be corrected, is that exactly the same rules apply.

I raise that for you to push back on --

MS SMITH: And if I may, I will come back to that.

MR JUSTICE MARCUS SMITH: Please do.

MS SMITH: I mean, it is absolutely clear, in our submission, that in the *Forex* proceedings, in *O'Higgins* and in the Supreme Court in *Merricks*, clearly the Tribunal and the Supreme Court held that the collective action regime does afford the representative claimant.

And it may be that the Tribunal can deal -- it gives them novel ways to deal with a market claim that might not be open to us as individuals.

And the implications of that, we do say that the test to be applied is one of mitigation rather than economic pass-on, to put it crudely.

However, whether that -- how that works for a collective proceedings action may be different.

I don't think it is different in that the same test is to be applied, but how that test is to be proven and the evidence that could be put forward by a representative claimant may be different.

But I need to think through the implications of that because I am not sure that it is said the fundamental legal test for mitigation will be different; it just may be that the means by which that is to be proven has to be different -- can be different in collective proceedings than it would be in individual proceedings.

MR TIDSWELL: While you are thinking about that, if I may add one other point to it.

You have identified in your submissions the difference between legal causation and factual causation, and so we recognise on your argument that there could be a situation where it is accepted that the cost has been passed on, but

mitigation doesn't arise.

Now, that, presumably, creates a very difficult position for the consumer who is then concerned -- it has paid the cost, but is still faced with the fact that the causation -- the mitigation has been made out.

Have I confused the position rather than assisted, perhaps?

MS SMITH: I am not sure what you mean -- with the greatest respect, sir, what you mean in that situation -- that it has been accepted that pass-on has occurred, because this goes to the very fundamental question of what needs to be proven as a matter of law.

You know, is that by looking at economic modelling, you think that the pass-on of other different costs might mean that the MIFs are passed on, or are you saying that, as a matter of law, legal or proximate causation has been proven?

MR TIDSWELL: I think I am saying if you, say, reach the conclusion that a retailer had -- had not had any regard to the MIF, and so as a consequence of that legal causation would have failed, on your argument, in which case the retailer is able to maintain a claim for the whole amount, but if, as a matter of fact, we know that the cost was passed on, because factual causation would have been passed, then you have got the potential for quite serious double recovery, haven't you?

MS SMITH: Well, in that situation again, it is very unclear to know what cost was passed on.

Are we then going back to a question of -- you look at -- which the Supreme Court rejected -- you look at the question of profitability of a merchant and if the merchant has covered their costs, become no less profitable or perhaps a little bit profitable, less profitable, that is evidence of pass-on.

That is the problem because the Supreme Court made it clear that it is not a question of -- it is, first, not a question of saying, you know, if a merchant is profitable and both Visa and Mastercard -- no one suggests that they can simply say: well, a profitable merchant covers all its costs, therefore pass-on.

Also the Supreme Court made it absolutely clear that a reduction in profits does not prove pass-on.

That is not the claim you are making.

So it is a question of mitigation.

So in that situation, accepting, as a matter of fact that pass-on has happened, is difficult because the only way we have been told that you can do that is by economic modelling of other costs, and that tells you nothing.

MR TIDSWELL: Let's take another example.

I think the position of a retailer setting prices by reference to what other retailers have set their prices is discussed in the economic evidence.

And I think, as I understand it, you would say that that does not pass the legal causation test because that is not a conscious act by the retailer to deal with the problem of the net cost, and therefore is not sufficiently proximate.

But if that were the case, then it would be very likely that by setting their prices -- and if the other retailers were setting their prices by reference to the enhanced cost, then in effect the cost is being passed on, the consumer certainly would be entitled to say: hang on, actually this cost has come through to me, not just through those who were setting their cost by reference to how the method also to the retailing was regional -- so a bit like the umbrella item, doesn't it?

MS SMITH: It is very difficult to answer that sort of question without descending into the facts because our case will be -- and on the basis of material that I have seen so far -- is that if, for example, a hotel chain sets its prices by reference

to its competitors' costs, it will be within that market sector, within that industry sector.

They don't look at the price of something completely different to set their costs, they look at the price of hotel rooms to set their costs.

No one in that sector -- there is no one in that sector who does this very unreal, we would say, pricing where you tot up all your costs and add 5 per cent on top, and every time your costs change, you change what the 5 per cent is applied to.

There is no one in that sector who prices like that, and then there may never be a question of factual pass-on, just because you have priced your -- you, personally, may not have looked at the MSC, but no one else may have looked at the MSC in that sector, either.

So these are not simple questions that say you can, obviously, have pass-on in a situation where you are not going to have legal pass-on -- factual causation in a situation where you are not going to have legal causation.

I don't say this is easy, but I do say that it is what the Supreme Court held, and the Supreme Court did not hold that because this is competition law, we somehow go and take a different approach to the question of mitigation.

The Supreme Court made that absolutely clear, in my submission, in its judgment.

The Supreme Court did not have in front of it the question that you are now having to grapple with.

It was looking at a slightly different point, so it may not have articulated the point in the detail that we now need it to be articulated.

But certainly the implications of the Supreme Court's approach, in my submission, is that it did say the standard common law approach to mitigation is the approach that you need to take in these cases, where you are claiming on the

back of tort, for tortious damages, just as you would take in any other tortious claim.

And if I may develop that point because I totally accept that it leads to -- has implications, but I think it also, I am afraid, is correct as a matter of law.

That, my Lord, is the threshold legal question that we ask the Tribunal to grapple with.

And it is our case, as you have identified, that it is only where a claimant has specifically acted in response to the unlawful overcharge, when setting its prices to customers, that it can be said to have acted so as to mitigate its costs by, in this case, passing on some of that loss to its customers.

I may, if I could, outline our case in summary as to why we say this is the correct position, as a matter of law, and then I will take you to relevant authorities to make it good.

There is quite a lot of common ground between us and the schemes.

I think it is uncontroversial that -- again, this is made clear by the Supreme Court -- it is uncontroversial first that if an infringement of article 101 is established, a merchant is ***prima facie*** entitled to the loss that has resulted from a breach of competition by the schemes, and that loss -- I think it is also uncontroversial -- is equivalent to the overcharge on the MSC, the merchant service charge.

Insofar as you need authority for that, it is paragraphs 199 and 206 of the *Sainsbury's* Supreme Court judgment, which is -- we may as well have it open -- it is authorities 3, tab 13.

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: In paragraph 199 of the Supreme Court's judgment, you will see it says:

"We are satisfied the merchants are correct in their submissions that they are entitled

to plead as the ***prima facie*** measure of their loss, the pecuniary loss, measured by the overcharge in the MSC and they do not have to plead and prove a consequential loss of profit."

That is the point I was making: it is about the ***prima facie*** measure of loss is the overcharge, it is not a loss of profit.

And while we are there, if I could just ask you also to look at paragraph 200:

"If a claimant suffers damage to property, such as a vehicle or ship as a result of the tortious actions of a defendant, it can claim as damages the diminution in value of the damaged property, usually measured by the cost of repairing the property, and consequential loss… without having to show that that expenditure diminished its overall profitability."

That's the point I was making: it is not a question of diminishing overall profitability, as has been suggested at one or two points mentioned in Visa's submissions, at the very least.

It is not a question of rendering a merchant unprofitable or even reducing the merchant's profitability -- that has to be proven, it is about the ***prima facie*** measure of loss that is the overcharge.

You start with that and then you move to mitigation.

While I am here, 206 as well:

"In our view the merchants are entitled to claim the overcharge on the MSC as the prime facie measure of their loss.

"But if there is evidence that they have adopted either option (iii) or (iv), or a combination of both to any extent, the compensatory principle mandates the court to take account of their effect and there will be a question of mitigation of loss, to which we now turn."

So the ***prima facie*** measure of damages is the overcharge.

You start with that, which you will have got to by the point, we hope, we have got to part (3) 101 -- 101(3).

There is the overcharge, and then it's a question of mitigation.

What is extremely important, in my submission, is what the Supreme Court then does is deals with this issue of pass-on, which I would like to get away from because it has a massive -- it is a very loaded term and it leads to the questions about economics, *et cetera*, *et cetera*, but the Supreme Court made it absolutely clear that what it was talking about is the overcharges**,** ***prima facie*** measure of loss.

Then we get on to the question of mitigation, and when it got on to the question of mitigation, the Supreme Court looked at decades of existing case law on mitigation, on the common law rules on mitigation, and it applied those rules.

Now, again, I don't think this is controversial, both Visa, in their skeleton at paragraph 11, and Mastercard, in their skeleton at paragraph 47, accept that pass-on, in quotation marks, is a form of mitigation and that what we are looking at is mitigation.

And it is also accepted by them that, for the purposes of mitigation of loss, a defendant has to prove both legal causation and factual causation.

It is not sufficient for the defendant to prove a but-for causal link.

It is not sufficient to simply present counterfactual evidence.

That goes to factual causation.

It is necessary, but not sufficient.

What is necessary is also to prove legal causation, before you get to the question of the but-for causal link, the factual causation.

That is made absolutely clear in the -- again, I don't think it is controversial, but insofar as you need authority for that, we referred the Tribunal in our skeleton

argument to the Court of Appeal judgment -- obviously, these issues have been addressed -- by the higher courts – in the Court of Appeal judgment in *AssetCo Plc v Grant Thornton*, which is in the authorities bundle 2, tab 11, page 925.

MR JUSTICE MARCUS SMITH: Sorry, which page?

MS SMITH: 925 on the bundle page numbering, internal page numbering 2518, paragraph 895.

Paragraph 895.

We quoted this in our skeleton, but I think it is important and it bears repetition:

"Thirdly, it is not sufficient for the defendant to prove a but-for causal link between its negligence and the mitigating act ..."

And then they quote from McGregor on Damages:

"There is some underlying unity in the three sub-rules of litigation in the notion of factual causation, but factual causation is not sufficient. Legal causation is also required."

And this has been expressed, before I read on, in slightly different ways in the three sub-rules of mitigation, but the one that we are concerned with in this case as the Supreme Court recognised in *Sainsbury's*, is the *British Westinghouse*-type of mitigation, which is avoidance of loss.

And in that sub-category, as the Court of Appeal says here:

"This has been expressed as requiring the mitigating act to have arisen out of the transaction giving rise to the claim, *British Westinghouse* and *Elena D'Amico* ..."

And then other -- or have flowed as part of the transaction, as part of a continuous transaction from the negligence.

And then slightly different formulations of the test for legal causation have been set

out in the other sub-rules of mitigation, obtaining a benefit, *et cetera*.

But the sub-rule of mitigation that we are concerned with here is whether merchants have avoided their loss.

And if you shut authorities bundle 2, the AssetCo case, and go back to the *Sainsbury's* judgment above, the Supreme Court, that is absolutely clear when you look at paragraph 215 of the Supreme Court's judgment.

As I said, the sub-rule of mitigation which arises in pass-on cases, such as those in front of the Tribunal now, is whether the merchants have avoided their loss.

And you will see in paragraph 215:

"We are not concerned in these appeals with additional benefits resulting from a victim's response to a wrong which was an independent commercial decision…[fault in the shipping case] ...or with any allegation of a failure to take reasonable commercial steps in response to a loss. The issue of mitigation which arises is whether in fact the merchants have avoided all or part of their losses."

Then they refer to the classic case of *British Westinghouse* in which:

"... Viscount Haldane described the principle that a claimant cannot recover for avoided loss in these terms: when in the course of his business the claimant has taken action arising out of the transaction which action has diminished his loss,the effect in actual diminution of the loss he has suffered may be taken into account."

The Supreme Court said:

"Here also a question of legal or proximate causation arises, as the underlined words show."

And then the statement of the Supreme Court which Visa and Mastercard rely upon, which I will come back to, the question of legal causation is straightforward in

the context of a retail business, *et cetera*.

Before I get on to addressing that point about the question of legal causation being straightforward, can I make the following submissions on the test?

There is, clearly, there set out in the Supreme Court and *Sainsbury's*:

this is not a test that the Supreme Court has developed for itself, it is a test that it applies and has resulted from over 100 years of common law case law.

So we see there the reference to the *British Westinghouse* judgment and the judgment of Viscount Haldane.

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: It is important, I think, to break down the question of legal causation to the number of elements that are set out in that statement.

First, the action has to be taken in the course of business; second, there has to be a positive action taken; and thirdly, that action has to arise out of the transaction giving rise to the claim.

MR JUSTICE MARCUS SMITH: What is the transaction in these cases?

MS SMITH: The transaction giving rise to the claim is the imposition of the overcharge, in my submission.

That is -- "transaction" is an unfortunate statement here because what we were dealing with here was a contract claim in *British Westinghouse*.

But there is no dispute that the *British Westinghouse* judgment has been applied subsequently, on a vast number of occasions to negligence cases, to tortious claims, and so there is no transaction in the sense of there being a contract which has been breached.

MR JUSTICE MARCUS SMITH: I am sure no one is taking that point -- thank you for pointing that out.

MS SMITH: In my submission, the transaction, for want of a better word, is the

breach of contract, which is the breach, or the tortious act, and in my submission, the tortious act in this case is the imposition of an overcharge which is unlawful.

MR JUSTICE MARCUS SMITH: Right.

MS SMITH: That is the tortious act, the imposition of an unlawful overcharge.

MR JUSTICE MARCUS SMITH: How exactly does the overcharge impact upon the retailer?

I mean, do you need to understand -- let's use the word "transaction", but we will use it widely -- do we need to understand precisely how that overcharge has been paid by the retailer?

MS SMITH: What we need to understand is what, if any, action has been taken by the retailer in response to the unlawful imposition of the overcharge.

MR JUSTICE MARCUS SMITH: In order to understand the reaction, surely we need to know the action?

It is a reaction, after all.

MS SMITH: Yes.

MR JUSTICE MARCUS SMITH: So what is it that we are zoning in on?

MS SMITH: I may be missing the point, but the action is the imposition of the overcharge.

MR JUSTICE MARCUS SMITH: Well, I know, but --

MS SMITH: Yes, it's the imposition of the MSC -- it's the charging of the MSC which contains an element which is unlawful.

MR JUSTICE MARCUS SMITH: Right, and the MSC is done on an *ad valorem* basis *per se*; is that right?

MS SMITH: No.

MR JUSTICE MARCUS SMITH: How is it done?

MS SMITH: Sometimes it is a MIF plus; sometimes it is a blended rate, which I think is charged as a pence amount per transaction; sometimes it is *ad valorem*.

MR JUSTICE MARCUS SMITH: But is it always triggered by a transaction?

MS SMITH: The liability to pay the MSC arises as a result of a transaction, as in a sale by the retailer; that is the liability to pay.

And the sum, which is then charged -- well, I am not sure whether the liability to pay does arise on that transaction.

The sum that is charged is calculated by reference to the number of transactions; whether the liability to pay then arises when the scheme bills the retailer at the end of each month, I am not entirely sure and I would have to look at that.

MR JUSTICE MARCUS SMITH: You see the reason -- there are two reasons why I am pressing you on this.

First of all, it does seem to me that the *Westinghouse* test is focusing very clearly on an action, as you say, arising out of the transaction.

Unless one understands with absolute clarity what the transaction is -- and I am willing to treat it as a very broad church -- you can have it as an extremely broad church, but we do need to know what we are talking about here, so you need to articulate that first.

MS SMITH: My Lord, I think I can articulate that -- and maybe I am getting sidetracked on questions of when does the legal obligation to pay arise.

The transaction that we focus on is the charging of the MSC by the acquirer to the merchant.

As I understand it, that happens, generally, once a month.

I don't want to make factual submissions on exactly how the billing is done, but it is the charging of the MSC to the merchant by the acquirer.

Because the charging of the MSC itself is not the tortious act, obviously, it is the

element within the MSC which is the overcharge -- the overcharge on the MSC, as the Supreme Court puts it.

That is the -- the overcharge on the MSC is the ***prima facie*** measure of loss.

The question is whether one has -- the retailer has mitigated that loss by taking action in response to the transaction, the charging of the MSC, which contains the unlawful overcharge, because the unlawful overcharge cannot be as a matter of fact -- it is contained and always contained within the MSC.

MR JUSTICE MARCUS SMITH: Okay.

And then related to that -- and very much unsaid in *Sainsbury's*, but I think because of the factual constellation of *Sainsbury's* at first instance, there was no debate about pass-on by the merchant services providers --

MS SMITH: The acquirers, yes.

MR JUSTICE MARCUS SMITH: -- to the merchant in that case.

MS SMITH: No.

MR JUSTICE MARCUS SMITH: As I understand it, that is not necessarily the case in these matters.

MS SMITH: No.

MR JUSTICE MARCUS SMITH: But presumably, you would accept that you are going to have to show that the merchant services provider mitigated its loss in the way that you haven't mitigated your loss.

MS SMITH: Yes.

Yes, my Lord, we don't resile from that.

MR JUSTICE MARCUS SMITH: Right.

MS SMITH: Despite what Mastercard may have hoped or indicated in their skeleton, we don't resile from that, and we are aware of the implications from that.

So yes, we do, my Lord.

It becomes more of an issue here because of the point made -- taken against us by Mastercard that pass-on between the acquirer and the merchant is not as clear as it was in the Supreme Court case.

The cases that the Supreme Court were considering, that will, with respect, I hope, my Lord, be a matter for another day, but we don't resile from the implications of the position we are taking at this stage, from the implications for that.

My Lord, what we say is there are two elements clearly set out by the Supreme Court for legal causation -- the requirement for legal causation.

First, there has to be a positive mitigating act taken by the claimant.

The claimant has taken action, so the first element is there has to be a positive mitigating act by the claimant.

The second element is there has to be -- that action has to have directly arisen out of, or as the CAT put it in the -- *Stellantis* -- yes, it has to be triggered by the transaction.

So mitigation, in our submission, has always and does require a positive act.

It cannot be undertaken unwittingly.

That is clear from the case law, but it is also clear when one goes back to first principles, or goes back to the principles that we say the Supreme Court was applying, as to what mitigation is about, because when one considers the flipside of the case you are looking at, where it is asserted there has been a positive mitigating act, the flipside of that is the duty to mitigate, as a matter of tort law.

That is, obviously, the flipside of an allegation that the defendant has actually mitigated its loss.

And it is put into sharp focus in these proceedings because Mastercard at the very least -- and this is, for example, paragraph 137(a) of their defence in the Dune

proceedings -- I will take you to it in a moment -- but Mastercard pleads either that we passed on the overcharge to our customers, or that we didn't pass on that overcharge, we acted unreasonably in failing to do so and therefore we failed to mitigate our losses, we failed to comply with the duty to mitigate.

That is in -- I will show you this because it is important to have in mind that flipside of what we are talking about, the mitigation -- a positive mitigating act is the flipside of the failure of the duty to mitigate, or the flipside of the duty to mitigate.

If you look at how Mastercard put it in this case, it is in -- sorry, I got out the wrong bundle -- CMC bundle 3.

Most of these bundles are just the pleadings and I hope we can look at just this one, for the purposes of the point I am making.

CMC, bundle 3, tab 36, bundle page number 784.

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: Actually, if you start by going back a page to 783, you will see the pleading at 136(a), which is that we positively mitigated our losses:

"As a business seeking to recover their costs in their annual or regular budgeting [that's reflecting the words in the Supreme Court judgment], it is likely that the claimants mitigated their loss to a material extent."

Then they go on to make the points in their submissions about it being a common cost, *et cetera*, and they refer to various regulators' decisions in support of their argument that we did positively pass on the MIF.

Well, in fact -- no, sorry, let's put it as it is put in the pleading, that we mitigated our loss, paragraph 136(a).

And then they say, 137(a):

"A claimant cannot recover damages for loss which it could have avoided by taking

reasonable commercial steps to mitigate its loss."

And we have seen that:

"Mastercard refers to article ...(Reading to the words)... therein."

A merchant can therefore reasonably be expected to recover the costs of an overcharge through the steps set out above where this will mitigate its loss.

"It is likely [137(b)] the claimants would have mitigated their loss and so the claimants can only recover damages to the extent that any volume effect that would have arisen from doing so as to which no claim is pleaded."

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: As I read it, that is an argument that we either did mitigate our loss or we should have acted reasonably to mitigate our loss, and insofar as we didn't, we failed in the duty to mitigate, and so shouldn't be able to recover those losses which we should have passed on.

In our submission, when one looks at it through that lens, for there to be a duty to mitigate, that only arises if a claimant has acted -- no duty to mitigate can arise unless a claimant unreasonably fails to act -- that is clearly what the duty of mitigation is about.

If the claimant reasonably failed to act, they haven't failed in their duty to mitigate.

A claimant cannot unreasonably fail to act unless it is aware of what it needs to do in order to mitigate its loss.

You cannot be said to have acted unreasonably if you failed to mitigate a loss of which you were unaware.

MR JUSTICE MARCUS SMITH: But does the converse apply, in other words, if you mitigate your loss, let us say unconsciously, but you take steps to do so, you are not under an obligation to do so, but you nevertheless do, that does still count as mitigation, doesn't it?

MS SMITH: In our submission, no, it doesn't, when you look at the -- when you look at both the case law and the test of mitigation, you have to have taken action which arises out of the transaction -- which is triggered by the transaction -- the imposition of, in this case, the unlawful cost, there has to be, in my submission, a positive act of mitigation.

We, in our submission – say there cannot be an inadvertent mitigation of loss.

We don't say, just to make this absolutely clear, that the claimant has to know that the loss it is acting in response to is unlawful; it doesn't have to know that it has a cause of action against a defendant in response to that loss, or cost; it doesn't have to know of the exact extent of how much of that loss is unlawful or that cost is unlawful.

But it does have to know that it is incurring or suffered that loss; it has to know that the transaction has taken place -- let's put it in neutral language, it has to know that the transaction has taken place; it has to know that the cost has been imposed upon it; and it has to have taken action in response to that imposition of the cost.

In our submission, that is what is clearly set out in all of the case law about mitigation, clearly set out in what the requirement for legal or proximate causation is.

And that as well, my Lord, is why we accept that surcharging is mitigation.

And is pass-on, because when a merchant imposes -- decides to impose a surcharge on credit card or debit card transactions, it does so in response to the imposition of the MSC.

The surcharging, the mitigating act, takes place in response to the transaction, the original charge to which it relates; in other words, the cause -- and again, this is the cause of the surcharge is the overcharge -- or to put it in the legal

terms, the overcharge is the proximate cause of the surcharge.

So in that situation, a merchant doesn't have to know that the MSC, or an element of the MSC, is unlawful.

It doesn't have to know how much of that MIF is lawful, whether it is all of it or a certain amount that can be exempted under 101(3).

All it knows -- and we say this is enough -- it knows there has been the imposition of this charge on it and it acts in response to that charge by putting in place an overcharge on credit card and debit credit card transactions.

So that we say is a mitigating act and that we have -- we do give credit for pass-on in that circumstance.

There may -- and perhaps we can have a look at the flowchart that we have put in with our submissions, which I hope makes this position clear.

It is in the CMC bundle 1 on page -- tab 7 of CMC bundle 1, page 80.

This is a flow chart which has been prepared by us, you will have seen, to illustrate both stage 1 and stage 2, and to illustrate the type of evidence that we say would properly go to proving those points.

So I may come back to it for those purposes, but it also makes clear the point that I am making to you now, which is you look at the claimant's price setting; were MSCs specifically taken into account in price setting?

Yes.

If they are taken into account in response to the imposition of the MSC the merchants have surcharged, then we accept that is pass-on; then it is a question of quantifying the extent of what is passed on.

We also accept that there may be circumstances where the MSCs are taken into account in price-setting in other situations where they are not surcharging, but they may be taken on, for example, in the type of cost-setting -- price-setting,

which we think is rare, but the type of price-setting where a merchant sets its prices specifically with regard to its costs, including the MSC.

And in that situation, there may be pass-on, depending on the factual investigation of how the merchant sets its prices.

So it is our submission that it is only where -- sorry, just to finish this point on surcharging, it is true that the surcharge -- a surcharge would not have been imposed absent the original charge, the MSC.

So but-for or factual causation is established.

But that is not in itself sufficient, we say, clearly on the case law -- both the Court of Appeal case I showed you and the Supreme Court's judgment.

Factual causation alone is not sufficient to give rise to mitigation.

It is only where a merchant can appreciate that it has an election whether to absorb a cost or whether to react to the imposition of that cost, for example, by surcharging its customers, that it can make the decision to undertake an act of mitigation.

The flipside is that the duty to mitigate can arise.

It is only where the merchant can appreciate that it has that election.

So in our submission, in the present case, in order to establish legal or proximate causation for the purposes of establishing mitigation by pass-on, the schemes are required to prove that the merchants set their prices in response to the unlawful overcharge on the MSC.

We accept that surcharging is in response to ... and there may be other circumstances depending on the facts.

Before I come back to the flowchart, could I just deal with Visa and Mastercard's dispute on this, as a matter of law?

MR JUSTICE MARCUS SMITH: I think we are being transcribed, aren't we?

In which case would that be a convenient moment?

MS SMITH: Absolutely.

MR JUSTICE MARCUS SMITH: Before we rise, though, just one point of clarification and one hard question, so good time to have the break.

First of all, the point of clarification.

Your flowchart, this represents what you would say has got to be undertaken at every level of the analysis; in other words, if there is a question of whether the merchant service provider has passed things on, they have to go through all of this in order to work that out, then we work it out at your level, to see whether you have or haven't passed on as well?

MS SMITH: We say the logical thought progression one has to go through, but the nature of the evidence may be different because we are dealing with 11 acquirers, for example --

MR JUSTICE MARCUS SMITH: But we need some understanding of how the acquirers operate.

MS SMITH: Yes.

MR JUSTICE MARCUS SMITH: Yes, okay.

I think it would help if you could, collectively, put together some agreed formulation as to how the transaction, as we will call it, took place; in other words, the range of options by which the merchant service provider charged the merchant for the services.

We don't want evidence, we just want to have something that is common ground to which we can attach when we are discussing something as abstract as the transaction.

I would like us to be able to say: this is what we are talking about.

And it seems to me it is the flipside of the merchant service provider's mitigation

position; in other words, you need to look at the payment or obligation to pay between the two, in order to actually deal with both the transaction at the merchant level and the mitigation question at the merchant service provider level.

That may be wrong, but that's at the moment how I see it.

That would be very helpful to have.

Then, finally, I think it is implicit in your framing of the duty to mitigate that you see no distinction between the duty to mitigate and the fact of mitigation.

Let me just unpack what I mean by that.

Normally, when one talks about the duty to mitigate, one is talking about a case where there has been a failure to mitigate.

What you say is: I am terribly sorry, claimant, you have suffered a loss, you could and should have avoided it, but didn't, and your damages are reduced accordingly.

As I understand it, we are not in a duty to mitigate case here.

It would be an interesting argument whether there was an obligation to pass on a cost by way of increased prices in those cases where one could -- I think that raises a whole raft of extremely interesting competition questions, which we will not get into now, or at all.

You say that unless there is a duty to mitigate, there can be no mitigation.

And what I think is going to be said against you is that if -- even if there is no duty to mitigate, you do in fact mitigate -- that is taken into account in the assessment of damages.

I think there may be a difference between the parties on that, but I would like to have that unpacked.

MS SMITH: My reading of the Mastercard pleading was that its case was: either you

did mitigate, in which case you have passed on, you have suffered no loss; or you failed to mitigate, in which case you have acted unreasonably; you could have passed on, you should have passed on and therefore your loss should be reduced by that amount.

That is what I understood Mastercard to be pleading.

If they are not pleading that -- but I understood that they were pleading a failure of the duty to mitigate.

MR JUSTICE MARCUS SMITH: Well, as a secondary position.

MS SMITH: As a secondary position, but absolutely following on from: either you did it or you didn't and you should have done ...

MR JUSTICE MARCUS SMITH: Yes, but that's the thing because I think you are saying that Mastercard(?) got it wrong, but are you saying that if you did mitigate, as a matter of fact, the duty doesn't matter?

MS SMITH: My Lord, what I am saying is that, conceptually, in assessing what the test is for having taken a mitigating act, you need to bear in mind that the flipside of that, in effect, is the failure to mitigate.

And if there is a duty to mitigate -- the starting point is in fact the duty to mitigate, and either you fulfil that duty and you mitigate, or you don't fulfil the duty and you have failed to mitigate.

So in understanding what a mitigating act is, for the purposes of the law, you need to bear in mind that it plays a role, conceptually, in both of those situations, and it cannot be said to be different in one situation and another situation, in those two situations.

Mitigation is to be understood both as a positive act -- what mitigation requires is both to be understood in a positive act when you do mitigate, but also what conceptually it means when you are talking about the duty to mitigate.

MR JUSTICE MARCUS SMITH: So if you reduce the loss you have suffered in circumstances where there is no duty to mitigate that loss, I don't need to worry?

MS SMITH: I will -- let me think about that because I am not sure I quite get the point, although those on the other end think it is a simple point, so they might be able to answer you on that one.

MR JUSTICE MARCUS SMITH: It is certainly not a simple point.

We will rise -- we will resume at 12.20.

If you are unclear about the question, do let me know.

MS SMITH: Thank you.

(12.10 pm)

(A short break)

(12.26 pm)

MR JUSTICE MARCUS SMITH: Yes, Ms Smith.

MS SMITH: Can I just go back to the point that you were (Inaudible) about what would happen in the hypothetical, where a time period overlapped between class actions and individual actions -- a class action and a number of individual actions -- and how the rule, or the provision, set out in section 47C(2), that the Tribunal may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person, and how the fact that in a collective action you just have to prove the overcharge across the market as a matter almost of averaging, rather than having to prove individual loss?

And we do say how that impacts on causation.

We say that in a situation of a collective action, the defendant still has to prove both

legal and factual causation, but where there is an overcharge on average, and they have proven legal and factual causation through whatever means they choose to do so in that case, as I have said, there may be situations where loss is mitigated; there may be situations where it is not mitigated.

And there may be situations where in individual actions, clients, individual clients -- my clients, for example -- may not have themselves passed on the loss, may not have taken mitigating action.

But we are a very small proportion of the market, so the fact that -- or the result of the test as regards our individual claims or individual claimants, may end up with a different result from the test when it is applied generally because across the market, (Inaudible) both legal and factual causation, it may be that on average across the market, generally, the overcharge was passed on generally in a way that averaged out over the market, both as a matter of legal and factual causation.

But that does not stop the fact -- does not prevent the fact that on individual actions there may be a different factual result for those individual claims that form only part of the market, and in individual claims you need to have established that the individual merchants have passed on, have taken mitigating action and what the effect of that mitigating action has been.

We say that could perhaps, the approach that is done -- although I am not here and I'm, putting it crudely, not being paid to stand here and tell Ms Wakefield or the claimants and the defendants in the collective action how they should run their action.

But what I am here and the interests I am here to represent are those of my clients, who are merchant claimants, who have individual claims and who are proceeding on the basis of the tests set out and the law set out in the Court of

Appeal and the Supreme Court as to mitigation.

On that point, before we rose, sir, you asked me about the interaction between the duty to mitigate and positive acts of mitigation.

All we are saying is that the conceptual approach to what a mitigating act requires needs to be considered, conceptually, in a similar way.

You do not have to say that unless the duty to mitigate is engaged, there can be no mitigation, positive act of mitigation, because of course you can go beyond what is reasonable and still have mitigated your loss.

But you still have to have taken a conscious action, you still have to have acted in response to the imposition of the cost in this case.

That is the meaning, in our submission, of what legal proximate causation requires.

You have to prove legal causation as well as factual causation.

As I understand it, Visa and Mastercard say: yes, fine, we don't dispute that it is not enough, as a matter of principle, to look at but-for causation; it is not enough, as a matter of principle, just to look at factual causation; we accept that you also -- and I think they are driven to say this on the case law, on the authorities -- we accept you have to establish legal causation, proximate causation.

But they say: well, the Supreme Court has already considered that in circumstances like the ones in front of the Tribunal today, and the Supreme Court has said that the requirement for legal causation in the context of pass-on of MIFs by merchants or MSCs by merchants the issue is straightforward.

So we don't need to reconsider the question of legal causation because the Supreme Court has already decided it for us.

They are not saying there is no requirement for legal causation -- at the risk of repeating myself -- they are just saying it has already been decided by the

Supreme Court on the facts of those cases which should be read across to the facts of the current present cases.

As a consequence, the schemes, the only live issue they say is that of factual or but-for causation.

And that is Mastercard's skeleton argument at paragraph 14 and Visa's skeleton argument at paragraphs 15 to 17.

Now, let's then focus on, as I said I was going to, the second part of paragraph 215 of the Supreme Court's judgment, which is in authorities bundle 3, tab 13, page 1098.

Paragraph 215, page 1098 of the bundle and page 1864 of the internal page numbering.

This is paragraph 215, the part I said I would come back to, which is where, in my submission, the Supreme Court has moved -- well, the Supreme Court clearly recognises there is a requirement for legal causation as well as factual causation, where it says here:

"Also a question of legal or proximate causation arises, as the underlined words show ..."

And then goes on to say:

"But the question of legal causation is straightforward in the context of a retail business in which the merchant seeks to recover its costs in its annual or other regular budgeting. The relevant question is a factual question: has the claimant in the course of its business recovered from others the costs of the MSC, including the overcharge contained therein?

The merchants, having acted reasonably, are entitled to recover their factual loss."

It goes on to say:

"If the court were to conclude on the evidence that the merchant had by reducing the

cost of its supplies or [more specifically] by the pass on of the cost to its customers… transferred all or part of its loss to others, its true loss would not be the ***prima facie*** measure of the overcharge but the lesser sum."

Visa and Mastercard focus on the words straightforward in the context of a retail business, in which the merchant seeks to recover its costs in annual or other regular budgeting.

And we say they read too much into those words when they say, therefore, there is nothing to see here, Tribunal, legal causation has already been established in the present claims.

The Tribunal should, first of all, bear in mind exactly what issue the Supreme Court was being asked to resolve on appeal as regards pass-on.

And if you look at paragraph 40 of the Supreme Court judgment, which is on page 1056, if you turn back to paragraph 40, paragraph 40(iv), the question -- or the issue before the Supreme Court on appeal as regards pass-on was a question about whether the Court of Appeal erred in law in finding that the defendant has to prove the exact amount of loss mitigated in order to reduce damages, the broad axe issue.

So the issue that the Supreme Court was resolving on appeal was whether a defendant has to prove the exact amount -- the exact quantum of loss mitigated in order to reduce damage.

That is not the issue now concerning the Tribunal.

The Supreme Court did not have to consider what the -- although it recognised there was a requirement for legal causation, it was not considering what needed to be established or what needed to be proven in order to establish legal causation.

It was looking at the subsequent point about the quantification of or the effect of the

mitigating act, once it had been established.

And that, in my submission, is -- the fact that there are two stages, in my submission, is also made clear by *British Westinghouse* -- and we can go back to that specific judgment, but it is quoted in paragraph 215.

There is a stage at which mitigation has to be established as a matter of legal and factual causation, and then there is the stage, once that has been established, the effect of that mitigating act in diminishing the loss needs to be taken into account.

So the quantification needs to be taken into account.

If you look at the Westinghouse quotation:

"When in the course of his business [the claimant] has taken action arising out of the transaction, which action has diminished his loss ..."

Then we get on to the second stage:

"The effect in actual diminution of the loss he has suffered may be taken into account."

So you don't even get to the question of what the effect of the mitigating act was, unless and until you have established that there was a properly mitigating act as a matter of legal and factual causation.

And then you go on to -- once you have established that, that the claimant took a mitigating act, you then go on to look at the effect of that mitigating act in diminishing its loss.

So that is, effectively, the stage one and stage two analysis that we have proposed.

So when the Supreme Court was talking about what – it was considering on appeal, the question that was appealed up to it from the Court of Appeal, it was focusing its attention on the level of detail that a defendant has to plead and prove in order to answer that second question, the effect of the mitigating act.

Although it made comments about the test, it was not focusing on the question that is now before the Tribunal, which is what does the legal test require -- what does the test for legal causation require.

MR JUSTICE MARCUS SMITH: So what are we to make of the sentence then --

MS SMITH: If I may go on and explain to you against that background, I say --

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: -- why I give you that background is because the Supreme Court's language here is not crystal clear, but that may be explained by the fact that it was not addressing its mind specifically to this question.

What we say this means, this sentence, is when the Supreme Court said the question of legal causation is straightforward in this context, it was not determining -- which is the effect of what the schemes are saying -- it was not saying, the Supreme Court, that there would be pass-on, if a merchant recovers its costs in its budgeting, without more -- without having specifically considered the cost, the MSC.

We say that can be seen from what the Supreme Court says at paragraph 216, because at paragraph 216, the Supreme Court -- even though it says the question is straightforward, the Supreme Court anticipates in paragraph 216 that merchants need to provide evidence -- this is the heavy evidential burden on the merchants to provide evidence as to how they have dealt with the recovery of their costs in their business.

Importantly, it goes on to say:

"Most of the relevant information [and the relevant information is] about what a merchant actually has done to cover its costs, including the costs of the MSC will be exclusively in the hands of the merchant itself."

So in our submission, what the Supreme Court was saying in making the statement

about legal causation being straightforward, is that in a case such as the present, rather than a different cartel case -- a cartel case, for example, relating to a different type of cost.

In the case as to the present, there is an identifiable specific cost that is capable of being isolated, the merchant service charge, an element of which had been the unlawful overcharge.

So it is only making the point, in our submission, that the inquiry as to whether -- which it says there must be legal or proximate causation and you must satisfy that legal or proximate causation -- the only statement it is making that it might be straightforward in this sort of case is that because there is this identifiable cost that can be specified.

In a situation where, for example, the merchant gives evidence as part of its heavy evidential burden as to how it has dealt with recovery of costs in its business, to the effect, for example: we have dealt with the cost of the MSC by surcharging; or: we have dealt with the cost of the MSC by looking at it every month and setting our prices so that it reflects that particular cost; then in those situations, the question of legal or proximate causation may be proven, and it is straightforward.

But in a case where they give evidence, the merchants, as to how they have dealt with recovery of their costs, and they say: well, we don't consider when we set prices, we treat MSC as part of our central overhead costs and we don't specifically consider it when we set prices; but we don't -- although we know what our costs are, we don't set our prices by reference to those costs, we set our prices on the basis of the RRP that is set -- the supply of cars to our dealerships; for example, we say the question is not so straightforward.

So we don't -- we certainly say that when you look in context as to what the Supreme

Court was considering in that appeal, it wasn't considering the question which is now being -- which is now in the spotlight before this Tribunal, and we say insofar as it was making any statements that can be dealt -- can be seen to be binding on this Tribunal, which is, effectively, what the schemes are saying, that the Supreme Court has already dealt with it, it is binding, it is straightforward and you could just go to but-for causation.

It certainly wasn't making any binding decisions on the question of legal or proximate causation being established in these types of cases.

And we say --

MR JUSTICE MARCUS SMITH: Are the schemes going so far as to say this is a binding question?

MS SMITH: Well, they say one can move straight on to the question of but-for causation, that is why I have quoted -- went back to (c).

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: You don't need to look at what the -- see what they actually said.

MR JUSTICE MARCUS SMITH: How far is this sentence simply an English articulation of the *res ipsa loquitur* doctrine, that the thing speaks for itself, that in a mixed economy like ours, you, as a business, try to recover your costs?

Isn't that what --

MS SMITH: That is what they are saying it means.

We are saying that when the Supreme Court makes that statement, after having said there is a question of legal or proximate causation in this case, and the test for legal or proximate causation is when the claimant has taken action arising out of the transaction, you cannot simply say that because in a market economy everyone covers their costs, legal causation is straightforward and that is the end of the matter, because there is in that situation an action arising out of the

transaction.

That is our submission, that is the point your Lordship has to decide, with the greatest of respect.

But we say that cannot be enough.

It is not simply enough that you have a profitable merchant or a merchant operating in a market economy will always cover their costs, because if that were the case, then we wouldn't have, for example, the distinction between the four options that the Supreme Court talks about.

MR JUSTICE MARCUS SMITH: Yes, but isn't that why *res ipsa loquitur* does actually work quite well, because it is not doing anything other than creating a framework in which questions of fact can be articulated?

If you say, well -- I forget the first *res ipsa loquitur* case, but I think it was something to do with an accident occurring which simply had no explanation, but a number of people got rather seriously injured and what the court said was: well, we don't know how these people got injured, but this is not how things should operate in a warehouse and we know we don't know, but we are going to presume something went wrong, and if you want to articulate an explanation that is not negligent as to how these injuries occurred, well, be my guest, but we are going to presume negligence.

Here, can't one say: well, you are a business, your business is striving to be profitable and that means in order to make a profit, revenue has to exceed costs, and you therefore will try to ensure that exactly that happens, revenue exceeds costs, and the thing speaks for itself?

If you have got a different factual constellation, then the question may not be straightforward, but generally speaking, that is the factual framework in which we operate.

We don't have an articulation of legal principle, all we have is an articulation of what normally goes on.

I mean, I am putting that --

MS SMITH: There are two points that arise out of that, my Lord.

The first is the second point you make, which is that, in effect, it is only a presumption -- and there may be situations where this is not true -- which in itself is the caveat that sort of undermines the rule, because if that is the case, how can you find out whether the general presumption should be applied in every case without looking at the cases?

Then, the first and more fundamental point is, if that is true, that in a market economy where a direct purchaser -- let's leave to one side the acquirer point at the moment -- but the case where a direct purchaser buys an input which they then incorporate into a service or a good, which they then sell on to the indirect purchaser and that input is affected by unlawful anti-competitive action or it is -- it should not have been charged at the price it was charged.

The effect of what you are saying is that presumption in a market economy is that a wholesaler, merchant, whoever at that level of the supply chain, will always cover their costs, and therefore will have passed on.

Basically, if you take it to its absurd conclusion, it means that wherever there is a claim by an indirect purchaser, there would be pass-on and therefore there is no claim for the indirect purchaser.

And that is certainly not the history of competition claims in this jurisdiction, where, as we have said in our written submissions or in our skeleton, for the past 15 years, the vast majority of claims have been made by indirect purchasers and they have been either settled or damages have been paid.

And it is certainly not what, for example, the European Commission envisaged in the

guidance that it published.

It certainly didn't say: you don't need to worry about claims by indirect purchasers because everything goes down the chain.

So the absurd result of just saying: well, you can presume pass-on, if an indirect purchaser, a merchant, a wholesaler, covers their costs -- and in a market economy you can assume that they would cover their costs -- is that there, effectively, can be no claims by indirect purchasers.

But in any event, it is also inconsistent, we say -- and I have established this and I don't want to start repeating -- I have made these submissions and I am at risk of starting to repeat myself, but that is not what we say is required under the common law and mitigation.

There has to be this legal -- it is not required -- well, it doesn't make any sense in the case of competition claims, the points I have just made about direct purchasers and indirect purchasers, and it also is not correct, in my submission, when you look at the common law and mitigation, because the common law on mitigation says but-for causation is not enough, clearly there has to be a legal causation, there has to be action taken in response to or arising out of the transaction, for want of a better word.

So we say that even in -- that is the starting point, there has to be legal or proximate causation; can it be straightforward in the sense that the schemes would like it to be in these claims?

And we say "no", because that just collapses into, effectively, an argument that indirect purchasers will always have passed on their loss if they cover their costs.

MR TIDSWELL: Can I ask you about the point you make about specifically considering the cost?

Maybe if we just take an example of a retailer that sets its prices annually and does that on an annual budget process looking forward, and it sets prices by reference to a markup on cost.

And when it looks at its cost base, it has hundreds of lines of cost and one of those is the merchant service charge.

So that is in the stack, but no one is suggesting that the finance director has specifically looked at that and decided to apply any increment to that, but it is in the pile of costs which, on aggregate, have been treated as the cost base for the purpose of the budget, and therefore the pricing exercise.

Would you say that that meets the legal causation test?

MS SMITH: That I think -- I hope I don't misstate what you are saying, but that is effectively the point that Mastercard were making against us, that -- in their skeleton -- to the effect that our approach to legal or proximate causation is illogical because they suggest that it depends on whether -- it depends on how a company breaks down its costs in its internal accounts.

So they say the logic of our position is, if a merchant who sets its prices by applying this fixed percentage mark up, whether it is annually, whether it is monthly, whether it is quarterly, it doesn't really matter but they set their prices -- but it might insofar as ...

Anyway, let's say there is a merchant who sets their prices by applying a fixed percentage mark up on its costs, they say the logic of our position is that such a merchant would only pass on the overcharge if it specifically identified the MSC as a line item in its internal accounting, but it wouldn't do so, they say, if it combined the MSC with other bank charges.

We say our argument doesn't have those consequences and that the criticism is misplaced, and I will explain why: first, because that example is based on the

premise that a merchant decides before selling anything what amount of profit it wants and then adds its costs to -- its selective profit margin in order to determine its prices and we certainly, in footnote 5 in fact to Mastercard's skeleton they fairly -- they don't suggest, they fairly state, they don't suggest the merchant actually does that but, in any event, we say it is an unreal example, but even if there were to be any -- because merchants don't generally set their prices like that, or certainly my clients don't, in my understanding -- but if there were to be any case where a merchant did set their prices in that way, we don't seek to draw a distinction between a situation where a merchant sets its prices by reference to the MSC when it is aggregated for example with other bank costs, and no merchant sets its prices by reference to the MSC as a separate line item.

We say if the schemes can prove by reference to the evidence and disclosure that we say is necessary to test this point, then a merchant set its prices specifically by reference to its costs, including that overcharge, including the MSC, it would be mitigating its loss in those circumstances, because it would be taking action arising out of the imposition of the overcharge, whether that was identified as a specific line item, or whether it was, you know, knowingly included in other bank charges, we don't -- we say that, as long as the prices were set in response to that cost, we don't seek to say it is so granular that it has to be on that type of level.

MR TIDSWELL: Perhaps getting into a slightly more (Inaudible) example, a retailer were to set its prices by reference to a number of factors, of which cost was one of them, and there was a line item somewhere in the costs, but there were other factors taken into account -- say, for example, other competitors' policies, prices and pricing strategies -- and so it wasn't purely driven by a

cost mark up, or not necessarily driven by a (Inaudible) particular problem of (Inaudible) budgets do tend to suggest that there is going to be a particular profit, but of course we all know budgets are an aspiration rather than a reality but, nonetheless, in the course of working out what a pricing strategy might be, I think it would be quite common for a company to set its budget and set its pricing strategy with some reference to its budget.

So in this hypothetical, moving on, we have some reference to costs but it is not the only element in what is perhaps a multi-factorial process of setting the cost.

Is there a point at which you say that becomes too far away from the costs?

MS SMITH: There has to be a point, there will be a point, because there we are getting into the shades of grey, and we say there is a different exercise that has to be undertaken on the evidence, and the exercise that has to be undertaken on the evidence is whether the prices are set in response to, as a result of, that action was taken, pricing action was taken, arising out of, by reference to, the MSC.

There will be a point at which the causal link is broken and that is, by definition, shades of grey because causation, always, there is a point at which the causal link is broken but that depends on the facts but there has to be that causal link established between, we say, the MSC, the overcharge in the MSC, and the prices that are set and where the case sits depends on the facts, but we are saying that is the exercise you have to engage in, establishing that causal link on the facts, which is quite different to what the schemes are saying.

The schemes are saying let's try to work out a statistical relationship between costs and prices.

So we say the test to be applied is the test we have set out, that prices have to be

set in response to the overcharge.

That is the causal link that has to be established, and the way to do that is by looking at the facts of how a company sets its prices.

There will obviously be a point at which the causal link is broken but I can't and I am not going to try to give you the answer in every hypothetical case because it all depends on the facts.

MR TIDSWELL: I understand that but I will ask you one other question, if I may, which is, you say the causal link might be broken at a stage before there was no regard to costs --

MS SMITH: Before, sorry?

MR TIDSWELL: Before the retailer ceased to have regard to costs instead of prices, so are you saying that somewhere in that shade of grey we are going to make a decision that the amount of reference that is paid to the costs is so tenuous that we no longer treat it as meeting the requirement or is it only when the retailer has actually decided to set their prices by reference to completely other factors and disregard costs that the causal link is broken?

MS SMITH: I think there will have to be a point at which -- the test, the touchstone, is that the mitigating action I keep coming back to, the mitigating action has to have arisen out of the overcharge, in response to the overcharge, in response to the -- and we say overcharge can for these purposes be identified as the MIF, because the overcharge -- sorry, the overcharge can be identified as the MSC because the overcharge is always going to be within the MSC.

So there has to be -- that is the test.

So it may very well be that the link is broken.

That is the test that has to be applied to the facts and it is not that a link has to be established between costs and prices, because the test that is being applied

is a test that can be applied not just to this sort of retail situation, it is a test for mitigating acts in general.

So you apply the test, in this factual situation, and it is not establishing a link between costs and prices; it is establishing a link between the overcharge and the mitigating action in setting the prices to recover that overcharge.

MR TIDSWELL: Yes, and we know for example in your client's case there are some local authorities for example, which have a completely different approach presumably -- I assume they set their budget and set the council tax, or whatever it is, however they do that, but I can see there would be different situations.

It does provide quite a challenge though, even if one has access to all the information on individual retailer basis, making that judgment is going to be quite difficult, I suppose?

MS SMITH: It is a judgment that has to be made applying the facts to the test and, yes, judgments like that are difficult on evidence but it is a question of causation and causation, with the greatest of respect, can be a difficult question but that is what it is.

It is a question of causation and the way in which one establishes that causation is by looking at the acts in question and establishing whether there is a causal link between them, and that is what we say clearly is the test to be applied in this context of mitigation.

MR TIDSWELL: Thank you.

MS SMITH: So that leads me on to the question of what -- that is quite neat because that is 1.00, thank you.

I was going to move from the legal test to how best it can be applied as a matter of process in these proceedings and I hope I can deal with that, I hope, a little

more quickly, because you have my submissions on that, but I will not spend too much time on that but I have, I hope, dealt with the arguments against me on the legal test and assuming, which I have to, that my submissions on that, that this is the correct legal test, the question is then whether -- how you do it.

MR JUSTICE MARCUS SMITH: That is absolutely understood, Ms Smith.

We don't want anyone to feel constrained in terms of time for submissions.

We have got two days.

We will have to rise, because I have a meeting at 4.30, at 4.25 but we can start a little earlier tomorrow if that would -- I am getting shakes of heads?

MR COOK: We were told my Lord you were not available until 11.30 tomorrow.

MR JUSTICE MARCUS SMITH: I think that may have moved on.

I will check that, but I think I have been cancelled for that particular meeting.

I will ensure that we have got some clarity about that before the end of today.

Mr Rabinowitz?

MR RABINOWITZ: Can I raise this as a suggestion -- you can disagree and that is fine, that is your decision.

It did occur to some of us that the Tribunal may be assisted if you hear all the arguments about the legal issue and then only move on to the how do I deal with this, because -- it is just a thought -- because you will be hearing similar points about the same issues from all the parties and you will then have a view on whether to make a decision, and we can then move on to the practical consequences of each side's position.

MR JUSTICE MARCUS SMITH: That is an attractive suggestion but I don't think we will adopt it, simply because I think it would interrupt Ms Smith's flow and you would probably get a degree of (Inaudible).

At the moment I have a fairly good idea of how long everyone has been on their feet.

If we split it up, then I will not be able to crack the whip quite as effectively where -- I am sure it wouldn't be necessary anyway but the whip cracking process would be rather harder if we had to split submissions.

So we will do everyone in one go but --

MS SMITH: Yes, I will try and be as quick as I can on the process because I think, in a number of cases, it may be that my answer to say, Visa's or Merricks' proposal as to evidence is simply it would not answer quite the right question.

So I am not going to rehearse again --

MR RABINOWITZ: There is only, I would submit, one possible way of dealing with this, which is to say, if Ms Smith is right on what legal causation requires, it is difficult to see that you can approach it otherwise than on an individual basis, but --

MS SMITH: My Lord, I think that getting an answer on the threshold legal question, as we have characterised it, might be a very sensible way of proceeding but I am anticipating the Tribunal not being able to tell us, say tomorrow, what the answer is.

So we are likely to have to come back again to argue about the process of procedure, evidence, et cetera.

MR JUSTICE MARCUS SMITH: Let's be clear, you are not going to get an answer tomorrow.

MR RABINOWITZ: No, I didn't envisage that.

MR JUSTICE MARCUS SMITH: But I think there is a lot of force in what Ms Smith says, and in what you have just said, namely that if we are with Ms Smith on the approach to the questions of mitigation, then one is driven down a more granular -- as I have called it, but call it what you like -- approach.

Whereas, if we are veering more towards your submissions, and Ms Wakefield's,

one has got the option, and I don't think it is more than an option, of doing it in a different way.

So I think you can all take that as read that we see it that way and I think we don't want to close anyone out but the practicalities, we would discourage going into the detail because in a sense that is going to be a matter for argument, if it cannot be agreed, after we have handed down our views.

We will I think try to be as explicit as we can as to what we would need evidence on and how we would expect that evidence to be created, but I think you can take a fairly light touch on that second part and focus on the first part, which informs the second part, if that helps?

MR RABINOWITZ: Thank you.

MR JUSTICE MARCUS SMITH: I am grateful.

Ms Smith, we will start at -- would it help if we started a little bit early, if we started at say 1.55?

We will start then.

(1.05 pm)

(The lunch break)

(1.55 pm)

MS SMITH: Thank you, sir.

I will try to deal with this as quickly as I can, given the indication before we rose.

I have already made the submission that our proposal is that merchant pass-on could most properly be considered in two stages.

Stage one where the Tribunal resolves the question of whether the claimant has passed on any of the overcharge, applying the test for legal and factual causation; and then stage two, resolving the quantum of any overcharge to the extent necessary, which is the effect of the mitigating act.

I have shown you the flowchart which illustrates how we say that could be done.

With that opening, can I turn to the nature of the evidence that we say is required?

The flowchart is in the CMC bundle -- bundle 1, tab 7, page 80.

You have already seen that.

I am not going to go through it in detail because it is there for you, sir, and for the Tribunal.

For stage one, we say we propose there be witness evidence and supporting disclosure.

We say that is the best way to determine the question of whether a claimant merchant has set its prices with regard to the MSC.

Mastercard appeared to accept the proposal for factual, and evidence and document disclosure, insofar as they say that although they want to test our evidence, they cannot see any basis on which the claimants could properly be prevented from adducing evidence on their own price-setting processes.

That is their skeleton, paragraph 64.

Our proposal is that, given the number of claimants that we represent, our proposal is -- from evidence and disclosure from a number of sample claimants, from a number of sectors which we say share common characteristics relevant to pass-on.

That is set out in some detail in our initial written submissions.

I can take you through those proposals if it assists, but I think it is there.

We say that that is a practical, fair and proportionate way of proceeding.

It gives real-world evidence of what actually goes on, which we say can be read across, given a careful sector-sampling approach, to the other claimants' claims -- the other individual merchants' claims -- and we certainly on our part are prepared to be bound by the decisions on the sampling basis on a -- and

we say they can be used to bind other claimants before the Tribunal, at least on an *Ashmore* basis.

In any event, even if it is not binding, those sample claimants -- the sample test claims -- the sample claims, we say they can be binding, but they certainly provide evidence if they are -- if the Tribunal proposes to -- accedes our request to go that way, the samples certainly provide evidence that they can be used as part of the evidence base, not just for other individual claims, but also, we suggest, for the collective proceedings, in that they would provide real evidence of what price-setting processes are carried out in certain industry sectors, and we say certainly better evidence than that which would be provided on Visa's and Merricks' proposals.

MR JUSTICE MARCUS SMITH: You say this is an *Ashmore* case, which is not accepted by Mastercard or Visa.

MS SMITH: No, that is not accepted.

MR JUSTICE MARCUS SMITH: Would your clients be prepared to concede that they should be bound -- or accept in terms that they would be bound by the outcome of the sampling, so one could avoid the *Ashmore* argument?

MS SMITH: Yes, for my clients -- and I can only speak for my clients represented by Scott + Scott and Humphries Kerstetter -- we are prepared to say that, and I think we said that in the individual -- in our written submissions.

So we are --

MS WAKEFIELD: I have been told that the live stream is frozen.

MR JUSTICE MARCUS SMITH: Right, we will continue, but thank you for drawing it to my attention.

Hopefully, it will rectify itself.

MS SMITH: Obviously, I can only speak for those who instruct me, but that is

certainly our position.

Then moving to the Visa and Merricks' approach, they propose, as you will have seen, an approach whereby their economists will estimate a sector-by-sector pass-on rate, and they will estimate that rate by reference to statistical correlations between prices and costs other than the MIFs.

They will then use that as a ***prima facie*** quantum pass-on rate for the pass-on of MIFs for each individual claimant in the sector.

So they are reading it across to each individual claimant.

A **number of points to underline.**

It is an estimate; it is only statistical correlation; and it is based on costs other than MIFs.

So there are three important points, as to the nature of the economic evidence that is proposed.

And I will come back to those three important points.

But also both Visa and Merricks put in -- have made a very substantial caveat to their proposal.

Both of them say that if a particular individual claimant says that they are in a materially different position to the sector average, then the Tribunal could conduct short trials for those claimants.

So that caveat is extremely important because I will explain why, on our case, that what you get from this proposed statistical modelling is not going to tell you anything -- we say not going to tell you anything about the correct legal test, but even on its own terms, assuming we are wrong on the correct legal test, it is not going to tell you anything about what might -- whether MIFs are passed on.

And I will explain why.

So the problems, as I have said with Visa's and Merricks' proposed approach, is, first, it tells you nothing about the question which we say, as a matter of law, the Tribunal has to consider.

It doesn't answer the question of proximate causation.

Second, I say the proposal is flawed on its own terms.

Just focusing on Mr Holt's proposal for Visa, he seeks to infer the pass-on of MIFs from an estimate of pass-on from other input costs -- he gives examples of VAT, studies as to pass-on of VAT, studies as to pass-on of the wholesale price of fuel by garage operators.

And he says we can estimate -- we can infer the pass-on of MIFs by reference to finding a statistical correlation between those other costs from other public studies and the impact of those other costs on the prices.

Now, that approach, as you will immediately see, rests on a significant assumption that the relationship between these unspecified costs -- he hasn't tied himself down to what costs he is going to use.

He says: look, there are all these studies out there and I have given the example of VAT and fuel -- but if his exercise is to be any use at all, it has to rest on the significant assumption that the relationship between these other costs, as yet unspecified, and price, is likely to be representative of the relationship between MIFs and price.

Mr Holt, himself, admits that because, as he explains, MIFs are such a tiny element of cost, less than 1 per cent, you cannot observe a statistical relationship between MIFs and prices.

He, himself, admits that, but he says: yes, I accept that is a significant assumption.

He describes it as an important consideration at paragraph 53 of his report, that there is -- that that relationship between MIFs and prices is going to be the

same as the relationship between these other generic costs and prices.

He says: yes, I accept that is an important consideration, but insofar as it doesn't appear to show the right correlation or people say it doesn't show a correct correlation between MIFs and prices, we can deal with that in a second round of mini trials.

As paragraph 53 of his report at CMC bundle 1, tab 14, 187 -- it might just be worth looking at that because that is fundamental, in our submission, as to why even on its own terms, assuming I lose on the legal causation test, on its own terms, this will not work.

If you look at page 187, of the bundle page numbering, paragraph 52, Mr Holt properly accepts:

"One important consideration [we say the fundamental consideration] that would need to be investigated at trial, if this approach were used, is whether reactions to MSC changes differ from reactions to other cost changes.

For instance, it could be argued that MSCs (a) are not explicitly taken into account as part of the claimants' pricing decisions ..."

That might be affected by the legal test.

But (b) and (c) certainly are not.

(b) and (c) still survive, even on Visa's proposed test.

It might be argued that MSCs "are too small to warrant price changes", or (c):

"... may not be treated as a variable cost in management accounts.

I have considered these issues but don't consider them to be significant enough to forego the advantage of my proposed approach."

He sets out various points to support that at (a), (b) and (c).

But then he says, this is the crux, at 53:

"Finally, I note that these sorts of claimant-specific objections could be taken into

account in a two-stage approach, in which one first determines average pass-on levels at the level of major economic sectors to facilitate the analysis of exemption ..."

And we say -- you have got my submissions, I hope, on dealing with exemption on another day:

"... and then allows the parties to contend that specific claimants were in a materially different position at the quantum stage."

So even on its own terms, certainly we say it tells the first -- the economic exercise tells you nothing useful, but even on its own terms, Visa and Merricks both accept that you are going to need a second round of mini trials.

So the question about proportionality, that obviously this Tribunal has to look at, must keep that -- bear that in mind.

Now, we say that the difference in nature between MSCs as -- MIFs as a cost and other types of cost, are fundamental.

It is a fundamental issue.

Mr Holt's assumption, we say, is not well founded, but assuming it is not well founded, his entire exercise is pretty much useless, and every claimant will object on the basis that his modelling work, which shows a statistical correlation between other costs and prices, cannot show any relationship between MIFs and prices charged by that claimant.

Now, this is why we put in the evidence from Mr Falcon.

Mr Falcon explains that there are good economic reasons to think that the relationship between MIFs and prices is different to the relationship between other costs and prices, so that it certainly cannot be assumed that all input costs are passed on at an identical rate.

He explains -- and I will not go through his report in detail, you have seen it, but it

can be summarised as follows:

"Contrary to the assumptions underpinning Mr Holt's proposed analysis, MIFs and MSCs are not at a transparent common cost, but they vary considerably between different merchants and sectors."

You will see in the PSR report there are a number of different types of MIFs.

We are not just talking here about domestic, inter-regional, intra-regional, but there are also MIFs that are charged on a MIFs plus basis, where the MSCs are MIFs plus, the MSCs are blended, for different merchants and sectors.

For your note, that is his report at paragraphs 56 to 57.

He says there is evidence that merchants don't generally treat MIFs as a variable cost.

That is his report at 76 to 86.

His evidence is that the claimants don't operate in perfectly competitive markets, which is another assumption that Mr Holt makes.

And in any event, it is not the low net margins that are relevant for assessing the likelihood of pass-on, but the gross margins that are relevant for assessing the likelihood of pass-on.

It is paragraphs 87 to 99 of his report.

Then he makes the point, which I think must be accepted, is accepted by Mr Holt and Mr Coombs, that MIFs and MSCs are an extremely small proportion of a firm's total costs, less than one per cent generally, and they are less likely, therefore, to (Audio distortion) for other large cost items, as a matter of economics.

And that is his report at paragraphs 100 to 104.

We say, even on its own terms, Visa and Merricks' proposals for the sector-by-sector analysis, the statistical correlation between other costs and prices, doesn't

work.

There are problems with it.

It will be challenged by claimants as not showing even a sector-wide causal link between MIFs and prices.

And it certainly -- they, themselves, accept that there will have to be a second round of mini trials, whereby individual merchants can say that they are not -- should not be treated in the same way as the sector average.

Now, that puts in -- sets the scene for the third point that I want to make about Visa and Merricks' proposals, which is that their protestations that our proposal for factual evidence and disclosure from a sample of claimants is disproportionate, is wholly undermined by the caveat that I have outlined to you, that they accept that their proposed econometric evidence is likely to have to be supplemented by an unspecified number of short trials, presumably conducted on the basis of factual evidence and disclosure, for any individual claimant who says it is in a materially different position to the sector average.

So those are my three points on Visa and Merricks' proposals.

As for Mastercard's proposals, as I have already said, Mastercard appears to accept, in principle, that there must be a role for factual evidence and disclosure by the claimants as to their price-setting processes.

However, in addition to that, they say they need not just qualitative evidence, but quantitative evidence about a firm's business, including data about a firm's prices, sales, values and quantities, variable input costs, fixed input costs and margins; they want evidence potentially from third parties, such as competitors, as to how they set their prices; they want expert economic evidence to analyse how, in theory, the predicted rates of merchant pass-on

will vary, as against various factors; they want forensic accounting evidence to examine how the merchant claimant operates its business, prices its products and interacts with its suppliers and manages costs revenues and margins; and they want expert economic evidence, not just on economic theory, but to apply analytical techniques, such as regression analysis, to identify trends and correlations in the quantitative evidence.

In my submission, that is just huge, unmanageable and disproportionate.

They appear to say: well, we can do it for a sample, once we have made, I think, every claimant answer a questionnaire -- as yet unspecified what the questionnaire will ask --

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: -- but we certainly need to start with a questionnaire to every claimant.

We say those proposals either go to the wrong legal point, but you have my point on that, but in any event they are unmanageable and disproportionate.

And we say that the sample claim that we have proposed, the sampling approach that we have proposed -- yes, we accept that it will lead to a tens of -- I think it's 83 -- evidence from 83 claimants on our proposal, at least for the Humphries Kerstetter sample claimants -- but it is far more manageable than the alternative proposals.

And also, cutting issues into stage one and stage two, we say also is a proportionate and sensible way of proceeding because at stage one, the issues that will need to be determined are whether there has been legal and factual causation, and that we say can be determined on the basis of just witness evidence and specific disclosure requests from this sample.

We then say it is only then that the Tribunal can determine what might be proportionate at the next stage of quantum because it is only then -- the

Tribunal will know, on our submission, at the end of stage one that surcharging we have already accepted is a pass-on, and one will need to engage in quantification of surcharging.

But one may also need to engage in quantification of pass-on, if, for example, one particular -- if it is one particular category, where legal and factual causation has been found, then the approach that you might take or might consider to be proportionate to take, might be considered different if there were, say, ten or 12 categories where legal and factual causation had been found.

So in our submission, there is real sense in waiting until the end of stage one to determine what is the proportionate way of determining quantum at stage two.

Before I sit down, I do, I think -- I haven't addressed acquirer pass-on; I haven't addressed accepting the basis that the questions that you asked me; I haven't addressed exemption and 101(3).

You have my submissions on that and my written submissions; if you wish me to develop those, I will.

But given the time, I am focusing on the merchant pass-on question.

Before I do sit down, intricately linked with the merchant pass-on question is the question about case managing the Merricks class action, together with the merchant individual actions and Merricks' proposal for joint case management.

As you will have already anticipated, we say that should be rejected, that proposal, for the following reasons.

First, we say there is little danger of inconsistent judgments, given the fact that, in summary, for the points I have already made and are made in my written submissions, there is no overlap in these cases.

The unlawful cost is not the same between the collective proceedings, on the one

hand, and the individual merchant claims, on the other.

Also, it is very important that class actions are fundamentally different from individual claims in the way in which they approach the question of assessment of damages.

And for your note, I would ask you to look back at what was said in *O'Higgins* at paragraph 2264, and I will just take a little time to refer you back to that.

So it is authorities bundle 4, tab 22, page 1488.

The president, at least, will be extremely familiar with this.

MR JUSTICE MARCUS SMITH: Yes, Mary Queen of Scots is branded on my heart, but the same is not true of --

MS SMITH: Absolutely.

I don't need to remind you what the Tribunal said in paragraph 2264, which, in our submission, is absolutely right on the difference between collective -- a class action and individual claims:

"Collective proceedings damages can be assessed on a class-wide basis without any need to articulate individual loss...

What is material is the Supreme Court's decision which demonstrates that collective proceedings may succeed where individual claims or group litigation claims… might very well fail."

And that I think is the sentence I would like you to underline, that because of that, we say, there is little -- and because of the temporal difference and the fact that our -- my clients and even all of the claimants before you -- both my clients and the Stephenson Harwood clients relate to a tiny fraction of merchants operating in the UK, but also across Europe.

The other points of distinction mean that the danger of inconsistent judgments between the class proceedings, Mr Merricks' proceedings, and these

individual merchant claims, we say, are small.

That is my first point: the danger of inconsistent judgments is small.

My second point to be weighed against that is that case managing together the collective proceedings and the individual merchant claims would, in my submission, lead to excessive cost, excessive complexity and delay, particularly given the different approaches which need to be taken to assessing damages, the different tests that the Tribunal will need to apply with, in my submission, very little incremental benefit, and certainly very little benefit for my clients.

So, sir, unless I can assist you further, those are my submissions.

MR JUSTICE MARCUS SMITH: No, thank you, Ms Smith.

Two questions.

First of all, we want, in the course of this process, to be as helpful to the parties as possible, in terms of framing how things go forward.

Leaving entirely on one side the participation or otherwise of the Merricks action, and just looking at the claims that are before us now, we would want not only to resolve the point that has to be resolved - i.e. what is the nature of pass-on and how it is approved -- and following on from that, we would, I think, want at least to try to articulate in as specific a detail as possible, how, having sight of the anterior question, one would go about proving matters later on down the line.

Now, I think, given the way the list of issues has been framed, with the parties still having to fill in how, in general terms, they propose to resolve that question and how then, in specific terms -- so columns 3 and column 4 -- they would do so.

What we would, I think, envisage -- and I raise this so all the parties can push back

on this to the extent they wish -- what we would envisage is giving a very clear steer as to how we would expect these matters to be resolved, but leaving it to the parties to -- when they go to look at the detail and complete columns 3 and 4, to be able to push back.

So suppose we were to say it is going to be a granular approach, that is how we see it working, sampling all that sort of stuff, I would not want it to be said that those who are advocating a less granular approach would be closed out forevermore from arguing that that was the better way of doing it.

I think we have got to say that we are giving a steer, but it would not be an irrevocable steer because we are at the stage of actually just framing the issues, rather than working out how they are proved.

So what we would want to do is give a good shove in a particular direction, but without prejudice to it being reversed if, on further information, there was a case to be made for such a reversal.

MS SMITH: Yes, my Lord, that does sound very sensible.

And I will be poked if I am saying the wrong thing, but for our part, from my clients, the important thing is that the threshold legal question is determined.

And it seems eminently sensible, if I may say so, that once that has been determined, the parties can then, in effect, go away and consider how that impacts on the next stage, the stages of filling in columns 3 and 4.

Obviously, it would be extremely helpful to have a steer from the Tribunal on that, once the legal test is determined, but for our part, it is the threshold legal question that is the most important.

MR JUSTICE MARCUS SMITH: In a sense, the threshold legal question then informs how you go about it.

MS SMITH: It will inform how one then goes on to filling in columns 3 and 4.

MR JUSTICE MARCUS SMITH: Just to test this, suppose we are against you and are more inclined to go down an econometric, or sector-wide or market-wide approach, but let's assume it was a very wide approach, so the very opposite of granular, is there anything you say about whether the broad axe has limits; in other words, is it part of your contention that one could not do the exercise -- even if we decide the essential point against you, is there a limit that precludes us from taking the course that Mr Rabinowitz and Ms Wakefield, I think, would be advocating?

MS SMITH: We certainly don't accept -- this is why I made the point that Visa's and Mastercard's proposals, Mr Holt's and Mr Coombs' proposals fail on their own terms -- sorry, Visa's and Merricks', Mr Holt's and Mr Coombs' proposals fail on their own terms, we certainly don't accept that those proposals for econometric evidence would be -- would even fulfil the test if it were not the test that we set out.

It may be that, depending on the answer to the threshold legal question, there is a role for economic evidence of some sort, but we would have to consider that, having seen your answer to the threshold legal question.

But we certainly don't accept, as currently proposed, the econometric modelling that is proposed by Visa and Merricks would work, even on their reading of the legal test.

MR JUSTICE MARCUS SMITH: The last point, and it follows on from this, if you could turn up bundle 1, page 75.

MS SMITH: Page 75?

MR JUSTICE MARCUS SMITH: Page 75.

This is your articulation as to how the legal questions would be resolved on your basis.

So you are, essentially, answering the worked example question on Pendragon, and in paragraph 55 at page 75, you say: well, what there would be for the sample claimants is a witness statement from the suitable senior employee explaining the various matters set out at (a) through to (e).

MS SMITH: Yes.

MR JUSTICE MARCUS SMITH: What I am asking is: how far could such a person -- assuming them to be capable, honest and having done all the hard work, how far could such a person actually give meaningful evidence on the pricing policy, given, as you've just said, that MIFs are actually such a small propotion…

(2.26 pm)

(Break in audio feed)

(2.27 pm)

MS SMITH: [...] from that particular claimant, and you will see on page 84 what Pendragon, in effect, indicated that they can give evidence on.

And he can give evidence -- he or she -- that individual can give evidence on how the prices are set, their relevant central costs, and explain how the costs are treated and how they are factored into any pricing policy; and they would address whether the MSC was explicitly or implicitly taken into account in any pricing policy or price-setting, including the company's price and reaction, if any, to the natural introduction of interchange fee regulation, and they'd exhibit documents to support that.

What they can say is for example: we have a pricing committee, who meet once a month -- and I am completely making it up now.

MR JUSTICE MARCUS SMITH: Fine.

MS SMITH: This doesn't necessarily reflect the facts of any particular claimant --

they could say: we have a pricing committee that meets every month to set the prices in our shops, and at the pricing committee we get a report from X, from Y and from Z, and we get the following data at the pricing committee.

And this is what we consider and this is how we consider it, and taking X, Y and Z into account, this is how we consider our prices.

And then we cascade them out to the retailers and the branches, and they may say the branches are obliged to set the prices at that level, or they may be -- there is certainly flexibility.

But anyway, that is what we propose the evidence to be, very similar to the evidence that the Tribunal, I think, considered in the *Sainsbury's* litigation when looking at that -- obviously that was done by Sainsbury's and they are a much bigger business than most of the businesses who are claimants -- my clients, but it would be exactly the same sort of evidence that was anticipated to be produced in the *Sainsbury's* Tribunal case.

MR JUSTICE MARCUS SMITH: Where of course (Inaudible) failed, but that will be read in the light of the particular decision.

MS SMITH: Yes, my Lord, one would need to look at the facts of every particular case.

MR JUSTICE MARCUS SMITH: And you would envisage that the person giving evidence would have to attend for cross-examination to be tested on what they said in their statement, by reference to the documents produced --

MS SMITH: It would be a witness statement, subject to a statement of truth, and yes, of course they could be cross-examined on that.

MR JUSTICE MARCUS SMITH: And although you say in page 85 that relevant documents would be appended --

MS SMITH: Sorry, your voice dropped.

MR JUSTICE MARCUS SMITH: -- although you say that relevant documents would be appended, do you envisage any kind of disclosure process?

MS SMITH: What we propose is the original documents would be appended to the witness statement in the normal way.

I can't remember off the top of my head the number of the practice direction, but we could append the documents.

And we would envisage after the witness statements have been considered by the defendants, they could make applications for specific disclosure because we anticipate that any application made for disclosure before the witness evidence -- the witness statements are produced, would be very unfocused.

And once they know that this is the way in which the pricing is carried out in this sector or for this sample claimant, the specific disclosure request can be much more focused.

But certainly we see a -- we anticipate a subsequent stage of specific disclosure applications -- but we think it must be the right way round to have the witness statements setting the scene first and then the disclosure coming next, because otherwise there is a danger that masses of disclosure is ordered, which turns out, ultimately, to be irrelevant.

MR JUSTICE MARCUS SMITH: And it is about 83 witnesses, you are thinking of?

MS SMITH: I think -- I can give you the exact numbers, they are there in our submissions.

The exercise that has been carried out, if you turn to page 72 of that bundle, this is an exercise that has been carried out on the back of the exercise that already was carried out over the course of a year, you will recall, between the claimants and Mastercard and Visa to identify the -- I think in the end it was ten lead claimants, the Tribunal indicated, you will recall, they want a trial of

eight lead claimants.

The parties then agreed, and there was a lot of work done behind the scenes on this, agreed ten categories as being representative of the Humphries Kerstetter claimants.

And those categories were based on work done by our market consultants, Punter Southall Analytics, who divided the claimants into ten groups which are set out at paragraph 44.

And those are the ten groups that were agreed between the claimants and the defendants.

So that is, we say, a good starting point for the next stage that we then say -- we then make the point that it can be seen that a number of these categories are made up of different business sectors.

For example, number 7, "hospitality, other", covers hotel, cinema, car rental.

And we accept there might need to be carried out a further refinement of those categories by reference to information that we say is relevant for the purposes of pass-on.

And that is set out in paragraph 45, which is the refinement that has been carried out by PSA for the Humphries Kerstetter claimants by reference to the standard industry classification code, or basically the market sector -- the industry sector in which the claimant operates.

Their average annual turnover is a measure of their size, because size is likely to be indicative of where the pass-on takes place.

See the average transaction value for their card transactions, and it gives an indication of the profile of their business, in particular whether they engage in business-to-business or wholesale or retail business-to-consumer activities and the value of the goods and services sold.

(d) their average MIF rate, which gives an indication of their mix of card sales, because of the substantially different MIF rates between the different card types.

The transaction share -- the commercial card transaction share.

And then (f) the inter-regional card share.

And those factors have enabled us to refine -- or PSA for the Humphries Kerstetter claimants -- to refine the previously agreed categories to provide a more fully representative sample for the purposes of pass-on, as we say at paragraph 46.

And that divides the claimants into 39 categories, and the 39 categories are set out in annex 2, which is at pages 81 and 82 of the bundle.

You will see the 39 categories at pages 81 and 82, and you will see the number of Humphries Kerstetter claimants who fall into each of those categories.

And then for the purposes of selecting the sample claimants, that is dealt with in paragraphs 49 through to 53 of my submissions.

But with those, you take those 39 categories, and a selection should be made from within those categories, and given the potential for both geography and claimant size to impact on pricing decisions, we propose, paragraph 50, that for larger groups of 20 or more, four claimants should be selected, one from each quartile, on the basis of their reported annual card turnover, and two from each, whether at five to 20.

And that is how we get to 83 sample claimants.

That is based on the Humphries Kerstetter claimants.

We think the general approach could be extended to encompass, not only the Scott + Scott claimants, but also the Stephenson Harwood claimants.

And obviously this process will need to be refined, and could be refined, with input

from the schemes as well.

MR TIDSWELL: Is the idea that with the (Inaudible) process or because of an agreed binding process, the outcome from those four linked local authority cases would bind the remaining 89 as to the question of --

MS SMITH: As I have already said, on behalf of the claimants I represent, which are Humphries Kerstetter claimants and the SSU claimants, which amounts to 673 Humphries Kerstetter claimants and another 200-odd SSU claimants, yes, we are willing -- we were willing to undertake to be bound by those results.

MR TIDSWELL: Sorry, I should have been clearer --

MS SMITH: -- yes.

For each category, yes.

MR TIDSWELL: Yes, as to the question which is set --

MS SMITH: Yes.

Sir, unless you have any further questions.

MR JUSTICE MARCUS SMITH: Thank you very much, Ms Smith, we are very much obliged to you.

Is it Mr Woolfe next?

Submissions by MR WOOLFE

MR WOOLFE: Thank you, sir.

First of all, I do adopt what has been said by Ms Smith.

I don't propose to repeat all of it, I can tell you I do adopt it.

So I am going to make a submission on a few points arising, where we have things to add.

The first is the Tribunal's note, if I may.

Because it was the final option, I think the third option, put forward in paragraph 8 of that note, does try to pick up on a perceived advantage of finality for the defendants in having a non-bilateral model.

In our submission, it is necessary to distinguish between benefits that arise from a certain sequencing that is implied in paragraph 8, as opposed to benefits that would derive from a non-bilateral model.

Specifically, we say that the proposal of a fund is not strictly necessary to the benefits that it is finding.

Essentially, what it seems to be proposing is if one can reach a determination of the defendant's total liability, which will later be split between different categories of claimant, then relevant provision can be made.

It doesn't really matter whether they continue to hold the money or pay it into a fund, the power to order a fund is not really at issue.

Now, if there are to be overlapping claims downstream, which we note is very much not in issue, but for future cases it may be an issue, and this is why I address it, the benefits for the defendants in terms of being able to take a less active role at that stage really stem from having all the issues which go to their liability determined.

So exemption in this case, and the percentage of overcharge, dealt with first before pass-on is finally determined.

And that is, in a sense, a benefit -- an approach that would deliver some of the benefits that the Tribunal is raising in that note.

I would also note that the fund idea itself wouldn't -- even if this approach were adopted, wouldn't necessarily enable defendants to drop out entirely, as it may not be clear that what is left is simply a zero sum gain between merchants and consumers downstream.

First, as is the case in these proceedings, there may well not be a consumer claim downstream which overlaps with the whole of the merchant claim -- the overlapping claim problem.

Secondly, and I think this is point which has not been addressed yet, there may be volume effect claims by merchants which would complicate the picture.

You cannot set the total quantum of damages for a case before you know whether the merchant had any volume effect claims; and you cannot quantify the volume effect claims until you have worked out what prices they have or have not raised downstream.

That will go -- that issue about pass-on effect and the size of the pot means that that type of approach -- I'm speaking in general principle terms, as the Tribunal asked, may not really enable the defendant to entirely drop out, but certainly there would be benefits to a defendant in having the things that set the parameters largely of its liability dealt with first before pass-on.

MR JUSTICE MARCUS SMITH: How will the volume effect claims operate in the list of issues process that we have articulated?

I mean, are you expecting the Tribunal to articulate that specific prices of specific goods would rise in a specific way; is that the sort of granularity that the claimants are expecting at the end of a trial?

MR WOOLFE: Well, I mean, our case of course is that that will not be made out. But in terms of -- that is, in a sense, one of the issues with the sectoral approach that is being suggested -- or at least it is being observed in other cases, as it were. Because if you simply have a finding that, generally speaking -- a certain amount found its way through to consumers, that may well be enough for Merricks -- the Merricks claimants to make out causation in their claim, but it wouldn't be enough to make sense of a volume effects claim on

that basis, no.

MR JUSTICE MARCUS SMITH: My question is: how is one to incorporate the claims which could arise in any number of ways, which are not directly related to simply the cost base of the retailer having been increased?

Because I mean, you are conceding that there is at least the potentiality for some costs to be passed on -- we heard that this morning and we have seen some material which goes to that -- so are you expecting a further round of pleadings to deal with things like volume effects later on?

I mean, how are you going to achieve --

MR WOOLFE: I wasn't advocating that in this case.

I was addressing the level of --

MR JUSTICE MARCUS SMITH: No, but --

MR WOOLFE: -- in a sense, it would be open to a claimant to the extent that limitation allows.

We have a situation with an ongoing situation here, so there will always be some part of the claim for which limitation would be allowed, to articulate a volume effects claim.

That is, in principle, a claim that could be made at any point by some claimants.

MR JUSTICE MARCUS SMITH: Yes, indeed, but I think that is the point that I am putting to you.

If there is going to be that sort of claim, I don't think it would say very much for the efficiency of our process if we were to anticipate, as it were, a further round of litigation, whereby you amend your damages claim and query whether there would be a limitation point to be taken or not.

But I think that would be, in itself, a difficult question.

But suppose we go down the line and it is found that on whatever sampling process

there is, there is a substantial element of pass-on to the consumers, are you suggesting that, at that stage, there could be a re-articulation to say: ah well, you found that there is a significant pass-on, prices therefore would have been higher and so the volume effects of that means we would have made fewer sales and so we would like to have “X” damages?

Is that something which is being envisaged by the claimants in this case?

MR WOOLFE: I am not in a position to say it is being envisaged.

I am simply setting out at the level of principle how this -- the issues of trying to adopt this kind of non-bilateral approach.

And of course I can only speak for the claimants who I represent here.

Others may make a claim at any point in time, by saying it is an ongoing situation by which these MIFs are being charged and some will be charged tomorrow, in respect of which somebody else who is not before the Tribunal today, may turn up and make a claim.

So --

MR JUSTICE MARCUS SMITH: Clearly, we can only deal with the claims that are before the Tribunal, but what I am thinking about -- I confess we will need to think about this quite carefully overnight -- is whether there ought to be some kind of pretty clear guillotine, that if you are going to plead this sort of thing, you do it sooner rather than later and if you don't do it sooner, you don't do it later.

MR WOOLFE: Yes, I can see, in terms of fairness, there comes a point at which you cannot raise new issues in litigation simply because you have lost on some point.

That is a well-known principle -- in other cases as well.

MR JUSTICE MARCUS SMITH: The problem you have got is, of course, your claim

is that there is no pass-on.

That does, in turn, depend on how we analyse pass-on.

So it may be that we need to have a revisiting of the list of issues after that has been handed down, so that this point can be flushed out -- or this sort of point can be flushed out.

Okay.

MR WOOLFE: Thank you.

In terms of everything I wanted to say about the fund suggestion, it is really, we say, the advantages that are there in the paragraph that arise from the sequencing of trying to get things -- the big picture parameters of liability done first before the pass-on.

The second area I wanted to touch on briefly to supplement what Ms Smith said is in relation to proximate causation being a distinct issue and a real issue in these cases.

As has been said, a great deal of reliance has been placed by both Visa and the Merricks claimant on a single sentence in 215, that the legal position is straightforward in the context of a retail business.

As Ms Smith has said, it has to be understood in context, the issue the Tribunal is trying to decide, and we would submit it is very clearly, if you need to classify it, an *obiter dictum*.

Perhaps we could turn to *Sainsbury's* because I do want to make a couple of supplementary points about it, authorities bundle 3, tab 13.

MR JUSTICE MARCUS SMITH: Yes.

MR WOOLFE: And the issue, as Ms Smith said, is stated in paragraph 40 of the judgment, and it is reiterated at paragraph 176 on page 1090 of the bundle. So under the quotation at the top of that page:

"The broad axe issue which is said to arise out of this statement is, “did the Court of Appeal find, and if so, did it err in law in finding, that the defendant has to prove the exact amount of loss mitigated in order to reduce damages?"”

The Tribunal's reasoning in considering this goes through four stages.

It sets out what they are at paragraph 181.

First, it is going to look at the requirements of EU law; and secondly, will consider whether the merchants are entitled to use the overcharge as the ***prima facie*** measure of the losses; thirdly, the issue of the burden of proof; and fourthly, the degree of precision required.

And to jump ahead slightly to see what their eventual ruling was as well, not just the issue stated but what they concluded, that is at paragraph 226 on page 1101.

What they found was -- in fact they hadn't found the defendants were required to prove the exact amount of the loss.

But insofar as they require a greater degree of precision in the quantification from the defendant -- from a claimant, they erred.

So everything in their reasoning, in a sense, has either got to relate to the issue that they are being asked to decide or relate to what they eventually say differed slightly from that narrow issue, which is to say, essentially, defendants are not required to be more precise than claimants.

Anyway, the section on the requirements of EU law starts on page 1091, and effectively it is just saying what you would expect: there is an EU right of action, given effect in national law, subject to effectiveness and equivalence.

And then paragraphs 192 through to 206 is the Supreme Court reasoning its way through the fact that the overcharge is the ***prima facie*** measure of loss.

Then we have the section on mitigation and burden of proof, starting at 207.

And in a sense, what they conclude there is what is stated in 211, which is there is

a legal burden on the defendants to plead and prove that the merchants have mitigated their loss.

That's the actual sort of bit of finding of law in that section.

What the Supreme Court then does at paragraphs 212 down to 215 is, in a sense, all obiter.

It is all a series of reasons why it says, by way of comment really, the significance of the legal burden should not be overstated.

All of this section here is not critical to the Tribunal's reasoning.

It is in the context of that that paragraph 215 comes.

I will come back to 215 in a moment.

217 through to 225 addresses the actual issue of the degree of precision required.

The conclusion in that section is set out at the bottom of paragraph 225:

"In accordance with the compensatory principle and the principle of proportionality, the law does not require unreasonable precision in the proof of the amount of the prima facie loss, which the merchants have passed on to suppliers and customers."

The simple point is that, nowhere in that is there any reference back to what is said at paragraphs -- the obiter section at paragraphs 212 through to 215.

It is all just something the Supreme Court says.

I may be slightly over-hammering a point, but it does not -- it is not binding ratio that means we are necessarily stuck with this finding for all time, as it were.

MR JUSTICE MARCUS SMITH: You don't say *per incuriam*, just *obiter*?

MR WOOLFE: Exactly, yes.

Now, turning back to 215, it is a single sentence.

MR JUSTICE MARCUS SMITH: Yes.

MR WOOLFE: They don't say the question of legal causation does not arise -- in

fact they say very clearly that it does arise.

They comment on that they think it's straightforward, and they say "in the context of", and there are some words that follow:

"... a retail business in which the merchant seeks to recover its costs in its annual or other regular budgeting ..."

So they are certainly leaving open at least arguing about where you fit within that.

We would, respectfully, submit that the Supreme Court cannot be intending to exclude any issue being raised in a future case as to proximate causation, in the case of businesses generally or even in the case of a retail business with annual budgeting.

It is simply a view expressed that they thought it was straightforward, but they were not sitting there looking at all the facts.

Now, if I may take you, sir, to in fact the facts of *Sainsbury's* itself.

If you turn to bundle authorities 1, tab 7, and if I can ask to you turn within the bundle to page 475, before we read this, the reason I am taking you here is partly to say there are circumstances in which it is not straightforward, but partly also in response to the questions from the Tribunal this morning as to, you know, do we have to look at -- well, what is the scope of the transaction out of which mitigation arises; and do we have to look at what is specifically being done.

Also, the question from, I think, Mr Tidswell this morning, regarding what happens if a cost becomes part of a costs stack, rather than being a single line item.

Now, what we can see has happened on the facts in *Sainsbury's* is set out at paragraph 443, and what seemed to have been the case is the cost of goods sold, COGS, an enormous item, is handled through commercial trading teams:

"These teams “set retail prices and are effectively responsible for delivering their

gross margin number.

They do not have regard to the cost of ...(Reading to the words)... that is demotivating.

We want to keep it “clean” so buyers are given specific gross margin targets."

On the facts in that case, it seems that the price-setting that was being done was being done by somebody who -- it wasn't their job to have regard to this cost.

And in a sense that is the kind of factual point which goes to the question of how businesses actually experience these costs, what they are actually doing in response to them.

It is not simply a question of where they sit in a line of accounts, but it is a question of: yes, actually how the business experiences the cost and what they do in response.

And it is the sort of point that goes to the question the Tribunal was raising, as to what is the transaction, does it arise out of the transaction, or not?

Now, turning more to the current facts, this is addressed by Mr Falcon, the expert witness for the Humphries Kerstetter claimants, and that is in bundle 1, tab 15(a).

And the section I wanted to take you to in that is page 226.28.

So that is page 28 of the report using the internal numbering.

MR JUSTICE MARCUS SMITH: Yes.

This entire section, paragraphs 83 through to 94, is really dealing with how merchants experience and treat the costs within their business.

MR WOOLFE: Now, we say it is not the role of the Tribunal here today to say: yes, they treat them this way or that way -- that is not what we are doing.

I am simply raising it with you to show there was actually a real issue.

We saw specific evidence in the finding in relation to the facts of *Sainsbury's* in the

context of one business, and Mr Falcon is an expert, saying this is a real issue -- he refers to *Sainsbury's* here as well -- saying there is a real issue here as to whether or not it is straightforward that these costs are passed through.

I would say, in those circumstances, where we have an *obiter dictum* from the Supreme Court, it cannot exclude this Tribunal from exercising its fact-finding function, in relation to the particular cases that it has before it.

In a sense, the point is summarised at paragraph 84 of that:

"While it admits MSC is technically a variable cost [as categorised in accounting or economic terms], the one point is whether the claimants treated the MSCs as variable costs for the purpose of making pricing decisions."

So there is this issue about pricing arising out of the transaction.

Now, the other point I had to make regarding whether it is straightforward or not, and paragraphs 215, the *Sainsbury's* point, is that the difficulties become more apparent when you see the variety of claimants that the Tribunal has before it.

You have seen the list in my learned friend's skeleton argument, with the sort of tendering of categories.

But just to show you in respect of our clients, in bundle 4, tab 71 is one of our -- one of my claim forms, if you like, and this is -- this claim form is -- the company named on it is Topps Tiles, but behind tab 71 at page 1336, we can see a list of the claimants in that action.

And what you can see is --

MR JUSTICE MARCUS SMITH: 1336?

MR WOOLFE: 1336, that's right.

If I may, sir, the first four are -- bundle 4, tab 71.

MR JUSTICE MARCUS SMITH: Yes, I am there, thank you.

MR WOOLFE: Yes.

So we have a list of the claimants on that particular claim form.

The first one is the University of Leeds; the second one is the Manchester Metropolitan University; third one, University of Manchester; and the fourth one, the University of York, all of whom you wouldn't necessarily describe as retail businesses, and I am not sure you can extend anything the Supreme Court was saying in *Sainsbury's* to them.

The fifth one is BMW Financial Services Limited.

There are a whole series of other car-trading businesses, automotive businesses here, and of course they may not take card payment for the full value of, say, the purchase price of a car.

So there is an issue about how -- whether they experienced the cost in the same way, for example, as somebody -- a different type of business.

And then we have a series of other holiday businesses, hair salons and so forth, as you can see.

There are real dangers when you look at the range of businesses involved.

A series of garages, 64 through to 70.

There is a real danger when looking at these in taking that single line from the Supreme Court judgment, and saying: ah, the legal causation is straightforward and therefore we don't need to consider the legal causation, no trial is necessary on legal causation.

We would submit that is not an approach the Tribunal ought to be adopting on the basis of that one line, yet it is the approach that Visa and Merricks are urging upon you.

Then, finally, I think one more point in relation to the general issue of proximate causation, again on the same issue that you cannot simply jump over the

issue, as it were.

Ms Smith was saying to you that there are sort of some common principles of mitigation, two different limbs, both in terms of actual mitigation and failure to mitigate, and you need to have regard to whether or not you have a duty to do something before considering whether or not it counts as actual mitigation.

I have two points to make with respect to that.

There are clearly some situations in which, if I may -- where the mitigating action means you never experience the effect of the wrong at all, then it may simply not matter whether you turn your mind to it or not.

I am now thinking of another case in the High Court at the moment, the *Servier Perindopril* case.

We had a trial last year in which the issue was whether or not the claimants should have taken action to reduce their purchasing of the relevant drug.

Some claimants did take some action.

We succeeded on the issue that they were not required to do that, but nonetheless some did.

Now, clearly, since they reduced their purchasing, they simply avoided experiencing some of the loss.

The fact that it is outside the scope of the duty to mitigate is neither here nor there, simply no loss was ever caused.

It is that simple kind of case.

But where you are looking at a situation where action is being taken, supposedly in mitigation, we do say it is a relevant consideration to look at whether or not it comes within the scope of the duty to mitigate.

And in support of that, if I could take you to the -- I can't remember the name of the case now -- the *Fulton Shipping* case, in volume 2, tab 10.

And if you are familiar with the facts of this case or not, sir, essentially it was a charterparty was extended for a period of two years, formally.

And the charterer was found to repudiate that two-year extension and they returned the vessel two years early.

And the owner sold the vessel and did quite well at that time because the market -- the price of the vessel was higher at that time.

And when they sued -- when the owner sued the charterer for losses arising from the repudiatory breach, the charterer said: ah, well, effectively, if you hadn't sold the vessel then, you would have sold it two years later when, on your case, I should have redelivered, the market price had fallen and therefore you need to take this benefit of having sold on top of the market into account in mitigation.

And Mr Justice Popplewell, I think it was, said that was not the case -- sorry, I might have taken you to the wrong version.

Sorry, I should have taken you to bundle 8, authorities 1, tab 6.

I wanted the High Court judgment, sorry.

It is bundle 1, tab 6.

This is quite a small point.

MR JUSTICE MARCUS SMITH: Yes.

MR WOOLFE: In the course of rejecting that argument, one thing that Mr Justice Popplewell said -- and it is right at the end, at paragraph 77 -- it arises out of the mitigation in some sense being a unitary thing.

And it is just below H, on the right-hand side of page 220:

"If, in the case of a sale, it is legitimate to look at the value of the vessel, so as to require an owner to give credit if the market falls, it must be legitimate for an owner to claim any additional loss caused by the sale if the market rises.

If the vessel would have doubled in value by November 2009, would the tribunal's finding that the sale was in reasonable mitigation of the loss have entitled the owners to claim the lost capital value?"

That is the "sauce for the goose, sauce for the gander" point.

But essentially, the principle -- if you take steps and act on mitigation of the loss, it is not simply the case that you cannot claim for the loss you have avoided, but you can claim for the costs of so doing.

And that is why the proximate causation step is a real and necessary one, that cannot simply be skipped over in an individual case because it has genuine consequences, as a matter of English law, as it were.

That is what I wanted to say about proximate causation.

I had a few points to make regarding the issue of the extent of the overlap between the merchant claims and the consumer claims.

The Tribunal is already well seized of the difference in time period, and as Ms Smith said, Merricks is Mastercard only, and indeed the different nature of the claims.

Now, the point I simply wanted to make is that Merricks is clear that they will be using -- seeking to use the pass-through of industry-wide cost changes to estimate the pass-on of MIFs to members of the class, and that is in the first Coombs' statement at paragraphs 1.15 and 1.16.

It seems the Merricks claim will stand or fall by that standard.

If sector-wide pass-on rates are enough for them to demonstrate their loss, then they will recover some damages; if sector-wide pass-on rates are not enough to demonstrate the loss, then they won't.

MR JUSTICE MARCUS SMITH: Well, as matters stand, I mean, are you saying that whatever we say in this ruling, Merricks cannot amend?

Presumably they can.

MR WOOLFE: No, I am not saying that.

Obviously -- I am simply looking at -- as things stand.

MR JUSTICE MARCUS SMITH: Yes.

MR WOOLFE: What I was going to go on to say is that, assuming that their case is as it stands -- well, looking at the interest they actually have in what is determined in terms of merchant claims and the issues that should be determined.

If they succeed in showing the sector wide pass-on is enough for them, as it were, so say they establish that the sector-wide pass-on is enough and that it is 50 per cent, 50 per cent was passed on, that tells you how much flowed through to them and they can claim damages as a result of it.

They don't actually have any particular interest in my clients turning up and demonstrating that the level of pass-on they were achieving was higher or lower than that because, in a sense, the merchants only cover part of the market.

If Merricks have the benefit of proving things at an aggregate level across the entire market, and if they succeed in showing that aggregate pass-on was of a certain level, and the Tribunal accepts that, the fact that it may be lower in respect of the merchants who come before you, doesn't change the correctness or otherwise of the finding in respect of Merricks.

Because pass-on may be higher or lower in respect of merchants who are not before you, a fairly simple point.

What they really have an interest in doing is establishing before the Tribunal the sector-wide pass-on rates -- the pass-on of general costs across sectors as a whole is a sufficient proxy.

And that is a point they are seeking to urge on you today.

But that is the real point of a sort of commonality, as it were, which sort of cuts across both claims, but that, we would submit, is one that cannot be determined, in a sense, without proper examination in the form of a trial with the relevant experts who are putting that case forward, and therefore it is not something the Tribunal -- the Tribunal cannot today conclude that sector-wide -- the average extent to which costs across that sector are passed on is the right standard to be used across the board, which is the point that Merricks -- that is what they really want determined in their favour.

Whichever way that goes, they then don't have a particular interest in what -- how my clients deal or don't deal with the issue of pass-on.

MR JUSTICE MARCUS SMITH: That, in a sense, is why our note of Friday raised the question of the fund.

Now, leave that on one side, here everything that has been said about the procedural impossibility of that, but the thinking behind it was that it was important to ensure that the award of damages was, in the broad axe sense, consistent.

And I wonder whether we oughtn't to be approaching the question of pass-on in this way, that one articulates, as one must, the amount of the illegal overcharge.

And then one says that one would receive evidence from all of the claimants, at whatever level, as to where the losses would end up.

Now, of course, each claimant level will principally only be able to use evidence, whether it be statistical or factual, in relation to their level.

But that might be said to be an advantage in having the level below that -- the consumer level -- before court, so that they can produce their own take on this, even if their claims are temporally different, so that one can achieve

a degree of evidential consistency as to how these costs flow through the market for the payment of goods and services broadly conceived.

The problem with a splitting of the claimant groups is that you run the risk of some form of inconsistency.

You get claimants at whichever level saying that there is either a low level of pass-on, if they are in your clients' position, or they are in a high-level of pass-on, if they are in Ms Wakefield's position, with the resultant risk of over-compensation, if one mismatches it; or one gets a situation where one has the defendants taking the view that pass-on occurs in whichever way is most beneficial for them, in that when the claimant is a direct claimant, everything is passed on and if the defendant is an indirect claimant, none of it is.

Now, that runs the risk of under-compensation.

So oughtn't the court to be trying to create a state of affairs where it is able to hear from all the interested levels and seek to obtain a result, which is, in the broad axe sense, internally consistent?

MR WOOLFE: I think the reason why that -- the position of that are those which my Lord identified, and in this case we are talking about a different period.

That is the first point.

And secondly, we are talking about consumers who are only claiming in respect of Mastercard, and therefore in that sense half the market -- half the types of payment for a different period, and then also, we are only representing a part of the market, in the merchant sense, now.

None of them match up in any way whatsoever, so there is not really sort of a common pot of overcharge, as it were, which has actually been transmitted through to us and transmitted through to them.

It is a different overcharge in any stance.

Now, clearly, there is also an issue of what is a relevant data point, as it were, and the Tribunal addressed -- those are different issues.

They are saying the pass over across the market was this.

And the pass on for any part of the market will be higher or lower than that, but they don't care, they don't have to care about that --

MR JUSTICE MARCUS SMITH: Well, they care, to the extent they want to maximise their claim.

MR WOOLFE: Yes.

MR JUSTICE MARCUS SMITH: My point is that the Tribunal wants to care about ensuring that every claim is appropriately maximal, but not excessive.

The problem with pass-on is that one has got a to-be-defined pot or fund, which then is passed through the market and as an outcome, at the end of the process, one needs, whether it is one decision or a series of decisions, a level of consistency which is altogether important, irrespective of who is before the Tribunal on any particular claim.

Put it this way.

Let's suppose one reached a situation where we conclude in the retail actions, without Merricks, that there is zero pass-on and we decide that.

And so you, as it were, scoop the pot of whatever overcharge there was, and then we have the collective action, and Ms Wakefield is very persuasive for her clients and she persuades us that in fact it is a 100 per cent pass-on, and she scoops the pot for her clients.

I mean, the problems -- and this is a perfectly plausible outcome because these are questions of fact, they are not questions of law, but frankly, it would be little short of outrageous for the process of trial to reach that sort of outcome.

Now, if it is the case that that is possible to achieve in relation to a series of separate trials, then isn't that a course that, really, we ought to be straining very hard to avoid?

MR WOOLFE: Sir, I would say -- you say it is outrageous, but if you may, I submit it is far from that.

MR JUSTICE MARCUS SMITH: Right.

MR WOOLFE: Say you have a finding that 100 per cent of -- well, say you have a finding that there was a very high-level of pass-on, to consumers in the period from, I think, it's 1998 to 2012.

Okay?

Now, we have some claims which -- I think it is the Topps Tiles one, I can't remember when it was filed, but in the last couple of years or so -- doesn't overlap with that period at all.

And so you have a finding that the university -- the Manchester Metropolitan University passed on none.

There is absolutely no inconsistency between those two findings.

And there is nothing outrageous about that at all, if I may --

MR JUSTICE MARCUS SMITH: I suppose it is more extreme than that.

Suppose we are persuaded, on your approach, that there is no pass-on at all, and in the other case, everything is passed on.

Now, you are quite right, those are both findings that are appropriate or open to the Tribunal to find, but isn't that the concern, or ought we just to think that the optics shouldn't matter, and that these are separate cases and so it is what it is?

MR WOOLFE: They are in separate cases -- they each are a claim that has to be adjudicated on its own merits -- merits, not Merricks -- but as I was going to

go on a moment ago to say, there is a second issue at an evidential level what the relevant evidence is that the Tribunal has before it.

I can certainly see that if, for example, estimates are being put forward in the Merricks trial of sector-wide pass-on, that is being said are relevant information, it wouldn't make sense for those not to be available to a Tribunal sitting in the merchant claims.

I mean, you wouldn't want one Tribunal to be sort of blindsided to everything put forward in another.

But that doesn't necessarily require a single trial at which all this is being determined in a binding way or when these are for two different time periods, and as Ms Smith said, these are -- both because of the statutory law and because their claim is put on a market-wide level, whereas ours are our own specific losses, these are not the same issue, fundamentally.

MR JUSTICE MARCUS SMITH: I am reminded about what caused the Supreme Court to become engaged in the *Sainsbury's* matter, and none of us, least of all me, need reminding that one of the problems was that there were three tribunals which reached radically different conclusions --

MR WOOLFE: Yes.

MR JUSTICE MARCUS SMITH: -- in relation to facts which to the person on the Clapham omnibus, looked identical.

And yet because there were evidential differences, as well as differences of approach by the tribunals, but particularly evidential differences, one reached three quite different outcomes.

Now, no one can criticise the tribunals for doing that because there were differences in the evidence that was presented before each of them, but it was not, I would suggest, a very happy outcome and it was one which was corrected

by the Court of Appeal and by the Supreme Court.

What I am seeing here is a little bit of a Groundhog Day, where we get, albeit on the question, not of infringement, but quantification of an infringement, exactly the same problem where one has differences in evidence which will impel different Tribunals to reach different outcomes, because that is the way the claimants put their case, with the end result that one achieves an assessment, which stepping back or viewing it from the top floor of the Clapham omnibus, one says: well, how can a court do this?

MR WOOLFE: Sir, I was under the -- the case of the three trials -- of course the Tribunal is right that the situation was well-known to everybody at the time and it was remarkable.

But if I may, they are rather different situations because if I recall, there was a death spiral argument being put: is the correct counterfactual at which you are looking, to assume that one scheme cannot charge a MIF when the other one can?

Okay?

And that is sort of a question of law, if you like, as to the correct formulation as to the counterfactual, which clearly is the same -- has to be the same -- across all claims, in a much more permanent and enduring sense.

That is different, I would say, from the issue of pass-on, which is bounded by the fact that there are different periods, one is a market-wide claim where they are only arguing about pass-through on an average market-wide level, for a different period than we are looking at pass-through by individual merchants.

And they are just fundamentally different issues -- even if they may sound the same to the man on the Clapham omnibus, they wouldn't necessarily sound the same to the judge on the Clapham omnibus on his way home after court, if

I could put it that way.

Just a related point.

I think, Mr Tidswell, you said earlier on, what if it was concluded that there is factual causation of pass-through, but no legal causation; is that a problem -- an unfortunate consequence?

I simply submit there are many situations where someone may, in response to a role, take action that detrimentally affects third parties, but those third parties don't have a claim.

I am not saying -- I am not saying that always applies in pass-through, but if legal causation is in issue -- if it's an issue that arises for us for the pass-through, it arises for Merricks as well -- if legal causation is failed to be shown -- even if there is factual pass-through, that is just the way it is and that is the correct outcome.

MR TIDSWELL: Do you not think that is a little bit odd, though, that a consumer seeking to claim is going to have the outcome dictated by quite fine points that we were talking to Ms Smith about, as to whether or not a retailer had applied its mind to a particular cost, doesn't that seem quite a strange outcome if that is what drives the position for the consumer, even if as a matter of fact or as a matter of economics -- if I'm allowed to approach it that way without being criticised -- as a matter of economics it's quite clear that the price has been increased, to the detriment of the consumer?

MR WOOLFE: So the Merricks claim is not going to turn on whether any one specific merchant in a later period did something, one way or the other, with its costs.

Its claim is explicitly a market-wide claim --

MR TIDSWELL: If, for example, you were very successful and were able to accept

that, as a matter of fact -- and particularly through a sampling process -- a very large proportion of retailers do not pass the cost on, I understood Ms Wakefield to be accepting that would have an implication for the recovery of her clients.

MR WOOLFE: So there are situations in which somebody may -- if raising prices is a form of mitigation, that may have detrimental effects on other people, it doesn't necessarily always entail, as it were, that the third person has a claim, necessarily.

So I think in an example where, imagine I own two houses and I am living in one of them, and my neighbour next door, in the first house -- and I am renting the second one out, and my neighbour is causing some form of a nuisance, they're playing music late at night, or some form of actionable nuisance.

I, in order to mitigate my loss, decide I am going to up sticks, move to my second house.

I kick out the tenant -- I have a right to kick them out at a month's notice, kick them out of that house, cause all sorts of problems for them.

Now, that might be said is not reasonable mitigation, I can't claim for all the costs of doing that.

Legal causation is not shown in terms of moving out.

I could have done something less extreme.

The person I am kicking out is detrimentally affected by the action, but they don't have a right to claim against the tortfeasor in that scenario --

MR TIDSWELL: It is different here because we know that the consumer does.

That is the essence of competition law, isn't it? It gives them an actionable right to --

MR WOOLFE: Yes, it actually does, if the requirements of causation, both legal and factual, are made out.

They have to work out how they are going to address legal and factual causation on a market-wide basis, and that is what they have been trying to persuade the Tribunal of.

And the fact that -- for a specific merchant -- if a specific merchant shows that legal causation is not made out, then in terms of the consequences of that, it will not necessarily affect the Merricks claim as a whole at all, but if they fail on legal causation in the round, they fail on legal causation.

MR JUSTICE MARCUS SMITH: Isn't that the problem?

Let's suppose we have our 83 witnesses from -- probably more because you will have Stephenson Harwood's claimants as well, but let's stick with 83.

So we have 83 witnesses, and we hear them all.

Ms Wakefield is absent, as we are not interested in a sampling-wide approach.

And your witnesses do really well.

Despite Mr Rabinowitz's and Mr Cook's best efforts, it's a case of no pass-on, the losses are retained and there's a big reclaim.

One has all the transcripts, it is an open court.

What is to stop when Ms Wakefield comes to bring her claim, for Mr Rabinowitz or Mr Cook, or both, to put in a whole raft of similar letters and notices, and saying, "We are relying on this, this, this, this and this; here you go, Ms Wakefield, you're wrong, your sampling evidence, your economist may be absolutely right, but we've got 83 people who were, on the coalface, they were cross-examined up hill and down dale, and they were believed."

Now, it is not binding, but it is evidence which a tribunal would have to take into account.

And the problem one has got is that this material is foisted on someone who, on the face of it, has got a claim, but which has been -- had that claim removed in the

course of a process which has caused the introduction of questions of fact which the consumer class haven't been able to challenge.

Obviously, we would take that into account in the later Tribunal, but it would be evidence that would be of some moment, dare I say.

So how does one square that particular circle?

It is, again, the consistency point in another dimension.

It would be a situation of not overcompensation, but unfair compensation between two different claimant groups, both of which, in theory, have got a claim because we recognise, as we must, both direct and indirect claims.

MR WOOLFE: At the risk of sounding a bit like a broken record -- well, part of the answer would be that these are from different time periods and they differ in various respects -- different time periods, different markets.

The fact that some sub-sets of merchants, did or didn't do something, doesn't actually tell you what was done at the market-wide level, for a start, and in respect of the different period, and in respect of Mastercard only.

But that is a -- what Merricks and Visa seem to be seeking to do is ignore entirely that question of proximate causation.The problem raised by the Tribunal of consistency, I can see at that that does arise and there may be a variety of case management means to get around that, including allowing people to see evidence in various forms along the way, a joint case management common tribunal.

There are issue of -- things that can be done.

The requirement for consistency doesn't require you to do what Visa or Merricks are advocating, which is to say: ah well, then, we have to use a sector-wide approach.

Because that won’t achieve consistency.

Because the fundamental thing the Tribunal has to do is adjudicate on the claims that are before it, according to the law, and the law requires a requirement for proximate causation -- and proximate causation, both for our pass-on, but indeed for their claim of causation of loss.

They have to find a way of satisfying you on that relevance to the available evidence. At the moment, it is just being put on a factual level.

MR JUSTICE MARCUS SMITH: I see, thank you.

MR WOOLFE: The very last point that I had down to raise was the extent -- how far the Tribunal can go today.

I think, to some extent, that has been answered by the helpful indication after lunch that this is a matter of giving a steer.

But what I would say is you have some expert reports before you -- not from my client, but from three of the parties -- that make some quite high-level points about this subject matter.

I would submit that in order to make more robust decisions about the inferences that can be drawn from granular evidence or sector-wide evidence, you would need a report before you -- so the Tribunal would have to have before it an actual report that did that job and then be subject to cross-examination – is to have an actual trial process, if you like.

So I submit that is another reason why you can't adopt the approach that Visa is urging upon you today, of simply saying: ah, proximate causation, that is straightforward; as the Supreme Court said, it is just factual, we have to do it in this sector-wide way.

And you can presume that merchants did with MIFs what people in the sector generally did with costs as a whole.

That is the case being put by Visa, and I submit you are not in a position to adopt

that as a position on the basis of the evidence that's before you and given the absence of cross-examination of that evidence.

MR JUSTICE MARCUS SMITH: Where would you -- you would be suggesting that there would be a stage of cross-examination at which we would hear that cross-examination, or hear that evidence, in order to determine how we would try the matter; is that what you are suggesting?

MR WOOLFE: No -- on that particular point, that question of whether or not a sectoral approach -- it is -- there is one question where the sectoral evidence is stuff that somebody may want to put forward, and the Tribunal can look at that as a case management matter, but if you are reaching the stage of it being said that all merchants are to be deemed to have passed on at the rate at which -- not just their sector as a whole, but also their sector as a whole dealt with costs in general.

That is the case being put forward by Mr Coombs and Mr Holt.

That is quite a thing to have to accept on a case management conference basis, as it has massive implications for the substantive outcome of individual merchants' claims.

I would submit that that is a trial point, fundamentally.

MR JUSTICE MARCUS SMITH: You are presumably saying that, that even if we took the Merricks Visa sampling approach, there would still be sample witnesses from your clients?

MR WOOLFE: That is envisaged, I think, even by -- as Ms Smith said, by some of what is said from the defendants.

I think Visa are saying there should be a presumption that merchants pass on in the same way across the board, but that individual merchants could come forward, even they allow for it -- to that extent, Mr Holt does.

We submit that because there is such a large thing the Tribunal is being asked to swallow, that in fact the right way, from a case management perspective, is to set down a process which does involve looking at both factual evidence and any economic evidence that maybe is wished to be adduced, and have a trial on that basis and try to make that trial as manageable as it can be made.

You can't adopt the sampling approach on the basis that it is being advanced because that requires the conclusion which, in a sense, a trial would be required to prove.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Woolfe, we have got no further questions.

That looks like a good time to break for the afternoon.

We will rise for ten minutes.

We can go until 4.25.

I am happy to tell you that I was indeed cancelled for tomorrow morning, so we can start at 10.15 -- I am afraid no earlier than that -- but if needed, we will abrogate the short adjournment tomorrow.

I don't want anyone to feel under time pressure.

So we will rise until 3.45.

Thank you.

(3.37 pm)

(A short break)

(3.56 pm)

MR JUSTICE MARCUS SMITH: Mr Rabinowitz.

Submissions by MR RABINOWITZ

MR RABINOWITZ: I am grateful.

I am going to address the Tribunal, first, on the preliminary note that the Tribunal sent, and then I will move on to the threshold legal issue.

I am sure I will not get to that today.

Can I just say before I get into the detail of the preliminary note, that we, with respect, entirely sympathise with the problems that sir has identified about inconsistent judgments.

What I am about to do is to sound incredibly negative about the solutions that you have proposed.

That there is a problem that needs to be addressed, you are obviously right about that, and I will come on to make the points as to why, with respect, the solutions you have identified cannot work in the state of the law, as it is at the moment.

Can I, first, by way of a preliminary point, make some small comments on paragraph 1, where there are minor errors?

They don't really matter, but I hope you will forgive me if I just identify what they are --

MR JUSTICE MARCUS SMITH: Of course.

MR RABINOWITZ: -- just so it will not later be said that we accepted these points.

Starting with paragraph 1.1, the reasons why the unlawful charge is still alleged, if I can put it that way, and still disputed, do extend far beyond article 101(3).

There are still, as you know, some live issues in relation to article 101(1) as well, which cover large parts of the volume of the commerce in these claims.

Going on to 1.2 -- and again I am sorry about this -- but it is again worth pointing out that it is certainly not accepted in these proceedings that the reason why the merchant acquirers are not before the Tribunal is that they have in fact passed on any unlawful costs.

I think this is a point that you, sir, may have made in the course of Ms Smith's submissions.

There is in fact still a pleaded dispute as to the extent of any pass-on by acquirers to retailers.

And with respect to the Tribunal, the answer to that pleaded dispute is neither truly obvious, nor uncontentious.

MR JUSTICE MARCUS SMITH: Yes, well, our sense is there has been a significant shift from the position as it was in *Sainsbury's* in 2016, in terms of that being a point that actually was not articulated at all.

We certainly are aware that it is live now.

That is as far as, I think, I would dare go.

But obviously it is why we asked Ms Smith about how her process for framing and resolving the pass-on question at her level would need to apply at the higher level as well, because consistency works at every level.

MR RABINOWITZ: Thank you for that.

If I could then move on to 1.3.

Following on from what I have just said, it is not accurate with respect to say, as the note does, at 1.3 that the retailers ***prima facie*** suffered loss that should be recoverable from the infringer.

That is because of the points at 1.1 and 1.2.

And then in relation to the table appearing under 1.4, it is, again, not entirely clear whether the table is intended to reflect arguments raised in the present case and, if so, by whom.

But I should make it clear that in the claims between the retailers, and Visa and Mastercard, neither Visa nor Mastercard has alleged that reducing employee incomes downwards constitutes pass-on of variety 3.

In terms of any submissions we have as to the categories and as to inconsistencies or curiosities between 2 and 3, I will come to that -- 3 and 4 and 2 and 3, I will come to that at the end of my points about the notes, if that helps.

MR JUSTICE MARCUS SMITH: Yes, this goes beyond, as it were, the marking of the homework points that you have been making.

MR RABINOWITZ: Indeed, I understand.

I just wanted to make it clear because there isn't an employee pass-on point in this case.

MR JUSTICE MARCUS SMITH: No.

What troubled us a little bit about pass-on, and it may be a matter that doesn't arise on the pleadings, but is, I think, likely to be an issue for any economist giving evidence on this, is that if one is looking at pass-on, it seems to us that it is less of a rigid categorisation and more of a spectrum.

So category 1, no pass-on; category 4, pass-on.

We have quite deliberately put no pass-on question mark in 2 and pass-on question mark in 3, because it seems to us that there is real debate about that.

And it may be that it is not articulated, and won't be articulated, on the pleadings, but I think it would be an error for the advocates to assume it would not be a question that we would be asking any economist who came to us, in order to understand precisely how their market-wide analysis operated, because it does seem to us to be a moderately obvious question to ask, to test the methodology of whatever economist is giving us the benefit of their view.

So that is why that is there.

MR RABINOWITZ: We would respectfully, if I may, agree with that.

There ought to be a question mark next to those two numbered categories, and I will come to that, if I may, at the end.

Moving on to 1.5 on page 2, again it is not quite right to say the consumers are represented before the Tribunal because of course, as the Tribunal are aware, no consumers have brought any claim in respect to any loss in respect of Visa's MIFs.

So one does have incomplete consumers.

Going on to paragraph 2 then, here, of course, the Tribunal articulates what it sees as the problems that exist and are difficult to resolve in the bilateral model.

And the Tribunal identifies these as the risk of under-compensation and over-compensation.

And just to say, we understand what you mean, but if I can just make a few points about this.

First, we would respectfully submit, or suggest, that the Tribunal's characterisation of the under-compensation problem is not quite -- I will say conventional rather than accurate, and that is for this reason.

You have in mind -- the Tribunal appears to have in mind the policy or objective of ensuring that all persons who have suffered recoverable loss should be compensated fully, and that to the extent that anyone is not compensated fully, something has gone wrong with the process.

With respect, that is not an objective that the Tribunal is charged with pursuing, and it is certainly not what is ordinarily understood when talking about the compensatory principle by the issue of under-compensation.

As the Tribunal knows, certainly in ordinary legal parlance, the compensatory principle is only concerned with ensuring that persons who bring claims are compensated fully; that is to say, no more and no less than the loss that they have suffered.

That is why the Court of Appeal in *Sainsbury's* disagreed with the Tribunal's view in

that case, that a successful pass-on defence requires a defendant to identify a class of person to whom the overcharge was passed on.

The Court of Appeal, with respect, rightly noted such a condition -- and this is what they said:

"... reflect the kind of policy decision which motivated the US Supreme Court in the *Hanover Shoe* case and is inconsistent with the principle that damages are compensatory, rather than punitive."

Now, in other words -- and this is the sort of bedrock of the point I am making about the under-compensation/over-compensation point: under-compensation is not about ensuring disgorgement or restitution, if I can put it that way, by an infringer.

It is simply about ensuring that a claimant obtains such damages as will make good its particular loss.

And of course there is authority on this in *Devenish* -- and I can give you the references --

MR JUSTICE MARCUS SMITH: No, I don't think you need to because I think one can have different forms of over and under-compensation.

And what I think we are getting at -- you are quite right, we have, perhaps slightly provocatively, referred to a fund to draw a little bit of fire, which clearly we have done.

But nevertheless, even if one lays on one side the point about only compensating the claims that are properly articulated and before a Tribunal, one even then has got the problem of over/under-compensation.

It really ties into the broader point of consistency.

So one might very well have a situation where no one has actually, strictly speaking, been over or under-compensated because the claims mismatch -- there's

different periods -- but actually the defendants don't pay out more than they should because of the happenstance in which the claims have been constructed.

But nevertheless, if one has got a degree of inconsistency, that results in the passenger on the Clapham omnibus scratching their head, saying, "I really don't see how these things fit together", that would in my book, probably inaccurately, be a case of over or under-compensation because of an inconsistency in the approach.

So read that way, that is, I think, what was driving our thinking here.

MR RABINOWITZ: I entirely, with respect, see the problem that you had.

And again, in our respectful submission, it would be good to find a solution.

The solution to the extent that it can exist is probably a case management solution of ensuring that where there are these separate claims, they are heard by the same Tribunal, particularly to the extent that they overlap.

I am not taking a position in relation to Merricks, I am just saying as a general matter.

But what, however, one has to recognise, in terms of your proposals -- your proposals, with respect, are directed at over and under-compensation in the sense in which you intended it, which is by looking at the position of the defendant rather than the position of the claimants.

And ordinarily when one talks about over and under-compensation, one is talking about making sure the claimant gets the right amount of compensation, neither too much or too little.

So to some extent, in our respectful submission, the proposals and the solutions which the Tribunal has come up with in the preliminary note, with respect, start from the wrong approach, which is to characterise as over-compensation and under-compensation, something about the defendant's position.

Now, that is not -- again, as I said at the beginning, I don't want to disagree with the Tribunal and I am not -- that is a problem; the problem of inconsistency is a problem; the Clapham omnibus is a problem; the problem of different evidence being used in different ways and proceedings is a problem.

Ultimately, in our respectful submission, as the law stands at the moment, the best you can do is two things.

Number one, make case management decisions, where to the extent possible, you avoid three Tribunals hearing something which has common ground; and number two, apply the compensatory principle in the way that the Supreme Court said it should be applied.

I am going to get on to this when I move on to my substantive submissions, but of course what the Supreme Court said -- I think this is at paragraph either 179 or 197 -- in addition to recognising a defence or a doctrine of pass-on because it is not just a defence, it can be used as a sword, they identified what they said were two sound grounds for its acceptance in English law.

And those two sound grounds are, first, the compensatory principle; and secondly, a recognition that you may have chains of claims by direct and indirect claimants, and that the only way in which you could both give effect to the compensatory principle, as it is properly understood, and have regard to the fact that they are chains of claimants, is by having proper regard to the pass-on principle.

Now, if one did that, and if one lived in a perfect world, you would never have a problem of over-compensation and under-compensation in any sense because -- the point Mr Tidswell made about not having a situation in which you know that there actually has been pass-on -- and yet the law says: no, there has not.

So let's take the merchants.

The merchants have actually avoided the loss.

I am not going to use mitigation, I am going to talk about what the Supreme Court talks about, which is avoided loss and pass-on.

That is really what we are talking about.

They have actually avoided the loss, and someone else has actually suffered it, but because of some technical approach they wanted to take to legal or proximate causation, the merchants scoop the pot and the consumers get nothing, notwithstanding that it is obvious to everyone involved that that cost, or loss, has been avoided and actually passed on to the consumer.

As I will say when I get to my substantive submissions, that is, in effect, where my learned friend, Ms Smith's, proposals will lead, and that is what we, with respect, wish to avoid.

So, as I say, one way in which you can avoid the problem of over-compensation and under-compensation is if, you know -- this is a theoretical position because in the real world you require the second point as well -- is to give proper effect to what the Supreme Court had in mind, and indeed what the authorities have in mind when they talk about legal and proximate causation, and not try and find a solution which prevents pass-on happening, because if you do, you are going to give claimants a claim even for loss they have avoided and, in circumstances where there are other claimants, they are going to be short changed.

That way you avoid under-compensation and over-compensation.

As I say, you need the second part of the solution as well, and that is to be lucky with case management, that there are claims which overlap which come before you at the same time.

If they don't, it is going to be a lot more difficult to achieve coherent and consistent results, and the person on the Clapham omnibus is bound to be disappointed in what you have done.

But they will have to, if one was on the Clapham omnibus, one would have to say to them, "Things are not that simple, you need to understand it depends on evidence ..." There were also limitation issues which affected some claims and not other claims.

I think Mr Woolfe raised the question of reduced volume, some parties had reduced volume and that ate into some claims.

There are lots of problems that arise.

Now, I am not beginning to suggest that we have the solution to the problem but I think all I am going to say is that the solutions to the problem, with respect, are not the ones -- at the moment, they are not the ones that the Tribunal has identified.

Can I very quickly say why, because I would rather not end on a negative note but I will just, if I may, just pick up on those points.

So just picking up on the solutions, paragraph 6 to 8.

MR JUSTICE MARCUS SMITH: Yes.

MR RABINOWITZ: At paragraph 6, the Tribunal notes rightly that the US approach of not recognising pass-on is precluded by the Supreme Court's decision in *Sainsbury's* and, with respect, that is right so I will put that to one side -- there are good reasons for recognising pass-on and we will come to those.

Going to paragraph 7, the variant proposed here, whereby the person highest in the chain willing to bring the claim is treated as claiming on behalf of all persons claiming the unlawful cost may be passed on, is again with respect not an approach that is available in this jurisdiction either.

There are a number of points here: first, that it is only something that one would even consider if the approach of English law was to seek to achieve disgorgement, rather than to ensure that any person that comes before the court and can establish a loss will be compensated for that loss, no more and no less, taking into account avoided loss.

Secondly, and in terms of what is available in the jurisdiction there are of course procedural regimes that enable one person to sue as a representative of the other -- in the High Court, the CPR rule 19 and in the CAT, there is a collective action regime which required primary legislation to become possible and, again, reflecting a point that my learned friend Ms Smith said, as Lord Briggs said in *Merricks*, paragraph 58:

"That of course involved a radical modification of the compensatory principle."

So those regimes have their own rules and procedures and, with respect, it is plainly not open to this Tribunal to try and produce something which cuts across those regimes.

That then brings to us paragraph 8 and the solution identified there.

Again, with respect, that is equally unavailable.

First, to repeat a point I have already made, this seeks a solution for a problem that doesn't in fact exist unless one regards the proper approach of the English common law here as effectively to bring about disgorgement, and I have already made my submissions on that.

MR JUSTICE MARCUS SMITH: Yes, though disgorgement is really a restitutionary term.

It is where you have gained a benefit which you then have to give back.

We are not talking about that here.

MR RABINOWITZ: No.

MR JUSTICE MARCUS SMITH: What we are saying is one identifies the overcharge that has been found to be unlawful, if it is found to be unlawful, and one then says, well, the appropriate approach to analysing past law is to say that unlawful charge must have ended up somewhere and one needs to have a system of dispute resolution that ensures that 100 per cent of that overcharge is allocated to the market.

Now, I am not saying that 100 per cent is paid out but one ought to be able to say at the end of the trial that one knows where all of that 100 per cent is going, so that one has achieved the consistency.

Now, it may be because 60 per cent of that overcharge went to a group of persons who are not litigating that the damages are not paid but nevertheless the 100 per cent cake represents a good starting point for keeping everyone honest, including the Tribunal, in ensuring that one has got a means of allocating within the market that loss which has in theoretical terms been generated.

MR RABINOWITZ: I entirely see the point and I entirely accept what -- I don't know whether to call you my Lord or sir -- has said about this not being restitution or disgorgement.

It is about damages and I understand you want to establish the size of the cake but, again, whilst one quite understands why one sees that as an approach, certainly at the moment it is not the approach taken by English law, where in effect what you are dealing with is ensuring that litigants who do come before the court are given proper compensation and one just has to work within those parameters, at least as things stand at the moment.

I have made the first point.

The second point in terms of what is proposed is that the Tribunal's power to add

parties to existing proceedings, obviously circumscribed by rule 38, the Tribunal can only grant permission for the addition of a party on the application of an existing party or the person wishing to become one -- that is rule 38.2.

The Tribunal cannot therefore join new parties, let alone whole classes of persons that meet a particular description, but it may be that we are at cross purposes and that that is not what you envisage, you simply want to identify the size of the cake -- rather than actually have a party, you are going to take a slice.

MR JUSTICE MARCUS SMITH: It is for the parties to bring the claim.

It is simply that if one has got, as it were, a cake that represents the overcharge that has been found to be unlawful, if you have got all of the claimants entitled to the cake, then one needs to have 100 per cent going to 100 per cent.

MR RABINOWITZ: But if you don't --

MR JUSTICE MARCUS SMITH: If half the cake is absent, then you ought not to be paying more than 50 per cent.

MR RABINOWITZ: Indeed.

MR JUSTICE MARCUS SMITH: Otherwise you are -- that is why I am hung up about over or under-compensation, because if you say the cake is 100 and half the cake is 50, and you end up paying 60 or 40, then something has gone wrong.

MR RABINOWITZ: Of course.

It is difficult to do that without parties being present calling evidence, because it is very difficult to know how you would know the size of the cake.

It has already been pointed out by Mr Woolfe, and possibly Ms Smith, that even if we're right -- and obviously we say we are -- about proximate causation here, that only applies to all the claimants here.

In relation to other claimants, and these may be the claimants who had never brought claims -- other non-claimants, if I can put it that way -- their position is different to claimants here.

So how does one estimate the size of the cake without them being present and in the case of non-merchants, if I can put it that way, who did pay a MIF establishing how does one establish proximate cause, how does one establish with them whether there was a pass-on or not?

It is hard to see how one does that.

MR JUSTICE MARCUS SMITH: That I entirely accept but one is moving, if I may say so, from the ideal of consistency into the fragility of the evidence that a court has and the need to apply an appropriate broad axe.

So, yes, we are never going to have perfect evidence but what I wouldn't want to have happen in this route would be to say to an economist who was approaching things from a cake-based angle, and trying to work out the totality of the overcharge and then ensure an internally consistent approach to its distribution so as to reach a proper outcome, I wouldn't want that to be closed out.

It might be impossible but that is a rather different question.

MR RABINOWITZ: So one has an ideal which, because of practical difficulties, may not be capable of being achieved but that doesn't leave you hopeless, of course.

In our respectful submission, whilst not suggesting there is not a problem -- and I make it clear I see, with respect, we accept there is a problem and a problem of potential inconsistency -- the Tribunal is not in a terrible position either, because as long as you apply -- easier said than done, I know -- as long as you apply the compensatory principle carefully and properly, and as long as

you have proper regard to legal and proximate causation and do not allow that to produce results which are all, with respect, incoherent to the person on the Clapham omnibus, because it is obvious there was a cost that was passed on, avoided by a merchant, you are very likely to be able to build the cake piece by piece and possibly be in no worse position by estimating the size of cake by building it up piece by piece than you would by trying to get a cake to begin with without knowing what some of those pieces look like.

So whilst one entirely understands what you want to achieve, and we entirely sympathise with that, in our respectful submission the state of the law as it is, with bilateral claims, I think is the expression that you used, does not produce a situation in which you are bound to produce a wrong result.

You would obviously be assisted if there were case management abilities to join everything but in our submission, as long as the Tribunal does not allow legal or proximate causation to produce results which simply do not accord with reality, the cake is likely to look pretty close, building it up piece by piece, as it would if you had started from the other end, and that is where we land up, that it is not perfect, but you are not going to ever be in a perfect world with this.

I think you said you wanted to stop at 4.25?

MR JUSTICE MARCUS SMITH: Yes, if that is a convenient moment?

MR RABINOWITZ: It is.

Can I say a few more words about the preliminary note, and subject to any points you have, because one thing I hadn't touched on was your paragraph 1.4 points, and about which category one set of potential pass-on things falls rather than another.

In our respectful submission the Tribunal is right to say that within two and three it is not always easy to see why as, a matter of logic for example, costs should not

be avoided by reducing what employees get, rather than reducing what your suppliers get.

The question that arises, and this is a question which permeates all of my submissions and indeed is at the heart of the Ms Smith threshold point is this: one has to understand what legal and proximate causation is actually about.

Legal and proximate causation is not just about logic.

It is not just about, can I draw a logical distinction, for example between reducing my costs by paying employees less or reducing my costs by hammering suppliers down and paying them less.

There is also a common sense policy aspect to legal and proximate causation and we know this, to take the most extreme example, from for example gratuitous payments and insurers.

Those are payments or receipts or a way of avoiding loss which is incredibly proximate to the transaction which gives rise to the loss.

You lose money in a car accident and your very wealthy aunt gives you money -- she only gives you money because you have had the accident.

It is as close as can be, as a matter of fact, but it is plainly the aunt's payment that is collateral, although it is very directly related to the two -- taking insurance is the same thing -- but as a matter of policy the law says we are not going to count that, that is not going to count as a matter of avoided loss and you, the wrongdoer, are not going to get off the hook because rich aunt gave you money or the insurer paid out.

When one comes to the categories within 2 and 3 and why it may fall within 2 and why it may fall within 3, I have another explanation for why employees didn't fall into 3 and why they fell into 2, which I will come to, but it may be that it is as a matter of policy the law says we don't want people to cut what employees

get.

We just don't think that should count and we don't think you should take advantage of that, we wanted to trial that as a collateral act for these purposes, whereas with suppliers, fair do's, that's business but employees are in a different position and we don't want the law to go that way.

I have another explanation, which is this, that by the time it -- one notices that in the Tribunal decision, employers cutting what is paid to employees appears in box 3, not 2, but it doesn't appear in box 3 and it appears in box -- well, it doesn't appear anyway.

It may well be that the Supreme Court just didn't address its mind to this.

It didn't have to address its mind to exactly what is going to be in those categories.

There is no, with respect, inconsistency between what the Tribunal said, what this Tribunal said, and what was said in the Supreme Court.

It is just perfectly possible that they didn't address their mind to specific categories which the Tribunal had addressed.

If they did, then in our respectful submission the answer may lie not in logic but in just a policy view being taken as to what sort of costs should you be able to get out of and say this is an avoided cost.

MR JUSTICE MARCUS SMITH: Not unrelated to the point that we heard from Mr Woolfe, the volume effect claims, you are not I think suggesting that we grapple with these issues in the judgment arising out of this hearing?

MR RABINOWITZ: With respect, there is not -- in a sense, it is up to the Tribunal.

No, is the answer.

We have had an indication from you.

We don't say there is anything in categories 2 or 3 which is binding, if I can put it that way, so you can't deal with that.

So I am not saying to this Tribunal that you have to make a decision about this.

The only reason I am addressing it is because you raised it in your preliminary note.

MR JUSTICE MARCUS SMITH: No, we are very grateful.

The reason I am raising it again now is really tied into the case management question that you have been touching upon and what we perhaps ought to have an eye on is the flushing out of these points further down the line, probably when one is getting to the column 4 of our list of issues --

MR RABINOWITZ: Indeed.

MR JUSTICE MARCUS SMITH: -- where one might need to ensure that either -- well, let's take the volume claims, or an argument about cuts to employees' hourly rates.

These things might need to be dealt with in a sort of strike-out or put up or shut up way that needs to be done well before trial.

MR RABINOWITZ: We would respectfully agree with that.

MR JUSTICE MARCUS SMITH: Yes.

MR RABINOWITZ: I am conscious of the time and I don't want to overrun.

I was going to leave off the preliminary note, subject to any points the Tribunal had for me, and move on to the threshold issues.

MR JUSTICE MARCUS SMITH: In that case, Mr Rabinowitz, we will grade this as Beta--- and we will resume hopefully with better marks and grades tomorrow morning.

MR RABINOWITZ: I hoped I'd get better than that but you could have given it an Alpha-, rather than -- which is still a 1st.

MR JUSTICE MARCUS SMITH: 10.15 tomorrow morning.

MR RABINOWITZ: We could start earlier -- I am being told we can't start earlier.

It is up to the Tribunal.

I will be as long as the Tribunal wants me to be -- and that may be five minutes because, you know, it is in the end a very short point.

I am not even saying there is only one sentence in paragraph 215.

It is all about what is meant by legal or proximate causation.

As soon as one gets that, the fact that the Supreme Court is able to say it in a single sentence makes perfect sense but -- those are my submissions.

MR JUSTICE MARCUS SMITH: You may emulate that but I think we will want more than five minutes from you Mr Rabinowitz.

We will say 10.15.

I can't make it any earlier I am afraid but that should be enough time for to us finish comfortably tomorrow.

MR RABINOWITZ: Thank you.

MR JUSTICE MARCUS SMITH: Thank you very much, until then.

(4.29 pm)

(The hearing adjourned until 10.15 am the following day)